COURT FILE NUMBER	2401-02664
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended
	AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**KOSKIE MINSKY LLP** Barristers & Solicitors 20 Queen St. West, Suite 900 Toronto, ON M5H 3R3 Lawyers: Andrew Hatnay / Abir Shamim Telephone: 416-557-3633 / 557-2039 Email: ahatnay@kmlaw.ca / ashamim@kmlaw.ca File Number: 16407-240298

Clerk's Stamp

APPLICATION BEFORE THE HONOURABLE JUSTICE ARMSTRONG ON DECEMBER 4, 2024 AT 2:00 PM ON THE COMMERCIAL LIST

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PART I - INTRODUCTION

1. The Applicant, the Canadian Union of Public Employees ("**CUPE**"), brings this application on behalf of 240 terminated Cabin Crew Employees of Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx Air (collectively, "**Lynx Air**") who were members of CUPE Local 5558, for an Order that the severance pay[1] claims of the Cabin Crew Employees should include an amount in respect of Group Termination Notice under section 212 of the *Canada Labour Code,* R.S.C. 1985, c. L-2 ("**CLC**"), for the purpose of obtaining a payment for them under the federal Wage Earner Protection Program ("**WEPP**").

2. CUPE also requests an Order appointing it as Representative of the Cabin Crew Employees pursuant to Rule 2.16 of the *Alberta Rules of the Court*, Alta. Reg. 124/2010 (the "***Alberta Rules***") with authorization to receive all employment-related data of their members ("**Employee Data**") from the Monitor and/or Lynx Air so it can confirm the accuracy and completeness of their members' severance pay claims for the purpose of finalizing a group Proof of Claim for its members, consistent with section 126(2) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3 ("**BIA**").

3. Lynx Air is a Calgary-based airline. On February 22, 2024, it was insolvent and obtained protection from its creditors under the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("**CCAA**"). Lynx Air cited escalating costs and increased airport fees as contributing factors for its insolvency. The Court of King's Bench of Alberta (the "**Court**") granted the Initial CCAA Order. FTI Consulting Canada Inc. was appointed as the Monitor.

> Affidavit of Natasha Lisun, sworn July 30, 2024 (the "**Lisun Affidavit**") at para. 5.

4. Paragraph 10(b) of the Initial CCAA Order provides that Lynx Air could terminate its employees "on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan [of Compromise]."

[1] The term "severance pay" as used in this Bench Brief refers to all payments owing to an employee as a result of their termination of employment and includes termination pay and pay in lieu of notice of termination.

> *In the Matter of the Compromise or Arrangement of Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx Air* (22 February 2024), Calgary 2401-02664 (ABKB) [**Tab 11**].

5. Three days later, on February 25, 2024, Lynx Air terminated the Cabin Crew Employees in a "group termination" without paying severance pay. The interim CEO of Lynx Air sent the Cabin Crew Employees a letter stating "[n]o severance payment or payment of accrued vacation will be made to you as a result of the termination of your employment."

> Lisun Affidavit at para 6.

6. The sudden terminations without prior notice caused immediate financial and other hardships to the Cabin Crew Employees and their families.

7. Lynx Air is liquidating while under CCAA protection. It is not restructuring. There is no Plan of Compromise or claims process for creditors at this time. The amount of future distributions, if any, to unsecured creditors (such as the Cabin Crew Employees) is unknown.

8. WEPP is therefore the only and most important source of compensation for the Cabin Crew Employees in respect of their unpaid severance pay. WEPP will pay up to $8,507.66 to each employee in respect of unpaid severance pay. The WEPP payment does not prejudice any other creditor of Lynx Air.

9. There is no dispute that the Cabin Crew Employees have claims in respect of their unpaid severance pay against Lynx Air. The Supreme Court of Canada held in *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27, that employees terminated by their employer in an insolvency proceeding without severance pay are entitled to a claim against their employer.

> *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27 [*Rizzo*] at paras. 28 & 40-41 [**Tab 15].**

10. In order to obtain a WEPP payment, the severance pay claims of the Cabin Crew Employees must be calculated and set out in a group Proof of Claim and the amounts accepted by the Monitor.

11. Where there is a union representing the terminated employees, as there is in this case, the union is authorized to prepare a group Proof of Claim for its members, consistent with section 126(2) of the BIA:

> **Worker's wage claims**
>
> 126 (2) ***Proofs of claims for wages of workers and others employed by the bankrupt*** may be made in one proof by the bankrupt, by someone on the bankrupt's behalf, by a representative of a federal or provincial ministry responsible for labour matters, ***by a representative of a union representing workers and others employed by the bankrupt*** or by a court-appointed representative, and that proof is to be made by attaching to it a schedule setting out the names and addresses of the workers and others and the amounts severally due to them, but that proof does not disentitle any worker or other wage earner to file a separate proof on his or her own behalf. [emphasis added]

BIA, s 126(2) **[Tab 2]**.

12. This provision applies in a liquidating CCAA proceeding such as the Lynx Air proceeding.

See for example, *Re Nortel Networks Corporation et al.,* 2014 ONSC 5274 at paras. 28-29 [**Tab 13**].

13. For an Employee to receive a WEPP payment, a three-stage process is followed:

(a) First, a Proof of Claim must be prepared for all the Cabin Crew Employees setting out their severance pay claims. The amount of those claims must then be accepted and certified by the Monitor pursuant to section 21 of WEPPA and then sent to the federal government;

(b) Each Cabin Crew Employee is then required to complete a WEPP application form declaring they are owed the severance amount from Lynx Air; and

(c) Following the approval of the WEPP application form, the federal government will send a payment to each employee up to a maximum of $8,507.66.

Lisun Affidavit at para 11.

14. Commencing in March 2024, CUPE contacted the Monitor in an effort to cooperatively settle the methodology to use to calculate the Cabin Crew Employees' severance pay claims for a

group Proof of Claim, and to avoid the possibility of a disallowance which would cause delays in obtaining a WEPP payment. Despite extensive efforts, no agreement on methodology was reached. The main issue of contention is that CUPE takes the position that the employees' severance pay claim should include an amount of Group Termination Notice under section 212 of the CLC, while the Monitor says it should not.

Lisun Affidavit at para. 25-26

15. On or about March 13, 2024, without CUPE's agreement on the amount of their members' severance pay claims, the Monitor proceeded to send its calculations of the Cabin Crew Employees' severance claims to Service Canada to process WEPP payments on their behalf. The Monitor's severance pay amounts were calculated without including an amount in respect of Group Termination Notice.

Lisun Affidavit at 26-43.

16. The Monitor says that Group Termination Notice should not be included in the Cabin Crew Employees' severance claims on the basis that "there is no express entitlement to pay in lieu of such notice under the *Canada Labour Code*" and that "the termination being necessitated by a liquidity crisis and the ensuing commencement of the CCAA proceedings".

Lisun Affidavit at paras. 32 & 33, Exhibit "G".

17. The difference in the two calculations is very material for the Cabin Crew Employees:

- By applying Group Termination Notice, CUPE has preliminarily calculated the total claim amount of the Cabin Crew Employees, including unpaid wages, vacation pay, termination pay, and severance pay and other amounts to be approximately \$3.2M, of which \$2.1M can be claimed by the Cabin Crew Employees under WEPP.

  Lisun Affidavit at para. 40 & Exhibit "M".

- By using only pay in lieu of notice of <u>individual</u> termination of employment and excluding Group Termination Notice, the Monitor has calculated the amount of the

severance pay claim in respect of outstanding wages, vacation pay, pay in lieu of individual termination notice, and severance amounts to be approximately $679,000, the entirety of which can be claimed by the Cabin Crew Employees under WEPP.

Lisun Affidavit at paras. 29, 39 & Exhibit "L".

18. The Monitor's exclusion of Group Termination Notice materially reduces the severance pay claim that each Cabin Crew Employee can use to apply for a WEPP payment in amounts ranging from $3,245.88 for some employees to $8,507.66 for others, thus entirely eliminating some employees' severance pay claim. The Monitor's approach results in the Cabin Crew Employees being underpaid their full entitlements under WEPP.

Lisun Affidavit at para. 41.

19. In the course of CUPE's outreach to the Monitor to try and settle the severance pay methodology, CUPE also requested the Monitor to provide it with the Employee Data of its members so that it could calculate their claim amounts. The complete Employee Data was not provided. Rather, on April 16, 2024, after the Monitor sent its own severance pay calculations to Service Canada which do not include an amount for Group Termination Notice and WEPP payments were in process, the Monitor sent CUPE its spreadsheet with the employees' names and its calculations of their severance pay that it sent to Service Canada.

Lisun Affidavit at para. 38.

20. Based on the Monitor's calculations (and exclusion of an amount of Group Termination Notice), approximately 215 of the 240 terminated Cabin Crew Employees have since received a WEPP payment and 25 have not received any WEPP payment. None of the Cabin Crew Employees who received a WEPP payment received the maximum amount of $8,507.66. CUPE says the payment amounts are materially too low, and some employees did not receive a WEPP payment at all.

Lisun Affidavit at paras. 39-40, Exhibits "L" & "M".

21. Where an employer terminates a *group* of at least 50 employees at the same time in a group termination, as Lynx Air did, then section 212 of the CLC requires the employer to provide at least 16 weeks prior notice of the termination to the Head of Compliance and Enforcement and to the union representing the employees. Lynx Air did not provide such prior notice. CUPE's calculations of the Cabin Crew Employees' severance pay calculations results in all of them receiving a full WEPP payment of $8507.66.

<u>WEPP will pay up to $8,507.66 to each Cabin Crew Employee</u>

22. WEPP was established by Parliament in 2008 to provide a payment of up to $3000 to employees who are terminated in the insolvency proceedings of their employer and are owed wages. In 2009, WEPP was expanded to provide a payment in respect of unpaid severance and termination pay. The amount available under WEPP has also increased over time, with the current maximum being $8,507.66.

23. WEPP applies automatically for employees who are terminated in a bankruptcy or receivership. However, for a CCAA proceeding (as well as a Proposal in Bankruptcy), a court, pursuant to section 5(1)(b)(iv) of the *Wage Earner Protection Program Act,* S.C. 2005, c. 47, s. 1 ("**WEPPA**"), is required to determine that WEPP applies, which is dependent on whether *all* the employees have been terminated (other than those retained to wind down the business).

24. In this case, where all the Cabin Crew Employees were terminated, the Court ordered that WEPPA applies for the Cabin Crew Employees in para. 11 of the Initial CCAA Order of February 22, 2024.

Lisun Affidavit at para. 24.

25. Lynx Air did not provide notice to the Head of Compliance and Enforcement nor to CUPE of the group termination of the Cabin Crew Employees, contrary to section 212 of the CLC. CUPE's position is that, in accordance with the CLC and the prevailing caselaw, the Cabin Crew Employees' severance claim should include an amount in respect of Group Termination Notice that Lynx Air did not provide. Accordingly, CUPE has calculated that the Cabin Crew Employees have a total severance pay claim of approximately $2.9 million.

Lisun Affidavit at para 9.

26. If this Court finds that the Cabin Crew Employees have a claim for Group Termination Notice, then the Monitor can amend the severance pay claims and re-file those amounts with Service Canada. Section 31.1 of WEPPA allows Service Canada to make a payment to the employees in respect of a WEPP amount they are eligible for, but did not receive.

> **No payment or partial payment**
>
> **31.1** If the Minister determines that an individual did not receive all or part of a payment that they were eligible to receive, the Minister shall make a payment to them in an amount equal to the amount that they did receive.
>
> *WEPPA*, s 31.1 [**Tab 6**].

27. Accordingly, CUPE submits that the Monitor, pursuant to its duty under section 21 of WEPPA, has an obligation to advise Service Canada of the Cabin Crew Employees' claim for pay in lieu of Group Termination Notice.

PART II - THE FACTS

28. Lynx Air is an ultra low-cost airline based in Calgary, Alberta. It commenced operations in November 2021, with its first flight in April 2022.

29. In September 2023, in response to strong interest among the Lynx flight employees, CUPE began to organize the Cabin Crew Employees of Lynx Air.

> Lisun Affidavit at para 14.

30. Approximately 60% of the Cabin Crew Employees signed cards to apply for union membership. On November 22, 2023, CUPE filed an application with the Canadian Industrial Relations Board to be certified as the Bargaining Agent of the Cabin Crew Employees. Lynx Air did not oppose the application. On February 7, 2024, CUPE was certified as the Bargaining Agent for the Cabin Crew Employees as CUPE Local 5558.

> Lisun Affidavit at paras. 15-18.

31. On February 15, 2024, CUPE served Lynx with a Notice to Bargain under section 50(a) of the CLC for the purposes of negotiating an initial collective agreement. In the Notice, CUPE requested the Employee Data of all Cabin Crew Employees.

Lisun Affidavit at para. 19.

32. Lynx Air confirmed receipt of the Notice but did not provide CUPE with the Employee Data.

Lisun Affidavit at para. 20.

33. At the time of the Initial CCAA Order on February 22, 2024, the collective agreement had not been finalized.

Lisun Affidavit at paras. 21-22.

PART III - THE LAW AND ARGUMENT

34. The issues are:

(a) are the terminated Cabin Crew Employees entitled to include an amount in respect of Group Termination Notice in their severance pay claim? **Answer: Yes.**

(b) should CUPE be appointed as Representative of the Cabin Crew Employees under Rule 2.16 of the *Alberta Rules* and be authorized to obtain all the Employee Data from Lynx Air and/or Monitor in respect of its members? **Answer: Yes.**

Issue #1: The Cabin Crew Employees are entitled to include Group Termination Notice in their severance pay claims

35. The purpose of employment standards legislation in every jurisdiction in Canada is to provide minimum standards of protection to workers and create certainty in the labour market by requiring basic employment practices. The mischief the legislation is intended to cure is the exploitation of workers in the workplace, and to redress the inherent power imbalance between the worker and their employer.

Canadian Master Labour Guide (Consulted on November 1, 2024), (Toronto: LexisNexis), ¶ 2000 (LexisNexis Digital Library) [**Tab 17**].

i) Notice of Individual Termination

36. One of the most important minimum standards is the requirement on an employer to provide prior notice to an individual employee before being terminated, or pay in lieu of notice. The purpose of prior notice of termination is to allow the employee to take preparatory measures prior to losing their job and income. Pay in lieu of notice is intended to cushion the employee as effectively as would receiving prior notice and make it easier for the worker to search for alternative employment. The CLC sets out the requirements for individual notice of termination in section 230.

> Geoffrey England, Rodrick Wood & Innis Christie, Employment Law in Canada (Consulted on November 1, 2024), (Toronto: LexisNexis), ch 14 at 14 & 17 (LexisNexis Digital Library) [**Tab 18**].

ii) Notice of Group Termination

37. However, when an employer terminates a *group* of employees within a certain time period, then the employer is required to give additional prior notice of such a termination. Group termination provisions are in the employment minimum standards legislations in all jurisdictions across Canada. See attached Schedule "A" for a list of group termination provisions across Canada.

