TAB 7

Case Name:

Air Canada (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended AND IN THE MATTER OF Section 191 of the Canada Business Corporations Act, R.S.C. 1985, c. C-44, as Amended AND IN THE MATTER OF a Plan of Compromise or Arrangement of Air Canada and those Subsidiaries Listed on Schedule "A" APPLICATION UNDER the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as Amended

[2003] O.J. No. 6254

28 C.B.R. (5th) 52

2003 CarswellOnt 9109

Docket: 03-CL-4932

Ontario Superior Court of Justice - Commercial List

J.M. Farley J.

Heard: July 15, 18, 2003.
Oral judgment: July 18, 2003. Released: July 21, 2003.

(31 paras.)

Counsel:

Katherine L. Kay, Danielle K. Royal, Ashley John Taylor for Air Canada.

Ian Dick, Jacqueline Dais-Visca for Attorney General of Canada.

Pascale Giguère for Commissioner of Official Languages.

Dougald Brown for Privacy Commissioner of Canada.

John R. Varley for Non-Union Retiree Representatives.

B.P. Bellmore for Executive, Senior Management, Management and Administrative Technical Support Employees Representative.

Heath L. Whiteley for Goodyear Tire & Rubber Company.

Robert Thornton, Greg Azeff for GE Capital Aviation Services Inc. (GECAS).

Jeremy Dacks for GE Capital.

Michael Kainer for Canadian Autoworkers.

James C. Tory for Air Canada Directors.

Stephen Wahl, Murray Gold for CUPE.

Richard B. Jones for Air Canada Pilots Association.

Elizabeth Shilton for IAMAW.

Peter Griffin, Monique Jilesen for Monitor, Ernst & Young Inc.

Kevin McElcheran, Linc Rogers for CIBC.

Joseph Bellissimo for Orix Corporation, Montrose & Company, Mitsubishi Corporation, Banca Intesca, Lambard Capital, Finova Capital Corp., Pegasus Aviation, et al.

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1 **J.M. FARLEY J.** (orally):-- These reasons deal with what has been termed the "Regulators' Motions". As argued, these motions by the Attorney General of Canada ("AG") and the Privacy Commissioner ("PC") were to the effect that this Court, the Superior Court of Justice, in dealing with the Air Canada applicants (collectively, "AC") in relation to the Companies' Creditors Arrangement Act ("CCAA") proceedings had no jurisdiction pursuant to the CCAA to impose a stay as to any of the federal departments or commissions ("Regulators") which regulate or otherwise deal with AC. They also argued that this court did not have any inherent jurisdiction to impose such a stay if this court lacked specific jurisdiction under the CCAA. Furthermore they asserted that the CCAA was in conflict with other federal legislation such as the Canada Labour Code (e.g. s. 123(1) and s. 168(1)), which contains language to the effect that the legislation is to be applied and acted upon notwithstanding the provisions of any other legislation. Please see my endorsement of July 18, 2003 (following my oral determination in court at the end of the hearing that day) that I had reached the conclusion that this court did have jurisdiction to issue a stay vis-à-vis the Regulators and that there was no conflict with the legislation. I indicated that I would give reasons later. These are the promised reasons. In addition I will deal with the other elements of the motions as to onus and whether or not a stay is justified in the circumstances initially and on an ongoing basis (the Regulators asserting that stays concerning regulatory functions ought to be granted sparingly and only where it is demonstrated that to allow the regulatory functions to continue would be of catastrophic or devastating consequences to a CCAA applicant in its restructuring activities or at least that it would materially interfere with such applicant focusing on such activities).

2 As previously indicated the Commissioner of Official Languages ("COL") withdrew her motion on July 18, 2003; it appears that she has worked out a modus vivendi with AC as to her ongoing activities.

3 The various AC unions and AC have also reached a modus vivendi as indicated in the attached draft order which I have found appropriate in the circumstances. This contemplates that matters from June 1, 2003 forward will be dealt with on an ongoing basis.

4 I also note that these motions are without prejudice to the discussions which the Superintendent of Financial Institutions ("OSFI") is having with AC and with the AC unions and others. I understand that these discussions are being engaged in to see if there can be a modus vivendi with respect to pension related matters.

5 Throughout these proceedings to date, including the end of the July 18th hearing, I have urged those concerned to engage in meaningful dialogue to see if matters of concern can be dealt with in an officient and effective manner, all with a view to seeing if there is a reasonable opportunity for AC to be restructured on an ongoing viable basis in a very competitive industry, an industry which faces many challenges (some of longstanding and others of recent impact such as SARS, the Iraqi War, the threat of terrorism and economic doldrums). Specifically on July 18th I requested AC and the Regulators to engage in bona fide objective discussions as to how to deal with regulatory activities on a streamlined effective and efficient basis that would minimize the use of A resources but at the same time ensure that each case was reasonably dealt with to ensure justice. Unfortunately as was candidly acknowledged at the hearing, in essence over the past three months, there has been a "dialogue of the deaf" by both sides as AC has insisted that it need not respond to any Regulator at all (although in fact, it appears that elements of AC have continued dealing with some of the Regulators on a "business as (almost) usual" basis), while at the same time the Regulators have insisted that there was no jurisdiction for paragraph 3 of the (Amended and Restated) Initial Order which provides:

> **STAY OF PROCEEDINGS**
>
> THIS COURT ORDERS that, until and including June 30, 2003, or such later date as the Court may order (the "Stay Period"), (a) no suit, action, enforcement process, extra-judicial proceeding or other proceeding (including a proceeding in any court, statutory or otherwise) (a "Proceeding") against or in respect of an Applicant or any present of future property, right, assets or undertaking of an Applicant wheresoever located, and whether held by an Applicant in whole or in part, di-

rectly or indirectly, as principal or nominee, beneficially or otherwise, and without limiting the generality of the foregoing, including the leasehold interests of the Applicants in my aircraft and engines leased by an Applicant, whether in the possession of an Applicant, or subleased to another entity (and for greater certainty excluding any other title or other interest in such aircraft and engines held by other parties), any and all real property, personal property and intellectual property of an Applicant, and any and all securities, instruments, debentures, notes or bonds issued to, or held by or on behalf of an Applicant (the "Applicants' Property"), shall be commenced and any and all Proceedings against or in respect of an Applicant or the Applicants' Property already commenced be and are hereby stayed and suspended, and (b) all persons are enjoined and restrained from realizing upon or enforcing by court proceedings, private seizure or otherwise, any security of any nature or description held by that person on the Applicants' Property or from otherwise seizing or retaining possession of the Applicants' Property, or from seizing, detaining or retaining aircraft operated by the Applicants.

6 While the stay is now operative to September 30, 2003, it has been indicated that under the foreseeable circumstances, the objective of AC is to emerge from CCAA protection by the end of the 2003 year with a restructured operation pursuant to a Reorganization Plan. Given the nature of the industry, it is of course "desirable for AC to see if it can do that emergence at the earliest reasonable date. Given the myriad of issues to be dealt with, it appears to me that year end is not unreasonable -- but if it is possible to do it earlier, so much the better. Given the circumstances here, that is a reasonably brief period.

7 I am of the view that every one truly appreciates that the time spent preparing for litigation and in court is not as desirably or productively spent as using that same time to work out matters on a reasonable functional basis, if that is possible with goodwill flowing both ways. The efforts of those who have engaged in such activities are recognized and applauded.

8 As was made quite clear by the Regulators' counsel during the hearing, these Motions are not in any respect to be considered as requests by the Regulators to lift the stay.

9 AC has proposed that as a compromise the Regulators be allowed to engage in their activities as such engage what AC termed the four pillars of safety, security, health and airworthiness but that there be no enforcement of any decision by the Regulators as to these areas.

CCAA Stay

10 Section 11(3) and (b) and (c) of the CCAA provides:

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

11 The Regulators submitted that the term "proceedings" ought to be restricted to judicial proceedings involving creditors in the sense of economic, financial, business or commercial concerns being affected; however, they did acknowledge that quasi-judicial matters might also be dealt with and affected by a CCAA stay in the sense that a matter might be the subject of an (non-court) arbitration. The Regulators rely on the views expressed at p. 173 of Sullivan and Dreidger, Construction of Statutes 4th Ed. (Markham: Butterworths Canada Limited, 2002) at pp. 173-4 as to the associated words rule. With respect, the term proceedings is to my view a term which imparts with it a great deal more than "action" or "suit" in their judicial or quasi-judicial element.

12 The CCAA is remedial legislation in its purest sense. See Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 O.R. (3d) 289 (Ont. C.A.) at p. 306 (Doherty, J.A. dissenting but not on this point). The term "proceeding" has been determined before as not referring solely to legal proceedings -- or proceedings involving economic, financial,

business or commercial rights. See Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd. (2000), 48 O.R. (3d) 746 (Ont. S.C.J. [Commercial List]) where Lane, J. was dealing with a regulatory hearing proposed by the Toronto Stock Exchange. See also Versatech Group Inc., Re, [2000] O.J. No. 3785 (Ont. S.C.J. [Commercial List]); Anvil Range Mining Corp., Re (1998), 3 C.B.R. (4th) 93 (Ont. Gen. Div. [Commercial List]). Although technically in obiter, Wachowich, J. had no hesitation in going beyond the narrow view of "proceedings" urged on me by the Regulators when he said at pp. 583-4 of Meridian Development Inc. v. Toronto Dominion Bank (1984), 11 D.L.R. (4th) 576 (Alta. Q.B.):

> Meridian argues further on the basis of the ejusdem generis role that the interpretation of "other proceeding" in s. 11 of the Companies' Creditors Arrangement Act is limited to proceedings which would fall within the genus indicated by the words "suit" and "action". This, too, indicates that the term as used in the Act ought to be restricted to proceedings which necessarily involve a court or court official.
>
> These arguments are persuasive. None the less, I am mindful of the wide scope of action which Parliament intended for this section of the Act. To narrow the interpretation of "proceeding" could lessen the ability of a court to restrain a creditor from acting to prejudice an eventual arrangement in the interim when other creditors am being consulted. As I indicated earlier, it is necessary to give this section a wide interpretation in order to ensure its effectiveness. I hesitate therefore to resider the term "proceedings" to those necessarily involving a court or court official because there are situations in which to do so would allow non-judicial proceedings to go against the creditor which would effectively prejudice other creditors and make effective arrangement impossible. The restriction could thus defeat the purpose of the Act. I must consider, for instance, the fact that it may still be possible to make distress without requiring a sheriff or his bailiff, as for example, on a chattel mortgage. It might well be necessary in terms of s. 11 in some future situations. As a result, in the absence of a clear indication from Parliament of an intention to restrict "proceedings" to "proceedings which involve either a court or court official", I cannot find that the term should be so restricted. Had Parliament intended to so restrict the term, it would have been easy to qualify it by saying for instance "proceedings before a court or tribunal". (emphasis added)

I agree with these views. Indeed there are no such restrictive words on proceedings nor are there any words which denote that the jurisdiction to grant a stay is only to deal with economic, financial, business or commercial matters. I would note that Parliament has had ample opportunity over the past two decades to amend section 11(3)(b) and (c) in the way urged on me by the Regulators if it felt that desirable; that could have been done in the 1992 or 1997 amendments pursuant to the five year review procedure. Amendments were made at those times in various areas; however, it appears that Parliament recognized that, with respect to the types of applicants which could apply for restructuring protection under the CCAA, it was undesirable to restrict the discretion of the court to deal with matters which involve delicate balancing of various interests with a view to ensuring that productive resources were utilized to the maximum degree for the overall benefit to Canada's social and economic values. Of course that discretion is not without restraint -- rather that discretion is to be judicially exercised according to the circumstances applicable in any particular case.

13 That is not to say that s. 11(3) has not been affected by amendment. In 1997, s. 11.1(2) was added to underscore that any stay granted under the CCAA did not affect certain activities related to the Canadian Payments Act. In 2001, s. 11.1(2) was modified to read:

> 11.1(2) No order may be made under this Act staying or restraining the exercise of my right to terminate, amend or claim any accelerated payment under an eligible financial contract or preventing a member of the Canadian Payments Association established by the Canadian Payments Act from ceasing to act as a clearing agent or group clearer for a company in accordance with that Act and the by-laws and rules of that Association.

That same year, the CCAA was further amended by adding s. 11.11:

> 11:11 No order may be made under this Act staying or restraining

(a) the exercise by the Minister of Finance or the Superintendent of Financial Institutions any power, duty or function assigned to them by the Bank Act, the Cooperative Credit Associations Act, the Insurance Companies Act or the Trust and Loan Companies Act;
(b) the exercise by the Governor in Council, the Minister of Finance or the Canada Deposit Insurance Corporation of any power, duty or function assigned to them by the Canada Deposit Insurance Corporation Act; or
(c) the exercise by the Attorney General of Canada of any power, assigned to him or her by the Winding-up and Restructuring Act.

It is clear that the activities envisaged by these restricting changes are not in any way related to judicial or quasi-judicial proceedings. Nor can they be said to be of the nature of the economic, financial, business or commercial concerns pressed on me by the Regulators. Indeed most of these activities could reasonably be said to be at a polar edge of the spectrum of activities well beyond the regulatory activities which the Regulators are engaged in. The Regulators suggested that these amendments were merely clarifications of what was already understood; however in my view, if it were already understood, then there would have been no need for clarification of that nature.

14 I am of the view that Section 11(3) provides this court with specific jurisdiction to grant the stay complained about by the Regulators.

15 I did observe during the hearing that the natural human tendency of legal counsel to add into "routine orders" additional language or provisions so as to "improve" the workability of the order (but within the four corners of the authority governing) sometimes backfires. It may well be that in expanding on the language of s. 11(3) inadvertently the draftspersons of these draft orders open up what might be perceived as loopholes and thus create false expectations amongst some of those affected. The Commercial List Users Committee is presently engaged in seeing if there can be a consensus on a "perfect order" for matters such as Initial CCAA orders; however, I recognize that legal counsel will undoubtedly be tempted to improve on that "perfection". It is perhaps the "overworking" of language in such orders that leads to misinterpretation which I respectfully am concerned may have been the case in Always Travel Inc. v. Air Canada, [2003] F.C.J. No. 933, 2003 FCT 707 (Fed. T.D.) regarding the question of "court".

Inherent Jurisdiction Stay

16 Even if I were to have reached the conclusion that this court had no jurisdiction under the CCAA to stay the activities of the Regulators, then I would be of the view that this court has the inherent jurisdiction to do so. See Loxtave Buildings of Canada Ltd., Re (1943), 25 C.B.R. 22 (Sask. K.B.):

> It is well established law that nothing shall be intended to be out of the jurisdiction of a Superior Court but what expressly appears to be so. The jurisdiction of the King's Superior Courts over matters cognizable by them can not be taken away but by express words or perhaps by necessary implication arising from the use of words absolutely inconsistent with the exercise of the jurisdiction, or to which effect can not be given except by exclusion of such jurisdiction. If a Court has jurisdiction of the principal matter it has also jurisdiction over all matters incident thereto and may try them according to the course of their law so that it be not contrary to the common law. I realize that the Bankruptcy law is statutory mainly and a Court should not go beyond the provisions of the statute applicable. But, if the subject matter is within the statute, the Court may draw on its inherent powers to give effect to the provisions of the statute applicable.
>
> (emphasis added)

See also Lehndorff General Partner Ltd., Re (1993), 9 B.L.R. (2d) 275 (Ont. Gen. Div. [Commercial List]) and Scaffold Connection Corp., Re (2000), 15 C.B.R. (4th) 289 (Alta. Q.B.) at p. 295. I am thoroughly familiar with the concept that inherent jurisdiction has no place to fill the gap if there is indeed no gap: see Royal Oak Mines Inc., Re (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]), wherein I followed the view of the Supreme Court of Canada in Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), 57 D.L.R. (3d) 1 (S.C.C.) while noting:

> However, it is fair to say that the S.C.C. in Baxter, when faced with the choice between an unpractical but "legal" solution and a procedural one, opted for the unpractical one. Thus, one is constrained from distinguishing on the basis of the recognition of the CCAA over the past 15 years having a familial relationship with Necessity.

17 However, it does not appear to me that there is any statute (or binding decision) which constrains or eliminates the ability of this court to grant a stay pursuant to its inherent jurisdiction provided that that discretion is judicially exercised in the circumstances prevailing. As I ruled at pp. 296-7 of Royal Oak Mines Inc., in order to accomplish the goal of facilitating the restructuring of a debtor company, the court has a fund of discretionary powers arising from its inherent jurisdiction to make orders not only to do justice between the parties or other affected person but also to do what practicality demands. See Algoma Steel Inc., Re (2001). 25 C.B.R. (4th) 194 (Ont. C.A.) at p. 196 citing Pacific National Lease Holding Corp., Re (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]) as to the recognition that appellate courts are reluctant to interfere with ongoing supervision of a CCAA matter, appreciating that the supervising judge is required of course to exercise his or her discretion judicially.

Question of Conflict with Other Legislation

18 The Regulators appeared to have approached these motions on the basis that the stay which has been granted is a permanent stay. Nothing could be further from the truth though since this stay is a temporal one only. Once AC emerges from these CCAA proceedings (successfully one would hope), then it will have to deal with each and every then unresolved Regulator matter. As discussed above, it is contemplated that the time horizon for that will be the end of 2003. By that time, if so, then AC will have been in CCAA proceedings for some nine months. It would not seem to me that the adage of "Justice delayed is justice denied" is truly applicable in these circumstances on a general basis (I do however recognize that there may be particular instances where that nine month period may cause some "justice delivery" difficulties; I would think that any such instances could be handled by reasonable discussion). See below for my view concerning the resource difficulty. Since the temporal stay is of an anticipated nine month temporary duration, then I do not see that there is any conflict with federal legislation such as the Canada Labour Code which has "notwithstanding any other legislation" language. See also United Used Auto & Truck Parts Ltd., Re (2000), 77 B.C.L.R. (3d) 143 (B.C. S.C. [In Chambers]) at p. 158, para. 38; Minister of National Revenue v. Points North Freight Forwarding Inc. (2000), 24 C.B.R. (4th) 184 (Sask. Q.B.) at p. 189 (Para. 14). Given my conclusion on there being no conflict, it is unnecessary to conclude whether or not federal jurisdiction to make laws respecting labour statutes is limited to its use as an ancillary power as to the regulation of federal undertakings as alluded to at p. 775 of Québec (Commission du salaire minimum) c. Bell Telephone Co., [1966] S.C.R. 767 (S.C.C.). AC was asserting that the federal jurisdiction with respect to insolvency matters, in contrast, was a core area of jurisdiction enumerated in section 91(21) of the Constitution Act, 1967. I pause to note that if AC were not to successfully emerge from these CCAA proceedings, then most, if not all, of the accumulated regulatory matters would become moot. Since these proceedings were initiated, no one has come forward to indicate that they would be advantage by a demise of AC; indeed when participants in these proceedings (including the Regulators) were asked that question, they all responded negatively. I take it as an unspoken given that the Regulators will do everything that is reasonably possible to avoid that possibility with its recognized very negative effects upon the stakeholders of AC, the great disruption that would entail for the public and the necessary loss of domestic economic activity and jobs. I am therefore confident that with the issue of principle as to whether or not this court has jurisdiction decided, AC and the Regulators will be able to work together to achieve a modus vivendi and not get bogged down.

19 Indeed it appears to me that if there is a bogging down, then there is the significant risk that momentum, the positive momentum which the AC proceedings have generated since their initiation will be halted. CCAA proceedings are somewhat like bicycles; if the rider loses momentum, the bicycle and the rider fall over. Neither should the parties get the Court bogged down as in a CCAA situation by bringing to it indefinitely and infinitely small item by small item as opposed to working out matters, if reasonably possible.

20 But I must not lose sight of the other issues which were argued and which of course affect the ultimate determination of these motions.

Onus

21 Firstly, allow me to deal with the question of onus. The onus is on an applicant in CCAA proceedings to demonstrate that it is appropriate to have a stay of proceedings. However, it must be recognized that insolvency situations are inherently chaotic. Perhaps the AC one is a prime example of that as events radically overtook which had been anticipated to be a consensual restructuring, forcing AC to run gasping to the Court for this CCAA proceeding. That was rec-

ognized at the initial order stage of April 1, 2003, with the indication that it was recognized that the order would have to undergo the critical eye of stakeholders as it had been drafted in great haste. As discussed part of AC's problems have been of longstanding and ought in fairness to have been functionally addressed well before now (an example of this would be the imperfect operational and functional merger of the old Air Canada and the old Canadian Airlines); I have indicated above the more recent impacts but did not there mention the pension deficit as to which OSFI took action in late March. It was appreciated by counsel during the hearing that on a practical and now routine basis, initial CCAA orders have broadly drafted stay provisions which may thereafter be tailored or whittled down as circumstances require. The broad stay is required to give initial stability to a crisis situation. Certainly the condition of AC at the time of the application was perilous; it required the stabilization that a broad stay provision would give.

