TAB 7

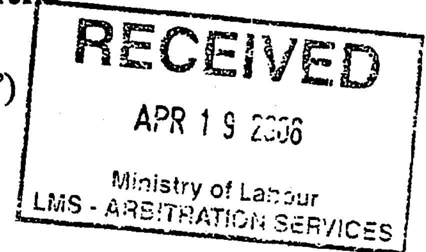
MPA/Y600144 P.A.

In the Matter of an Arbitration

Between

05 117 007

Providence Continuing Care Centre
St. Mary's of The Lake
(Hereinafter referred to as "the Employer")



And

Ontario Public Service Employees' Union – Local 483
(Hereinafter referred to as "the Union")

Regarding: **Union Grievance**

Sole Arbitrator: Felicity D. Briggs

For the Union: Peggy Smith, Counsel
Bob Cook

For the Employer: Vincent M. Panetta, Counsel
Ron Pearson
Elizabeth Soden

On February 11, 2005, the Union filed a grievance that alleged the Employer violated Articles 17.02(b) and 17.10(c) which are the termination and severance provisions of the Collective Agreement and requested full redress.

The parties provided the following Agreed Statement of Fact:

1. The Employer is a non-acute, complex continuing care, rehabilitative and palliative care facility which is part of the Providence Continuing Care Centre ("PCCC") in Kingston, Ontario. PCCC also operates a Mental Health Site and Providence Manor in Kingston, Ontario. In addition, PCCC also operates St. Vincent de Paul Hospital located in Brockville.
2. The Employer is a 64 bed facility with approximately 660 employees represented by the Union, the Canadian National Federation of Independent Unions and the Ontario Nurses' Association.
3. The Union represents paramedical employees working with the Employer.
4. The parties are bound to a Collective Agreement as attached.
5. As a result of the Ministry of Health's balanced budget initiatives, the Employer reduced serviced in orthotics and speech language therapy.
6. Five employees were affected and received notices of layoff. They were as follows:
    (a) Luc Chau, an orthotist, was issued a notice of layoff dated January 27, 2005 to take effect on May 27, 2005;
    (b) Kristine Jones, an orthotist, was issued a notice of layoff dated January 27, 2005 to take effect of May 27, 2005;
    (c) Robert O'Brien, an orthotist technician, was issued a notice of layoff dated April 27, 2005 to take effect on July 27, 2005;
    (d) John Ross, an orthotist technician, was issued a notice of layoff dated January 27, 2005 to take effect on May 27, 2005;
    (e) Martin Robertson, a professional practice leader, was issued a notice of layoff dated January 27, 2005, to take effect on May 27, 2005;
    (f) Audrey Brown, a speech pathologist, was issued a notice of layoff dated January 26, 2005 to take effect of May 26, 2005. This employee's position was not eliminated and she remains in the workplace as a 0.5 FTE Speech Language Pathologist.

7. During the operation of the notice periods, the above noted employees were not required to come to work but had all of their terms and conditions of employment continued until such time as the effective date of layoff was reached or they otherwise resigned from employment.
8. All of the affected employees received their full notice period with the exception of Mr. Robert O'Brien, as outlined in Paragraph 9.
9. Of the affected employees, only Mr. O'Brien opted to receive the separation allowance in accordance with Article 17.10 and resigned by letter dated July 26, 2005 which took effect on the same day.
10. In response to the notices of layoff having been issued, the Union filed a policy grievance dated February 11, 2005 alleging violations of article 17.02(b) and 17.10(c) of the Collective Agreement between the Employer and Union which expired March 31, 2004.
11. The grievance has been referred to arbitration and is scheduled to be heard by Arbitrator Briggs on December 20, 2005 at which time the parties will make legal argument.

There was no dispute between the parties that the above facts did not cause any employee to be affected in such a way so as to require compensatory remedy in the event the grievance was to succeed. However, it became evident through the layoff process set out above that the parties have disparate views on the issues of termination and severance. For that reason, this award will be only declarative in nature and will clarify the Collective Agreement provisions for the parties.

The relevant provisions of the Collective Agreement are as follows:

> 17.02 A "layoff" includes a temporary or permanent discontinuation of work or reduction in hours of work. In the event of a proposed layoff at the Hospital of a short-term (less than three (3) months) or long-term nature (three (3) months or longer), the Hospital will:
>
> > (a) for short-term layoff provide no less than thirty (30) days notice to the affected employees(s) or pay in lieu thereof, and no less than thirty (30) days notice to the Union, indicating the

reasons causing the layoff, the anticipated duration of the layoff and identify the employees likely to be affected. If requested, the parties will meet.

(b) for long-term layoff provide the Union with no less than four (4) months written notice of the proposed layoff or elimination of position; and provide to the affected employees(s), if any, no less than three (3) months written notice of layoff or pay in lieu thereof; and meet with the Union to review the following:

(i) the reason causing the layoff;
(ii) the service the Hospital will undertake after the layoff including the areas of cut-back and the employees to be laid off;

And plan the following:

(iii) the method of implementation;
(iv) revised work schedules including reallocation of hours of work among full-time and part-time employees with due regard to seniority;
(v) ways the hospital can assist the employees to find alternate employment including identifying vacant positions within the hospital for which surplus members of the bargaining unit might qualify, or such positions which are currently filled but which are expected to become vacant within a twelve (12) month period.

17.04

(a) For short-term layoff the available work assignments shall be distributed to the most senior incumbents of the classification where operationally feasible provided that they are willing and capable of performing the available job duties to ensure to the greatest extent possible that the layoff impacts the most junior employee(s). No bumping is permitted.
For the purpose of this provision only, the term "classification" shall have a broad meaning to include all jobs which have the

same professional base; example Practice Leader – Physiotherapy and Physiotherapist is one classification.

(b) An employee who is subject to a long-term layoff shall have the right to:

- (i) accept the layoff; or
- (ii) displace an employee who has lesser bargaining unit seniority in a lower or identical paying classification if the employee originally subject to layoff can perform the duties of the lower or identical paying classification without training or other orientation; or
- (iii) elect to transfer to a vacant position provided that she is qualified to perform the available work; or
- (iv) opt to receive the separation allowance as outlined in Article 17.10; or
- (v) opt to retire, if eligible under the terms of the Hospitals of Ontario Pension Plan (HOOPP) as outlined in Article 17.10.

17.10

(a) The local Human Resources Plan will apply to the Health Services Restructuring Commission directives. In other circumstances, the balance of this Article will apply.

(b) At the time of issuing notice of long-term layoff pursuant to Article 17.02(b), the Hospital will offer early retirement allowance to a sufficient number of employees eligible for early retirement under the Hospital's pension plan, in order of seniority, to the extent that the maximum number of employees within a classification who elect early retirement is equivalent to the number of employees who would otherwise be subject to layoff under Article 17.02.
An employee who elects an early retirement option shall receive, following completion of the last day of work, a retirement allowance of two (2) weeks' salary for each year of service, to a maximum ceiling of fifty-two (52) weeks' salary.

(c) Where an employee has received individual notice of long term layoff under Article 17.02(b) such employee may resign and receive a separation allowance as follows:

(i) Where an employee resigns effective within thirty (30) days after receiving individual notice of long term layoff, she or he shall be entitled to a separation allowance of two (2) weeks' salary for each year of continuous service to a maximum of sixteen (16) weeks' pay, and, on production of receipts from an approved educational program, within twelve (12) months of resignation will be reimbursed for tuition fees up to a maximum of three thousand ($3,000.00) dollars.

(ii) Where an employee resigns effective later than thirty (30) days after receiving individual notice of long term layoff, he or she shall be entitled to a separation allowance of four (4) weeks salary, and, on production of receipts from an approved educational program, within twelve (12) months of resignation will be reimbursed for tuition fees up to a maximum of one thousand two hundred and fifty ($1,250.00) dollars.

I was also provided with copies of the letters sent to the affected employees. The letter to Mr. O'Brien, which was virtually identical to the others, stated the following:

> As you may be aware, the provincial government has introduced new accountability requirements for all Ontario hospitals, which includes eliminating operating deficits by March 2006. Hospitals operating with a deficit of two percent or more were required to submit a Balanced Budget Plan to the Ministry of Health & Long Term Care, to identify the ways in which the deficit would be eliminated. Savings through efficiencies were identified across the Hospital as an outcome of an Operational Improvement process completed in the summer of 2004, and were included in the Balanced Budget Plan. As a result of the approval to implement the efficiencies contained in our Balanced Budget Plan and in accordance with Article 17.02(b) of the Collective Agreement, this letter serves as formal notice that the position you currently occupy as Orthotist Technician will be eliminated effective July 27, 2005. Your actual completion date in your current position will be determined by your election under the layoff entitlements outlined below.
>
> Under the provisions of the Collective Agreement Article 17.04 (b) you may elect to:
>
> 1. Accept the layoff; or

2. Displace an employee who has lesser bargaining unit seniority in a lower or identical paying classification if you can perform the duties of the lower or identical paying classification without training other than orientation; or
3. Elect to transfer to a vacant position provided that you are qualified to perform the available work; or
4. Opt to receive the separation allowance as outlined in Article 17.10 (estimate as of April 26, 2005 as per Article 17.10 c) i) to be $6,859.80 or as per Article 17.10 c) ii), $3,429.90; or
5. Opt to retire, if eligible under the terms of the Hospitals of Ontario Pension Plan (ie. Enrolled in HOOPP and currently age 55 or older).

Enclosed is a seniority list and a list of classifications with their pay rates. You must advise the Hospital of your election within seven (7) days after receiving this notice of layoff.

To help you during this period of transition, you may wish to avail yourself of the Employee Assistance Program (EAP) whose information is also attached. The decision to seek assistance is your own and all meetings with the counselor are kept in strict confidence.

We would sincerely thank you for the dedicated service that you have provided. Please do not hesitate to contact Human Resources should you require any additional information or have any questions concerning this matter.

The parties also referred to the *Employment Standards Act*, 2000 S.O. 2000, c. 41 (hereinafter referred to as "the *Act*"). Relevant provisions of the *Act* are as follows:

Part XV
Termination and Severance of Employment

Termination of Employment
54. **No termination without notice.** – No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer,
(a) has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or
(b) has complied with section 61.

> 61. (1) **Pay instead of notice.** – An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,
> (a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and
> (b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive. 2001, c.9, Sch.1, s. 1(14)

The parties were agreed that for the purposes of this decision I ought to consider facts of a permanent layoff.

Simply put, the issue before me is whether an employee who has received layoff notice and who elects to receive a separation allowance, in accordance with Article 17.10(c) is disentitled to receive their pay in lieu of notice as set out in Article 17.02(b). It was the position of the Employer that if an employee elects to receive separation allowance in accordance with Article 17.10(c), then he has chosen to resign his employment and is therefore not entitled to other provisions. The Union contended that in instances where employees receive notice of permanent layoff with their work being discontinued, the Employer cannot convert a termination of employment into a resignation from employment.

UNION SUBMISSIONS

Ms. Smith, for the Union, asserted that the layoff scheme in the instant Collective Agreement is a step by step progression of events that must be

strictly followed. It is important to recall in the fact situation before me that there was no work for any of the affected employees. With that fact in mind, a review of the contractual scheme of layoff is useful. Article 17.02 defines a permanent layoff and subsection (b) requires the Employer to provide the union with four months notice while employees are to receive no less than three months notice of layoff or pay in lieu thereof. It is not until employees have received this notice, or pay in lieu, that the options found at Article 17.04 are offered. Article 17.04 provides certain rights and employees can elect to receive a separation allowance found in Article 17.10(c). That right only crystallizes after notice of layoff is received. To be clear, electing to receive separation allowance is dependant upon having already received the mandatory notice.

The Union took strong offense to the Employer's position that an employee who elects separation allowance has left their employment voluntarily. Notice as set out in Article 17.02 is a condition precedent to allow access to the separation allowance found at article 17.10. If the parties meant the separation allowance to be inclusive of the notice rights they would have so stated clearly.

The terms of the Collective Agreement must be read in concert with the provisions of the *Employment Standards Act*. Section 54 of the *Act* mandates employers to give notice or pay in lieu thereof to employees and Article 17.02 complies with this model. The Union asserted that according to Section 63.1(e) an employee who resigns after having been given notice of termination from his employer is still considered to have his employment terminated by the employer. Further, the statute says that the resignation is

considered to be the date of the employer's termination. This ensures that employees are not required to wait for the end of the notice period prior to getting on with their lives. In other words, the notice period is protected irrespective of what the employee actually does during that period.

These parties have negotiated an enhanced severance package whereby employees who are separated will get notice or pay in lieu thereof. Those employees who sat at home during the notice period were paid. Indeed, irrespective of what option employees elect they are entitled to the full period of the notice. Nothing in Article 17.10 undermines or reduces this right. The Union relied upon **Re Wright Lithographing Co. and Graphic Communications International union, Local 517** (2000), 91 L.A.C. (4th) 129 (Howe); and **Re Victorian Order of Nurses and Ontario Nurses' Association** (2004), 134 L.A.C. (4th) 199 (Herlich).

EMPLOYER SUBMISSIONS

Mr. Panetta, for the Employer, said that the letters sent to employees have three purposes. The first is to notify employees that at a future date their position will be eliminated. Second, the actual date of the end is made clear. Finally, employees are told that the actual completion date in their current position depends on their election under the Collective Agreement.

It was the Hospital's position that an employee who elects to receive his separation allowance as provided in article 17.10(c) must first resign. Once a resignation is given, the employment relationship is severed in advance of the Employer's proposed date of termination. That is to say, once an

employee's resignation becomes effective there are no further entitlements except those provided by Article 17.10(c).

The Employer submitted that if an employee elects either the fourth or fifth option as set out in Article 17.04 s/he has ended the employment relationship with either a retirement or a resignation. Contrast those options with the earlier choices which contemplate accepting the layoff. If the Union's position is adopted, all of the options would be akin to accepting the layoff.

In order for an employee to receive separation allowance as found at Article 17.10(c) two things must first occur. That employee must have already received notice in accordance with Article 17.02(b) and the employee must have elected to resign. Article 17.10 then provides that the amount of the allowance depends upon the timing of the resignation. There is a financial incentive to resign early in the notice period. The Union's view of this matter does not take this incentive aspect into account. If the Union's position were correct, why would the parties have built in this incentive for early resignation?

Mr. Panetta asserted that it is trite to say that a resignation is a voluntary act that brings about an end to the employment relationship. In this regard the Employer relied upon **Re Redpath Industries Ltd. and Ison et al.** (1985), 52 O.R. (2d) 770 (Ontario High Court of Justice, Divisional Court); and **Re Telegram Publishing co. Ltd. and Zwelling et al** (1975), 67 D.L.R. 404 (Ontario Court of Appeal). These cases make clear that a resignation during a notice period is voluntary and brings about no further payment beyond the resignation date.

The Employer suggested that the Union's case is premised on rights crystallizing at the time the notice of layoff is issued. It is the Employer's view that rights are not crystallized until the time of the layoff or the termination. It is the actual layoff that brings the rights.

Mr. Panetta contended that the purpose of severance pay is to compensate employees for their past investment with the Employer, that is, to recognize their past service. This purpose is to be distinguished from the notice requirement which is given to provide employees with an opportunity to seek out other employment before their present employment actually ends. When these purposes are kept in mind it is evident that a voluntary resignation eliminates the need for termination notice because the end of the employment relationship is within the employees own determination.

The Employer said that Section 63.1 of the *Act* does not apply because the facts before this Board do not deal with the end of a business. In **Re Wright** (*supra*) it was determined that the failure the include a provision such as Section 63.1 in a Collective Agreement is cogent and must lead to a finding that a resignation brings about the end of the employment relationship. It was said that legislators specifically placed a "deeming" provision in the *Act* as it relates to severance pay and in the absence of that language a resignation ends the relationship.

By way of reply Ms. Smith asserted that it is important to recall that in the agreed facts there was a permanent discontinuance of an operation. There was no further work for these employees and therefore irrespective of the

wording of the notices, a recall was never going to occur. In these circumstances the *Act* considers the letters issued notice of termination, not notices of layoff. Further, the jurisprudence provided by the Employer is of little assistance because of the ever changing nature of the provisions of the *Act*.

DECISION

Under the instant Collective Agreement employees are entitled to notice of both temporary and permanent lay-offs. In the facts at hand, the employees were each given a notice of permanent lay-off. The Union underscored the point that the work of these individuals was being eliminated. Perhaps it was for this reason the Union suggested Section 63.1 of the *Act* ought to apply because the Employer is permanently discontinuing the work. I disagree. This is not a situation where the Employer is closing its business.

There was no dispute between the parties that the Employer correctly followed the provisions of the Collective Agreement in the issuance of the notices of lay off. In accordance with Article 17.02(b) the Employer notified the individuals that because of certain government budget initiatives their positions were being eliminated. Each was told that their "actual completion" date would be determined by their choice of various options as provided in Article 17.04.

Setting out those alternatives again would be useful:

> 17.04(b) An employee who is subject to a long-term layoff shall have the right to:
>
> (i) accept the layoff; or

(ii) displace an employee who has lesser bargaining unit seniority in a lower or identical paying classification if the employee originally subject to layoff can perform the duties of the lower or identical paying classification without training or other orientation; or

(iii) elect to transfer to a vacant position provided that she is qualified to perform the available work; or

(iv) opt to receive the separation allowance as outlined in Article 17.10; or

(v) opt to retire, if eligible under the terms of the Hospitals of Ontario Pension Plane (HOOPP) as outlined in Article 17.10.

