TAB 8

Case Name:

Nortel Networks Corp. (Re)

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

[2009] O.J. No. 2558

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

75 C.C.P.B. 233

2009 CarswellOnt 3583

Court File No. 09-CL-7950

Ontario Superior Court of Justice
Commercial List

G.B. Morawetz J.

Heard: April 21, 2009.
Judgment: June 18, 2009.

(89 paras.)

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

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

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

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

Statutes, Regulations and Rules Cited:

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

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

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

Counsel:

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

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

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

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

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

Leanne Williams, for Flextronics Inc.

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

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

Gail Misra, for the CEP Union.

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

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

Alex MacFarlane, for the Official Unsecured Creditors Committee.

M. Starnino, for the Superintendent of Financial Services.

ENDORSEMENT

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

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

Union Motion

3 The first motion is brought by the National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905, and/or 1915 (the "Union") and by George Borosh on his own behalf and on behalf of all retirees of the Applicants who were formerly represented by the Union.

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

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

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

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

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

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

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

Former Employee Motion

10 The second motion is brought by Mr. Donald Sproule, Mr. David Archibald and Mr. Michael Campbell (collectively, the "Representatives") on behalf of former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in receipt of a Nortel pension, or group or class of them (collectively, the "Former Employees"). The Representatives seek an order varying the Initial Order by requiring the Applicants to pay termination pay, severance pay, vacation pay and an amount equivalent to the continuation of the benefit plans during the notice period, which are required to be paid to affected Former Employees in accordance with the *Employment Standards Act, 2000* S.O. 2000 c. 41 ("ESA") or any other relevant provincial employment legislation. The Representatives also seek an order varying the Initial Order by requiring the Applicants to recommence certain periodic and lump sum payments and to make payment of all periodic and lump sum payments which should have been paid since the Initial Order, which the Applicants are obligated to pay Former Employees in accordance with the statutory and contractual obligations entered into by Nortel and affected Former Employees, including the Transitional Retirement Allowance ("TRA") and any pension benefit payments Former Employees are entitled to receive in excess of the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan"). TRA is similar to RAP, but is for non-unionized retirees. There are approximately 442 individuals who may claim the TRA. The current value of TRA obligations is approximately $18 million.

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

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

Background

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

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

15 The Initial Order provides:

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

Position of Union

16 The position of the CAW is that the Applicants' obligations to make the payments is to the CAW pursuant to the

Collective Agreement. The obligation is not to the individual beneficiaries.

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

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

19 Section 11.3 of the CCAA provides:

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

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

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

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

23 The Union takes the position that Section 11.3 of the CCAA specifically contemplates that a supplier is entitled to payment for post-filing goods and services provided, and would undoubtedly refuse to continue supply in the event of receiving only partial payment. However, the Union contends that it does not have the ability to cease providing services due to the *Labour Relations Act, 1995*, S.O. 1995, c. 1. As such, the only alternative open to the Union is to seek an order to recommence the payments halted by the Initial Order.

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

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

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

27 The Union concludes that the Applicants must pay for the full measure of its bargain with the Union while the

Collective Agreement remains in force and the court should direct the recommencement and repayment of those benefits that arise out of the Collective Agreement and which were suspended subsequently to the filing of the CCAA application on January 14, 2009.

Position of the Former Employees

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

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

30 Counsel submits that each province has minimum standards employment legislation and regulations which govern employment relationships at the provincial level and that provincial laws such as the ESA continue to apply during CCAA proceedings.

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

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

Position of the Applicants

33 Counsel to the Applicants sets out the central purpose of the CCAA as being: "to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business". (*Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070, aff'd by 1992, 15 C.B.R. (3d) 265), and that the stay is the primary procedural instrument used to achieve the purpose of the CCAA:

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

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

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

35 The corresponding protection extended to persons doing business with the debtor is that such persons (including employees) are not required to extend credit to the debtor corporation in the course of the CCAA proceedings. The protection afforded by Section 11.3 extends only to services provided after the Initial Order. Post-filing payments are only made for the purpose of ensuring the continued supply of services and that obligations in connection with past

services are stayed. (See *Mirant Canada Energy Marketing Ltd. (Re)*, [2004] A.J. No. 331).

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

37 Counsel to the Applicants also relies on the following statement from *Mirant, supra*, at paragraph 28:

> Thus, for me to find the decision of the Court of Appeal in Smokey River Coal analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only is his salary which he has been paid falls within that definition.

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

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

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

> Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.
>
> The same is true in the case of the loss of certain fringe benefits sustained by persons who have not provided services to the debtor since the initial order. These persons became creditors of the debtor for the monetary value of the benefits lost further to Jeffrey Mines Inc.'s having ceased to pay premiums. The fact that these benefits are provided for in the collective agreements changes nothing.

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

> [Unofficial translation] Employees' rights are defined by the collective agreement that governs them and by certain legislative provisions. However, the resulting claims are just as much [at] risk as those of other creditors, in this case suppliers whose livelihood is also threatened by the financial precariousness of their debtor.
>
> The arguments of counsel for the Applicants are based on the erroneous premise that the employees are entitled to a privileged status. That is not what the CCAA provides nor is it what this court decided in *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*

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

Report of the Monitor

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

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

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

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

Discussion and Analysis

47 The acknowledged purpose of the CCAA is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. (See *Pacific National Lease Holding Corp. (Re),* [1992] B.C.J. No. 3070, aff'd by (1992), 15 C.B.R. (3d) 265, at para. 18 citing *Chef Ready Foods Ltd.* v. *Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 (B.C.C.A.) at 315). The primary procedural instrument used to achieve that goal is the ability of the court to issue a broad stay of proceedings under Section 11 of the CCAA.

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

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

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

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

(a) The Applicants are not in a position to honour their obligations to all creditors.
(b) The Applicants are in default of contractual obligations to a number of creditors, including with respect to significant bond issues. The obligations owed to bondholders are unsecured.

(c) The Applicants are in default of certain obligations under the Collective Agreements.
(d) The Applicants are in default of certain obligations owed to the Former Employees.

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

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

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

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

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

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

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

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

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

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

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

63 It is necessary to consider the meaning of Section 11.3 and, in particular, whether the Section should be interpreted in the manner suggested by the Union.

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

65 No cases were cited in support of this interpretation.

66 I am unable to agree with the Union's argument. In my view, section 11.3 is an exception to the general stay provision authorized by section 11 provided for in the Initial Order. As such, it seems to me that section 11.3 should be narrowly construed. (See Ruth Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham, Ont.: LexisNexis Canada Inc., 2008) at 483-485.) Section 11.3 applies to services provided after the date of the Initial Order. The ordinary meaning of "services" must be considered in the context of the phrase "services, ... provided after the order is made". On a plain reading, it contemplates, in my view, some activity on behalf of the service provider which is performed after the date of the Initial Order. The CCAA contemplates that during the reorganization process, pre-filing debts are not paid, absent exceptional circumstances and services provided after the date of the Initial Order will be paid for the purpose of ensuring the continued supply of services.

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

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

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

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

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

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

73 However, as is clear from the context, these cases referenced at [70] are dealing with the ordinary situation in which there is no issue of insolvency. In this case, we are dealing with a group of companies which are insolvent and

which have been accorded the protection of the CCAA. In my view, this insolvency context is an important distinguishing factor. The insolvency context requires that the stay provisions provided in the CCAA and the Initial Order must be given meaningful interpretation.

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

> It appears to me that an order which treats creditors alike is in accord with the purpose of the CCAA. Without the provisions of that statute the petitioner companies might soon be in bankruptcy, and the priority which the employees now have would be lost. The process provided by the CCAA is an interim one. Generally, it suspends but does not determine the ultimate rights of any creditor. In the end it may result in the rights of employees being protected, but in the meantime it preserves the status quo and protects all creditors while a reorganization is being attempted.
>
> ...
>
> This case is not so much about the rights of employees as creditors, but the right of the court under the CCAA to serve not only the special interests of the directors and officers of the company but the broader constituency referred to in *Chef Ready Foods Ltd., supra.* Such a decision may invariably conflict with provincial legislation, but the broad purpose of the CCAA must be served.

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

> The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in the case of collective agreements). Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the prospect of the resulting debts.
>
> Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand to be paid immediately (s. 11.3 CCAA).
>
> Obligations that have not been met with regard to employees who were laid off permanently on October 7, 2002, or with regard to persons who were former employees of Jeffrey Mine Inc. on

> that date and that stem from the collective agreements or other commitments constitute debts of the debtor to be disposed of in the restructuring plan or, failing that, upon the bankruptcy of Jeffrey Mine Inc.

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

> ... The claims for severance pay arise from the collective bargaining agreement. But severance pay does not fall into the category of essential services provided during the organization period in order to enable Printwest to function.
>
> ...
>
> If the Union's request should be accepted, with the result that the claims for severance pay be dealt with outside the plan of compromise - and thereby be paid in full - such a result could not possibly be viewed as fair and reasonable with respect to other unsecured creditors, who will possibly receive only a small fraction of the amounts owing to them for goods and services provided to Printwest in good faith. Thus, the application of the Union in this respect must be rejected.

Disposition

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

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

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

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

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

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

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

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

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

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

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

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

88 In recognition of the circumstances that face certain retirees and Former Employees, the Monitor is directed to review the current financial circumstances of the Applicants and report back as to whether it is feasible to establish a process by which certain creditors, upon demonstrating hardship, could qualify for an unspecified partial distribution in advance of a general distribution to creditors. I would ask that the Monitor consider and report back to this court on this issue within 30 days.

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

G.B. MORAWETZ J.

cp/e/qllxr/qlpxm/qlaxw/qlaxr

Case Name:

Nortel Networks Corp. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended
AND IN THE MATTER OF a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation
Between
Donald Sproule, David D. Archibald and Michael Campbell on their own behalf and on behalf of Former Employees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Appellants, and
Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor, Respondents
And between
National Automobile, Aerospace, Transportation and General Workers Union of Canada (CAW-Canada) and its Locals 27, 1525, 1530, 1535, 1837, 1839, 1905 and/or 1915, George Borosh and other retirees of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, Appellants, and
Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation, the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited, the Informal Nortel Noteholder Group, the Official Committee of Unsecured Creditors and Ernst & Young Inc. in its capacity as Monitor, Respondents

[2009] O.J. No. 4967

2009 ONCA 833

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

77 C.C.P.B. 161

[2010] CLLC para. 210-005

2009 CarswellOnt 7383

Dockets: C50986, C50988

Ontario Court of Appeal
Toronto, Ontario

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

Heard: October 1, 2009.
Judgment: November 26, 2009.

(49 paras.)

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

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

Employment law -- Employment standards legislation -- Constitutional issues -- Appeal by former employees of company under protection from dismissal of motion for directions dismissed -- Former employees sought direction requiring company to make retirement and severance payments to for-

mer employees as required by provincial employment standards legislation -- Appellate court upheld finding that payments were not exempted from stay provisions of protection order under application of doctrine of paramountcy -- To find otherwise would defeat intent of stay provisions providing for restructuring for benefit of all stakeholders -- Companies' Creditors Arrangement Act, ss. 11 -- Employment Standards Act, s. 11(5).

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

HELD: Appeals dismissed. The periodic payments sought by the union were not excluded from the stay provisions of the protection order under s. 11.3(a) of the CCAA. The payments required for current services provided by Nortel's continuing employees did not encompass the periodic retirement or severance payments owed to former employees. Such payments were best characterized as deferred compensation under predecessor collective agreements rather than compensation for services currently being performed for Nortel. In addition, the vested interest of former employees in such payments was inconsistent with current services being the source of the obligation to pay. The statutory payments sought by former employees were not excluded from the stay provisions of the protection order. The stay provisions of the CCAA were intended to freeze Nortel's debt obligations in order to permit restructuring for the benefit of all stakeholders. Upon consideration of the doctrine of paramountcy, such intent would be frustrated if the order did not apply to termination and severance payments owed under the provincial ESA to terminated employees in respect of past services. The effect of the stay related to the timing of the statutory payments rather than the interrelationship between ESA and the CCAA in respect of ultimate payment of Nortel's statutory obligations.

Statutes, Regulations and Rules Cited:

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

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

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

Appeal From:

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

Counsel:

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

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

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

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

Benjamin Zarnett, for the monitor Ernst & Young Inc.

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

Thomas McRae, for the Nortel Canadian Continuing Employees.

Massimo Starnino, for the Superintendent of Financial Services.

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

---

The judgment of the Court was delivered by

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

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

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

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

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

THE UNION APPEAL

Background

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

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

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

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

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

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

> The flaw in the argument of the Union is that it equates the crystallization of a payment obligation under the Collective Agreement to a provision of a service within the meaning of s. 11.3. The triggering of the payment obligation may have

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

11 The Union challenges this conclusion.

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

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

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

15 In our opinion, this argument must fail.

Analysis

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

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

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

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

19 What then does the collective agreement require of Nortel as payment for the work done by its continuing employees? The straightforward answer is that the collective agreement sets out in detail the compensation that Nortel must pay and the benefits it must provide to its employees in return for their services. That bargain is at the heart of the collective agreement. Indeed, as counsel

for the Union candidly acknowledged, the typical grievance, if services of employees went unremunerated, would be to seek as a remedy not what might be owed to former employees but only the payment of compensation and benefits owed under the collective agreement to those employees who provided the services. Indeed, that package of compensation and benefits represents the commercially reasonable contractual obligation resting on Nortel for the supply of services by those continuing employees. It is that which is protected by s. 11.3(a) from the reach of the January 14, 2009 order: see *Re: Mirant Canada Energy Marketing Ltd.* (2004), 36 Alta. L.R. (4th) 87 (Q.B.).

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

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

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

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

24 The Union's appeal must be dismissed.

THE FORMER EMPLOYEES' APPEAL

Background

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

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

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

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

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

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

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

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

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

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

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

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

Analysis

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

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

34 Parliament has carved out defined exceptions to the court's ability to impose a stay. For example, s. 11.3(a) prohibits a stay of payments for goods and services provided after the initial order, so that while the company is given the opportunity and privilege to carry on during the *CCAA* restructuring process without paying its existing creditors, it is on a pay-as-you-go basis only. In contrast, there is no exception for statutory termination and severance pay.[2] Furthermore, as the respondent Boards of Directors point out, the recent amendments to the *CCAA* that came into force on

September 18, 2009 do not address this issue, although they do deal in other respects with employee-related matters.

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

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

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

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

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

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

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

39 The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if

the court's stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

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

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

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

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

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

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

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

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

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

49 The appeal by the former employees is also dismissed.

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

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

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

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

TAB 9

Case Name:

RE GLOBE AND MAIL LTD AND TORONTO NEWSPAPER GUILD

[1978] O.L.A.A. No. 128

21 L.A.C. (2d) 112

Ontario
Labour Arbitration

W. H. Fox, Q.C., M. Tate, S. E. Dinsdale, Q.C.

Decision: November 17, 1978

(33 paras.)

Appearances:

H. Goldblatt and others, for the union.

R. V. Hicks, Q.C., and others, for the employer.

AWARD

1 The facts giving rise to the grievances are relatively straightforward and are not in dispute. At issue is art. 3 of the Globe and Mail pension plan which provides that an employee must, as a condition of employment, join the plan after he has completed two years of service. The pension plan was instituted in 1954 and covers both unionized and non-unionized personnel. It is admitted that art. 3 or a similar version has been part of the plan since that time.

2 Filed with the board was a copy of the current collective agreement between the parties and the board was referred to art. 9.02 which stipulates that the employer shall continue the pension plan during the life of the agreement. It goes on to provide that notwithstanding certain provisions in the plan, employees covered by the agreement shall continue to remain eligible for the plan. The parties first entered into a collective agreement in 1955 and art. 9.02 has in essence remained the same since that time.

3 Pursuant to art. 3 of the plan, the practice for some years has been to require employees to complete and sign ex. 6 during their probationary period. Exhibit 6 serves as both an acknowledgement of the conditions of the plan and an enrolment card. Employees may then join the plan at any of the next regular entry dates up to the entry date which immediately follows completion of two years' service, when membership in the plan becomes compulsory.