38. The CLC states in section 212 that an employer who terminates more than 50 employees within a period of four weeks is required to give an ***additional*** 16 weeks prior notice of the terminations to the Head of Compliance and Enforcement, ***and to*** the union representing the employees, or if there is no union, post the notice in the workplace:

> **Notice of group termination**
>
> **212 (1)** Any employer who terminates, either simultaneously or within any period not exceeding four weeks, the employment of a group of 50 or more employees employed by the employer within a particular industrial establishment, or of such lesser number of employees as prescribed by regulations applicable to the employer made under paragraph 227(b), shall, ***in addition to any notice required to be given under section 230, give notice to the Head [of Compliance and Enforcement], in writing, of his intention to so terminate <u>at least 16 weeks before</u> the date of termination of the employment of the employee in the group whose employment is first to be terminated.***

Copies of notice

> (2) A copy of any notice given to the Head under subsection (1) must be given immediately by the employer to the Minister of Employment and Social Development Canada and the Canada Employment Insurance Commission ***and*** any trade union representing a redundant employee, and if any redundant employee is not represented by a trade union, a copy of that notice must be given to the employee or immediately posted by the employer in a conspicuous place within the industrial establishment in which that employee is employed. [emphasis added]

CLC, s 212 [**Tab 3**].

39. The purpose of group termination notice provisions have been described as follows:

> [20] Looking at the group termination notice requirements included in section 40 of the Act, it is readily apparent that the primary purpose of this legislation, as it affects collective bargaining regimes, is to provide the Minister of Labour and any trade union that is affected, with advance warning of a mass lay off. This provides them with an opportunity to review the situation with the employer to see if there are ways and means to avoid the plant closure. It also provides an opportunity to find ways to minimize the impact of the termination on the affected employees and to assist them in finding other employment. In this regard, aside from advance warning, section 40 of the Act speaks of joint planning committees, employer cooperation with the Minister and with the joint planning committees. Obviously, as opposed to severance pay which compensates for past service, group termination notice provisions are aimed at the future. The purposes are to see if there is a remedy and to ease the personal and social impact of plant closures when masses of employees, usually with the same skills, are thrown on the job market at the same time.

Readyfoods Limited v United Food and Commercial Workers Union, Local No 832, 1998 CanLII 19020 (MB LA) [**Tab 14**].

40. The labour standards department of the federal government has provided commentary for employers as to how the group termination provisions in the CLC operate:

Notice of group termination

If you are an employer planning a group termination of employment, ***you must:***

- notify the Labour Program's Head of Compliance and Enforcement in writing ***at least 16 weeks before the termination of employment is to take effect, and***
- ***immediately*** give a copy of the notice to:

- the Minister of Employment and Social Development Canada (ESDC)
- the Canada Employment Insurance Commission, and
- ***any union representing the affected employees, or***
- ***to the employees if they are not represented by a union,*** or
  - ***immediately post the notice in a visible place within the workplace in which your employees are employed.*** This may include electronic posting if all affected employees can readily access the notice [emphasis added]

Government of Canada, "Termination, layoff or dismissal" (last modified 24 April 2024), online: <www.canada.ca/en/services/jobs/workplace/federal-labour-standards/termination.html#h2.1-h3.4>[https://web.archive.org/web/20241006213402/https://www.canada.ca/en/services/jobs/workplace/federal-labour-standards/termination.html#h2.1-h3.4] [**Tab 19**].

41. Lynx Air did not comply with section 212 of the CLC. It did not provide 16 weeks notice to the Head of Compliance and Enforcement, the Minister of Employment and Social Development Canada, the Canadian Employment Insurance Commission, nor did it provide 16 weeks prior notice to CUPE so that the union could immediately inform its members of their pending terminations. Based on both the language of section 212 and prevailing caselaw, the Cabin Crew Employees have a claim for Group Termination Notice in their severance pay claims.

42. Cases have held that terminated employees who are subject to the CLC and are not provided with Group Termination Notice nor given pay in lieu of notice are entitled to a claim for lack of the notice.

43. In *WestJet, an Alberta Partnership and Employees in the Service of WestJet, an Alberta Partnership, Re,* 2021 CanLII 58975 (CA LA), the Arbitrator held that the airline, WestJet should provide a group of 68 terminated Calgary employees a severance package of pay in lieu of 16 weeks notice as per section 212 of the CLC. WestJet terminated approximately 3,000 employees or 30% of its Canadian workforce due to the "sudden, unforeseeable, and unprecedented loss" resulting from the COVID-19 pandemic. WestJet offered the terminated employees a severance package of "two weeks severance per year of employment, together with a wage top-up for the 16-week statutory group notice period". All terminated Canadian employees agreed to the severance package with the exception of the 68 Calgary employees. These employees argued they were entitled to reasonable notice. In assessing whether the severance package offered by WestJet was fair and reasonable, the arbitrator noted that the issue at the heart of the application was "a review

of the legislation governing group terminations". A review of section 212 of the CLC led the arbitrator to determine the terminated employees should be entitled to their full salary for the 16-week notice period:

> [50] ***I am satisfied my jurisdiction includes consideration of section 212 and the 16-week statutory notice period.*** WestJet used the 16-week statutory notice period as part of its consideration for its separation package offer and an indication of the generosity of its offer. Thus, WestJet itself considered it to be inclusive within the separation package. The "contents of a separation package" are not limited; to the contrary, the wording provides a non-exhaustive list of considerations.
>
> [51] Although section 212 sets out the 16-week notice, unlike section 230 (which it refers to), section 212 does not specifically set out that employees are entitled to their regular rate of wages for the notice period. ***Despite the fact the section does not reference payment to employees of their regular rate of wages, this is the logical presumption.***
>
> [52] ***I am of the view that WestJet can only equitably rely on the provision of the 16-week notice as evidence of its "fair and reasonable offer" if the employees received full salary for that period. They did not and the employees are entitled to receive an appropriate top up to make them whole for this 16-week period.***
>
> [53] ***Further, Part IX should be viewed purposively. The group termination provisions within the Code are intended to reasonably compensate the greatest number of employees in an efficient and timely manner***. Little is served by leaving the issue of the CEWS shortfall for another day, as WestJet suggests. A potential plethora of claims following determination of the Adjustment Program is stated concern of WestJet. All parties would welcome finality to the extent possible. [emphasis added]
>
> *WestJet, an Alberta Partnership and Employees in the Service of WestJet, an Alberta Partnership, Re,* 2021 CanLII 58975 (CA LA) [**Tab 16**].

44. A similar conclusion was reached in *ATU, Local 1374 and Saskatchewan Transportation Co. (Layoff of Bargaining Unit Employees), Re,* 2018 CanLII 39001 (CA LA). In that case, the Amalgamated Transit Union, Local 1374 argued the Saskatchewan Transportation Company breached section 212 of the CLC by failing to provide the terminated employees pay in lieu of 16 weeks Group Termination Notice upon its closure. The Arbitrator confirmed that the employees are entitled to a claim for Group Termination Notice, although that case focused on the number of employees terminated in the four week period with the company arguing that group termination was not triggered because less than 50 employees were terminated at each of its three industrial units, while the union argued that the company operated one industrial unit from three geographical

locations, and that more than 50 employees were terminated. The Arbitrator agreed with the union and awarded the terminated employees damages for the balance of pay owed to them in lieu of 16 weeks notice:

> [163] The Union accepted the Employer provided notice of termination on April 10, 2017, and the notice period dictated by section 212 of the Code was partially fulfilled. Therefore, the entire 16-week periods should not be used to calculate damages; only that period of the 16 weeks for which notice was not provided.
>
> [164] Therefore, in accordance with the principle of compensatory damages, ***I award damages to the Union for the Employer's failure to provide the requisite notice under section 212 of the Code. Such damages shall be calculated according to pay in lieu of notice on the basis of wages and other benefits for the 95 affected employees for the period of 8 weeks and 4 days.*** [emphasis added]

ATU, Local 1374 and Saskatchewan Transportation Co. (Layoff of Bargaining Unit Employees), Re, 2018 CanLII 39001 (CA LA) [**Tab 8**].

Statutory interpretation supports the inclusion of an amount in respect of Group Termination Notice in the Cabin Crew Employees' severance pay claim

45. The modern principle of statutory interpretation states that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Ruth Sullivan, The Construction of Statutes, 7th ed (Consulted on 1 November 2024), (Toronto: LexisNexis), ch 2 at 2.01 (LexisNexis Digital Library) [**Tab 20**].

46. Under section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21, every enactment is deemed remedial and should be given such fair large and liberal construction and interpretation as best ensures the attainment of its purpose.

Interpretation Act, R.S.C. 1985, c. I-21, s 12 [**Tab 5**].

47. Another established principle of statutory interpretation is "that the legislature does not intend to produce absurd consequences." The Supreme Court of Canada held in *Rizzo*, a case involving the claims of terminated employees of the bankrupt Rizzo & Rizzo Shoes Ltd., that an interpretation is "considered absurd if it leads to ridiculous or frivolous consequences, if it is

extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment." In *Rizzo*, the Supreme Court held that employee claims for unpaid termination and severance pay that are mandated in employment standards legislation remain applicable in bankruptcy proceedings because to deny such a claim for employees would lead to an "absurd" and "unreasonable" interpretation of the statute. Similarly in this case, it would be an absurd and unreasonable interpretation of section 212 to not allow the Cabin Crew Employees to have a claim for Group Termination Notice in their severance pay claims. The fact that the employer is insolvent or has a "liquidity problem" is irrelevant to the interpretation of section 212 and there is no legislative basis for reading such a concept into the legislation.

Rizzo at paras. 27-29 [**Tab 15].**

Issue #2: CUPE should be appointed as Representative of the Cabin Crew Employees to obtain Employee Data of its members

48. As noted above, unions are authorized to prepare and file a group Proof of Claim for their members under section 126(2) of the BIA, and by extension, in a liquidating CCAA proceeding. In order to calculate their members' claims, CUPE requires the Employee Data for their members.

49. In response to the requests by the union, the Monitor provided its spreadsheet of its own calculation of the Cabin Crew Employees severance pay claim, which as noted, do not include an amount in respect of Group Termination Notice.

50. To resolve this impasse, the union requests the Court to order its appointment as Representative of the Cabin Crew Employees in the CCAA proceeding and to authorize the Monitor and/or Lynx Air to provide CUPE with the Employee Data of its members.

51. Unions have been appointed as Representatives for their members in CCAA proceedings in several cases. In *Fraser Papers Inc., (Re)*, in ordering a representation order for the union, the Court stated:

> [9] In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar

> with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.
>
> *Fraser Papers Inc., (Re)*, 2009 CanLII 55115 (ONSC) [**Tab 10**].

52. A similar representation order was issued more recently by the Supreme Court of British Columbia:

> [126] I agree that these employees presently have a commonality of interest that is best represented in this proceeding as an entire group. Wanda Skinner is the president of the Unifor local. Ms. Skinner's affidavit #2 sworn July 28, 2020 supports the vulnerability of the unionized employees arising from the disastrous economic consequences to them of losing their jobs and benefits.
>
> [127] Unifor clearly has a relationship with this cohort and is in the best position to advance the entire group's interests, at least at this time. That representation will be a benefit to the Petitioners in advancing this restructuring by facilitating discussions between them. The estate will incur no cost by reason of Unifor's representation, welcome news given the lack of cash resources available to the Petitioners.
>
> [128] The order sought by Unifor is consistent with the order granted in the Fraser Papers Inc. restructuring: see *Fraser Papers Inc., (Re),* 2009 CanLII 55115 and 2009 CanLII 63589 (Ont. S.C.J.).
>
> [129] I am satisfied that the terms of the order sought are appropriate, with one exception. In para. 3 of the draft order, Unifor seeks authority to "determine, file, advance or compromise" any claims of its current or former employees. The only change I would make to that provision is to amend it to provide that any compromise proposed to be made by Unifor will be subject to court approval. This will ensure some oversight in respect of any decisions that Unifor seeks to make for the employee group they will represent.
>
> *1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359 [**Tab 7**].

53. In *Canwest Publishing Inc*, 2010 CarswellOnt 18850, the Ontario Superior Court of Justice granted the motion of the Communications, Energy and Paperworkers Union to Canada to continue to represent its current and former members in the CCAA proceeding and to file and pursue claims on their behalf. As part of the Representation Order, the court also directed the debtor company to provide the union with the data of its members:

> [2] THIS COURT ORDERS that the Union is hereby authorized to continue to represent its current members and to represent former members of bargaining units represented by the Union, including pensioners, retirees, deferred vested participants and surviving spouses and dependents (the "Current and Former Members") employed or formerly employed by the Applicants or the Limited Partnership referred to in paragraph 2 of the Initial Order (collectively, the Applicants) in this proceeding and in connection with any concurrent or subsequent proceeding that may be commenced under the *Bankruptcy and Insolvency Act* ("BIA") or similar legislation (collectively, the "Proceedings").
>
> [3] THIS COURT ORDERS that the Union is authorized to determine, file, advance or compromise any and all claims of its Current and Former Members that exist or may arise at law or equity or pursuant to any applicable collective agreement, which may be made against the Applicants in the Proceedings in connection with any issue or matter related to any recovery, or compromise of rights or entitlements of the Current and Former Members.
>
> [4] THIS COURT ORDERS that the Applicants shall use their best efforts subject to the Union executing a confidentiality agreement to provide to counsel for the Union, as soon as possible after the granting of this Order, without charge, the names, last known addresses, last known phone numbers and email addresses (if any) of all Current and Former Members.
>
> [5] THIS COURT ORDERS that subject to any direction to the contrary by the regulatory body the Union, or their counsel on their behalf, are authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court or any regulatory body, other governmental ministry, department or agency (each a "Governmental Authority").
>
> *Canwest Publishing Inc*, 2010 CarswellOnt 18850 (ONSC) [**Tab 9**].

54. This Court has the authority to appoint Representatives for terminated employees under the broad power granted in section 11 of the CCAA, which has been interpreted as "the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings".

> *Nortel Networks Corporation (Re)*, [2009] OJ No 3280, 2009 CanLII 26603 (ONSC) at para. 12 [**Tab 12**].

55. This Court also has authority to appoint a Representative under Rule 2.16 of the *Alberta Rules*:

> **Court-appointed litigation representatives in limited cases**
>
> 2.16(1) This rule applies to an action concerning any of the following:

> (a) the administration of the estate of a deceased person;
> (b) property subject to a trust;
> (c) the interpretation of a written instrument;
> (d) the interpretation of an enactment.
>
> **(2)** In an action described in subrule (1), a person or class of persons who is or may be interested in or affected by a claim, whether presently or for a future, contingent or unascertained interest, must have a Court-appointed litigation representative to make a claim in or defend an action or to continue to participate in an action, or for a claim in an action to be made or an action to be continued against that person or class of persons, if the person or class of persons meets one or more of the following conditions:
>
> (a) the person, the class or a member of the class cannot be readily ascertained, or is not yet born;
>
> (b) the person, the class or a member of the class, though ascertained, cannot be found;
>
> (c) the person, the class or the members of the class can be ascertained and found, but the Court considers it expedient to make an appointment to save expense, having regard to all the circumstances, including the amount at stake and the degree of difficulty of the issue to be determined.
>
> **(3)** On application by an interested person, the Court may appoint a person as litigation representative for a person or class of persons to whom this rule applies on being satisfied that both the proposed appointee and the appointment are appropriate.
>
> *Alberta Rules,* Rule 2.16 [**Tab 1**].