The dispute between the parties became apparent as the result of Mr. O'Brien's election. He sought to receive separation allowance as provided in Article 17.10(c)(ii). Again, it would be useful to restate the relevant portion of that Article. It states:

> (c) Where an employee has received individual notice of long term layoff under Article 17.02(b) such employee may resign and receive a separation allowance as follows:
>
> (i) Where an employee resigns effective within thirty (30) days after receiving individual notice of long term layoff, she or he shall be entitled to a separation allowance of two (2) weeks' salary for each year of continuous service to a maximum of sixteen (16) weeks' pay, and, on production of receipts from an approved educational program, within twelve (12) months of resignation will be reimbursed for tuition fees up to a maximum of three thousand ($3,000.00) dollars.
>
> (ii) Where an employee resigns effective later than thirty (30) days after receiving individual notice of long term layoff, he or she shall be entitled to a separation allowance of four (4) weeks salary, and, on production of receipts from an approved educational program, within twelve (12) months of resignation will be reimbursed for tuition fees up to a maximum of one thousand two hundred and fifty ($1,250.00) dollars.

It was the Union's position that an employee who received notice in accordance with Article 17.02 elected to resign and receive a separation allowance as considered in Articles 17.04 and 17.10, could not be disentitled to receive their pay in lieu of notice. In other words, the Union contended that an employee can receive both pay in lieu of notice and separation allowance under the instant Collective Agreement. After much consideration, I must disagree. Article 17.04 sets out the five options for employees who have received a notice of long term layoff. In my view, the Union's position is tantamount to electing two of these options simultaneously and, simply put, it is not open to employees to do so.

Further, if the parties intended for employees to receive both pay in lieu of notice of layoff and a separation allowance they would have clearly stated those provisions. They did not. Indeed, to the contrary, the parties set out different options for employees. One is to accept the layoff and therefore work until the end of the notice period or receive pay in lieu. A second is to resign and receive a separation allowance. An employee is not entitled to elect two options set out in article 17.04(b). Moreover, the right to separation allowance provided at Article 17.10(c) is clearly predicated upon the employee having received notice of lay off and tendering their resignation. In my view, once the employee has resigned they are not entitled to further pay in lieu of notice of lay off beyond the effective date of their resignation. The amount of the separation allowance will depend on the timing of the resignation in relation to the employee's notice of layoff.

Most of the jurisprudence provided by the parties was of little assistance because of evolving and changing legislation. Further, these cases are

usually fact specific and turn on the particular language of the governing Collective Agreement. However, the decision of Arbitrator Howe was helpful in **Re Wright Lithographing**. In that case the grievors had received notice on September 23, 1999 that their employment would be terminated on November 19, 1999. They each tendered their resignations and left work prior to November 19, 1999. It was the Union's assertion that the grievors were entitled to receive severance pay as set out in the provisions of the Collective Agreement. In his deliberations Arbitrator Howe analyzed the Collective Agreement, the *Act* and prior jurisprudence. In denying the grievances he found that the grievors were notified of the Company's intention to terminate their employment on November 19, 1999 and they would have remained employees until November 19, 1999 had they not first resigned. It was determined that the end of their employment was the date set out in their letters of resignation, not November 19, 1999. Accordingly Arbitrator Howe found that the grievors' employment with the Company was neither terminated nor severed but rather brought to an end by their resignations. Applying those principles to the facts at hand leads to a finding that once an employee tenders their resignation in accordance with Article 17.10(c), their employment and entitlement to further pay in lieu of notice ends as of the effective date of their resignation.

In the instant matter the parties disagreed as to whether the notice of lay off and the actual lay off were one or two distinct events. As set out in **Re Wright**, I find these are two events. This issuance of the notice is an announcement of an intended act. The actual lay off begins at the point when the employee is not working and is not in receipt of compensation. This distinction is true for lay off and for termination of employment. It therefore

follows that those who have received notice remain employees during the notice period unless a resignation or some other event brings the employment relationship to an end.

Finally, there are no provisions in the *Employment Standards Act* that would have me agree with the Union's view of this matter. I must find that the Employer's interpretation in this regard violates neither the *Act* nor the Collective Agreement.

As set out at the beginning of this decision, the parties asked me to make a finding based on facts with the understanding that such a determination would provide guidance for the future. For all of the above reasons I find that under the instant Collective Agreement, if an employee who receives a notice of lay off as provided at Article 17.02(b) elects to receive the separation allowance in accordance with Article 17.04(b)(iv) and resigns his or her employment as set out in Article 17.10(c), their employment ends as of the date set out in the resignation letter and not on the date set out in the notice of termination letter. Accordingly, pay in lieu of notice would end as of the date the resignation takes effect.

I remain seized in the event there are any problems with the implementation of this decision.

Dated in Toronto this 11th day of April, 2006.

Felicity D. Briggs

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TAB 8

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended and in the Matter of a Proposed Plan of Compromise or Arrangement with respect to Stelco Inc., and other Applicants listed in Schedule "A" Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 as amended

[Indexed as: Stelco Inc. (Re)]
[* Editor's note: Schedule "A" was not attached to the copy received from the Court and therefore is not included in the judgment.]

75 O.R. (3d) 5

[2005] O.J. No. 1171

Docket: M32289

Court of Appeal for Ontario,

Goudge, Feldman and Blair JJ.A.

March 31, 2005

Corporations -- Directors -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under Companies' Creditors Arrangement Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation -- In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise restructuring -- Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11.

Debtor and creditor -- Arrangements -- Removal of directors -- Jurisdiction of court to remove directors -- Restructuring supervised by court under the Companies' Creditors Arrangement Act -- Supervising judge erring in removing directors based on apprehension that directors would not act in best interests of corporation - In context of restructuring, court not having inherent jurisdiction to remove directors -- Removal of directors governed by normal principles of corporate law and not by court's authority under s. 11 of Companies' Creditors Arrangement Act to supervise

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

On January 29, 2004, Stelco Inc. ("Stelco") obtained protection from creditors under the Companies' Creditors Arrangement Act ("CCAA"). Subsequently, while a restructuring under the CCAA was under way, Clearwater Capital Management Inc. ("Clearwater") and Equilibrium Capital Management Inc. ("Equilibrium") acquired a 20 per cent holding in the outstanding publicly traded common shares of Stelco. Michael Woollcombe and Roland Keiper, who were associated with Clearwater and Equilibrium, asked to be appointed to the Stelco board of directors, which had been depleted as a result of resignations. Their request was supported by other shareholders who, together with Clearwater and Equilibrium, represented about 40 per cent of the common shareholders. On February 18, 2005, the Board acceded to the request and Woollcombe and Keiper were appointed to the Board. On the same day as their appointments, the board of directors began consideration of competing bids that had been received as a result of a court-approved capital raising process that had become the focus of the CCAA restructuring.

The appointment of Woollcombe and Keiper to the Board incensed the employees of Stelco. They applied to the court to have the appointments set aside. The employees argued that there was a reasonable apprehension that Woollcombe [page6] and Keiper would not be able to act in the best interests of Stelco as opposed to their own best interests as shareholders. Purporting to rely on the court's inherent jurisdiction and the discretion provided by the CCAA, on February 25, 2005, Farley J. ordered Woollcombe and Keiper removed from the Board.

Woollcombe and Keiper applied for leave to appeal the order of Farley J. and if leave be granted, that the order be set aside on the grounds that (a) Farley J. did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test had no application to the removal of directors, (c) he had erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) in any event, the facts did not meet any test that would justify the removal of directors by a court.

Held, leave to appeal should be granted, and the appeal should be allowed.

The appeal involved the scope of a judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process of the CCAA. In particular, it involved the court's power, if any, to make an order removing directors under s. 11 of the CCAA. The order to remove directors could not be founded on inherent jurisdiction. Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, and it permits the court to maintain its authority and to prevent its process from being obstructed and abused. However, inherent jurisdiction does not operate where Parliament or the legislature has acted and, in the CCAA context, the discretion given by s. 11 to stay proceedings against the debtor corporation and the discretion given by s. 6 to approve a plan which appears to be reasonable and fair supplanted the need to resort to inherent jurisdiction. A judge is general ly

exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it was designed to supervise the company's process, not the court's process.

The issue then was the nature of the court's power under s. 11 of the CCAA. The s. 11 discretion is not open-ended and unfettered. Its exercise was guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. What the court does under s. 11 is establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. In the course of acting as referee, the court has authority 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. The court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructurin g efforts. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. The court is not catapulted into the shoes of the board of directors or into the seat of the chair of the board when acting in its supervisory role in the restructuring.

The matters relating to the removal of directors did not fall within the court's discretion under s. 11. The fact that s. 11 did not itself provide the authority for a CCAA judge to order the removal of directors, however, did not mean that the supervising judge was powerless to make such an order. Section 20 of the CCAA offered a gateway to the oppression remedy and other provisions of the Canada [page7] Business Corporations Act, R.S.C. 1985, c. C-44 ("CBCA") and similar provincial statutes. The powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute.

Court removal of directors is an exceptional remedy and one that is rarely exercised in corporate law. In determining whether directors have fallen foul of their obligations, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. The evidence in this case was far from reaching the standard for removal, and the record would not support a finding of oppression, even if one had been sought. The record did not support a finding that there was a sufficient risk of misconduct to warrant a conclusion of oppression. Further, Farley J.'s borrowing the administrative law notion of apprehension of bias was foreign to the principles that govern the election, appointment and removal of directors and to corporate governance considerations in general. There was nothing in the CBCA or other corporate legislation that envisaged the screening of directors in advance for their ability to a ct neutrally, in the best interests of the corporation, as a prerequisite for appointment. The issue to be determined was not whether there was a connection between a director and other shareholders or stakeholders, but rather whether there was some conduct on the part of the director that would justify the imposition of a corrective sanction. An apprehension of bias approach did not fit this sort of analysis.

For these reasons, Farley J. erred in declaring the appointment of Woollcombe and Keiper as directors of Stelco of no force and effect, and the appeal should be allowed.

Cases referred to

Alberta Pacific Terminals Ltd. (Re), [1991] B.C.J. No. 1065, 8 C.B.R. (3d) 99 (S.C.); Algoma Steel Inc. (Re), [2001] O.J. No. 1943, 147 O.A.C. 291, 25 C.B.R. (4th) 194 (C.A.); Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71, 39 C.B.R. (4th) 5 (C.A.), revg in part [2001] O.J. No. 5046, 30 C.B.R. (4th) 163 (S.C.J.); Babcock & Wilcox Canada Ltd. (Re) [2000] O.J. No. 786, 18 C.B.R. (4th) 157, 5 B.L.R. (3d) 75 (S.C.J.); Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, 5 N.R. 515, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240; Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, 25 O.R. (3d) 480n, 128 D.L.R. (4th) 73, 187 N.R. 241, 24 B.L.R. (2d) 161; Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683, 45 O.A.C. 320, 80 D.L.R. (4th) 161, 1 B.L.R. (2d) 225 (C.A.); Catalyst Fund General Partne r I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R. (4th) 186 (S.C.J.); Chef Ready Foods Ltd. v. Hongkong Bank of Canada, [1990] B.C.J. No. 2384, 51 B.C.L.R. (2d) 84, [1991] 2 W.W.R. 136, 4 C.B.R. (3d) 311 (C.A.); Clear Creek Contracting Ltd. v. Skeena Cellulose Inc. [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 (C.A.); Country Style Foods Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.); Dylex Ltd. (Re), [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div.); Ivaco Inc. (Re), [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.); Lehndorff General Partner Ltd. (Re), [1993] O.J. No. 14, 9 B.L.R. (2d) 275, 17 C.B.R. (3d) 24 (Gen. Div.); London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Olympia & York Developments Ltd. (Re) (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545, 17 C.B.R. (3d) 1 (Gen. Div.) (sub nom. Olympia & York Dev. v. Royal Trust Co.); Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, 244 D.L.R. (4th) 564, 2004 SCC 68, 49 B.L.R. (3d) 165, 4 C.B.R. (5th) 215; R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] [page8] S.C.J. No. 3, 88 B.C.L.R. (3d) 1, 194 D.L.R. (4th) 1, [2001] 6 W.W.R. 1, 86 C.R.R. (2d) 1, 150 C.C.C. (3d) 321, 39 C.R. (5th) 72, [2001] SCC 2; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251, 7 C.B.R. (5th) 294 (S.C.J.); Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, 36 O.R. (3d) 418n, 154 D.L.R. (4th) 193, 221 N.R. 241, 50 C.B.R. (3d) 163, 33 C.C.E.L. (2d) 173, 98 CLLC 210-006 (sub nom. Ontario Ministry of Labour v. Rizzo & Rizzo Shoes Ltd., Adrien v. Ontario Ministry of Labour); Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293, 96 O.T.C. 279 (Gen. Div.); Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Stephenson v. Vokes (1896), 27 O.R. 691, [1896] O.J. No. 191 (H.C.J.); Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 14 C.B.R. (3d) 88, 70 B.C.L.R. (2d) 6, [1992] 6 W.W.R. 331 (S.C.)

Statutes referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44, ss. 2 [as am.], 102 [as am.], 106(3) [as

am], 109(1) [as am.], 111 [as am.], 122(1) [as am.], 145 [as am.], 241 [as am.]

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 11 [as am.], 20 [as am.]

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APPLICATION for leave to appeal and, if leave is granted, an appeal from the order of Farley J., reported at [2005] O.J. No. 729, 7 C.B.R. (5th) 307 (S.C.J.), removing two directors from the board of directors of Stelco Inc.

Jeffrey S. Leon and Richard B. Swan, for appellants Michael Woollcombe and Roland Keiper.

Kenneth T. Rosenberg and Robert A. Centa, for respondent United Steelworkers of America.

Murray Gold and Andrew J. Hatnay, for respondent Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd. And Welland Pipe Ltd.

Michael C.P. McCreary and Carrie L. Clynick, for USWA Locals 5328 and 8782.

John R. Varley, for Active Salaried Employee Representative.

Michael Barrack, for Stelco Inc.

Peter Griffin, for Board of Directors of Stelco Inc.

K. Mahar, for Monitor.

David R. Byers, for CIT Business Credit, Agent for DIP Lender. [page9]

The judgment of the court was delivered by

BLAIR J.A.: --

Part I -- Introduction

[1] Stelco Inc. and four of its wholly-owned subsidiaries obtained protection from their creditors under the Companies' Creditors Arrangement Act (the "CCAA")[1] at the end of the document] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

[2] Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

[3] The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies -- Clearwater Capital Management Inc. and Equilibrium Capital Management Inc. -- which, respectively, hold approximately 20 per cent of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

[4] The Stelco board of directors (the "Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40 per cent of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.
>
> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their [page10] experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

[5] On the same day, the Board began its consideration of the various competing bids that had

been received through the capital raising process.

[6] The appointments of the appellants to the Board incensed the employee stakeholders of Stelco (the "Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability -- exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as "the bare knuckled arena" of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

[7] The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

[8] The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation -- as opposed to their own best interests as shareholders -- in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as the "Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse. [page11]

[9] On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

[10] For the reasons that follow, I would grant leave to appeal, allow the appeal and order the reinstatement of the applicants to the Board.

Part II -- Additional Facts

[11] Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met

at their annual general meeting on April 29, 2003. At that meeting they elected 11 directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

[12] Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of 20 directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

[13] Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

[14] In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids and report on the bids to the court.

[15] On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a [page12]capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

[16] A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

[17] Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately five per cent as at November 19, to 14.9 per cent as at January 25, 2005, and finally to approximately 20 per cent on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders

are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

[18] On February 1, 2005, Messrs. Keiper and Woollcombe and other representatives of Clearwater and Equilibrium met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20 per cent of the company's common shares. [page13]

[19] At paras. 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

> 17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40 per cent of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
> 18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

[20] In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

(a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;

(b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and
(c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

[21] On the basis of the foregoing -- and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" -- the Board made the appointments on February 18, 2005.

[22] Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but [page14] because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III -- Leave to Appeal

[23] Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

[24] This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": Country Style Food Services Inc. (Re), [2002] O.J. No. 1377, 158 O.A.C. 30 (C.A.), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

(a) whether the point on appeal is of significance to the practice;

(b) whether the point is of significance to the action;

(c) whether the appeal is prima facie meritorious or frivolous;

(d) whether the appeal will unduly hinder the progress of the action.

[25] Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions of considerable importance to the practice and on [page15] which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision-making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be e vident that in my view the appeal has merit.

[26] Leave to appeal is therefore granted.

Part IV -- The Appeal

The Positions of the Parties

[27] The appellants submit that,

(a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;
(b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

(c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;
(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

[28] The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, second, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the [page16] ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: Re Algoma Steel Inc., [2001] O.J. No. 1943, 25 C.B.R. (4th) 194 (C.A.), at para. 8.