4 The grievor became a regular full-time employee on August 1, 1977, and he signed ex. 4 (which is the reverse side

of ex. 6) on November 1, 1977, after being instructed that it was compulsory to do so. He added at the foot of ex. 4 the words "signed under duress. This does not prejudice my right to grieve under the grievance procedure." The grievor then filed a grievance marked as ex. 1, on November 17, 1977, and on the same date, the union filed a policy grievance marked ex. 2. The two grievances in essence sought the same remedy, namely, a declaration that it is not compulsory for employees in the bargaining unit to join the plan. Both grievances also sought a cease and desist order.

5 The guild took the position that the parties to the collective agreement had not agreed that membership in the plan was a condition of employment. They said that the pension plan was not incorporated by reference into the collective agreement so as to become part of the agreement. In support of this position, counsel relied upon a previous award between the same parties, chaired by Prof. Arthurs, and dated September 23, 1976 [unreported]. Prof. Arthurs found no "apt words of reference" which would have the effect of incorporating the plan by reference into the collective agreement. The union argued that where art. 9.02 required that the plan "shall be continued by the employer" this did not mean that the parties had agreed to the contents of the plan but rather only that the employer could not discontinue the plan. Counsel said that the employer had the right to amend the plan by virtue of art. 18 of the plan but that the plan had to continue under art. 9.02, but not as part of the collective agreement.

6 Counsel for the union argued that since the parties have not agreed that membership in the plan is a condition of employment it would be illegal for it to be a condition of employment, and counsel referred the board to several sections of the *Labour Relations Act*, R.S.O. 1970, c. 232, including s. 35 [am. 1975, c. 76, s. 8] which provides that the union is the exclusive bargaining agent; s. 41 which provides that there can only be one collective agreement, and s. 59 which in effect prohibits individual bargaining.

7 Counsel for the employer raised a number of issues in reply. First, he contended that the only matter which can properly come before the board must concern the *application* of the agreement, and if the board were to find that the employer had complied with art. 9.02 the grievance should be dismissed. He cited in support of this contention art. 17 of the collective agreement which provides for a committee to be appointed by the union "to deal with the employer or his authorized agent on any matter arising from the *application* of the agreement or affecting the relations of the employees and the employer." The board does not hesitate to say that we were not impressed with this proposition, having regard to the wording of s. 37 [am. *ibid.*, s. 10] of the *Labour Relations Act* which says that:

> 37. Every collective agreement shall provide for the final and binding settlement by arbitration ... of *all differences* between the parties arising from the *interpretation, application, or alleged violation of the agreement*, including any question as to whether a matter is arbitrable.

8 [Emphasis added.] In view of this provision the board does not feel that it is limited to hearing only a matter concerning the application of the agreement.

9 Mr. Hicks then referred to the fact that art. 9.02 was a negotiated term which had been in the agreement ever since 1955. It is to be noted that the pension plan pre-dated the first agreement by about a year. Mr. Hicks then argued that since the union, with full knowledge of the plan, negotiated art. 9.02 requiring its continuation, it must be taken to have accepted the plan. Counsel submitted further that the union, having required continuation of the plan could not now deny the application of all the provisions of the plan, including subart. 3.

10 The union argued that any condition of employment which is not set out in the collective agreement is illegal. After reviewing the cases cited by Mr. Goldblatt, we are unable to give effect to this contention. Clearly management retains the right to establish rules subject to the limitation that such rules must be reasonable. The leading case in this area is *Re KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73 (Robinson), referred to in *Re District of North Vancouver and Int'l Assoc. of Fire Fighters* (1974), 6 L.A.C. (2d) 203 (MacIntyre), where the test for "reasonableness" was set out in six requisites. These requisites, the board feels, have been fulfilled in this case. It should be noted that unlike the *KVP* case, where the rule or condition was unilaterally established, this case is an

instance where the condition has been continually in existence for over 20 years. Furthermore, to reiterate, the condition arises out of a plan which the parties have mutually agreed would continue. This is in contrast to both *Re Page-Hersey Tubes, Ltd. and United Electrical, Radio & Machine Workers of America, Local 523* (1953), 4 L.A.C. 1375 (Fuller), and *Re Union Carbide Canada Ltd. and Printing Specialties & Paper Products Union, Local 512* (1970), 22 L.A.C. 194 (O'Shea) (cited by Mr. Goldblatt), where the employer in essence ignored the collective agreement and engaged in what is considered to be individual bargaining. The present case seems to fall directly in line with *Re Oshawa General Hospital and Nurses' Assoc. Oshawa General Hospital* (1975), 10 L.A.C. (2d) 201 (Brown), where many of the same points were argued. The board in that case found that the hospital had merely restated a policy in order to accommodate changes from the College of Nurses. At p. 206, the board quoted from an earlier decision between the parties which, in essence, held that this was not a unilateral alteration of the collective agreement, but simply a restatement of the hiring policy it had always followed. The board in *Oshawa General Hospital* went on to find that the hospital was not in breach of the collective agreement when it terminated the grievor for failure to comply with the condition of employment. Considering the length of time which the condition in the present case has been in existence, we find this to be even a clearer case then the *Oshawa General Hospital* decision and do not consider that any violation of the collective agreement has been made out.

11 Article 9.02 of the collective agreement reads in part: "The Globe and Mail Pension Plan ... shall be continued by the employer during the life of this agreement ...". What pension plan does this refer to, the board asks itself. It can only refer to the pension plan: ex. 5. No other plan was mentioned as ever having been in existence. That being so the union undoubtedly was aware of the plan and all of its provisions and implications, including subart. 3 making membership in the plan a condition of employment. Although, as Prof. Arthurs held, the plan may not legally be a part of the collective agreement, by way of incorporation by reference, the board feels that it was sufficiently "covered" (to use Mr. Hicks' term) to make the union and the employees bound by it.

12 The board finds that the union has agreed to the conditions contained in the plan as a result of art. 9.02 of the collective agreement and furthermore that the union has acquiesced to sub-art. 3 of the plan since it, like art. 9.02 of the agreement, has remained unchanged since 1954 and 1955 respectively.

13 We cannot see how the condition can be considered to be a violation of the collective agreement since it was not unilaterally imposed but arises out of a plan which the collective agreement itself requires be continued.

14 For these reasons, we award that the grievances be dismissed.

DISSENT (Tate)

15 I have read the chairman's proposed award and cannot concur in its findings. Several citations have been noted by the chairman. *Re KVP Co. Ltd. and Lumber & Sawmill Workers' Union, Local 2537* (1965), 16 L.A.C. 73 (Robinson), can be totally distinguished from the current case. Among other things it dealt with discharge, just cause, rule-making powers, garnishees, etc. The employee concerned was discharged because of garnishees. On p. 81, the following is found:

> While the making of rules appears to be considered to be an inherent right of management, unless taken away by the terms of the collective agreement ... the general principle appears to be well established that company rules and regulations must be consistent with the terms of the collective agreement.

16 In allowing the grievance, the majority of the board stated, on p. 107:

> 1. The company rule in question as written was beyond the competence of the company to introduce unilaterally several years after the grievor commenced his employment with the company.

> 2. In any event, even if the rule had been within the competence of the company to so introduce (*which this board considers it was not*), the penalty ... was unjust...

17 (Emphasis added. The dissenting board member was R. V. Hicks, counsel for the company in the current case.)

18 The chairman has cited *Re Oshawa General Hospital and Nurses' Assoc. Oshawa General Hospital* (1975), 10 L.A.C. (2d) 201 (Brown). He states that "the present case seems to fall directly in line" with it. With respect, I differ. The grievor was requested to pass a nurses' examination. The distinction between the *Oshawa* case and the instant one is that the union had accepted the condition tacitly and the employee had accepted it at the point of hiring. Further, *the requirement related to the qualifications of the employee to perform his or her job.* None of the above factors exist here.

19 I shall now deal with a previous award between the Globe and Mail and the Toronto Newspaper Guild (H. Arthurs [unreported]) which is touched upon in the majority award. First, I cannot stress too strongly that in my view, *this* is the most important and cogent citation given to the board. Second, it appears to have been given little attention or weight by the learned chairman. Yet, it is directly on point with the "gut" issue of the current case. At the bottom of p. 3 of the Arthurs decision, the following appears:

> Indeed, in the circumstances, it is difficult to see how the plan [pension] could, as a practical matter, be regarded as being part of the collective agreement. On the one hand, the plan covers a large group of salaried employees (including management personnel) who are not members of these bargaining units; *bargaining unit members in the plan constitute only a minority of participants*. Thus, if the terms of the plan are to be changed only through the collective bargaining process -- a necessary implication of *"incorporation by reference"* -- the union would be negotiating for a large group for which it lacked bargaining authority, and which it is legally denied the right to represent, at least in so far as management personnel are concerned.

20 (Emphasis added.) The award goes on to further state that the plan makes no special mention of arrangements between the company and union and lays down no special provisions defining its operation in relation to members of the bargaining unit. The award further states in the second last paragraph of p. 5 that art. 9.02 of the collective agreement:

> ... is not merely empty verbiage, it records certain promises by the company to the union. As noted, the company's promise is that the plan shall be "continued". It was conceded by the company counsel that discontinuance of the plan would therefore violate art. 9.02 as would a change in the plan so extreme or radical as to amount to discontinuance.

21 Arthurs stated categorically that what is left is a plan which continues, *but is not part of the collective agreement* and which can be amended in any way by the employer, providing that the amendment does not adversely affect employees covered by the collective agreement. I submit categorically that the Arthurs decision is binding upon the parties. It is interesting to note that this award was not challenged in the Courts by the company. As union counsel stated, all Prof. Arthurs said was that the parties have not agreed to the contents of the pension plan. The employer is free to alter the contents *except that the plan cannot be amended to the detriment of the employees.*

22 Article 3 of the pension plan is critical to the issue before the board. It reads in part:

> Each (such) employee must however, *as a condition of employment*, join the Plan...
>
> To become a member, an employee must complete and sign the enrolment forms required by the company.

23 (Emphasis added.) The above condition of employment is not incorporated in the collective agreement because the

pension plan is not incorporated in the agreement. It has not been agreed to by the union, because if it had been so agreed, the employer could not have amended it unilaterally. It can now do so by virtue of art. 18 of the plan which reads:

> While it is the intention and the hope of the Company to maintain the Plan in force indefinitely, the Company does not assume contractual obligation to do so. *The Company reserves the right to change, modify or discontinue the Plan.*

24 The *Labour Relations Act*, R.S.O. 1970, c. 232, is quite clear. It defines "collective agreement" in s. 1(*e*) [rep. & sub. 1977, c. 31, s. 1] and which I need not repeat, except that it stresses that it contains "provisions respecting *terms or conditions of employment* ...". Further, there can be only one collective agreement. It therefore follows, that since the company and union have not agreed that membership in the plan is a condition of employment and the employer cannot bargain with an individual *Labour Relations Act)* to make it a condition of employment, it simply cannot *be* a condition of employment: ss. 35 [am. 1975, c. 76, s. 8] and 59 of the *Labour Relations Act.*

25 With reference to art. 9.02 of the collective agreement, it simply refers to *eligibility*. There is no mandatory insistence that employees *must* join. Black's Law Dictionary describes "eligible" as "fit to be chosen. Legally qualified." There is nothing in the collective agreement that says that failure to join the pension plan represents "just cause" for dismissal. Yet that is the thrust of art. 3 of the pension plan and the card (ex. 6) which each prospective employee is obliged to sign. It reads:

> I have received a copy of the Globe and Mail Pension Plan and I understand that membership in the Plan becomes a condition of employment when an employee completes two years of continuous service and has attained the age of 25.

26 I submit that the employer cannot rely on something outside the collective agreement to discharge an employee.

27 This board is governed by the collective agreement between the parties. The employer, by insisting that an employee join the pension plan, is in violation, not only of the collective agreement, but of the *Labour Relations Act* which only recognizes the union as the bargaining agent for each employee and therefore, there can be no "agreement" between an individual employee and the company.

28 Company counsel argued that art. 9.02 is a provision negotiated between the parties and that it is not a unilateral condition. One may well ask, how can the union negotiate for management personnel which, according to the Arthurs decision, also belong to the plan? Further, it is self-evident that the only thing negotiated by the union is the continuation of the plan. That, and nothing more. Certainly such continuation does not contemplate that if an employee refuses to sign, his employment shall be terminated! For the company counsel to say that art. 9.02 was co-authored is to fly in the face of the fact that the plan was introduced on January 1, 1954, by the company -- one year before there was a collective agreement with the union.

29 Mr. Hicks, company counsel, commented that ex. 6 is nothing more than a receipt(!) and simply a permanent record of an employee's acknowledgement that he or she has received a copy of the pension plan. On the contrary, it is a document which binds the employee in the words, "I agree to the provisions of the company's retirement or pension plan as set out in the booklet given to me ...". In other words, it is an agreement between an individual employee and the employer.

30 The Arthurs award made it quite clear that the pension plan was not incorporated in the collective agreement either directly or by reference and therefore art. 9.02 is not "negotiated" but only an assurance that the pension plan will continue and may be amended by the employer, but without detriment to the employees. Further, a pension plan which is outside the collective agreement cannot be used to terminate employees. Article 20 of the collective agreement states:

> 20.01 There shall be no dismissals except for just and sufficient cause.

> 20.02 There shall be no dismissals of or other discrimination against any employee because of his membership or activity in the Guild, nor *as a result of this Agreement coming into effect*; nor because of age, sex, race, creed, colour, national origin or marital status.

(Emphasis added.)

31 A company is fully justified in looking at a potential employee's qualifications: see *Oshawa General Hospital* case, *supra.* An employer may well ask, will the employee be efficient? Can he or she learn his duties in reasonable time? Will he or she be a loyal employee? Will the individual's personality be an asset to the company? All the preceding are valid considerations for the employer to take into consideration. However, the employer is barred from setting *conditions* of employment which have not been agreed to by the employee's bargaining agent. That is the law of the Province.

32 Accordingly, I submit that for the company to institute a condition that obliges an employee to join a pension plan *against his or her will* and further, hangs the threat of discharge over the individual's head, comes well within the meaning of coercion.

33 For the above reasons, I would declare that it is not compulsory for employees in the guild unit of the Globe and Mail to join the pension plan and would direct that the employer cease and desist from insisting that they do.

TAB 10

RE UNITED AUTOMOBILE WORKERS, LOCAL 199, AND COLUMBUS McKINNON LTD.

17 L.A.C. 213
1966 CLB 564

H. D. Lang, C.C.J.
June 8, 1966

Pension plan -- Integration of Canada Pension Plan with existing plan -- Whether proper.

Collective agreement -- Pension plan -- Whether incorporated in agreement.

Arbitrability of submission -- Pension plan -- Whether incorporated in agreement.

UNION GRIEVANCE relating to integration of existing pension plan with *Canada Pension Plan* , 1964-65 (Can.), c. 51.

F. Fairchild , *M. Corcoran* and others for the union.

R. H. Baker and others for the company.

AWARD

Article 26.01 of the contract which is dated October 1, 1964, and is in force for three years, reads as follows:

> The present contributions by the Company to the present Pension Plan shall be continued for the duration of this Agreement.

The union charges that the company is violating this article.

On April 1, 1964, the company entered into an agreement with the Canada Trust Co. as trustee for the establishment of a pension plan for the company's hourly-rated employees. This plan was substituted for a former plan. Section 10 of the trustee agreement provided in s-s. (a) that "each member shall contribute 5% of earnings by payroll deduction from his date of joining the plan to his date of retirement". "Member" is defined as meaning an eligible employee who has completed the necessary enrollment forms and continues to be entitled to benefits or rights under the plan, and the word "employee" is defined as an hourly-rated employee of the company who is employed on a permanent full-time basis. Section 10(b) of the plan provides for contributions by the company as follows: "The company shall contribute such sums in addition to the members' contributions as are required to provide all pension benefits under the plan." Section 19 of the plan is headed "Future of the Plan" and reads in part as follows:

[p. 214]

> The Company expects and intends to maintain this Plan in force indefinitely but necessarily reserves the right to amend, suspend or discontinue the Plan, either in whole or in part, at any time or times, subject always to the requirements of the Department of National Revenue and the provisions of the Pension Benefits Act.
>
> If any social or pension benefits should be created in favour of the Members in the Plan, by means of legislation under which the Company would be required to make contributions to or for the benefit of such Members, either directly or indirectly, through taxation or otherwise, the Company may, with respect to such Members, either discontinue the Plan or make such modifications as the

Company considers equitable without limiting the general rights reserved to the Company above.

