TAB 2

Case Name:

Richtree Inc. (Re)

IN THE MATTER OF the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF a plan of compromise or arrangement of Richtree Inc. and Richtree Markets Inc.

[2005] O.J. No. 251

74 O.R. (3d) 174

[2005] O.T.C. 63

10 B.L.R. (4th) 334

7 C.B.R. (5th) 294

13 C.B.R. (5th) 111

136 A.C.W.S. (3d) 768

2005 CarswellOnt 255

2005 CarswellOnt 4045

2005 CanLII 55905

Court File No. 04-CL-5584

Ontario Superior Court of Justice
Commercial List

J.L. Lax J.

Heard: December 8, 2004.
Judgment: January 26, 2005.

(19 paras.)

Constitutional law -- Division of powers -- Determination of jurisdiction -- Paramountcy doctrine -- Insolvency law -- Legislation -- Companies' Creditors Arrangement Act -- Practice -- Proceedings in bankruptcy -- Securities regulation -- Legislation -- Administration and enforcement.

Motion by the reporting issuer, Richtree Inc, for an exempting order by way of extension from the requirement to file its audited financial statements and other continuous disclosure documents with the

Ontario Securities Commission. At the time of its motion, Richtree had received creditor protection under the Companies' Creditors Arrangement Act, and proceedings were ongoing. When the Commission refused its request, Richtree sought similar relief from Superior Court. The question arose, therefore, whether the statutory discretion granted to a court under the Companies' Creditors Arrangement Act could be exercised in the fact of s. 80 of the Securities Act, which provided that it was the Commission that could grant or refuse the exemptions sought.

HELD: Motion dismissed. There was no provision of the Companies' Creditors Arrangement Act that either addressed or contemplated an application to the court for exemption from the filing requirements of the Securities Act. As there was no inconsistency between the federal Companies' Creditors Arrangement Act and the provincial Securities Act, the doctrine of paramountcy did not apply. Furthermore, where the Securities Act gave exclusive jurisdiction to determine a matter, the court's discretionary power under the Companies' Creditors Arrangement Act could not be used to override it. The purpose of s. 11 of the federal act was to provide the court with a discretionary power to restrain conduct against a debtor company so as to permit it to continue in business during the arrangement period. The power was discretionary and to be exercised judiciously. Neither were companies under the protection of bankruptcy legislation immunized from complying with regulatory regimes.

Statutes, Regulations and Rules Cited:

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, ss. 6, 11.

Securities Act, R.S.O. 1990, c. S-5, s. 80.

Counsel:

Edmond F.B. Lamek, for the Applicant, Richtree Inc.

Michael Weinczok, for Catalyst Fund General Partner Inc.

Kelley McKinnon, Alexandra S. Clark, J.H. Grout for the Respondent, The Ontario Securities Commission.

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1 J.L. LAX J.:-- Richtree Inc. is a reporting issuer in Ontario and in several other Canadian jurisdictions. It brings this motion requesting an exemption by way of extension from the requirement to file its audited financial statements and other continuous disclosure documents with the Ontario Securities Commission (the "OSC") and the equivalent regulatory authorities in British Columbia, Alberta, Saskatchewan, Manitoba, Newfoundland and Labrador and Nova Scotia. Following submissions, I dismissed the motion with reasons to follow. These are the reasons.

Background

2 At the time of the motion, Richtree had filed an Application with the Superior Court of Justice, Commercial List, and received creditor protection under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA"). This proceeding is ongoing.

3 On November 24, 2004, it made an Application under the Mutual Reliance Review System for Exemptive Relief Applications (the "MRRS System") for an exemption from the obligation to meet its filing requirements with the OSC. The MRRS System permits reporting issuers to request exemptions

from multiple Canadian securities regulators with a single application. As Richtree had appointed the OSC as the principal regulator, its staff had primary carriage of the Application for Exemption. The exemptions sought were exemptions from the filing with the OSC the 2005 Q1 Interim Financial Statements and the 2005 Q1 Management's Discussion and Analysis by December 8, 2004; and, the 2004 Annual Financial Statements, the 2004 Management's Discussion and Analysis and the 2004 Annual Information Form by December 10, 2004.