[29] The crux of the respondents' concern is well-articulated in the following excerpt from para. 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group -- particular investment funds that have acquired Stelco shares during the CCAA itself -- have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

[30] The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see Re Olympia & York Development Ltd. (1993), 12 O.R. (3d) 500, [1993] O.J. No. 545 (Gen. Div.); Re Ivaco Inc., [2004] O.J. No. 2483, 3 C.B.R. (5th) 33 (S.C.J.), at paras. 15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

[31] The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the CCAA". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

[32] The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: Babcock & Wilcox Canada Ltd. (Re), [2000] O.J. No. 786, 5 B.L.R. (3d) 75 (S.C.J.), at para. 11. See also, Chef Ready Foods Ltd. v. Hong Kong Bank of Canada, [1990] B.C.J. No. 2384, 4 C.B.R. (3d) 311 (C.A.), at p. 320 C.B.R.; Re Lehndorff General Partners Ltd., [1993] O.J. No. 14, 17 C.B.R. (3d) 24 (Gen. Div.). [page17]Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see Re Dylex Ltd., [1995] O.J. No. 595, 31 C.B.R. (3d) 106 (Gen. Div. (Commercial List)), Royal Oak Mines Inc. (Re), [1999] O.J. No. 864, 7 C.B.R. (4th) 293 (Gen. Div. (Commercial List); and Westar Mining Ltd. (Re), [1992] B.C.J. No. 1360, 70 B.C.L.R. (2d) 6 (S.C.).

[33] It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent jurisdiction

[34] Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4th ed. (London: LexisNexis UK, 1973 --), vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

[35] In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in Royal Oak Mines, supra, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should [page18] not be brought into play" (para. 4). See also, Baxter Student Housing Ltd. v. College Housing Co-operative Ltd., [1976] 2 S.C.R. 475, 57 D.L.R. (3d) 1, at p.

480 S.C.R.; Richtree Inc. (Re) (2005), 74 O.R. (3d) 174, [2005] O.J. No. 251 (S.C.J.).

[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, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (C.A.), at para. 46, that:

> ... the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. ... This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above[2] at the end of the docuemnt], rather than the integrity of their own process.

[37] As Jacob observes, in his article "The Inherent Jurisdiction of the Court", supra, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

[38] I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however -- difficult as it may be to draw -- between the court's process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the company's process, on the other hand. The court simply supervises the latter [page19]process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose"[3] at the end fo the document]. Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The section 11 discretion

[39] This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA,

in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion -- in spite of its considerable breadth and flexibility -- does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the Canada Business Corporation Act, R.S.C. 1985, c. C-44 ("CBCA"), and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy gr ounds.

[40] The pertinent portions of s. 11 of the CCAA provide as follows:

Powers of court

11(1) Notwithstanding anything in the Bankruptcy and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

. . . . .

Initial application court orders

(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); [page20]
(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.

Other than initial application court orders

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

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

. . . . .

Burden of proof on application

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

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

[41] The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as R. v. Sharpe, [2001] 1 S.C.R. 45, [2001] S.C.J. No. 3, at para. 33, and Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2, at para. 21, is articulated in E.A. Driedger, The Construction of Statutes, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes, 4th ed. (Toronto: Butterworths, 2002), at p. 262.

[42] The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions [page21]made by

directors and officers in the course of managing the business and affairs of the corporation.

[43] Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparas. 11(3)(a) -- (c) and 11(4)(a) -- (c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

[44] What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in Lehndorff, supra, at para. 5, "to make order[s] 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". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance the company's restructuring efforts.

[45] With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

[46] I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: London Finance Corp. Ltd. v. Banking Service Corp. Ltd., [1922] O.J. No. 378, 23 O.W.N. 138 (H.C.); Stephenson v. Vokes, [1896] O.J. No. 191, 27 O.R. 691 (H.C.J.). The authority to remove must therefore be found in statute law.

[47] In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: [page22] CBCA, ss. 106(3) and 111[4] at the end of the document]. The specific power to remove directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court -- where it finds that oppression as therein defined exists -- to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, Catalyst Fund General Partner I Inc. v. Hollinger Inc., [2004] O.J. No. 4722, 1 B.L.R.

(4th) 186 (S.C.J.).

[48] There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment and removal of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See Baxter Student Housing Ltd. v. College Housing Cooperative Ltd., supra, at p. 480 S.C.R.; Royal Oak Mines Inc. (Re), supra; and Richtree Inc. (Re), supra.

[49] At para. 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [sic] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem. The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.

(Emphasis added)

[50] Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

[51] Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in [page23] the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the court should not read into the s. 11 discretion an extraordinary power -- which the courts are disinclined to exercise in any event -- except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The oppression remedy gateway

[52] The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> 20. The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

[53] The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

[54] I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority. [page24]

The level of conduct required

[55] Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in Catalyst Fund General Partner I Inc. v. Hollinger Inc., supra. The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is an extraordinary remedy and certainly should be imposed most sparingly. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada".[5] at the end of the document]

>> SS. 18.172 Removing and appointing directors to the board is an extreme form of judicial intervention. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. By tampering with a board, a court directly affects the management of the corporation. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be a measure of last resort. The order could be suitable

> where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.

(Emphasis added)

[56] C. Campbell J. found that the continued involvement of the Ravelston directors in the Hollinger situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

[57] Everyone accepts that there is no evidence the appellants have conducted themselves, as directors -- in which capacity they participated over two days in the bid consideration exercise -- in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk -- a reasonable apprehension -- that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future. [page25]

[58] The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium -- the shareholders represented by the appellants on the Board -- had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

[59] Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: Peoples Department Stores Inc. (Trustee of) v. Wise, [2004] 3 S.C.R. 461, [2004] S.C.J. No. 64, at paras. 42-49.

[60] In Peoples the Supreme Court noted that "the interests of the corporation are not to be

confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well -- in the context of "the shifting interest and incentives of shareholders and creditors" -- the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in [page26]its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

[61] In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs. Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

[62] The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over 14 months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

[63] There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see Algoma Steel Inc. v. Union Gas Ltd. (2003), 63 O.R. (3d) 78, [2003] O.J. No. 71 (C.A.), at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

[64] The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The business judgment rule

[65] The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings -- and courts in general -- will be

very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in Peoples, supra, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ... [page27]

[66] In Brant Investments Ltd. v. KeepRite Inc. (1991), 3 O.R. (3d) 289, [1991] O.J. No. 683 (C.A.), at p. 320 O.R., this court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority.[6] at the end of the document]

[67] McKinlay J.A. then went on to say [at p. 320 O.R.]:

> There can be no doubt that on an application under s. 234[7] at the end of the document] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

[68] Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also Clear Creek Contracting Ltd. v. Skeena Cellulose Inc., supra; Sammi Atlas Inc. (Re), [1998] O.J. No. 1089, 3 C.B.R. (4th) 171 (Gen. Div.); Olympia & York Developments Ltd. (Re), supra; Re Alberta Pacific Terminals Ltd., [1991] B.C.J. No. 1065, 8 C.B.R. (4th) 99 (S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

[69] Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a [page28]situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

[70] I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) -- which describes the directors' overall responsibilities -- and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e., in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 2 of the CBCA as meaning "the relationships among a corporation, its affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business and affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

[71] This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

[72] The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion -- not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and [page29] flexible supervisory jurisdiction -- a jurisdiction which feeds the creativity that makes the CCAA work so well -- in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of di rectors.

The reasonable apprehension of bias analogy

[73] In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias ... with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual aebias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40 per cent of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

[74] In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

[75] Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably [page30]prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants -- including the respondents in this case -- but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

[76] If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in Blair v. Consolidated Enfield Corp., [1995] 4 S.C.R. 5, [1995] S.C.J. No. 29, at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly

the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V -- Disposition

[77] For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

[78] I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

[79] Counsel have agreed that there shall be no costs of the appeal.

Order accordingly.

[page31]

Notes

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

Note 2: The reference is to the decisions in Dyle, Royal Oak Mines and Westar, cited above.

Note 3: See para. 43, infra, where I elaborate on this decision.

Note 4: It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

Note 5: Dennis H. Peterson, Shareholder Remedies in Canada, looseleaf (Markham: LexisNexis -- Butterworths, 1989), at 18-47.

Note 6:Or, I would add, unpopular with other stakeholders.

Note 7: Now s. 241.

TAB 9

Case Name:

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

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

[2003] J.Q. no 264

[2003] Q.J. No. 264

[2003] R.J.Q. 420

J.E. 2003-346

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

35 C.C.P.B. 71

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

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

2003 CanLII 47918

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

Quebec Court of Appeal
Montreal Registry

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

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

(70 paras.)

Counsel:

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

JUDGMENT

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

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

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

4 ALLOWS the appeal in part, as follows:

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

5 THE WHOLE, without costs.

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

REASONS OF DALPHOND J.A.

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

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

THE FACTS

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

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

> [TRANSLATION]
>
> [6] Orders the monitor to mail a copy of this order, within the next 10 days, to all ordinary creditors of Jeffrey Mine Inc., and, for the employees of Jeffrey Mine Inc., to their union;
>
> [8] Authorizes Jeffrey Mine Inc. to file an arrangement with its creditors, the whole in accordance with the CCAA;
>
> ...
>
> [16] Authorizes the monitor to take possession of all of the tangible and

intangible assets, movable and immovable, belonging to Jeffrey Mine Inc. or used in its business operations;

...

[18] Authorizes the monitor to take all necessary action to preserve and maintain the property and premises of Jeffrey Mine Inc. according to commercial standards in the field;

...

[20] Authorizes the monitor to exercise the following powers:

...

(h) hire and retain the services of certain former directors of Jeffrey Mine Inc., and of any other person, whether a former employee or not of Jeffrey Mine Inc., according to the terms and conditions it deems appropriate, with a view to completing the collection of accounts receivable, the sale of finished products, the implementation of capital asset protection measures, the formulation of a plan to salvage assets and shut down the mining complex for a time, and the conclusion of an arrangement with Jeffrey Mine Inc.'s creditors;

(i) proceed with shutting down Jeffrey Mine Inc.'s production operations and with implementing measures to protect the company's capital assets;

(l) lay off Jeffrey Mine Inc.'s employees, and terminate their employment contracts, as it deems appropriate;

(m) retain, in the service of Jeffrey Mine Inc., all employees it deems appropriate for the purpose of implementing the arrangement;

(n) incur and pay, out of Jeffrey Mine Inc.'s receipts, the fees and expenditures relating to the arrangement, including, in particular, the salaries of the employees kept on and of the consultants hired, as well as the expenditures relating to the salvaging of Jeffrey Mine Inc.'s property;

[22] Authorizes the monitor to suspend, as it deems appropriate, any agreement obliging Jeffrey Mine Inc. to pay amounts on behalf of current or former Jeffrey

Mine Inc. employees, with regard to the fringe benefits granted by Jeffrey Mine Inc. to its current and former employees, such as drug and dental insurance, life and disability insurance, and contributions to pension plans made by employees other than those kept on by the monitor, the whole reserving any right of such creditors to file a proof of claim;

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

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

...

[My emphasis]

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

[TRANSLATION]

2. REMUNERATION

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

3. HOLIDAYS AND FRINGE BENEFITS

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

4. PENSION PLAN

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

5. UNION DUES

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

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

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

[TRANSLATION]

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

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

contributing to the pension plan.

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

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

...

[My emphasis]

12 The evidence shows that the actuarial liability was between $30 million and $35 million at that time, and that there were 1200 retired employees. The actuarial liability had been evaluated at approximately $12 million in December 1999, and the debtor made monthly payments of $170,500 until September 1999 to absorb it. As indicated in the letter of October 23, the monitor suspended those payments in October 2002.

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

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

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

16 In the following weeks, the monitor negotiated with bankers, secured creditors holding rights

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

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

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

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

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

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

THE TRIAL JUDGMENT

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

> [TRANSLATION]
>
> [6] RENEWS to May 31, 2003 the second order, rendered by the Honourable Pierre C. Fournier J.S.C. on November 7, 2002, as amended by this order;
>
> [7] AUTHORIZES the monitor, in that position, to resume certain operations of Jeffrey Mine Inc., for and in the name of the latter, and, to that end, AUTHORIZES the monitor to exercise the following powers:
>
> (a) hire and retain the services of any person, regardless of whether or not that person is a former employee of Jeffrey Mine Inc., according to the terms and conditions it deems appropriate;
>
> (b) mine raw asbestos ore and convert it into a finished product;
>
> ...
>
> (c) incur and pay, out of Jeffrey Mine Inc.'s receipts, the cost and expenditures relating to the resumption of operations for the purpose of the Thiokol project;
>
> ...
>
> (f) exercise any other power necessary or helpful in managing the operations of Jeffrey Mine Inc.;
>
> ...

[12] DECLARES that the Monitor and any persons whose services it retains under the present order and, subsequently, under the arrangement, cannot incur statutory or civil liability for any action, decision, omission or damage arising out of the exercise of the powers authorized under the terms of this order, including, but without being limited to, any damage relating to the quality, and to the effects and consequences stemming from the sale, of asbestos fibre products further to the resumption of the operations of Jeffrey Mine Inc., or any environmental damage resulting from the resumption of the Debtor's operations, unless such a fact or damage is caused by gross negligence or wilful misconduct on their part;

[16] DECLARES that the Monitor is not bound by the collective agreements between Jeffrey Mine Inc. and its former unionized employees, and that, consequently, it is not required to comply with the provisions therein for the purpose of the Thiokol project;

[20] DECLARES this order executory notwithstanding all appeals;

[My emphasis]

THE ARGUMENTS OF THE PARTIES

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

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

25 As for the parts of the third order pertaining to collective agreements, they would simply

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

THE RELEVANT LEGISLATIVE PROVISIONS

26 The following are the relevant provisions of the CCAA:

11.3

No order made under section 11 shall have the effect of

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

11.7

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

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

financial affairs, containing prescribed information,

(i) forthwith after ascertaining any material adverse change in the company's projected cash-flow or financial circumstances,
(ii) at least seven days before any meeting of creditors under section 4 or 5,

or

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

c) advise the creditors of the filing of the report referred to in paragraph (b) in any notice of a meeting of creditors referred to in section 4 or 5; and
d) carry out such other functions in relation to the company as the court may direct.

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

a) provide such assistance to the monitor as is necessary to enable the monitor to adequately carry out the monitor's functions; and
b) perform such duties set out in section 158 of the Bankruptcy and Insolvency Act as are appropriate and applicable in the circumstances.

11.8

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

requirement imposed on the company to pay an amount where the claim arose before or upon the monitor's appointment.

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

* * *

11.3

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

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

b) d'exiger la prestation de nouvelles avances de fonds ou de nouveaux crédits.

11.7

(1) Le Tribunal qui accorde l'ordonnance visée à l'article 11 nomme une personne pour agir à titre de contrôleur des affaires et des finances de la compagnie pour la période pendant laquelle l'ordonnance est en vigueur.

(2) Sauf décision contraire du Tribunal, le vérificateur de la compagnie peut être nommé pour agir à titre de contrôleur.

(3) Le contrôleur :

a) dans le cadre de la surveillance des affaires et des finances de la compagnie et dans la mesure où cela s'avère nécessaire pour lui permettre de les évaluer adéquatement, a accès aux biens de celle-ci - notamment locaux, livres, données sur support électronique ou autre, registres et autres documents financiers -, biens qu'il est d'ailleurs tenu d'examiner;

b) est tenu de déposer auprès du Tribunal un rapport portant sur l'état des affaires et des finances de la compagnie et contenant les

renseignements prescrits :

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

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

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

11.8

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

[My emphasis]

ANALYSIS

I. A bit of history

27 The CCAA was passed by Parliament in 1933, during the Great Depression. Its validity as a

law governing insolvency and bankruptcy was recognized as of 1934 by the Supreme Court, in Attorney General of Canada v. Attorney General of Quebec, [1934] S.C.R. 659.

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

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

II. Aim of the CCAA

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

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

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

> The legislation is intended to have wide scope and allow a judge to make orders

which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

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

[TRANSLATION]

[52] The vitality of the CCAA is due in part to the way it has been interpreted by the courts, primarily in Ontario, British Columbia and Alberta. These courts opted for a broad and liberal interpretation of the CCAA and the notion of "inherent jurisdiction" and "equity" in order to give effect to the aims of the CCAA, which are to enable companies to remain in operation so that they can find a solution to their insolvency and turn their financial situation around. The courts concluded that the CCAA must be interpreted and applied in this way in order to provide a flexible tool for restructuring insolvent companies.

[53] On the basis of these concepts, the courts have not hesitated in recent years to render orders-such as the debtor's right to cancel contracts-that have become almost routine under the CCAA.

[54] A number of these judgments draw on the Supreme Court decision in Baxter Student Housing Ltd. v. College Housing Co-operative Limited[9], for the purpose of exercising their inherent jurisdiction and giving effect to the objectives of the CCAA. The Supreme Court stated that a court's inherent jurisdiction does not allow it to render an order negating the unambiguous expression of the legislative will. In Re Westar Mining Ltd.[10], Macdonald J. referred to Baxter and established the principle that would be followed in several judgments:

> Proceedings under the C.C.A.A. are a prime example of the kind of situation where the Court must draw such powers to "flesh out" the bare bones of an inadequate incomplete statutory provision in order to give effect to its objectives[11].

[58] Certain decisions rendered by the Court of Appeal on other CCAA related

matters show that the Court of Appeal shares the same vision as the other Canadian courts regarding the need for a broad, liberal interpretation in order to give effect to the objectives of the CCAA.