This pension plan is not a contract between the company and the union, but between the company and the trustee, Canada Trust Co. The company in March of 1965 prepared information on the plan to its hourly-rated employees in the form of a booklet. This booklet set out the provisions of the trust agreement in abbreviated form. It informed the members briefly as follows:

1. Members' contribution -- 5% of regular earnings plus additional voluntary contributions up to a certain limit.

2. The company provides whatever balance is necessary when added to the employees' required contribution to guarantee the pension payments.

3. The annual pension will be 2% of the regular earnings on which the employee has made the required contribution.

4. The future of the plan:

The Company expects to continue the Plan indefinitely, but in the event of future legislation or other circumstances, beyond the Company's control, necessarily reserves the right to change or discontinue the Plan.

In any event, all contributions made by the Company are irrevocable and must remain in the trust fund for the sole benefit of members and their beneficiaries. No money paid for benefits under the Plan by the Company can ever be returned to the Company.

[p. 215]

The umpire was referred to two decisions on integration of the *Canada Pension Plan* , 1964-65 (Can.), c. 51, with a company plan, but in each case the wording in the collective agreement was different. The first case was an award in *Tecumseh Products Ltd. and U.A.W.* (unreported), in which the wording was "during the term of this agreement the company agrees to continue the present pension plan without change". The umpire held that the company had changed the plan by integrating it with the Canada Pension Plan and upheld the union grievance. The other case referred to was *Re U.S.W., Local 4906, and Timken Roller Bearing Co., Canadian Timken Div.* (1965), 16 L.A.C. 209 (Reville, J., Chairman), where the wording was as follows: "Far the duration of this agreement the company will continue in force the benefits as provided in the existing group insurance and retirement annuity plans which have been instituted voluntarily by the company." The board held: (1) the company is not required to continue in force the existing retirement annuity plan *per se* because otherwise the clause would have read "the company will continue in force the existing retirement annuity plan"; (2) the company is not required to continue in force the benefits, that is the exact or identical benefits, otherwise the clause would have read "the company will continue in force the benefits provided in the existing retirement annuity plan".

Neither of these decisions is of much assistance to this problem. The wording of each is different and the plans are different. Article 26 of this agreement is peculiar in these respects: (1) it mentions present contributions by the company shall continue; (2) it makes no mention of contributions by the members continuing; (3) it does not say the present plan shall continue.

I shall consider each of these. Company contributions are not a fixed amount. It does not say 5% of the members' earnings or any definite percentage. The grey booklet said "such sums in addition to members' contributions as are required to provide all pension benefits under the plan". The corresponding section in the pension plan itself is substantially the same. The financial status of the plan is reviewed annually and adjustments or changes in the company's contribution to the plan are made so as to keep it on a sound actuarial basis. The company maintains it is still doing

this. What the company has

[p. 216]

done is to reduce the employees' contribution to the plan from 5% of earnings to co-ordinate it with the *Canada Pension Plan* , thus reducing the employee's contribution to the pension plan to 3.4% of the first $5,000 of earnings (1.6% of such earnings going to the *Canada Pension Plan*) and the 5% rate continuing on earnings exceeding $5,000. The company amended the retirement benefits payable under the plan by changing the mode of expressing them from 2% of earnings to 40% of contributions (which is the same ratio of benefits to contributions as previously).

Article 26 in the collective agreement makes no reference to the contributions of employees continuing. The company says it has the right to amend the provision in the trust agreement. I shall consider the right of the company to amend the agreement in the next paragraph.

The company contends it has not altered its contribution to the plan, that its contributions are sufficient to guarantee the pensions in accordance with the employees' contributions. The company says this clause does not prevent it from amending or altering the plan otherwise, and specifically that it does not prevent the company from reducing the employees' contributions to the plan or the amount of benefits to be provided by the plan. The company says further that nothing in the collective agreement forces it to preserve the plan unchanged. The company's brief puts it this way:

> IT IS SUBMITTED THAT while the collective agreement was entered into subsequent to the establishment of the pension plan, it does not prevent the company from amending the pension plan in the manner already accomplished, particularly in the light of the enactment of the *Canada Pension Plan* which was contemplated in the provisions of para. 2 of s. 19 of the pension plan.
>
> IT IS FURTHER SUBMITTED THAT, more specifically, art. 26 of the collective agreement does not prevent the reduction in employee contributions in that it provides only for the maintenance of company contributions to the pension plan and does not refer to the amount of benefits co be provided or that benefits be maintained at previous levels.
>
> IT IS FURTHER SUBMITTED THAT at no time has the company undertaken either in the pension plan, in the collective

[p. 217]

> agreement or elsewhere to preserve the pension plan unchanged either for the duration of the collective agreement or for any other period of time.
>
> IT IS FURTHER SUBMITTED THAT the company is not required to continue in force the pension plan as such, bat merely to continue its contributions as provided for in the pension plan and that the company has maintained its contributions, will continue to make contributions as heretofore, and does not intend to modify the method by which its contributions are determined, but will continue to make them in the amounts recommended by the Actuary of the pension plan.

Article 26 refers to "present Pension Plan". What is the present plan? The present plan is the whole plan, not only the plan providing for the company and employees' contributions and benefits, but clauses as heretofore quoted enabling the company to amend or discontinue the plan at any time or times and particularly if any social or pension benefits come into force by any legislation under which the company must contribute. So when this art. 26 refers to the "present Pension Plan" it means the whole plan, including these reservations. The company under the plan has the right, therefore, to amend the employees' contributions and the benefits accordingly. Under art. 26 it must continue its contributions so as to provide the benefits necessary from time to time to keep the plan actuarially sound. The company has done this and has agreed to do this.

The union requests the company to reinstate the employees' contributions back to January 1, 1966.

Nothing in art. 26 refers to employees' contributions and the company cannot be in violation of the agreement in that regard. In order to bind the company to do this the clause should provide that employees' contributions to the present or existing plan shall remain at 5% of earnings for the duration of the agreement. Had this been so, the company's contributions would have had to remain unchanged in order to provide the necessary benefits. The words "present contribution by the Company" refer to an indefinite amount, not 5% or any other per cent but to such amount as necessary to provide benefits, and when the employees' contribution changes the company's contribution changes accordingly. The contract does not provide "the present pension plan shall be continued

[p. 218]

without change" as in the *Tecumseh Products* case. For all of the above reasons the grievance will be dismissed.

As mentioned above the pension plan is not an agreement between the company and the union and not binding on the union and can be changed by the company without consultation or agreement of the union unless the company and union have otherwise provided in the collective bargaining agreement. The parties have so provided in art. 26, but unfortunately for the union, art. 26 only provides for maintaining the company's contributions according to the plan and its scope is therefore limited.

It appears to the umpire that this question of integrating or stacking or co-ordinating the *Canada Pension Plan* with a private plan is essentially a matter for negotiations rather than arbitration. The decision of an arbitrator is only binding until the termination of the agreement, at which time the parties in most cases will undoubtedly negotiate this matter since it is a cost item.

© The Cartwright Group Ltd., 2010. | Terms and Conditions of Use

TAB 11

Case Name:

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

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

[2003] J.Q. no 264

[2003] Q.J. No. 264

[2003] R.J.Q. 420

J.E. 2003-346

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

35 C.C.P.B. 71

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

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

2003 CanLII 47918

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

Quebec Court of Appeal
Montreal Registry

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

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

(70 paras.)

Counsel:

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

JUDGMENT

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

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

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

4 ALLOWS the appeal in part, as follows:

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

5 THE WHOLE, without costs.

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

REASONS OF DALPHOND J.A.

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

7 Could the Superior Court authorize the monitor to cease making the payments required to offset the actuarial

liability of the pension plan?

THE FACTS

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

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

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

complex for a time, and the conclusion of an arrangement with Jeffrey Mine Inc.'s creditors;

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

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

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

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

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

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

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

...

[My emphasis]

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

[TRANSLATION]

2. REMUNERATION

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

3. HOLIDAYS AND FRINGE BENEFITS

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

4. PENSION PLAN

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

5. UNION DUES

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

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

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

[TRANSLATION]

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

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

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

Lastly, given Jeffrey Mine Inc.'s precarious financial situation, the monitor notifies you that,

beginning on October 1, 2002 and ending on a date to be determined, employer contributions will no Ionizer be made to the pension fund for the purpose of offsetting the plan's actuarial liability.

...

[My emphasis]

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

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

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

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

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

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

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

four months of operation would cost some $4 million, an amount that the monitor did not have and that far exceeded the anticipated profits from the Thiokol project.

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

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

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

THE TRIAL JUDGMENT

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

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

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

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

[20] DECLARES this order executory notwithstanding all appeals;

[My emphasis]

THE ARGUMENTS OF THE PARTIES

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

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

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

THE RELEVANT LEGISLATIVE PROVISIONS

26 The following are the relevant provisions of the CCAA:

11.3

No order made under section 11 shall have the effect of

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

11.7

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

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

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

or

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

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

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

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

11.8

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

* * *

11.3

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

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

11.7

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

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

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

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

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

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

11.8

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

[My emphasis]

ANALYSIS

I. A bit of history

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

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

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

II. Aim of the CCAA

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

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

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

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

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

> [TRANSLATION]
>
> [52] The vitality of the CCAA is due in part to the way it has been interpreted by the courts, primarily in Ontario, British Columbia and Alberta. These courts opted for a broad and liberal interpretation of the CCAA and the notion of "inherent jurisdiction" and "equity" in order to give effect to the aims of the CCAA, which are to enable companies to remain in operation so that they can find a solution to their insolvency and turn their financial situation around. The courts concluded that the CCAA must be interpreted and applied in this way in order to provide a flexible tool for restructuring insolvent companies.
>
> [53] On the basis of these concepts, the courts have not hesitated in recent years to render orders-such as the debtor's right to cancel contracts-that have become almost routine under the

CCAA.

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

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

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

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

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

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

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

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

arrangement involving the cancellation of lease agreements:

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

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

...

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

...

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

[My emphasis]

III. The monitor's role

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

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

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

company.

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

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

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

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

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

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

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

42 I find nothing in section 11.8 to contradict that conclusion. It is true that the first paragraph of the French version of section 11.8 CCAA stipulates the following: "le contrôleur qui, ès qualité, ... succède à la compagnie débitrice comme employeur". Out of context, these words could perhaps be construed to mean that the monitor is a new employer. With respect, however, I find such an interpretation to be contrary to the very spirit of the CCAA, notably because the debtor continues to exist and to own its property, and because the monitor is not a third party in relation to the debtor. Moreover, the English version of section 11.8 is clearer, stating: "where a monitor carries on in that position

the business of a debtor company or continues the employment of the company's employees". "Continue the employment of the company's employees" describes the decision made by the monitor, while accurately reflecting the idea that the employees are still in the company's employ, since the monitor continues their employment.

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

IV. The CCAA and the appellants' exclusive representation

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

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

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

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

V. The working conditions of employees kept on or recalled

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

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

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

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

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

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

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

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

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

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

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

dismissed the appeal in the following terms:

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

57 In the case at bar, the Superior Court did not amend the collective agreements when it authorized the monitor to suspend pension plan contributions [TRANSLATION] "except, ..., for employees whose services are retained by the monitor". In fact, Jeffrey Mine Inc.'s obligations regarding the amounts payable to the pension fund under the collective

agreements continue to exist, but are not being honoured because of insufficient funds. Within the framework of the restructuring plan, arrangements can be made respecting the amounts owing in this regard.

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

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

VI. Recapitulation

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

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

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

VII. Conclusions sought by the appellants

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

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

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

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

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

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

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

VIII. Conclusion and disposition

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

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

PIERRE DALPHOND J.A.

cp/i/qw/qlisl/qlesc/qljxl

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

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

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

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

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

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

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

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

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

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

11 Ibid. at 93.

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

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

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

15 Michaud v. Steinberg, supra, at 1690.

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

17 Ibid. at 191.

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

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

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

21 Section 33 of the winding-up Act.

22 Section 35 of the Winding-up Act.

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

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

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

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

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

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

TAB 12

Toronto Public Library Board and C.U.P.E., Local 1996 (Re)

IN THE MATTER OF AN ARBITRATION BETWEEN: THE TORONTO PUBLIC LIBRARY BOARD, "the Employer" and THE CANADIAN UNION OF PUBLIC EMPLOYEES AND ITS LOCAL 1996, "the Union" RESPECTING THE GRIEVANCE OF PATRICIA O'SULLIVAN (86-17) AND A POLICY GRIEVANCE RESPECTING MATERNITY BENEFITS (86-18)

12 C.L.A.S. 66
1988 CLB 11469
Ontario
majority: Dunn, O'Byrne, dissent: Solberg
December 19, 1988

LEAVE OF ABSENCE -- Maternity leave -- Payment of pension contributions -- Obligation of employer limited under statutory municipal pension plan incorporated by reference -- No requirement to pay one-half contributions during leave.

Under terms of pension plan grievor repurchased credited service by payment of full pension contributions during maternity leave. Union claimed employer required under collective agreement to continue to pay one-half of contributions for first three-month period and sought reimbursement. Employer maintained grievor explicitly bound to pay full contributions under terms of pension plan. Held: Parties entitled to extend benefits arising under statutory authority but language of collective agreement does not support relief of pension contribution claimed. Intention of parties to refer to legislation and supporting regulations to determine specific benefits and obligation to pay premiums. Denial of contribution by employer proper. Grievance denied. (11 pp.)

Employer: J. R. Hassell, Counsel
Union: Steven Barrett, Counsel, Freda Page, President, Local 1996, Michael Pearl, Chief Steward

AWARD

[1] The policy grievance filed concerned the same issues as those to be considered in the O'Sullivan grievance. With the concurrence of the Employer, the Union withdrew the policy grievance at the hearing without prejudice to its position that policy grievances can be launched in these circumstances.

[2] The parties agreed on the facts, and no evidence was called.

[3] The grievor took maternity leave on May 13th, 1985. She returned to work on October 25th of 1985.

[4] Upon her return, Mrs. O'Sullivan was provided with a claim form permitting her to claim as credited service, for the purpose of calculating Ontario Municipal Employees Retirement System benefits (OMERS benefits), the period of broken service occasioned by her absence on maternity leave. An absence in excess of fifteen days ordinarily is treated as "broken service". In order to have her broken service credited as credited service, the grievor paid the sum of $1,596.10. She claims that the Employer was bound to make a contribution in respect to the first three months that she was on maternity leave. It is agreed that the amount of that contribution (in the neighbourhood of $347.00) will be settled by the parties, if the Employer is indeed found liable to contribute.

[5] There is no claim of discrimination against the Employer.

[6] It was agreed that the effect of past practice should not be considered in the initial determination of this grievance, the parties wishing an interpretation of the agreement on its face.

[7] It was agreed that past practice may be considered at a further hearing, if necessary.

[8] The Union submits that Article 21.04 of the collective agreement, dealing with maternity leave, requires that the Employer pay its regular contribution during the first three month of the leave.

[9] The Employer argues that the collective agreement, on a strict reading, does not require it to pay pension contributions for the period.

[10] The Employer further submits that Article 24.01, and particularly sub-clause (a), by explicit reference incorporates into the collective agreement the provisions of the OMERS statute and regulations. It is the pension legislation, it is urged, that directs who is to pay for benefit coverage, and the amount. Finally, the Employer argues that if there is any doubt as to the extent of the agreement and the incorporation by reference, there is a latent ambiguity, with the OMERS legislation being the only extrinsic evidence available to resolve it.

[11] Articles 21.04 (a) and 24.01 (a) of the collective agreement read:

"21.04 Maternity Leave (Full-Time and Part-Time Employees)

(a) maternity leave without pay will be in accordance with Part XI of *The Employment Standards Act* R.S.O. 1980 as amended. The employee should give the Board two (2) weeks notice in writing of the day on which she intends to commence her leave of absence. Benefits as provided in Article 24 shall be continued by the Board for three (3) months subsequent to the commencement of her leave.

24.01 Pension (Full-Time Employees)

(a) All permanent full-time employees on staff prior to July 1, 1965 are enrolled in the Toronto Civic Employees Pension and Benefit Fund. All other permanent Full-Time Employees are covered by the Ontario Municipal Employees Retirement System, in accordance with the entrance requirements of the scheme. Supplementary coverage is also provided on a Type 1 and Type 111 plan with a 2% benefit level."