22 I would note that the initial application material did not provide any information specifically with respect to the stay necessity. It is only with the affidavit affirmed July 8, 2003 by Louise-Hélène Sénécal, internal counsel at AC that AC has specifically dealt with the need for such a stay (as modified as suggested above). Ms. Sénécal was not cross-examined on this affidavit but that may have been the result or a function of the Regulators growing (and reasonably so in my view) impatient with getting their motions finally on. I have no doubt that in a CCAA proceeding which has fewer fires to put out than this AC one, justification for the stay would be forthcoming on a more timely basis. However in my view it is not inappropriate for the court now to receive this type of "fresh evidence" and I note that the Regulators did not take much issue with its introduction.

Justification of the Stay Being Granted

23 The Sénécal Affidavit may be criticized as being too general. However it must be viewed in the context of the prevailing circumstances. AC is a large enterprise with at peak some forty thousand employees; it operates domestically and internationally; its facilities are widespread; it is involved in an industry which interacts with a very large number of regulatory authorities; its activities bring it into contact with an immense number of the travelling public, some of whom are veteran fliers and others who may be novices. From the material of the Regulators it appears that there are innumerable interfaces between these Regulators and AC as to various concerns. It would be relatively fruitless to specify each and every interface incident and advise in detail as to them.

24 As indicated above, AC has made progress in dealing with various of its problems. Perhaps the most important of these, at least to date, is the negotiation of revised collective agreements with its nine unions. That was accomplished in three weeks of intensive facilitation supervised by Winkler, J. (as to whom all concerned have expressed an immense debt of gratitude well deserved); that perhaps ought to be contrasted with the glacial pace of labour negotiations prior to the CCAA proceedings. These negotiations with the subsequent sanctioning of the amendments by the various memberships and the ongoing ancillary involvement with ongoing labour matters as a result have no doubt left AC's labour and legal departments breathless. The legal department (together with outside legal assistance) has also continued to be involved in negotiations relating to other areas and existing contracts. Based on a fair reading of the Sénécal Affidavit in these circumstances, I would conclude that the legal side resources of AC to deal with regulatory matters is under strain. If AC were not so heavily involved with regulatory matters as it appears that it is, then I would have expected better detail. However I am not of the view that the Sénécal Affidavit was a formalistic statement as referred to at paragraph 5 of Versatech Group Inc. It seems to me that with the arrangements that AC now has with the unions as to matters June 1, 2003 on and with its proposal as to the four pillars of safety, security, health and airworthiness (subject to my views below), AC is in the range of having regulatory matters impair its ability to deal with its business and its restructuring activities on an ongoing basis. I note that in Quintette Coal Ltd. v. Nippon Steel Corp. (1990), 2 C.B.R. (3d) 303 (B.C. C.A.), Gibbs J.A. for the British Columbia Court of Appeal stated at pp. 311-12:

> ... it would appear to be that under s. 11 there is a discretionary power to restrain judicial or extra judicial conduct against the debtor company the effect of which is or would be, seriously to impair the ability of the debtor company to continue in business during the compromise or arrangement negotiation period. The power is discretionary and therefore to be exercised judicially.

25 Blair, J. in Campeau v. Olympia & York Developments Ltd. (1992), 14 C.P.C. (3d) 339 (Ont. Gen. Div.) observed at p. 346 that the Court's power to grant a stay under section 11(3) of the CCAA extended "to conduct which could seriously impair the debtor's ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement". See also Noreen Energy Resources Ltd. v. Oakwood Petroleums Ltd. (1988), 72 C.B.R. (N.S.) 1 (Alta. Q.B.) where Forsyth, J. at page 16 stated:

> Surely a necessary part of promoting the continuance of a company is to give that company some time to stop and gather its faculties without interference from affected parties for a brief period of time. In my opinion, the distinction between creditors' contractual rights and the contractual rights of non-creditor third parties that Noreen asks me to draw is not a helpful one in these circumstances. Continuance of a company involves more than a consideration of creditor claims.

26 See also Sairex GmbH v. Prudential Steel Ltd. (1991), 8 C.B.R. (3d) 62 (Ont. Gen. Div.) at p. 77 where I observed:

> However, I must be cognizant of the fact that activity on Sairex's part would likely require activity on Algoma's part -- thereby requiring the deployment of executive time in this manner which can be pursued after Algoma comes out from its C.C.A.A. shell, rather than such executives spending their time on the restructuring process or general operations of making and selling steel at a critical time. It would also result in legal expense and possible diversion of legal talent.

I would note that I mentioned "executive" time. To my view if regulatory matters can be reasonably dealt with on a managerial or lower level then that would not interfere with executive time. However that should not Presuppose that such managerial or lower level resource might not be actively engaged in putting out more "immediate fires" than what might be considered "routine" regulatory matters. I would also observe that individually no one regulatory matter would likely be a "killer", but it is possible to die the "death of a thousand cuts" if one were to take on all of the matters in the aggregate.

27 The Regulators rely heavily on Toronto Stock Exchange Inc. v. United Keno Hill Mines Ltd., supra. What Lane, J. said at page 752 was that he must weight the interests of affected parties. In that ease he did so, but as he indicated at page 747: "I do not regard them [in terrorem examples] as useful because I do not regard my task as setting out a rule of general application. Rather, my task is to determine, on these particular facts and dealing with the specific legislation involved whether to exercise my discretion to lift the CCAA stay". In the present case, I am similarly not setting out a rule of general application. Further, as opposed to the situation which Lane J. faced, I specifically am not dealing with a list stay request as the Regulators have indicated they have made no such request.

28 It seems to me that it is a reasonable conclusion that AC has made out a case for the continuance of the stay with the modifications noted above on a balancing of interests basis recognizing the focus feature. However with respect to the four pillars vis-a-vis the Regulators, I would adjust that proposal so that the Regulators, if they saw fit in any particular situation based on objective justifiable grounds, would be permitted to immediately enforce any regulatory order or equivalent. However, if AC were to be of the view that the enforcement were unnecessary in the circumstances, then AC could apply to this court to have the reasonability of the Regulator's action determined. If this court were of the opinion that the action taken was unreasonable in the circumstances, then an appropriate penalty would be levied against the Regulator. I cannot foresee that such an application would ever come to pass, given the goodwill which exists between a regulator and one regulated, especially when the one regulated is in such a delicate financial condition. I may be spoken to about the appropriate language to be embodied in the order if perchance the sides were unable to agree.

Modus Vivendi

29 Again I come back to the need for AC and the Regulators to sit down and come to a modus vivendi, hopefully with a streamlined system. It will not do AC any good to delay dealing with matters which it could otherwise usefully deal with prior to emergence from the CCAA proceedings without undue strain on available resources. To do otherwise bears the risk of being knocked over by a tidal wave of pent up issues; similarly if matters are delayed, then there is the further problem that any third party complainants become more frustrated than they were when they made the complaints. The three Cs of the Commercial List: communication, cooperation and common sense might be usefully employed by AC and its personnel. I would observe that if there is a failure to communicate on a meaningful timely basis with respect to even matters which are outside the control of AC -- e.g., the weather, then travellers start to complain that AC is not doing enough to "control the weather". In other words, bad customer relationships spill over; but if they are attended to on a preventative basis (as opposed to a reactive basis), they can be more easily managed to the satisfaction of all concerned.

30 The PC advises that it has five active files, one of which is fully ready for the release of a prepared report. As I understand the legislation under which the PC operates, after an investigation the PC releases a non-binding report to the complainant and the company (here AC). The complainant can then choose to proceed further before the Federal

Court. Based on that I can see no objection to die PC releasing that report, with the proviso that the complainant would have to obtain a lift of the stay from this court in order to proceed with a further Federal Court proceeding. Given that apparently there is a designated manager of privacy compliance, I would think it advisable for AC and the PC in their dialogue to review whether or not that compliance manager could be allowed to deal with the other four and possibly future privacy matters if not otherwise reengaged in more pressing current matters.

Conclusion

31 In conclusion, I would dismiss the Motions of the regulators. That of course is without prejudice to any Regulator moving to lift the stay. However, I assume that before that will happen, that AC and the Regulators would have exhausted their bona fide discussions on necessity, timeliness, prioritization and related matters. Each should approach the matter in a businesslike and flexible way, recognizing that it is important for AC to have the basis for maintaining the confidence of the public and to be seen to have that confidence with it on a team basis putting consumer requirements first as an ongoing principle to maintain good will and loyalty. This will take, as I have previously expressed, respect and trust flowing both ways (originally I expressed this mostly as to relations between management and labour -- but in addition I now express it between the labour-management team and the Regulators.

J.M. FARLEY J.

* * * * *

Appendix

NOTE: This order is without prejudice to all parties' positions on the union motions, or to the Regulators' Motions.

THIS COURT ORDERS that effective upon the ratification of new and/or modified collective agreements (the "Modified Collective Agreements") with respect to any of the Applicants' bargaining units consequent upon the agreements reached during the mediation before Justice Winkler pursuant to the order of this Court dated May 9, 2003,

(a) Proceedings in respect of events, actions or circumstances which occur on or after June 1, 2003 which arise from such Modified Collective Agreements (including, without limitation, grievances or arbitration procedures); and

(b) Proceedings pursuant to Part I or Part II of the Canada Labour Code which arise from events, actions or circumstances which occur on or after June 1, 2003,

shall not be deemed to be stayed notwithstanding the Amended and Restated initial Order or any subsequent amendments thereof, provided however that (i) nothing prevents the Applicants from applying to this Court to stay any specific proceeding referred to in subparagraph (a) or (b) above, and/or the enforcement of any direction, decision or order of the Canada Industrial Relations Board made pursuant to Section 134 or 156 of the Canada Labour Code; and (ii) no proceeding may be taken in respect of any statutory offence provision under Part I or Part II of the Canada Labour Code without further order of this Court.

THIS COURT ORDERS that subparagraph 24(c) of the Amended and Restated Initial Order shall be deleted and replaced by the following:

(c) terminate the employment of such of their unionized employees or temporarily lay off such of their unionized employees in accordance with the applicable Modified Collective Agreement; and terminate the employment of such of their non-unionized employees on such terms as may be agreed upon between the Applicant and each such employee, or failing such agreement, terminate such employment and deal with the consequences thereof in the Plan;

THIS COURT ORDERS that subparagraph 24(d) of the Amended and Restated Initial Order shall be deleted.

THIS COURT ORDERS that the unions and the Applicants meet forthwith to discuss a process for the resolution of pre-June 1, 2003 grievances, with the assistance of Mr. Justice Winkler if necessary.

THIS COURT ORDERS that the union motions be set down for hearing on August 7 and 8, 2003.

qp/s/qlfxs/qljjn/qlhcs

TAB 8

Case Name:

Fraser Papers Inc. (Re)

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

[2009] O.J. No. 3188

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

76 C.C.P.B. 254

2009 CarswellOnt 4469

Court File No. CV-09-8241-OOCL

Ontario Superior Court of Justice
Commercial List

S.E. Pepall J.

July 16, 2009.

(24 paras.)

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

Application to suspend special payments. The applicants were a number of related companies, all under the protection of the Creditors' Companies Arrangement Act. Due to the market conditions, the applicants had become obligated to make special payments for employee pension deficits. The applicants expected to be obligated to pay $13.5 million in 2009 and $34.7 million in 2010, over and above their regular contributions. The applicants lacked the financial capacity to make these special payments and argued the special payments were pre-filing, unsecured debts with no special status.

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

the applicants' business operations, which would be even less in the interest of the employees. Furthermore, allowing the application would merely suspend the special payments, not extinguish the applicants' obligations.

Statutes, Regulations and Rules Cited:

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

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

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

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

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

United States Bankruptcy Code, Chapter 11

Counsel:

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

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

P. Griffin, for the Directors.

D. Chernos, for Brookfield Asset Management Inc.

K. McEachern, for CIT Business Credit Canada Inc.

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

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

C. Sinclair, for the United Steelworkers.

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

REASONS FOR DECISION

S.E. PEPALL J.:--

Relief Requested

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

2 This motion addresses the need for the Applicants to make past service contributions or special payments to fund any going concern unfunded liability or solvency deficiencies ("special payments") of certain pension plans during the stay period as that term is defined in the Initial Order. The Applicants seek to suspend those payments. Current service payments or normal cost contributions are not in issue. The Applicants are supported by the Monitor, Pricewaterhouse-Coopers Inc., the Directors and one of the DIP lenders, Brookfield Asset Management Inc. Brookfield also directly or indirectly owns 70.5% of the outstanding common shares of Fraser Papers Inc. The other DIP lender, CIT Business Credit Canada Inc., the Superintendent of Pensions for New Brunswick, the Minister of Business New Brunswick, and

la Régie des rentes du Québec' are all unopposed to the relief requested. The Communications, Energy and Paper Workers Union of Canada and its local unions 4N, 6N, 29,189,894, and 2930 ("the CEP") who represent approximately 660 employees at facilities in New Brunswick and Quebec oppose the request. They are supported by the United Steelworkers and the New Brunswick Regional Council of Carpenters, Millwrights and Allied Workers, Local 2540.

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

Facts

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

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

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

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

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

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

Positions of the Parties

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

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

Issues

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

Discussion

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

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

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

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

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

15 The *CCAA* does not directly address employment or labour claims. The power to stay claims against a debtor company is found in section 11 of the *CCAA*. Section 11.3 of the *Act* provides some limitation on the Court's discretion. It states:

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

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

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

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

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

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

19 Decisions of courts of co-ordinate jurisdiction are not binding but are highly persuasive and ought to be followed in the absence of strong reasons to the contrary: *R. v. Cameron*[12] and *Holmes v. Jarrett*[13]. This is in the interests of predictability, consistency, and stability in the administration of justice. This need is particularly evident in the current economic climate where companies and their stakeholders including employees and unions require time to restructure and stability in the law is an enabler in this regard. Until such time as an appellate court provides different guidance, it seems to me that this line of cases should be followed. I also note that neither la Regie des rentes du Quebec nor the Superintendent of Insurance for the Province of New Brunswick was opposed to the order requested by the Applicants.

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

21 I must then consider whether having concluded that I have jurisdiction, I should exercise it as requested by the Applicants. Frankly, I do not consider either of the alternatives to be particularly appealing. On the one hand, one does not wish to in any way jeopardize pensions. On the other hand, the Applicants have no ability to pay the special payments at this time. Their ability to operate is wholly dependent on the provision of DIP financing. Furthermore, payment

of the special payments constitutes a DIP loan event of default. A bankruptcy would not produce a better result for the employees with respect to the special payments in that they do not receive priority in bankruptcy. Claims in this regard are unsecured. The relief requested by the Applicants, importantly in my view, does not extinguish or compromise or even permit the Applicants to compromise their obligations with respect to special payments. Indeed, the proposed order expressly provides that nothing in it shall be taken to extinguish or compromise the obligations of the Applicants, if any, regarding payments under the pension plans.[14] Failure to stay the obligation to pay the special payments would jeopardize the business of the Applicants and their ability to restructure. The opportunity to restructure is for the benefit of all stakeholders including the employees. That opportunity should be maintained.

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

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

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

S.E. PEPALL J.

* * * * *

Schedule "A"

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

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

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

> **50**(1) Subject to section 59, a pension fund is trust property for the benefit of the beneficiaries of the fund.
>
> **50**(2) The beneficiaries of the pension fund are members, former members, and any other persons entitled to pensions, pension benefits, ancillary benefits or refunds under the plan.
>
> **51**(1) If an employer receives money from an employee under an arrangement that the employer will pay the money into a pension fund as the employee's contribution under the pension plan, the employer shall be deemed to hold the money in trust for the employee until the employer pays the money into the pension fund.
>
> **51**(2) For the purposes of subsection (1), money withheld by an employer, whether by payroll deduction or otherwise, from money payable to an employee shall be deemed to be money received by the employer from the employee.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 2009, Ontario Bar Association, Continuing Legal Education

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

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

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

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

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

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

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

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

11 Ibid at para.

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

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

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

TAB 9

Case Name:

Collins & Aikman Automotive Canada Inc. (Re)

IN THE MATTER OF the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Collins & Aikman Automotive Canada Inc.
APPLICATION UNDER the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

[2007] O.J. No. 4186
37 C.B.R. (5th) 282
63 C.C.P.B. 125
161 A.C.W.S. (3d) 675
2007 CanLII 45908
2007 CarswellOnt 7014
Court File No. 07-CL-7105

Ontario Superior Court of Justice

J.M. Spence J.

Heard: September 20 and 26, 2007.
Judgment: October 31, 2007.

(141 paras.)

Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from lender subject to certain terms, which terms were approved in Initial Order -- Court declined to order changes to paragraphs in Initial Order, as moving parties provided insufficient basis for their objections -- Court could not compel Collins to make "special payments" ordinarily required under statutory pension law when terms of financing did not contemplate such payments.

Insolvency law -- Receivers, managers and monitors -- Liability -- Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act dismissed -- Collins & Aikman Automotive filed for protection under CCAA -- Court declined to alter paragraphs of Initial Order and Order approving engagement of Chief Restructuring Officer that provided limitation of liability for monitor and CRO because moving parties failed to show that Court lacked jurisdiction to make such provision -- Established practice indicated that Court did have authority to grant such protection.

Motion by Superintendent of Financial Services, United Steelworkers, and CAW - Canada for relief relating to Initial Order made under Companies Creditors Arrangement Act -- Collins & Aikman Automotive filed for protection under CCAA -- Collins had obtained funding from a lender subject to certain terms, which terms were approved in Initial Order of July 19, 2007 -- Moving parties objected to wording of certain paragraphs of Initial Order, and also sought to compel Collins to make "special payments" contemplated under statutory pension law -- HELD: Motion dismissed -- Paragraph 4 of Initial Order allowing Collins to hire further individuals was not altered, since USW provided no basis for its concern that paragraph authorized unilateral contracting out of union positions -- Paragraph 6 of Initial Order

stating that Collins was "not required" to make various employee compensation payments was not altered because terms of financing that Collins obtained specifically set out what disbursements were contemplated in cash flow, and "special payments" at issue were not included -- Collins was precluded by terms of financing agreement from making any material disbursements not contemplated in cash flow approved by lender -- Even if the "not required" provision resulted in abrogation of statutory pension plan law by permitting Collins to refrain from making "special payments" ordinarily required by Pension Benefits Act, Court had jurisdiction to approve an order under CCAA which conflicted with, and overrode provincial legislation -- Further, it was a proper exercise of Court's discretion to approve provision because moving parties had opportunity to object to Court's approval of financing terms, but did not do so -- Ordering Collins to make "special payments" would constitute a collateral attack on Initial Order that approved financing because Collins had no alternative funds available and such an order would require it to use funds for a purpose which was not permitted pursuant to Initial Order -- Paragraph 11 of Initial Order allowing Collins to terminate employment arrangements as it deemed appropriate was not altered, since USW did not establish that paragraph would allow Collins to repudiate its collective agreements -- Paragraph 26 of Initial Order providing that monitor was not to be deemed to have become an employer was not altered because if monitor started to act as de facto employer, motion could be brought at that time to consider matter in context of actual fact situation, rather than in current abstract circumstances -- Paragraph 29 of Initial Order providing for limitation of monitor's liability to gross negligence or willful misconduct was not altered because Court did not agree with USW's argument that such provision was beyond Court's jurisdiction to make under CCAA -- Similar limitation of liability that was provided for Chief Restructuring Officer in paragraph 4 of Order approving engagement of CRO was not altered for the same reason, and since established practice showed that Court did have authority to grant such protection to CRO.

Statutes, Regulations and Rules Cited:

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, s. 11(3), s. 11(4), s. 11(6), s. 11.3, s. 11.8(1)

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A, s. 69(1), s. 69(2), s. 69(12), s. 116

Pension Benefits Act, R.S.O. 1990, c. P.8, s. 55(2)

Pension Benefits Act, General Regulation, R.R.O. 1990, Reg.909, s. 4, s. 5

Counsel:

M.E. Bailey, for the Superintendent of Financial Services (Ontario).

K.T. Rosenberg and M.C. Starnino, for the United Steelworkers.