56. CUPE has been certified as a Bargaining Agent of the Cabin Crew Employees and is best placed to represent their interests. As the Representative appointed by the Court, CUPE will help streamline the CCAA process in relation to the Cabin Crew Employees by:

(a) Determining the amounts owing to the Cabin Crew Employees for severance pay;

(b) Finalizing the group Proof of Claim on behalf of all the Cabin Crew Employees;

(c) Acting as a single point of contact for all Cabin Crew Employee claims to prevent the filing of different Cabin Crew Employee claims with different legal methodologies thereby generating overall cost-saving for Lynx Air, its estate and other creditors;

(d) Settling claims as required in cases of individual Cabin Crew Employee disputes, or applying to the Court for directions to settle such a dispute; and,

(e) Assisting Cabin Crew Employees with preparing documentation and applying for payments under WEPP, a future claims process or a Plan of Compromise.

PART IV - ORDER REQUESTED

57. CUPE respectfully requests the following relief in respect of the CCAA proceedings:

(a) An Order that the severance pay claim of terminated Cabin Crew Employees should include an amount representing 16 weeks of additional termination pay under the group termination provision under section 212 of the CLC; and

(b) A Representation Order:

(i) appointing CUPE as Representative to the Cabin Crew Employees under Rule 2.16 of the *Alberta Rules* in this proceeding, or in connection with any other proceeding in respect of Lynx Air that may be commenced under the BIA;

(ii) authorizing CUPE to determine, file, advance or compromise the claims of the Cabin Crew Employees which exists or may arise at law or equity, against Lynx Air in the Proceedings in connection with any issue or matter related to the recovery, compromise of rights or entitlements of the Cabin Crew Employees;

(iii) authorizing the Monitor and/or Lynx Air to provide CUPE all relevant Employee Data in respect of the employment and the termination of the Cabin Crew Employees, including those pertaining to pension, benefit, and severance and termination payments and arrangements for group health, life insurance, and including where available, and up-to-date financial information regarding these arrangements;

(iv) that CUPE be authorized to take all steps and to do all acts necessary and desirable to carry out the terms of the Representation Order including

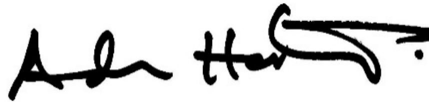
dealing with any Court or any regulatory body, other governmental ministry, department or agency;

(v) that CUPE shall have no liability as a result of its appointment or the fulfilment of its duties in carrying out the provisions of the Representation Order, save and except for any claim based on gross negligence and wilful misconduct on its part; and

(vi) that CUPE shall be at liberty and is authorized to apply to this Honourable Court for advice and directions in the discharge or variation of its powers and duties; and

(c) Such further and other relief as CUPE may request and this Honourable Court may grant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of November, 2024.



Andrew Hatnay

Abir Shamim

Lawyers for the Applicant

SCHEDULE "A"

INDIVIDUAL AND GROUP TERMINATION NOTICE PERIODS

JURISDICTION	INDIVIDUAL NOTICE TO EMPLOYEE	GROUP TERMINATION NOTICE		
		NOTICE TO EMPLOYEE	NOTICE TO MINISTER	NOTICE TO UNION
FEDERAL	3+ months' service: 2 weeks 3+ years' service: 3 weeks 4+ years' service: 4 weeks 5+ years' service: 5 weeks 6+ years' service: 6 weeks 7+ years' service: 7 weeks 8+ years' service: 8 weeks[2]	16 weeks[3]	16 weeks[4]	Yes[5]
ALBERTA	90 days to <2 years' service: 1 week 2 years or more, less than 4 years' service: 2 weeks	Not specified[7]	50+ employees: 4 weeks	Not specified

[2] *CLC,* s 230(1.1).
[3] *Ibid*, s 212.
[4] *Ibid*.
[5] *Ibid*.
[7] *Employment Standards Code,* R.S.A. 2000, c. E-9, s 137.

	4 years or more, less than 6 years' service: 4 weeks 6 years or more, less than 8 years' service: 5 weeks 8 years or more, less than 10 years' service: 6 weeks 10+ years' service: 8 weeks[6]			
BRITISH COLUMBIA	3 months or more, less than 1 year of service: 1 weeks 1 year or more, less than 3 years' service: 2 weeks 3 years or more, less than 4 years' service: 3 weeks 4+ years' service: 1 additional week for each subsequent year up to a maximum of 8 weeks[8]	50-100 employees: 8 weeks 101-300 employees: 12 weeks 301+ employees: 16 weeks[9]	Same as for employees[10]	Same as for employees[11]

[6] *Ibid*, s 56.
[8] *Employment Standards Act,* R.S.B.C. 1996, c. 113, s 63.
[9] *Ibid*, s 64.
[10] *Ibid*.
[11] *Ibid*.

MANITOBA	30 days or more, less than 1 year of service: 1 week 1 year or more, less than 3 years' service: 2 weeks 3 years or more, less than 5 years' service: 4 weeks 5 years or more, less than 10 years' service: 6 weeks 10+ years service: 8 weeks[12]	50-100 employees: 10 weeks 101-299 employees: 14 weeks 300+ employees: 18 weeks[13]	Same as for employees[14]	Same as for employees[15]
NEW BRUNSWICK	6 months or more, less than 5 years' service: 2 weeks 5+ years' service: 4 weeks[16]	6 weeks[17]	6 weeks[18]	6 weeks[19]
NEWFOUNDLAND AND LABRADOR	3 months or more, less than 2 years' service: 1 week	50-199 employees: 8 weeks 200-499 employees: 12 weeks	Same as for employees[22]	Not stated[23]

[12] *The Employment Standards Code,* C.C.S.M. c. E110, s 61.
[13] *Ibid*, s 67.
[14] *Ibid.*
[15] *Ibid*.
[16] *Employment Standards Act,* S.N.B. 1982, c. E-7.2, s. 30.
[17] *Ibid*, s. 32.
[18] *Ibid*.
[19] *Ibid*.
[22] *Labour Standards Act,* R.S.N.L. 1990, c. L-2, s 57.
[23] *Ibid*.

	2 years or more, less than 5 years' service: 2 weeks 5 years or more, less than 10 years' service: 3 weeks 10 years or more, less than 15 years' service: 4 weeks 15+ years' service: 6 weeks[20]	500+ employees: 16 weeks[21]		
NOVA SCOTIA	3 months or more, less than 2 years' service: 1 week 2 years or more, less than 5 years' service: 2 weeks 5 years or more, less than 10 years' service: 4 weeks 10+ years: 8 weeks[24]	10-99 employees: 8 weeks 100-299 employees: 12 weeks 300+ employees: 16 weeks[25]	Same as for employees[26]	Not stated[27]

[20] *Ibid*, s 55.
[21] *Ibid*, s 57.
[24] *Labour Standards Code,* R.S.N.S. 1989, c. 246, s 72(1).
[25] *Ibid*, s 72(2).
[26] *Ibid*.
[27] *Ibid*.

ONTARIO	3 months or more, less than 1 year of service: 1 week 1 year or more, less than 3 years' service: 2 weeks 3 years or more, less than 4 years' service: 3 weeks 4 years or more, less than 5 years' service: 4 weeks 5 years or more, less than 6 years' service: 5 weeks 6 years or more, less than 7 years' service: 6 weeks 7 years or more, less than 8 years' service: 7 weeks 8+ years' service: 8 weeks[28]	50-199 employees: 8 weeks 200-499 employees:12 weeks 500+ employees:16 weeks[29]	Same as for employees[30]	Not stated[31]
PRINCE EDWARD ISLAND	6 months or more, less than 5 years' service: 2 weeks	Same as for individual termination[33]	Not stated[34]	Not stated[35]

[28] *Employment Standards Act, 2000,* S.O. 2000, c. 41, s 57.
[29] *Ibid*, s 58; *Termination and Severance of Employment,* O. Reg. 288/01, s 3.
[30] *Ibid*.
[31] *Ibid*.
[33] *Employment Standards Act,* R.S.P.E.I. 1988, c. E-6.2, s 29.
[34] *Ibid*.
[35] *Ibid*.

	5 years or more, less than 10 years' service: 4 weeks 10 years or more, less than 15 years' service: 6 weeks 15+ years' service: 8 weeks[32]			
QUEBEC	3 months or more, less than 1 year of service: 1 week 1 year or more, less than 5 years' service: 2 weeks 5 years or more, less than 10 years' service: 4 weeks 10+ years' service: 8 weeks[36]	Same as for individual termination[37]	10-99 employees: 8 weeks 100-299 employees: 12 weeks 300+ employees:16 weeks[38]	Not stated[39]
SASKATCHEWAN	13+ weeks' service to 1 year of service: 1 week 1+ year of service, less than 3 years' service: 2 weeks	10-49 employees: 4 weeks 50-99 employees: 8 weeks 100+ employees: 12 weeks[41]	Same as for employees[42]	Same as for employees[43]

[32] *Ibid*.
[36] *Act respecting labour standards,* C.Q.L.R., c. N-1.1, s 82.
[37] *Ibid,* ss 84.01-84.04.
[38] *Ibid*.
[39] *Ibid*.
[41] *The Saskatchewan Employment Act,* S.S. 2013, c. S-15.1, s 2-62; *The Employment Standards Regulations,* R.R.S. c. S-15.1, Reg. 5, s 31.
[42] *Ibid*.
[43] *Ibid*.

	3+ years' service, less than 5 years' service: 4 weeks 5+ years' service, less than 10 years' service: 6 weeks 10+ years' service: 8 weeks[40]			
NORTHWEST TERRITORIES	90+ days of service, less than 3 years' service: 2 weeks 3 to 4 years' service: 3 weeks 4 to 5 years' service: 4 weeks 5 to 6 years' service: 5 weeks 6 to 7 years' service: 6 weeks 7 to 8 years' service: 7 weeks 8+ years' service: 8 weeks[44]	Same as for individual termination[45]	25-49 employees: 4 weeks 50-99 employees: 8 weeks 100-299 employees: 12 weeks 300+ employees: 16 weeks[46]	Not stated[47]

[40] *Ibid*, s 2-60.
[44] *Employment Standards Act,* S.N.W.T. 2007, c. 13, ss 38
[45] *Ibid*, ss 38-41.
[46] *Ibid*.
[47] *Ibid*.

NUNAVUT	90+ days of service, less than 3 years' service: 2 weeks 3 to 4 years' service: 3 weeks 4 to 5 years' service: 4 weeks 5 to 6 years' service: 5 weeks 6 to 7 years' service: 6 weeks 7 to 8 years' service: 7 weeks 8+ years' service: 8 weeks[48]	Same as for individual termination[49]	25-49 employees: 4 weeks 50-99 employees: 8 weeks 100-299 employees: 12 weeks 300+ employees: 16 weeks[50]	Not stated[51]
YUKON	6+ months' service, less than 1 year of service: 1 week 1 to 3 years' service: 2 weeks 3 to 4 years' service: 3 weeks	Same as for individual termination[53]	25-49 employees: 4 weeks 50-99 employees: 8 weeks 100-299 employees: 12 weeks	Not stated[55]

[48] *Labour Standards Act,* R.S.N.W.T. (Nu) 1988, c. L-1, s 14.03.
[49] *Ibid*, s 14.07.
[50] *Ibid*.
[51] *Ibid*.
[53] *Employment Standards Act,* R.S.Y. 2002, c. 72, s 58.
[55] *Ibid*.

	4 to 5 years' service: 4 weeks 5 to 6 years' service: 5 weeks 6 to 7 years' service: 6 weeks 7 to 8 years' service: 7 weeks 8+ years' service: 8 weeks[52]		300+ employees: 16 weeks[54]	

[52] *Ibid*, s 50.
[54] *Ibid*, s 58.

TABLE OF AUTHORITIES

TAB	AUTHORITY
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1.	*Alberta Rules of the Court*, Alta. Reg. 124/2010
2.	*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
3.	*Canada Labour Code*, R.S.C. 1985, c. L-2
4.	*Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36
5.	*Interpretation Act*, R.S.C., 1985, c. I-21
6.	*Wage Earner Protection Program Act*, S.C. 2005, c. 47
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7.	*1057863 B.C. Ltd. (Re)*, 2020 BCSC 1359
8.	*ATU, Local 1374 and Saskatchewan Transportation Co. Layoff of Bargaining Unit Employees), Re*, 2018 CanLII 39001 (CA LA)
9.	*Canwest Publishing Inc*., 2010 CarswellOnt 18850 (ONSC)
10.	*Fraser Papers Inc., (Re)*, 2009 CanLII 55115 (ONSC)
11.	*In the Matter of the Compromise or Arrangement of Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx Air* (22 February 2024), Calgary 2401-02664 (ABKB)
12.	*Nortel Networks Corporation (Re)*, [2009] OJ No 3280, 2009 CanLII 26603 (ONSC)
13.	*Re Nortel Networks Corporation et al*., 2014 ONSC 5274
14.	*Readyfoods Limited v United Food and Commercial Workers Union, Local No 832*, 1998 CanLII 19020 (MB LA)
15.	*Rizzo & Rizzo Shoes Ltd., (Re)*, [1998] 1 SCR 27
16.	*WestJet, an Alberta Partnership and Employees in the Service of WestJet, an Alberta Partnership, Re*, 2021 CanLII 58975 (CA LA)
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17.	Canadian Master Labour Guide (Consulted on November 1, 2024), (Toronto: LexisNexis), (LexisNexis Digital Library)

18.	Geoffrey England, Rodrick Wood & Innis Christie, Employment Law in Canada (Consulted on 1 November 2024), (Toronto: LexisNexis), (LexisNexis Digital Library)
19.	Government of Canada, "Termination, layoff or dismissal" (last modified 24 April 2024), online:<www.canada.ca/en/services/jobs/workplace/federal-labour-standards/termination.html#h2.1-h3.4> [https://web.archive.org/web/20241006213402/https://www.canada.ca/en/services/jobs/workplace/federal-labour-standards/termination.html#h2.1-h3.4]
20.	Ruth Sullivan, The Construction of Statutes, 7th ed (Consulted on 1 November 2024), (Toronto: LexisNexis), (LexisNexis Digital Library)

TAB 1

Most Recently Cited in: Dynamo Coatings Ltd v. Alberta Building Trades Council Benevolent Society (A.B.T.C.B.S.), 2023 ABCA 355, 2023 CarswellAlta 3039, [2024] A.W.L.D. 1555, 2023 A.C.W.S. 6251 | (Alta. C.A., Dec 11, 2023)

Alta. Reg. 124/2010, s. 2.16

s 2.16 Court-appointed litigation representatives in limited cases

Currency

2.16Court-appointed litigation representatives in limited cases
2.16(1) This rule applies to an action concerning any of the following:

(a) the administration of the estate of a deceased person;

(b) property subject to a trust;

(c) the interpretation of a written instrument;

(d) the interpretation of an enactment.