[12] The Employer submitted that Sections 10 and 11 of the *OMERS Act* (R.S.O. 1980, C. 348) are relevant. They read:

"10. The contributions of the members shall be as prescribed in the regulations. R.S.O. 1980, c. 3480 s. 10.

11. The contributions of the employers who participate in the system shall be such an amount as is required, in addition to the contributions of the members and the interest earned by the Fund, to provide for the payment of the benefits and the expenses under the regulations. R.S.O. 1980, c. 348, s. 11"

[13] The Regulation provisions cited include:

GENERAL INTERPRETATION

"1. In this Regulation,

(a) ...

(b) ...

(c) ...

(d) "continuous service" means unbroken service, and such service shall be deemed not to be broken by,

(i) ...

(ii) a leave of absence for any reason where the employer has authorized such leave and either before or after the commencement of such leave has agreed that it shall be deemed not to be a break in service.

(e) ...

(f) "credited service" means the service of a member for which contributions under section 9 have been made and have not been refunded and includes any service established for a member in accordance with sections 13. 22 and 23;"

"CONTRIBUTIONS BY MEMBERS

9.(1) Every member shall contribute to the Fund by payroll deduction in each pay period a percentage of his contributory earning while he is an employee or councillor of an employer who participates in the System but no contribution shall be payable by a member from the first day of the month following the month in which he attains seventy-one years of age.

(2) - (7) ...

(8) A member who did not make a contribution to the Fund under subsection (1) during an absence that was an absence described in sub-clause 1 (d) (ii) or Uv) may establish the period of the absence as credited service by paying into the Fund an amount equal to twice the amount of contribution calculated in accordance with subsection (2) as if the annual rate of contributory earnings of the member on the day immediately preceding the absence had been received by the member during the absence and,

(a) ...

(b) if the absence terminates after the 31St December, 1977, the amount to be paid by the member shall be paid to the Fund on or before the end of the year next following the year in which the absence terminates."

"CONTRIBUTIONS BY EMPLOYERS

10. (1) to (7) ...

(8) Where a member elects to make a contribution,

(a) under subsection 9 (5), the employer shall make an equal contribution and shall pay such member contributions and employer contributions to the Fund forthwith;

(b) ...

(c) under clause 9 (7) (b) or sub- section 9 (8), the employer shall pay such contributions to the Fund forthwith."

[14] The Employer submitted in evidence an extract from the OMERS Benefit Manual, an instruction to describe broken service and its effect. The Union, quite properly, pointed out that this manual has no particular probative relevance in itself, being established neither by act nor regulation. However, we think it is of value, in that it appears to fairly reflect the law and the established practice under the statutory authority.

[15] The manual defines broken service as:

> "A period of broken service is a period of absence from work as defined in the OMERS Regulation during which a member does not receive either his normal rate of contributory earnings or a disability waiver of premium benefit. For the purposes of the OMERS pension a period of broken service does not break the continuity of a member's service (see also manual section Credited Service) but it does not count as credited service unless special arrangements are made to buy it as such (see below)."

[16] The manual then sets out the types of broken service that may be purchased as credited service by a member (employee). These include a number of categories listed under "Authorized Leave of Absence", including "maternity" leave".

[17] Maternity leave is an authorized leave of absence without pay under Article 21.04 of the collective agreement which adopts by reference the provisions of the *Employment Standards Act* , R.S.O. 1980, c. 137, Part XI. It is "broken service" within the definition of the OMERS Regulation. Under OMERS, an employee is entitled to pay the full contribution (of both herself and the employer) over the period of authorized absence, and have the time credited as service for the purposes of all benefits. Since she was not gainfully employed (receiving her normal rate of contributory earnings), her employer is excused from paying what otherwise would have been its share.

[18] The Employer takes the position that OMERS is part and parcel of the collective agreement by reference, and that it follows that one of its employees on maternity leave is explicitly bound to pay for all contributions to OMERS during the period of her absence.

[19] The Union, on the other hand, while agreeing that OMERS, in the ordinary course, relieves an employer from making a contribution during an employee's authorized absence, contends that an employer and union may extend the obligation of the employer by their collective agreement and require the employer to pay its contribution during a period of employee authorized absence as if that employee continued to receive her normal earnings, it is submitted that such is the effect of Article 21.04 (a), when it provides that, in the case of maternity leave Y benefits as provided by Article 24 (which include OMERS benfits) shall be continued by the Employer for three months subsequent to the commencement of her leave.

[20] We agree that parties to a collective agreement in the municipal field are entitled by their contract to extend benefits to employees beyond those envisaged by statutory authority, and thereby relieve them from the burden of paying premiums for which they otherwise would be charged when they elect to preserve the continuity of OMERS benefits during an authorized absence beyond the fifteen days contemplated.

[21] Article 21.04 (a) of the agreement before us prevents the withdrawal of "benefits" under Article 24 during the first three months of an employee's maternity leave. The question that this board must resolve is whether the obligation of the employer to pay a share of the premiums under the OMERS plan before the grievor commenced her leave, is a "benefit" contemplated by Article 21.04 (a) that must be continued by the employer for the first three months of her leave.

[22] Article 24 covers a wide range of employee benefits, including pension benefits (with which we are concerned), medical, dental and optical benefits, workers' compensation, long-term disability insurance and group life insurance. The employer is obliged by specific provision to pay 100% of all premiums for medical, dental and optical benefits, long-term disability and group life insurance. However, the clause respecting pension benefits (24.01 (a) *supra*) does not direct where the obligation to pay premiums lies. It simply directs that " ... permanent full- time employees are covered by the Ontario municipal Employees' Retirement System". We are of the

opinion that it was the evident intention that the OMERS statute and regulations be looked to for both specific benefits and the obligation to pay premiums in the ordinary course of an employee's active employment. The regulations require "an equal contribution" by the employer to the OMERS fund.

[23] Does the situation change when an employee is on maternity leave? The collective agreement provides no specific direction whereby the employer is obliged to pay the full contribution in circumstances where the employee is on such an authorized leave of absence. Although her absence does not interfere with the employee's record of "continuous service", the regulations nevertheless require that she double her contribution for the period of her absence if she wishes to have that period counted as credited service towards pension benefits. In other words, she must pay what had been the employer's contribution. We are urged that in the context of this collective agreement, the employer must pay what would otherwise have been her added contribution, as a "benefit" envisaged by Article 21.04 (a).

[24] We are of the opinion that the obligation of the employer imposed by Article 21.04 (a) of the collective agreement to continue the benefits of an employee for three months subsequent to the commencement of her maternity leave does not oblige the employer to continue payment during the period of the employee's leave of what would have been its share of contributory premiums had the employee continued to be gainfully employed. Article 24.01 provides that employees, such as the grievor, "are covered" by OMERS. It is to that system that we must look, not only for the benefits, but for the obligation to pay premiums.

[25] The obligation of the employer imposed by Article 24 to continue benefits must be read in the context of the whole collective agreement and the OMERS legislation. Keeping that in mind, we must conclude that when the parties directed by Article 21.04 that the benefits provided by Article 24 shall be continued for the first three months of maternity leave, they intended that the OMERS plan should continue to be available to employees on authorized leave of absence. It does not follow that the employer was meant to assume an obligation to pay one-half of premium charges. To find this would fly in the face of the provisions of the OMERS statute and regulations, incorporated by reference in the collective agreement.

[26] The "benefits" to an employee in respect to a plan may or may not include payment by the employer of premiums. It is clear enough that full premiums must be continued to be paid by the employer in order that it meet its obligation to continue to provide certain medical and other benefits. But in respect to pension coverage, its obligation is limited to the obligation of an employer under the appropriate OMERS legislation, it must accept the employee's offer within the appropriate time frame to pay double her normal contribution of premiums to sustain her "credited service" record. Such is one of the continued benefits envisaged under Article 21.04 as it relates to pensions.

[27] In the result, we find that the grievance of Patricia O'Sullivan must be dismissed on the basis of our interpretation of the collective agreement on its face. Our disposition is, of course, subject to the effect of past practice as noted earlier in this award.

O'BYRNE, J.:-- I CONCUR.

SOLBERG, J.:-- I DISSENT.

DISSENT

[28] The issue before this Board was deceptively simple: what does the language of Article 21.04 (a) mean when read together with Article 24.01? In other words, what is the "benefit" in respect of pensions which is to be continued during a maternity leave as contracted for by the parties to this

collective agreement?

[29] Does the "benefit" refer to the fact that this employee continues to be a member in a pension plan? I say no. The grievor's leave of absence did not sever her employment relationship. She is still an employee of the local Board and, as such, her membership in OMERS is obligatory. In my view, that which is obligatory cannot be considered a benefit negotiated an her behalf by her union.

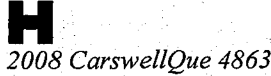
[30] Does the "benefit" refer to the fact that, exceptional circumstances aside, the Employer and employee make matching contributions to the OMERS pension plan? Again I say no. Ontario Regulation 724, Sections 9(1) and 10(8) mandates a 50/50 share. As I said in the paragraph above, that which is mandatory under legislation cannot be considered a benefit negotiated on behalf of an employee by her union.

[31] In the end, I suggest that a rather more meaningful interpretation of the clause must imply an obligation on the Employer to continue its matching contribution to OMERS. Anything less pays little heed to the parties' clear intention of maintaining the status quo in respect of benefits for employees on maternity leave.

© The Cartwright Group Ltd., 2010. | Terms and Conditions of Use

TAB 13

2008 CarswellQue 4863, 2008 QCCS 2288, EYB 2008-134261, J.E. 2008-1409, 55 C.B.R. (5th) 197



2008 CarswellQue 4863

TQS inc., Re

In the matter of the Companies' Creditors Arrangement Act, R.S.C. (1985), c. C-36, concerning TQS inc. et al.: Union of the employees of CFAP-TV (TQS-Québec), local section 3946 of the Canadian Union of Public Employees, Éric Lévesque, Martin Beaulieu, Jasmine Thériault and Suzanne Gagné (Petitioners) and TQS inc. et al. (Debtor-petitioner) v. RSM Richter inc. (Controller) and Canadian Human Rights Commission (Joined to the case)

Superior Court of Québec

P. Journet, J.C.S.

Heard: May 15, 2008
Judgment: May, 15, 2008
Oral reasons: May 15, 2008
Written reasons: June 3, 2008
Docket: C.S. Qué. Montréal 500-11-032130-078

© Thomson Reuters Canada Limited or its Licensors. All rights reserved.

Proceedings: refused leave to appeal TQS inc., Re (2008), 2008 QCCA 1429, 45 C.B.R. (5th) 1 (Que. C.A.)Proceedings: refused leave to appeal TQS inc., Re (February 12, 2009), Doc. 32836 (S.C.C.)

Counsel: Atty. Pierre Grenier, Atty. Annick Desjardins for the petitioners

Atty. François Fontaine, Atty. Philippe Buist for the debtor-petitioner TQS inc.

Atty. Martin Desrosiers for RSM Richter inc.

Atty. Jean Legault for Remstar

Subject: Insolvency; Corporate and Commercial

Faillite et insolvabilité — Proposition — Loi sur les arrangements avec les créanciers des compagnies — Questions diverses

Radiodiffuseur était en difficulté financière et s'est placé sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Employés d'une station de télé appartenant au radiodiffuseur étaient représentés par un syndicat — Syndicat a déposé une requête en modification du plan d'arrangement — Requête accueillie en partie — Tribunal s'est fondé sur un arrêt clé de la Cour d'appel du Québec en ce qui concerne les réclamations salariales des employés — Selon cet arrêt, les réclamations des employés syndiqués seraient disposées dans le cadre du plan de réorganisation du radiodiffuseur — Tribunal a statué que tous les employés syndiqués pourraient déposer une preuve de réclamation selon les dispositions de la convention collective — Bien que la Charte des droits et libertés soit à la base du règlement sur l'équité salariale, elle ne confère pas un droit à l'exécution différente des autres créances.

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

MONTREAL:2593623.2
1114233

2008 CarswellQue 4863, 2008 QCCS 2288, EYB 2008-134261, J.E. 2008-1409, 55 C.B.R. (5th) 197
Broadcaster had serious financial difficulties and sought protection under Companies' Creditors Arrangement Act — Employees working for television station of broadcaster were represented by union — Union brought motion to modify Plan of arrangement — Motion granted in part — Court referred to key decision by Court of Appeal of Quebec regarding salary claims by employees — According to that decision, unionized employees' claims were to be dealt with as part of broadcaster's restructuring plan — Court held that all unionized employees would be able to file proof of claim in accordance with collective agreement — Although Charter of Rights and Freedoms was basis for pay equity settlement, it did not provide special right to execution.

Cases considered by* P. Journet, J.C.S.*:

Mine Jeffrey inc., Re *(2003), 35 C.C.P.B. 71, 2003 CarswellQue 90, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom.* Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.) *[2003] R.J.Q. 420 (Que. C.A.) — considered*

Statutes considered:

Canadian Charter of Rights and Freedoms, *Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11*

Generally — referred to

PETITION of the union to modify the Plan of arrangement.

P. Journet, J.C.S.*:*

1 The Court receives a petition for the modification of the Plan of arrangement and of various orders related to the Plan of arrangement and to the meeting of all creditors who must give their opinion on said plan next May 22.

2 The petitioner Union requests more particularly three things:

1. Removal of paragraph 4.2 of the Plan of arrangement;

2. Modification of subparagraph (kk) of paragraph 1.1 to add in it, according to the conclusions sought, the pay equity claims including the payment of fixed sum salaries and the adjustments in salary scale;

3. Add the claims arising from the collective bargaining agreement.

3 The Court heard with interest the attorneys for the petitioners as well as the attorneys for the debtor and for the administrator of the debtor.

Copr. (c) West 2008 No Claim to Orig. Govt. Works

4 We must remember that in matters of salary claims of unionized employees of a company, the key decision is in the ruling of the Court of Appeal of Quebec rendered in Mine Jeffrey inc., Re[FN1].

5 It is based on this ruling that the Court must establish the rights and obligations of the parties, including as part of an Plan of arrangement.

6 The Court repeats what the Court of Appeal stated, in the reasons of Judge Pierre J. Dalphond, more particularly paragraphs 61, 62 of page 27 of said decision.

7 The Union asks the Court to modify the Plan of arrangement submitted, so that said plan would respect the right of the unionized employees to file a claim according to the terms of the collective bargaining agreement. In my opinion, it is a right that belongs to all creditors, regardless of their category.

8 The Court reiterates the opinion of Judge Dalphond, and infers that claims of the unionized workers will be settled as part of the recovery plan of the debtor. It adds that the obligations resulting from claims against the debtor must be settled either by negotiation or according to the terms of the collective bargaining agreement.

9 The Court can only confirm that all unionized employees may file a proof of claim according to the provisions of the collective bargaining agreement and their perceived rights against the debtor. In other words, the Court reserves to the employees the right to claim what it is owed to them under the collective bargaining agreement. It will be up to the authorized persons to decide on the fate of these claims.

10 Thus, there may be representations or objections to the proof of claim when the Plan of arrangement is accepted or refused. At this stage of the proceedings, the Court can only admit the petition, stressing that the claims that arise from the collective bargaining agreement must be filed with the administrator Mr. Vincent.

11 As to the claim that arises from pay equity for two employees, which is the object of an understanding reached before the initial order, the Court cannot, in spite of its respect for the contrary opinion, allow the request submitted to it, namely that the claims should be treated differently from the claims that may have existed or which exist before the issuance of the initial order. As an example, a judgment, a settlement agreement, a contract, an understanding which occurs during the initial order, must be treated identically to the other preexisting claims and consequently will be submitted with the other claims for approval of the Plan of arrangement at the time of its presentation.

12 The charter of rights and freedoms *which is the basis of the settlement on pay equity is the law that allowed reaching the settlement and determining the amounts that were owed and enforceable. The charter, however, does not give the right to different execution of the other claims that exist and the order of placement found in the Quebec Code.*

13 ON THESE GROUNDS, the Court believes that there is interest for the purposes of justice, for the order to be split so that the request for postponement of the meeting of creditors of May 22, 2008 be decided in a different judgment which will also decide on the request of the other unions for the same purpose, and proceeding to decide on this request, the Court:

14 REJECTS the request for removal of paragraph 4.2 from the Plan of arrangement.

15 REJECTS the request for modification of subparagraph (kk) of paragraph 1.1 of the draft arrangement concerning the claim for pay equity.