C.E. Sinclair, for the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW - Canada).

R.J. Chadwick, for Ernst & Young Inc., as Monitor of Collins & Aikman Automotive Canada Inc.

A.J. Taylor and K.L. Mah, for Collins & Aikman Automotive Canada Inc.

J.E. Dacks, for JP Morgan Chase Bank NA.

C.J. Hill, for Chrysler LLC.

REASONS FOR DECISION

1 **J.M. SPENCE J.**:-- Each of the three moving parties, the Superintendent of Financial Services, the USW and the CAW - Canada, seeks relief relating to the Initial Order made by this Court under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") on July 19, 2007 (the "Initial Order") with respect to Collins & Aikman Automotive Canada Inc. ("Automotive" or the "Applicant").

2 On July 19, 2007, Collins & Aikman Automotive Canada Inc. ("Automotive") filed for protection from its creditors pursuant to the CCAA. The Applicant is insolvent. It was clear at the time of the CCAA filing that Automotive would not be able to reorganize and the Court was informed by counsel to Automotive and the Monitor that this proceeding is

effectively a liquidation. The Court is advised that the CCAA is being utilized by the Applicant to attempt to maximize the potential recovery for the benefit of all creditors by creating the opportunity to attempt to sell some or all of its remaining operating facilities on a going concern basis.

3 Chrysler LLC (previously known as DaimlerChrysler Company LLC) ("Chrysler") is Automotive's largest remaining customer. In order to provide Automotive with the stability to pursue the sale of its facilities, Automotive, Chrysler, the U.S. Debtors and JPMorgan Chase Bank, N.A. as Agent for the U.S. Debtors' pre-petition secured creditors negotiated a comprehensive funding agreement whereby Chrysler (the "DIP Lender") will fund the costs of this CCAA filing.

4 The relief sought by the moving parties concerns, *inter alia*, the pension plans of Automotive. The Superintendent advises that Automotive maintains seven pension plans which are registered in Ontario,

The Impugned Provisions of the Initial Order

Paragraph 4

5 Paragraph 4 of the Initial Order provides as follows:

> Applicants shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.

The USW is concerned that, as presently worded, paragraph 4 of the Initial Order is open to an interpretation that permits the Applicant to employ individuals in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation. In particular, paragraph 4 could be taken to authorize the unilateral contracting out of union positions. Accordingly, the USW proposes that the following text should be appended at the end of paragraph 4: ", provided that such further retainers are not in breach of any of its collective agreements."

6 The CAW supports the Superintendent and the USW with respect to their submissions in respect of the above provisions of the Order.

Paragraph 6

7 Paragraph 6 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall be entitled but not required to pay the following expenses whether incurred prior to or after this Order:
>
> (a) all outstanding and future wages, salaries, employee benefits, contributions to pension plans, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements ...

8 The Superintendent objects to any provision that would be inconsistent with the Applicant being required to make any and all required employee contributions to its pension plans.

9 The USW objects to the foregoing provision of the Initial Order on the basis that Automotive appears to be interpreting that provision so as to amend the terms of their employment by staying Automotive's obligation to pay compensation accruing due to employees post filing, including, wages, benefits and special payments to the pension plan. Accordingly, the USW proposes that the words "but not required" be struck from paragraph 6.

Paragraph 11

10 Paragraph 11 of the Initial Order provides as follows:

> THIS COURT ORDERS that the Applicants shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to:
>
> ...

b. Terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in any plan of arrangement or compromise filed by the Applicants under the CCAA (the "Plan"); ...

d. Repudiate such of its arrangements or agreement of any nature whatsoever, whether oral or written, as the Applicants deem appropriate on such terms as may be agreed upon between the Applicants and such counter-parties, or failing such agreement, to deal with the consequences thereof in the Plan; ...

The USW is concerned that these provisions are open to an interpretation that permits Automotive to repudiate its collective agreements with the USW's members. Accordingly, the USW proposes that the following text be added at paragraph 11, following the phrase "(as hereinafter defined)":

> "and any and all applicable collective agreements (including, without limitation, all employee benefit, pension and related agreements, compensation policies, and arrangements), and labour laws ...."

11 The Superintendent seeks an order directing the Applicant to make all required employer contributions to its Pension Plans in accordance with the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "PBA") and an order amending the Initial Order as is necessary to reflect this relief.

12 The CAW seeks an order compelling the Applicant to make the special payments due to the pension plans operated for the benefit of the CAW's members. The special payments that are referred to include the special payments that are provided for under s. 5(1)(b) and section 5(1)(e) of the Regulation under the PBA. These payments are required to be made to liquidate any unfunded liability in the plan by reason of a going concern deficiency and any insolvency deficiency based on actuarial valuation of the plan. The other special payments referred to are those dealt with in s. 31 of the Regulation. These payments are post wind-up special payments owing under s. 75 of the PBA to address a wind-up deficit. Section 31 states that annual special payments are to commence at the "effective date of wind up" and are equal to "the amount required in the year to fund the employer's liabilities under section 75 of the [PBA] in equal payments, payable annually in advance, over not more than five years".

13 As stated in *Toronto-Dominion Bank v. Usarco Ltd.*, (1991), 42 E.T.R. 235 at paragraph 25 (Ont. Gen. Div.), in the context of going concern special payments, special payments "may fluctuate depending upon the investment results of the pension fund and the employer's ongoing contributions, together with estimated demands on the fund by the beneficiaries" and other factors. The true position of the plan cannot, in fact, be known until the crystallization of all benefits when benefits are settled after a wind-up at which time "it will be known what are the assets in the fund and the liabilities to be set against such funds by those beneficiaries who are then established as being legally entitled to claim".

14 Accordingly, special payments are better understood as the payments which (in accordance with the PBA and Regulations and actuarial practice) have to be made to a pension plan now to meet the plan's benefit obligations which do not arise until some point in the future (either on retirement or termination for individual members or when benefits are settled in a plan wind up for the plan as a whole).

15 Likewise, post-wind-up special payments to address a wind up deficit are based on an actuarial estimate of the position of the plan as of the wind up date. Again, the actual liabilities of the pension plan are not determined until benefits are settled and the funds in the plan are used to actually purchase annuities from an insurance company (at then prevailing annuity rates) to provide the monthly pension benefit to the member.

16 The Applicant has indicated that monthly special payments for the Pension Plans are approximately $345,000 as of June 2007. The Superintendent is not in a position to confirm this amount precisely but advises that, owing to the funded position of the Plans it is clear that special payments are required for all the Pension Plans on the basis of the actuarial valuation reports last filed with the FSCO. The requirement to make special payments also applies to two of the Pension Plans which have been wound up, the Gananoque and Stratford Plans, although the special payment requirement arises on an annual rather than a monthly basis.

17 The factums of the USW and the CAW state that the most recently filed valuations for Automotive's various pension plans identify an aggregate wind-up deficiency of approximately $18.2 million.

Paragraph 26

18 Paragraph 26 provides as follows:

> THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof - or be deemed to have been or become an employer of any of the Applicant's employees.

The USW is concerned that this provision usurps the exclusive jurisdiction of the Labour Relations Board (the "Board" or the "OLRB") to determine, on a full factual record, whether someone is a successor employer. Accordingly, the USW proposes that the following text be deleted from paragraph 26: "or be deemed to have been or become an employer of any of the Applicant's employees"; and that the following words be added: ", provided that the foregoing is without prejudice to any rights pursuant to the *Labour Relations Act, 1995*, (Ontario)."

19 The CAW seeks the same order.

Paragraph 29

20 Paragraph 29 provides as follows:

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

The USW is concerned that this provision provides the Monitor with a blanket immunity on a prospective basis, and that the court has no jurisdiction to provide this immunity and should not provide this immunity even if it did have such authority. Accordingly, the USW proposes that paragraph 29 be deleted and replaced with the following:

> THIS COURT ORDERS that nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any other applicable legislation.

The CRO Order

21 On September 11, 2007, Automotive returned a motion for an order approving its engagement of Axis Consulting Group Inc. ("Axis") and Allan Rutman ("Rutman") as Chief Restructuring Officer of Automotive (the "CRO Approval Motion")

22 On September 11, 2007, this court made an order approving Automotive and Axis' engagement (the "CRO Order"), subject to a reservation of rights by the USW to challenge paragraph 4 of the CRO Order.

23 Paragraph 4 of the CRO Order is similar to paragraph 29 of the Automotive Initial Order and the USW objects to it for the same reason. That paragraph provides as follows:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfillment of its duties, save and except for any liability or obligation arising from the gross negligence or willful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the fees and disbursements paid to or incurred by the CRO in connection herewith. This last limitation of liability will be effective up until + including Sept. 20/07 + thereafter as directed by the judge hearing the motion on Sept. 20/07.

24 The USW proposes that this paragraph be deleted and replaced with the following:

THIS COURT ORDERS that no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO.

Relevant Statutory and Regulatory Provisions

The *Companies Creditors Arrangement Act*

25 Section 11(1) of the CCAA provides as follows:

> 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.

26 Subsections 11(3) and (4) of the CCAA provide as follows:

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

27 Section 11(6) of the CCAA provides as follows:

> 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 satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

28 Section 11.3 of the CCAA provides as follows:

> 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.

The *Pension Benefits Act*

29 Section 55(2) of the PBA provides as follows:

> An employer required to make contributions under a pension plan, or a person or entity required to make contributions under a pension plan on behalf of an employer, shall make the contributions in accordance with the prescribed requirements for funding and shall make the contributions in the prescribed manner and at the prescribed times, ...

30 The General Regulation to the Act, R.R.O. 1990, Reg. 909, provides in part as follows:

> 4. (2) Subject to subsection (2.1), an employer who is required to make contributions under a pension plan ... shall make payments to the pension fund or to an insurance company, as applicable, that are not less than the sum of,
>
> (a) all contributions, including contributions in respect of any going concern unfunded liability and solvency deficiency and money withheld by payroll deduction or otherwise from an employee, that are received from employees as the employees' contributions to the pension plan;
> (b) all contributions required to pay the normal cost;
> (c) all special payments determined in accordance with section 5; and
> (d) all special payments determined in accordance with sections 31, 32 and 35 and all payments determined in accordance with section 31.1.
>
> ...
>
> 5. (1) Except as otherwise provided in this section and in sections 4, 5.1 and 7, the special payments required to be made after the initial valuation date under clause 4(2)(c) shall be not less than the sum of,
>
> ...
>
> (b) with respect to any going concern unfunded liability not covered by clause (a), the special payments required to liquidate the liability, with interest at the going concern valuation interest rate, by equal monthly instalments over a period of fifteen years beginning on the valuation date of the report in which the going concern unfunded liability was determined;
>
> ...
>
> (e) with respect to any solvency deficiency arising on or after the Regulation date, the special payments required to liquidate the solvency deficiency, with interest at the rates described in subsection (2), by equal monthly instalments over the period beginning on the valuation date of the report in which the solvency deficiency was determined and ending on the 31st day of December, 2002, or five years, whichever is longer.

The *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "LRA")

31 Section 69 of the LRA provides in part as follows:

> 69. (1) In this section,
>
> "business" includes a part or parts thereof; ("enterprise")
>
> "sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")
>
> Successor employer

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

...

Power of Board to determine whether sale

(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

32 Section 116 of the LRA provides as follows:

Board's orders not subject to review

116. No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *quo warranto*, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.

Jurisdiction of the Court under the *Companies' Creditors Arrangement Act*

33 In *Canadian Red Cross Society (Re)*, [1998] O.J. No. 3306 (Gen. Div. [Commercial List]), Blair J. adopted, at paragraph 46, the following passage from the decision of Farley J. in *Lehndorff General Partner Ltd. (Re)* (1993), 17 C.B.R. (3d) 24, at p. 31 (Ont. Gen. Div.):

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA (citations omitted)
>
> [emphasis added]

34 In *Sulphur Corp. of Canada Ltd. (Re)*, [2002] 35 C.B.R. (4th) 304 (Alta. Q.B.), Lovecchio J. considered the jurisdiction of the Court to make an order under s. 11 of the CCAA with provisions that conflicted with provisions of the *Builders Lien Act* of British Columbia (the "BLA"), a conflict which arose because of the grant under a CCAA order of a priority to the financing charge of a debtor in possession ("DIP financing") over all other creditors of the applicant

company. Lovecchio J. decided that the Court has jurisdiction to grant a change under the CCAA to secure DIP financing which ranks in priority to a statutory lien under the BLA of British Columbia (paragraph 16).

35 After noting that, apart from the circumstances of the case, the lien under the BLA would have priority, Lovecchio J. provided the following analysis under the headings set out below in the following excerpt which addresses the jurisdiction of the Court in helpful detail and is therefore set out fully here:

> The Paramountcy Argument and the Jurisdiction of the Courts
>
> para. 23 Sections 11(3) and 11(4) of the CCAA read as follows:
>
> > 11(3) A Court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such a period as the Court deems necessary not exceeding 30 days, ... [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
> >
> > 11(4) A court may on application in respect of a company other than an initial application, make an order on such terms as it may impose, ... [staying proceedings, restraining proceedings and prohibiting proceedings against the debtor company].
>
> para. 24 It is clear that the power of the Court to create a charge to support a DIP financing is not mentioned. Are the words "such terms as it may impose" sufficient to give inherent jurisdiction a statutory cloak?
>
> para. 25 The facts at bar are similar to those that were before Associate Chief Justice Wachowich (as he then was) in *Re Hunters Trailer & Marine Ltd.*[3] In that case, Wachowich C.J.Q.B. granted Hunters an *ex parte*, 30 day stay of proceedings under the CCAA and, further, granted a DIP financing and Administrative Charge with a super-priority ranking over the claims of the other creditors.

Note 3: (2002) 94 Alta. L.R.(3d) 389.

> para. 26 In discussing the objective of the CCAA, Wachowich C.J.Q.B. stated the following at para. 15:
>
> > The aim of the CCAA is to maintain the status quo while an insolvent company attempts to bring its creditors on side in terms of a plan of arrangement which will allow the company to remain in business to the mutual benefit of the company and its creditors ...
>
> At para 18:
>
> > I agree with the statement made by Mackenzie J.A. in United Used Auto & Truck Parts Ltd., Re (2000), 16 C.B.R. (4th) 141 (BCCA), at 146 that: "... the CCAA's effectiveness in achieving its objectives is dependent on a broad and flexible exercise of jurisdiction to facilitate a restructuring and continue the debtor as a going concern in the interim.
>
> Later, at para.32:

> Having reviewed the jurisprudence on this issue, I am satisfied that the Court has the inherent or equitable jurisdiction to grant a super-priority for DIP financing and administrative charges, including the fees and disbursements of the professional advisors who guide a debtor company through the CCAA process. Hunters brought its initial CCAA application *ex parte* because it was insolvent and there was a threat of seizure by some of its major floor planners. If super-priority cannot be granted without the consent of secured creditors, the protection of the CCAA effectively would be denied a debtor company in many cases.

...

para. 27 In addressing the Court's jurisdiction to grant an order, the Court of Appeal in *Luscar Ltd. v. Smoky River Coal Ltd.*[4] confirmed the conclusion that s. 11(4) confers broad powers on the Court to exercise a wide discretion to make an order "on such terms as it may impose". At p. 11, para 53 of the decision, Hunt J.A. for the Court wrote:

> These statements about the goals and operations of the CCAA support the view that the discretion under s. 11(4) should be interpreted widely.

Note 4: [1999] A.J. No. 185 (C.A.), online: (AJ).

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para. 28 As indicated by Wachowich C.J.Q.B., numerous decisions in Canada have supported the proposition that s. 11 provides the courts with broad and liberal power to be used to help achieve the overall objective of the CCAA. It is within this context that my initial Order and the June 19 Order were based.

para. 29 Counsel for the Applicants referred to *Royal Oak Mines Inc., Re*[5] as an authority supporting their submission that the Courts cannot use inherent jurisdiction to override a provincial statute. ...

Note 5: (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div.).

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para. 30 In *Royal Oak*, Farley J. also relied on *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*[6], where the Supreme Court of Canada remarked that there is a limit to the inherent jurisdiction of superior courts and, in the circumstances of that particular case, the Court's inherent jurisdiction should not be applied to override an express statutory provision. At p. 480 the Court wrote the following:

> Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or a Rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

Note 6: (1975), [1976] 2 S.C.R. 475.

---

para. 31 *Baxter* may be distinguished from the case at hand since, in that particular case, the contest came down to the Court's inherent jurisdiction pursuant to s. 59 of the *Court of Queen's Bench Act*[7], a provincial statute which, the Supreme Court of Canada noted, was not intended to empower the Court to negate the unambiguous expression of the legislative will found in s. 11(1) of the *Mechanics' Liens Act*[8], also a provincial statute.

Note 7: R.S.M. 1970, c. C280.

Note 8: R.S.M. 1970, c. M80.

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para. 32 ... In *Smoky*, Hunt J.A. used the words the exercise of discretion - a discretion she found to have been broad and one provided for in the statute.

para. 33 It is clear that the Court's power to attach conditions was envisioned by Parliament. The intent of Parliament, through the enactment of the CCAA, was to help foster restructuring which, in turn, fosters the preservation and enhancement of the insolvent corporation's value.

para. 34 In *Re United Used Auto & Truck Parts Ltd.*[9], Mackenzie J.A., of the Court of Appeal, wrote the following at p. 152, para. 29:

> When, as here, the cash flow from operations is insufficient to assure payment and asset values exceeding secured charges are in doubt, granting a super-priority is the only practical means of securing payment. In such circumstances, if a super-priority cannot be granted without the consent of secured creditors, then those creditors would have an effective veto over CCAA relief. I do not think that Parliament intended that the objects of the Act could be indirectly frustrated by secured creditors.

Note 9: (2000), 16 C.B.R. (4th) 141 (BCCA).

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para. 35 Parliament's way of ensuring that the CCAA would have the necessary force to meet this objective was to entitle the Courts, pursuant to s. 11, to exercise its discretion and no specific limitations were placed on the exercise of that discretion. There is a logic to the lack of specificity as what is required to be done is often dictated at least in part by the particular circumstances of the case. Whether the Court should exercise that discretion is obviously a different matter and that will be discussed below.

para. 36 For the foregoing reasons, I find that in the circumstances of this case, there is a federal statute versus a provincial statute conflict.

Paramountcy

para. 37 Having established that the Court has a statutory basis to use its inherent jurisdiction in the exercise of a discretion granted under the CCAA, the next question is whether this jurisdiction can be used to override an express provincial statutory provision, in this case s. 32 of the BLA.

para. 38 The case of *Pacific National Lease Holding Corp. v. Sun Life Trust Co.*[10] was raised by Sulphur's Counsel to draw an analogy to the paramountcy issue at bar. While the facts are not identical, the case involved a conflict between the Court's power pursuant to the federal CCAA and the Legal Professions Act of British Columbia. In that decision, the Court found that it is within the Court's jurisdiction, pursuant to the CCAA, to exercise broad "power and flexibility", and proceeded to comment on p. 6 that the CCAA "will prevail should a conflict arise between this and another federal or provincial statute". I agree with that conclusion and would apply it in this case.

Note 10: [1995] B.C.J. No. 1535 (C.A.)

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36 More recently, the Court of Appeal, in its decision in its decision in *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5, considered the jurisdiction of the Court under s. 11 of the CCAA in connection with an order given under that section removing directors from the board of the applicant company. Paragraphs 31ff of the decision dealt first with the jurisdiction of the Court and then with the exercise of its discretion. The following passages from that decision are relevant with respect to the jurisdiction of the Court:

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.

...

[35] ... [I]nherent 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 document], 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 restruc-

> turing, 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 of 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.

37 As to the exercise of the jurisdiction given by s. 11, the Court in *Stelco* said the following at paragraphs 43 and 44:

> [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. ...
>
> [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.

38 The Court in *Stelco* went on to determine that it was not for the Court under s. 11 to usurp the role of the directors and management in conducting the restructuring efforts and found that there was no authority in s. 11 of the CCAA for the Court to interfere with the composition of a board of directors.

