CITATION: Re: Canwest Global Communications Corp., 2010 ONSC 1746
COURT FILE NO.: CV-09-8396-00CL
DATE: 20100614

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS

COUNSEL: *Lyndon Barnes, and Alex Cobb* for the CMI Entities
Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.
Robert Chadwick and Logan Willis for the Ad Hoc Committee of Noteholders
Steve Weisz for CIT Business Credit Canada Inc.
D. Wray for the Communications, Energy and Paperworkers' Union

REASONS FOR DECISION

PEPALL J.

Introduction

[1] On October 6, 2009, I granted the CMI Entities an Initial Order which provided protection under the Companies' Creditors Arrangement Act[1] (the "CCAA") and stayed all proceedings against them. The Communications, Energy and Paperworkers' Union ("CEP") is the certified bargaining agent for certain employees of the CMI Entities. The CEP and the CMI Entities are parties to certain collective agreements. The CEP requests an order directing the CMI Entities to satisfy all obligations in respect of severance payments and notice of termination and/or notice of layoff payments in accordance with the terms of collective agreements. These payments are alleged to be due to union members who rendered services to the CMI Entities after October 6, 2009, the date of the Initial Order. Payments to two groups of employees are in issue. CEP did not proceed with that part of the motion relating to a third group whose effective

[1] R.S.C. 1985, c. C-36, as amended

layoff date predated the Initial Order. In addition, the parties adjourned on consent CEP's request for the establishment of a financial hardship process.

Factual Background

[2] On September 3, 2009, the applicable CMI Entity employer announced nine layoffs of employees at the CHBC Kelowna television station. The effective layoff dates were in mid October or December of 2009. The applicable collective agreement provided for severance payments. Specifically, it stated:

> In the event that an employee who has completed their probationary period is laid off, he/she shall receive severance of two (2) weeks pay for each completed year of continuous service up to seven (7) years, and three (3) weeks severance pay for each year of continuous service beyond seven (7) years, to a maximum of fifty-two (52) weeks severance pay. Up to two (2) weeks of the total may be actual notice with the balance paid in a single lump sum or in payments agreeable between the employee and the Company. In the event of a temporary layoff not longer than eight (8) weeks, where the (sic) is guaranteed to be recalled, there shall be no requirement to pay severance pay.

[3] In lieu of lump sum severance payments, the CMI Entities proposed to make severance payments by way of "salary continuance". As such, post layoff, the CMI Entities would continue to pay the employees their regular salary until their severance obligations were exhausted. But for the CCAA proceedings and the insolvency of the debtor companies, this salary continuance would have commenced in mid October or December, 2009. All of the employees worked beyond October 6, 2009 and remained employed until their effective layoff dates. They were paid their ordinary wages and benefits until their effective layoff dates and thereafter nothing was paid.

[4] On November 12, 2009, the applicable CMI Entity employer announced nine terminations of employment at Global Saskatoon[2]. The effective termination date was November 30, 2009. The CMI Entities did not pay these employees any severance after they were laid off. Some of these employees are also owed money in respect of pay in lieu of notice of termination. These payments were also not made. While the applicable collective agreement was not filed on this motion, it is acknowledged that it provides for termination and severance

[2] Two of these were later rescinded.

payments to employees whose employment has been terminated or severed. Even though they were told that they would not be paid any severance, all of the affected employees continued to work until their effective termination date of November 30, 2009. The employer paid the employees their wages plus a retention bonus if they continued to work until November 30, 2009. For example, one employee was paid a retention bonus of $5400. Two layoffs were subsequently rescinded.

[5] CEP filed an affidavit of Robert Lumgair, a national representative of the Union. He emphasized the significance of severance payments to employees. He stated that employees consider the promise of severance pay to be part of their total compensation package. He also noted that anticipated severance often serves as an incentive for employees to remain in the employment of the employer.

[6] The Initial Order was largely based on the Commercial List Users' Committee Model Order. Paragraph 7(a) of the Initial Order entitles but does not require the CMI Entities: (a) to pay all outstanding and future wages, salaries, and employee benefits (including, but not limited to, employee medical, dental, disability, life insurance and similar benefit plans or arrangements, incentive plans, share compensation plans and employee assistance programs and employee or employer contributions in respect of pension and other benefits), current service, special and similar pension and/or retirement benefit payments, vacation pay, commissions, bonuses and other incentive payments, payments under collective bargaining agreements, and employee and director expenses and reimbursements, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements.