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

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

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

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

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

> [TRANSLATION]

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

> [65] More recently, it was the judgments and decisions rendered in Re Blue Range Resources Corp.[18] and in Re Eaton Co.[19] that put an end to claims by creditors that section 11 does not provide for the power to allow the cancellation of contracts.
>
> ...
>
> [74] A review of the jurisprudence shows that the debtor's right to cancel contracts prejudicial to it can be provided for in an order to stay proceedings made under section 11.
>
> ...
>
> [81] However, even if the initial order allows that right of the debtor, creditor that believes it has been treated unfairly is entitled to ask the court to review the order. The court can then determine whether it is appropriate for the debtor to cancel the contract in question.
>
> [My emphasis]

III. The monitor's role

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

34 As indicated in section 11.7(3) CCAA, the monitor's role is primarily one of monitoring the debtor's business and financial affairs and of preparing reports for creditors and the court. Thus, the monitor's role is similar to that of a trustee appointed in conjunction with a proposal under Part III

BIA. At no time does that role involve stripping the debtor of its property or of depriving it of control of the property.

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

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

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

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

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

40 Thus, the orders rendered specified correctly that the monitor could not be considered the employer of the employees kept on or recalled, since Jeffrey Mine Inc. remained their employer. In paragraph 14 of the decision in Royal Oak Mines (Re), [2001] O.J. No 562, the Court of Appeal of Ontario stated that the monitor appointed under the CCAA, to which the court had also entrusted

interim receiver powers under section 47 BIA, did not become the employer even if it operated, as the debtor remained the employer:

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

41 It follows that the monitor cannot be considered the new employer, instead of the debtor, with regard to the employees kept on or recalled. Nor is a tripartite relationship[24] involved, since, as mentioned above, the monitor is not a third party in relation to Jeffrey Mine Inc. In reality, when the monitor lays off or rehires employees, it does so in the debtor's name, as specified in paragraphs 20 (i), (1) and (m) of the initial order and in paragraph 7 of the impugned order.

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

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

IV. The CCAA and the appellants' exclusive representation

44 There is nothing in the orders rendered about the abolishment or modification of the certifications. Thus, the appellants' certifications are still valid and in effect. Furthermore, it is doubtful that the Superior Court would have jurisdiction to rule on such matters, as determined by

the majority in conjunction with the winding-up of the Coopérants (Syndicat des employés de coopératives d'assurance-vie v. Raymond, Chabot, Fafard, Gagnon inc., [1997] R.J.Q. 776 (C.A.)), unless that were allowed under a constitutionally valid provision in the CCAA. It follows that the appellants' exclusive representation continues, which, incidentally, is recognized in paragraph 6 of the initial order, where it is stated that a notice to their union constitutes a notice to their employees.

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

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

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

V. The working conditions of employees kept on or recalled

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

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

monitor given the debtor's financial situation.

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

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

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

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

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

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

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

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

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

> [11] The appellants submitted that paragraph 33 was beyond the power of the Court to order and, in effect, that paragraph 33 was illegal. They argued that the power of the interim receiver[27] could not exceed the power of Royal Oak and that as Royal Oak could not legally refuse to pay the pension benefits owing under its collective agreements, the Court could not authorize the interim receiver to refrain from paying them.
>
> [12] This submission misconstrues or mischaracterizes the situation. Royal Oak sought the protection of the CCAA, because it was incapable of dealing with the claims against it. The appointment of an interim receiver was sought in April 1999 by Royal Oak, its banker and other creditors because, as one counsel put it, Royal Oak's management had disappeared. It was hoped that with careful management the operations could be salvaged and the mines sold to others.
>
> [13] The interim receiver, however, had no funds with which to pay debts or with which to continue Royal Oak's operations. Nor did Royal Oak. Work could only begin or continue, and debts could only be paid with the infusion of financial support from Trilon Financial Corporation ("Trilon"), Northgate Exploration Limited ("Northgate") and other prospective lenders. What operations were to be continued and what debts were to be paid were decided upon in advance by PwC and then authorized by Court order.

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

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

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

[My emphasis]

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

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

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

VI. Recapitulation

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

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

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

VII. Conclusions sought by the appellants

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

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

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

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

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

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

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

VIII. Conclusion and disposition

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

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

PIERRE DALPHOND J.A.

cp/i/qw/qlisl/qlesc/qljxl

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

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

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

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

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

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

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

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

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

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

11 Ibid. at 93.

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

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

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

15 Michaud v. Steinberg, supra, at 1690.

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

17 Ibid. at 191.

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

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

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

21 Section 33 of the winding-up Act.

22 Section 35 of the Winding-up Act.

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

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

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

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

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

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

TAB 10

Case Name:

West Bay SonShip Yachts Ltd. v. Esau

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36
AND IN THE MATTER OF the Business Corporations Act, S.B.C. 2002, c. 57
Between
West Bay SonShip Yachts Ltd., Respondent, (Petitioner), and
Gerald Esau, Appellant, (Respondent)

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

2009 BCCA 31

306 D.L.R. (4th) 294

[2009] 4 W.W.R. 415

49 C.B.R. (5th) 159

89 B.C.L.R. (4th) 82

71 C.C.E.L. (3d) 45

265 B.C.A.C. 203

2009 CarswellBC 139

Docket: CA035080

British Columbia Court of Appeal
Vancouver, British Columbia

M.A. Rowles, R.E. Levine and H. Groberman JJ.A.

Heard: October 8, 2008.
Judgment: January 30, 2009.

(47 paras.)

[Editor's note: Supplementary reasons for judgment were released November 18, 2009. See [2009] B.C.J. No. 2275.]

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Compromises and arrangements -- Claims -- Appeal by Esau from order finding he was a creditor subject to his employer's plan of arrangement dismissed -- Appellant was terminated after employer filed for protection -- Appellant commenced wrongful dismissal action and did not file proof of claim under Act -- Chambers judge held that wrongful dismissal claim was a contingent liability on filing date and fell within definition of claim in the plan -- Chambers judge refused to extend time to file proof of claim -- Wrongful dismissal claim was not contingent liability -- Appellant's employment contract was executory contract and within definition of claim in plan -- Granting extension of time was discretionary and discretion was properly exercised.

Appeal by Esau from an order of a chambers judge finding that he was a creditor subject to the plan of arrangement of the respondent West Bay, his former employer. The respondent filed for protection under the Companies' Creditors Arrangement Act. The appellant was terminated. He sued for wrongful dismissal but did not file a proof of claim under the Act. The respondent's plan of arrangement was approved by the court. The chambers judge held that the appellant's claim for wrongful dismissal was a contingent liability at the filing date, and as such, fell within the definition of a claim in the plan. She concluded that the appellant's claim was a pre-filing claim and accrued from the outset of his employment, and was therefore a liability of West Bay on the filing date. She permanently stayed the appellant's action and refused to grant him an extension of time to file a proof of claim. The appellant argued that his claim only arose upon termination and that the respondent thus had no liability until termination, which occurred after the respondent filed for protection. The appellant thus argued his claim was not compromised by the plan.

HELD: Appeal dismissed. The liability to pay damages if an employment contract was breached for failing to give reasonable notice of termination was not a contingent liability within the ordinary meaning of that term. Until the termination of employment without adequate notice, there was no injury. The possibility of a breach of contract was not sufficient to give rise to a contingent liability. The wrongful dismissal claim did not accrue from the outset of the appellant's employment and it did not represent a contingent liability of the respondent on the filing date. The claim was not a pre-filing claim on this basis. The appellant's employment contract was, on the filing Date, an executory contract and thus fell within the definition of a claim in the plan. The terms of the plan required creditors to file a proof of claim, which the appellant failed to do. The chambers judge's decision to deny an extension of time to file a proof of claim was discretionary. The appellant had not shown that the chambers judge's decision was clearly wrong.

Statutes, Regulations and Rules Cited:

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

Counsel:

S. Kent: Counsel for the Appellant.

R.A. Millar: Counsel for the Respondent.

Reasons for Judgment

The judgment of the Court was delivered by

R.E. LEVINE J.A.:--

Introduction

1 The appellant, Gerald Esau, appeals from the order of a Supreme Court chambers judge made May 3, 2007, in the course of proceedings involving the respondent, West Bay SonShip Yachts Ltd., under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Mr. Esau claims, among other grounds of appeal, that the chambers judge erred in ruling that he was a creditor subject to the terms of the Plan of Arrangement (the "Plan").

2 For the reasons that follow, I would dismiss the appeal.

Background

Facts

3 On December 16, 2005, West Bay filed for protection under the *CCAA*. Mr. Esau had been an employee of West Bay since 1991. On January 17, 2006, he received notice that his employment in the position of Vice President, Production, would be terminated, effective June 6, 2006. Mr. Esau sued West Bay for damages for wrongful dismissal, but did not file a Proof of Claim in the *CCAA* restructuring. West Bay sought a declaration that Mr. Esau's claim was compromised by the Plan, and an order that the wrongful dismissal action be stayed.

The CCAA Proceedings

4 In the initial order in the *CCAA* proceedings, made on December 16, 2005 (the "Filing Date"), the court imposed a stay of proceedings against West Bay, including any proceeding pursuant to labour or employment standards legislation (s. 2(c)). The initial order provided for West Bay to continue to pay obligations incurred by it after the Filing Date, including wages and "other monies owing to or in respect of its employees", but expressly prohibited the payment of "any amounts that

are due on account of severance pay arising at law or under Statute" (s. 5). The order permitted West Bay to downsize its operations and terminate its employees. The financial consequences of downsizing were to be dealt with in the Plan to be filed (s. 6):

> 5. THIS COURT FURTHER ORDERS that all obligations incurred by the Petitioner after the Filing Date, including without limitation, all obligations to persons who advance or supply goods or services to the Petitioner after the Filing Date (including those under purchase orders outstanding at the Filing Date but excluding any interest on the Petitioner's existing obligations incurred prior to the Filing Date) shall be paid or otherwise satisfied by the Petitioner and, without limiting the generality of the foregoing, that the Petitioner shall pay all wages, source deductions, benefits (including long and short term disability payments), expenses, omissions, vacation pay, and other monies owing to or in respect of its employees (including any independent contractor providing employment related services to the Petitioner) irrespective of whether such obligations arose or were earned before or after the Filing Date but not including any amounts that are due on account of severance pay arising at law or under Statute (hereinafter collectively referred to as "Wages").
>
> 6. THIS COURT FURTHER ORDERS that, subject to the terms of this Order, the Petitioner shall remain in possession of its undertaking, property and assets, wherever situate (collectively, the "Assets") with full power and authority to relocate to British Columbia those Assets currently situated within other jurisdictions including, without limitation, the State of California, the State of Florida and the State of Washington and shall continue to carry on its business in the ordinary course, provided that:
>
> (b) it shall have the right without further Order of this Court, but subject to the consent of the Monitor, to proceed with an orderly disposition of such of its Assets outside of the ordinary course of its business as it deems appropriate in order to facilitate the downsizing of its business and operations ("Downsizing"), including:
>
> (i) terminating the employment of such of its employees or temporarily laying off such of its employees, as it deems appropriate;
>
> all without interference of any kind from third parties, including its landlords and notwithstanding the provisions of any lease, mortgage other instrument or law affecting or limiting the rights of the Petitioner to move or liquidate Assets from

> leased premises, and may take any Downsizing steps at any time after the Filing Date irrespective of whether or not payments have been made subsequent to the Filing Date under any lease or mortgage, provided that the financial obligations, if any, of the Petitioner to creditors affected by such Downsizing shall be provided for and dealt with in the Plan of Arrangement to be filed by the Petitioner.
>
> [Emphasis added]

5 By final order in the *CCAA* proceedings, pronounced June 23, 2006, the court approved West Bay's Plan. All claims falling within the definition of "Claim" in Article 1.1 of the Plan were compromised as against West Bay and others:

> **"Claim"** means a claim for an amount alleged by a person to be owed to it by the Company, or a claim in relation to any obligation, enforceable right, duty or liability, contingent, accrued, vested or otherwise, (including any claim whether contingent or accrued on behalf of Her Majesty the Queen in right of the Dominion of Canada or any Province or any municipality) against the Company which was in existence in whole or in part as of the Filing Date, including any claim in relation to any liability, loss or damage arising from any such claim after the Filing Date, or any cause of action against the Company or its assets and property calculated either as at the Filing Date, or, in the case of claims under executory contracts arising subsequent to the Filing Date as a result of the termination of such contracts in accordance with an order of the Court made prior to the date of the Meeting, as at the date of such termination, either:
>
> (a) as set forth in a Proof of Claim which has either:
>
> (i) been admitted by the Company pursuant to the Plan for all purposes; or
>
> (ii) been determined by a Court of competent jurisdiction to be a proper obligation of either or both of the Company; or
>
> (b) for which a valid Proof of Claim could have been filed with the Company, but which Proof of Claim was not so filed prior to the Claims Bar Date;
>
> provided that a Claim shall not include the amount due or accruing due to a Post Filing Creditor in respect of Post Filing Creditor Claims, nor shall the Claim

include interest for the period subsequent to the Filing Date.

[Emphasis added]

The Reasons of the Chambers Judge

6 The chambers judge held that Mr. Esau's claim for damages for wrongful dismissal was a "contingent liability" at the Filing Date, and, as such, fell within the definition of "Claim" in the Plan. She relied on two superior court decisions, *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 21 B.C.L.R. (3d) 91 (S.C.), and *Rizzo and Rizzo Shoes Ltd. (Re)* (1991), 6 O.R. (3d) 441 (Gen. Div.), aff'd. (on other grounds), [1998] 1 S.C.R. 27, in concluding that the claim for damages for breach of Mr. Esau's employment contract accrued from the outset of his employment, and was therefore a liability of West Bay at the Filing Date.

7 The chambers judge ordered that Mr. Esau's claim was a "pre-filing claim" and was compromised by the Plan. She permanently stayed the action, and refused to grant Mr. Esau an extension of time to file a Proof of Claim.

8 Her reasons may be found at *West Bay SonShip Yachts Ltd. (Re)*, 2007 BCSC 1553, 37 C.B.R. (5th) 253.

Issues on Appeal

9 On appeal, the parties joined issue on two alternative interpretations of the definition of "Claim" in the Plan, under which Mr. Esau's claim for damages for wrongful dismissal may be considered to be a "pre-filing claim": if it was a contingent liability at the Filing Date, or it was a claim under an executory contract.

10 Thus, there are two issues in this appeal:

1. Is a wrongful dismissal claim a contingent liability prior to the termination of employment?
2. Is an employment contract an executory contract?

Analysis

Contingent Liability

11 Mr. Esau takes the position that his claim for damages for breach of his employment contract did not accrue throughout his employment, but only arose when he was terminated. Thus, he argues, West Bay had no liability, contingent or otherwise, until the termination of his employment, which occurred after West Bay filed for protection under the *CCAA*. Thus, he says, his claim for damages

is not compromised by the Plan.

12 West Bay argues that while Mr. Esau's right to bring an action for damages for wrongful dismissal may not have crystallized until notice of termination was given, West Bay's obligation to pay severance was in existence "in whole or in part" as of the filing date. Thus, Mr. Esau's claim for damages for wrongful dismissal is a pre-filing claim and is compromised by the Plan.

13 Both *Eland Distributors* and *Rizzo and Rizzo Shoes*, relied on by the chambers judge and West Bay, dealt with severance under employment standards legislation. The present case, however, involves a common law claim for damages for wrongful dismissal. As explored in three recent decisions of the British Columbia Employment Standards Tribunal, citing the decision of the Supreme Court of Canada in *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027, this distinction is significant.

14 In *Sitter (Re)*, [2000] B.C.E.S.T.D. No. 515 at paras. 11 and 14, the adjudicator drew the following distinction between statutory and common law claims:

> Compensation for length of service payable under section 63 of the [*Employment Standards*] *Act* is a form of deferred contingent compensation that is intended "to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment ends" (see *Re Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 27). Consistent with it being a service-based benefit, the amount of compensation for length of service payable by an employer increases in lockstep with an employee's tenure. However, "an amount payable in lieu of [contractual] notice does not flow from services performed for the corporation, but rather from the damage arising from non-performance of a contractual obligation to give sufficient notice" (see *Barrette v. Crabtree Estate*, [1993] 1 S.C.R. 1027).
>
> "Wages", as defined in section 1 of the Act, includes monies payable as compensation for length of service. Since compensation for length of service represents compensation for "years of service" (see *Rizzo*, supra.) it is, in fact, deferred compensation that is paid for "work" (see definition, section 1). On the other hand, damages for breach of a contractual notice provision are not paid for "work" but, rather, are paid (subject to mitigation) for "non-performance of a contractual obligation to give sufficient notice" (*Barrette*, supra.). An employee's right to sue for damages for breach of contract, even though the proper amount of compensation for length of service has been paid to the employee, is preserved by section 118 of the Act.

[Emphasis added]

15 This view was affirmed in *Rupert Title Search Ltd. (Re)*, [2003] B.C.E.S.T.D. No. 70 at paras. 25 and 32, and in *Taylor (Re)*, [2003] B.C.E.S.T.D. No. 82 at para. 11. In *Rupert Title Search*, the Tribunal described the statutory liability of an employer as "an 'earned' benefit to the employee that accumulates as the length of service of the employee increases", and distinguished this "length of service compensation" from common law damages for wrongful dismissal.