2.16(2) In an action described in subrule (1), a person or class of persons who is or may be interested in or affected by a claim, whether presently or for a future, contingent or unascertained interest, must have a Court-appointed litigation representative to make a claim in or defend an action or to continue to participate in an action, or for a claim in an action to be made or an action to be continued against that person or class of persons, if the person or class of persons meets one or more of the following conditions:

(a) the person, the class or a member of the class cannot be readily ascertained, or is not yet born;

(b) the person, the class or a member of the class, though ascertained, cannot be found;

(c) the person, the class or the members of the class can be ascertained and found, but the Court considers it expedient to make an appointment to save expense, having regard to all the circumstances, including the amount at stake and the degree of difficulty of the issue to be determined.

2.16(3) On application by an interested person, the Court may appoint a person as litigation representative for a person or class of persons to whom this rule applies on being satisfied that both the proposed appointee and the appointment are appropriate.

Currency
Alberta Current to Gazette Vol. 120:10 (May 31, 2024)

Concordance References
Rules Concordance 2, Representation
Rules Concordance 23, Joinder of parties
Rules Concordance 193, Dependent adults

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End of Document

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TAB 2

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to October 30, 2024

Last amended on June 28, 2024

À jour au 30 octobre 2024

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http://lois-laws.justice.gc.ca

Shall refer to account

(4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counter-claim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers or other evidence, if any, by which it can be substantiated.

(5) [Repealed, 2005, c. 47, s. 86]

R.S., 1985, c. B-3, s. 124; 2005, c. 47, s. 86.

La preuve doit mentionner un état de compte

(4) La preuve de réclamation doit contenir ou mentionner un état de compte énonçant les détails de la réclamation, ainsi que toute créance compensatoire que le failli peut avoir à la connaissance du créancier, et doit aussi spécifier les pièces justificatives ou autre preuve, s’il en est, qui peuvent en établir le bien-fondé.

(5) [Abrogé, 2005, ch. 47, art. 86]

L.R. (1985), ch. B-3, art. 124; 2005, ch. 47, art. 86.

Penalty for filing false claim

125 Where a creditor or other person in any proceedings under this Act files with the trustee a proof of claim containing any wilfully false statement or wilful misrepresentation, the court may, in addition to any other penalty provided in this Act, disallow the claim in whole or in part as the court in its discretion may see fit.

R.S., c. B-3, s. 97.

Peine en cas de réclamation fausse ou injustifiable

125 Lorsqu’un créancier ou une autre personne, au cours de procédures prises en vertu de la présente loi, dépose entre les mains du syndic une preuve de réclamation contenant une déclaration délibérément fausse ou une fausse représentation faite de propos délibéré, le tribunal peut, en sus de toute autre peine prévue par la présente loi, rejeter la créance en tout ou en partie selon que, à sa discrétion, il pourra juger à propos.

S.R., ch. B-3, art. 97.

Who may examine proofs

126 (1) Every creditor who has filed a proof of claim is entitled to see and examine the proofs of other creditors.

Qui peut examiner la preuve

126 (1) Tout créancier qui a déposé une preuve de réclamation a le droit de voir et d’examiner les preuves d’autres créanciers.

Worker’s wage claims

(2) Proofs of claims for wages of workers and others employed by the bankrupt may be made in one proof by the bankrupt, by someone on the bankrupt’s behalf, by a representative of a federal or provincial ministry responsible for labour matters, by a representative of a union representing workers and others employed by the bankrupt or by a court-appointed representative, and that proof is to be made by attaching to it a schedule setting out the names and addresses of the workers and others and the amounts severally due to them, but that proof does not disentitle any worker or other wage earner to file a separate proof on his or her own behalf.

R.S., 1985, c. B-3, s. 126; 1997, c. 12, s. 88; 2005, c. 47, s. 87.

Réclamations d’ouvriers pour gages

(2) Les preuves de réclamations pour gages d’ouvriers et d’autres personnes employés par le failli peuvent être établies en une seule preuve par celui-ci ou pour son compte, par le représentant soit d’un ministère fédéral ou provincial responsable des questions liées au travail, soit d’un syndicat représentant les ouvriers et autres employés, ou par le représentant nommé par le tribunal; la preuve est accompagnée d’une annexe énumérant les noms et adresses des ouvriers et des autres personnes, ainsi que les sommes qui leur sont respectivement dues. Une telle preuve n’enlève pas à l’ouvrier ou à tout autre salarié le droit de produire pour son propre compte une preuve distincte.

L.R. (1985), ch. B-3, art. 126; 1997, ch. 12, art. 88; 2005, ch. 47, art. 87.

Proof by Secured Creditors

Proof by secured creditor

127 (1) Where a secured creditor realizes his security, he may prove the balance due to him after deducting the net amount realized.

Preuve des créanciers garantis

Preuve du créancier garanti

127 (1) Lorsqu’un créancier garanti réalise sa garantie, il peut prouver le reliquat qui lui est dû, après avoir déduit la somme nette réalisée.

TAB 3

CANADA

CONSOLIDATION

CODIFICATION

Canada Labour Code

Code canadien du travail

R.S.C., 1985, c. L-2

L.R.C. (1985), ch. L-2

Current to October 30, 2024

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DIVISION IX

Group Termination of Employment

Definitions

211 In this Division,

joint planning committee means a committee established pursuant to section 214; (*comité mixte*)

redundant employee means an employee whose employment is to be terminated pursuant to a notice under section 212; (*surnuméraire*)

trade union means a trade union that is certified under Part I to represent any redundant employee or that is recognized by an employer of any redundant employee as the bargaining agent for that employee. (*syndicat*)

1980-81-82-83, c. 89, s. 31.

Notice of group termination

212 (1) Any employer who terminates, either simultaneously or within any period not exceeding four weeks, the employment of a group of 50 or more employees employed by the employer within a particular industrial establishment, or of such lesser number of employees as prescribed by regulations applicable to the employer made under paragraph 227(b), shall, in addition to any notice required to be given under section 230, give notice to the Head, in writing, of his intention to so terminate at least 16 weeks before the date of termination of the employment of the employee in the group whose employment is first to be terminated.

Copies of notice

(2) A copy of any notice given to the Head under subsection (1) must be given immediately by the employer to the Minister of Employment and Social Development and the Canada Employment Insurance Commission and any trade union representing a redundant employee, and if any redundant employee is not represented by a trade union, a copy of that notice must be given to the employee or immediately posted by the employer in a conspicuous place within the industrial establishment in which that employee is employed.

Contents of notice

(3) A notice referred to in subsection (1) shall set out

(a) the date or dates on which the employer intends to terminate the employment of any one or more employees;

SECTION IX

Licenciements collectifs

Définitions

211 Les définitions qui suivent s’appliquent à la présente section.

comité mixte Le comité mixte de planification constitué aux termes de l’article 214. (*joint planning committee*)

surnuméraire Employé visé par l’avis prévu à l’article 212. (*redundant employee*)

syndicat Le syndicat qui est accrédité sous le régime de la partie I et représente des surnuméraires, ou qui est reconnu par l’employeur à titre d’agent négociateur de surnuméraires. (*trade union*)

1980-81-82-83, ch. 89, art. 31.

Avis de licenciement collectif

212 (1) Avant de procéder au licenciement simultané, ou échelonné sur au plus quatre semaines, de cinquante ou plus — ou le nombre inférieur applicable à l’employeur et fixé par règlement d’application de l’alinéa 227b) — employés d’un même établissement, l’employeur doit en donner avis au chef par écrit au moins seize semaines avant la date du premier licenciement prévu. La transmission de cet avis ne dispense pas de l’obligation de donner le préavis mentionné à l’article 230.

Transmission de l’avis

(2) Copie de l’avis donné au chef est transmise immédiatement par l’employeur au ministre de l’Emploi et du Développement social, à la Commission de l’assurance-emploi du Canada et à tous les syndicats représentant les surnuméraires en cause; en l’absence de représentation syndicale, l’employeur doit, sans délai, remettre une copie au surnuméraire ou l’afficher dans un endroit bien en vue à l’intérieur de l’établissement où celui-ci travaille.

Teneur de l’avis

(3) L’avis prévu au paragraphe (1) doit comporter les mentions suivantes :

a) la date ou le calendrier des licenciements;

b) le nombre estimatif d’employés à licencier, ventilé par catégorie professionnelle;

(b) the estimated number of employees in each occupational classification whose employment will be terminated; and

(c) such other information as is prescribed by the regulations.

c) les autres renseignements réglementaires.

Where employer deemed to terminate employment

(4) Except where otherwise prescribed by regulation, an employer shall, for the purposes of this Division, be deemed to have terminated the employment of an employee where the employer lays off that employee.

R.S., 1985, c. L-2, s. 212; 1996, c. 11, s. 67; 2005, c. 34, s. 80; 2013, c. 40, s. 238; 2018, c. 27, s. 574.

Assimilation

(4) Sauf disposition contraire d’un règlement, la mise à pied est, pour l’application de la présente section, assimilée au licenciement.

L.R. (1985), ch. L-2, art. 212; 1996, ch. 11, art. 67; 2005, ch. 34, art. 80; 2013, ch. 40, art. 238; 2018, ch. 27, art. 574.

Cooperation with Commission

213 (1) An employer who gives notice to the Head under section 212 and any trade union to which a copy of that notice is given must give the Canada Employment Insurance Commission any information requested by it for the purpose of assisting any redundant employee and must cooperate with the Commission to facilitate the reestablishment in employment of that employee.

Coopération avec la Commission

213 (1) L’employeur qui donne au chef l’avis prévu par l’article 212 et le ou les syndicats à qui copie en est transmise doivent fournir à la Commission de l’assurance-emploi du Canada tous les renseignements que celle-ci demande afin d’aider les surnuméraires et coopérer avec elle pour faciliter leur réemploi.

Statement of benefits

(2) An employer who gives notice to the Head under section 212 shall give each redundant employee, as soon as possible after the notice is so given but in any case not later than two weeks before the date of the termination of the employment of the employee, a statement in writing setting out, as at the date of the statement, his vacation benefits, wages, severance pay and any other benefits and pay arising from his employment with that employer.

R.S., 1985, c. L-2, s. 213; 1996, c. 11, s. 99; 2018, c. 27, s. 575.

Relevé des prestations

(2) Dans les meilleurs délais suivant la transmission de l’avis au chef, l’employeur remet à chaque surnuméraire, au plus tard deux semaines avant la date de licenciement, un bulletin indiquant les indemnités de congé annuel, le salaire, les indemnités de départ et les autres prestations auxquelles lui donne droit son emploi, à la date du bulletin.

L.R. (1985), ch. L-2, art. 213; 1996, ch. 11, art. 99; 2018, ch. 27, art. 575.

Establishment of joint planning committee

214 (1) An employer who gives notice to the Head under section 212 must, as soon as possible after giving the notice, establish a joint planning committee consisting of any number of members that is required or permitted by this section and sections 215 and 217.

Constitution d’un comité mixte de planification

214 (1) Aussitôt après avoir transmis l’avis au chef, l’employeur procède à la constitution d’un comité mixte de planification conformément au présent article et aux articles 215 et 217.

Minimum number of members

(2) A joint planning committee established under subsection (1) shall consist of at least four members.

Composition

(2) Le comité mixte de planification est composé d’au moins quatre membres.

Appointment of members

(3) At least half of the members of a joint planning committee shall be appointed, in accordance with subsections 215(1), (2) and (3), as representatives of the redundant employees and the rest of the members shall be appointed, in accordance with subsection 215(5), as representatives of the employer.

R.S., 1985, c. L-2, s. 214; 2018, c. 27, s. 576.

Représentation

(3) Le comité mixte doit être formé, pour au moins la moitié, de représentants des surnuméraires nommés conformément aux paragraphes 215(1), (2) et (3), le reste consistant en représentants de l’employeur, nommés conformément au paragraphe 215(5).

L.R. (1985), ch. L-2, art. 214; 2018, ch. 27, art. 576.

subsection 51(1) and sections 52, 54 and 55 apply or would, but for subsection 51(2), apply to the trade union and the employer.

1980-81-82-83, c. 89, s. 33.

DIVISION X

Individual Terminations of Employment

Application

229.1 This Division does not apply to an employee whose termination of employment is by way of dismissal for just cause.

2018, c. 27, s. 483.

Employer's duty

230 (1) An employer who terminates the employment of an employee must give the employee

(a) notice in writing of the employer's intention to terminate their employment on a date specified in the notice, at least the applicable number of weeks set out in subsection (1.1) before that date;

(b) wages in lieu of notice, at their regular rate of wages for their regular hours of work, for at least the applicable number of weeks set out in subsection (1.1); or

(c) any combination of notice and amounts of wages in lieu of notice so that the total of the number of weeks of notice in writing and the number of weeks for which wages are paid in lieu of notice is equivalent to at least the applicable number of weeks set out in subsection (1.1).

Clarification

(1.01) The employer's obligation to give and the employee's right to receive notice or wages in lieu of notice under subsection (1) apply whether or not the employee has a right to avail themselves of any procedure for redress under this Part, including under subsection 240(1), with respect to the termination of their employment.

Notice period

(1.1) The applicable number of weeks for the purposes of subsections (1) and (2) is

(a) two weeks, if the employee has completed at least three consecutive months of continuous employment with the employer;

syndicat et l'employeur sont assujettis à l'application des articles 52, 54 et 55, ou le seraient en l'absence du paragraphe 51(2).

1980-81-82-83, ch. 89, art. 33.

SECTION X

Licenciements individuels

Application

229.1 La présente section ne s'applique pas en cas de congédiement justifié.

2018, ch. 27, art. 483.

Obligation de l'employeur

230 (1) L'employeur qui licencie un employé :

a) soit lui donne un préavis de licenciement écrit dans le délai qui est égal à au moins le nombre de semaines prévu au paragraphe (1.1);

b) soit lui verse, au taux régulier de salaire pour le nombre d'heures de travail normal, une indemnité tenant lieu de préavis équivalant au salaire à payer pour au moins le nombre de semaines prévu au paragraphe (1.1);

c) soit, à la fois, lui donne un préavis et lui verse une indemnité à la condition toutefois que le total du nombre de semaines du préavis et du nombre de semaines pour lesquelles l'indemnité est versée soit égal à au moins le nombre de semaines prévu au paragraphe (1.1).

Précision

(1.01) L'employeur est tenu de satisfaire à l'obligation prévue au paragraphe (1), et l'employé a droit au préavis ou à l'indemnité, indépendamment du fait que, relativement à son licenciement, l'employé aurait le droit de se prévaloir de tout recours prévu à la présente partie, notamment le recours prévu au paragraphe 240(1).