[7] Subject to certain conditions including such requirements as are imposed by the CCAA, paragraph 12 of the Initial Order authorizes the CMI Entities to terminate the employment of such of their employees or lay off or temporarily or indefinitely lay off such of their employees as the relevant CMI Entity deems appropriate on such terms as may be agreed upon between the relevant CMI Entity and such employee, or failing such agreement, to deal with the consequences thereof in the CMI Plan.

[8] The CMI Entities sent letters to the affected employees outlining the anticipated payments due to them.

[9] Severance payments to sixteen employees totaling approximately $425,000 are in issue on this motion. Of the sixteen, eleven termination claims amounting to approximately $6000 are also in issue.[3]

Issue

[10] The parties agree that: (i) the collective agreements provide for severance and termination pay; (ii) the collective agreements remain in force during the CCAA proceeding; and (iii) section 11.01 of the CCAA provides that employees are entitled to immediate payment for services provided to the CMI Entities after the date of the Initial Order. The issue for me to consider is whether as a result of working for some period of time after the granting of the Initial Order, these sixteen employees are entitled to immediate payment of all severance and termination payments owed to them.

Positions of the Parties

[11] CEP submits that these groups of employees provided post-filing service to the CMI Entities and are entitled to severance and termination payments in accordance with the terms of the collective agreements. Section 11.01 of the CCAA provides that employees are entitled to payment for post-filing services. The collective agreements provide for severance and termination payments. Pursuant to section 33(1) of the CCAA, collective agreements remain in force during CCAA proceedings. Severance and termination payments are in respect of post-filing service and therefore should be paid. In the alternative, at a minimum, the termination payments are properly characterized as payments in respect of post-filing service. CEP relies on

[3] Of the eleven, four claim 3 months pay in lieu but these claims were not quantified.

Jeffrey Mines Inc. [4], *Nortel Networks Corp. (Re)*[5] , *West Bay SonShip Yachts Ltd. (Re)*[6], and *Fraser Papers Inc.*[7] CEP submits that *Windsor Machine & Stamping Ltd.*[8] was wrongly decided.

[12] The CMI Entities submit that they paid the ordinary wages and benefits of the two groups of employees until the effective date of their layoff, based on the fact that they remained at work until that date and that payment of their salary for such service was required by section 11.01 of the CCAA. The fact that these employees provided services following the date of the Initial Order did not convert their severance entitlements---which take effect upon the termination of their services and are calculated based on tenure of past service---into post-filing obligations. Such a holding would be contrary to the jurisprudence and would have wide spread and unprecedented implications generally for the application of a stay to pre-filing obligations owed to post-filing suppliers. There is a distinction between the conclusion that a collective agreement subsists during the CCAA stay period and the conclusion that any and all amounts owing under the collective agreement can be enforced during that period. The CMI Entities rely on the same cases relied upon by CEP plus *Communications, Energy, Paperworkers, Local 721G v. Printwest Communications Ltd.*[9], *Re ICM/Krebsoge Canada Ltd. and International Association of Machinists & Aerospace Workers, Local 1975*[10], *Re Lehndorff General Partner Ltd.*[11],*Re Mirant Canada Energy Marketing Ltd.*[12], *Providence Continuing Care Centre St. Mary's of the Lake v. Ontario Public Service Employees' Union-Local 483*[13], *Re Stelco Inc.*[14], and *Re Wright Lithographing Co. and Graphic Communications International Union Local 517*[15].