16 AUTHORIZES all employees concerned by the collective bargaining agreements to file claims with the administrator according to the existing collective bargaining agreements, provided they are filed before May 20, 2008 at noon.

Request partly admitted.

FN1Mine Jeffrey inc., Re, *[2003] R.J.Q. 420 (Que. C.A.).*

Copr. (c) West 2008 No Claim to Orig. Govt. Works

END OF DOCUMENT

Copr. (c) West 2008 No Claim to Orig. Govt. Works

H
2008 CarswellQue 4863

TQS inc., Re

Dans l'affaire de la loi sur les arrangements avec les créanciers des compagnies, L.R.C. (1985), c. C-36, relativement à TQS inc. et al: Syndicat des employés de CFAP-TV (TQS-Québec), section locale 3946 du Syndicat canadien de la fonction publique, Éric Lévesque, Martin Beaulieu, Jasmine Thériault et Suzanne Gagné (Requérants) et TQS inc. et als (Débitrice-requérante) c. RSM Richter inc. (Contrôleur) et Commission canadienne des droits de la personne (Mise en cause)

Cour supérieure du Québec

P. Journet, J.C.S.

Heard: 15 mai 2008
Judgment: 15 mai 2008
Oral reasons: 15 mai 2008
Written reasons: 3 juin 2008
Docket: C.S. Qué. Montréal 500-11-032130-078

© Thomson Reuters Canada Limited or its Licensors. All rights reserved.

Proceedings: refused leave to appeal *TQS inc., Re* (2008), 2008 QCCA 1429, 45 C.B.R. (5th) 1 (Que. C.A.)**Proceedings: refused leave to appeal *TQS inc., Re* (February 12, 2009), Doc. 32836 (S.C.C.)**

Counsel: Me Pierre Grenier, Me Annick Desjardins pour les requérants

Me François Fontaine, Me Philippe Buist pour la débitrice-requérante TQS inc.

Me Martin Desrosiers pour RSM Richter inc.

Me Jean Legault pour Remstar

Subject: Insolvency; Corporate and Commercial

Faillite et insolvabilité --- Proposition — Loi sur les arrangements avec les créanciers des compagnies — Questions diverses

Radiodiffuseur était en difficulté financière et s'est placé sous la protection de la Loi sur les arrangements avec les créanciers des compagnies — Employés d'une station de télé appartenant au radiodiffuseur étaient représentés par un syndicat — Syndicat a déposé une requête en modification du plan d'arrangement — Requête accueillie en partie — Tribunal s'est fondé sur un arrêt clé de la Cour d'appel du Québec en ce qui concerne les réclamations salariales des employés — Selon cet arrêt, les réclamations des employés syndiqués seraient

Copr. (c) West 2008 No Claim to Orig. Govt. Works

disposées dans le cadre du plan de réorganisation du radiodiffuseur — Tribunal a statué que tous les employés syndiqués pourraient déposer une preuve de réclamation selon les dispositions de la convention collective — Bien que la Charte des droits et libertés soit à la base du règlement sur l'équité salariale, elle ne confère pas un droit à l'exécution différente des autres créances.

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

Broadcaster had serious financial difficulties and sought protection under Companies' Creditors Arrangement Act — Employees working for television station of broadcaster were represented by union — Union brought motion to modify plan of arrangement — Motion granted in part — Court referred to key decision by Court of Appeal of Quebec regarding salary claims by employees — According to that decision, unionized employees' claims were to be dealt with as part of broadcaster's restructuring plan — Court held that all unionized employees would be able to file proof of claim in accordance with collective agreement — Although Charter of Rights and Freedoms was basis for pay equity settlement, it did not provide special right to execution.

Cases considered by *P. Journet, J.C.S.*:

Mine Jeffrey inc., Re (2003), 35 C.C.P.B. 71, 2003 CarswellQue 90, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.*) [2003] R.J.Q. 420 (Que. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

REQUÊTE du syndicat en modification du plan d'arrangement.

***P. Journet, J.C.S.*:**

1 Le Tribunal est saisi d'une requête en modification du plan d'arrangements et de diverses ordonnances relatives au plan d'arrangements et à l'assemblée des créanciers qui sont appelés à se prononcer sur ledit plan le 22 mai prochain.

2 Le Syndicat requérant demande plus particulièrement trois choses :

1. Le retrait du paragraphe 4.2 du plan d'arrangement;

2. La modification du sous-paragraphe (kk) du paragraphe 1.1 pour y ajouter selon les conclusions recherchées, les réclamations d'équité salariale incluant le versement des salaires forfaitaires et les ajustements d'échelle salariale;

3. Ajouter les réclamations découlant de la convention collective.

3 Le Tribunal a entendu avec intérêt les procureurs du requérant ainsi que les procureurs de la débitrice et des administrateurs de la débitrice.

Copr. (c) West 2008 No Claim to Orig. Govt. Works

4 Il faut se souvenir qu'en matière de réclamations salariales du personnel syndiqué d'une compagnie, la décision clef se retrouve dans l'arrêt de la Cour d'Appel du Québec rendue dans *Mine Jeffrey inc., Re*[FN1].

5 C'est à partir de cet arrêt que le Tribunal devra établir les droits et obligations des parties, incluant celles relatives à un plan d'arrangement.

6 Le Tribunal réitère ce que la Cour d'Appel enseigne, sous la plume du Juge Pierre J. Dalphond, plus particulièrement aux paragraphes 61, 62 de la page 27 de ladite décision.

7 Le Syndicat demande au Tribunal qu'il y ait modification du plan d'arrangement soumis, afin que ledit plan respecte le droit des employés syndiqués de produire une réclamation selon les termes de la convention collective. Il s'agit à mon sens d'un droit qui appartient à tous les créanciers quel que soit leur catégorie.

8 Le Tribunal réitère l'opinion du Juge Dalphond, et en déduit que les réclamations des syndiqués seront disposées dans le cadre du plan de réorganisation de la débitrice. Il ajoute que les obligations qui résultent des créances contre une débitrice doivent être réglées soit par négociation ou selon les termes de la convention collective.

9 Le Tribunal ne peut que confirmer que tous les employés syndiqués pourront déposer une preuve de réclamation selon les dispositions de la convention collective selon leur prétention à faire valoir contre la débitrice. En d'autres termes, le Tribunal réserve aux salariés le droit de réclamer ce qui leurs est dû par la convention collective. Il appartiendra aux personnes habilitées à le faire de décider du sort de ces réclamations.

10 Ainsi, il pourra y avoir des représentations ou des contestations sur les preuves de réclamation lorsque le plan d'arrangement aura été accepté ou refusé. Au stade des procédures, le Tribunal ne peut que faire droit à la demande, en soulignant que les réclamations qui découlent de la convention collective devront être déposées auprès de l'administrateur Monsieur Vincent.

11 Quant à la réclamation qui découle de l'équité salariale pour deux employés, laquelle fait l'objet d'une entente survenue avant l'ordonnance initiale, le Tribunal ne peut malgré le respect qu'il a pour l'opinion contraire, suivre la demande qui lui a été soumise voulant que les réclamations soient traitées différemment des réclamations qui auraient pu exister ou qui existent avant l'entrée de l'ordonnance initiale. À titre d'exemple, un jugement, une convention de règlement, un contrat, une entente survenue durant l'ordonnance initiale, devront être traités d'une manière identique aux autres créances préexistantes et seront en conséquence soumises avec les autres créances pour approbation du plan d'arrangement lors de sa présentation.

12 *La charte des droits et liberté* qui est à la base du règlement sur l'équité salariale est la Loi qui a permis d'en venir au règlement et de déterminer les sommes qui étaient dues et exigibles. La Charte ne confère pas cependant un droit à l'exécution différente des autres créances qui existent et de l'ordre de collocation que l'on retrouve au Code québécois.

13 **POUR CES MOTIFS, le Tribunal croit qu'il y a intérêt pour les fins de la justice, que l'ordonnance soit scindée afin que la demande de report de l'assemblée du 22 mai 2008, soit décidée dans un jugement distinct qui visera également la demande des autres syndicats au même effet, et procédant à décider sur la présente requête, le Tribunal :**

14 **REJETTE la demande de retrait du paragraphe 4.2 du plan d'arrangement.**

Copr. (c) West 2008 No Claim to Orig. Govt. Works

15 **REJETTE la demande de modification du sous-paragraphe (kk) du paragraphe 1.1 du projet d'arrangement relatif à la réclamation d'équité salariale.**

16 **AUTORISE tous les salariés visés par les conventions collectives à déposer des réclamations auprès de l'administrateur conformément aux conventions collectives existantes à condition qu'elles soient déposées avant le 20 mai 2008 à midi.**

Requête accueillie en partie.

FN1 *Mine Jeffrey inc., Re,* [2003] R.J.Q. 420 (Que. C.A.).

END OF DOCUMENT

Copr. (c) West 2008 No Claim to Orig. Govt. Works

AFFIDAVIT

I, the undersigned, DOMINIQUE TÊTU, in my capacity as practising lawyer in charge of the Translation Department with the law firm of Osler, Hoskin & Harcourt LLP, 1000 De La Gauchetière Street West, Suite 2100, Montréal, Québec, H3B 4W5, do hereby make the following solemn declaration:

1. I have read the attached English-language and French-language versions of i) a judgment dated May 15, 2008 rendered by Mr. Justice P. Journet of the Superior Court of Québec and ii) a judgment dated August 1st, 2008 rendered by Mrs. Justice P. Rayle of the Court of Appeal of Québec, in respect of TQS inc. (the "Judgments"); and

2. The English version of such Judgments are in all material respects complete and proper translations of the French version thereof.

Dominique Têtu

SOLEMNLY DECLARED BEFORE ME
in Montréal this 26th day of February 2010

COMMISSIONER FOR OATHS FOR THE CITY
AND DISTRICT OF MONTRÉAL

COMMISSAIRE À L'ASSERMENTATION
MARCELLE DUBUC DROUIN
113 508
POUR TOUT LE DISTRICT DU QUÉBEC

MONTREAL:2634077.1
1114233 DT/ct

TAB 14

2008 CarswellQue 7132, EYB 2008-141628, 2008 QCCA 1429, 45 C.B.R. (5th) 1, J.E. 2008-1578

H
2008 CarswellQue 7132

TQS inc., Re

Union of the employees of CFAP-TV (TQS-Québec), local section 3946 of the Canadian Union of Public Employees et al. (Petitioners) v. TQS inc. et al. and Remstar Corporation (Respondents) and RSM Richter Inc. and the Canadian Human Rights Commission (Joined to the case)

Court of Appeal of Quebec

P. Rayle J.C.A.

Heard: July 9, 2008
Judgment: August 1, 2008 [FN*]
Docket: C.A. Qué. Montréal 500-09-018723-080, 500-09-018777-086, 500-11-032130-078

© Thomson Reuters Canada Limited or its Licensors. All rights reserved.

Counsel: Atty. Pierre Grenier for the Petitioners

Atty. C. Jean Fontaine, Atty. Philippe Buist for TQS et al.

Atty. Jean Legault for Remstar Corporation

Atty. Martin Desrosiers for RSM Richter Inc.

Atty. Ikram Farah Warsame for the Canadian Human Rights Commission

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Labor and Employment; Public

Faillite et insolvabilité — Proposition — Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — « Juste et raisonnable »

Réseau de télévision était en difficulté financière et une ordonnance initiale a été rendue par le tribunal en vertu de la Loi sur les arrangements avec les créanciers des compagnies (« Loi ») — Plan d'arrangement a été préparé par le réseau afin de régler les réclamations des créanciers chirographaires rassemblées en une seule catégorie — Syndicat des employés du réseau a déposé une requête visant à faire en sorte que les employés du réseau forment une catégorie à part, sans succès — Réseau a soumis son plan d'arrangement à ses créanciers et ces derniers l'ont approuvé — Syndicat a déposé une seconde requête, fondée sur les mêmes allégations et les mêmes moyens que la première, afin de contester le plan d'arrangement, sans succès — Syndicat a interjeté appel de ces deux décisions — Appel rejeté — Loi confère au juge de la Cour supérieure un vaste pouvoir discrétionnaire lui permettant de rendre des ordonnances sur mesure, adaptées aux circonstances de chaque cas — Compte tenu de ce vaste pouvoir discrétionnaire, l'appel n'était possible que si une question sérieuse et d'intérêt général était soulevée — Pourvoi envisagé ne remplissait pas ce critère — En effet, les employés du réseau représentaient une minorité de l'ensemble des créanciers chirographaires et aucun fondement ne leur permettait d'obtenir un rang prioritaire — Bien que le réseau devait respecter la collective bargaining agreement, le plan d'arrangement approuvé par les créanciers et homolgué par le tribunal constituait un compromis juste et équitable — Appel interjeté par le syndicat n'était pas mu par l'intérêt de toutes les parties, ni même par celui de tous les créanciers.

Faillite et insolvabilité — Procédure devant les tribunaux — Appels — À la Cour d'appel — Principes généraux

Réseau de télévision était en difficulté financière et une ordonnance initiale a été rendue par le tribunal en vertu de la Loi sur les arrangements avec les créanciers des compagnies (« Loi ») — Plan d'arrangement a été préparé par le réseau afin de régler les réclamations des créanciers chirographaires rassemblées en une seule catégorie — Syndicat des employés du réseau a déposé une requête visant à faire en sorte que les employés du réseau forment une catégorie à part, sans succès — Réseau a soumis son plan d'arrangement à ses créanciers et ces derniers l'ont approuvé — Syndicat a déposé une seconde requête, fondée sur les mêmes allégations et les mêmes moyens que la première, afin de contester le plan d'arrangement, sans succès — Syndicat a interjeté appel de ces deux décisions — Appel rejeté — Loi confère au juge de la Cour supérieure un vaste pouvoir discrétionnaire lui permettant de rendre des ordonnances sur mesure, adaptées aux circonstances de chaque cas — Compte tenu de ce vaste pouvoir discrétionnaire, l'appel n'était possible que si une question sérieuse et d'intérêt général était soulevée — Pourvoi envisagé ne remplissait pas ce critère — En effet, les employés du réseau représentaient une minorité de l'ensemble des créanciers chirographaires et aucun fondement ne leur permettait d'obtenir un rang prioritaire — Bien que le réseau devait respecter la collective bargaining agreement, le plan d'arrangement approuvé par les créanciers et homolgué par le tribunal constituait un compromis juste et équitable — Appel interjeté par le syndicat n'était pas mu par l'intérêt de toutes les parties, ni même par celui de tous les créanciers.

Bankruptcy and insolvency — Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Television network had financial problems and initial order was made by court, under Companies' Creditors Arrangement Act ("Act") — Plan of arrangement was made by network to settle claims of ordinary creditors, all grouped into one category — Network employees' union unsuccessfully brought motion seeking that employees be grouped into distinct category — Network submitted Plan of arrangement to its creditors, who approved it — Union unsuccessfully brought another motion, with same allegations and same request for relief, challenging Plan of arrangement — Union appealed against both decisions — Appeal dismissed — Act vests Superior Court judges with broad discretionary powers, allowing them to make custom-made orders, tailored to fit particular facts of each case — Given these broad discretionary powers, appeal was possible only if it raised issue that was serious and of general interest — Appeal did not meet that criteria — Network employees represented minority amongst ordinary creditors and there was no basis for giving them priority — While network must abide by collective agreement, Plan of arrangement, as approved by creditors and court, was fair and reasonable compromise — Union's appeal was not motivated by interest of all parties, nor even that of all creditors.

Bankruptcy and insolvency — Practice and procedure in courts — Appeals — To Court of Appeal — General principles

Television network had financial problems and initial order was made by court, under Companies' Creditors Arrangement Act ("Act") — Plan of arrangement was made by network to settle claims of ordinary creditors, all grouped into one category — Network employees' union unsuccessfully brought motion seeking that employees be grouped into distinct category — Network submitted Plan of arrangement to its creditors, who approved it — Union unsuccessfully brought another motion, with same allegations and same request for relief, challenging Plan of arrangement — Union appealed against both decisions — Appeal dismissed — Act vests Superior Court judges with broad discretionary powers, allowing them to make custom-made orders, tailored to fit particular facts of each case — Given these broad discretionary powers, appeal was possible only if it raised issue that was serious and of general interest — Appeal did not meet that criteria — Network employees represented minority amongst ordinary creditors and there was no basis for giving them priority — While network must abide by collective agreement, arrangement, as approved by creditors and court, was fair and reasonable compromise — Union's appeal was not motivated by interest of all parties, nor even that of all creditors.