Période de préavis

(1.1) Pour l'application des paragraphes (1) et (2), le nombre de semaines est de :

a) deux, dans le cas où l'employé travaille sans interruption pour l'employeur depuis au moins trois mois;

(b) three weeks, if the employee has completed at least three consecutive years of continuous employment with the employer;

(c) four weeks, if the employee has completed at least four consecutive years of continuous employment with the employer;

(d) five weeks, if the employee has completed at least five consecutive years of continuous employment with the employer;

(e) six weeks, if the employee has completed at least six consecutive years of continuous employment with the employer;

(f) seven weeks, if the employee has completed at least seven consecutive years of continuous employment with the employer; and

(g) eight weeks, if the employee has completed at least eight consecutive years of continuous employment with the employer.

Notice to trade union

(2) If an employer is bound by a collective agreement that contains a provision authorizing an employee whose position becomes redundant to displace another employee on the basis of seniority, and the position of an employee who is so authorized becomes redundant, the employer must give at least the applicable number of weeks' notice set out in subsection (1.1) in writing to the trade union that is a party to the collective agreement and to the employee that the employee's position has become redundant.

Rights of displaced employee

(2.1) For greater certainty, any employee who is displaced and whose employment is terminated is entitled to and shall be given notice or wages in lieu of notice under subsection (1).

Statement of benefits

(2.2) An employer must give any employee whose employment is terminated a statement in writing that sets out their vacation benefits, wages, severance pay and any other benefits and pay arising from their employment with the employer as at the date of the statement. The statement must be given to the employee

(a) in the case of an employee who receives notice under paragraph (1)(a), as soon as possible, but not later than two weeks before the date of the termination of their employment;

b) trois, dans le cas où l'employé travaille sans interruption pour l'employeur depuis au moins trois ans;

c) quatre, dans le cas où l'employé travaille sans interruption pour l'employeur depuis au moins quatre ans;

d) cinq, dans le cas où l'employé travaille sans interruption pour l'employeur depuis au moins cinq ans;

e) six, dans le cas où l'employé travaille sans interruption pour l'employeur depuis au moins six ans;

f) sept, dans le cas où l'employé travaille sans interruption pour l'employeur depuis au moins sept ans;

g) huit, dans le cas où l'employé travaille sans interruption pour l'employeur depuis au moins huit ans.

Préavis au syndicat

(2) Dans le cas où le poste d'un employé est supprimé et que ce dernier a le droit, en vertu d'une convention collective, de supplanter un autre employé ayant moins d'ancienneté que lui, l'employeur doit donner, à l'employé dont le poste est supprimé et à son syndicat, un préavis de suppression de poste dans le délai égal au moins au nombre de semaines visé au paragraphe (1.1) qui s'applique à cet employé.

Droit de l'employé supplanté

(2.1) Il est entendu que l'employé supplanté qui est licencié a le droit de recevoir le préavis ou l'indemnité prévus au paragraphe (1).

Relevé des prestations

(2.2) L'employeur donne à l'employé licencié un bulletin indiquant les prestations auxquelles il a droit à la date du bulletin, notamment au titre du salaire et des indemnités de congé annuel et de départ :

a) dans les meilleurs délais mais au plus tard deux semaines avant la date du licenciement de l'employé, dans le cas où il reçoit le préavis prévu à l'alinéa (1)a);

b) au plus tard à la date de son licenciement, dans le cas où il reçoit l'indemnité prévue à l'alinéa (1)b);

TAB 4

CONSOLIDATION

Companies' Creditors Arrangement Act

R.S.C., 1985, c. C-36

CODIFICATION

Loi sur les arrangements avec les créanciers des compagnies

L.R.C. (1985), ch. C-36

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Form of applications

10 (1) Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with the practice of the court in which the application is made.

Documents that must accompany initial application

(2) An initial application must be accompanied by

(a) a statement indicating, on a weekly basis, the projected cash flow of the debtor company;

(b) a report containing the prescribed representations of the debtor company regarding the preparation of the cash-flow statement; and

(c) copies of all financial statements, audited or unaudited, prepared during the year before the application or, if no such statements were prepared in that year, a copy of the most recent such statement.

Publication ban

(3) The court may make an order prohibiting the release to the public of any cash-flow statement, or any part of a cash-flow statement, if it is satisfied that the release would unduly prejudice the debtor company and the making of the order would not unduly prejudice the company's creditors, but the court may, in the order, direct that the cash-flow statement or any part of it be made available to any person specified in the order on any terms or conditions that the court considers appropriate.

R.S., 1985, c. C-36, s. 10; 2005, c. 47, s. 127.

General power of court

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

R.S., 1985, c. C-36, s. 11; 1992, c. 27, s. 90; 1996, c. 6, s. 167; 1997, c. 12, s. 124; 2005, c. 47, s. 128.

Relief reasonably necessary

11.001 An order made under section 11 at the same time as an order made under subsection 11.02(1) or during the period referred to in an order made under that subsection with respect to an initial application shall be

Forme des demandes

10 (1) Les demandes prévues par la présente loi peuvent être formulées par requête ou par voie d'assignation introductive d'instance ou d'avis de motion conformément à la pratique du tribunal auquel la demande est présentée.

Documents accompagnant la demande initiale

(2) La demande initiale doit être accompagnée :

a) d'un état portant, projections à l'appui, sur l'évolution hebdomadaire de l'encaisse de la compagnie débitrice;

b) d'un rapport contenant les observations réglementaires de la compagnie débitrice relativement à l'établissement de cet état;

c) d'une copie des états financiers, vérifiés ou non, établis au cours de l'année précédant la demande ou, à défaut, d'une copie des états financiers les plus récents.

Interdiction de mettre l'état à la disposition du public

(3) Le tribunal peut, par ordonnance, interdire la communication au public de tout ou partie de l'état de l'évolution de l'encaisse de la compagnie débitrice s'il est convaincu que sa communication causerait un préjudice indu à celle-ci et que sa non-communication ne causerait pas de préjudice indu à ses créanciers. Il peut toutefois préciser dans l'ordonnance que tout ou partie de cet état peut être communiqué, aux conditions qu'il estime indiquées, à la personne qu'il nomme.

L.R. (1985), ch. C-36, art. 10; 2005, ch. 47, art. 127.

Pouvoir général du tribunal

11 Malgré toute disposition de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*, le tribunal peut, dans le cas de toute demande sous le régime de la présente loi à l'égard d'une compagnie débitrice, rendre, sur demande d'un intéressé, mais sous réserve des restrictions prévues par la présente loi et avec ou sans avis, toute ordonnance qu'il estime indiquée.

L.R. (1985), ch. C-36, art. 11; 1992, ch. 27, art. 90; 1996, ch. 6, art. 167; 1997, ch. 12, art. 124; 2005, ch. 47, art. 128.

Redressements normalement nécessaires

11.001 L'ordonnance rendue au titre de l'article 11 en même temps que l'ordonnance rendue au titre du paragraphe 11.02(1) ou pendant la période visée dans l'ordonnance rendue au titre de ce paragraphe relativement à la demande initiale n'est limitée qu'aux redressements normalement nécessaires à la continuation de l'exploitation

TAB 5

CANADA

CONSOLIDATION

CODIFICATION

Interpretation Act

Loi d’interprétation

R.S.C., 1985, c. I-21

L.R.C. (1985), ch. I-21

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Private Acts

Provisions in private Acts

9 No provision in a private Act affects the rights of any person, except as therein mentioned or referred to.

R.S., c. I-23, s. 9.

Lois d'intérêt privé

Effets

9 Les lois d'intérêt privé n'ont d'effet sur les droits subjectifs que dans la mesure qui y est prévue.

S.R., ch. I-23, art. 9.

Law Always Speaking

Law always speaking

10 The law shall be considered as always speaking, and where a matter or thing is expressed in the present tense, it shall be applied to the circumstances as they arise, so that effect may be given to the enactment according to its true spirit, intent and meaning.

R.S., c. I-23, s. 10.

Permanence de la règle de droit

Principe général

10 La règle de droit a vocation permanente; exprimée dans un texte au présent intemporel, elle s'applique à la situation du moment de façon que le texte produise ses effets selon son esprit, son sens et son objet.

S.R., ch. I-23, art. 10.

Imperative and Permissive Construction

"Shall" and "may"

11 The expression "shall" is to be construed as imperative and the expression "may" as permissive.

R.S., c. I-23, s. 28.

Obligation et pouvoirs

Expression des notions

11 L'obligation s'exprime essentiellement par l'indicatif présent du verbe porteur de sens principal et, à l'occasion, par des verbes ou expressions comportant cette notion. L'octroi de pouvoirs, de droits, d'autorisations ou de facultés s'exprime essentiellement par le verbe « pouvoir » et, à l'occasion, par des expressions comportant ces notions.

S.R., ch. I-23, art. 28.

Enactments Remedial

Enactments deemed remedial

12 Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

R.S., c. I-23, s. 11.

Solution de droit

Principe et interprétation

12 Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

S.R., ch. I-23, art. 11.

Preambles and Marginal Notes

Preamble

13 The preamble of an enactment shall be read as a part of the enactment intended to assist in explaining its purport and object.

R.S., c. I-23, s. 12.

Préambules et notes marginales

Préambule

13 Le préambule fait partie du texte et en constitue l'exposé des motifs.

S.R., ch. I-23, art. 12.

TAB 6

CONSOLIDATION

CODIFICATION

Wage Earner Protection Program Act

Loi sur le Programme de protection des salariés

S.C. 2005, c. 47, s. 1

L.C. 2005, ch. 47, art. 1

NOTE

[Enacted by section 1 of chapter 47 of the Statutes of Canada, 2005, in force July 7, 2008, *see* SI/2008-78.]

NOTE

[Édictée par l'article 1 du chapitre 47 des Lois du Canada (2005), en vigueur le 7 juillet 2008, *voir* TR/2008-78.]

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Program Established

Establishment

4 The Wage Earner Protection Program is established to provide for payments to individuals in respect of wages owed to them by employers who are insolvent.

2005, c. 47, s. 1 “4”; 2018, c. 27, s. 628.

Eligibility for Payments

Conditions of eligibility

5 (1) An individual is eligible to receive a payment if

(a) the individual’s employment ended for a reason prescribed by regulation;

(b) one of the following applies:

(i) the former employer is bankrupt,

(ii) the former employer is subject to a receivership,

(iii) the former employer is the subject of a foreign proceeding that is recognized by a court under subsection 270(1) of the *Bankruptcy and Insolvency Act* and

(A) the court determines under subsection (2) that the foreign proceeding meets the criteria prescribed by regulation, and

(B) a trustee is appointed, or

(iv) the former employer is the subject of proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies’ Creditors Arrangement Act* and a court determines under subsection (5) that the criteria prescribed by regulation are met; and

(c) the individual is owed eligible wages by the former employer.

(d) [Repealed, 2009, c. 2, s. 343]

Prescribed criteria — foreign proceeding

(2) On application by any person, a court may, in a proceeding under Part XIII of the *Bankruptcy and Insolvency Act*, determine that the foreign proceeding meets the criteria prescribed by regulation. If the court determines that the foreign proceeding meets the prescribed criteria, the court may appoint a trustee for the purposes of this Act.

Établissement du programme

Établissement

4 Est établi le Programme de protection des salariés prévoyant le versement de prestations aux personnes physiques titulaires de créances salariales sur un employeur insolvable.

2005, ch. 47, art. 1 « 4 »; 2018, ch. 27, art. 628.

Admissibilité aux prestations

Conditions d’admissibilité

5 (1) Toute personne physique est admissible au versement de prestations si les conditions suivantes sont réunies :

a) son emploi auprès d’un employeur a pris fin pour un motif prévu par règlement;

b) son ancien employeur, selon le cas :

(i) est en faillite,

(ii) fait l’objet d’une mise sous séquestre,

(iii) fait l’objet d’une instance étrangère reconnue par un tribunal au titre du paragraphe 270(1) de la *Loi sur la faillite et l’insolvabilité* et, à la fois :

(A) le tribunal décide, en vertu du paragraphe (2), que l’instance étrangère satisfait aux critères réglementaires,

(B) un syndic est nommé,

(iv) fait l’objet de procédures intentées au titre de la section I de la partie III de la *Loi sur la faillite et l’insolvabilité* ou sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies* et le tribunal décide, en vertu du paragraphe (5), que les critères réglementaires sont satisfaits;

c) elle est titulaire d’une créance au titre du salaire admissible sur son ancien employeur.

d) [Abrogé, 2009, ch. 2, art. 343]

Critères réglementaires : instance étrangère

(2) À la demande de toute personne, le tribunal peut, dans le cadre d’une procédure visée à la partie XIII de la *Loi sur la faillite et l’insolvabilité*, décider que l’instance étrangère satisfait aux critères réglementaires. Dans l’affirmative, le tribunal peut nommer un syndic pour l’application de la présente loi.

Employment in Canada

(3) An individual who is eligible to receive a payment because of subparagraph (1)(b)(iii) is only eligible to receive a payment in respect of eligible wages earned for employment in Canada and termination pay and severance pay that relate to that employment.

Deemed bankruptcy

(4) For the purposes of this Act, if all of the conditions set out in subparagraph (1)(b)(iii) are met, the former employer is deemed to be bankrupt and the date of the bankruptcy is deemed to be the day on which all of those conditions are met.

Prescribed criteria — other proceedings

(5) On application by any person, a court may, in proceedings under Division I of Part III of the *Bankruptcy and Insolvency Act* or under the *Companies' Creditors Arrangement Act*, determine that the former employer meets the criteria prescribed by regulation.

2005, c. 47, s. 1 “5”; 2007, c. 36, s. 84; 2009, c. 2, s. 343; 2018, c. 27, s. 629.

Exceptions

6 An individual is not eligible to receive a payment in respect of any wages earned during, or that otherwise relate to, a period in which the individual

(a) was an officer or director of the former employer;

(b) had a controlling interest within the meaning of the regulations in the business of the former employer;

(c) occupied a managerial position within the meaning of the regulations with the former employer; or

(d) was not dealing at arm's length with

(i) an officer or director of the former employer,

(ii) a person who had a controlling interest within the meaning of the regulations in the business of the former employer, or

(iii) an individual who occupied a managerial position within the meaning of the regulations with the former employer.

2005, c. 47, s. 1 “6”; 2007, c. 36, s. 85; 2009, c. 2, s. 344; 2018, c. 27, s. 630(F).

Emploi au Canada

(3) La personne physique admissible au versement de prestations au titre du sous-alinéa (1)b)(iii) ne peut recevoir de versement qu'à l'égard du salaire admissible gagné en cours d'emploi au Canada et qu'à l'égard de l'indemnité de préavis et de l'indemnité de départ se rapportant à cet emploi.

Faillite présumée

(4) Pour l'application de la présente loi, si toutes les conditions visées au sous-alinéa (1)b)(iii) sont réunies, l'ancien employeur est réputé en faillite et la date de la faillite est réputée être le jour où toutes ces conditions sont réunies.

Critères réglementaires : autres procédures

(5) À la demande de toute personne, le tribunal peut, dans le cadre d'une procédure commencée au titre de la section I de la partie III de la *Loi sur la faillite et l'insolvabilité* ou sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*, décider que l'ancien employeur satisfait aux critères réglementaires.

2005, ch. 47, art. 1 « 5 »; 2007, ch. 36, art. 84; 2009, ch. 2, art. 343; 2018, ch. 27, art. 629.