[13] The Ad Hoc Committee of Noteholders and CIT Business Credit Canada Inc. both supported the position advanced by the CMI Entities. Counsel for the Ad Hoc Committee also observed that under the proposed Plan, unsecured creditors owed $5000 or less would be paid in

---

[4] [2003] J.Q. No. 264.
[5] (2009), 55 C.B.R. (5th) 68 (ont. S.C.J.), aff'd 2009 ONCA 833 .
[6] [2009] B.C.J. No. 120 [B.C. C.A.].
[7] [2009] O.J. No. 3188.
[8] [2009] O.J. No. 3195.
[9] 2005 SKQB 331.
[10] 38 L.A.C. (4th).
[11] (1993), 9 B.L.R. (2d) 275.
[12] 2004 ABQB 218.
[13] 85 C.L.A.S.149, 2006 C.L.B. 12961.
[14] (2005), 75 O.R. (3d) 5 (C.A.).
[15] 91 L.A.C. (4th) 141.

full. As such, approximately one half of the 16 employees would be paid in full provided the Plan is approved, sanctioned and remains unchanged in that regard. The Monitor took no position on the motion.

Discussion

[14] To properly assess these issues, it is necessary to examine the relevant provisions of the CCAA, the treatment of termination and severance obligations, and recent case law.

[15] The CCAA was amended on September 18, 2009. The relevant provisions of the CCAA are sections 11 and 33. Subject to the restrictions set out in the Act, section 11 provides the court with the power to make any order that it considers appropriate in the circumstances and the power to grant a stay of proceedings. Additionally, section 11.01 states:

> No order made under section 11 or 11.02 has the effect of
>
> (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or
>
> (b) requiring the further advance of money or credit.

Case law on this provision has focused on the provision of services after the Initial Order has been made.

[16] Section 33 for the most part incorporates law that has been established and applied for some time[16]. It is, however, a new provision in the statute itself. Section 33.1 states:

> If proceedings under this Act have been commenced in respect of a debtor company, any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.

[17] Both termination and severance pay are designed to "cushion the economic dislocation that an employee suffers upon termination of employment and provide support to allow

[16] See for example *Jeffrey Mines*, supra note 3.

terminated employees to secure new employment: M. Starnino, J-C Killey and C. P. Prophet in "*The Inter Section of Labour and Restructuring Law in Ontario: A Survey of the Current Law*"[17] In discussing the treatment of termination and severance in CCAA proceedings, the same authors note,

> "...amounts owing to employees whose employment has been terminated in the course of or at the end of the restructuring proceeding are typically treated as unsecured creditors in the restructuring proceeding and subject to compromise in accordance with the plan of compromise or arrangement....
>
> There are remarkably few cases expressly considering whether post-employment benefits, termination pay and severance pay are subject to compromise. What little authority there is tends to support the treatment of these claims as unsecured claims subject to compromise in the plan of arrangement. The apparent rationale behind this approach is that in bankruptcy these claims would be treated as unsecured claims subject to compensation in accordance with the scheme of distribution set forth in the BIA."[18]

[18] Turning to the relevant case law, in *Re: Nortel Networks Corp.*[19], two motions were involved. In the first motion, the Union requested a declaration that certain former employees were entitled to post-employment retirement benefits and termination and severance amounts. None of the former employees had provided services to Nortel after the Initial Order. The Union argued that the collective agreement was a bargain that should not be divided into separate obligations and therefore the compensation for services should include all monetary obligations and not just those owed to active employees.

[19] The Court of Appeal rejected the Union's appeal. The Court acknowledged the purpose of the CCAA, namely the facilitation of a compromise or an arrangement between a company and its creditors and stated that the Initial Order stays obligations; it does not eliminate them. The Court reiterated that section 11.3 (now section 11.01(a)) of the CCAA is an exception to the general stay provision and should be narrowly construed. Payment for services provided by the continuing employees did not extend to encompass payments to former employees. The latter

---

[17] Ontario Bar Association Continuing Legal Education, April 24, 2009.
[18] Ibid, at p.27-29. Although logical, the authors state that there is a lack of clarity as to whether the analysis should end there.
[19] (2009) ONCA 833.

were in the nature of deferred compensation for prior, not current services. Furthermore, these were independent vested rights.

[20] The ratio of *Re: Nortel Networks Corp* did not address post-filing employees and their rights, if any, to severance and termination payments nor did it address any of the amendments to the CCAA[20]. The Court of Appeal did state:

> "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 [Initial Order]: see *Re: Mirant Canada Energy Marketing Ltd.* (2004), 36 Alta. L.R. (4th) 87 (Q.B.)."[21]

[21] The second motion in the *Re Nortel Networks* case was brought by former non-unionized employees who sought payment of statutory termination and severance claims under the *Employment Standards Act, 2000*[22]. In addressing their appeal, in a footnote, the Court of Appeal observed that:

> "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 in issue on the motion. In *Windsor Machine & Stamping Ltd (Re)* [2009] O.J. 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."