In the course of that analysis the Court stated as follows at paragraph 48:

> [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.*

39 It appears to me that in making the analysis set out in the above paragraphs and coming to the conclusion that it reached, the Court was addressing the need to ensure that the "terms" imposed by the Court under its s. 11 powers to do so are terms that are properly related to the jurisdiction given under s. 11 to the Court to grant stays and the purpose of that jurisdiction under the CCAA. In that regard, the Court did not consider that intervening in the composition of the internal management of the company contrary to the applicable laws in that regard was proper. This conclusion is perhaps best understood in the context of the earlier discussion in the decision of the nature of the jurisdiction of the Court under s. 11. In particular, the Court emphasized the role of the Court as a supervisory one which is exercised through its ability "to stay, restrain or prohibit proceedings against the company during the plan negotiation period" on such terms as the Court may impose (paragraph 38). It is not apparent how an order removing directors would be inherently or functionally related to the Court's role to provide a protection against legal proceedings which are potentially adverse to the facilitation of "the continuation of the corporation as a viable entity" (paragraph 36, in the quoted passage from the *Skeena* decision).

40 On this basis, the limitation expressed by the Court in *Re Stelco* is not to be understood as restricting the jurisdiction of the Court to make orders which carry out that protective function.

41 Similarly, but in a quite different fact situation, Lax J. of this Court, in her decision in *Richtree Inc. (Re)* (2005), 74 O.R.(3d) 174 dismissed a motion to exempt the applicant company from certain filing requirements with regulatory authorities: see paragraphs 13 to 18 of the decision. In paragraph 18 of the decision, Lax J. said that the order that was sought had nothing to do with the restructuring process of the applicant company.

42 In view of the reasoning and the decisions in the above cases considered, the Court has a jurisdiction under the CCAA which, in the words of the decision in *Re Sulphur Corp. of Canada Ltd., supra*, at paragraph 37, "can be used to override an express provincial statutory provision" where that would contribute to carrying out the protective function of the CCAA as reflected particularly in the provisions of s. 11 of the CCAA.

43 This analysis is developed further with regard to the special payments in the part of the text below that deals with the issue relating to paragraph 6 of the Initial Order.

The Context of the Initial Order and the CRO Order

44 On July 19, 2007, the Court issued the Initial Order authorizing, *inter alia*, Automotive to obtain and borrow under a credit facility (the "DIP Facility") from Chrysler as DIP Lender in order to finance certain expenditures contemplated by the cash flows that are approved by the DIP Lender and filed with the Court.

45 The Initial Order provided that the DIP Facility was to be on the terms and subject to the conditions set forth in the DIP Term Sheet and Commitment Letter between Automotive and the DIP Lender dated as of July 18, 2007 (the "Commitment Letter"), filed with the Court.

46 The Commitment Letter provides:

> The Borrower covenants as follows:
>
> > The Borrower shall not, without the Lender's prior written consent, make any material disbursement unless it is contemplated in the Initial cash flow, attached as Schedule "A" to this DIP Term Sheet and Commitment Letter (the "Initial Cash Flow") or any rolling cash flow approved by the Lender (collectively "Cash Flow Projections") and, for greater certainty, the Borrower shall not issue any cheques or make any disbursements until such point in time as the Lender has approved the same and confirmed sufficient funding of the same in accordance with the terms hereof[.]

47 The Initial Order also stated that rights of the DIP Lender under the Commitment Letter shall not be impaired in any way in Automotive's CCAA proceedings or by any provincial or federal statutes and that the DIP Lender shall not have any liability to any person whatsoever resulting from the breach by Automotive of any agreement caused by Automotive entering into the Commitment Letter.

48 The Initial Order provided that the DIP Lender was entitled to the benefit of the DIP Lender's Charge on all of the property of Automotive (except certain tax refunds).

49 The Affidavit of John Boken, dated July 19, 2007, sworn on behalf of Automotive and filed with the Court in connection with the application for the Initial Order (the "Boken Affidavit") stated the following at paragraph 46 with respect to the pension plans of Automotive:

> [Automotive] intends to continue to pay current service costs with respect to benefits accruing from the date of filing. The DIP Loan (as defined below), does not provide for the funding of any special payments.

50 In addition, the initial cash flow approved by Chrysler and filed with the Court on the application for the Initial Order clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

51 Automotive brought a motion to the Court on July 30, 2007 for, inter alia, an Order confirming the terms of the DIP Facility (the "DIP Approval Motion"). The DIP Approval Motion was made on notice to, among others, the USW and the Superintendent. The Boken Affidavit was again served in connection with the DIP Approval Motion. As noted

above, the Boken Affidavit unequivocally indicated that special payments would not be made and were not permitted by the DIP Facility.

52 In addition, the Monitor filed its First Report with the Court at the return of the DIP Approval Motion and specifically noted that Automotive could not make any payments that were not in the cash flow forecast and that special pension payments were not provided for in the forecast. That point was reiterated in the notes to the cash flow forecast.

53 On July 30, 2007, the Court issued an Order confirming the terms of the DIP Facility (the "DIP Approval Order"). The DIP Approval Order provided:

> 3. THIS COURT ORDERS that the DIP Facility provided by DCC to the Applicant in the amount of Cdn.$13.6 million on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and DCC dated as of July 18, 2007, all as set forth in the Initial Order, is hereby confirmed and approved.

54 Based on the First Report of the Monitor and the submissions of all counsel Justice Stinson granted the requested relief and approved the DIP Loan "on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter between the Applicant and the DIP Lender dated as of July 18, 2007, all as set forth in the Initial Order". As noted in Justice Stinson's endorsement in respect of the DIP Approval Order, Mr. Bailey on behalf of FSCO and Mr. Starnino on behalf of the USW requested that the Court "record their respective clients' reservation of rights in relation to the pension fund payments and other matters referenced in paragraphs 6(a), 11(b) and (d) of paragraph 26 of the [Initial] Order". Although the CAW did not attend the hearing on July 30, it did receive notice of Automotive's CCAA proceedings on July 23, 2007.

55 No party objected to the approval of the DIP Loan, or the terms and conditions set forth therein. No party appealed Justice Stinson's July 30 order approving the DIP Loan. The appeal period expired on August 20, 2007.

56 The DIP Approval Order was not opposed by the USW or the Superintendent, although they did appear at the DIP Approval Motion.

57 Automotive brought a motion to the Court on August 23, 2007 for an Order, inter alia, extending the stay of proceedings and increasing the amount of an amended DIP Facility. The motion was made on notice to the Unions and the Superintendent. The revised Cash Flow approved by Chrysler and filed with the Court (as a Schedule to the Monitor's Second Report) clearly stated that special payments would not be made and that such payments were not included in the cash flow projections.

58 On August 23, 2007, the Court issued an Order (the "August 23 Order") approving the Amended DIP Term Sheet and Commitment letter dated August 21, 2007 (the "Amended Commitment Letter"). The Amended Commitment Letter provides that Automotive shall not, without the DIP Lender's prior written consent, make any material disbursement unless it is contemplated in the cash flows approved by the DIP Lender. The Unions and the Superintendent did not oppose the August 23 Order, and they did not seek leave to appeal it.

59 The Boken Affidavit filed in support of the Initial Application indicated that:

> (a) Automotive had no other realistic source of DIP funding to continue operations;
> (b) the DIP Loan was the only basis on which funding was available to keep the potential for the preservation of some of the plants as going concerns; and
> (c) the DIP Loan was being provided as a component of a complex multi-party agreement that represented a compromise of the rights of Chrysler, Automotive and the U.S. Debtors, which agreement was approved by the US Bankruptcy Court.

60 By Order of Justice Pepall dated September 11, 2007, Axis Consulting Group and Allan Rutman was appointed Chief Restructuring Officer ("CRO") of Automotive (the "CRO Order"). Paragraph 4 of that CRO Order states:

> THIS COURT ORDERS that the CRO shall not incur any liability or obligation as a result of the fulfilment of its duties, save and except for any liability or obligation arising from the gross negligence or wilful misconduct of the CRO, and no action or other proceedings may be commenced against the CRO relating to its appointment or its conduct as CRO except with the prior leave of this Court obtained on at least seven (7) days' notice to Automotive and the CRO and provided further that any liability of the CRO hereunder shall not in any event exceed the quantum of the

> fees and disbursements paid to or incurred by the CRO in connection therewith. This last limitation on liability will be effective up until and including Sept. 20, 2007 and thereafter as ordered by the judge hearing the motion on Sept. 20, 2007.

61 The last sentence in paragraph 4 of the CRO Order was added by Justice Pepall in response to submissions by counsel that the issue of protections for the CRO were to be further addressed on this motion by the USW.

The Issues

Paragraph 4

62 The USW states its concern that the provision in paragraph 4 that allows the Applicant to retain further Assistants could be interpreted to allow hiring "in a manner inconsistent with the terms of the Collective Agreement, contrary to applicable labour legislation" (USW Factum, paragraph 43). How in particular that might come about is not explained. It is not suggested that the Applicant has acted or intends to act in such a manner.

63 Paragraph 4 does not provide that such hirings may be made in the manner that is the cause of concern. No basis was submitted for considering that such a result is implicit in paragraph 4.

64 Paragraph 4 is, as it is stated, consistent with the protective function of s. 11 because it effectively restrains proceedings that might otherwise be brought against the Applicant for making further hirings. It is conceivable in principle that hirings might be made in a way that would raise issues of the kind raised in *Re Richtree Inc., supra.* In such circumstances, having regard to the approach taken by the Court in *Richtree*, the aggrieved parties would apparently be able to seeks appropriate relief from the Court as part of administrative or supervisory jurisdiction in respect of orders made by the Court under the CCAA. That would be an appropriate context in which to address the question of whether there is a conflict between the Collective Agreement and/or the LRA on the one hand and the CCAA and/or the Initial Order on the other. In the present circumstances, it is unnecessary to address the matter and there is no fact situation before the Court to allow it to be addressed properly.

Paragraph 6

65 The objection taken to the phrase "but not required" in paragraph 6 is that Automotive regards the phrase as staying its obligations to pay various kinds of post-filing employee compensation, including in particular special payments to the pension plan.

66 Under the DIP Approval Order, the Court approved the DIP Facility on the terms and subject to the conditions contained in the DIP Term Sheet and Commitment Letter dated July 18, 2007. As noted, the Commitment Letter precludes Automotive from making distributions not contemplated in approved cash flows and the cash flow filed with the Court stated that special payments under the pension plans would not be made. These features link the DIP Approval Order to the paragraph 6 provision in the Initial Order that the specified kinds of payments are not required to be made. That is to say, the Initial Order and the DIP Approval Order are an integrated arrangement. The rationale given for this arrangement in the records is that Automotive will not be in a position to carry on business and will not have available funds without the DIP Facility and the terms on which the DIP Lender is prepared to commit to the DIP Facility are as stated.

67 Automotive states in its factum that it has continued to pay all wages and vacation pay during the course of this CCAA proceeding and intends to continue such payments and that the DIP Loan will, subject to certain conditions, provide advances to facilitate payment of statutory severance obligations.

68 The Initial Cash Flow provides for certain operating disbursements in respect of "Payroll, Payroll Taxes, Benefits, Severance, Other". The associated note states:

> The Forecast [Initial Cash Flow] assumes that payments are made for medical and health benefits and current service pension payments will be made while a plant is operating and then cease on the end of production date. The Forecast does not provide for the payment of any special pension payments as it is assumed these will be stayed in a CCAA filing.

69 The Court has approved the DIP Facility and, subject to this motion, the Initial Order. It is obvious that the DIP Facility and the Initial Order are integrally related. In consequence, if Automotive were to fail to use the funds available under the DIP Facility for the purposes that have been indicated for those funds in these CCAA proceedings, that would be a matter that might properly found a motion to the Court for relief. So the phrase "but not required" in paragraph 6

does not given Automotive a carte blanche to withhold contemplated payments, contrary to a suggestion that was made against the paragraph in the course of the hearing.

70 On the other hand, it is clear that the effect of the terms of the DIP Approval and paragraph 6 of the Initial Order is that Automotive, under the Order, is "not required" to make the special payments under its Pension Plans that would otherwise be required.

71 The requirement for the making of such special payments is a statutory requirement. The special payments are provided for in the pension benefits regime under the PBA and the related regulations, as set out in the relevant provisions excerpted above.

Jurisdiction under the CCAA re the Special Payments

72 The USW and the CAW submitted that the obligation under the pension benefits statutory regime to make special payments is an obligation under their respective collective agreements with Automotive. Those agreements require Automotive to maintain pension plans for members having certain specific features, principally relating to the amount of the pension to be earned and paid for the period of employment served by the employee. It was not shown that any provisions in the collective agreements do expressly require Automotive to comply with the statutory regime as to special payments. Rather, the submission seemed to be that because Automotive has an obligation under the Collective Agreement to maintain the pension plan and also has a statutory obligation in respect of pension plans it maintains to make certain special payments, that the contractual obligation impliedly includes the statutory obligations and therefore, any relief from the statutory obligation also constitutes relief from the contractual obligation under the Collective Agreement. Whenever it is argued, as here, that a term should be implied in a contract, the necessary question is why that is so and in this case, no answer is evident from the submissions. The implication was perhaps that it is self-evident but that may be debatable. The pension plan provisions in the collective agreements are addressed to the pension benefits that the plan is required to make available to the members and not to how that is to be done. On this basis, it would seem to be a stretch to say that just because a pension plan is required to conform to the statutory regime, the company sponsoring the plan has impliedly agreed with the bargaining agent to do so. This would suggest that all that the company has agreed to do in the Collective Agreement is to maintain a plan that provides for the benefits contracted for in the collective bargain.

73 However, that analysis may be unduly technical for purposes of the issues on this motion. The commitment of Automotive in its collective agreement to maintain pension plans would given rise to a reasonable expectation that it would keep those plans in good standing in accordance with applicable regulatory requirements designed to ensure that the plans will be able to meet their payment obligations. Moreover, at least one of the pension plans contains a provision which requires the making of all payments required by the applicable statutes. So the better approach is probably to regard the maintenance of the special payments as effectively contemplated by the collective agreements.

74 Even so, this consideration would be relevant to the issue of the jurisdiction of the Court to make the impugned order only if this relationship to the collective agreements gives rise to jurisdictional considerations that are different from those that arise by reasons of the payments being required pursuant to the PBA.

75 As observed by the Supreme Court of Canada in its decision in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, [2007] S.C.J. No. 27, 2007 SCC 27 at paragraph 86, collective bargaining is a fundamental aspect of Canadian society, which has emerged as the most significant collective activity through which the freedom of association protected by s. 2(d) of the Charter is expressed in the labour context. Recognizing that workers have the right to bargain collectively reaffirms the values of dignity, personal autonomy, equality and democracy.

76 This fundamental process of collective bargaining is entrenched in the laws of Ontario by the LRA, which provides a comprehensive scheme for employment relations. Among other things, that statute directs that:

(a) there shall only be one collective agreement in force between a trade union and an employer;
(b) the trade union that is a party to the collective agreement is recognized as the exclusive bargaining agent of the employees in the bargaining unit defined therein;
(c) the collective agreement is binding upon the employer and the employees;
(d) the collective agreement shall not be terminated by the parties before it ceases to operate in accordance with its provisions or the statute without the consent of the Labour Board on the joint application of the parties;

(e) a provision of a collective agreement may only be revised on the mutual consent of the parties;
(f) no employer and no person acting on behalf of an employer shall interfere with the representation of employees by a trade union; and,
(g) no employer shall, so long as a trade union continues to be entitled to represent the employees in a bargaining unit, bargain with or enter into a collective agreement with any person on behalf of or purporting, designed or intended to be binding upon the employees in the bargaining unit or any of them.

77 Based on these elements of the LRA, it appears that the employees cannot legally terminate their employment under their collective agreement before "it ceases to operate in accordance with its provisions or the LRA without consent of the O.L.R.B. on the joint application of the parties". The USW submits that therefore, the employees cannot legally terminate their services. However, whether this is so would depend first on whether the making of the Initial Order or its terms would allow the Collective Agreement to be terminated. No submissions were made that assist on this point.

78 Secondly, since the LRA provides that the Collective Agreement could be terminated with the consent of the Board, there is a question whether that consent could be obtained - a matter that was not canvassed in the submissions.

79 The above considerations relating to the LRA do not suggest that the relationship of the PBA requirements for special payments to the collective agreements should be considered to give those requirements any jurisdictional status for the issues in this case that would go beyond the implications that arise from the fact of those requirements being imposed pursuant to statute.

80 This result is not altered by the Court's recognition that collective bargaining is a fundamental aspect of Canadian society involving the exercise of the freedom of association protected by s. 2(d) of the *Charter*. It was not suggested that the Initial Order constitutes a breach of the *Charter* rights of the employees.

81 The Moving Parties rely upon the decision of Farley J. in *United Air Lines, Inc. (Re)* (2005), 45 C.C.P.B. 151 (Ont. S.C.J. [Commercial List]) as authority for the proposition that a CCAA debtor must in all circumstances continue to make special payments post-filing. *United Air Lines* involved a motion brought by UAL for an order authorizing it to cease making contributions to its Canadian pension plans. UAL applied for protection from its creditors pursuant to section 18.6 of the CCAA, whereby it sought recognition of a Chapter 11 proceeding in the United States. UAL had filed for bankruptcy protection in the United States in December 2002 and filed under section 18.6 of the CCAA in 2003. The motion was not brought until February 2005.

82 UAL was a large U.S. corporation that was attempting to restructure. It had an international workforce, including a small Canadian workforce. In its motion, it was seeking authority to cease making all contributions to its Canadian pension plans even though it continued to meet its pension funding commitments in all countries other than the United States and Canada. UAL's U.S. employees and retirees had the benefit of the protections provided by the Pension Benefits Guarantee Corporation, while the Canadian employees, as the beneficiaries of a federally regulated scheme, did not. UAL had not presented any evidence of its inability to make the pension payments.

83 After reviewing all of the facts, Farley J. summarized as follows at paragraph 7:

> As discussed above, the relative size of the Canadian problems *vis-a-vis* the U.S.A. problems is rather insignificant. It would not seem on the evidence before me that payment of funding obligations would in any way cause any particular stress or strain on the U.S. restructuring - given their relatively insignificant amounts in question. UAL had no qualms about making such payments in the other countries internationally. Additionally there is the issue of the U.S. situation having the benefit of the Pension Benefits Guarantee Corp. (as to which UAL would have paid premiums) but there being no such safety net in Canada on the federal level (and thus no previous premium obligation on UAL).

84 *United Air Lines* does not appear to stand for the proposition that all pension contributions, including special payments, must in all cases be paid by a CCAA debtor absent an agreement with its unions and FSCO. On the contrary, Farley J.'s decision states in paragraph 8 that it was made "on the basis of fairness and equity" after a consideration of the facts and circumstances existing in that case.

85 Based on the decision of the Court of appeal for Quebec in *Syndicat national de l'amiante d'Asbestos inc. et al. v. Jeffrey Mine Inc.*, [2003] Q.J. No. 264, there is a reason to consider that the "not required" clause does not purport to abrogate the pension plan obligations. It authorizes the company not to make payments on account of its obligations

during the currency of the Initial Order. Unpaid obligations would constitute debts of the company to be dealt with at the termination of its protection under the CCAA: see *Jeffrey Mine* paragraphs 60 to 62.

86 It was submitted that the text of the *Jeffrey Mine* decision at paragraph 57 shows that in that case there was no suspension of the special payments obligation in respect of the employees who continued to work in the post-filing period. The phrase in paragraph 57 that is relied on in this regard is that the monitor was authorized to suspend pension contributions "except for employees whose services are retained by the monitor". This phrase is stated in the text to be a translation. The text of the original version of the initial order in *Jeffrey Mine* is set out at paragraph 9 of the decision. Paragraph [22] of the order authorizes the monitor to suspend "contributions to pension plans made by employees other than those kept by the monitor". At paragraphs 10 and 11 of the decision, the text makes clear that, in respect of the pension plan, the monitor advised that the payments that would continue to be paid were the current service payments, which are described as monthly remuneration to the employees to be paid to them by being paid to the plan. Nothing is said there about making any other payments to the plan. Paragraphs 68 and 70 express the Court's rejection of paragraph 16 of the Court's Order of November 29, 2006 which exempted the monitor from the collective agreements. However, paragraphs 54 and 55 of the decision deal with the suspension by the Court of payments to offset actuarial liability, which would seem to be payments in the nature of the special payments that are in issue in the present case. At paragraph 55 the Court gave its opinion that it was within the power of the Superior Court to suspend those payments. The Court of Appeal may have been making a distinction between the powers of the monitor and the Court.

87 Based on the analysis set out earlier in these reasons, even if it is correct to view the "not required" provision as abrogating provisions of pension plan statutory law, the Court has the jurisdiction under the CCAA to make an order under the CCAA which conflicts with, and overrides, provincial legislation. There is no apparent reason why this principle would not apply to an order made under the CCAA which conflicts with the PBA.