16 *Sitter*, *Rupert Title Search*, and *Taylor* were recently approved by this Court in *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220, 66 B.C.L.R. (4th) 373 at paras. 5-7. Madam Justice Huddart, for the Court, held that the Tribunal's understanding of the *Employment Standards Act*, R.S.B.C. 1996, c. 113, and the distinction between statutory compensation payments and reasonable notice under an employment contract "merits respect". Common law claims for damages for wrongful dismissal are distinguishable from statutory claims for severance under employment standards legislation in terms of how they arise and are calculated.

17 It is not necessary for the purpose of this appeal to determine whether a statutory claim for severance is properly characterized as a contingent liability prior to termination of employment. For present purposes, it is sufficient to conclude that *Eland Distributors* and *Rizzo and Rizzo Shoes* do not assist in the analysis of Mr. Esau's claim.

18 The first step in determining whether Mr. Esau's claim for damages for breach of his employment contract represents a contingent liability is to consider the meaning of that term. This was recently discussed by the Supreme Court of Canada in *Canada v. McLarty*, 2008 SCC 26, [2008] 2 S.C.R. 79 at paras. 17-18, where Rothstein J. for the majority referred to the "well-accepted test for a contingent liability" as that described by Lord Guest in *Winter v. Inland Revenue Commissioners*, [1963] A.C. 235 at 262 (H.L.):

> I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.

19 Similarly, *Black's Law Dictionary*, 8th ed. 2004, defines contingent liability as a "liability that will occur only if a specific event happens; a liability that depends on the occurrence of a future and uncertain event."

20 For financial reporting purposes, threatened and pending litigation are considered to be contingent liabilities of a company: *Institute of Chartered Accountants Handbook*, looseleaf (Toronto: Canadian Institute of Chartered Accountants, 1981) at s. 3290; Errol C. Soriano, *Understanding Financial Analysis in Litigation* (Scarborough: Carswell, 2004) at 64-65; *Levy-Russell Ltd. v. Shieldings Inc.* (2004), 48 B.L.R. (3d) 28 at para. 126 (Ont. S.C.J. [Commercial List]). That is, threatened or pending litigation is characterized as a contingent liability. Actual liability will arise only when there is a judgment against the company.

21 The question that arises in this case is whether the existence of a contractual obligation, and

the corresponding potential for a claim for damages for its breach, is a contingent liability of the party who may commit the breach. I conclude that, although there is the potential of a claim for damages, there can be no liability, contingent or otherwise, where there is no present cause of action. That is, until there is a breach of contract, there is no legal basis for any claim or any corresponding liability.

22 This conclusion finds support in the following definition of "liability" from *Royal Trust Co. v. H.A. Roberts Group Ltd.*, [1995] 4 W.W.R. 305 at para. 119 (Sask. Q.B.):

> These statutory provisions [s. 125(1) and (3) of *The Land Titles Act*] envisage three kinds of obligations that can be secured by a registrable mortgage: a debt, a loan, or a liability that is future or contingent. No case was cited to me that clarifies what is meant by these terms used in s. 125. The term "liability" is a broad term and is most often used to describe an unliquidated or unspecified legal obligation which arises due to negligence, breach of contract, etc. The term "debt" is a narrower term and means a specific kind of obligation for a liquidated or certain sum incurred pursuant to an agreement. The term "loan" is even narrower and means a specific type of debt. [emphasis added]

23 Further support can be found in the American case of *Grant-Howard Associates v. General Housewares*, 472 N.E.2d 1 at 3-4 (N.Y. 1984), approved in *Climatrol Industries Inc. v. Fedders Corp.*, 501 N.E. 2d 292 at 294-295 (Ill.App. 1 Dist. 1986), in the context of a product liability claim:

> An uninjured party simply is not a "contingent liability" in the usual sense of that term (see, e.g., Black's Law Dictionary [5th ed.], p. 291 ["A potential liability; e.g. pending lawsuit"]). There is no liability or claim before injury occurs. Granted that "contingency" invokes uncertain events, the uncertainty should be restricted to the success of asserting an existing claim, rather than expanding it to include the altogether unpredictable event that an injury will occur. [emphasis added]

24 I conclude that the liability to pay damages if an employment contract is breached for failing to give reasonable notice of termination is not a contingent liability within the ordinary meaning of that term. Until the termination of employment without adequate notice, there is no injury. The possibility of a breach of contract is not sufficient to give rise to a contingent liability.

25 Therefore, Mr. Esau's wrongful dismissal claim did not accrue from the outset of his employment and it did not represent a contingent liability of West Bay at the Filing Date. Consequently, Mr. Esau's claim is not a pre-filing claim on this basis.

Executory Contract

26 West Bay argues in the alternative that Mr. Esau's contract of employment was an executory contract. As a result, it maintains that his claim for damages for its termination after the Filing Date and before the date of the meeting of General Creditors to approve the Plan on June 12, 2006 (the "Meeting"), was a "Claim" within the meaning of, and compromised by, the Plan. It says that the characterization of an employment contract as an executory contract is consistent with the legal definition of executory contracts and the purpose of the *CCAA*.

27 Mr. Esau submits that when his employment contract was terminated it was not an executory contract because the only remaining performance to be tendered was the payment of money. He cites in support of his argument *re U.S. Metalsource Corp.*, 163 B.R. 260 at 269 (Bankr. W.D. Pa. 1993), in which it was held that where the only obligation of the debtor was the obligation to pay severance pay to terminated employees, "[t]his type of contractual duty to pay a debt is insufficient to create an executory contract."

28 If the contract was an executory contract at the Filing Date, however, a claim arising subsequent to that date as a result of termination of the contract is a "Claim" as of the date of termination. That is, if Mr. Esau's contract of employment was an executory contract at the Filing Date, his claim for damages for wrongful dismissal, arising as a result of his termination subsequent to that date and before the Meeting, became a "Claim" as of the date of termination.

29 Thus, the question is whether a contract of employment such as Mr. Esau's, under which he promised to render services in return for West Bay's promise to pay him, was an executory contract at the Filing Date.

30 The Alberta Court of Appeal recently considered the meaning of "executory contract" in *Kary Investment Corp. v. Tremblay*, 2005 ABCA 273 at para. 19, 371 A.R. 339:

> A contract is said to be executory if anything remains to be done under it by any party, and executed when it has been wholly performed by all parties: *Halsbury's Laws of England*, 4th ed. reissue, vol. 9(1) (London: Butterworths, 1998) at 341, para. 606; *S. W. Mackay & Associates Ltd. v. Park Lane Ventures Ltd.* (1997), 32 B.C.L.R. (3d) 338 at para. 8 (S.C.).

[Emphasis added]

31 In "*A Joint Report of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals - Joint Task Force on Business Insolvency Law Reform - March 15, 2002*", the authors cited the following meanings for "executory contract":

> What is an executory contract? Neither the CCAA nor the BIA use the expression, but the United States Bankruptcy Code does in s. 365 ("Code, s. 365"). In general contract law, "executory contract" means a contract under

which one or both parties still have obligations to perform. However, in U.S. bankruptcy law the expression is normally given a narrower meaning. According to the most widely accepted definition in the United States, an executory contract for the purposes of Code s. 365 is:

> a contract under which both the obligations of the bankrupt ["A"] under the contract and the other party to the contract ["B"] are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.

(Countryman, "Executory Contracts in Bankruptcy" (1974) 57 *Minnesota Law Review* 439 (Part 1), at 460).

32 The authors included an employment contract as an executory contract in this sense. See also: *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act*, a Report of the Standing Senate Committee on Banking, Trade and Commerce, November 2003, at 131, and Janis Sarra, *Rescue!: The Companies' Creditors Arrangement Act* (Toronto: Carswell, 2007) at 177-178, where employment contracts were characterized as executory contracts in the context of the discussion of insolvency laws. Professor Sarra noted (at 178-179) that damage claims resulting from termination or repudiation of executory contracts after the initial order are unsecured claims for damages.

33 None of these sources discussed the application of the U.S. definition of executory contract for bankruptcy purposes to an employment contract. It is not clear to me, because of the nature of the employment relationship, that that definition will generally apply. As a matter of contract law, if the employee fails to provide the promised services, or the employer fails to pay for services rendered, subject to any other terms of the contract, that would ordinarily be a material breach excusing the performance of the other party. Whether that conclusion would ordinarily apply to an employment contract is, however, a question I do not need to decide for the purposes of this case. The ordinary legal definition of executory contract covers these circumstances.

34 An ongoing employment contract, under which an employee has promised to render services in return for the employer's promise to pay for those services, is an executory contract as there are obligations on both parties that are yet to be completed. Thus, Mr. Esau's employment contract was, at the Filing Date, an executory contract.

35 Accordingly, Mr. Esau's claim against West Bay for damages for wrongful dismissal fell within the definition of "Claim" in the Plan.

36 That Mr. Esau's rights arising on termination of his employment contract were compromised under the Plan is consistent with the purpose of the *CCAA*, as recently considered by this Court in

Skeena Cellulose Inc. v. Clear Creek Contracting Ltd., 2003 BCCA 344, (sub nom. *Skeena Cellulose Inc. (Re)*) 13 B.C.L.R. (4th) 236 at para. 34:

> ... [C]ourts appear to have given full effect to the "broad public policy objectives" of the [CCAA], which in the phrase of a venerable article on the topic (Stanley E. Edwards, "Reorganizations under the Companies' Creditors Arrangement Act", (1947) 25 *Can. Bar Rev.* 587) are to "keep the company going despite insolvency" for the benefit of creditors, shareholders and others who depend on the debtor's continued viability for their economic success. As the author commented:
>
> > Hon. C.H. Cahan when he introduced the bill into the House of Commons indicated that it was designed to permit a corporation through reorganization to continue its business, and thereby to prevent its organization being disrupted and its goodwill lost. It may be that the main value of the assets of a company is derived from their being fitted together into one system and that individually they are worth little. The trade connections associated with the system and held by the management may also be valuable. In the case of a large company it is probable that no buyer can be found who would be able and willing to buy the enterprise as a whole and pay its going concern value. The alternative to reorganization then is often the sale of the property piecemeal for an amount which would yield little satisfaction to the creditors and none at all to the shareholders.
>
> Reorganization may give to those who have a financial stake in the company an opportunity to salvage its intangible assets. To accomplish this they must ordinarily give up some of their nominal rights, in order to keep the enterprise going until business is better or defects in the management can be remedied. This object may be furthered by providing in the reorganization plan for such matters as a shift in control of the company or reduction of the fixed charges to such a degree as to make it possible to raise new money through new issues of bonds or shares. It may therefore be in the interest of all parties concerned to give up their claims against an insolvent company in exchange for new securities of lower nominal amount and later maturity date.

[Emphasis added]

37 The Plan permitted West Bay to rationalize its business affairs with a view to a reorganization

that would make it viable in the future. The stated purpose of the Plan was to allow West Bay to "settle payment of its liabilities arising both before and after the Filing Date and to compromise the indebtedness owed to Creditors of the Company on a fair and equitable basis" (Plan, s. 2.1). It needed to retain its employees in order to complete existing orders for the construction of yachts, and to use the sale proceeds from the yachts to fund payments to its creditors on a compromised basis, on the basis that all of its creditors would "derive a greater benefit from the Plan than would result from the bankruptcy of the Company and so as to allow the Company to continue in business in the future". West Bay's tangible assets were sold to a related company to provide cash to further fund payments to creditors. It was intended that the company would remain in business using a revised production financing model, using private capital raised after the effective date of the Plan.

38 In *Skeena*, the issue addressed by the Court was whether the termination of replaceable forest contracts, which could have "disastrous consequences for many individuals, local governments and communities", supplanted the intent and purpose of the *CCAA* to stave off a bankruptcy. The Court upheld the trial judge's decision that terminated employees were not to be placed in a better position than other creditors (at para. 22), and noted that "[i]n the exercise of their 'broad discretion' under the CCAA, it has now become common for courts to sanction the indefinite, or even permanent, affecting of contractual rights" (at para. 37). In considering whether the arrangement under the *CCAA*, as a whole, was "fair, reasonable and equitable", the Court noted that "equity" is not necessarily "equality" and that the courts looks to all of the creditors to see if rights are compromised in an attempt to balance interests (at para. 59). The Court concluded (at para. 60):

> As the Chief Justice noted, many individuals and corporations, as well as the Province, incurred major losses under the Plan. Each of them might also ask "Why me?" However, as he also noted, that is a frequent and unfortunate fact of life in CCAA cases, where the only "upside" is the possibility that bankruptcy and even greater losses will be averted.

Mr. Esau's Claim

39 Mr. Esau's claim was thus subject to the terms of the Plan, which required creditors to file a "Proof of Claim" in accordance with the procedure and before the times set out in the relevant court orders. Mr. Esau did not file a Proof of Claim at any time. He did not receive a "Proof of Claim Package", as did other creditors, providing notice to file a Proof of Claim. However, West Bay published the notice to creditors, as ordered by the court, in the Vancouver Sun, and on its website. Mr. Esau was advised, through his counsel, that he was not entitled to bring an action against the company because of the stay of proceedings, that his claim as a creditor was compromised in the Plan, and that he could apply for an extension of time to file a Proof of Claim.

40 In West Bay's application that is the subject of this appeal, it sought an order extending the time for Mr. Esau to file a Proof of Claim. It was only during the hearing of West Bay's application that Mr. Esau took the position that the time should be extended.

41 The chambers judge denied the application for the extension of time, after considering the factors enumerated in *Blue Range Resources Corp. (Re)*, 2000 ABCA 285, 271 A.R. 138 at para. 26:

1. Was the delay caused by inadvertence and if so, did the claimant act in good faith?
2. What is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay?
3. If relevant prejudice is found can it be alleviated by attaching appropriate conditions to an order permitting late filing?
4. If relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

42 She concluded that the delay was significant, and was not caused by inadvertence. She further concluded that permitting the claim would result in prejudice that could not reasonably be alleviated (at paras. 32-36).

43 The chambers judge's decision to deny an extension of time to file a Proof of Claim was discretionary, reviewable by this Court only if it was clearly wrong or has worked a substantial injustice: see *Meuller v. Coronation Insurance* (1995), 12 B.C.L.R. (3d) 90 (C.A.).

44 Mr. Esau has not shown that the chambers judge's decision was clearly wrong, and she was in the best position, as the judge supervising the *CCAA* proceedings, to weigh the relative prejudice to all parties if his claim was allowed to be litigated while all other matters involving West Bay's creditors had been finalized.

45 I see no basis to interfere with the chambers judge's decision not to extend the time to file the Proof of Claim.

Conclusion

46 Mr. Esau's claim for damages for wrongful dismissal was a claim under an executory contract, and as such was stayed and compromised by the *CCAA* proceedings. There is no basis to interfere with the chambers judge's decision not to extend the time to file a Proof of Claim, nor to consider Mr. Esau's claim for misrepresentation.

47 It follows that I would dismiss the appeal.

R.E. LEVINE J.A.
M.A. ROWLES J.A.:-- I agree.
H. GROBERMAN J.A.:-- I agree.

cp/e/qlrxc/qlmxb/qlaxw/qlrxg/qlaxr/qlbrl/qlaxr/qlbrl/qlaxr

TAB 11

Case Name:

Windsor Machine & Stamping Ltd. (Re)

RE:IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as Amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Windsor Machine & Stamping Limited, Lipel Investments Ltd., WMSL Holdings Ltd., 442260 Ontario Ltd., Winmach Canada Ltd., Production Machine Services Ltd., 538185 Ontario Ltd., Southern Wire Products Limited, Pellus Manufacturing Ltd., Tilbury Assembly Ltd., St. Clair Forms Inc., Centroy Assembly Ltd., Pioneer Polymers Inc., G&R Cold Forging Inc., Windsor Machine De Mexico, Winmach Inc., Windsor Machine Products, Inc. Wayne Manufacturing Inc. and 383301 Ontario Limited, Applicants

[2009] O.J. No. 3195

Court File No. CV-08-7672-00CL

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: March 6 and 10, 2009.
Judgment: July 27, 2009.

(53 paras.)

Bankruptcy and insolvency law -- Companies' Creditors Arrangement Act (CCAA) matters -- Application of Act -- Debtor company -- Compromises and arrangements -- With unsecured creditors -- Claims -- Priority -- Motion by union for order requiring applicants to pay termination and severance pay dismissed -- Applicants were engaged in CCAA proceedings and had been unable to secure proposal that would provide value to unsecured creditors -- Employees had been terminated subsequent to beginning of CCAA proceedings -- Employees were unsecured creditors and would have been in same position had applicants filed for bankruptcy -- Bank was secured creditor and allowing motion would inappropriately give special status to employees and reduce

bank's claim -- While applicants had some available cash, they were not entitled to use it any way they wished.

Employment law -- Discipline and termination of employment -- Termination by employer, with cause -- Winding-up, receivership, bankruptcy or financial restructuring -- Motion by union for order requiring applicants to pay termination and severance pay dismissed -- Applicants were engaged in CCAA proceedings and had been unable to secure proposal that would provide value to unsecured creditors -- Employees had been terminated subsequent to beginning of CCAA proceedings -- Employees were unsecured creditors and would have been in same position had applicants filed for bankruptcy -- Bank was secured creditor and allowing motion would inappropriately give special status to employees and reduce bank's claim -- While applicants had some available cash, they were not entitled to use it any way they wished.