---

[20] The *Nortel* filing predated the CCAA amendments in September, 2009.
[21] *Supra* note 19 at paragraph 19.
[22] 2000, S.O, c 41.

[22] The leave to appeal proceedings in *Windsor Machine* have been delayed. Although it was a pre-amendment case, the issue was similar to that before me. While it would have been helpful to have the benefit of the Court of Appeal's decision in that case, unfortunately, given timing requirements, I am rendering this decision beforehand.

[23] In *Windsor Machine and Stamping Ltd.*[23], the Union sought an order that the CCAA applicants pay termination and severance pay arising from terminations that occurred some time after the CCAA Initial Order. Morawetz J. reiterated and applied certain of his conclusions from *Re: Nortel Networks Corp.* including that the claims for termination and severance pay were unsecured claims and based for the most part on services that were provided pre-filing. A failure to pay did not amount to a contracting out of a payment obligation; rather, during the stay period, there was a stay of the enforcement of the payment obligation.

[24] There, as in the case before me, the claims for termination and severance were for the most part based on services that were provided pre-filing. Morawetz J. stated that the court has jurisdiction to order a stay of outstanding termination and severance pay obligations and concluded that the effect of paying termination and severance would be to accord to those claims special status over the claims of other unsecured and secured creditors. He noted that the priority of secured creditors had to be recognized. He also observed that in a receivership or bankruptcy, termination and severance pay claims would rank as unsecured claims.

[25] Morawetz J. did order that any incremental increases in termination and severance pay attributable to the post-filing time period were not stayed.

[26] The case relied upon by the Court of Appeal in *Re: Nortel Networks Corp.* was *Mirant Canada Energy Marketing.*[24] In that case, a letter agreement provided for severance pay in the event that an employee's employment was terminated without cause. Kent J. held that an obligation to pay severance was an obligation that arose on termination of services, not an obligation that was essential for the continued supply of services. She wrote:

---

[23] [2009] O.J. 3195.
[24] (2004) A.B.Q.B. 218.

> Thus, for me to find the decision of the Court of Appeal in *Smokey River Coal* analogous to Schaefer's situation, I would need to find that the obligation to pay severance pay to Schaefer was a clear contractual obligation that was necessary for Schaefer to continue his employment and not an obligation that arose from the cessation or termination of services. In my view, to find it to be the former would be to stretch the meaning of the obligation in the Letter Agreement to pay severance pay. It is an obligation that arises on the termination of services. It does not fall within a commercially reasonable contractual obligation essential for the continued supply of services. Only his salary which he has been paid falls within that definition.[25]

[27] Similarly, in *Communications, Energy, Paperworkers, Local 721G v. Printwest Communications Ltd.* [26], the court held that severance pay did not fall within the category of essential services provided during the reorganization period in order to enable the debtor company to function.

[28] Other cases of note include *Jeffrey Mines Inc.*[27] and *TQS Inc.*[28] both of which accepted that an employer is bound by its collective agreement notwithstanding CCAA proceedings, however, both courts concluded that obligations governed by collective agreements may be compromised.

[29] Having conducted this review, I have concluded that CEP's request for immediate payment should be dismissed. I do so for the following reasons.

[30] As noted by numerous courts including the Court of Appeal in *Re: Nortel Networks Corp.*, the purpose of the CCAA is to facilitate a compromise between a company and its creditors. The Act is rehabilitative in nature. A key feature of this purpose is found in the court's power to stay the payment of obligations including termination and severance payments. Section 11.01(a) permits payment for services provided after the date of the Initial Order. Consistent with the purpose of the statute, that subsection is to be narrowly construed.