Cases considered by *Rayle*:

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — followed

Mine Jeffrey inc., Re (2003), 35 C.C.P.B. 71, 2003 CarswellQue 90, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.*) [2003] R.J.Q. 420 (Que. C.A.) —

Copr. (c) West 2008 No Claim to Orig. Govt. Works

2008 CarswellQue 7132, EYB 2008-141628, 2008 QCCA 1429, 45 C.B.R. (5th) 1, J.E. 2008-1578
considered

Uniforêt inc., Re (2003), 2003 CarswellQue 1843, 44 C.B.R. (4th) 158 (Que. C.A.) — followed

Statutes considered:

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

Generally — referred to

APPEAL filed by the union of television network employees from two decisions of the Superior Court which dismissed their petitions objecting to the network Plan of arrangement.

***Rayle J.C.A.*:**

1 I received two motions for permission to appeal decisions rendered by the Honorable Pierre Journet of the Quebec Superior Court, District of Montreal, under the Company Creditors Arrangement Act (LRC 1985, ch. C-36 as amended), hereinafter CCAA concerning the TQS Group.

2 An initial motion for permission to appeal dated June 2, 2008 was filed in record 500-09-018723-080; its object is the decision rendered in two stages, on May 15 and 16, 2008, rejecting a request of the Petitioners. The trial judge refuses to amend the Plan of arrangement to be submitted to the creditors of TQS and refuses to postpone the meeting of creditors scheduled for May 22, 2008.

3 The second motion for permission to appeal is dated June 19, 2008 and refers to the decision of June 4, 2008[FN1] by which the trial judge dismisses the objections of the Petitioners and upholds the Plan of arrangement which has already been submitted to the creditors and approved by them.

4 The allegations and pleas in the first motion are resumed and completed in the second. Moreover, the Petitioners request that the appeals, if permitted, be joined and examined in the same hearing. I will therefore treat the two motions together.

5 In essence, all the remedies sought by the Petitioners were intended to modify certain provisions of the Plan of arrangement submitted by the TQS group in order to remove any settlement concerning the payment of the receivables of the employees based on the collective bargaining agreement in force. Thus, the Petitioners wanted:

• the unionized workers to constitute a special category of unsecured creditors to assure that their votes are

Copr. (c) West 2008 No Claim to Orig. Govt. Works

decisive concerning the aspects of the Plan that may affect them [FN2];

• pure and simple removal of paragraph 4.2 from the Plan of arrangement "Claim of an Employee concerning severance pay";

• modification of paragraph 1.1 to add to subparagraph (KK) "the pay equity claims. . . and the claims arising from the collective bargaining agreement" as well as paragraph 3.2 to make untouchable the quota of the receivables arising from the collective bargaining agreement.

6 A word about the Petitioners. The union is one of nine unions that have been accredited to represent the unionized employees of TQS Group. It represents the forty-eight unionized employees of the station CFAP-TV [FN3], one of the five stations of the TQS Group. Other unions did not try to appeal. The collective bargaining agreement was reached on November 22, 2007, before the original order rendered by the trial judge under the CCAA.

7 All four individual petitioners were employed by TQS Quebec. The first two received notice of layoff on April 23, 2008. Their claim under the provisions of the collective bargaining agreement (severance pay, vacation, accrued time and specific benefits) totals $22,134.77 for petitioner Lévesque and $34,763.13 for petitioner Beaulieu. Petitioners Thériault and Gagné submitted two claims related to the settlement of complaints of wage discrimination; they totaled $72,000. These amounts may seem modest in the eyes of the controller, directors, shareholders and creditors concerned about the fate of all claims affected by the Agreement Plan, which total more or less $33,000,000. However, in the eyes of every employee, the loss is crushing.

8 The purpose of the Plan of arrangement submitted on May 7, 2008 by the TQS Group is clearly to settle the claims of unsecured creditors grouped in a single category according to procedures and a timetable to be approved by the creditors so that the debtor companies be released on fulfillment of their obligations as redefined by the settlement and assure the recovery and continuity of the companies[FN4].

9 The *CCAA* is such that the reorganization plan of the business of the debtor is designed, proposed and executed in a court-governed environment. The Court initially protects the debtor against the assaults of its creditors by suspending their action, then ensures by its required presence at each step of the process that the business recovery of the debtor company take place in an orderly, non-fraudulent, fair and reasonable manner in relation to the creditors concerned, *all creditors concerned.*

10 In this case, it meant that the trial judge had to care for the interests of some 608 unsecured creditors, including 203 employees eligible to vote and representing a total amount of $5,398,111 and 405 suppliers, whose claims total $27,797,397. The judge must also ensure that the creditors - all affected by the financial situation of their debtor - are adequately informed so as to be able to express an informed vote about the fate of the reorganization plan.

11 The *CCAA* gives the judge of the Superior Court broad discretion to issue "customized" orders, i.e., adapted to the circumstances of each case.

12 Indeed, the trial judge had to make ample use of his discretion: the complexity of the case and the ramifications in public law of a change of control (CRTC approval[FN5], formalities with the Competition Bureau) required it.

13 Thus, and I am not claiming to give an exhaustive list, the trial judge needed to, after the initial order of December 18, 2007, approve or authorize:

Copr. (c) West 2008 No Claim to Orig. Govt. Works

• several petitions for extension of the term;

• a sale process and a timetable;

• a purchase and financing offer from Remstar Corporation (Remstar);

• a purchase offer for certain assets by Sociétè Radio-Canada;

• a proceeding concerning the filing and hearing of the complaints;

• a proceeding concerning the meeting of creditors.

14 In addition, on May 15 and 16, 2008, the trial judge rejected the request of the Petitioners to amend the Plan of arrangement and postpone the meeting of creditors. He believes[FN6] that the content and modification of the licenses issued by CRTC are the exclusive prerogative of this agency, that the postponement of the meeting and the temporary freezing of the recovery process could not serve the interests of the workers, whose fate is in part subject to the possible decision of CRTC affective the preservation of the jobs.

15 His decision is final and enforceable notwithstanding appeal and the meeting of creditors is held on the scheduled date, May 22, 2008, since the prescribed notices have been given.

16 The Plan of arrangement is described as follows in the Motion for approval of an Plan of arrangement of the TQS Group:

> 17. Essentially, the Plan provides for the establishment of a fund consisting of a lump sum of $7,000,000, the base amount payable under the terms stipulated in the Plan and intended for the payment of the Claims of Unsecured Creditors;
>
> 18. The Base Amount may also be increased by a maximum of $4,000,000 following a favorable decision of CRTC, which would approve payment to general broadcasters of royalties originating from radio broadcast companies operating in Canada;
>
> 19. The Plan provides for a single class of creditors, Unsecured Creditors, and includes the following definitions: Creditor, Unsecured Creditor, Proven Claim and Claim related to the Restructuring;
>
> [...]
>
> 22. Depending on the distribution under the Plan, all Unsecured Creditors of the TQS Group are expected to receive full payment of Proven Claims up to one thousand dollars ($1,000) per Unsecured Creditor, then, concerning the balance, a payment in proportion to the portion of the Proven Claims in excess of one thousand dollars ($1,000) per Unsecured Creditor.

17 The Controller recommends approval of the Plan to the creditors present, describes in more detail some aspects of the situation, answers questions and specifies that the proposed Plan allows for continued operations of the TQS Group and maintains more than 210 jobs[FN7].

18 The vote is held, and the Plan of arrangement is approved by 368 of the 478 creditors who exercised their voting right, i.e. 77% in number, representing claims of $29,377,576, or 92% of the total value of eligible claims

Copr. (c) West 2008 No Claim to Orig. Govt. Works

for voting purposes[FN8].

19 The trial judge resolves the objections of the Petitioners and admits the Motion for Approval of an Plan of arrangement as follows:

> [2] The result of the vote, including the vote of the union members, demonstrates that the plan was overwhelmingly approved by the creditors, except for the unionized employees who had received the authorization. The outcome of the vote, including the vote of the union members, demonstrates that the plan was overwhelmingly approved by the creditors, except for the unionized employees who had received the voting authorization from the administrator.
>
> [3] The Union of the employees of CFAP-TV (TQS-Quebec), Local section 3946 of the Canadian Union of Public Employees opposes the approval of the plan sought for three reasons. It alleges the illegality of the plan, as it derogates from the collective bargaining agreement. Secondly, it alleges the unfairness of the plan, and thirdly it opposes to the extension of the initial order regarding the suspension of proceedings that may be undertaken by the Union until August 27, 2008.
>
> [4] As to the illegality of the plan, the union claims that it does not comply with the provisions of the collective bargaining agreement regarding payment for employees laid off, for example, seniority, the stoppage of the layoffs and pay equity.
>
> [5] To support its proposals, the Union cites the *Syndicat national de l'amiante d'Asbestos v. Mine Jeffrey inc.*[1] case in paragraphs 60 to 64 of the judgment.
>
> [6] The Court has already ruled in a decision dated May 16, 2008 on the interpretation it would give to the above ruling of the Court of Appeal on an earlier petition of the Union.
>
> [7] The Court reiterates that the recognition of a right contained in a collective bargaining agreement is quite different from the right to receive payment under this right. In other words, the recognition of a right is different from its enforcement.
>
> [8] The Court cannot accept an argument that seeks the cancellation of the Plan of arrangement on grounds that the provisions of the collective bargaining agreement are not met in general. The illegality must be determined on a case-by-case basis in light of the facts of each claim.
>
> [9] The petition of the Union is therefore inadmissible as to its petition to declare the illegality of the plan, because it is vague and lacks details as to the alleged illegalities.
>
> [10] It is not for the Court to amend the Plan of arrangement submitted and accepted by an overwhelming majority of creditors.[2]
>
> [11] The Union claims that special or particular categories of creditors should have been created to identify the categories of employees and give them a specific vote right.
>
> [12] The Court does not see how a special category of creditors would have asserted the rights of the employees to enable them to exercise their rights in a fairer way than that used.
>
> [13] The Court sees no justification to grant the petition and shares the statements of the Court of British Columbia in the *Woodward's Ltd.* Case.[3]

Copr. (c) West 2008 No Claim to Orig. Govt. Works

[14] The Union requests not to renew the original order, as it has the effect of suspending and depriving them of their actions against the debtor until August 27, 2008. The Union indeed wants to submit, through grievances, the petitions of its members against employer decisions to lay off employees of TQS.

[15] The Union and the union members can request authorization and carry out procedures qualifying them specifically at any time. The petition as submitted is too general and does not allow seriously studying the remedies sought and the claims raised. For this reason alone, it must be rejected. In addition, the creditors do not lose any right to obtain the right to take any action they want, where appropriate.

1Syndicat national de l'amiante d'Asbestos v. Mine Jeffrey inc., 2003, CANLII 47918 (C.A.).

2Scaffold Connection Corp. 2001 ABQB 1124, par.20 #9.

3Woodward's Ltd., 20 C.B.R. (3d) 74, 84 BCLR(2d) 206, par.18. # 6.

20 Commenting on the decision of the trial judge, the counsel for the Petitioners write in paragraph 127 of their motion for permission to appeal: "These statements of the Court are completely inconsistent." In addition to being wrong, the point is arrogant and inappropriate. I will discuss it further.

21 Given the broad discretion that the *CCAA* gives the judge of the Superior Court, the appeal is possible only with permission, and permission will be granted only if the appeal raises a serious question of general interest. In *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]), Judge Wittman of the Court of Appeal of Alberta writes:

> The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties: (. . .) Subsumed in the general criterion are four applicable elements: (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (4) whether the appeal will unduly hinder the progress of the action.

22 I agree with this approach that my colleague, Judge Dalphond, also followed in *Uniforêt inc., Re* [2003 CarswellQue 1843 (Que. C.A.)], 2003 CanLII 44615.

23 I am of the opinion that the proposed appeal does not meet the criteria outlined above. What is sought by the Petitioners, a minority of affected unionized employees, I stress it again, is the recognition of a priority over the other unsecured creditors. Because they are protected by a collective bargaining agreement, their legal and economic situation should remain intact. However, there are no grounds for this premise, either in *CCAA* or in jurisprudence.

24 It is true that even when a company uses the protection of the *CCAA*, it cannot escape the conditions imposed by the collective bargaining agreement that binds it to its employees. Attempts were made in the past to gloss over the working conditions negotiated collectively by dismissing the employees as soon as they were rehired under conditions laid down unilaterally by the administrator. In *Mine Jeffrey inc., Re* [2003 CarswellQue 90 (Que. C.A.)], 2003 Can LII 47918, our Court held that the consideration payable to the employees retained in their jobs or called back after the initial order must be that provided by the collective bargaining agreement.

Copr. (c) West 2008 No Claim to Orig. Govt. Works

25 This does not mean that the claims of the employees prior to the date of the initial order must be paid in full. These claims are not immune to the painful compromise inevitably implied by the Plan of arrangement. The employees who became creditors are not entitled to priority or guaranteed status.

26 The rights of the employees are defined by the collective bargaining agreement that governs them and certain legal provisions; however, the claims that arise can be random, as are those of other creditors, here the suppliers whose livelihood is also threatened by the financial precariousness of their debtor.

27 The proposals of the counsel for the Petitioners rely on the false premise that the employees are entitled to a privileged status. This is not what the CCAA provides, nor what our Court decided in *Syndicat national de l'amiante d'Asbestos inc. v. Mine Jeffrey inc.*, quoted above:

> [60] The collective agreements continue to apply, like any contract with successive performance not amended by mutual agreement after the original order or not completed (assuming that it may be possible for collective bargaining agreements). The controller or the court cannot amend them unilaterally. This being said, it is necessary to make distinctions as to the payments of the resulting claims.
>
> [61] Thus, unionized employees retained or recalled have the right to be paid immediately by the controller for any services rendered after the date of the order (Art. 11.3), under the terms of the collective bargaining agreement applicable in its original or amended version by agreement with the union concerned. On the other hand, for prior services, the obligations not performed by Mine Jeffrey Inc. result in claims against Mine Jeffrey Inc. for which the controller cannot be held responsible (art. 11.8 CCAA) and for which the employees may not require immediate payment (Article 11.3 CCAA).
>
> [62] For employees permanently laid off on October 7, 2002 and the persons who were, at the time, ex-employees of Mine Jeffrey Inc., unfulfilled obligations arising from collective bargaining agreements or other obligations constitute claims of the debtor, Mine Jeffrey Inc., which will be disposed of under the reorganization plan or otherwise, the bankruptcy of Mine Jeffrey Inc.
>
> (emphasis added)

28 The reasons given by the trial judge in his decision of June 4, 2008 are not inconsistent. They resume succinctly what he had expressed previously on the same issue, that of treating employees as part of an Plan of arrangement, especially in the reasons for his decision of May 15, 2008. I quote:

> [9] The Court can only confirm that all unionized employees may file a proof of claim under the provisions of the collective bargaining agreement according to their claim asserted against the debtor. In other words, the Court provides the employees the right to claim what is due to them under the collective bargaining agreement. It is up to the persons authorized to do so to decide the fate of these claims.
>
> [10] Thus, there may be representations or objections to the proof of complaint when the Plan of arrangement is accepted or refused. At this stage of the proceedings, the Court can only admit the petition, stressing that the complaints that arise from the collective bargaining agreement must be filed with the administrator Mr. Vincent.
>
> [11] As to the complaint that arises from pay equity for two employees, which is the object of an understanding reached before the initial order, the Court cannot, in spite of its respect for the contrary opinion, follow the request submitted to it, namely that the complaints should be treated differently from the complaints that may have existed or which exist before the issuance of the initial order. As an example, a judgment, a settlement agreement, a contract, an understanding which occurs during the initial order, must be

Copr. (c) West 2008 No Claim to Orig. Govt. Works

treated identically to the other preexisting claims and consequently will be submitted with the other claims for approval of the Plan of arrangement at the time of its presentation.