Exceptions

6 La personne physique n'est pas admissible au versement de prestations à l'égard de tout salaire gagné au cours d'une période — ou qui s'y rapporte autrement — durant laquelle, selon le cas :

a) elle occupait un poste de dirigeant ou d'administrateur auprès de son ancien employeur;

b) elle avait une participation lui assurant le contrôle, au sens des règlements, dans les affaires de son ancien employeur;

c) elle occupait un poste de cadre, au sens des règlements, auprès de son ancien employeur;

d) elle avait un lien de dépendance avec une personne physique occupant un poste de dirigeant ou d'administrateur auprès de son ancien employeur, ou de cadre auprès de celui-ci au sens des règlements, ou avec une personne qui avait une participation lui assurant le contrôle, au sens des règlements, dans les affaires de son ancien employeur.

2005, ch. 47, art. 1 « 6 »; 2007, ch. 36, art. 85; 2009, ch. 2, art. 344; 2018, ch. 27, art. 630(F).

administration or enforcement of this Act or the *Income Tax Act*.

2005, c. 47, s. 1 “29”; 2007, c. 36, s. 90; 2018, c. 27, s. 640(F).

Delegation

30 The Minister may delegate to any person the exercise of any power or the performance of any duty or function that may be exercised or performed by the Minister under this Act.

Audit of applications

31 (1) Subject to subsections (2) to (4), the Minister may, on his or her initiative, conduct an audit of any application for payment under this Act.

Applications with payment

(2) An audit of an application in respect of which a payment was made may be conducted at any time within three years after the day on which the payment was made.

Exception

(3) If the Minister has reasonable grounds to believe that a payment was made on the basis of any false or misleading information, an audit of the application in respect of which the payment was made may be conducted at any time within six years after the payment was made.

Other applications

(4) An audit of an application in respect of which no payment was made may be conducted at any time within three years after the day on which the applicant was sent a notice informing the applicant that he or she was not eligible to receive a payment.

No payment or partial payment

31.1 If the Minister determines that an individual did not receive all or part of a payment that they were eligible to receive, the Minister shall make a payment to them in an amount equal to the amount that they did not receive.

2018, c. 27, s. 641.

Overpayments

Determination of overpayment

32 (1) If the Minister determines that an individual received a payment in an amount greater than the amount that they were eligible to receive, the Minister shall send them a notice

(a) informing them of the determination; and

présente loi, si ce n’est pour l’application de celle-ci ou de la *Loi de l’impôt sur le revenu*.

2005, ch. 47, art. 1 « 29 »; 2007, ch. 36, art. 90; 2018, ch. 27, art. 640(F).

Délégation

30 Le ministre peut autoriser toute personne à exercer tout ou partie des attributions que lui confère la présente loi.

Vérification des demandes

31 (1) Sous réserve des paragraphes (2) à (4), le ministre peut, de sa propre initiative, procéder à la vérification des demandes de prestations présentées au titre de la présente loi.

Demande suivie du versement de prestations

(2) La vérification d’une demande ayant donné lieu au versement de prestations peut être effectuée dans les trois ans suivant la date du versement.

Exception

(3) S’il a des motifs raisonnables de croire que des prestations ont été versées sur la foi d’une déclaration ou de renseignements faux ou trompeurs, le ministre peut procéder à la vérification de la demande dans les six ans suivant la date du versement.

Autres demandes

(4) La vérification de toute demande n’ayant pas donné lieu au versement de prestations peut être effectuée dans les trois ans suivant la date à laquelle le ministre a envoyé au demandeur un avis l’informant qu’il n’était pas admissible au versement de prestations.

Non-versement ou versement partiel des prestations

31.1 Si le ministre conclut qu’une personne physique n’a pas reçu tout ou partie des prestations auxquelles elle était admissible, il verse à celle-ci une somme égale aux prestations manquantes.

2018, ch. 27, art. 641.

Trop-perçu

Trop-perçu

32 (1) S’il décide qu’une personne physique a perçu des sommes en trop, le ministre lui fait parvenir un avis écrit :

a) l’informant de sa décision;

b) précisant le montant du trop-perçu.

TAB 7

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1057863 B.C. Ltd. (Re),*
2020 BCSC 1359

Date: 20200914
Docket: S206189
Registry: Vancouver

2020 BCSC 1359 (CanLII)

In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36

and

In the Matter of the *Business Corporations Act,* S.B.C. 2002, c. 57

and

In the Matter of a Plan of Compromise or Arrangement of 1057863 B.C. Ltd., Northern Resources Nova Scotia Corporation, Northern Pulp Nova Scotia Corporation, Northern Timber Nova Scotia Corporation, 3253527 Nova Scotia Limited, 3243722 Nova Scotia Limited and Northern Pulp NS GP ULC

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Petitioners:	S. Collins W.W. MacLeod J. Roberts
Counsel for Province of Nova Scotia:	R.G. Grant, Q.C. M.P. Chiasson, Q.C.
Counsel for Paper Excellence Canada Holdings Corporation:	P.J. Reardon
Counsel for the Monitor, Ernst & Young Inc.:	E. Pillon L. Nicholson

Counsel for Unifor, Local 440:	R.A. Pink, QC
Counsel Pacific Harbor North American Resources Ltd, as the proposed interim lender:	B. Brammall
Counsel for Atlas Holdings LLC and Blue Wolf Capital Management, LLC:	N. MacParland
Counsel for Envirosystems Inc., dba Terrapure Environmental:	H. P. Whiteley
Counsel for Pictou Landing First Nation:	B. Hebert
Counsel for Nova Scotia Superintendent of Pensions:	S. Choo
Place and Date of Hearing:	Vancouver, B.C. July 31 and August 5, 2020
Place and Date of Ruling with Written Reasons to Follow:	Vancouver, B.C. August 6, 2020
Place and Date of Written Reasons:	Vancouver, B.C. September 14, 2020

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INTRODUCTION

[1] On June 17, 2020, the petitioners filed these proceedings seeking a restructuring solution to their financial problems, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

[2] The petitioner, 1057863 B.C. Ltd., a British Columbia company, is the parent company of the other petitioners. The corporate group also includes various limited partnerships that are not named petitioners. Together, the group operates a pulp mill in Pictou County, Nova Scotia (the "Pulp Mill"). They also conduct related forestry activities in the Province of Nova Scotia to support those operations. I will refer to the group collectively as the "Petitioners".

[3] On January 31, 2020, the Petitioners were required to shut down the Pulp Mill, resulting in a complete cessation of its business activities. At the centre of the reasons for the shut down is an Effluent Treatment Facility ("ETF") that became inoperable after that date. The ETF is source of considerable controversy with certain of the stakeholders.

[4] Without the ability to use the ETF, the Pulp Mill could not operate.

[5] The Petitioners describe that the shut down of the Pulp Mill had a "devastating effect" on them and their partners. Indeed, most employees were laid off after the shut down.

[6] On June 19, 2020, the Petitioners sought and the Court granted an initial order under the *CCAA* (the "Initial Order"). The Petitioners' stated intention at that time was to continue to ensure the orderly hibernation, care and maintenance of the Pulp Mill while they investigated and assessed various restructuring options. The Initial Order granted was what is colloquially termed a "skinny" order, particularly in light of new strictures under s. 11.001 of the *CCAA* that limit the initial relief to what is reasonably necessary during the initial stay period.

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[7] In the Initial Order, I appointed Ernst & Young Inc. as Monitor. I granted a Director's Charge limited to $500,000. I extended the stay of proceedings to the limited partnerships, as appropriate in these circumstances: *4519922 Canada Inc. (Re)*, 2015 ONSC 124 at para. 37. Finally, I granted an Administration Charge of $500,000. At the time of the initial hearing, the Petitioners indicated that it was their intention to come back to the Court to seek approval of interim financing and other relief, including approval of a Key Employee Retention Plan ("KERP") and authority to pay certain pre-filing amounts.

[8] Since June 19, 2020, I have extended the stay a number of times to allow further discussions between the Petitioners and their stakeholders toward a possible resolution, including with the Province of Nova Scotia ("Nova Scotia"), their major secured creditor. The Monitor supported those extensions, as set out in its first report to the Court dated July 2, 2020 (the "First Report").

[9] Unfortunately, considerable disagreement remains as to whether this proceeding should continue and if so, on what terms.

[10] This hearing was essentially the comeback hearing. The Petitioners sought an Amended and Restated Initial Order ("ARIO") to incorporate the original relief in the Initial Order, with some amendments; significantly, they sought approval for interim financing that would allow their restructuring activities to continue.

[11] On August 6, 2020, I granted an ARIO that incorporated much of the relief sought. In addition, I granted the order sought by Unifor, Local 440 ("Unifor") for representative status in this proceeding. These reasons follow from my decisions at that time.

BACKGROUND

[12] The Pulp Mill has a considerable history leading to the current and fraught relationship between the owners of the Pulp Mill and other stakeholders, being Nova Scotia in particular. I will only provide a very high-level description of that history as is relevant to this application.

[13] The Pulp Mill has been in operation since 1967. It is located on Abercrombie Point in Pictou County, NS. The process of producing pulp at the Pulp Mill creates wastewater, and it is necessary to treat that wastewater before discharge. Since 1972, the treatment of the wastewater was done at the ETF, which is located near “Boat Harbour”. Nova Scotia owns the ETF and has leased it to the Pulp Mill’s owners over the years. As stated, the Pulp Mill cannot operate without treating the wastewater at the ETF.

[14] The Pulp Mill is adjacent to reserve lands of the Pictou Landing First Nation (“PLFN”), a Mi’kmaq First Nation.

[15] In 2011, Paper Excellence Canada Holdings Corporation (“PEC”) directly or indirectly acquired ownership of the Petitioners. PEC describes having spent more than $118 million in respect of the operations of the Pulp Mill and related activities.

[16] Events leading to the Petitioners’ financial difficulties include:

a) In 2014, there was an effluent leak in the pipeline from the Pulp Mill to the ETF; that event led to PLFN members blockading the area;

b) In 2015, Nova Scotia passed the *Boat Harbour Act*, S.N.S. 2015, c. 4 (the “*BHAct*”). The *BHAct* required the Petitioners cease using the ETF for the reception and treatment of effluent from the Pulp Mill by January 31, 2020. The deadline set in this legislation was contrary to the terms of the lease between Nova Scotia and the Pulp Mill (entered into prior to PEC’s involvement) that contemplated use of the ETF until December 31, 2030;

c) The Petitioners set about planning for a replacement ETF (“RETF”) that would allow the Pulp Mill’s operations to continue past January 2020. The Petitioners have spent considerable monies to advance the project, with financial and other contributions by Nova Scotia;

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d) The Petitioners' efforts to establish the RETF involved, understandably, considerable input and agreement from Nova Scotia under its environmental and regulatory process and requirements;

e) The RETF approval process did not go smoothly, at least from the Petitioners' point of view. In part, the process took place in the face of litigation between Nova Scotia and PLFN relating to Nova Scotia's decisions in relation to the Petitioners and the Pulp Mill;

f) The Petitioners say that they told Nova Scotia that it was not possible to complete the RETF by January 2020. Nova Scotia says that they never gave the Petitioners any inkling that a possible extension would be afforded to them;

g) Matters came to a head somewhat in late December 2019. Nova Scotia's Minister of Environment ("MOE") determined that a further environmental assessment report ("EAR") was required for the RETF. Almost immediately thereafter, Nova Scotia gave formal notice to the Petitioners that no extension under the *BHAct* was forthcoming;

h) In January 2020, the Petitioners filed a judicial review proceeding challenging the MOE's requirement to file a further EAR (the "Judicial Review");

i) The Pulp Mill ceased operations on January 12, 2020;

j) Commencing January 29, 2020, the MOE issued various orders to the Petitioners in respect of the orderly shutdown of the Pulp Mill. The MOE's May 14, 2020 order was appealed to the Supreme Court of Nova Scotia (the "Appeal"); and

k) The Petitioners have clearly signalled to Nova Scotia that they are seeking financial redress from the Province arising from the passage and implementation of the *BHAct* (the "BH Claim"). As matters stand,

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> the Judicial Review and Appeal are in abeyance, along with the Petitioners' consideration of the BH Claim against Nova Scotia.

[17] The primary debt owed by the Petitioners is to PEC and Nova Scotia. The Petitioners owe PEC approximately $213 million; $30 million of that amount is secured against the Petitioners' assets. The Petitioners owe Nova Scotia approximately $85 million, which has a first ranking secured position against the assets. The Petitioners also owe Nova Scotia $1.3 million on an unsecured basis.

[18] In addition to unsecured amounts owed to PEC, Nova Scotia and employees, the Petitioners owe approximately $4.3 million to trade creditors and owners of the timberlands that they harvested.

[19] Before the shutdown of the Pulp Mill, the Petitioners employed approximately 200 unionized persons, represented by Unifor. In addition, there were approximately 135 other full-time employees, including salaried personnel. The Petitioners also retained approximately 600 contractors on a full or part-time basis.

[20] As of June 2020, approximately 32 employees and 18 seasonal part-time employees remained. The rest of the employees were laid off or terminated.

[21] Considered more broadly, the impact of the shutdown of the Pulp Mill has had far-reaching and considerable negative consequences for the stakeholders.

[22] The Monitor confirms in the First Report that the Petitioners contributed more than $279 million annually to the Nova Scotia economy, arising from purchases of goods and services. The Petitioners maintained a supply chain of approximately 1,379 companies who supported the operations of the Pulp Mill. Finally, the Pulp Mill provided employment for an estimated 2,679 full-time equivalent jobs, generating an estimated $38 million annually in provincial and federal taxes.

INTERIM FINANCING

[23] The Petitioners seek court approval of an interim financing term sheet (the "Term Sheet") for a financing facility (the "Interim Lending Facility") between the

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Petitioners, as borrowers, PEC, as arranger and agent, and PEC together with Pacific Harbor North American Resources Ltd., as lenders (collectively, the "Interim Lenders").

[24] The Interim Lending Facility contemplates a maximum principal amount of $50 million. However, the Petitioners presently only seek approval of an initial advance of $15 million and a corresponding charge in favour of the Interim Lenders over the Petitioners' assets in first ranking priority (the "Interim Financing Charge"). The stated purpose for these initial funds is to allow payment of the Petitioners' expenses to December 2020. If the Term Sheet is approved, the Petitioners intend to make later applications for court approval to access further draws.

[25] In support of their request, the Petitioners prepared a budget to detail the uses of the $50 million (the "Financing Budget"). The Financing Budget indicates the projected financing requirements of the Petitioners to June 2022. As stated by Bruce Chapman, the general manager of the Petitioners and PEC, those projections were based on a "successful outcome" of these proceedings, said to include: the successful shutdown of the ETF; hibernation of the Pulp Mill; identifying, designing, and obtaining approvals for the RETF; and, negotiating contributions and financing associated with those activities.