4 Shortly before the formal filing of the Application for Exemption, OSC staff informed Richtree that they would not recommend that the OSC grant the exemption. On December 1, 2004, OSC staff confirmed its recommendation and also informed Richtree that staff of the other regulators would also recommend that their securities commissions refuse the request for exemption. The OSC staff offered to convene a joint hearing before a panel of the OSC, with the other jurisdictions participating by conference, or a hearing before the OSC if the other jurisdictions agreed to abide by the decision of the OSC. Richtree refused the hearing and brought this motion on December 7, 2004, which was the day before its first filings were due.

Analysis

5 Richtree concedes that the OSC has statutory jurisdiction to grant an exemption to a reporting issuer: Securities Act, R.S.O. 1990, c. S-5, s. 80. However, it submits that the court has inherent jurisdiction to grant this relief consistent with its discretionary powers under section 11 of the CCAA to accomplish the goal of facilitating the restructuring of a debtor company. It points to examples of stays in the nature of "tolling provisions". These are frequently granted in Initial CCAA Orders and constrain creditors or third parties from exercising rights so as to provide the necessary stability for the debtor company to restructure its affairs. It submits that the court has a variety of discretionary powers arising from its inherent jurisdiction to make orders to do justice between the parties and also to do what practicality demands. For this proposition, it relies on dicta of Farley J. in Re Royal Oak Mines Inc. (1999) 7 C.B.R. (4th) 293 (Ont. Gen. Div.[Commercial List]) where he said at p. 296:

> ... In light of the very general framework of the CCAA, judges must rely upon inherent jurisdiction to deal with CCAA proceedings. However, inherent jurisdiction is not limitless if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play. The same limitations are applicable to a Court's use of a discretion granted by statute. I appreciate that there may have been some blurring of distinction among discretion, inherent jurisdiction and general jurisdiction (including the common law facility). This combination is implicitly recognized in Baxter Student Housing Ltd. v. College Housing Cooperative Ltd. (1975) 57 D.L.R. (3d) 1 S.C.C.) in Dickson J's analysis of inherent jurisdiction at pp. 4-5 ...

6 In Baxter, Dickson J. emphasized that inherent jurisdiction does not empower a judge to negate an unambiguous expression of the legislature. Neither may it be exercised to conflict with a statute or rule. It is a special and extraordinary power to be exercised only sparingly and in a clear case and usually to maintain the authority and integrity of the court process.

7 The concept of "inherent jurisdiction" within CCAA proceedings is discussed in the recent decision of the British Columbia Court of Appeal in Re Skeena Cellulose Inc. (2003) 43 C.B.R. (4th) 187 at 211-212 (B.C.C.A.). The court concludes that when one analyzes cases such as Re Royal Oak Mines, as well as others referred to by Farley J. such as Re Westar Mining Ltd., [1992] 6 W.W.R. 331 (B.C.S.C.), the court's use of the term "inherent jurisdiction", is a misnomer. In these cases, the courts are exercising a statutory discretion given by the CCAA rather than their inherent jurisdiction. This is an important

distinction, which Farley J. recognizes in Re Royal Oak Mines in the passage quoted and in his reference to the decision of the Supreme Court of Canada in Baxter.

8 I agree with the analysis in Skeena Cellulose that when a court grants a stay of proceedings under section 11 or approves a plan of arrangement under section 6, the court is not exercising a power that arises from its nature as a Superior Court, but rather is exercising the discretion granted to it under the broad statutory regime of the CCAA. The relief that Richtree requests whether under the CCAA or the Securities Act is discretionary. The question that arises then is whether the statutory discretion granted to a court under the CCAA can be exercised in the face of section 80 of the Securities Act, which provides that it is the Commission that may grant or refuse the exemptions sought.