88 Reference was made to s. 11.3(a) of the CCAA, which provides that no order made under s. 11 is to have the effect of prohibiting a person from requiring payment for services provided after the order is made. The Applicant is paying the wages and the current service obligations under the pension plans of the employees who continue to be employed. The special payments do not relate exclusively to the continuing employees. It is not shown (and does not seem to be submitted) that the amounts that might be required under the special payments arise from or are in connection with the current service obligations to the plan (assuming those obligations are paid in due course). The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.

89 Accordingly, this point does not alter the conclusion that the Court has the jurisdiction to approve the "not required" clause, notwithstanding its effect in respect of the special payments.

Exercise of the Statutory Discretion under the CCAA

90 There is a separate question raised whether it is a proper exercise of the discretion of the court for it to approve the provision in question. That question must be addressed in the context discussed above.

91 The evidence before this Court is that Automotive is incapable of making the special payments. Automotive does not have the funds necessary to make the special payments. As at July 19, 2007, Automotive had no cash of its own. In the five-week period from July 19, 2007 to August 25, 2007, Automotive had negative cash flow from operations of approximately $5 million. It is forecast that in the four-week period from August 26, 2007 until September 22, 2007 Automotive will have negative cash flow of approximately an additional $12 million. Since filing, Automotive has been wholly dependent on the DIP Loan to fund all disbursements.

92 Two other important considerations are evident in the present case. First, for the reasons given above, the effective suspension of special payments is a feature of the integrated arrangement which was made available by Chrysler as the DIP Lender and which was the arrangement which enabled the company to continue in operation. So there was and is a very good reason for the Court to approve that arrangement.

93 Secondly, the moving parties each had a full opportunity to object to the approval of the DIP Facility and none of them did so, even though it was clear from the terms of the DIP Facility and the terms of the Initial Order that they are an integrated arrangement. Instead of objecting to the DIP Facility, they have allowed it to be approved and have objected only to the related provisions of the Initial Order. In proceeding this way, it appears they have avoided facing the

question whether if they opposed the DIP Approval Order for the reasons they now advance in respect of the special payments, the DIP Lender might have resisted their demands at the first moment, to the detriment of the continuing employment of members, and they now seek to raise the issue now that the DIP lender is in place and has been advancing funds, in circumstances where the only practical consequence could be to raise the question which would have appropriately been raised at the earlier stage.

94 Chrysler submitted that this conduct is a collateral attack on the DIP Approval Order and should not be countenanced by the Court.

95 The Initial Order was approved on July 19, 2007 with a provision in paragraph 3 providing for a further hearing on July 30, 2007 (the "Comeback Date") at which time the Initial Order could be supplemented or otherwise varied. On July 30, 2007 the Court ordered the approval of the DIP Facility. It ordered an extension of the Stay Period to August 24, 2007.

96 The Court did not make any order to supplement or vary the Initial Order in any other respects. Neither did it make any order to the contrary. Nor does it appear from the recitals in the DIP Approval Order that the Court was asked on that motion to deal with the Initial Order in other respects. Stinson J., in his endorsement of July 30, 2007 approving the issuance of the DIP Approval Order, recorded the requests on behalf of the Superintendent and the USW that he record their respective clients' reservation of rights in relation to the pension fund payment and other matters referenced in paragraphs 6(a), 11(b) and (d) and paragraph 26 of the Initial Order. Since this reservation was recorded at the same time as the DIP Approval Order was granted and without any order being granted at that time to deal with any variations to the Initial Order, this raises a question of whether it is fair to regard the motion now before the Court as a collateral attack on the DIP Approval Order.

97 It is important that, in the Initial Order at paragraph 34, the DIP Facility was ordered to be on the terms and conditions in the DIP Term Sheet and Commitment Letter dated as of July 18, 2007 which was approved in that paragraph subject to a further hearing on the Comeback Date. Covenant No. 1 in the DIP Term Sheet and Commitment Letter provides that the Borrower shall not without the Lender's prior written consent make any material disbursement unless it is contemplated in the initial cash flow or any subsequent cash flow approved by the Lender.

98 As noted earlier, on the motion to approve the Initial Order the Court had affidavit information from Automotive that the DIP Loan does not provide for the funding of any special payments, along with a copy of the cash flow which states that no provision is made for the payment of any special pension payments.

99 So, based on the above analysis, the Court, in the Initial Order, by reason of paragraph 34 (as to which no reservation of a right to object has been made or is now asserted), has ordered that the DIP Loan is not to be applied to special payments except with the consent of the DIP Lender.

100 The Superintendent seeks an order requiring the Applicant to pay the Special Payments. For the reasons given above, such an order would constitute a collateral attack on DIP Approval because the evidence is that the Applicant has no funds available to it other than the DIP Loan. Consequently, the order the Superintendent requests would effectively order the Applicant to use the DIP Loan for a purpose which, pursuant to paragraph 34 of the Initial Order, is not permitted.

101 Chrysler's agreement to act as DIP lender is based on the fact that the Applicant's supply is required to maintain Chrysler's own just-in-time vehicle manufacturing operations. The Superintendent submits that if Chrysler has concluded that it requires the output derived from the labour of the employees, then it is only fair and equitable that Chrysler bears the cost, in terms of remuneration to the employees including special payments to the Pension Plans, of that labour.

102 In the decision in *Ivaco Inc. (Re)* (2005), 47 C.C.P.B. 62 at paragraph 4 (Ont. S.C.J. [Commercial List]) (affirmed (2006) 275 D.L.R. (4th) 132 (Ont. C.A.), leave to appeal granted [2006] S.C.C.A. No. 490) at the first instance, Farley J. characterized the nature of special payments, stating that "notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a fresh' obligation".

103 The amount of the outstanding special payments in the present case appears to have been determined prior to the Initial Order based on information relating to the pre-filing period. It is not apparent that the continuation of the operations of the Applicant in the post-filing period has given rise to an increase in the amount of the special payments from

the amount that would otherwise have been applicable by reason of the pre-filing experience. Consequently, it seems tendentious to characterize the outstanding special payments as the costs of operating in the post-filing period.

104 The Superintendent objects that the approach that has been taken by the Applicant in the present case has been done without the requisite negotiation with the Superintendent and the pension plan stakeholders. In the decision in *United Airlines, Inc., supra*, Farley J. cited the example of a case where the company obtained specific relief from the requirement to make special payments although current service costs were made. The Court, however, concluded that such an arrangement "is not a given right' of the company" and is to be achieved "on a consensual basis after negotiation" with the pension plan stakeholders.

105 If there had been an objection to paragraph 34 of the Initial Order, that might well have occasioned negotiations of this kind, but there was no such objection. As noted, if there had been, each side could have assessed its own interests *vis-à-vis* the position of the other and the extent to which it would take the risk of insisting on its position or instead seek a compromise. Instead, what has happened is that the DIP Facility has proceeded without objection and the DIP Lender has changed its position on the basis of the Court orders given to date and now, after it has done so, an effort is made to put it in a position where it has no choice but to increase its funding or risk the loss of the continuing operations. This might yield a negotiation but it would be a lopsided one by reason of the DIP Lender already having provided funding in accordance with the Court orders.

106 The USW contends that its submissions in respect of paragraph 6 of the Initial Order are not in conflict with paragraph 34 because they do not seek an order that the DIP Lender provide the funds that Automotive would require to make the special payments or that Automotive make the payments, but only that it not be ordered that Automotive is not required to make those payments.

107 Since the material before the Court is to the effect that Automotive had and has no funds and has no expectation of having funds available which could be used to make the special payments, other than the monies available under the DIP Facility, if the Court were now to countenance and make the amendment to paragraph 6 which the moving party seeks, the necessary practical consequence of that amendment would be to allow pressure to be put on the DIP Lender to increase its funding commitment to Automotive and consent to Automotive making the special payments, because Automotive would otherwise be potentially vulnerable to proceedings to force it to meet its payment obligations and there would inevitably be concerns about the consequences that could flow from default on its part. That situation would be contrary to the expectations which both Automotive and the DIP Lender would reasonably have been entitled to hold in respect of the Initial Order. It might well be different if the moving party had instead sought an order that the "not required" clause in paragraph 6 should be subject to a proviso that it would not apply to the extent that payment of such amounts could be funded out of monies other than from the DIP Facility. There is no alternative request for such a proviso, perhaps because no one expects it would be of any use.

108 So what remains is a request that the Court, in the exercise of its discretion under s. 11, should make an order that would be contrary to the reasonable expectations of the Applicant and the DIP Lender based on the steps already taken and the orders already granted under the CCAA in this proceeding. That would be unfair and it would not contribute to the fair application of the CCAA in this case or as a precedent for others.

109 Moreover, the failure of the moving parties to reserve in respect of and then dispute paragraph 34 of the Initial Order has the following unsatisfactory effect. If the moving parties had duly disputed paragraph 34 there would have been an opportunity for the Court to consider what would have been the two opposing positions on whether the DIP terms proposed by the DIP Lender should be accepted. If that question had properly been put in issue, then there would also have been an opportunity for each side to consider whether it would seek to press its position or would compromise for the sake of the respective potential benefits to each side. No such opportunity would exists with the request that is now before the Court. So the request should not be granted.

110 For the reasons given above, there is no fair way at the present time to put the parties on a level playing field for negotiation about the special payments. For the reasons mentioned at other points above, it is desirable to ensure that there is an opportunity for such negotiation in CCAA circumstances, as an important means of achieving the most satisfactory arrangements for all concerned to the extent possible. With these considerations in mind, it is appropriate to take into account that the period of the application of the Initial Order was extended by Court order and will expire on the date set by the last such Order unless further extended. If a motion is made for a further extension of the Initial Order beyond its present expiry date, there would seem to be no basis in the above reasons to object to the legitimacy of interested parties raising an objection to paragraph 6 at that time, provided they are also prepared to object to paragraph 34.

Paragraph 11

111 The objection taken by the USW is that the provisions of s. 11 are open to an interpretation that would permit Automotive to repudiate its collective agreements with the USW's members.

112 Paragraph 11 is stated to be subject to covenants in the Definitive Documents as defined in the Initial Order. (They appear to be certain security documents.) The provision does not state that the right to terminate is subject only to such covenants. No mention is made in paragraph 11 of other obligations to which the Applicant may or may not be subject.

113 The USW seeks to have the rights provided for in clauses (b) and (d) of paragraph 11 made subject to all applicable collective agreements and labour laws. Those rights can only be exercised by agreement with the affected employees or other counterparty or under a plan filed under the CCAA, failing which the matters are to be left to be dealt with in any plan of arrangement filed by the Applicant under the CCAA. Nothing in the provision purports to abrogate any applicable collective agreement or labour laws. No reason was advanced why the authorized bargaining agent could not withhold agreement to any proposed exercise of clause (b) or (d) and if Automotive then sought to deal further with the matter pursuant to the CCAA there is no apparent reason why the matter could not be pursued against Automotive in court under the CCAA.

114 Reference is made to the discussion set out earlier with respect to the provision in paragraph 4 relating to further hirings. The comments made there are, with appropriate changes, applicable with respect to the issue relating to paragraph 11.

Paragraph 26

115 The USW and the CAW object to the part of paragraph 26 which provides that the monitor, by fulfilling its obligations under the Initial Order, shall not be deemed to have taken control of the business or be deemed to have "been or become an employer of any of the Applicant's employees." [The word "employees" does not appear in the text of the Order in certain of the materials, but it is obviously intended.]

116 The USW objects to the provision on the basis that the determination of whether the monitor is an employer is within the exclusive jurisdiction of the O.L.R.B. by reason of s. 69, s. 111 and s. 116 of the LRA. Section 69(2) of that Act provides that a person to whom an employer sells its business becomes the employer (the "successor employer") for the purposes specified in that section until the Board declares otherwise.

117 The Initial Order does not expressly purport to determine the application of s. 69(2) of the LRA, since it does not refer to that Act. The application of paragraph 26 is stated to be limited to the monitor in its limited role under the Initial Order, which leaves the Applicant in possession and control of the business and, therefore, as the employer . This consideration has been regarded as determinative in finding such a provision to be acceptable: see the *Jeffrey Mine* decision at paragraph [76].

118 The discussion in *Re Jeffrey Mine* about a provision of this kind did not address statutory provisions such as s. 69(2) of the LRA.

119 As worded, it is not apparent that paragraph 26 warrants the concern expressed by the USW. It seems reasonable to assume that if the monitor were to take action of a kind that would suggest that the monitor has started to act *de facto* as the employer, in breach of paragraph 26, a motion might be brought before the Court under the CCAA and/or to the Ontario Labour Relations Board and the matter would then be considered in the context of an actual fact situation rather than in the present abstract and ill-defined circumstances. No order to give effect to the objection of the USW and the CAW in respect of this feature of paragraph 26 is appropriate at the present time.

Paragraph 29

120 The USW objects that the immunity, or limitation of liability, provided to the monitor in the first sentence of paragraph 29 is not within the jurisdiction of the Court under the CCAA, or if it is, the granting of this immunity is not a proper exercise of the discretion of the Court. The impugned provision limits liability to gross negligence and willful misconduct.

121 There was no reservation of rights in the endorsement of Stinson J. of July 30, 2007 with respect to this paragraph.

122 The USW cites no authority that has been decided with respect to the CCAA in support of its contention that the limitation of liability is beyond the jurisdiction of the Court under the CCAA. In view of the stay jurisdiction of s. 11 of the CCAA and taking into account the "on such terms" jurisdiction under that section, it might seem that the better view is that the Court does have the jurisdiction to make such an order and that the only issue is whether the grant of limited liability of the kind specified is a proper exercise of the discretion of the Court.

123 The USW submits that other court decisions show that the Court does not have the jurisdiction to grant a limitation of liability to the monitor of the kind set out in paragraph 29.

124 In *GMAC Commercial Credit Corp. - Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123 ("*T.C.T. Logistics*"), the Supreme Court of Canada held that the "boiler plate" immunization of the receiver, though not uncommon in receivership orders, was invalid in the absence of "explicit statutory language" to authorize such an extreme measure:

> Flexibility is required to cure the problems in any particular bankruptcy. But guarding that flexibility with boiler plate immunizations that inoculate against the assertion of rights is beyond the therapeutic reach of the Bankruptcy and Insolvency Act.
>
> ...
>
> As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, 2004 SCC 3 (CanLII), [2004] 1 S.C.R. 60, 2004 SCC 3:
>
> > ... explicit statutory language is required to divest persons of rights they otherwise enjoy at law ... [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]

125 The USW also relies on s. 11.8(1) of the CCAA. Indeed, subsection 11.8(1) explicitly exempts a monitor from liability in respect of claims against the company which arise "before or upon the monitor's appointment":

> 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.

126 The decision in *T.C.T. Logistics* did not deal with the CCAA. The monitor in that case had been appointed by the Court with a mandate to hire employees and carry on the business, but in the present case the monitor is restricted from hiring any employees and Automotive remains the employer of all of the unionized employees. The statements quoted from the *T.C.T. Logistics* decision are made in the context of a consideration of the issue whether a bankruptcy court judge can determine successor rights issues relating to the LRA. The immunity given in that case was that no action could be taken against the interim receiver without the leave of the Court.

127 Section 11.8(1) deals with the situation where a monitor carries on in that position the business of a debtor company or continues the employment of the company's employees and it provides a blanket immunity against claims which arose before or upon the monitor's appointment. It is understandable that in the situation addressed in the section that the immunity would be limited to such claims and that it would be a blanket immunity in respect of such claims. The existence of s. 11.8(1) does not given rise to any implication as to what kind of limitation of liability would be reasonable in respect of a monitor with the limited powers given in the present case.

128 The specific wording in paragraph 29 of the Initial Order is consistent with the standard limitation of liability protections granted to monitors under the standard-form model CCAA Initial Order, which was authorized and approved by the Commercial List Users' Committee on September 12, 2006.

129 That is, of course, not determinative but it suggest that the clause has received serious favourable consideration from members of the bar in a context unrelated to particular party interests.

130 The monitor submitted in its factum a list of twelve recent CCAA proceedings in which orders have been granted with similar provisions to the limitation of liability in this case. This would seem to suggest that in those cases the clause limiting liability was not disputed or, if it was, the Court found the clause to be acceptable.

131 For these reasons, paragraph 29 is acceptable.

Paragraph 4 of the CRO Order

132 The USW advances the submissions made with respect to jurisdiction as regards the monitor based on *T.C.T. Logistics* against the clause limiting the liability of the CRO.

133 Automotive does not have D&O insurance in place. The protection set out in paragraph 4 of the CRO Order can reasonably be regarded as a fundamental condition of Axis Consulting Group Inc. and Mr. Rutman's agreement to accept and continue as CRO. Automotive would probably be severely restricted in its ability to appoint a capable and experienced Chief Restructuring Officer without the ability to offer a limitation on potential liability.

134 The USW's claim that the Court does not have authority to grant this protection to the CRO is contrary to established practice. These protections are consistent with limitations of liability granted to Chief Restructuring Officers in other CCAA proceedings, and are consistent with the protections granted to Monitors under the standard-form CCAA Initial Order. The same or similar language was used in paragraph 19 of the Order of July 29, 2004 in the Stelco Inc. CCAA proceedings and in paragraph 3 of the Order of November 28, 2003 in the Ivaco Inc. CCAA proceeding, both granted by Farley J.

135 In *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, [2007] S.J. No. 154 the Saskatchewan Court of Queen's Bench upheld a similar limitation of liability for the Chief Restructuring Officer of Bricore. In dismissing a motion to lift the stay against the Chief Restructuring Officer, Koch J. stated:

> The [CCAA] is intended to facilitate restructuring to serve the public interest. In many cases such as the present it is necessary for the Court to appoint officers whose expertise is required to fulfill its mandate. It is clearly in the public interest that capable people be willing to accept such assignments. It is to be expected that such acceptance be contingent on protective provisions such as are included in the order of May 23, 2006, appointing Mr. Duval. It is important that the Court exercise caution in removing such restrictions; otherwise, the ability of the Court to obtain the assistance of needed experts will necessarily be impaired. Qualified professionals will be less willing to accept assignments absent the protection provisions in the appointing order.

136 The Saskatchewan Court of Appeal upheld the decision, [2007] S.J. No. 313.

137 The terms of the limitation of liability given to the CRO are similar to the limitation in the indemnity ordered in paragraph 21 of the Initial Order to be given by the Applicant to the directors and officers of the Applicant. The moving parties have not requested any amendment of that paragraph.

138 It is hard to imagine how a prospective CRO would be prepared to take on the responsibilities of that position in the context of a situation like the present one, fraught as it is with obvious conflicting interests on the part of the different parties involved and a background of action in the work place and litigation in court, without significant protection against liability.

139 Paragraph 4 of the CRO Order appears satisfactory for the above reasons.

Conclusion

140 For the reasons given above, the motions are dismissed.

141 Counsel may make written submissions as to costs if necessary.

J.M. SPENCE J.

cp/e/qlaxs/qlmxt/qlhcs/qlisl

TAB 10

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 se-

cured 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 ex-

pression of the legislative will. In Re Westar Mining Ltd.[10], Macdonald J. referred to Baxter and established the principle that would be followed in several judgments:

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

[58] Certain decisions rendered by the Court of Appeal on other CCAA related matters show that the Court of Appeal shares the same vision as the other Canadian courts regarding the need for a broad, liberal interpretation in order to give effect to the objectives of the CCAA.

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

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

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

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

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

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

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

...

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

...