[26] After the Petitioners' introduced the Financing Budget as part of this application, Nova Scotia raised a variety of objections. Nova Scotia's response at para. 2, filed in opposition to the application, sets out those objections:

> (a) there is no restructuring plan being pursued by the Applicants;
>
> (b) the DIP financing will be used to fund the Applicants' pre-filing obligations;
>
> (c) the DIP financing will be an inappropriate re-prioritization of security;
>
> (d) the cash flow statements are not supported by appropriate documentation; and
>
> (e) the Applicants have not engaged the Province in any meaningful way, other than to continue to pursue their agenda for obtaining the DIP financing to fund existing obligations.

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[27] The Monitor has brought considerable balance and objectivity forward in terms of assisting the stakeholders in understanding the Financing Budget. In particular, the Monitor has sought to address Nova Scotia's concerns in the face of significant disputes between the Petitioners and Nova Scotia.

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[28] In the Monitor's second report dated July 23, 2020 (the "Second Report"), the Monitor introduced the concept of milestones. The milestones set out categories of work or activities required to move the overall restructuring toward the anticipated "success" date of June 2022. Target Completion Dates are identified in the "Milestones Schedule" at Appendix C to the Second Report, along with Evaluation Dates and the Cumulative DIP Draw required by the respective dates. This "Milestones Schedule" provides, in my view, considerable structure to the approval process and it will allow, in the future, the Court, the Monitor and the stakeholders (particularly Nova Scotia) to gauge the ongoing progress of the Petitioners' efforts.

[29] In addition, the Monitor assisted in the development of an interim budget to December 2020 (the "Interim Budget"). That document, discussed in the Monitor's Second Report and its Supplemental Report dated July 30, 2020, provides a detailed breakdown of the activities and the estimated cost of those activities under the initial draw of $15 million. Those activities and costs are:

Activity	**Activity Costs**
Boat Harbour operations and de-commissioning costs and environmental costs	$6,846,698
Mill operating costs	$1,231,650
Financing and administration costs	$407,734
Employee costs	$1,161,104
Severance and salary continuations	$2,646,498
Professional fees (includes approx. $575,000 for the Judicial Review and Appeal)	$3,481,625
TOTAL	**$15,775,308**

[30] The Monitor anticipates that, with cash on hand of approximately $4.8 million, the Petitioners will have sufficient funding through to the end of 2020 with this interim financing.

[31] Section 11.2(1) and (2) of the *CCAA* confirms the Court's jurisdiction to approve interim financing and approve a charge in priority to existing secured creditors:

> (1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[32] The Supreme Court of Canada recently commented on the importance of the relief available under s. 11.2, including the granting of an interim lenders' charge. In *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at para. 85-86, the Court confirmed that a court may exercise its discretion to approve such financing to achieve the important statutory objective under the *CCAA* of not only providing working capital, but also enabling the "preservation and realization of the value of a debtor's assets".

[33] The Court in *Callidus* also acknowledged that a court's ability to grant a charge in favour of an interim financier is often necessarily and practically the only way to secure this benefit:

> [89] Such charges, also known as "priming liens", reduce lenders' risks, thereby incentivizing them to assist insolvent companies. As a practical matter, these charges are often the only way to encourage this lending. Normally, a lender protects itself against lending risk by taking a security interest in the borrower's assets. However, debtor companies under *CCAA* protection will often have pledged all or substantially all of their assets to other creditors. Accordingly, without the benefit of a super-priority charge, an interim financing lender would rank behind those other creditors. Although super-priority charges do subordinate secured creditors' security positions to

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> the interim financing lender's — a result that was controversial at common law — Parliament has indicated its general acceptance of the trade-offs associated with these charges by enacting s. 11.2(2) [citations omitted].

[34] Section 11.2(4) of the *CCAA* sets out certain non-exhaustive factors to be considered by the court in deciding whether to approve interim financing and grant an interim lenders' charge:

> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report…

[35] No one factor set out in s. 11.2(4) governs or limits the Court's consideration. The exercise is necessarily one of balancing the respective interests of the debtors and its stakeholders towards ensuring, if appropriate, that the financing will assist the debtor company to obtain the "breathing room" said to be needed to hopefully achieve a restructuring acceptable to the creditors and the court: *White Birch Paper Holding Co. (Re)*, 2010 QCCS 1176, at para. 33 and *Pacific Shores Resort & Spa Ltd. (Re)*, 2011 BCSC 1775 at para. 49.

[36] I will discuss the factors in turn.

[37] These proceedings were filed in mid-June 2020. Despite the Petitioners' initial intentions to undertake a restructuring process to mid-2022 under the Interim Lending Facility, their ambitions have been significantly curtailed, at least in the short term. Under the present proposal, the Petitioners seek only to extend these proceedings to December 2020, when hopefully there will be further clarity about how the restructuring may proceed. This shortened period will allow the Court, the

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Monitor and the stakeholders to get a sense of the Petitioners' progress toward assessing whether any further extension of the proceedings is justified.

[38] Nova Scotia submitted that, if the Court approved the interim financing and extended the stay, that stay period should only be to October 2020, when the Court could assess matters then.

[39] I would not accede to this submission. There is considerable cost and energy to bring matters forward to the Court, which may not necessarily be justified depending on the status of matters in October 2020. Rather, I accept that the financing is justified in order to allow further operations to December 2020. I have specifically ordered the Monitor to provide oversight with respect to the Petitioners' expenditures to ensure that they are consistent with the Interim Budget. In addition, I ordered that the Monitor file a formal report with the Court by no later than October 31, 2020 as to the status of the Petitioners' restructuring efforts and spending under the Interim Budget. That information will of course be available to the stakeholders. If anything arises from that report, the Monitor or any stakeholder may apply to the Court.

[40] Nova Scotia has raised, however obliquely, concerns regarding how the Petitioners' business and financial affairs will be managed during the proceedings. In my view, this largely arises from the great degree of mistrust and suspicion, if not downright animosity, that exists in the chasm that separates Nova Scotia and the Petitioners.

[41] Nova Scotia filed various affidavits in support of its opposition to this application, being those of Duff MacKay Montgomerie, Paul Bradley and Kenneth Swain. All of these affidavits were intended to provide Nova Scotia's side of the "story" and respond to Mr. Chapman's various affidavits. Mr. Chapman replied to the points raised in Nova Scotia's affidavits.

[42] Clearly, the disagreements between the Petitioners and Nova Scotia are many, and some long-standing. Two major issues relate to (a) payments made by

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the Petitioners to PEC as a shareholder some years ago when monies were owed to Nova Scotia, and (b) the use of monies advanced by Nova Scotia to the Petitioners for environmental expenses under a Contribution Agreement. I only note the existence of those disputes; in my view, there is no need at this time and in these proceedings to resolve those disputes. Whether those disputes need to be resolved in the fullness of time remains to be seen.

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[43] I accept that Nova Scotia's concerns give rise to some question as to the future conduct of these proceedings. However, this question is largely answered by the Monitor, who raises no concerns regarding the conduct of the Petitioners' management from the time of the Initial Order. As stated in *Pacific Shores* at para. 31, the good faith requirement to support the relief on this application relates to conduct within the proceeding, not conduct pre-existing the filing. The Monitor continues to provide oversight with respect to the Petitioners' activities.

[44] One of the major factors is whether the loan would enhance the prospect of the Petitioners making a viable compromise or arrangement with their creditors.

[45] The result of not approving this financing is stark. The shutdown of the Pulp Mill has resulted in a complete cessation of any revenue. Both Mr. Chapman and the Monitor confirm that, without the financing, the Petitioners cannot continue any restructuring efforts or even the continued hibernation of the Pulp Mill. The Monitor confirms that a lack of funding would likely result in a receivership or bankruptcy, with the usual dire result of yielding nothing for the majority of the stakeholders.

[46] A large portion of the $15 million interim financing is earmarked for what Mr. Chapman calls "critical expenses" relating to the direct and indirect expenses of the hibernation of the Pulp Mill. In its opposition, Nova Scotia does not address what would happen in the event that PEC walked away from its investment in the Petitioners and the Pulp Mill. As best I can tell, Nova Scotia seems to be ready to test PEC's resolve to determine if PEC will, as the shareholder, fund the ongoing costs itself without any interim financing and related charge.

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[47] In my view, given the sensitive nature of the assets, and the potential and negative consequences particular to the environment and local population arising on a liquidation, I do not consider it is reasonable to allow a "game of chicken" to take place between Nova Scotia and PEC. It appears to be the case that even if a receivership takes place (perhaps at the behest of Nova Scotia), many of these costs would be incurred in any event: *Pacific Shores* at para. 49(f).

[48] Nova Scotia also takes issue with payment of pre-filing unsecured amounts, including amounts owed to employees and former employees, which the Petitioners seek to fund under the Financing Budget and the Interim Budget. I will address that issue separately below.

[49] Finally, Nova Scotia takes great umbrage in having an Interim Financing Charge placed ahead of its own charge when some of the funds under the Financing and Interim Budgets are to be used to some extent to advance litigation (or potential litigation) against it. Paragraph 10 of the Term Sheet provides that the purpose of the facility is in part to fund expenses associated with:

> … the evaluation, settlement or progression of claims and other legal remedies that may be available to the Borrowers and to pay transaction costs, fees and expenses [including all reasonable fees and expenses in connection with any other proceeding pursued or defended by the Borrowers relating to the Northern Pulp facility and business] …

[50] It is common ground that the "claims and other legal remedies" include the Judicial Review, the Appeal and the potential BH Claim against Nova Scotia. The estimated cost in the Interim Budget of professional fees toward those matters is approximately $575,000. Nova Scotia questions whether the Interim Financing Facility is simply to improve the Petitioners' negotiating position with Nova Scotia.

[51] The Petitioners state that they remain committed to pursuing the re-start of the Pulp Mill in an environmentally responsible manner by ultimately constructing the RETF and resuming operations. The Petitioners believe that a re-start of operations affords Nova Scotia the best opportunity to recover its secured claims for money

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advanced. Nova Scotia disagrees and appears to have considered the consequences of a complete and permanent shutdown of the Pulp Mill.

[52] The Petitioners say that they have continued the litigation – and are still considering the BH Claim – against Nova Scotia only as a backstop if they are not able to resolve their outstanding claims against Nova Scotia through negotiation and settlement. As noted by the Petitioners' counsel, the rights of the Petitioners under the Judicial Review, the Appeal and the BH Claim are choses in action and part of the Petitioners' assets. In *Callidus* at para. 96, the Court recognized that funding to preserve a "litigation asset" may be appropriate if it is intended to preserve and realize upon that asset for the benefit of the stakeholders.

[53] In my view, in the overall context, the limited amount of litigation funding proposed to be spent between now and December 2020 is justified in these circumstances. If the proceedings are extended beyond that date, and further funding for that purpose is requested, the Court may revisit the matter.

[54] Another factor is the nature and value of the Petitioners' property. The Monitor sets out in the First Report that the 2019 unaudited consolidated assets of the Petitioners (at book value) was approximately $343 million. The estimated liabilities as of mid-June 2020 were approximately $311 million. By any measure, most of the value of the Petitioners' assets, particularly the Pulp Mill, will only be realized if the Pulp Mill begins operations again. That necessarily involves the establishment of the RETF.

[55] The Interim Financing Facility, as limited by the initial draw under the Interim Budget, will allow the Petitioners a short period (some five months) to show real progress toward that objective of enhancing the value of their assets. I do not agree with Nova Scotia that the Petitioners have failed to identify any restructuring plan or that the Interim Financing Facility *is* the plan. The materials before the Court clearly show a "kernel of a plan" – namely the restart of the Pulp Mill and the Petitioners' operations, all intended to alleviate the dire financial circumstances here and allow the Petitioners to fashion a way forward with the support of their creditors. The

Petitioners should be allowed some opportunity to advance their efforts to that end, if possible.

[56] Another significant factor here is whether any creditor would be materially prejudiced if the Interim Financing Charge is granted. Clearly, Nova Scotia, as the major and presently first ranking secured creditor thinks so. It is not difficult to discern that Nova Scotia faces a myriad of concerns with respect to the Petitioners and the Pulp Mill, including relating to the environment, employment of its citizens, the general welfare of the employees, obligations to the PLFN and the state of its economy.

[57] It is not my role on this application to judge how Nova Scotia has seen fit to balance its duties and obligations in this complex situation. Nova Scotia is clearly frustrated with the Petitioners, noting in particular that it has already contributed significant amounts of public money and other benefits to assist them in meeting their environmental obligations.

[58] I agree that Nova Scotia faces prejudice, although not to the degree submitted by its counsel. As stated above, it remains the case that, if a receivership occurs, a receiver would incur some of these expenses anyway. This is particularly so, with respect to the expenses (both direct and indirect) intended to protect the environment and the citizens of Pictou County in the Pulp Mill hibernation process.

[59] I have no concerns that Nova Scotia is anything but committed to the well-being of the environment and its citizens, particularly those living near the Pulp Mill, such as members of the PLFN. I acknowledge Nova Scotia's concerns, but they must be balanced against other stakeholder interests and prejudice faced by those stakeholders if the financing is not approved: *Pacific Shores* at para. 49.

[60] The final factor is whether the monitor supports the financing. That is clearly the case here. As stated above, the Monitor has attempt to bridge the gap between Nova Scotia's concerns and the objectives of the Petitioners. It has succeeded to some degree.

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[61] The Monitor has carefully analyzed the proposed financing terms. In its various reports, the Monitor has provided a detailed summary of the key elements of the Term Sheet, including specific terms that Nova Scotia questioned (including those provisions relating to payment-in-kind terms, change of control, right of first refusal and right to match, a prohibition on voluntary provisions and certain default terms). In light of submissions made by the Petitioners, and comments of the Monitor, I have no concerns regarding those matters.

[62] Nova Scotia also raised an issue with respect to possible action by the Interim Lenders if there is an Event of Default (para. 23 of the Term Sheet). Again, I had no concerns in that respect as those were normal terms. I ordered an amendment to the draft ARIO to ensure that it was consistent with the provisions in the Term Sheet.

[63] The Monitor recommends approval of the Interim Financing Facility, limited to the initial draw under the Interim Budget. I expect that the Monitor will work closely with the Petitioners in the next few months to ensure that proper expenditures are made in accordance with the Interim Budget. Such oversight will allow adequate protection to the stakeholders in this critical interim period while the Petitioners explore what options are available to them in the future with or without certain stakeholder support.

[64] I conclude that the Interim Financing Facility is reasonable and appropriate in the circumstances. I approve the interim draw of $15 million, as sought. This financing will provide a viable short term path forward to allow the Petitioners to explore restructuring options, all for the benefit of the entire large stakeholder group, including Nova Scotia, the employees (both past and present) and members of the PLFN, all of whom were represented on this application.

[65] As noted by Petitioners' counsel, no other viable alternatives are available to avoid the significant and negative social, economic and environmental consequences if the Petitioners do not receive the funding they need to advance their restructuring plan.