9 The answer is no. There is no provision of the CCAA that either addresses or contemplates an application to the court for exemption from the filing requirements of the Securities Act. The doctrine of paramountcy has been acknowledged to apply where the exercise of a court's discretion under the CCAA conflicts with the mandatory provisions of provincial legislation, see for example, Re Smoky River Coal Ltd. (1999) 12 C.B.R. (4th) 94 at 115 (Alta. C.A.); Re Loewen Group Inc. (2001) 32 C.B.R. (4th) 54 at 58 (Ont. S.C.J.) However, it is worth noting that in neither case was it necessary to invoke the paramountcy doctrine. Here, as in the cases referred to, there is no inconsistency between federal and provincial law. The doctrine of paramountcy does not apply.

10 Further, where a provincial statute is given exclusive jurisdiction to determine a matter, the court's discretionary power under the CCAA cannot be used to override it. Hence, a broad receivership power under federal bankruptcy legislation confers no authority on a bankruptcy court to determine whether a receiver that carries on the business of a debtor is a successor employer. This is within the exclusive jurisdiction of the Ontario Labour Relations Board: GMAC Commercial Credit Corp. v. TCT Logistics Inc., (2004) 238 D.L.R. (4th) 677 (Ont. C.A.). On this point, the court was unanimous.

11 Richtree relies on Orders made in CCAA proceedings in Slater Steel and Air Canada where the court granted extensions of time for calling an annual general meeting of shareholders. This is commonly done in CCAA proceedings. It is quite a different thing to relieve a reporting issuer from providing timely and accurate financial information to members of the public where, as here, the company's shares continue to trade. At the time of its application for exemption from filing requirements, Slater's shares had been delisted from the Toronto Stock Exchange and were no longer trading. Further, the OSC, as lead regulator, had granted Slater a filing exemption, which is recited in the Order of May 5, 2004.

12 Richtree submits that the court should defer to the opinion of the directors of the company who are attempting to achieve the best results they can for the company and all of its stakeholders. I agree that the task of the directors is to focus their attention on assisting Richtree with its restructuring. However, the proper forum for debating the effect of the filing requirements on Richtree is not on this motion, but at the OSC. The legislature has decided that it is the proper forum for balancing the interests of the company and its stakeholders on the one hand and the interests of members of the public on the other. I conclude that the court has no jurisdiction under the CCAA to grant the exemptions sought.

13 Having said this, I wish to make some comments about the reasons that the Richtree directors have come to court. The company does not plan to comply with its filing requirements and the directors have two concerns. The only evidence before the court is a solicitor's affidavit, which deposes in paragraph 2:

> ... I understand that Richtree's directors are concerned that they could be required under applicable securities laws to notify the boards of any other public companies on which they serve or may in the future serve, of such filing requirement defaults. Moreover, I understand that Richtree's directors are concerned that they might be

viewed as having acquiesced in a deliberate breach by Richtree of securities law and corporate legislation and thereafter suffer damage to their respective reputations.

14 As to the first concern, the Richtree directors are already required to disclose that they have been directors of a company that has made a plan of arrangement under the CCAA. Specifically, the rules of the Toronto Stock Exchange require directors to disclose this on a Personal Information Form for all companies seeking to list, or that currently list their shares for trading on the TSX.

15 The sole consequence of Richtree's failure to meet the filing requirements is that the company will be placed on the OSC's Default List. There is no requirement under Ontario securities law to disclose that an individual has been a director of a company that has been placed on the Default List. Although the OSC does place companies that are under CCAA protection on the Default List, there is no evidence that this has caused any harm to Richtree or indeed to other companies currently on the list, or to their directors.

16 As to the second concern, I was informed that the Richtree directors, or at least some of them, are on several boards, and that this raises concerns for them about their reputations as directors of these boards or other boards they may be invited to join. I find this to be a disquieting submission. As directors of Richtree and as directors of any other boards on which they may now or in the future serve, they have fiduciary duties that require them to act honestly and in good faith with a view to the best interests of the corporation. These duties are paramount. Reputational concerns of a personal nature play no role in assessing the alleged harm that may flow to a director from being a member of a board whose company is a defaulting issuer.