[12] *The charter of rights and freedoms* which is at the basis of the settlement on pay equity is the law that allowed reaching the settlement and determining the amounts that were owed and enforceable. The charter, however, does not give the right to different execution of the other claims that exist and the order of placement found in the Quebec Code.

29 In summary, I am of the opinion that the appeals that the Petitioners wish to undertake are not driven by the interests of all parties, nor even that of all creditors, that the issue of dealing with employee rights, as well as the recovery of their claims, are no longer subject to judicial debate, and that the appeal would unnecessarily delay the progress of the case and the enforcement of the Plan of arrangement. It is probably not perfect, but it is - in the absence of proof to the contrary - a fair and just settlement of the claims of all creditors. Since they have approved the plan by a strong majority, it is not up to the Court of Appeal to interfere without reason and compromise the recovery of the debtor.

30 For these reasons, the motions for permission to appeal are dismissed with costs in the case 500-09-018723-080 only.

Appeal dismissed.

FN* Leave to appeal refused *TQS inc., Re* (2008), 2008 QCCS 2288, 2008 CarswellQue 4863 (Que. S.C.).

FN1 The reasons for the decision are dated June 12, 2008.

FN2 This petition was abandoned en route.

FN3 The employer identified for accreditation is a division of TQS Inc.

FN4 Clause 2.1 of the Plan of arrangement.

FN5 The Canadian Radio and Telecommunications Commission.

FN6 His reasons are partly reflected in another decision rendered May 16 on the motion of Patrick St-Pierre et al.

FN7 Paragraph 29 of the Motion for Approval of an Plan of arrangement.

FN8 Paragraph 31 of the Motion for Approval of an Plan of arrangement.

END OF DOCUMENT

Copr. (c) West 2008 No Claim to Orig. Govt. Works

H
2008 CarswellQue 7132

TQS inc., Re

Syndicat des employé(es) de CFAP-TV (TQS-Québec), section locale 3946 du Syndicat canadien de la fonction publique et al (Requérants) c. TQS inc. et al et Remstar Corporation (Intimées) et RSM Richter Inc. et Commission canadienne des droits de la personne (Mises en cause)

Cour d'appel du Québec

P. Rayle J.C.A.

Heard: 9 juillet 2008
Judgment: 1 août 2008 [FN*]
Docket: C.A. Qué. Montréal 500-09-018723-080, 500-09-018777-086, 500-11-032130-078

© Thomson Reuters Canada Limited or its Licensors. All rights reserved.

Counsel: Me Pierre Grenier pour les requérants

Me C. Jean Fontaine, Me Philippe Buist pour TQS et al

Me Jean Legault pour Remstar Corporation

Me Martin Desrosiers pour RSM Richter Inc.

Me Ikram Farah Warsame pour Commission canadienne des droits de la personne

Subject: Insolvency; Civil Practice and Procedure; Corporate and Commercial; Labour and Employment; Public

Faillite et insolvabilité --- Proposition — Loi sur les arrangements avec les créanciers des compagnies — Arrangements — Approbation par le tribunal — « Juste et raisonnable »

Réseau de télévision était en difficulté financière et une ordonnance initiale a été rendue par le tribunal en vertu de la Loi sur les arrangements avec les créanciers des compagnies (« Loi ») — Plan d'arrangement a été préparé par le réseau afin de régler les réclamations des créanciers chirographaires rassemblées en une seule catégorie — Syndicat des employés du réseau a déposé une requête visant à faire en sorte que les employés du réseau forment une catégorie à part, sans succès — Réseau a soumis son plan d'arrangement à ses créanciers et ces derniers l'ont approuvé — Syndicat a déposé une seconde requête, fondée sur les mêmes allégations et les mêmes moyens que la première, afin de contester le plan d'arrangement, sans succès — Syndicat a interjeté appel de ces deux décisions — Appel rejeté — Loi confère au juge de la Cour supérieure un vaste pouvoir discrétionnaire lui permettant de rendre des ordonnances sur mesure, adaptées aux circonstances de chaque cas

— Compte tenu de ce vaste pouvoir discrétionnaire, l'appel n'était possible que si une question sérieuse et d'intérêt général était soulevée — Pourvoi envisagé ne remplissait pas ce critère — En effet, les employés du réseau représentaient une minorité de l'ensemble des créanciers chirographaires et aucun fondement ne leur permettait d'obtenir un rang prioritaire — Bien que le réseau devait respecter la convention collective, le plan d'arrangement approuvé par les créanciers et homolgué par le tribunal constituait un compromis juste et équitable — Appel interjeté par le syndicat n'était pas mu par l'intérêt de toutes les parties, ni même par celui de tous les créanciers.

Faillite et insolvabilité --- Procédure devant les tribunaux — Appels — À la Cour d'appel — Principes généraux

Réseau de télévision était en difficulté financière et une ordonnance initiale a été rendue par le tribunal en vertu de la Loi sur les arrangements avec les créanciers des compagnies (« Loi ») — Plan d'arrangement a été préparé par le réseau afin de régler les réclamations des créanciers chirographaires rassemblées en une seule catégorie — Syndicat des employés du réseau a déposé une requête visant à faire en sorte que les employés du réseau forment une catégorie à part, sans succès — Réseau a soumis son plan d'arrangement à ses créanciers et ces derniers l'ont approuvé — Syndicat a déposé une seconde requête, fondée sur les mêmes allégations et les mêmes moyens que la première, afin de contester le plan d'arrangement, sans succès — Syndicat a interjeté appel de ces deux décisions — Appel rejeté — Loi confère au juge de la Cour supérieure un vaste pouvoir discrétionnaire lui permettant de rendre des ordonnances sur mesure, adaptées aux circonstances de chaque cas — Compte tenu de ce vaste pouvoir discrétionnaire, l'appel n'était possible que si une question sérieuse et d'intérêt général était soulevée — Pourvoi envisagé ne remplissait pas ce critère — En effet, les employés du réseau représentaient une minorité de l'ensemble des créanciers chirographaires et aucun fondement ne leur permettait d'obtenir un rang prioritaire — Bien que le réseau devait respecter la convention collective, le plan d'arrangement approuvé par les créanciers et homolgué par le tribunal constituait un compromis juste et équitable — Appel interjeté par le syndicat n'était pas mu par l'intérêt de toutes les parties, ni même par celui de tous les créanciers.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"

Television network had financial problems and initial order was made by court, under Companies' Creditors Arrangement Act ("Act") — Arrangement was made by network to settle claims of ordinary creditors, all grouped into one category — Network employees' union unsuccessfully brought motion seeking that employees be grouped into distinct category — Network submitted arrangement to its creditors, who approved it — Union unsuccessfully brought another motion, with same allegations and same request for relief, challenging arrangement — Union appealed against both decisions — Appeal dismissed — Act vests Superior Court judges with broad discretionary powers, allowing them to make custom-made orders, tailored to fit particular facts of each case — Given these broad discretionary powers, appeal was possible only if it raised issue that was serious and of general interest — Appeal did not meet that criteria — Network employees represented minority amongst ordinary creditors and there was no basis for giving them priority — While network must abide by collective agreement, arrangement, as approved by creditors and court, was fair and reasonable compromise — Union's appeal was not motivated by interest of all parties, nor even that of all creditors.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles

Copr. (c) West 2008 No Claim to Orig. Govt. Works

Television network had financial problems and initial order was made by court, under Companies' Creditors Arrangement Act ("Act") — Arrangement was made by network to settle claims of ordinary creditors, all grouped into one category — Network employees' union unsuccessfully brought motion seeking that employees be grouped into distinct category — Network submitted arrangement to its creditors, who approved it — Union unsuccessfully brought another motion, with same allegations and same request for relief, challenging arrangement — Union appealed against both decisions — Appeal dismissed — Act vests Superior Court judges with broad discretionary powers, allowing them to make custom-made orders, tailored to fit particular facts of each case — Given these broad discretionary powers, appeal was possible only if it raised issue that was serious and of general interest — Appeal did not meet that criteria — Network employees represented minority amongst ordinary creditors and there was no basis for giving them priority — While network must abide by collective agreement, arrangement, as approved by creditors and court, was fair and reasonable compromise — Union's appeal was not motivated by interest of all parties, nor even that of all creditors.

Cases considered by *Rayle*:

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — followed

Mine Jeffrey inc., Re (2003), 35 C.C.P.B. 71, 2003 CarswellQue 90, 40 C.B.R. (4th) 95, [2003] R.J.D.T. 23, (sub nom. *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.)* [2003] R.J.Q. 420 (Que. C.A.) — considered

Uniforêt inc., Re (2003), 2003 CarswellQue 1843, 44 C.B.R. (4th) 158 (Que. C.A.) — followed

Statutes considered:

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

Generally — referred to

APPEL interjeté par le syndicat des employés d'un réseau de télévision à l'encontre de deux décisions de la Cour supérieure ayant rejeté ses requêtes contestant le plan d'arrangement du réseau.

***Rayle J.C.A.*:**

1 Je suis saisie de deux requêtes pour permission d'appeler des décisions rendues par l'honorable Pierre Journet de la Cour supérieure du Québec, district de Montréal, en vertu de la *Loi sur les arrangements avec les créanciers des compagnies* (L.R.C. 1985, ch. C-36 et ses amendements), ci-après la *LACC*, concernant le groupe TQS.

2 Une première requête pour permission d'appeler datée le 2 juin 2008 a été déposée dans le dossier 500-09-018723-080; elle a pour objet la décision rendue en deux temps, les 15 et 16 mai 2008, qui rejette une requête des requérants. Le premier juge refuse de modifier le Plan d'arrangement à être soumis aux créanciers de TQS et refuse de reporter l'assemblée des créanciers fixée au 22 mai 2008.

3 La seconde requête pour permission d'appeler est datée le 19 juin 2008 et elle vise la décision du 4 juin 2008 [FN1] par laquelle le premier juge passe outre aux objections des requérants et homologue le Plan d'arrangement qui a déjà été soumis aux créanciers et approuvé par eux.

Copr. (c) West 2008 No Claim to Orig. Govt. Works

4 Les allégations et moyens soulevés dans la première requête sont repris et complétés dans la seconde. D'ailleurs, les requérants demandent que les appels, s'ils sont autorisés, soient réunis et fassent l'objet d'une même audition. Je traiterai donc des deux requêtes ensemble.

5 Essentiellement, toutes les modalités recherchées par les requérants visaient à modifier certaines dispositions du Plan d'arrangement soumis par le groupe TQS afin d'en retirer tout compromis relativement au paiement des créances des employés fondées sur la convention collective en vigueur. Ainsi, les requérants désiraient :

- que les employés syndiqués constituent une catégorie particulière de créanciers chirographaires pour assurer que leurs votes soient déterminants quant aux aspects du Plan pouvant les affecter[FN2];

- que soit retiré purement et simplement le paragraphe 4.2 du Plan d'arrangement « Réclamation d'un Employé relativement à une indemnité de départ »;

- que soient modifiés le paragraphe 1.1 pour ajouter au sous-paragraphe (KK) « les réclamations d'équité salariale . . . et les réclamations découlant de la convention collective » ainsi que le paragraphe 3.2 pour rendre intouchable la quotité des créances découlant de la convention collective.

6 Un mot au sujet des requérants. Le syndicat est un parmi neuf syndicats qui ont été accrédités pour représenter les employés syndiqués du groupe TQS. Il représente les 48 employés syndiqués de la station CFAP-TV[FN3], l'une des 5 stations du groupe TQS. Les autres syndicats n'ont pas tenté de se pourvoir en appel. La convention collective est intervenue le 22 novembre 2007, avant l'ordonnance initiale prononcée par le premier juge en vertu de la *LACC*.

7 Les requérants individuels étaient tous les quatre à l'emploi de TQS-Québec. Les deux premiers ont reçu un avis de mise à pied, le 23 avril 2008. Leur réclamation en vertu des dispositions de la convention collective (indemnité de mise à pied, vacances, banque de temps et bénéfices spécifiques) totalise 22 134,77 $ pour le requérant Lévesque et 34 763,13 $ pour le requérant Beaulieu. Les requérantes Thériault et Gagné ont soumis deux créances liées au règlement de plaintes de discrimination salariale; elles totalisent 72 000 $. Ces sommes peuvent paraître modestes aux yeux du contrôleur, des administrateurs, actionnaires et créanciers préoccupés par le sort de l'ensemble des réclamations affectées par le Plan d'arrangement qui totalisent plus ou moins 33 000 000 $. Toutefois, aux yeux de chaque employé et dans leurs goussets respectifs, la perte est cuisante.

8 L'objet du Plan d'arrangement soumis le 7 mai 2008 par le groupe TQS est évidemment de régler les réclamations des créanciers chirographaires rassemblés en une seule catégorie selon des modalités et un échéancier à être approuvés par les créanciers de sorte que les compagnies débitrices soient libérées sur accomplissement de leurs obligations telles que redéfinies par le compromis et que soient assurées la relance et la continuité des compagnies[FN4].

9 La *LACC* est ainsi faite que le plan de redressement des affaires de la débitrice est conçu, proposé et exécuté dans un environnement judiciarisé. Le Tribunal, dans un premier temps, protège la débitrice contre les assauts de ses créanciers en suspendant leurs recours, puis assure par sa présence obligatoire à chaque étape du processus que le redressement des affaires de la compagnie débitrice se fasse de manière ordonnée, non frauduleuse, juste et raisonnable au regard des créanciers concernés, *de tous les créanciers concernés*.

10 Dans le cas présent, cela signifiait que le juge de première instance devait se soucier des intérêts de quelques 608 créanciers chirographaires incluant 203 employés admis à voter et représentant une valeur totale

Copr. (c) West 2008 No Claim to Orig. Govt. Works

de 5 398 111 $ et 405 fournisseurs dont les créances représentent une valeur totale de 27 797 397 $. Le juge devait aussi voir à ce que les créanciers - tous affectés par la situation financière de leur débitrice - soient adéquatement informés pour être en mesure d'exprimer un vote éclairé quant au sort du Plan de redressement.

11 La *LACC* confère au juge de la Cour supérieure un vaste pouvoir discrétionnaire lui permettant de rendre des ordonnances « sur mesure », c'est-à-dire adaptées aux circonstances de chaque cas.

12 Effectivement, le premier juge a dû faire ample usage de sa discrétion : la complexité du dossier et les ramifications en droit public d'un changement de contrôle (approbation du CRTC[FN5], formalités auprès du Bureau de la concurrence) le commandaient.

13 Ainsi, et je ne prétends pas en faire une nomenclature exhaustive, le premier juge a dû, après l'ordonnance initiale du 18 décembre 2007, approuver ou autoriser :

- plusieurs demandes de prorogation de délai;
- un processus de vente et un échéancier;
- une offre d'achat et de financement de Remstar Corporation (Remstar);
- une offre d'achat de certains éléments d'actif par la Société Radio-Canada;
- une procédure relative au dépôt et au traitement des réclamations;
- une procédure relative à l'assemblée des créanciers.

14 En outre, les 15 et 16 mai 2008, le juge de première instance rejette la demande des requérants de modifier le Plan d'arrangement et de reporter l'assemblée des créanciers. Il est d'avis[FN6] que le contenu ou la modification des licences délivrées par le CRTC sont du ressort exclusif de cet organisme, que le report de l'assemblée et le gel temporaire du processus de redressement ne sauraient servir les intérêts des employés dont le sort est en partie tributaire de la décision éventuelle du CRTC affectant la conservation des emplois.

15 Sa décision est exécutoire nonobstant appel et l'assemblée des créanciers a lieu à la date prévue, le 22 mai 2008, les avis prescrits ayant été donnés.