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

III. The monitor's role

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

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

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

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

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

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

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

40 Thus, the orders rendered specified correctly that the monitor could not be considered the employer of the employees kept on or recalled, since Jeffrey Mine Inc. remained their employer. In paragraph 14 of the decision in Royal Oak Mines (Re), [2001] O.J. No 562, the Court of Appeal of Ontario stated that the monitor appointed under the CCAA, to which the court had also entrusted interim receiver powers under section 47 BIA, did not become the employer even if it operated, as the debtor remained the employer:

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

[My emphasis]

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

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

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

IV. The CCAA and the appellants' exclusive representation

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

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

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

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

V. The working conditions of employees kept on or recalled

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

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

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

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

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

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

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

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

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

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

56 In Royal Oak Mines Inc. (Re), cited above, the Court of Appeal of Ontario was seized of an appeal by the union, which contested the validity of that part of the initial order preventing the monitor, authorized to continue operating the

company, from making contributions to the pension plan without the authorization of the court. The Court of Appeal dismissed the appeal in the following terms:

> [11] The appellants submitted that paragraph 33 was beyond the power of the Court to order and, in effect, that paragraph 33 was illegal. They argued that the power of the interim receiver[27] could not exceed the power of Royal Oak and that as Royal Oak could not legally refuse to pay the pension benefits owing under its collective agreements, the Court could not authorize the interim receiver to refrain from paying them.
>
> [12] This submission misconstrues or mischaracterizes the situation. Royal Oak sought the protection of the CCAA, because it was incapable of dealing with the claims against it. The appointment of an interim receiver was sought in April 1999 by Royal Oak, its banker and other creditors because, as one counsel put it, Royal Oak's management had disappeared. It was hoped that with careful management the operations could be salvaged and the mines sold to others.
>
> [13] The interim receiver, however, had no funds with which to pay debts or with which to continue Royal Oak's operations. Nor did Royal Oak. Work could only begin or continue, and debts could only be paid with the infusion of financial support from Trilon Financial Corporation ("Trilon"), Northgate Exploration Limited ("Northgate") and other prospective lenders. What operations were to be continued and what debts were to be paid were decided upon in advance by PwC and then authorized by Court order.
>
> [14] The obligation to pay pension benefits was an obligation of Royal Oak under the collective agreement. That obligation was not altered by the order of April 16, 1999 because Royal Oak remained the employer. That obligation, however, was not honoured by Royal Oak for the simple reason that Royal Oak had no funds. PwC was under no obligation to pay the pension benefits; it was not the employer of the employees, nor was it the agent of Royal Oak. PwC's obligation and liabilities, positive and negative, were spelled out in the order of April 16, 1999. In our view, s. 47(2) of the BIA gave the Court jurisdiction to make the order, including paragraph 33[28].
>
> [15] Indeed, all that paragraph 33 of the order of April 16, 1999 did was to make it clear to the interim receiver and to others that the money being advanced by Trilon, Northgate and others was not to be applied to pension benefits without the express direction and authority of the Court. Between April 16 and August 29, 1999, approximately $37,174,400. was advanced pursuant to the terms of the order of April 16, 1999 in order to keep Royal Oak in operation.
>
> [16] It was argued that the inclusion of paragraph 33 in the order served to undermine the collective agreement which provided for the payment of pension benefits. We do not accept that submission. The benefits were not paid because Royal Oak had no funds with which to pay the and the financial support available to the receiver did not provide for such payments.
>
> [My emphasis]

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

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

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

VI. Recapitulation

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

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

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

VII. Conclusions sought by the appellants

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

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

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

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

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

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

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

VIII. Conclusion and disposition

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

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

PIERRE DALPHOND J.A.

cp/i/qw/qlisl/qlesc/qljxl

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

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

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

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

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

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

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

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

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

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

11 Ibid. at 93.

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

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

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

15 Michaud v. Steinberg, supra, at 1690.

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

17 Ibid. at 191.

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

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

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

21 Section 33 of the winding-up Act.

22 Section 35 of the Winding-up Act.

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

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

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

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

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

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

TAB 11

Intitulé de la cause :

Abitibibowater inc. (Arrangement relatif à)

DANS L'AFFAIRE DU PLAN D'ARRANGEMENT DE : ABITIBIBOWATER INC., ABITIBI-CONSOLIDATED INC., BOWATER CANADIAN HOLDINGS INC. et les autres requérants mentionnés aux annexes A, B, C et D,
requérants
et
ERNST & YOUNG INC, mise en cause

[2009] J.Q. no 4473

2009 QCCS 2028

74 C.C.P.B. 254

2009 CarswellQue 4329

J.E. 2009-1058

[2009] R.J.Q. 1415

57 C.B.R. (5th) 285

EYB 2009-158507

No : 500-11-036133-094

Cour supérieure du Québec
District de Montréal

L'honorable Danièle Mayrand, J.C.S.

Entendu : 4 mai 2009.
Jugement oral : 7 mai 2009.
Jugement écrit : 8 mai 2009.

(64 paragr.)

Faillite et insolvabilité -- Réclamations -- À l'encontre de régimes de retraite enregistrés et de fonds détenus en fiducie -- La Cour supérieure a juridiction pour décider s'il y a lieu d'ordonner la suspension des cotisations d'équilibre à la caisse d'un régime complémentaire de retraite -- La situation financière d'AbitibiBowater commande la suspension du paiement des cotisations d'équilibre, étant donné que la restructuration est vouée à l'échec si les cotisations mensuelles sont versées -- Requêtes accueillies -- Loi sur les arrangements avec les créanciers des compagnies, art. 11(3) et (4).

Faillite et insolvabilité -- Loi sur les arrangements avec les créanciers des compagnies -- Aux termes de l'art. 11(3) de la Loi sur les arrangements avec les créanciers des compagnies, l'ordonnance initiale ne peut suspendre les droits ou créances qui résultent d'obligations relatives à la fourniture de services ou de biens après l'ordonnance initiale -- Or, la preuve démontre que les cotisations d'équilibre visent à combler un déficit pour des services antérieurs au dépôt de la requête initiale -- La situation financière d'Abitibi commande la suspension du paiement des cotisations d'équilibre -- Requêtes accueillies -- Loi sur les arrangements avec les créanciers des compagnies, art. 11(3) et (4).

AbitibiBowater inc. et ses autres sociétés affiliées (Abitibi) demandent au Tribunal de suspendre le versement de certaines cotisations aux régimes de retraite de ses filiales Abitibi et Bowater -- Elle prétend que si elle continue à verser les cotisations pour services passés et les paiements spéciaux aux caisses de retraite, elle sera incapable de procéder à sa restructuration, puisque ses liquidités seront alors insuffisantes -- Tant le contrôleur que le comité ad hoc, qui représente les détenteurs d'obligations non garanties, et le prêteur intérimaire Fairfax Financial Holdings Ltd., qui a consenti un financement à Bowater, appuient cette demande -- Le Syndicat canadien des communications de l'énergie et du papier, le Syndicat des employés professionnels et de bureau, ainsi que la Fédération des travailleurs et travailleuses du papier et de la forêt la contestent -- Les organismes responsables de la réglementation et de l'application des lois aux divers régimes de retraite visés par la présente requête n'appuient ni ne contestent la requête -- Ils considèrent toutefois que, dans la mesure où les cotisations d'équilibre sont suspendues, elles ne peuvent faire l'objet d'un compromis pendant la restructuration -- DISPOSITIF : Requêtes accueillies -- La Cour supérieure a juridiction pour décider s'il y a lieu d'ordonner la suspension des cotisations d'équilibre à la caisse d'un régime complémentaire de retraite -- La question n'est pas nouvelle et a fait l'objet de décisions par les tribunaux québécois et canadiens -- Les participants aux régimes de retraite n'ont pas un statut distinct -- Les créances en cause sont des créances ordinaires, que le législateur n'a pas choisi de protéger dans le contexte de la présente restructuration -- Aux termes de l'art. 11(3) de la Loi sur les arrangements avec les créanciers des compagnies, l'ordonnance initiale ne peut suspendre les droits ou créances qui résultent d'obligations relatives à la fourniture de services ou de biens après l'ordonnance initiale -- Or, la preuve démontre que les cotisations d'équilibre visent à combler un déficit pour des services antérieurs au dépôt de la requête initiale -- Les évaluations actuarielles, qui ont déterminé les montants des cotisations d'équilibre et dont on demande la suspension, sont toutes antérieures au dépôt de la demande initiale -- La situation financière d'Abitibi commande la suspension du paiement des cotisations d'équilibre -- La restructuration est vouée à l'échec si les cotisations mensuelles sont versées -- Abitibi, de concert avec l'ensemble de ses créanciers, employés, prêteurs et fournisseurs, peut réussir son pari et sortir de l'impasse en convenant d'un arrangement pour remettre l'entreprise sur les rails, à court ou moyen terme.

Législation citée :

Loi sur la faillite et l'insolvabilité, art. 81.5

Loi sur les arrangements avec les créanciers des compagnies, art. 11(3), art. 11(4)

Loi sur les régimes complémentaires de retraite, L.R.Q., c. R.- 15.1, art. 49

Pension Benefit Act, R.S.O. 1990 c. P.8, art. 57(3)

Avocats :

Mes Guy P. Martel, Joseph Reynaud et Mélanie Béland, procureurs des requérantes.

Me Gilles Paquin, procureur du contrôleur.

Me Frederick L. Myers, procureur du ad hoc Committee of Bondholders

Me Nicolas Plourde, procureur de Fairfax Financial Holdins Ltd.

Me Yves Saint-André, procureur du SCEP et du SEPB.

Me Jean-François Cliche, procureur de la Fédération des travailleurs et travailleuses du papier et de la forêt.

Me Pierre Lecavalier, procureur du Procureur général du Canada.

Me Louis Robillard, procureur de la Régie des rentes du Québec, de la Commission des services financiers de l'Ontario, et du Surintendant des pensions de la Colombie-Britannique.

MOTIFS D'UN JUGEMENT PRONONCÉ SÉANCE TENANTE LE 7 MAI 2009
SUR LA REQUÊTE POUR SUSPENSION DES COTISATIONS
AUX RÉGIMES DE RETRAITE (No 37)

MISE EN SITUATION

1 *AbitibiBowater inc.* et ses autres sociétés affiliées demandent au Tribunal de suspendre le versement de certaines cotisations aux régimes de retraite de ses filiales Abitibi (20) et Bowater (13).

2 Lors de la présentation de la requête pour ordonnance initiale, le juge responsable de la supervision du présent dossier a reporté cette demande spécifique, alors contenue aux paragraphes 22 et suivants de requête initiale, devant la soussignée et après que les parties intéressées en aient été avisées.

3 Au soutien de sa demande, présentée en vertu de l'article 11(3) et (4) de la *Loi sur les arrangements avec les créanciers des compagnies* LACC[1], *Abitibi* prétend que, si elle continue à verser les cotisations pour services passés et les paiements spéciaux (cotisations d'équilibre aux fins du présent jugement) aux caisses de retraite, elle sera incapable de procéder à sa restructuration puisque ses liquidités seront alors insuffisantes, et ce, même en tenant compte des financements intérimaires qui lui sont octroyés.

LES INTERVENANTS

4 Tant le contrôleur que le comité *ad hoc*, qui représente les détenteurs d'obligations non garanties, à hauteur de 3 G $ et le prêteur intérimaire *Fairfax Financial Holdings Ltd.*, qui a consenti un financement de 40 M $ à *Bowater*, appuient cette demande formulée par *Abitibi*.

5 Le *Syndicat canadien des communications de l'énergie et du papier* (SCEP), le *Syndicat des employés professionnels et de* bureau (SEPB), ainsi que la *Fédération des travailleurs et travailleuses du papier et de la forêt* la contestent.

6 Les organismes responsables de la réglementation et de l'application des lois aux divers régimes de retraite visés par la présente requête, soit la *Régie des rentes du Québec*, la *Commission des services financiers de l'Ontario*, *Le Surintendant des pensions de la Colombie-Britannique* et *Le Surintendant des régimes de retraite du Canada*, sont aussi intervenus.

7 Ils n'appuient ni ne contestent la requête. Ils considèrent toutefois que, dans la mesure où les cotisations d'équilibre sont suspendues, elles ne peuvent faire l'objet d'un compromis pendant la restructuration. À leur demande, *Abitibi* a acquiescé à l'ajout de la conclusion suivante :

> Nothing in this order shall be taken to extinguish or compromise the obligations of the Petitioners or Partnerships, if any, regarding payments under the Pension Plans.

8 Les procureurs de ces organismes ont, par ailleurs, informé le Tribunal qu'ils s'apprêtent à déposer une requête pour faire établir les cotisations d'exercice de manière différente de celle faite par *Abitibi*.

PROLOGUE

9 Dès à présent, il convient d'apporter certaines précisions aux fins de bien comprendre les enjeux débattus par les parties. Une distinction s'impose en effet entre le financement d'un régime de retraite et les droits et prestations qui y sont prévus.

10 La demande de suspension met en cause une partie des engagements légaux et contractuels d'*Abitibi* à l'égard du financement des régimes de retraite qu'elle a mis sur pied au bénéfice de ses employés et pour lesquels elle a l'obligation de combler tout déficit actuariel.

11 En d'autres mots, *Abitibi* ne demande pas de modifier les termes des régimes ou des conventions collectives, mais plutôt de suspendre l'exécution d'une partie de ses obligations de financement, soit le versement des cotisations d'équilibre. Il n'est pas question de suspendre les cotisations d'exercice, c.-à-d. pour le service courant, qu'*Abitibi* continuera de verser pendant la restructuration.

LES COTISATIONS D'ÉQUILIBRE

12 L'ampleur des montants en cause est considérable.

13 Ce sont les évaluations actuarielles, effectuées pour chaque régime de retraite, qui identifient les déficits actuariels et les cotisations à verser. Ces évaluations sont nécessaires afin de tenir compte de la performance et des fluctuations de la caisse de retraite et des événements qui surviennent en cours de régime.

14 Suivant ces évaluations actuarielles, lors de la demande initiale, le déficit de solvabilité (c.-à-d. si les régimes se terminaient aujourd'hui) est de l'ordre de 1,383 G $ pour l'ensemble de tous les régimes de retraite d'*Abitibi* et de *Bowater*.

15 Les cotisations d'équilibre visent à renflouer le déficit de solvabilité de la caisse de retraite et sont amorties sur une période de cinq ans.

16 Le déficit de solvabilité du régime d'*Abitibi* est de 962 M $. Quant à celui de *Bowater*, il atteint 419 M $. Il faut, par ailleurs, ajouter à ce montant le déficit actuariel d'environ 70 M $ suite aux bonifications apportées aux régimes de retraite et entrées en vigueur le 1er mai 2009, et que le juge Gascon a refusé de modifier dans le cadre du jugement qu'il rendait le 4 mai dernier.

17 Selon le rapport du contrôleur et le témoignage de l'actuaire des régimes, les cotisations d'équilibre, requises pour amortir le déficit de solvabilité sur une période de cinq ans, sont de 102,4 M $ par année pour *Abitibi* (8,5 M $ par mois) et de 56,9 M $ par année pour *Bowater* (4,7 M $ par mois), soit un versement mensuel global de 13,2 M $.

LES COTISATIONS D'EXERCICE

18 Il s'agit des cotisations requises d'*Abitibi* aux fins de financer le service courant de ses employés actifs. Elles sont de 43,7 M $ par année, soit 28,6 M $ pour le régime d'*Abitibi* et 15,1 M $ pour le régime de *Bowater*.

19 Il convient d'y ajouter les cotisations de 400 000 $ pour l'ensemble des régimes en vigueur depuis le 1er mai 2009.

20 *Abitibi* continuera de verser ces cotisations à la caisse de retraite pendant la restructuration.

LES QUESTIONS EN LITIGE

21 Trois questions sont en cause dans la présente affaire, à savoir :

1) La Cour supérieure a-t-elle juridiction?
2) Les cotisations d'équilibre visent-elles à combler un déficit pour des services antérieurs au dépôt de la demande initiale?
3) Dans l'affirmative, est-il alors approprié, dans les circonstances, d'en suspendre le paiement pendant la période de restructuration?

ANALYSE

1) La Cour supérieure a-t-elle juridiction?

22 Les objectifs de la LACC ont été exprimés par le juge Gascon[2] dans le cadre du jugement qu'il a rendu le 4 mai dernier dans la présente affaire. Le tribunal abonde dans le même sens et fait siens les propos qu'il énoncent aux paragraphes 3 à 14 de son jugement.

23 Le Tribunal ajoute que la LACC a été instaurée en 1933, lors de la *Grande Dépression*,pour faire face à la crise économique mondiale. Utilisée fréquemment à ses débuts, elle a, par la suite, connu une période d'accalmie. Toutefois, depuis une vingtaine d'années, elle a connu une renaissance remarquable. Plusieurs ont douté de la pertinence de recourir à cette loi unique dans le contexte d'une économie plus florissante. Face au chaos économique et financier international, on peut, aujourd'hui, affirmer, sans se tromper, que cette législation a reconquis ses lettres de noblesse.

24 Abordant maintenant la question de la juridiction du Tribunal en vertu de la LACC, il convient de bien comprendre la nature et la portée des conclusions recherchées.

25 Le Tribunal réitère que les prestations et les avantages, qui découlent des régimes de retraite et qui font partie des conventions collectives, ne peuvent être modifiés unilatéralement. Cette question a déjà été résolue par la Cour d'appel

du Québec dans trois dossiers différents : *Mine Jeffrey*[3], *Uniforêt*[4] *et TQS*[5]. Le juge Gascon l'a à nouveau affirmé, le 4 mai dernier, dans le présent dossier.

26 La demande a trait au financement des régimes de retraite. En effet, *Abitibi* demande de suspendre l'exécution de son obligation de financer en partie les régimes de retraite, en suspendant ses cotisations d'équilibre.

27 La Cour supérieure a juridiction pour décider s'il y a lieu d'ordonner la suspension des cotisations d'équilibre à la caisse d'un régime complémentaire de retraite. La question n'est pas nouvelle et a d'ailleurs fait l'objet de décisions par les tribunaux québécois et canadiens.

28 Dans l'arrêt *Mine Jeffrey*[6], la débitrice avait obtenu la protection de la LACC pour se restructurer. La Cour d'appel du Québec a, d'une part, décidé que l'employeur ne pouvait modifier unilatéralement le contrat collectif de travail, mais a fait droit à la demande de suspension des cotisations d'équilibre, pendant la période de restructuration.

29 La suspension des cotisations d'équilibre a aussi été ordonnée dans l'affaire de *Papiers Gaspésia*[7] par le juge Chaput de cette Cour.

30 Plus récemment, dans *Collins* c. *Eickman Automotive Canada Inc.*[8], le juge Spence de la Cour supérieure de l'Ontario fait une revue exhaustive de la jurisprudence canadienne sur la question (dont l'arrêt de la Cour d'appel dans *Mine Jeffrey*)[9].

31 Le juge Spence soulève la distinction importante entre les droits qui découlent d'une convention collective, notamment ceux prévus dans le régime de retraite, et l'exécution des obligations pour y donner effet. Du point de vue juridictionnel, il ajoute que, malgré le cadre statutaire provincial qui oblige l'employeur à verser des cotisations d'équilibre ponctuellement, il n'en demeure pas moins qu'il s'agit de créances qui peuvent être suspendues et qui seront traitées lorsqu'il sera mis fin à la protection offerte en vertu de la LACC.

32 Le Tribunal partage cet avis et considère dès lors avoir juridiction pour trancher la question qui lui est soumise.

33 Avant d'aborder la seconde question en litige, il y a lieu de répondre à l'une des prétentions des syndicats. Ceux-ci invoquent que les participants aux régimes de retraite ont un statut distinct et qu'ils devraient donc être traités différemment des autres créanciers.

34 Avec égards, que ce soit en vertu de la LACC ou de l'article 49 de la *Loi sur les régimes complémentaires de retraite* (LRCR)[10], les créances en cause sont des créances ordinaires, que le législateur n'a pas choisi de protéger dans le contexte de la présente restructuration. Le libellé de l'article 49 LRCR n'est pas suffisant en soi pour conclure à l'établissement d'une véritable fiducie devant avoir priorité sur les autres créanciers. D'ailleurs, la Cour d'appel de l'Ontario, dans l'affaire *Ivaco*[11], alors qu'elle décide de la portée de l'article 57(3) du *Pension Benefit Act*[12] (dont les termes sont au même effet que ceux de l'article 49 LRCR), mentionne ce qui suit à l'égard des fiducies présumées (*Deemed Trust*) :

> [...] *This Legislative designation by itself does not create a true trust. If the province wants to require an employer to keep its unpaid contributions to a pension plan in a separate account, it must legislate that separation. It has not done so.*

35 S'il est vrai que l'article 81.5 de la *Loi sur la faillite et l'insolvabilité* (LFI) prévoit une super priorité pour les contributions des employés qui sont déduites à la source par l'employeur et les cotisations d'exercice que celui-ci doit faire pour le service courant à la caisse de retraite, la LFI n'est toutefois pas applicable en l'instance.

36 D'une part, la restructuration se fait en vertu d'une autre loi qui ne prévoit pas une telle priorité et, d'autre part, cette priorité ne vise pas les cotisations d'équilibre, car elle est limitée aux déductions à la source et aux cotisations d'exercice pour le service courant.

2) Les cotisations d'équilibre visent-elles à combler un déficit pour des services antérieurs au dépôt de la requête initiale?