Motion by the union for an order requiring the applicants to pay termination and severance pay to employees. The employees were owed approximately $500,000 due to terminations that occurred when the applicants closed plants subsequent to beginning CCAA proceedings. The bank, a secured creditor, opposed the motion, arguing that the employees' claim was subordinate to its claim and not allowed by the initial order. The union argued that CCAA proceedings could not trump civil rights and the applicants had cash available to pay the employees' claim. The applicants had not yet drawn on the DIP Facility. The bank was owed $16.25 million and various vendors were owed $6.5 million.

HELD: Motion dismissed. The initial order entitled, but did not require, applicants to pay outstanding pay and entitled them to terminate employees. The applicants had been unable to propose a plan under the CCAA that would provide value to unsecured creditors such as the employees. However, the only alternative for the applicants was bankruptcy, which would not have provided value to unsecured creditors either. Secured creditors were already going to suffer a loss and allowing the motion would further reduce their claim, thus inappropriately providing the employees with special status. While the applicants had some cash available, they were not entitled to use it however they wished.

Statutes, Regulations and Rules Cited:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 47, s. 50.4(1)

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

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

Wage Earner Protection Program,

Counsel:

Andrew Hatnay and Andrea McKinnon, for United Auto Workers Local 251.

Daniel Dowdall and Jane Dietrich, for Bank of Montreal.

Joseph Marin, for the Applicants.

Tony Reyes, for RSM Richter Inc., Monitor.

Raong Phalavong, for Saginaw Pattern.

ENDORSEMENT

G.B. MORAWETZ J.:--

INTRODUCTION

1 International Union, United Automobile Aerospace & Agricultural Implement Workers of America ("United Auto Workers, Local 251" or the "Union") bring this motion for an order requiring the Applicants to pay termination and severance pay that is due and owing to the unionized employees of Tilbury Assembly Ltd. ("Tilbury") and Pellus Manufacturing Limited ("Pellus") under the *Employment Standards Act*, 2000 ("ESA") as result of terminations that occurred subsequent to the filing of proceedings by the Applicants under the *Companies' Creditors Arrangement Act* ("CCAA").

2 The motion was opposed by Bank of Montreal (the "Bank"), the secured creditor of the Applicants and by the Applicants.

3 The amount owing to the Tilbury employees for termination pay is approximately $23,000 and the amount owing for severance pay is approximately $216,000. These amounts are not in dispute.

4 The amount claimed to be owing to the Pellus employees (assuming that the employees were terminated on February 20, 2009) is approximately $132,000 and the amount claimed to be owing for severance pay as of that date is approximately $326,000. This amount is disputed by Pellus.

5 The Union submits that the Applicants should be required to pay the termination pay and severance pay owing to the Tilbury and Pellus employees for the following reasons:

(a) The ESA sets out a comprehensive code that requires an employer who terminates an employee to give the employee prior notice of termination, or if such notice is not given, pay in lieu of notice (commonly referred to

as "termination pay"). The ESA also requires that an additional amount (referred to as "severance pay") be paid to certain long service employees if criteria in the ESA are met.

(b) The Amended and Restated Initial CCAA Order and the consent orders issued by this Court dated October 29, 2008, do not authorize the company to avoid paying termination pay and severance pay. The October 29, 2008 consent orders state that "the *Employment Standards Act, 2000* continues to apply".

(c) 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.

(d) The Supreme Court of Canada has held that federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights, as long as the doctrine of paramountcy is not triggered. In the absence of paramountcy, a provincial law such as the ESA continues to apply in insolvency proceedings.

(e) For the Tilbury and Pellus employees who continued to work for the Company after it went into CCAA protection and who were subsequently terminated, the payment of termination pay and severance pay is an ordinary course payment by the Company. It is to be paid the same way wages, benefits and other aspects of employee compensation are paid.

(f) The payment of termination pay and severance pay in a CCAA proceeding is not a re-ordering of priorities among creditors nor is it giving a higher rank to unsecured employee creditors. Termination pay and severance pay that arises on the termination of employees post-CCAA filing is not pre-filing debt. It is an ordinary course payment.

(g) The payment of termination pay and severance pay in the case at bar is within the reasonable expectations of the parties because:

(i) Company management represented to the Union employees from the outset of the CCAA proceedings that it would continue to pay all contractual amounts due to employees who worked during the CCAA proceedings, which would include amounts for termination pay and severance pay; and

(ii) The Company, the Bank and the Monitor consented to the terms of court orders that expressly state that the "*Employment Standards Act 2000* continues to apply".

(h) The employees have no recourse to be compensated for the unpaid termination pay and severance pay. There will be no Plan of Compromise.

(i) The *Wage Earner Protection Plan* (WEPP) is not available to the

employees because the Company is in CCAA proceedings and the WEPP is only available to terminated employees if their employer is a bankrupt or in receivership.

(j) The amount of termination pay and severance pay owing is relatively low.

(k) The Company has the cash to pay the termination pay and severance pay that is owing.

(l) The payment of termination pay and severance pay will not jeopardize the Company's restructuring which is to be a Proposed Transaction involving a purchase of the company by its controlling shareholders.

(m) The Company has not drawn on the DIP Facility throughout the CCAA proceedings.

(n) The Company should not be able to use the CCAA to avoid its employee termination pay and severance pay obligations under the ESA.

(Note: In the excerpt from the factum, counsel to the Union references "Applicants", and the "Company". Hereafter, the collective reference is to "Applicants".)

6 The Bank submits that the Union's motion for the payment of termination and severance claims should be dismissed because:

(a) the termination and severance claims are unsecured obligations of Tilbury and Pellus which are not afforded any priority under the Amended and Restated Initial Order, or any other orders that have been made in the CCAA proceeding, and are therefore unsecured claims subordinate to the claims of the Bank as a secured creditor. Any amount paid in respect of the termination and severance claims is a direct deduction from recoveries for the secured creditors; and

(b) the provisions of the Amended and Restated Initial Order granted by this Court on September 2, 2009 (the "Amended and Restated Initial Order") do not permit the Applicants to pay termination and severance claims at this time.

7 The Applicants submit that the Union's motion should be dismissed because:

(a) the provisions of the Amended and Restated Initial Order do not permit the Applicants to pay the termination and severance claims in the circumstances in which the Union is seeking such payment;

(b) the Union has not sought to amend the Amended and Restated Initial Order at any time during these proceedings to require the Applicants to pay the termination and severance claims; and

(c) the effect of granting the relief to the Union would be to accord termination and severance claims a special status over the claims of other

unsecured creditors of the Applicants and would result in the payment of such claims in priority to the claims of the Applicants' secured creditors.

FACTS

8 The Union represents employees at four facilities of the Applicants: Tilbury, Pellus, G&R Cold Forging Inc. and Pioneer Polymers Inc. The Union represents approximately 180 employees out of the total workforce of 300 employees.

9 On August 1, 2008, Windsor Machine & Stamping Ltd. ("WMSL"), 538185 Ontario Ltd. (Pellus Tool), Pellus, Tilbury, G&R Cold Forging Inc. and 383301 Ontario Limited (the "BIA Proposal Proponents") each filed a notice of intention ("NOI") to make a proposal pursuant to s. 50.4(1) of the *Bankruptcy and Insolvency Act* ("BIA").

10 On August 6, 2008, the Applicants (including the BIA Proposal Proponents) were granted protection under the CCAA.

11 As of the date of the initial CCAA order on August 6, 2008, the Monitor reported that the Bank was owed approximately $16.25 million comprised of approximately $8.1 million under an operating line of credit and approximately $8.15 million under a term loan. The Bank agreed to make available up to an additional $2 million to fund the Applicants' operations during the CCAA proceedings under a DIP Loan Agreement.

12 The amount owing to various vendors as of the date of the NOI Filing was approximately $6.5 million.

13 The DIP Facility was extended to the Applicants under the terms of a DIP Loan Agreement. The DIP Facility was approved under the terms of the Initial Order at the outset of the CCAA proceedings.

14 The provisions of the DIP Loan Agreement provide that advances from the Bank to WMSL could be loaned to Pellus and Tilbury, (among other Applicants) to fund ordinary course operations of those affiliates. Counsel to the Applicants submits that as Tilbury and Pellus have no funds to pay any termination or severance pay to the employees at Tilbury and Pellus represented by the Union (the "Tilbury Union Employees" and "Pellus Union Employees"), respectively, and they would have to ask that WMSL lend them sufficient funds for that purpose.

15 Under the terms of the Amended and Restated Initial Order, counsel to the Applicants submit that the right of the Applicants to negotiate the terms on which termination and severance payments may be made upon termination of the employment of the Applicants' employees was subject to the covenants which are contained in the DIP Loan Agreement and that the Applicants, with limited exceptions that do not include the making of termination and severance payments, are not permitted to do anything which adversely affects the ranking of the obligations of WMSL to the Bank under

either the DIP Loan Agreement or under the Amended and Restated Credit Agreement that governs the terms of loans made by the Bank to the WMSL prior to the commencement of the CCAA proceedings.

16 On October 8, 2008 a sales process was approved by court order. The deadline for submission of offers to the Monitor was November 18, 2008. On November 18, 2008 there were no offers received, however, certain parties continued to express an interest in the Applicants' operations.

17 Orders were made in these proceedings on October 29, 2008 (the "October 29 Orders") at the time that access agreements with two major customers of the Applicants were approved by the court. The October 29 Orders included provisions stating that the notice of one week for termination of the employment of employees on the expiry of the access periods under the Access Agreements would not operate to neutralize or suspend the provisions of the ESA.

18 In September or October, 2008, the Union was informed of the possibility of the closure of the Tilbury facility. The Union advised the Applicants at that time that should the employment of any Tilbury Union Employees be terminated, those employees should be paid termination and severance pay as required under the ESA.

19 The efforts of the Applicants in October and early November, 2008, were directed to securing sources of funding for the Applicants' restructuring initiatives from prospective purchasers, financial institutions and other providers of capital as strategic partners and investors. The Applicants submit that they considered filing a plan of arrangement during that period if their efforts to secure funding had been successful.

20 When no offer was received to purchase the assets of the Applicants, the principals of WMSL (the "Shareholders") negotiated with the Bank and with Export Development Canada ("EDC") to obtain financing from the Bank and from EDC for two newly incorporated corporations ("New Cos") to be controlled by the Shareholders which would purchase the Applicants' assets, properties and undertakings on a going-concern basis (the "Proposed Sale").

21 The Applicants were of the view that the Proposed Sale was the only alternative to a liquidation sale or auction of the Applicants' assets and properties.

22 The Applicants acknowledge that they are not in a position to proceed with a plan of arrangement that would see value paid to their unsecured creditors.

23 At the end of November 2008, the management of Tilbury determined that a transfer of the employment of any of the Tilbury Union Employees was no longer economically feasible because of the decline in current and projected volume for the Applicants. The Union was advised of this decision and effective December 5, 2008, the Applicants terminated 47 Tilbury Union Employees at the Tilbury plant. The Tilbury Union Employees did not receive termination pay and severance pay.

24 On January 21, 2009, the Applicants informed the Pellus Union Employees that the operations of Pellus would be closed down and that their employment would be terminated. The closure date was subsequently extended to late February 2009. The number of Pellus Union Employees whose employment will be terminated as a result of the closure of the Pellus facility is 43, of whom 40 are Pellus Union Employees.

25 Pellus advised the Union of its position that under the provisions of the ESA, the Pellus Union Employees are not entitled to be paid severance pay because each Pellus Union Employee is not one of 50 or more employees who will have had the employment relationship with Pellus severed within a six-month period and Pellus does not have a payroll of $2.5 million of more. The adjudication of this issue is not before me at this time.

26 In January 2009, the Applicants paid $2.8 million toward the Bank operating line as a repayment of pre-filing debt. In addition, as a result of asset sales and collections a further $1.2 million was also paid to the Bank toward its term loan facilities.

27 The Monitor's Sixth Report is dated February 23, 2009 and at that date, the Applicants had approximately $3.4 million in cash and at the end of April 2009, the Applicants were expected to have $3 million. The Applicants has not drawn the DIP Facility throughout the CCAA proceedings.

28 Periodically during the CCAA proceedings, the Applicants returned to court and obtained orders extending the CCAA proceedings. Extensions were granted, under s. 11(4) of the CCAA based upon the court making required findings that the Applicants were operating in good faith and with due diligence such as to justify an extension of the stay.

ISSUES AND ANALYSIS

29 The issue to be determined on this motion is: Should the Applicants, in these CCAA proceedings, be required to pay termination pay and severance pay to the Tilbury Union Employees and the Pellus Union Employees.

30 This issue was recently considered in *Nortel Networks Corp., Re*, [2009] O.J. No. 2558, 2009 CanLII 31600 (On. S.C.) in the context of proceedings commenced by Nortel Networks Corp., et al (the "Nortel Applicants") under the CCAA (the "Nortel CCAA Proceedings").

31 In the Nortel CCAA Proceedings, both unionized and non-unionized employees brought motions seeking an order to vary the Initial Order to require the Nortel Applicants to pay, among other things, termination pay and severance pay, in accordance with the applicable collective agreement and/or the *Employment Standards Act*. The motions were dismissed.

32 The initial order in the Nortel CCAA Proceedings (the "Nortel Initial Order") was similar to the Amended and Restated Initial Order. Both were based on the Model Order.

33 The applicable order in each case, (a) entitles but did not require the Applicants to pay outstanding and future wages, salaries, vacation pay, ..., in each case incurred in the ordinary course of business; (b) provides that the Applicants were entitled to terminate the employment or lay off any of its employees and to deal with the consequences in the Plan.

34 Many of the submissions raised by the Union at [5], were considered in the Nortel decision.

35 Included in the conclusions in Nortel were statements to the effect that:

(i) claims for termination pay and severance pay are unsecured claims. These claims do not have any statutory priority;
(ii) Section 11.3 of the CCAA is an exception to the general stay provisions authorized by Section 11 and as such should be narrowly construed;
(iii) Section 11.3 applies to services provided after the date of the Initial Order;
(iv) the triggering of the payment obligations for termination and severance pay may have arisen after the Initial Order but it does not follow that a service was provided after the Initial Order. The claims for termination and severance pay are based, for the most part, on services that were provided pre-filing.
(v) a key factor is whether the employee provided services after the date of the Initial Order. If so, he or she, is entitled to compensation benefits for such services.
(vi) the court has the jurisdiction to order a stay of outstanding termination pay and severance pay obligations under Section 11 of the CCAA.
(vii) the failure to pay outstanding termination pay and severance pay obligations does not amount to 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. The ESA applies, but during the stay period, there is a stay of the enforcement of the payment obligation.

36 In my view, these conclusions are equally applicable to this motion.

37 The submissions of the Union which are addressed in the Nortel decision are as follows:

(i) Payment of termination pay and severance pay are subject to the stay provisions.
(ii) The failure to pay outstanding termination pay and severance pay obligations does not amount to a 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. The ESA applies, but during the stay period, there is a stay of the enforcement of the payment obligations.
(iii) The ESA continues to apply but there is a stay of the enforcement of the payment obligations.
(iv) The triggering of the payment obligations for termination and severance pay may

have arisen after the Initial Order but it does not follow that a service was provided after the Initial Order. The claims for termination and severance pay are based, for the most part, on services that were provided pre-filing.

(v) A key factor is whether the employee provided services after the date of the Initial Order. If so, he or see, is entitled to compensation benefits for such services.

38 Two additional points that are not directly addressed in the Nortel decision are as follows:

(i) Counsel to the Union submitted that the recent case of *Re West Bay SonShip Yachts Ltd.* 2009 BCCA 31 stands for the proposition that claims for termination and severance pay becomes owing to the employees at the point where their employment was terminated during the post-filing period and therefore such claims are post-filing claims. In my view, this case can be distinguished. The claim in *West Bay* involved a common law claim for damages for wrongful dismissal. This type of claim is distinct from a claim for severance pay or termination pay under employment standards legislation, as noted by Levine J.A. at paragraph [14].

(ii) Tilbury Union Employees and Pellus Union Employees did provide services after the date of the CCAA application. Any incremental increase in termination pay and severance pay attributable to the period of time after the Applicants went into CCAA protection may justify treatment as a post-filing claim.

39 This motion raises an interesting question. Should the Applicants be faulted for commencing proceedings under the CCAA, even though it turns out that no plan can be proposed which provides value to the unsecured creditors. In this case, the alternative to filing under the CCAA would have been to continue with the NOI under the BIA. In light of the acknowledgment that no CCAA plan can be presented which would be of benefit for the unsecured creditors, it follows that no viable proposal could have been made under the BIA. The failure to file a proposal under the BIA would have resulted in a bankruptcy and likely a receivership. In a receivership/bankruptcy, the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees would rank as unsecured claims and subordinate to the secured creditors.

40 In turn, this raises a further question. Should the priority status of the Tilbury Union Employees and Pellus Union Employees be different in the context of CCAA proceedings as opposed to a receivership or bankruptcy.

41 In this case, the Monitor reports that certain secured creditors will suffer a loss. Any amount paid in respect of termination and severance pay claims would be as a result of a direct deduction from recoveries for the secured creditors. In my view, the effect of granting the requested relief would be to accord the termination and severance pay claims special status over the claims of other unsecured creditors of the Applicants and would also result in the payment of such claims in

priority to the claims of the Applicants' secured creditors.

42 In addition to my conclusions as set out in *Nortel*, I have not been persuaded that the requested relief can be justified in this case on the following grounds.