16 Le Plan d'arrangement est ainsi décrit dans la Requête pour homologation d'un Plan d'arrangement du groupe TQS :

> 17. Pour l'essentiel, le Plan prévoit la constitution d'un fonds constitué d'une somme forfaitaire de 7 000 000 $, le Montant de Base, payable selon les modalités prévues au Plan et destiné au paiement des Réclamations des Créanciers Ordinaires;
>
> 18. Le Montant de Base peut en outre être majoré d'un montant maximum de 4 000 000 $ suite à une décision favorable du CRTC qui approuverait le versement aux diffuseurs généralistes de redevances provenant des entreprises de radiodiffusion opérant au Canada;
>
> 19. Le Plan prévoit une seule catégorie de créanciers, les Créanciers Ordinaires, et comporte notamment les définitions suivantes : Créancier, Créancier Ordinaire, Réclamation Prouvée et Réclamation reliée à la Restructuration;

Copr. (c) West 2008 No Claim to Orig. Govt. Works

> [...]
>
> 22. En fonction de la répartition prévue au Plan, tous les Créanciers Ordinaires du Groupe TQS sont appelés à recevoir un paiement complet des Réclamations Prouvées jusqu'à concurrence de mille dollars (1000$) par Créancier Ordinaire, puis, quant au solde, un paiement au prorata de la portion des Réclamations Prouvées supérieure à mille dollars (1000$) par Créancier Ordinaire;

17 Le Contrôleur recommande l'approbation du Plan aux créanciers présents, expose en plus de détails certains aspects de la situation, répond aux questions et précise que le Plan proposé permet de poursuivre les opérations du groupe TQS et permet de maintenir plus de 210 emplois[FN7].

18 Le vote a lieu et le Plan d'arrangement est approuvé par 368 des 478 créanciers ayant exercé leur droit de vote, soit 77% en nombre, représentant des réclamations de 29 377 576 $, ou 92% en valeur du total des réclamations admissibles pour fin de vote[FN8].

19 Le premier juge tranche les moyens de contestation des requérants et accueille la Requête pour homologation d'un Plan d'arrangement en ces termes :

> [2] Le résultat du scrutin incluant le vote des syndiqués, démontre que le plan a été largement approuvé par les créanciers, sauf les employés syndiqués qui avaient reçu l'autorisation. Le résultat du scrutin incluant le vote des syndiqués, démontre que le plan a été largement approuvé par les créanciers, sauf les employés syndiqués qui avaient reçu l'autorisation de vote de l'administrateur.
>
> [3] Le Syndicat des employés de CFAP-TV (TQS-Québec), section locale 3946 du Syndicat canadien de la fonction publique s'oppose à l'homologation recherchée du plan pour trois motifs. Il soulève l'illégalité du plan, puisqu'il dérogerait à la convention collective. Deuxièmement, il soulève l'iniquité du plan, et troisièmement il conteste le report de l'ordonnance initiale relativement à la suspension des procédures pouvant être entreprises par le Syndicat d'ici le 27 août 2008.
>
> [4] Quant à l'illégalité du plan, le syndicat soulève qu'il ne respecte pas les dispositions de la convention collective en matière de paiement pour les employés mis à pied, à titre d'exemple, l'ancienneté, la supplantation des mises à pied et l'équité salariale.
>
> [5] Pour soutenir ses propositions, le Syndicat invoque l'arrêt du *Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc.*[1] aux paragraphes 60 à 64 du jugement.
>
> [6] Le Tribunal s'est déjà prononcé dans une décision du 16 mai 2008 sur l'interprétation qu'il donnait à l'arrêt précité de la Cour d'appel lors d'une demande antérieure du Syndicat.
>
> [7] Le Tribunal réitère que la reconnaissance d'un droit contenu dans une convention collective est tout à fait différente du droit à la réception du paiement découlant de ce droit. En d'autres termes, la reconnaissance d'un droit diffère de son exécution.
>
> [8] Le Tribunal ne peut accueillir un argument qui vise l'annulation d'un plan d'arrangement aux motifs que les dispositions de la convention collective ne sont pas respectées de manière générale. L'illégalité doit être déterminée cas par cas à la lumière des faits propres à chaque réclamation.
>
> [9] La demande du Syndicat est en conséquence irrecevable quant à sa demande déclaratoire d'illégalité du

Copr. (c) West 2008 No Claim to Orig. Govt. Works

plan puisqu'elle est vague et manque de précisions quant aux illégalités reprochées.

[10] Il n'appartient pas au Tribunal de modifier le plan d'arrangement soumis et accepté par une majorité écrasante de créanciers[2].

[11] Le Syndicat prétend que des catégories spéciales ou particulières de créanciers auraient dû être créées pour permettre d'identifier celles des employés et leur donner un droit de vote spécifique.

[12] Le Tribunal ne voit pas comment une catégorie spéciale de créanciers aurait pu faire valoir les droits des employés de manière à leur permettre d'exercer leurs droits d'une manière plus juste que celle utilisée.

[13] Le Tribunal ne voit pas de justification pour faire droit à la demande et fait siens les propos du Tribunal de la Colombie-Britannique dans l'affaire *Woodward's Ltd.*[3].

[14] Le Syndicat demande de ne pas reconduire l'ordonnance initiale puisque cela a pour conséquence de suspendre et de priver de leurs recours à l'encontre de la débitrice jusqu'au 27 août 2008. Le Syndicat entend en effet vouloir soumettre par voie de griefs les demandes de ses membres à l'encontre des décisions patronales visant des mises à pied des employés de TQS.

[15] Le Syndicat et les syndiqués peuvent requérir l'autorisation et entreprendre des procédures en les qualifiant spécifiquement, en tout temps. La demande telle que soumise est trop générale et ne permet pas d'étudier le sérieux du recours recherché et des prétentions soulevées. À ce seul motif, elle doit être rejetée. De plus, les créanciers ne perdent aucun droit d'obtenir le droit d'entreprendre ce qu'ils recherchent, le cas échéant.

---

1 Syndicat national de l'amiante d'Asbestos c. Mine Jeffrey inc., 2003, CANLII 47918 (C.A.).

2 Scaffold Connection Corp, 2001 ABQB 1124, par.20 #9.

3 Woodward's Ltd., 20 C.B.R. (3d) 74, 84 BCLR(2d) 206, par.18. # 6.

20 Commentant la décision du premier juge, les avocats des requérants écrivent au paragraphe 127 de leur requête pour permission d'appeler : « Ces énoncés du Tribunal sont complètement incohérents. ». En plus d'être erronée, la remarque est insolente et déplacée. J'y reviendrai.

21 Compte tenu du vaste pouvoir discrétionnaire que la *LACC* confère au juge de la Cour supérieure, l'appel n'est possible que sur permission et permission ne sera accordée que si l'appel soulève une question sérieuse et d'intérêt général. Dans *Canadian Airlines Corp., Re* (2000), 19 C.B.R. (4th) 33 (Alta. C.A. [In Chambers]), le juge Wittman de la Cour d'appel d'Alberta écrit ce qui suit :

> The general criterion is embodied in the concept that there must be serious and arguable grounds that are of real and significant interest to the parties : (. . .) Subsumed in the general criterion are four applicable elements : (1) whether the point on appeal is of significance to the practice; (2) whether the point raised is of significance to the action itself; (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (4) whether the appeal will unduly hinder the progress of the action.

Copr. (c) West 2008 No Claim to Orig. Govt. Works

22 Je suis d'accord avec cette approche que mon collègue le juge Dalphond a aussi suivie dans *Uniforêt inc., Re* [2003 CarswellQue 1843 (Que. C.A.)], 2003 CanLII 44615.

23 Je suis d'avis que le pourvoi envisagé ne remplit pas les critères énoncés ci-haut. Ce que recherchent les requérants, une minorité des employés syndiqués affectés, je le souligne à nouveau, c'est qu'on leur reconnaisse une priorité sur les autres créanciers ordinaires. Du fait qu'ils sont protégés par une convention collective, leur situation juridique *et* économique devrait demeurer intacte. Or, il n'y a, ni dans la *LACC* ni dans la jurisprudence, aucun fondement à cette prémisse.

24 Il est vrai que, même lorsqu'une compagnie a recours à la protection de la *LACC*, elle ne peut échapper aux conditions imposées par la convention collective qui la lie à son corps salarial. On a tenté, dans le passé, d'escamoter les conditions de travail négociées collectivement en remerciant des salariés aussitôt réembauchés à des conditions fixées unilatéralement par l'administrateur judiciaire. Dans *Mine Jeffrey inc., Re* [2003 CarswellQue 90 (Que. C.A.)], 2003 Can LII 47918, notre Cour a conclu que la contrepartie payable aux salariés maintenus en poste ou rappelés après l'ordonnance initiale doit être celle prévue par la convention collective.

25 Cela ne signifie pas pour autant que les créances des employés antérieures à la date de l'ordonnance initiale doivent être acquittées intégralement. Ces créances n'échappent pas au compromis douloureux que comporte inévitablement le Plan d'arrangement. Les employés devenus créanciers n'ont pas droit à un statut prioritaire ou garanti.

26 Les droits des employés sont définis par la convention collective qui les régit et par certaines dispositions législatives; toutefois, les créances qui en découlent peuvent être aléatoires tout comme celles des autres créanciers, ici des fournisseurs dont le gagne-pain est aussi menacé par la précarité financière de leur débitrice.

27 Les propositions de l'avocat des requérants se fondent sur la prémisse erronée que les salariés ont droit à un statut privilégié. Ce n'est pas ce que la *LACC* prévoit ni ce que notre Cour a décidé dans *Syndicat national de l'amiante d'Asbestos inc. c. Mine Jeffrey inc.*, précité :

> [60] Les conventions collectives continuent de s'appliquer comme tout contrat à exécution successive non modifié d'un commun accord après l'ordonnance initiale ou non terminé (à supposer que cela puisse être possible pour des conventions collectives). Le contrôleur ou le tribunal ne peut les amender par décision unilatérale. Ceci dit, il y a lieu de faire des distinctions quant au paiement des créances qui en résultent.
>
> [61] Ainsi, les employés syndiqués gardés ou rappelés ont le droit d'être payés immédiatement par le contrôleur pour tout service rendu après la date de l'ordonnance (art. 11.3) et ce, selon les termes de la convention collective applicable dans sa version originale ou modifiée de consentement avec le syndicat concerné. Par contre, pour les services antérieurs, les obligations non exécutées par Mine Jeffrey inc. résultent en des créances contre Mine Jeffrey inc. pour lesquelles le contrôleur ne peut être tenu responsable (art. 11.8 LACC) et dont les employés ne peuvent exiger le paiement immédiat (art. 11.3 LACC).
>
> [62] Pour les employés licenciés définitivement le 7 octobre 2002 et les personnes qui étaient à ce jour des ex-employés de Mine Jeffrey inc., les obligations non honorées résultant des conventions collectives ou d'autres engagements constituent des créances de la débitrice, Mine Jeffrey inc., dont il sera disposé dans le cadre du plan de réorganisation ou à défaut, de la faillite de Mine Jeffrey inc.
>
> (soulignements ajoutés)

Copr. (c) West 2008 No Claim to Orig. Govt. Works

28 Les motifs exprimés par le premier juge dans sa décision du 4 juin 2008 ne sont pas incohérents. Ils reprennent de manière succincte ce qu'il avait exprimé antérieurement sur la même question, celle du traitement des employés dans le cadre d'un Plan d'arrangement, notamment dans les motifs de sa décision du 15 mai 2008. Je cite :

> [9] Le Tribunal ne peut que confirmer que tous les employés syndiqués pourront déposer une preuve de réclamation selon les dispositions de la convention collective selon leur prétention à faire valoir contre la débitrice. En d'autres termes, le Tribunal réserve aux salariés le droit de réclamer ce qui leurs est dû par la convention collective. Il appartiendra aux personnes habilitées à le faire de décider du sort de ces réclamations.
>
> [10] Ainsi, il pourra y avoir des représentations ou des contestations sur les preuves de réclamation lorsque le plan d'arrangement aura été accepté ou refusé. Au stade des procédures, le Tribunal ne peut que faire droit à la demande, en soulignant que les réclamations qui découlent de la convention collective devront être déposées auprès de l'administrateur Monsieur Vincent.
>
> [11] Quant à la réclamation qui découle de l'équité salariale pour deux employés, laquelle fait l'objet d'une entente survenue avant l'ordonnance initiale, le Tribunal ne peut malgré le respect qu'il a pour l'opinion contraire, suivre la demande qui lui a été soumise voulant que les réclamations soient traitées différemment des réclamations qui auraient pu exister ou qui existent avant l'entrée de l'ordonnance initiale. À titre d'exemple, un jugement, une convention de règlement, un contrat, une entente survenue durant l'ordonnance initiale, devront être traités d'une manière identique aux autres créances préexistantes et seront en conséquence soumises avec les autres créances pour approbation du plan d'arrangement lors de sa présentation.
>
> [12] *La charte des droits et liberté* qui est à la base du règlement sur l'équité salariale est la Loi qui a permis d'en venir au règlement et de déterminer les sommes qui étaient dues et exigibles. La Charte ne confère pas cependant un droit à l'exécution différente des autres créances qui existent et de l'ordre de collocation que l'on retrouve au Code québécois.

29 En résumé, je suis d'avis que les pourvois que les requérants désirent entreprendre ne sont pas mus par l'intérêt de toutes les parties, ni même par celui de tous les créanciers, que la question du traitement des droits des employés ainsi que celle du recouvrement de leurs réclamations ne font plus l'objet d'un débat jurisprudentiel et que l'appel aurait pour effet de retarder inutilement le déroulement du dossier et la mise à exécution du Plan d'arrangement. Celui-ci n'est sans doute pas parfait mais il constitue - en l'absence d'une démonstration à l'effet contraire - un compromis juste et équitable des réclamations de tous les créanciers. Ceux-ci ayant approuvé le Plan par une forte majorité, il n'appartient pas à une cour d'appel de s'immiscer sans raison et de compromettre le redressement de la débitrice.

30 Pour ces motifs, les requêtes pour permission d'appeler sont rejetées, avec dépens dans le dossier 500-09-018723-080 seulement.

Appel rejeté.

FN* Leave to appeal refused *TQS inc., Re* (2008), 2008 QCCS 2288, 2008 CarswellQue 4863 (Que. S.C.).

FN1 Les motifs de la décision sont datés le 12 juin 2008.

Copr. (c) West 2008 No Claim to Orig. Govt. Works

FN2 Cette demande a été abandonnée en cours de route.

FN3 L'employeur identifié à l'accréditation est une division de TQS Inc.

FN4 Clause 2.1 du Plan d'arrangement.

FN5 Le Conseil de la radiodiffusion et des télécommunications canadiennes.

FN6 Ses motifs sont en partie exprimés dans une autre décision rendue le 16 mai sur la requête de Patrick St-Pierre et al.

FN7 Paragraphe 29 de la Requête pour homologation d'un Plan d'arrangement.

FN8 Paragraphe 31 de la Requête pour homologation d'un Plan d'arrangement.

END OF DOCUMENT

Copr. (c) West 2008 No Claim to Orig. Govt. Works

AFFIDAVIT

I, the undersigned, DOMINIQUE TÊTU, in my capacity as practising lawyer in charge of the Translation Department with the law firm of Osler, Hoskin & Harcourt LLP, 1000 De La Gauchetière Street West, Suite 2100, Montréal, Québec, H3B 4W5, do hereby make the following solemn declaration:

1. I have read the attached English-language and French-language versions of i) a judgment dated May 15, 2008 rendered by Mr. Justice P. Journet of the Superior Court of Québec and ii) a judgment dated August 1st, 2008 rendered by Mrs. Justice P. Rayle of the Court of Appeal of Québec, in respect of TQS inc. (the "Judgments"); and

2. The English version of such Judgments are in all material respects complete and proper translations of the French version thereof.

Dominique Têtu

SOLEMNLY DECLARED BEFORE ME
in Montréal this 26th day of February 2010

COMMISSIONER FOR OATHS FOR THE CITY
AND DISTRICT OF MONTRÉAL

COMMISSAIRE À L'ASSERMENTATION
MARCELLE DUBUC DROUIN
113,508
POUR TOUT LE DISTRICT DU QUÉBEC

MONTREAL:2634077.1
1114233 DT/cı

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

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

APPLICANTS

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES
OF THE APPLICANTS
(Declarations Regarding CH Plan Claims)

OSLER, HOSKIN & HARCOURT LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8

Lyndon A.J. Barnes (LSUC#: 13350D)
Tel: (416) 862-6679

Jeremy E. Dacks (LSUC #: 41851R)
Tel: (416) 862-4923

Alexander Cobb (LSUC#: 45363F)
Tel: (416) 862-5964
Fax: (416) 862-6666

Lawyers for the Applicants

F. 1114233

TOR_P2Z:4345449.1