[31] Termination and severance payments have traditionally been treated as unsecured claims. There is no express statutory priority given to these obligations. The nub of the issue is whether

---

[25] Supra, note 11 at para. 28.
[26] Supra, note 8.
[27] 2003 CarswellQue 90 (C.A.).
[28] 2008 CarswellQue 7132 (C.A.).

section 33 of the CCAA dealing with collective agreements alters the treatment of these obligations. In my view, it does not.

[32] Consistent with established law, section 33 of the CCAA does provide that a collective agreement remains in force and may not be altered except as provided by section 33 or under the laws of the jurisdiction governing collective bargaining. It does not provide for any priority of treatment though. The section maintains the terms and obligations contained in the collective agreement but does not alter priorities or status. The essential nature of severance pay is rooted in tenure of service most of which will have occurred in the pre-filing period. As established in the *Re Nortel Networks Corp., Windsor Machine,* and *Mirant* decisions, severance pay relates to prior service regardless of whether the source of the severance obligation is a collective agreement, an employment standards statute or an individual employment contract. As such, terminated employees are entitled to termination and severance but payment of that obligation is not immediate; rather it is stayed and is subject to compromise in a Plan. This conclusion is consistent with the case law and with the statute. As noted by the CMI Entities in their factum, the case law affirms that severance pay is the antithesis of a payment for current service.

[33] Furthermore, there is no statutory justification for giving these employees priority of payment over secured creditors. As stated by Morawetz J. in *Windsor Machine*, the priority of secured creditors must be recognized. There are certain provisions in the amendments that expressly mandate certain employee-related payments. In those instances, section 6(5) dealing with the sanction of a Plan and section 36 dealing with a sale outside the ordinary course of business being two such examples, Parliament specifically dealt with certain employee claims. If Parliament had intended to make such a significant amendment whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured creditors, it would have done so expressly.

[34] The same is true with respect to other unsecured creditors including other non-unionized employees. Quite apart from the priority to which secured creditors are entitled, quere the merits of a priority regime that treated unionized and non-unionized employees differently. Under such a regime, unionized employees would get immediate payment of termination and severance obligations based on section 33 of the CCAA whereas non-unionized employees would not.

[35] Additionally, based on CEP's submissions, someone who worked a day after the Initial Order would be entitled to full and immediate payment of termination and severance obligations ahead of all others whereas someone who was terminated the day before the Initial Order would not. This cannot be the scheme contemplated by the statutory amendments.

[36] I should say in all frankness that it would be appealing to find in favour of the employees in this case. They are a small group and the quantum in issue is not large relative to the amounts involved in this CCAA proceeding. That said, I have a very serious concern that while such a decision would result in immediate payment for these sixteen employees, the precedent such a decision would establish would have long term and negative consequences for employees generally. Although case law on a superficial read might cause one to conclude otherwise, in CCAA proceedings, a judge is extraordinarily conscious of the fate of employees. Indeed, one of the primary benefits of a restructuring that sees the continuance of the debtor company as a going concern is the maintenance of jobs for the employees. Acceptance of CEP's submissions could well result in behavior modification that would be an anathema to the interests of employees as a whole. As stated by Morawetz J. in *Windsor Machine and Stamping Ltd.*, the giving of priority to termination and severance payments would result in:

> "a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the status quo during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs."[29]

Other alternatives such as mass pre-filing terminations are even less palatable.

[37] As to CEP's alternative submission that termination payments are properly characterized as payments in respect of post-filing service, I am not persuaded that the distinction between severance and termination payments is a meaningful one within the context of this case. The *West Bay* decision supported the conclusion that a claim for damages for wrongful dismissal

---

[29] *Ibid* paragraph 43.

carried out in the post-filing period gave rise to a monetary claim that was subject to compromise under a plan. The clear inference to be drawn from the case is that the claim had been stayed and there was no immediate requirement to pay. The same is true in the case before me.

[38] As in *Windsor Machine*, any incremental amount of termination and severance pay attributable to the period of time after the date of the Initial Order in which services were actually provided is not stayed. Otherwise, for the reasons outlined, I am dismissing CEP's motion.

Pepall J.

DATE: June 14, 2010

CITATION: Re: Canwest Global Communications Corp., 2010 ONSC 1746
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100614

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. AND THE OTHER APPLICANTS

REASONS FOR DECISION

Pepall J.

Released: June 14, 2010