17 The purpose of section 11 of the CCAA is to provide the court with a discretionary power to restrain conduct against a debtor company so as to permit it to continue in business during the arrangement period: see Quintette Coal Ltd. v. Nippon Steel Corp. (1990) 2 C.B.R. (3d) 303 at 312 (B.C.C.A.). As observed there, the power is discretionary and therefore is to be exercised judicially.

18 Companies under CCAA protection are not immunized from complying with regulatory regimes. During a CCAA proceeding, directors are not immunized from carrying out their responsibilities or relieved of their obligations to serve the company and its stakeholders diligently. The order that is sought has nothing to do with Richtree's restructuring process. It is intended to grant the directors personal protection to their reputations. This is neither contemplated by section 11, nor are the directors entitled to this protection. Even if the court had the jurisdiction to grant the relief sought, I would not do so as this is an improper and injudicious exercise of the court's discretion under the CCAA.

19 For these reasons, the motion was dismissed. The OSC does not seek costs.

J.L. LAX J.

cp/e/qlgxc/qlisl

TAB 3

Case Name:

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

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

[2003] J.Q. no 264

[2003] Q.J. No. 264

[2003] R.J.Q. 420

J.E. 2003-346

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

35 C.C.P.B. 71

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

2003 CarswellQue 90

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

2003 CanLII 47918

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

Quebec Court of Appeal
Montreal Registry

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

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

(70 paras.)

Counsel:

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

JUDGMENT

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

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

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

4 ALLOWS the appeal in part, as follows:

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

5 THE WHOLE, without costs.

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

REASONS OF DALPHOND J.A.

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

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

THE FACTS

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

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

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

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

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

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

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

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

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

...

[My emphasis]

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

[TRANSLATION]

2. REMUNERATION

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

3. HOLIDAYS AND FRINGE BENEFITS

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

the end of each week.

4. PENSION PLAN

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

5. UNION DUES

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

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

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

[TRANSLATION]

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

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

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

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

...

[My emphasis]

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

payments in October 2002.

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

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

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

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

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

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

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

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

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

THE TRIAL JUDGMENT

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

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

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

THE ARGUMENTS OF THE PARTIES

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

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

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

THE RELEVANT LEGISLATIVE PROVISIONS

26 The following are the relevant provisions of the CCAA:

11.3

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

11.7

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

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

(3) The monitor shall

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

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

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

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

or

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

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

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

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

(5) The debtor company shall

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

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

11.8

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

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

* * *

11.3

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

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

11.7

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

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

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

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

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

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

11.8

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

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

[My emphasis]

ANALYSIS

I. A bit of history

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

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

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

II. Aim of the CCAA

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

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

initiation of proceedings in bankruptcy.

[My emphasis]

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

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

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

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

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

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

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

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

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

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

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

...

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

...

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

contract in question.

[My emphasis]

III. The monitor's role

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. The CCAA and the appellants' exclusive representation

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

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

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

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

V. The working conditions of employees kept on or recalled

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

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

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

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

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

the debtor will eventually propose an arrangement.

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

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

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

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

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

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

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

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

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

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

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

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

[My emphasis]

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

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

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

VI. Recapitulation

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

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

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

VII. Conclusions sought by the appellants

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

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

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

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

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

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

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

VIII. Conclusion and disposition

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

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

PIERRE DALPHOND J.A.

cp/i/qw/qlisl/qlesc/qljxl

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

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

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

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

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

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

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

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

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

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

11 Ibid. at 93.

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

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

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

15 Michaud v. Steinberg, supra, at 1690.

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

17 Ibid. at 191.

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

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

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

21 Section 33 of the winding-up Act.

22 Section 35 of the Winding-up Act.

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

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

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

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

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

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

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 TIMMINCO LIMITED AND BECANCOUR SILICON INC.

Court File No. CV-12-9539-00CL

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