37 Aux termes de l'article 11(3) de la LACC, l'ordonnance initiale ne peut suspendre les droits ou créances qui résultent d'obligations relatives à la fourniture de services ou de biens après l'ordonnance initiale.

38 Les syndicats prétendent que les cotisations d'équilibre visent à combler des obligations qui découlent de services rendus par les employés après le dépôt de la demande initiale.

39 Avec respect, cet argument n'est pas fondé.

40 Les syndicats prennent appui sur un commentaire du juge Farley de la Cour supérieure de l'Ontario qui, dans la cause de *Ivaco*[13] en première instance, dit ce qui suit :

> *Notwithstanding that past service contributions could be characterized as functionally a pre-filed obligation, legally, the obligation pursuant to the applicable pension legislation is a "fresh obligation".*

41 Avec égards, cette assertion n'est pas déterminante et a d'ailleurs été écartée par le juge Spence dans la cause de *Collins*[14], alors qu'il s'exprime ainsi :

> *The amount of the outstanding special payments in the present case appears to have been determined prior to the initial order based on information relating to the pre-filing period.*

42 Plus loin, il ajoute :

> *It is not apparent that the continuation of the operation of the applicant in the post-filing period has given rise to the increase in the amount of the special payments from the amount that would otherwise have been applicable by reason of the pre-filing experience.*
>
> *Consequently, it seems tendentious to characterize the outstanding special payments as the cost of operating in the post-filing period.*

43 Dans le présent dossier, les évaluations actuarielles, qui ont déterminé les montants des cotisations d'équilibre et dont on demande la suspension, sont toutes antérieures au dépôt de la demande initiale. D'ailleurs, l'évaluation actuarielle du "Régime de retraite applicable aux employés syndiqués de la compagnie *Abitibi-Consolidated du Canada*", de loin le plus important, date du 2 décembre 2006.

44 Tout comme dans les dossiers de *Papiers Gaspésia*[15] et *Mine Jeffrey*[16], les cotisations d'équilibre suspendues ont été identifiées avant le dépôt de la demande initiale et ne sont pas dues pour des services rendus après le dépôt de celle-ci.

3) Dans l'affirmative, est-il approprié, dans les circonstances, d'en suspendre le paiement pendant la période de restructuration?

45 Bien que le Tribunal, qui supervise et qui est appelé à trancher les questions dans le cadre d'une restructuration de cette envergure, jouit d'une très large discrétion judiciaire, cette discrétion a toutefois ses limites.

46 La discrétion judiciaire s'exerce, en effet, dans le respect des lois existantes que le Tribunal ne peut modifier.

47 L'objectif, primé par la LACC, consiste à sortir l'entreprise de son marasme et convenir d'un arrangement éventuel avec ses créanciers. Aux fins d'accomplir cet objectif, le soutien, voire même les sacrifices de tous les intervenants sont indispensables.

48 L'affrontement se produit ici entre *Abitibi*, insolvable et confrontée à une crise économique mondiale, ses créanciers ordinaires qui l'appuient et ses employés.

49 Les conséquences des mesures recherchées et contestées par les deux groupes sont majeures. Si *Abitibi* ne peut se restructurer, parce qu'elle verse les cotisations d'équilibre et que, ce faisant, sa survie est en péril, survient alors un premier spectre, soit celui de la fermeture de l'entreprise, de la perte des emplois, de la terminaison et la liquidation des régimes de retraite.

50 L'actuaire témoigne qu'à la date de la demande initiale, la solvabilité des régimes représente environ 75 %. Cela signifie qu'en cas de terminaison, les prestations payables seraient acquittées à concurrence de ce pourcentage.

51 Par ailleurs, *Abitibi*, de concert avec l'ensemble de ses créanciers, employés, prêteurs et fournisseurs, peut réussir son pari et sortir de l'impasse en convenant d'un arrangement pour remettre l'entreprise sur les rails, à court ou moyen terme. Des modalités, pour le remboursement des cotisations suspendues, pourront être convenues avec l'aval des autorités compétentes. Cela se fera à une autre étape.

52 Entre temps et en l'absence d'entente entre les parties, le Tribunal doit décider de la troisième question : la situation financière d'*Abitibi* commande-t-elle la suspension du paiement des cotisations d'équilibre.

53 Selon le représentant du contrôleur, la restructuration est vouée à l'échec si les cotisations mensuelles de 13 M $ sont versées. Il a déposé, avec son rapport, les prévisions de l'évolution de la trésorerie d'ici le 19 juillet 2009, et ce, tant pour *Abitibi* que pour *Bowater.*

BOWATER

54 Lors de l'émission de l'ordonnance initiale, *Bowater* a obtenu un financement intérimaire de 40 M $ de *Fairfax*, afin de lui permettre de poursuivre ses activités courantes, et payer les fournisseurs de services et de biens, depuis le dépôt de la demande initiale.

55 *Fairfax* a indiqué au Tribunal que ce financement avait été octroyé pour financer les activités courantes de *Bowater* et ne pouvait ainsi être utilisé pour payer les cotisations d'équilibre aux régimes de retraite. Le financement est aussi sujet au respect de différents ratios de solvabilité.

56 Bien que les prévisions déposées incluent le financement de 40 M $ de *Fairfax* et omettent les cotisations d'équilibre mensuelles de 4.7 M $, elles démontrent la précarité de la situation financière de *Bowater* à très court terme.

57 Au mois de juillet 2009, il ne restera que 17,773 M $ pour maintenir le *statu quo*, continuer l'exploitation de l'entreprise et amorcer sa restructuration. Si elle devait payer les cotisations d'équilibre dues depuis le 31 mars 2009, le résultat est évident : il ne restera aucune liquidité.

ABITIBI

58 La situation d'*Abitibi* n'est guère plus reluisante. Ce n'est qu'hier qu'elle a obtenu "à l'arrachée" un financement temporaire de 100 M $. En fait, les sommes disponibles pour *Abitibi*, à même ce financement, représentent, tout au plus, 87 M $. Le prêteur exige que les sommes prêtées ne soient utilisées que pour le maintien de l'exploitation et des activités courantes, et impose le respect de ratios de solvabilité qui ne seront pas satisfaits si *Abitibi* doit verser les cotisations disponibles.

59 Enfin, son nom le dit, le financement est temporaire; il doit être remboursé en novembre 2009, dans le cadre d'une vente d'éléments d'actifs de l'entreprise.

60 Abstraction faite du financement intérimaire et du versement mensuel des cotisations de 8,5 M $, les prévisions déposées au 19 juillet 2009 laissent des liquidités de 70 M $. Ceci n'inclut pas les paiements additionnels du service courant requis pour la cotisation d'exercice à la suite des modifications entrées en vigueur le 1er mai 2009.

61 Comme l'a clairement expliqué le contrôleur dans son rapport et lors de son témoignage, la marge de manoeuvre d'*Abitibi* est trop mince. L'entreprise a besoin d'oxygène pour faire face aux prochains mois cruciaux de sa restructuration. Le Tribunal réfère notamment aux paragraphes 42 à 51 et 57 à 60 et 63 du troisième rapport du contrôleur.

62 Il y a donc lieu d'ordonner la suspension des cotisations d'équilibre.

63 Par ailleurs, après analyse, le Tribunal fera droit la conclusion identifiée comme étant le paragraphe 23, ainsi que celle du paragraphe 24, sur laquelle les parties se sont entendues.

64 Puisque le présent jugement modifie l'ordonnance initiale rédigée en anglais, le dispositif est prononcé en anglais.

FOR THESE REASONS, THE COURT :

1. **GRANTS** the *Motion for Authorization to Suspend Certain Payments to Pension Plans Maintained by the Petitioners* (No 37).
2. **AMENDS** as follows the Initial Order issued by this Court in this matter on April 17, 2009, as amended on April 22 and May 6, 2009 by adding these paragraphs after Paragraph 21 of the Initial Order :

[22] **ORDERS** that notwithstanding any other provision of this Order, the Petitioners and the Partnerships shall not make any past service contributions or special payments to funded pension plans maintained by the Petitioners or the Partnerships (the "**Pension Plans**") during the Stay Period, pending further order of this Court.

[23] **ORDERS** that none of the Petitioners or the Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any Person to make any contribution or payments other than current cost contribution obligations ("**Current Contributions**") during the Stay Period that they might otherwise have become required to make to any Pension Plans maintained by a Petitioner or by a Partnership.

[24] **ORDERS** that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions in accordance with Sections 81.5 and 81.6 of the *Bankruptcy and Insolvency Act*) during the Stay Period that such Person might otherwise have become required to make to any Pension Plans but for the stay provided for herein, no such claim lien, charge or trust shall be recognized in these proceedings or in any subsequent receivership, interim receivership or bankruptcy of any of the Petitioners or the Partnerships as having priority over the claims of the CCAA Charges as set out in this Order.

[24.1] **ORDERS AND DECLARES** that nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

3. **ORDERS** the provisional execution of this Order notwithstanding any appeal and without the necessity of furnishing any security.
4. **THE WHOLE WITHOUT COSTS.**

DANIÈLE MAYRAND, J.C.S.

* * * * *

SCHEDULE "A"

ABITIBI PETITIONERS

1. Abitibi-Consolidated Inc.
2. Abitibi-Consolidated Company of Canada
3. 3224112 Nova Scotia Limited
4. Marketing Donohue Inc.
5. Abitibi-Consolidated Canadian Office Products Holdings Inc.
6. 3834328 Canada Inc.
7. 6169678 Canada Inc.
8. 4042140 Canada Inc.
9. Donohue Recycling Inc.
10. 1508756 Ontario Inc.
11. 3217925 Nova Scotia Company

12. La Tuque Forest Products Inc.
13. Abitibi-Consolidated Nova Scotia Incorporated
14. Saguenay Forest Products Inc.
15. Terra Nova Explorations Ltd.
16. The Jonquière Pulp Company
17. The International Bridge and Terminal Company
18. Scramble Mining Ltd.
19. 9150-3383 Québec Inc.

SCHEDULE "B"

BOWATER PETITIONERS

1. Bowater Canadian Holdings Inc.
2. Bowater Canada Finance Corporation
3. Bowater Canadian Limited
4. 3231378 Nova Scotia Company
5. AbitibiBowater Canada Inc.
6. Bowater Canada Treasury Corporation
7. Bowater Canadian Forest Products Inc.
8. Bowater Shelburne Corporation
9. Bowater LaHave Corporation
10. St-Maurice River Drive Company Limited
11. Bowater Treated Wood Inc.
12. Canexel Hardboard Inc.
13. 9068-9050 Québec Inc.
14. Alliance Forest Products (2001) Inc.
15. Bowater Belledune Sawmill Inc.
16. Bowater Maritimes Inc.
17. Bowater Mitis Inc.
18. Bowater Guérette Inc.
19. Bowater Couturier Inc.

SCHEDULE "C"

18.6 CCAA PETITIONERS

1. AbitibiBowater Inc.
2. AbitibiBowater US Holding 1 Corp.
3. Bowater Ventures Inc.
4. Bowater Incorporated
5. Bowater Nuway Inc.
6. Bowater Nuway Mid-States Inc.
7. Catawba Property Holdings LLC
8. Bowater Finance Company Inc.
9. Bowater South American Holdings Incorporated
10. Bowater America Inc.
11. Lake Superior Forest Products Inc.
12. Bowater Newsprint South LLC
13. Bowater Newsprint South Operations LLC
14. Bowater Finance II, LLC
15. Bowater Alabama LLC
16. Coosa Pines Golf Club Holdings LLC

SCHEDULE "D"

PARTNERSHIPS

1. Bowater Canada Finance Limited Partnership
2. Bowater Pulp and Paper Canada Holdings Limited Partnership
3. Abitibi-Consolidated Finance LP

cp/i/qlcys/qlana/qlced/qlaxc/qlcal/qlaxc/qlhcs

1 *Loi sur les arrangements avec les créanciers des compagnies*, L.R.C. 1985 c. C-36.

2 Jugement du 4 mai 2009 du juge Clément Gascon sur la requête pour jugement déclaratoire, dans le présent dossier.

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

4 *Uniforêt inc.* c. *9027-1875 Québec inc.* [2003] R.J.Q. 2073 (C.A.).

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

6 *Idem* note 3.

7 *Papiers Gaspésia inc.* 2004 CanLII 40296 (QC S.C.).

8 *Collins & Aikman Automotive Canada Inc. (Re)* [2007] O.J. No 4186 (Ont. S.C.).

9 *Idem* note 3.

10 L.R.Q., c. R.-15.1.

11 *Ivaco inc. (Re)*, (2006) 275 D.L.R. (4th) 132 (Ont. C.A.) paragr. 46.

12 R.S.O. 1990 c. P.8.

13 *Ivaco inc. (Re)* [2005] O.J. No 3337 (Ont. S.C.) paragr.4.

14 *Idem* note 8, paragr. 103.

15 *Idem* note 7.

16 *Idem* note 3.

TAB 12

Unofficial English Translation

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-11-038474-108

DATE: June 16, 2010

THE HONOURABLE ROBERT MONGEON, J.S.C., PRESIDING

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. (1985), c. C-36 (the "CCAA") REGARDING:

WHITE BIRCH PAPER HOLDING COMPANY
-and-
WHITE BIRCH PAPER COMPANY
-and-
STADACONA GENERAL PARTNER INC.
-and-
BLACK SPRUCE PAPER INC.
-and-
F.F. SOUCY GENERAL PARTNER INC.
-and-
3120772 NOVA SCOTIA COMPANY
-and-
ARRIMAGE DE GROS CACOUNA INC.
-and-
PAPIER MASSON LTÉE
Debtors
-and-
ERNST & YOUNG INC.
Monitor
-and-
STADACONA LIMITED PARTNERSHIP
-and-
F.F. SOUCY LIMITED PARTNERSHIP
-and-
F.F. SOUCY, INC. & PARTNERS, LIMITED PARTNERSHIP
Mis en cause
-and-
COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION

JM1838

JUDGMENT ON THE UNION'S APPLICATION FOR A DECLARATORY JUDGMENT DATED MAY 12, 2010

Introduction

[1] The debtors have been under CCAA protection since February 24, 2010. The various companies in White Birch Group have continued to operate since that date and, where the Group employs unionized employees, the working conditions of these workers have been governed by the various collective agreements in force when the Initial Order was issued.

[2] These collective agreements contain various provisions creating obligations for the various employers in the Group (including Stadacona Limited Partnership ("Stadacona")) toward workers who are not currently working or former workers who are now retired. More specifically, certain former workers who have benefited from a special early retirement or voluntary separation program are entitled, under the terms of such programs, to life insurance, health insurance, and dental insurance at Stadacona's expense until the age of 65.

Factual background

[3] On April 26, 2010, Stadacona announced to its early retirees and its former employees who had opted for voluntary separation under the terms of the aforementioned programs, that it intended, effective June 1, 2010, to stop paying the insurance premiums in question and announced to them that, effective June 1, they would no longer be covered by the various insurance policies in question.

[4] The application from the Communications, Energy and Paperworkers Union of Canada (CEP), Locals 137, 200 and 250 (the "Union"), is therefore submitted to this Court in order to obtain the following declarations:

> [TRANSLATION]
>
> 1. **DECLARE that the collective agreements applicable to the workers represented by the Communications, Energy and Paperworkers Union of Canada (CEP) and its Locals 137, 200 and 250 are maintained in effect until a new agreement is concluded between the parties and that,**

in the meantime, STADACONA LIMITED PARTNERSHIP is required to respect the said collective agreements;

2. **DECLARE to be invalid and unlawful STADACONA LIMITED PARTNERSHIP's decision to suspend, effective June 1, 2010, entitlement to group insurance benefits, including health, dental and life insurance benefits, to workers who had enrolled in the special early retirement program or the special voluntary separation program provided for in the collective agreements (including memoranda of agreement), S-1 en liasse, represented by the Communications, Energy and Paperworkers Union of Canada (CEP) and its Locals 137, 200 and 250;**

3. **ORDER the provisional enforcement of this judgment notwithstanding appeal without it being necessary to post security;**

Without costs, unless contested.

[5] The letter dated April 26, 2010, from Stadacona, sent to approximately 125 former unionized and now retired employees reads as follows:

[TRANSLATION]

...

Dear Sir,

As you probably know, White Birch Paper Company ("White Birch") and some of its affiliates, including Stadacona Limited Partnership, are currently under the protection of the *Companies' Creditors Arrangement Act* ("CCAA"). An initial order was issued by Quebec Superior Court on February 24, 2010, pursuant to which the remedies of White Birch's creditors have been stayed. The said stay was extended until July 12, 2010, pursuant to an order issued by the Quebec Superior Court on March 26, 2010.

We hereby inform you of the effect of the said orders on the amounts normally payable to you by Stadacona Limited Partnership. Under Section 9 of the initial order, all rights, remedies, proceedings and means of performance against Stadacona Limited Partnership have been stayed. The CCAA establishes that this stay involves the stopping of all payments due by Stadacona Limited Partnership, subject to certain limited exceptions (notably payments for goods and services delivered after February 24, 2010). The stay does not eliminate creditors' rights. However, it does make obligations due by White Birch subject to the terms of the CCAA and permits compromise for creditors' claims by way of a plan of arrangement. Damages resulting from non-payment of amounts due may be claimed by submitting a proof of claim, in the event that a plan of arrangement is filed;

The payment of benefits under the group insurance plan (including health, dental and life insurance benefits), as specified in the special early

retirement program in which you are currently enrolled, is an obligation whose enforcement is stayed under the aforementioned orders. Consequently, we must send you this notice to inform you that Stadacona Limited Partnership will cease to make these payments as of June 1, 2010. You will therefore no longer be covered by the group insurance plan as of that date. As mentioned above, you will have the opportunity to submit a proof of claim for all amounts due and unpaid. Your claim will then be subject to approval by White Birch and the monitor, as well as to the terms of any future plan of arrangement.

We sincerely regret the prejudice to you as a result of this unfortunate situation. However, the financial condition of White Birch and its affiliates means that a reorganization is inevitable if we wish to avoid bankruptcy.

We thank you for your understanding, and will answer any questions you may have.

Yours very truly,

White Birch Paper,
Stadacona Limited Partnership Division

Daniel Boucher,
Vice-President, Human Resources,
Communications and Logistics

The monitor has taken note of the content of this letter and is in agreement therewith.

ERNST & YOUNG INC.
Monitor appointed by the Court in the matter of the plan of arrangement and compromise proposed by White Birch Paper Company and its affiliates

Per: Mark Bernier, CA, CIRP
Senior Vice-President

(Emphasis added.)

[6] In its application, the Union alleges that Stadacona's obligation to pay the group insurance premiums in question is stipulated in the collective agreements in force, that there has been no agreement between the parties to amend such agreements, and that the stay of such payments constitutes a breach of section 33 CCAA. Stadacona's decision is therefore unlawful and the Union's application is the only useful remedy to stop this alleged unlawfulness.

[7] Stadacona, for its part, alleges that:

- The early retirement program, which benefits some 125 former employees, is not part of the collective agreements in force and the

principle of maintaining collective agreements now codified in section 33 CCAA therefore does not come into play;

- Even if the said program was part of the collective agreements in force, Stadacona would not be required to maintain payment of these insurance coverages, since the 125 beneficiaries are retirees who do not perform any work or provide any consideration to the company. Consequently, the stay of the said payments is in accordance with the terms of the initial order made in this matter as well as with the terms of section 11.01 CCAA.

[8] It was during the last negotiation of the collective agreements that the employer Stadacona set up a program for early retirement[1] (for unionized employees who were already eligible for the program) and voluntary separation (for those who were not). The main purpose of the program was to:

- Reduce the mill's operating costs by eliminating the regular position held by an eligible employee.