43 First, the priority of secured creditors must, in my view, be recognized. Counsel to the Union made the submission that the Applicants and the Bank are advancing a priority argument that may be relevant in a bankruptcy or receivership proceeding but not in a CCAA proceeding, as there is no priority distribution scheme in the CCAA. In my view this submission is misguided. Although there is no specific priority distribution scheme in the CCAA, that does not mean that priority issues should not be considered. An initial order under the CCAA usually results in a stay of proceedings as against secured creditors as well as unsecured creditors. The stay prevents secured creditors from taking enforcement proceedings which would confirm their priority position. The inability of a secured creditor to take such enforcement proceedings should not result in an enhanced position for unsecured creditors. There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the *status quo* during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors. In this case, the secured creditors have priority over the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees.

44 Second, counsel to the Union also submits that based on the rationale in the decision of the Court of Appeal in *Re 1231640 Ontario Inc. (State Group)* (2007), 37 C.B.R. (5th) 185 (Ont. C.A.), priority rules do not crystallize in a CCAA proceeding. I do not accept this argument. *State Group* addressed a priority issue as between competing PPSA secured creditors in the context of a interim receivership under s. 47 of the BIA. The issue in *State Group* was whether a s. 47 BIA receiver was a person who represents creditors of the debtor under s. 20(1)(b) of the PPSA. The Court of Appeal held that an interim receiver was not such a person. The issue in *State Group* governs the relationship as between competing interests under the PPSA. In my view, it does not stand for the proposition that the priority position of a secured creditor vis-à-vis unsecured creditors should not be recognized in the context of a CCAA proceeding.

45 Third, the Union put forth submissions to the effect that, in this particular situation, the amount of termination pay and severance pay is relatively low and the Applicants have the cash to pay the amounts owing and, further, that such payments would not jeopardize the Proposed Sale.

46 In my view, the fact that the Applicants may have available cash does not mean that the Applicants can use the cash as they see fit. The asset is to be used in accordance with credit agreements and court authorized purposes, including those set out in the Amended and Restated Initial Order. I am in agreement with these submissions of counsel to the Applicants as set out at [15]. This Order placed restrictions on the use of cash, which restrictions are consistent with legal priorities. In my view, the fact that the Applicants have cash does not justify an alteration of legal priorities. The legal priority position is that the claims for termination pay and severance pay are unsecured claims which rank pari passu with other unsecured creditors and subordinate to the interests of the secured creditors. (See also Indalex Limited, [2009] O.J. No. 3165, CV-09-8122-00CL - July 24, 2009 on this point.)

47 I acknowledge that the situation facing the employees is unfortunate and that in Nortel, a hardship exception was made. However, this exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the former employees. Such is not the case in this matter.

48 Counsel to the Union also submitted that paragraph 11(d) of the Amended and Restated Initial Order only allows the company to terminate employees on terms agreed to by the employees or "to deal with the consequences thereof in the plan". Counsel to the Union submits that there is no agreement in this case and there is no plan and consequently paragraph 11(d) does not authorize the company not to pay termination pay and severance pay.

49 In my view, the Applicants provide a complete response to this argument in their submission summarized at [15] which I accept and at paragraph 32 of their factum by noting that the Applicants could have proposed a Plan that would not have seen value paid to the unsecured creditors and that could have effected the Proposed Sale through a Plan, and to require that the Applicants propose a Plan in order to effect the sale would be an overly technical requirement inconsistent with the CCAA's remedial objective. I also accept these submissions. In my view, this is not a case where the Applicants have used the CCAA to avoid termination and severance pay obligations under the ESA. The fact that these claims will not be paid is a result of legal priorities as opposed to any specific action of the Applicants.

50 I also note the CCAA proceedings are ongoing and the Applicants have brought forth a motion to propose a plan directed only at the secured creditors, but such a plan has been accepted in other cases. (See *Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) page 1 (Ont. S.C.J.), aff'd 2002, 34 C.B.R. (4th) 157 (Ont. C.A.)) This motion has yet to be heard.

DISPOSITION

51 In the result, I have not been persuaded that the facts of this case are such that would justify an outcome different from that of *Nortel*. The claims for termination pay and severance pay are unsecured claims and enforcement proceedings are stayed, save and except for any incremental amount of termination pay and severance pay attributable to the period of time after the Applicants

went into CCAA protection.

52 Counsel to the Bank also raised the issue that Tilbury and Pellus do not have the funds to pay the termination and severance claims as all cash is held by WMSL. Counsel to the Bank submits that if an order were to be made that WMSL were required to pay or to loan money to Tilbury or Pellus so that they could then pay the termination and severance pay claims, such would be equivalent to a common employer finding without a proper trial of such issue. I accept this position and to the extent that I have erred in my conclusions and this issue becomes relevant, it would be necessary, in my view, to have a hearing to determine whether WMSL, Tilbury and Pellus are a common employer. This possibility is recognized at paragraph 38 of the Reply Factum served by counsel to the Union.

53 For the foregoing reasons, subject to the caveat in [51], the motion is dismissed.

G.B. MORAWETZ J.

cp/e/qllxr/qlmxb/qlmxl/qlaxw

TAB 12

Re Wright Lithographing Co. and Graphic Communications International Union, Local 517

[Indexed as: Wright Lithographing Co. and G.C.I.U., Loc. 517 (Re)]

Ontario
R.D. Howe

Heard: September 8, 2000
Decision rendered: September 22, 2000

Benefits — Severance pay — Notice of termination and act of termination distinguished — Grievors resigning during notice period — Collective agreement not empowering arbitrator to apply s. 58(13) of Employment Standards Act — Employment Standards Act, R.S.O. 1990, c. E.14, s. 58(13).

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

Cases referred to

Community Child Care & Developmental Services Inc. and C.U.P.E., Loc. 3677-2 (Lambier) (Re) (1997), 65 L.A.C. (4th) 289, 48 C.L.A.S. 570
Ford Motor Co. of Canada and U.A.W., Loc. 707 (Re), E.E. Palmer, April 23, 1976
National Drug and Chemical Co. and R.W.D.S.U. (Re) (1977), 14 L.A.C. (2d) 422
National Grocers Co. and R.W.D.S.U., Loc. 414 (Re) (1979), 24 L.A.C. (2d) 422
O.P.E.I.U., Loc. 343 and U.S.W., Loc. 6500 (Re) (1982), 8 L.A.C. (3d) 71
School District No. 54 (Bulkley Valley) and Bulkley Valley Teachers' Assn. (Vadeboncoeur) (Re) (1998), 71 L.A.C. (4th) 169, 52 C.L.A.S. 25
Telegram Publishing Co. and Marc Zwelling & Gottlob Essig (Re) (1972), 1 L.A.C. (2d) 1; application for judicial review granted 41 D.L.R. (3d) 176, 74 C.L.L.C. ¶14,210, 1 O.R. (2d) 592; appeal allowed in part 67 D.L.R. (3d) 404, 76 C.L.L.C. ¶14,047, 11 O.R. (2d) 740
Viskase Canada Inc. and G.C.I.U., Loc. 512-S (Re) (1990), 18 L.A.C. (4th) 227, 21 C.L.A.S. 450

Statutes referred to

Employment Standards Act, R.S.O. 1990, c. E.14
s. 1, definition "severance pay"
s. 1, definition "statutory notice period"
s. 1, definition "termination pay"
s. 4
s. 5(1)
s. 57(1)
s. 57(15)
s. 58(2)
s. 58(4)
s. 58(13)
s. 58(14)

GROUP GRIEVANCE regarding entitlement to severance pay. Grievance dismissed.

D.J. Wray and others, for the union.
B. Brown and others, for the employer.

AWARD

The primary matter in issue in these proceedings is whether Don Stephenson and Larry Coupar (the "grievors") are entitled under the terms of the applicable collective agreement (the "Agreement") to receive severance pay from the Employer (also referred to in this award as the "Company", for ease of exposition). If such entitlement exists, there is a subsidiary issue regarding the amount of severance pay which Mr. Coupar should receive.

Facts

Counsel agreed to argue the case on the basis of the facts which were stipulated during the course of their opening statements, and the exhibits which were entered into evidence on the agreement of counsel.

Prior to the events in question, the Company had approximately thirty employees, of whom approximately twenty were production employees. The Company's total payroll did not exceed 2.5 million dollars. On September 23, 1999, the Company gave notice to all of the employees in its lithographing division ("litho") and in its finishing division ("finishing") that their employment was being terminated effective as of November 19, 1999. There were approximately five employees in litho, including the two grievors, and approximately seven employees in finishing. The remainder of the Company's production employees worked in its flexo division. The litho employees were covered by the collective agreement (the "Agreement") which is Exhibit #3 in these proceedings. Finishing employees were covered by a separate collective agreement.

All of the aforementioned litho and finishing employees received eight weeks' notice of termination. Exhibit 1A is the following notice of termination letter dated September 23, 1999 from the Company to Don Stephenson:

> As we are sure you are aware, Wright Lithographing Company Limited has decided that we are unable to maintain the litho portion of our business, and therefore it is with regret that we hereby give you eight weeks notice of termination of employment. Your termination date is Friday November 19, 1999.

For those who stay with us until the termination date of November 19, 1999, severance pay will be given in accordance with the Collective Agreement.

On behalf of all of the Shareholders, and the management team, thanks very much for your service of the past 24 years, and thanks in advance for your co-operation in the next few difficult weeks ahead.

Mr. Coupar received a similar letter (Exhibit 1B), the third paragraph of which referred to his "service for the past 15 years".

The Company also provided the grievors with letters of reference dated September 28, 1999. The one pertaining to Mr. Stephenson (Exhibit 7) reads:

To Whom It may Concern:

This letter is to confirm that Don Stephenson was an employee of Wright Lithographing Company Limited from December 1, 1975 until the present.

Don's termination came as a result of the Company closing its lithographing division.

Don has always been an attentive and willing employee. He put the best interests of the Company to the front at all times. He worked in many areas and always demonstrated a strong desire to learn the job completely.

I would recommend Don to any employer.

Yours truly,

"George Ashby"
Chief Executive Officer

The letter of reference provided to Mr. Coupar (Exhibit 6) is identical, with the exception of his name and the date contained in the first paragraph (which is "February 5, 1990", rather than "December 1, 1975").

Employees who worked until November 19, 1999 received severance pay. The grievors did not work until November 19, 1999, and did not receive severance pay.

The Union operates a hiring hall. Another unionized company called Specialized Packaging Group ("SPG") contacted the Union and indicated that it needed a pressman and a press feeder. The Union posted those job opportunities on the Union bulletin board at the Company's premises. The grievors contacted the Union about those job opportunities, and then contacted SPG directly. SPG set up interviews for them the same day, and agreed to hire both of them. SPG wanted them to start work the following week, but the grievors indicated that they wanted to provide two weeks' notice to the Company. The grievors contacted the Employment Standards

Branch of the Ministry of Labour, and also spoke with the Union about giving two weeks' notice.

Mr. Coupar gave the Company two weeks' notice through the following letter dated October 1, 1999:

> I regret to inform you that I have accepted a position elsewhere due to receiving my notice of termination of employment at Wright Lithographing. Therefore, I am giving the company 2 weeks notice. As of October 15, 1999 this will be my last day of employment at Wright Litho. I would like to take this opportunity to thank you for the many years of employment.

Mr. Stephenson gave the Company two weeks' notice by means of the following letter dated October 4, 1999:

> It is with great regret that I have to inform you that I am giving my notice of two weeks. I have been offered a job at SPG to operate their 63 inch Roland and they will need me to start the week of Oct 18th. I would like to take this opportunity to thank you for the past 24 years and this is without a doubt the hardest time of my life. I feel like I am losing a big part of a family and will miss all the good times we have had. I hope that in the future we can still have the relationship we have always had in the past. If there is anything I can do to be of assistance please do not hesitate to call me. I will do what I can in the next 2 weeks to help meet out customers needs. Like I said this is the hardest thing that I ever thought I would have to do and I am very sad that things had to come down to this. Thank you gentlemen. I wish the Wrights the very best in the future.

As indicated above, Mr. Stephenson was a pressman who had 24 years of service with the Company. Mr. Coupar was a second pressman. He worked for the Company from 1981 until 1987, when he resigned and went to Windsor. He did not receive any severance pay at that time. He returned to the Company in February of 1990 and worked there until October 15, 1999. When he returned, the Company recognized his past service in determining his vacation entitlement. Thus, he received four weeks of vacation without having to complete four years of employment (as required by Article 5 "A" of the Agreement).

After giving the above-quoted notices, the grievors continued to work for the Company until Friday October 15, 1999, and commenced working at SPG on the following Monday.

Collective Agreement and Statutory Provisions

During the course of argument, counsel referred to the following provisions of the Agreement (between "Council of Printing Industries of Canada on behalf of Wright Lithographing Company

Limited" and "Graphic Communications International Union Local 517 (Lithographers)"):

ARTICLE 30 — GRIEVANCE PROCEDURE

. . . . .

30.07 It is agreed that the impartial arbitrator shall not have the authority or jurisdiction to alter the terms of this collective agreement, to substitute any new provisions, or make any decision inconsistent with the terms and provisions of this collective agreement, or to deal with any matter which is not a grievance. The parties hereto shall jointly bear the expense of the impartial arbitrator.

. . . . .

ARTICLE 33 — SEVERANCE PAY

33.01(a) No Employer shall terminate the employment of an employee unless the Employer gives one (1) week's notice for each year of service up to a maximum of eight (8) weeks' notice.

(b) In lieu of notice Company may pay wage [*sic*] equal to notice.

(c) As a severance pay for employees with 5 years of service or more, an Employer will give one week pay for each year of service, up to a maximum of thirteen (13) weeks.

33.02 The present article is not an addition to the Employment Standard [*sic*] Act and does not apply in case of dismissal for just cause.

Reference was also made during the course of argument to a number of provisions of the *Employment Standards Act*, R.S.O. 1990, c. E.14, as amended, including the following:

1. In this Act,

. . . . .

"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,

. . . . .

"termination pay" means the amount of pay to which an employee is entitled under section 57;

. . . . .

4(1) An employment standard shall be deemed a minimum requirement only.

(2) A right, benefit, term or condition of employment under a contact, oral or written, express or implied, or under any other Act or any schedule, order or regulation made thereunder that provides in favour of an employee a higher

remuneration in money, a greater right or benefit or lesser hours of work than the requirement imposed by an employment standard shall prevail over an employment standard.

5(1) Where terms or conditions of employment in a collective agreement as defined in the *Labour Relations Act* confer a higher remuneration in money or a greater right or benefit for an employee respecting holidays than the provisions of Part VII, the terms or conditions of employment shall prevail.

. . . . .

PART XIV

TERMINATION OF EMPLOYMENT

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

(*a*) one weeks notice in writing to the employee if his or her period of employment is less than one year;

(*b*) two weeks notice in writing to the employee if his or her period of employment is one year or more but less than three years;

(*c*) three weeks notice in writing to the employee if his or her period of employment is three years or more but less than four years;

(*d*) four weeks notice in writing to the employee if his or her period of employment is four years or more but less than five years;

(*e*) five weeks notice in writing to the employee if his or her period of employment is five years or more but less than six years;

(*f*) six weeks notice in writing to the employee if his or her period of employment is six years or more but less than seven years;

(*g*) seven weeks notice in writing to the employee if his or her period of employment is seven years or more but less than eight years;

(*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.

. . . . .

(15) An employee to whom notice has been given under subsection (2) shall not terminate his or her employment until after the expiry of,

(*a*) one weeks notice in writing to the employer if the period of employment is less than two years; or

(*b*) two weeks notice in writing to the employer if the period of employment is two years or more,

unless the employer has been guilty of a breach of the terms and conditions of employment.

. . . . .

58(2) Where,

(*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; or

(*b*) one or more employees have their employment terminated by an employer with a payroll of $2.5 million or more,

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.

. . . . .

(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,

(*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.

. . . . .

(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,

(*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.

(14) The amount of severance pay for an employee who is entitled to severance pay under subsection (13) shall be calculated on the employee's length of employment up to the date on which his or her notice of resignation takes effect.

Summary of Submissions by Counsel for the Union

Counsel for the Union contended that both the *Employment Standards Act* (the "Act") and the Agreement distinguish between notice of termination and severance. He also contended that they serve different purposes, with notice of termination being based on fairness to employees so that they can plan their lives and severance pay being intended to provide some compensation based on years of service in recognition of the investment the employee has made in

the company. He submitted that the only prerequisites for receiving severance pay under the Agreement are that the employees are being terminated and that they have five years of service. He further submitted that nothing in the Agreement requires employees to work out their notice period in order to be entitled to severance pay, and that to make that a requirement would be to amend the Agreement as proscribed by Article 30.07. It was also his position that no labour relations purpose would be served by adding such a requirement, in view of the different purposes served by severance pay and notice of termination.

Although counsel for the Union acknowledged that the Act's severance pay provisions were not triggered in the circumstances of this case (as the Company did not terminate the employment of fifty or more employees, nor have a payroll of $2.5 million or more), he relied upon the Act as a guide to interpreting the Agreement on the basis that the Act provides the background upon which Article 33 was negotiated. Thus, he argued that the approach set forth in subsection 58(13) of the Act should be adopted in determining the grievors' entitlement to severance pay under Article 33.01(c) the Agreement. He also relied upon the following cases: *Re Telegram Publishing Co. and Marc Zwelling & Gottlob Essig* (1972), 1 L.A.C. (2d) 1 (Carter) [application for judicial review granted, 41 D.L.R. (3d) 176 (Ont. Div. Ct.); appeal allowed in part, 67 D.L.R. (3d) 404 (Ont. C.A.)]; *Re National Drug and Chemical Co. and R.W.D.S.U.* (1977), 14 L.A.C. (2d) 422 (Hope); and *Re National Grocers Co. and R.W.D.S.U., Loc. 414* (1979), 24 L.A.C. (2d) 422 (Kennedy).