---

[1] [TRANSLATION] **Special early retirement program**: In order to reduce the mill's operating costs and mitigate the impact of the workforce rationalization, the Company is offering a special early retirement program to eligible employees of CEP, Local 137.
To be offered to an eligible employee, a special early retirement must follow the elimination of a regular position.
The program is applied from the time the positions are abolished in order to limit workforce movements.
The employer determines the number of employees and the date they can leave on early retirement.
This agreement takes effect immediately and ends on December 31, 2007. If the Company's objective has not been reached by the end of 2007, the program may be extended into 2008.
This agreement takes precedence over the collective agreement and the memoranda of agreement.
Eligibility and conditions: Employees who are directly affected by the workforce reorganization will have priority for the special early retirement program.
Only eligible employees, actively working at the mill, who are at least 55 years of age at the time of retirement and have at least 20 years' service, are entitled to early retirement without an actuarial reduction subject to the minimum reduction required by the *Income Tax Regulations* (rule of 80).
The life insurance in effect (2004-2009 collective labour agreement) at the time the early retirement program is applied will be maintained until age 65 and will be paid for in full by the Company.
The Company will maintain its contribution to the major medical insurance and dental insurance plan applicable at the time of retirement (2004-2009 collective labour agreement) until age 65.
A lump sum payment of $15,000 will be made as a retiring allowance.
Eligible employees who are interested have until September 1, 2005, to sign and confirm their decision to avail themselves of this program in 2005, until February 1, 2006, for the year 2006, and until February 1, 2007, for the year 2007. It is understood that this written decision is irrevocable.
An eligible employee who does not avail himself of the program offered will no longer be eligible for the program.
The retiring allowances (lump sum amounts) as determined above are not considered gains for the purpose of calculating vacation pay.
No enhancement will be applicable to the insurance program for employees who avail themselves of these early retirement offers based on future enhancements for the renewal of collective agreements.
The employee concerned must declare that he understands the scope and content hereof, and that he has had an opportunity to consult with his advisors.
Daniel Boucher
Vice-President, Human Resources

- Offer early retirement to any employee at least 55 years of age with 20 years of service. The employee received a lump sum payment of $15,000 in addition to his retirement pension, without any actuarial reduction.

- Assumption by the employer of the cost of life, major medical and dental insurance protection until the early retiree has reached the age of 65.

- A period of up to February 1, 2007, for each worker to avail himself of the program.

[9] For unionized employees not eligible for the early retirement program, a voluntary separation program was also set up, providing, *inter alia,* for life, medical and dental insurance policies to be maintained at Stadacona's expense until age 65.

[10] It costs Stadacona approximately $52,000 per month to maintain the plans in effect, or $416 per month per early retiree.

[11] The Union bases its complete position on section 33 CCAA, which reads as follows:

> **33. (1) If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.**
>
> **(2) A debtor company that is a party to a collective agreement and that is unable to reach a voluntary agreement with the bargaining agent to revise any of the provisions of the collective agreement may, on giving five days notice to the bargaining agent, apply to the court for an order authorizing the company to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.**
>
> **Conditions for issuance of order**
>
> **(3) The court may issue the order only if it is satisfied that**
>
> ***(a)* a viable compromise or arrangement could not be made in respect of the company, taking into account the terms of the collective agreement;**
>
> ***(b)* the company has made good faith efforts to renegotiate the provisions of the collective agreement; and**
>
> ***(c)* a failure to issue the order is likely to result in irreparable damage to the company.**

(4) The vote of the creditors in respect of a compromise or an arrangement may not be delayed solely because the period provided in the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent has not expired.
Claims arising from termination or amendment

(5) If the parties to the collective agreement agree to revise the collective agreement after proceedings have been commenced under this Act in respect of the company, the bargaining agent that is a party to the agreement is deemed to have a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement.
Order to disclose information

(6) On the application of the bargaining agent and on notice to the person to whom the application relates, the court may, subject to any terms and conditions it specifies, make an order requiring the person to make available to the bargaining agent any information specified by the court in the person's possession or control that relates to the company's business or financial affairs and that is relevant to the collective bargaining between the company and the bargaining agent. The court may make the order only after the company has been authorized to serve a notice to bargain under subsection (2).
Parties

(7) For the purpose of this section, the parties to a collective agreement are the debtor company and the bargaining agent that are bound by the collective agreement.
Unrevised collective agreements remain in force

(8) For greater certainty, any collective agreement that the company and the bargaining agent have not agreed to revise remains in force, and the court shall not alter its terms.

(Emphasis added.)

[12] The Union argues that this section compels the employer Stadacona to respect all the terms and all the conditions of the collective agreements in force, including the early retirement and voluntary separation programs, until a new agreement or memorandum of agreement is signed. This obligation is, according to the applicant Union, indivisible: it would therefore compel the employer to continue to pay benefits to persons who are no longer in its employ but who decided to retire from the company. For these early retirees, these insurance premiums represent an amount of approximately $624,000 per annum.

[13] Stadacona, for its part, has not attempted to demonstrate that it was unable to meet these specific obligations or that maintaining these payments would prevent it from restructuring. It has simply based itself on the fact that the

initial order had been issued and that it was entitled to protection under section 11.01 CCAA.[2]

[14] Stadacona further acknowledges that it did not send any bargaining notice to the applicant Union.

[15] Furthermore, Stadacona considers that the early retirement and/or voluntary separation programs are not part of the collective agreements because they are not incorporated therein or appended thereto as a memorandum of agreement.

Is letter S-2 an integral part of the collective agreement?

[16] On this last point, the Court heard evidence that can be summarized as follows:

a) Testimony of Daniel Boucher, Vice-President, Human Resources at Stadacona

16.1 Mr. Boucher explained to the Court that this program was a unilateral offer from the employer in keeping with what was being done in the pulp and paper industry. For one thing, the program was not negotiated, and for another, it was not signed by the Union. It was an early retirement program, not working conditions. In addition, it was intended not only for unionized employees but also for company management.

b) Testimony of Jeannot Larouche, President of CEP Local 137

16.2 Mr. Larouche states that he was involved in the bargaining for the last collective agreements. At the time, the employer wanted to reduce the number of employees from approximately 1,000 at that time to approximately 675. According to Mr. Larouche, the early retirement program took shape before the conciliator at the very end of the bargaining process, and the letter from Mr. Boucher confirming its existence and conditions was tabled during the final

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[2] Section 11.01 CCAA: No order made under section 11 or 11.02 has the effect of

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

(b) requiring the further advance of money or credit.

2005, c. 47, s.128.

round of bargaining during the night preceding the agreement in principle concerning the new working conditions.

c) Rebuttal evidence

16.3 Mr. Boucher was heard again in rebuttal and categorically denies that the early retirement program was an integral part of the bargaining. He states that the program in question had been approved by Stadacona before the bargaining, that it was [TRANSLATION] "cut and pasted" from what existed in the industry and that Stadacona had decided to offer it to its employees. Moreover, the program was to the employer's advantage because it would reduce its labour costs.

16.4 Mr. Boucher did not remember, however, when the letter was filed. He could not say whether the document had been given to the Union before or during the bargaining.

d) Discussion

16.5 This matter must be decided from the outset because if the early retirement program is in fact not an integral part of the collective agreements, the Union acknowledges that section 33 CCAA does not have to be taken into consideration and there is no basis for its application.

16.6 Looking at the evidence in its entirety, the undersigned is of the opinion that the letter outlining the early retirement program and the letter outlining the voluntary separation program are part of the 2006 collective agreements.

16.7 Indeed, the preponderance of this evidence, however succinct, suggests that it was during the bargaining for the collective agreements that this program was offered and, given Stadacona's objective of reducing its workforce, it is logical for this letter to have been submitted during the bargaining that led to a new agreement between management and the union.

16.8 The two letters included in Exhibit S-1B are, moreover, included in a document entitled [TRANSLATION] "Information Further to the Negotiations", intended as a compendium of the various agreements, memoranda of agreement and other writings that are part of the overall agreement. Furthermore, Stadacona had

undertaken to combine in a single document all such memoranda, letters, etc., and to give a copy to all employees, which it did.

16.9 The two letters also contain the following sentence:

[TRANSLATION]

> **"This agreement takes precedence over the collective agreement and the memoranda of agreement."**
> **(Emphasis added.)**

For the content of such a letter, which is furthermore referred to as an agreement, to take such precedence, all the parties must agree that its content be part of the overall working conditions. Otherwise, it would be a unilateral amendment to the collective agreements by the employer.

16.10 Given the principle whereby the Union has a monopoly on representing employees in the bargaining unit and the absence of individual labour agreements for the benefit of collective labour relations, Stadacona's argument that the early retirement program is an employer program, meaning that each person who wants to avail himself of the program must make an individual agreement with Stadacona by signing a document to this effect (R-1), is not consistent with the foregoing.

16.11 See, *inter alia*, *Dayco (Canada) Ltd v. CAW-Canada,* [1993] 2 S.C.R. 230, at 55 to 57, which deals specifically with determining whether the rights of certain retirees could be included in collective labour relations and which contains the following comments from La Forest J. (at 57):

> **...First, there is no doubt that the prospective employment relationship can only be governed by one collective agreement, and that the most current. While an employee continues to be a part of the bargaining unit, he or she is of necessity subject to the vicissitudes of the collective bargaining process.**

16.12 See also *Bisaillon v. Concordia University* [2006] 1 S.C.R. 666, at para. 25, where LeBel J. writes:

> **...Second, the monopoly on representation also has a significant impact on employees' rights. Our system of collective representation proscribes the individual negotiation of conditions of employment. A screen is erected between the employer and the employees in**

> **the bargaining unit. This screen prevents the employer from negotiating directly with its employees and in so doing precludes the employees from negotiating their individual conditions of employment directly with their employer.**
>
> **(Citations omitted.)**

16.13 For all these reasons, the undersigned considers that the document entitled [TRANSLATION] "Special Early Retirement Program", included in Exhibit S-1B, to be an integral part of the collective agreement.

Issues to be addressed

[17] Now that this first point is settled, let us look at the other issues raised by the Union's application.

[18] First, the Court must consider whether it has jurisdiction to decide whether it can intervene in the context of Stadacona's non-compliance with a provision that is part of the collective labour agreement. In other words, is this a matter under the jurisdiction of the grievance arbitrator, or is it a matter under the Court's jurisdiction pursuant to the CCAA?

[19] If the Court does have jurisdiction, it must then consider the issue of the intended scope of section 33 CCAA and its interaction with section 11.01 CCAA.

Analysis

The Court's jurisdiction

[20] From a reading of the Union's application, it might seem that Stadacona is refusing to honour an obligation because it denies its existence. As written, the application outlines a dispute that might fall more under the grievance arbitrator's jurisdiction than under the Superior Court's.

[21] Normally, a dispute between an employer and a retired employee concerning the termination of payment of the said retirees' benefits under a collective agreement constitutes an arbitrable grievance.

See "*Dayco*", *supra.*
See "*Bisaillon*", *supra.*

[22] If the dispute stems from the application of the collective agreement, it can be arbitrated. However, if the dispute results not from the application of the collective agreement but from the economic situation of Stadacona, which currently finds itself under CCAA protection, then it should not be heard by the grievance arbitrator.

[23] The CCAA proceedings do not confer jurisdiction on the Superior Court for a series of disputes that otherwise would be under the jurisdiction *ratione materiae* of another court. Except as provided for by law, or more specifically, under the CCAA, the grievance arbitration system, as it exists in Quebec law, is not altered and the grievance arbitrators retain their full jurisdiction.

[24] But a careful reading of letter S-2, which is the very source of the Union's application, shows that it cannot be construed as negating the rights of the retirees concerned.

[25] Letter S-2 simply informs the retirees that Stadacona must stay its payments (which it acknowledges having to do) because of its financial situation and because it is subject to the CCAA. It therefore acknowledges that, if it had not been for this situation, it would have continued to discharge its obligations.

[26] Thus, if the dispute were submitted to the grievance arbitrator in the present case, the arbitrator would not have to decide anything. Stadacona would confess judgment as to the existence of its obligation and would invoke the CCAA in order not to have to perform its obligation.

[27] Furthermore, the grievance arbitrator would have no jurisdiction concerning the application of the CCAA or concerning the Superior Court's power whether or not to permit the stay of Stadacona's financial obligations with regard to its retired former employees.

[28] Consequently, even if a *prima facie* jurisdictional issue could be raised, the truth of the matter is that there is no such issue. The dispute arising from the Union's application is exclusively one of interpreting and applying the CCAA.

[29] That does not mean, however, that a grievance arbitrator loses jurisdiction as soon as an employer is under CCAA protection. For instance, if an employer failed to respect a recall list, altered the description of a position's tasks, did not fulfill its obligation to compensate a worker for overtime at the agreed rate, then it seems evident, depending on the existing special circumstances at the time, that such a dispute must first be submitted to the grievance arbitrator who would then examine his own jurisdiction before this Court did so.

<u>The intended scope of section 33 CCAA</u>

[30] Section 33 was passed during the last revision of the CCAA in September 2009.

[31] The Union sees it as a new provision that, in its view, would make any collective agreement completely immutable unless an amendment was negotiated and approved by the Court. Furthermore, if the Union were right, all employer obligations and all unionized employee rights arising from the collective

agreement (including, where applicable, all pension plans incorporated therein) would be enforceable notwithstanding any initial order unless an agreement was made after notice was given under section 33 CCAA. In the undersigned's opinion, this would mean excluding the entire collective labour relations process from the application of the CCAA, except to the extent the Court can intervene, following notice and after bargaining has failed. According to a reading of, *inter alia*, section 33(8) of the CCAA, the Court would not have any manoeuvring room and the employer would, in particular, be required to fulfill all of its monetary obligations toward former employees who had retired and no longer work and to whom no consideration for work is therefore provided.

[32] For its part, Stadacona claims that the terms and conditions of the collective agreement apply only to the unionized employees the company keeps and needs to ensure operational productivity. In other words, the employer may reduce its workforce, but if it has some of its employees performing work, they are then entitled to complete coverage of the working conditions negotiated and recorded in the collective agreement. In addition, the employer is not required to indemnify anyone who does not perform work in exchange for consideration (s. 11.01 CCAA).[3]

[33] The parties submitted no jurisprudential example interpreting section 33 CCAA or defining its intended scope.

[34] The Union relies on the work of the House of Commons during the discussions concerning the passage of Bill C-55. Even if such a reference may be useful, however, it applies only if the legislation in question entails difficulties in interpretation.

[35] More specifically, the Union relies on the various testimonies provided before the Parliamentary Committee to suggest that collective agreements are now raised to the rank of absolute contracts which are completely outside the restructuring process and the CCAA unless the Union and the employer agree otherwise. That, however, would be tantamount to paralyzing the employer with respect to reducing its costs by any means at all, and to providing the Union with a veto with regard to the restructuring process.

[36] That does not mean that section 33 CCAA has no effect; far from it. In the Court's opinion, however, section 33 CCAA in fact codifies what Quebec and Canadian case law has established as applicable principles when a debtor

[3] For an example applicable to such a situation, see the decision of Clément Gascon J. in *Arrangement relatif à Abitibi-Bowater Inc.* dated May 4, 2009, EYB 2009-158332 [2009] QCCS 2152, where he refuses to stay some of the employer's obligations with regard to certain enhanced retirement pension payments and where he declared null and void the unilateral amendments made to the working conditions of active employees governed by a collective agreement.

company, bound to its employees under a collective agreement, obtains CCAA protection.

[37] Furthermore, if the Union's position were accepted, Stadacona would be required to continue to pay large amounts of money to former employees who do not perform any work in exchange (in this case, $52,000 a month or $624,000 a year). These third-party creditors would then be in a privileged position vis-à-vis all other creditors of the company for whom collection of claims has been stayed.

[38] There is no doubt that Stadacona's obligation to pay life, health and dental insurance premiums for its retirees originated prior to February 24, 2010. It is therefore an obligation stayed by the initial order unless it qualifies as any of the exceptions under section 11.01 CCAA (formerly section 11.3 CCAA).

[39] Below is the Union's statement (notes and authorities filed at the hearing).

[TRANSLATION]

6. The applicant Union respectfully submits that by adding section 33 to the CCAA, Parliament wanted to add more protection for collective agreements. The purpose of the amendment, which came into force on September 18, 2009, is to allow collective agreements to be maintained integrally and to provide for a revision process, which was not followed by Stadacona in the present case.

7. The principle stated in section 33 CCAA goes beyond the concept of valuable consideration stipulated in section 11.01(a) CCAA (formerly s.11.3 CCAA).

...

9. As a result of the amendments made to the CCAA, the applicant Union respectfully submits that the employer cannot unilaterally alter the terms of the collective agreement or breach it by eliminating benefits without having first complied with the procedure set out in section 33 CCAA and obtained the agreement of the Union following bargaining. In the interim, compliance with the collective agreement is required and the applicant Union's only remedy is to apply to this Court because all proceedings have been stayed in accordance with Section 9 of the initial order as well as the extension order dated March 26, 2010.

(Emphasis added.)

10. During the consideration of Bill C-55, which led to the enactment of the CCAA amendments that came into force on September 18, 2009, the Honourable Joe Fontana, Minister of Labour and Housing, declared as follows:

> **If leave were granted to both parties, the union and the insolvent employer would be subject to a requirement to bargain in good**

> **faith over possible amendments to any existing collective agreement. Should the parties be unable—and I want to repeat, unable—to reach an agreement on such amendments, then the existing collective agreement would remain in place and could not be changed by the courts. Should the parties reach an agreement on concessions, then the bargaining agent would become an unsecured creditor for an amount equal to the value of those concessions.**
>
> **Mr. Chairman, these amendments to the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* have been developed with the intention of creating a fair and balanced regime for the conduct of labour-management relations in an insolvency situation and to ensure appropriate protection for all employees.**
>
> **So if one is accessing the CCAA or bankruptcy, we're trying to make sure we don't go to the American model--if I can put it that way--and throw out the collective agreement that essentially respects, as part 1 of the Labour Code does, that the two parties, employers and employees, have come to an agreement on how they will deal with certain issues. We want to maintain that standard. To ensure that the collective agreements are respected, even under receivership or bankruptcy, they can't just be holus-bolus thrown out by a particular judge, and so on. That's why I think we've put in place some greater clarity as to what the responsibilities would be.**
>
> **As we've said, notice must be given to reopen the collective agreement, and it's only with the agreement of both parties, especially the employees, that such a thing could happen. If they don't agree with the notice or want to fight the notice, they can. If they can't come to an agreement, if the collective agreement is open, the employees can essentially say no.**
>
> **So for all intents and purposes, they have a veto on whether or not a collective agreement should be reopened. I think this is a fundamental value that we want to maintain in our system. This bill essentially does that and clarifies what has been very unclear in terms of what courts have been able to do with collective agreements.**

[40] There is nothing in the foregoing that empowers the Court to protect the claims of former employees who are now retirees and could be deprived of employee benefits of the nature discussed in the present case. The remarks above must be read in a context where Stadacona continues to employ unionized employees. Then the salary and benefits (including group insurance) that the employer must pay them are the ones which prevail in the collective agreements in force. That is the true intended scope of section 33 CCAA, and this interpretation does not conflict in any way with the statement of Minister Fontana, *supra*.

[41] Though section 33 CCAA came into force only in 2009, it was enacted in 2005 shortly after *Mine Jeffrey Inc.*[4]

[42] The Court is of the view that section 33 CCAA codifies the principles that Dalphond J.A. established in finding that, where there is a collective agreement in force between unionized employees and a debtor company subject to the CCAA, the employees called to render services or perform work for the debtor company after an Initial Order has been issued must be compensated in accordance with the terms of the collective agreement and not at the monitor's discretion.

[43] In Section V of his judgment on the working conditions of employees continued or recalled (versus former employees who have retired), Dalphond J.A. wrote:

> [TRANSLATION]
>
> **[47] Section 11.3 of the CCAA does not allow a court to order suppliers of goods and services, including employees, to provide goods or services without being paid immediately by the monitor. In my opinion, the consideration payable cannot be unilaterally imposed by the monitor or the court.**
>
> ...
>
> **[50] In short, nothing in the CCAA authorizes the monitor or the court to unilaterally stop payment of the consideration payable to the person providing a good or service to the debtor company. Furthermore, such consideration must have been agreed upon with the supplier before the goods or services were provided, or must have been agreed upon before the initial order, as for example in a contract of successive performance, or be the consideration applicable under the Act, a regulation, a rate or market rules. The situation is once again similar to that of a debtor governed by the BIA.**
>
> **[51] In the present case, since the certifications are not affected by the orders made, since the layoff of all unionized employees does not terminate the certifications, and since people were recalled on the following day or later to fill positions covered by the certifications, it follows that the consideration to be paid to such persons must be that stipulated in the collective agreements or in any amendment thereto negotiated with the appropriate union. Such consideration includes the salary and other benefits associated with such persons rendering services since the initial order. Furthermore, any other suppliers may further require payment of any amounts due at the date of the initial order (s. 11.3(a) *in fine*); within the meaning of the CCAA, they will be creditors with regard to such amounts and will possibly be offered an arrangement by the debtor.**

[4] *Syndicat National de l'Amiante d'Asbestos Inc. et al v. Mine Jeffrey Inc. et Raymond Chabot Inc.* [2003] Q.J., No. 264 (QC C.A.).