In his submissions regarding the subsidiary issue of the amount of severance pay which Mr. Coupar should receive, Union counsel argued that there is nothing in Article 33.01(c) which requires an employee's service to be continuous. He submitted that Mr. Coupar is entitled to receive the maximum of thirteen weeks' severance pay, because he has a total of fifteen or sixteen years of service and Article 33.01(c) requires the Employer to give him one week's pay "for each year of service" up to that maximum.

Union counsel closed his submissions by arguing that the grievors should not have to reject alternative employment in order to be entitled to severance pay, as it would be unfair to require employees in the situation in which the grievors found themselves to choose between taking alternative employment and receiving severance pay.

Summary of Submissions by Counsel for the Company

Counsel for the Company submitted that the grievors are not entitled to severance pay because their employment was terminated by their resignations and not by the Company. He contended that it is important to distinguish between the intention to terminate and the act of termination, because a notice of intention to terminate is fundamentally different from the act of termination both conceptually and in terms of time. Thus, it was his position that although the Company's letters of September 23, 1999 notified the grievors that the Company intended to terminate their employment on November 19, 1999, that intention was never acted upon by the Company because the grievors resigned from their employment prior to that date. In distinguishing between an intention to terminate and an act of termination, counsel noted that an intention to terminate may ultimately not be acted upon as an employer may rescind or withdraw it.

After noting that what must be interpreted in this case is the parties' Agreement and not the *Employment Standards Act*, Company counsel argued that what would have happened if section 58 of the Act were applicable is not of assistance in interpreting the Agreement because the parties did not incorporate that section, or subsection 58(13), into the Agreement. He further submitted that subsection 58(13) is included in the Act because the legislature recognized that without a saving provision of that type, an employee's resignation would extinguish his entitlement to severance pay.

Counsel for the Company submitted that the subsidiary issue of how much severance pay Mr. Coupar would have been entitled to receive under Article 33.01(c) does not arise in the circumstances of this case because his employment was not terminated by the Company. He also submitted that if this issue did arise, it would have to be addressed from first principles because nothing in the Agreement indicates whether Mr. Coupar's previous employment with the Company should or should not be taken into account in calculating severance pay. In this regard, it was his contention that an employee who resigns renounces all rights under the Agreement, and does not have those rights restored by rejoining the Company unless the Agreement specifically provides otherwise. Thus, he argued that when Mr. Coupar rejoined the Company in 1990 after resigning from its employ in 1987, he did not return with his previous rights intact because there is nothing in the Agreement which

preserved or restored those rights. He also argued that the Company's recognition of Mr. Coupar's past service in determining his vacation entitlement does not establish that Mr. Coupar had a contractual right to have his past service recognized for that purpose or for any other purpose.

In responding to Union counsel's fairness argument, Company counsel submitted that an arbitrator is called upon to interpret the Agreement, rather than to do what the arbitrator might consider to be fair. Thus, it was his contention that what must prevail is the language of the Agreement, rather than any individual's notion of what is fair. He also submitted that there is no evidence that the grievors were required to resign; all that is known, and all that is needed to be known, is that the grievors chose to leave the employ of the Company effective October 15, 1999.

The cases cited by Company counsel during the course of his submissions were *Re Community Child Care & Developmental Services Inc. and C.U.P.E., Loc. 3677-2 (Lambier)* (1997), 65 L.A.C. (4th) 289 (Cocker); *Re School District No. 54 (Bulkley Valley) and Bulkley Valley Teachers' Assn. (Vadeboncoeur)* (1998), 71 L.A.C. (4th) 169 (Gordon); *Re Viskase Canada Inc. and G.C.I.U., Loc. 512-S* (1990), 18 L.A.C. (4th) 227 (Springate); and *Re O.P.E.I.U., Loc. 343 and U.S.W., Loc. 6500* (1982), 8 L.A.C. (3d) 71 (Swan).

Summary of Union Counsel's Reply Submissions

During his reply submissions, counsel for the Union submitted that the Company's letters of September 23, 1999 were not merely notice of intention to terminate the grievors' employment as they indicated that the Company had decided that it was unable to maintain the litho portion of it business. He submitted that there was no indication that there was any possibility whatsoever that those notices of termination would be withdrawn or rescinded, and further submitted that if there was any doubt about the finality of the Company's decision, it was removed by the aforementioned letters of reference dated September 28, 1999. He also noted that none of the notices of termination were in fact withdrawn or rescinded prior to the grievors' resignations, prior to their last day of work, or at any other time. Thus, he submitted that the circumstances of the instant case are distinguishable from those of the cases relied upon by the Company. He also submitted that each of the cases has to be considered in light of the purpose of the benefit being claimed.

In his reply submissions regarding subsection 58(13) of the Act, Union counsel submitted that this subsection protects employers by requiring employees to give two weeks' written notice of resignation. It was his submission that in the absence of that provision, an employee might resign without any advance notice and still be entitled to receive severance pay. He also submitted that there is nothing counterintuitive about subsection 58(13), which he characterized as being entirely consistent with the general purpose of severance pay.

Analysis and Decision

The purpose of severance pay was described as follows by Professor Carter in *Re Telegram Publishing Co. and Marc Zwelling & Gottlob Essig, supra*, at page 19:

> 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 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 loss of investment.

At pages 20 and 21 of that decision, Professor Carter distinguished and contrasted the purpose served by the employer's obligation to give notice of termination:

> There do appear to be substantial differences between the contractual obligation to pay severance benefits and the obligation to give notice of termination contained in Part II [now Part XIV] of the Act. Part II gives primary emphasis to the requirement of notice, not to a requirement to make payments upon the termination of the employment relationship. It would appear that the purpose of this notice requirement is to provide the employee with some insulation against the difficult economic consequences resulting from the disruption of his employment by giving him an opportunity to make arrangements for other employment in advance of his dismissal. Although s. 13(6) of the Act does allow the employer to pay wages in lieu of notice, this provision appears to be ancillary to the requirement of notice. Payment in lieu of notice appears to be provided for the convenience of the employer who might have difficulty in carrying on his business during the period of notice.
>
> Severance pay, on the other hand, is compensation for the years of service that an employee has devoted to an employer. As was stated above, the long service employee who is terminated loses a great deal as his seniority rights are extinguished. Severance pay, to some extent, compensates the employee for

> that loss while notice simply gives him some advance warning of his dismissal and gives him a better opportunity to locate another job. Notice does not compensate the employee for the fact that he will have no seniority when he commences that new job.

Although that decision was made by Professor Carter as a referee under the *Employment Standards Act* rather than as an arbitrator under a collective agreement, his comments regarding the purpose of severance pay pertained to a severance pay provision which had been included in a collective agreement and which he (at pages 12-14) and the Ontario Court of Appeal (in 67 D.L.R. (3d) 404, at page 412) held to be included in the employees' individual contracts of employment following the expiry of the collective agreement. His comments regarding the purpose of notice of termination pertained to the notice requirements under the Act, but are equally applicable to notice requirements under a collective agreement, as evidenced by the following passage found at page 21 of his decision:

> The employer himself seems to have recognized the fundamental difference between the obligation to give notice and the obligation to make severance payments. Article 16.02 of the collective agreement provides that "the employee shall be notified at least two weeks in advance of any dismissal". The existence in the collective agreement of this obligation to give notice in addition to the obligation to make severance payments would indicate that there is a difference between the two obligations.

I respectfully agree with that reasoning and find it to be equally applicable to the instant case, in which Article 33.01(a) of the Agreement provides for notice of termination and Article 33.01(c) of the Agreement provides for severance pay. However, the existence of that distinct purpose for including a severance pay provision in the Agreement does not warrant the conclusion that severance pay must be paid irrespective of how the employment relationship between an employee and the Company comes to an end.

As indicated above, Article 33.01(c) provides:

> As a severance pay for employees with 5 years of service or more, an Employer will give one week pay for each year of service, up to a maximum of thirteen (13) weeks.

That clause is the final clause in Article 33.01, which also includes the following notice of termination requirement in clause (a) :

> No Employer shall terminate the employment of an employee unless the Employer gives one (1) week's notice for each year of service up to a maximum of eight (8) weeks' notice.

Clause (b) of that provision permits the Company to give pay in lieu of notice. When those three provisions are read together, it is evident that the event which triggers the entitlement of an employee with five years of service or more to receive severance pay is the Company's termination of his or her employment (after giving one week's notice for each year of service up to a maximum of eight weeks' notice pursuant to clause (a), or making the payment in lieu of such notice permitted by clause (b)).

There is an obvious distinction between the giving of notice of an intended act and the actual performance of that act. In *Re Community Child Care & Developmental Services Inc. and C.U.P.E., Loc. 3677-2 (Lambier), supra*, at page 298, arbitrator Cocker held that "the lay-off notice and lay-off are two separate events". In reaching that conclusion, he relied upon *Re Ford Motor Co. of Canada and U.A.W., Loc. 707* (unreported award dated April 23, 1976), in which arbitrator Palmer wrote, in part, as follows:

> "As was noted in both cases submitted by the union — *Re Aeroquip Corp. and U.A.W., Loc. 475* (January 28, 1976); and *Re Ford Motor Co. and U.A.W.* (June 4, 1948), the beginning of a lay-off is not the day when notice of lay-off is received, but rather the day on which the employee involved begins to lose time. In short, the company cannot say a lemon is a lime."

See also *Re Viskase Canada Inc. and G.C.I.U., Loc. 512-S, supra*.

A similar distinction exists between notice of termination and termination. The termination of an employment relationship does not occur at the time when an employer gives an employee advance notice of termination. That individual remains an employee during the notice period and does not cease to be an employee until the time of termination (unless a resignation or other event brings the employment relationship to an earlier conclusion): see, for example, *Re School District No. 54 (Bulkley Valley) and Bulkley Valley Teachers' Assn. (Vadeboncoeur), supra*. Thus, when the Company gave the grievors "eight weeks notice of termination of employment" by means of the letters dated September 23, 1999 (Exhibits 1A and 1B), the employment relationship between the grievors and the Company was not immediately terminated or severed. Those letters notified the grievors of the Company's intention to terminate their employment on Friday November 19, 1999 (as a result of the Company's decision that it was unable to maintain the litho portion of its business). If the grievors had not brought their employment

relationship to the Company to an earlier end by resigning, they would have remained in the employ of the Company until that date. (It may be noted that the same principle applies to Exhibits 4 and 5. Those letters did not bring the grievors' employment to an end on the dates they were presented to the Company, but rather gave the Company two weeks' notice that the grievors' last day of employment by the Company would be October 15, 1999.)

In *Re National Drug and Chemical Co. and R.W.D.S.U., supra*, disabled employees absent from work on sick leave at the time the employer ceased operation and terminated all of its employees were found to be entitled to severance pay because they remained employees at the time of the terminations. However, that award does not advance the case of the grievors who, by virtue of their resignations, had ceased to be employees prior to the date on which the Company intended to terminate their employment. The same is true of *Re National Grocers Co. and R.W.D.S.U., Loc. 414, supra*, in which a laid off employee who retained seniority and recall rights at the time of the closure of the company's operation was found to be entitled to severance pay under an article which provided [at p. 423]:

> "21.1 In the event the Company closes a branch before the expiry date of this Agreement, the Company agrees to pay severance pay to those employees affected thereby who have greater than 5 years' continuous service and who are on the payroll at the time of closure at the rate of 1 week's pay for each year of service up to $3,000.00 maximum.
>
> "21.2 It is understood between the parties that this severance pay would not apply to an employee who leaves the Company prior to complete closure of his Branch, except with the approval in writing of the Branch Manager."

Although the grievor in that case was working for another employer at the time of the closure, he remained willing and able to accept recall and was therefore found not to have "left the company" within the sense of that article.

As indicated above, section 58 of the Act includes the following provisions:

> 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,
>
> (*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.

(14) The amount of severance pay for an employee who is entitled to severance pay under subsection (13) shall be calculated on the employee's length of employment up to the date on which his or her notice of resignation takes effect.

In *Re Viskase Canada Inc. and G.C.I.U., Loc. 512-S*, arbitrator Springate described "the apparent rationale" of what is now subsection 58(13) (which was then subsection 40*a*(10) of the Act) as being "to ensure that an employee who is about to lose his or her job does not have to elect between passing up a new employment opportunity and working out his/her notice period in order to qualify for severance pay" [p. 238]. However, he also noted that it "relates to an employee's entitlement to severance pay under the *Employment Standards Act*" [p. 238], and concluded that it had no direct application to the case before him, which pertained to a lay-off allowance under a collective agreement.

The effect of subsection 57(13) is to "deem" an employee who provides his or her employer with two weeks' written notice of resignation during the statutory notice of termination period to have had his or her employment terminated by the employer (or to have been laid off by the employer) on the date the notice of termination was to have taken effect. In the absence of such a provision, the resigner would cease to be an employee on the effective date of the resignation and would not be entitled to severance pay as the employment relationship would have been brought to an end by the employee's resignation, rather than being severed or terminated by the employer.

It is common ground between the parties that the grievors are not entitled to severance pay under section 58 of the Act because the Company neither terminated the employment of fifty or more employees nor had a payroll of $2.5 million or more. Thus, in his able submissions on behalf of the grievors, Mr. Wray did not suggest that subsection 58(13) or any of the other provisions contained in section 58 of the Act were directly applicable to the instant case.

What he did suggest was that the Act could be used as a guide to interpreting Article 33 of the Agreement.

The only direct indication in Article 33 that the parties were mindful of the Act when they negotiated that provision is found in Article 33.02 which provides:

> The present article is not an addition to the Employment Standard [*sic*] Act and does not apply in case of dismissal for just cause.

In addition to making it clear that an employee who is dismissed for just cause is not entitled to receive severance pay or advance notice of termination, the effect of that provision is to ensure that the notice of termination and severance pay requirements contained in Article 33.01 will not be construed as being in addition to those contained in the Act. However, it does not expressly or implicitly incorporate into the Agreement subsection 58(13) or any of the other provisions of the Act, nor is there anything else in the Agreement which expressly or implicitly warrants applying subsection 58(13) of the Act to Article 33 of the Agreement.

There is nothing in the Agreement or in the facts of this case which suggests that during the negotiation of Article 33 the parties ever addressed their minds to the issue of whether an employee who resigned during the notice period contemplated by Article 33.01(a) would be entitled to receive severance pay under Article 33.01(c). It is possible that if they had turned their minds to that issue they would have included a provision akin to subsection 58(13), or incorporated that subsection into the Agreement by reference. However, it is also possible that they would not have done so. Speculation regarding what might have occurred during negotiations is not of assistance in deciding the grievance, as it is not the function of an arbitrator to determine what the parties would have done if they had turned their minds to a question which is not addressed in the Agreement. As indicated in *Re National Drug and Chemical Co. and R.W.D.S.U., supra*, at page 437, that is a matter to be determined at the bargaining table, not at a rights arbitration hearing. Moreover, Article 30.07 of the Agreement expressly precludes an arbitrator from altering the terms of the Agreement or substituting any new provisions, which is what would be required in order for an arbitrator to be in a position to legitimately apply the approach set forth in subsection 58(13) of the Act.

As indicated above, counsel for the Union argued that the grievors should not have to reject alternative employment in order to be entitled to severance pay, as it would be unfair to require employees in the situation in which the grievors found themselves to choose between taking alternative employment and receiving severance pay. However, as submitted by counsel for the Employer, what must prevail in arbitration proceedings is the language of the Agreement, rather than any individual's notion of what is fair. Moreover, fairness (like beauty) is often "in the eye of the beholder". Although an employee may perceive it to be unfair that he or she must continue to work until the end of the notice period and thereby possibly pass up an alternate employment opportunity in order to receive severance pay under the Agreement, the employer and employees who did not resign might well perceive it to be unfair if employees who quit their employment during the notice period and left them in the position of having to complete the required work with a diminished workforce were nevertheless entitled to receive severance pay. The legitimacy of both of those disparate points of view underlines the necessity of having such disputes resolved on the basis of the contractual language to which the parties have agreed through collective bargaining, and not on the basis of abstract notions of fairness (in the absence of a collective agreement provision mandating an arbitrator to resolve disputes on that basis).

For the foregoing reasons, I have concluded that the grievors are not entitled to severance pay under Article 33 because their employment relationship with the Company was not terminated or severed by the Company but rather was brought to an end by their resignations, and because nothing in the Agreement expressly or implicitly empowers an arbitrator to apply subsection 58(13) of the Act so as to deem employees who give the Company two weeks' written notice of resignation during the Article 33.01(a) notice period to have had their employment terminated by the Company on the date the notice of termination was to have taken effect. In view of that conclusion, it is unnecessary to address the subsidiary issue of how much severance pay Mr. Coupar would have been entitled to receive if he had been entitled to severance pay under Article 33.01(c).

Accordingly, the grievance is hereby dismissed.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

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

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