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SEVERANCE / SALARY CONTINUATION PAYMENTS

[66] The Initial Order provided that the Petitioners could pay certain employee expenses incurred prior to that date:

> 4. The Petitioners shall be entitled, but not required, to pay the following expenses which may have been incurred prior to the Order Date:
>
> (a) all outstanding wages, salaries, employee and pension benefits (including long and short term disability payments), vacation pay and expenses (but excluding severance pay) payable before or after the Order Date, in each case incurred in the ordinary course of business and consistent with the relevant compensation policies and arrangements existing at the time incurred …

[67] The pre-filing unsecured employee obligations fall into two categories:

a) 191 unionized employees were terminated before filing (or expect to be terminated shortly), trigging severance obligations under Unifor's collective bargaining agreements (the "Severance Obligations"). Before the filing, approximately half of that amount ($1.65 million) was paid, leaving approximately $1.94 million to be paid (some already due and the rest to be funded into July 2021); and

b) Between January and June 2020, 45 salaried employees were terminated. In that event, their employment agreements require payment of salary continuance (the "Salary Continuance"). Before the filing, $3.3 million of Salary Continuance was paid. Under the terms of the Initial Order, $370,000 was paid to these employees. The remaining estimated amount of Salary Continuance budgeted to be paid from August 2020 to September 2024 is approximately $3.5 million.

[68] The Interim Budget provides for payment of the Severance Obligations and the Salary Continuance, together with benefits to retired employees. The Petitioners seek an order allowing them to make such payments, estimated in total at $2.9 million to December 2020.

[69] Unifor understandably supports the Petitioners' request to make pre-filing payments of the Severance Obligations in accordance with the Interim Budget.

[70] There is no dispute between the parties that I have the jurisdiction to authorize payment of pre-filing unsecured obligations. Section 11 of the *CCAA* provides a broad discretion to the Court to make any order as may be "appropriate in the circumstances". The more difficult question is whether I *should* exercise my discretion to allow such payments here.

[71] Nova Scotia disputes that these payments are appropriate in the circumstances. The Monitor presents, appropriately, a neutral exposition of the relevant circumstances, without recommendation.

[72] The Petitioners refer to *Cinram International Inc. (Re)*, 2012 ONSC 3767. In *Cinram*, the Court authorized payments to certain employees, including any obligations that arose prior to the filing. However, as noted at paras. 23 and 43, the Court did so in the context of Cinram's "ongoing business operations" and with respect to the "active employment of employees in the ordinary course".

[73] In this case, there are no ongoing business operations as discussed in *Cinram*; in addition, the payments are to be made to *former* employees who were terminated before the filing.

[74] The circumstances considered in *JTI-Macdonald Corp. (Re)*, 2019 ONSC 1625 are also unhelpful to the Petitioners. At paras. 24-25, the Court's discussion of payment of pre-filing employee claims took place within the context of "critical suppliers" and the need to ensure continued delivery of necessary goods and services for the debtor's operations and to support the restructuring. The Court accepted the recommendation of the proposed monitor that pre and post-filing "payroll and benefits" be paid. The monitor's reasons included that many of the relevant payments would have priority status and/or give rise to director liability if not paid. Further, in the proposed monitor's experience, it is common to pay pre-filing and post-filing obligations to employees in the normal course, to ensure continued

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and uninterrupted service by employees. Importantly, the debtor had sufficient cash on hand to pay these expenses, which is not the case here.

[75] The reasons advanced by the Petitioners in asserting that these payments are "critical" are much more ephemeral than the reasons advanced in *JTI-Macdonald*. The Petitioners argue that allowing payment of the pre-filing unsecured employee amounts (in addition to ongoing employee expenses) is necessary to:

a) preserve the Petitioners' going concern value;

b) ensure that the other activities provided for in the Interim Financing Budget can be carried out by the Petitioners' remaining employees;

c) mitigate the adverse effects of the Pulp Mill's closure in the communities in which the Petitioners operate. The Petitioners emphasize the significant negative consequences suffered by the lay-offs and terminations, particularly in the face of the COVID-19 pandemic;

d) preserve their relationships with the employees who are no longer working, many of whom are expected to be called upon to return to employment at the Pulp Mill in the future if the construction of the RETF is undertaken; and

e) preserve their relationship with Unifor. The Petitioners state that unions as a whole will inevitably be present in some form if the Petitioners resume operations. They say that preserving an effective working relationship with Unifor, consistent with Unifor's collective bargaining agreements, will provide an additional benefit to them, both during and after these proceedings.

[76] The Petitioners also reiterate that payment of these pre-filing employee amounts will signal their commitment to the stakeholders to develop and implement

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a plan to recommence the Pulp Mill's operations and in doing so, alleviate financial hardship within what they describe is a critical stakeholder group.

[77] I appreciate that court approval to allow payment to employees, even for pre-filing unsecured amounts, is often granted. When a debtor is conducting ongoing operations during a proceeding, it will often be necessary to ensure that employment relationships are not disrupted so as to hinder the restructuring efforts.

[78] However, the starting point for this discussion continues to be that *all* pre-filing unsecured amounts are not to be paid in a *CCAA* proceeding, even if owed to employees. All pre-filing creditors are covered under the general stay of proceedings; any payment is the exception to the general rule. That starting point is intended to preserve the *status quo* between creditors of the debtor pending the debtor advancing a fair and equitable proposal at the end of the day in respect of all of its obligations.

[79] At that later stage, it is generally anticipated that unsecured creditors will be treated fairly and equitably in any plan of arrangement, usually by way of a *pro rata* payment, subject to certain minimum requirements with respect to employee claims, as set out in s. 6(5) of the *CCAA*.

[80] Two Ontario decisions, cited by Nova Scotia, are of assistance.

[81] The first decision is *Nortel Networks Corp. (Re)*, [2009] O.J. No. 2558 (Ont. S.C.J.) aff'd *Sproule v. Nortel Networks Corp.*, 2009 ONCA 833. In the lower court, Justice Morawetz (as he then was) was addressing requests from the union and former employees for payment of their pre-filing claims for retirement allowance payments, voluntary retirement options, vacation pay, benefit options and termination and severance pay.

[82] At para. 51 of *Nortel*, Morawetz J. noted that it was necessary to take into account the overall financial picture of the applicants, who opposed the applications. There, as here, the debtor was not in a position to pay their obligations to all creditors and a number of defaults were present, including those relating to the

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unionized and former employees. At para. 57, Morawetz J. described that *Nortel* was not carrying on “business as usual”, which is also the case here. The Court dismissed the application stating:

> [60] An overriding consideration is that the employee claims whether put forth by the Union or the Former Employees, are unsecured claims. These claims do not have any statutory priority.
>
> . . .
>
> [80] At this stage of the Applicants’ CCAA process, I see no basis in principle to treat either unionized or non-unionized employees differently than other unsecured creditors of the Applicants. Their claims are all stayed. The Applicants are attempting to restructure for the benefit of all stakeholders and their resources should be used for such a purpose.

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[83] In *Sproule*, the Court of Appeal agreed that the stay applied to these types of claims:

> [39] The *CCAA* stay provision is a clear example of a case where the intent of Parliament, to allow the court to freeze the debt obligations owing to all creditors for past services (and goods) in order to permit a company to restructure for the benefit of all stakeholders, would be frustrated if the court’s stay order could not apply to statutory termination and severance payments owed to terminated employees in respect of past services.

[84] The Court in *Nortel* asked the monitor to investigate whether an interim payment might be made to the employees in any event. That request was made, however, in very different circumstances where there were no significant secured creditors and a distribution to the unsecured creditors seemed likely in any event:

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

[85] In *Windsor Machine & Stamping Ltd. (Re)*, [2009] O.J. No. 3195 (Ont. S.C.J.), the union brought an application to require the debtors to pay termination and

severance pay owing as a result of post-filing terminations. The major secured creditor objected. Justice Morawetz similarly rejected this application, citing the priority of that secured creditor:

> [43] First, the priority of secured creditors must, in my view, be recognized. Counsel to the Union made the submission that the Applicants and the Bank are advancing a priority argument that may be relevant in a bankruptcy or receivership proceeding but not in a CCAA proceeding, as there is no priority distribution scheme in the CCAA. In my view this submission is misguided. Although there is no specific priority distribution scheme in the CCAA, that does not mean that priority issues should not be considered. An initial order under the CCAA usually results in a stay of proceedings as against secured creditors as well as unsecured creditors. The stay prevents secured creditors from taking enforcement proceedings which would confirm their priority position. The inability of a secured creditor to take such enforcement proceedings should not result in an enhanced position for unsecured creditors. There is no basis, in my view, for the argument that somehow the absence of a statutory distribution scheme entitles unsecured creditors to obtain enhanced priority over secured creditors for pre-filing obligations. To give effect to this argument would result in a situation where secured creditors would be prejudiced by participating in CCAA proceedings as opposed to receivership/bankruptcy proceedings. This could very well result in a situation where secured creditors would prefer the receivership/bankruptcy option as opposed to the CCAA option as it would recognize their priority position. Such an outcome would undermine certain key objectives of the CCAA, namely, (i) maintain the *status quo* during the proceedings; and (ii) to facilitate the ability of a debtor to restructure its affairs. In my view, it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors. In this case, the secured creditors have priority over the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees.
>
> [44] Second, counsel to the Union also submits that based on the rationale in the decision of the Court of Appeal in *Re 1231640 Ontario Inc. (State Group)* (2007), 37 C.B.R. (5th) 185 (Ont. C.A.), priority rules do not crystallize in a CCAA proceeding. I do not accept this argument. *State Group* addressed a priority issue as between competing PPSA secured creditors in the context of a interim receivership under s. 47 of the BIA. The issue in *State Group* was whether a s. 47 BIA receiver was a person who represents creditors of the debtor under s. 20(1)(b) of the PPSA. The Court of Appeal held that an interim receiver was not such a person. The issue in *State Group* governs the relationship as between competing interests under the PPSA. In my view, it does not stand for the proposition that the priority position of a secured creditor vis-à-vis unsecured creditors should not be recognized in the context of a CCAA proceeding.
>
> [45] Third, the Union put forth submissions to the effect that, in this particular situation, the amount of termination pay and severance pay is relatively low and the Applicants have the cash to pay the amounts owing and, further, that such payments would not jeopardize the Proposed Sale.

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> [46] In my view, the fact that the Applicants may have available cash does not mean that the Applicants can use the cash as they see fit. The asset is to be used in accordance with credit agreements and court authorized purposes, including those set out in the Amended and Restated Initial Order. I am in agreement with these submissions of counsel to the Applicants as set out at [15]. This Order placed restrictions on the use of cash, which restrictions are consistent with legal priorities. In my view, the fact that the Applicants have cash does not justify an alteration of legal priorities. The legal priority position is that the claims for termination pay and severance pay are unsecured claims which rank pari passu with other unsecured creditors and subordinate to the interests of the secured creditors. (See also *Indalex Limited*, [2009] O.J. No. 3165, CV-09-8122-00CL – July 24, 2009 on this point.)
>
> [47] I acknowledge that the situation facing the employees is unfortunate and that in *Nortel*, a hardship exception was made. However, this exception was predicated, in part, on the reasonable expectation that there will be a meaningful distribution to unsecured creditors, including the former employees. Such is not the case in this matter.

[86] The circumstances here are more resonant with the facts discussed in *Nortel* and *Windsor Machine*. Given that this proceeding is very much in its early days, I cannot conclude that a distribution to pre-filing unsecured claims (including to the employees) is likely at the end of the day. There are no ongoing operations; there is no cash with which to pay these amounts.

[87] Significantly, Nova Scotia, the major secured creditor, whose security would be primed by these payments, objects. In the absence of any objection by Nova Scotia, and with the general support of the Petitioners and the stakeholders appearing on this application, I might have come to a different conclusion.

[88] The Petitioners also argue that the Severance Obligations constitute inchoate priority charges under provisions of the Nova Scotia *Labour Standards Code*, R.S.N.S. 1989, c. 246 (the "*Code*"). They argue that these provisions would be triggered if an employee makes a successful claim to the Nova Scotia Labour Board (the "Board") and the Board issues an order. They refer to s. 88 of the *Code* that provides that amounts in an order are a debt due to the Board secured by a lien or mortgage that has priority over all other liens, charges, or mortgages. They also refer to ss. 90 and 90A of the *Code* with respect to potential actions by the Board. However, any such actions are currently stayed under the Initial Order, just as they

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are with respect to any action that might have been taken by Nova Scotia as a secured creditor.

[89] This is an unpersuasive argument by the Petitioners in any event. It is well taken that a province cannot create priorities that alter the federal scheme of distribution in the event of a bankruptcy: *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 86-87, 136: *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453. Given that these proceedings are in their nascent days, it is anyone's guess on the outcome. A bankruptcy remains a possibility, however slight in the Petitioners' minds.

[90] I accept, without hesitation, that these hard working and dedicated employees will meet my decision with a great deal of disappointment, if not dismay. The reasons for the closure and shutdown are completely divorced from their commitment to their jobs. I also appreciate that this vulnerable group of stakeholders will suffer arising from my decision. I say this knowing that the Petitioners represented – or at least previously represented – a significant employer in the province and in Pictou County, particularly. I expect that many of these lost jobs, no doubt some with expertise involving work at pulp mills, cannot be easily replaced, if at all.

[91] The Petitioners have emphasized the need to maintain the goodwill of their workforce in the event that the RETF is constructed and operations recommence. Whether or not the Petitioners will achieve that objective is simply unknown at this time.

[92] Unfortunately, I conclude that there is no principled basis upon which I could exercise my discretion to grant this relief. The Petitioners have not advanced a persuasive case toward authorizing such payments in such nebulous circumstances, particularly when it would amount to prioritizing those unsecured creditors over the existing security of Nova Scotia and where Nova Scotia objects.

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TERRAPURE

[93] Before and after the *CCAA* filing, Envirosystems Inc., dba Terrapure Environmental ("Terrapure") provided services to the Petitioners relating to the removal of wastewater. The pre-filing debt owed to Terrapure for its services is approximately $1.1 million.

[94] The Petitioners do not seek any relief in favour of Terrapure, such as a declaration that it is a "critical supplier". Indeed, by the date of this application, the Petitioners had found an alternate means to remove the wastewater and they advised that it is unlikely they will need any further services from Terrapure.

[95] Terrapure's position on this application is to support the approval of the Interim Financing Facility and the payment of the unsecured pre-filing claims of the employees, but only if Terrapure is similarly paid its pre-filing unsecured claim.

[96] The general discussion above regarding the general application of the stay of proceedings with respect to unsecured creditors equally applies to Terrapure. Nova Scotia similarly objects to any payment to Terrapure, since the means to make any such payment could only arise from the Interim Financing Facility.

[97] In my view, there is no basis to prefer Terrapure in this case by allowing payment of its pre-filing unsecured claim. All claims by unsecured creditors are equally covered by the stay under the Initial Order, including the claims by employees, as discussed above, and Terrapure.

[98] In the event that the Court did not approve payment of its pre-filing debt, Terrapure requested the addition of a term in the ARIO to confirm that it has no further obligation to provide services to the Petitioners. No one raised any objections to that provision and I grant that relief.

KEY EMPLOYEE RETENTION PLAN (KERP)

[99] The Petitioners seek approval of a KERP and the granting of a Court ordered KERP charge to a maximum of $342,207 (the "KERP Charge"). They say that the

KERP is for a select group of key employees to incentivize their continued retention, which is necessary if there is to be any viable prospect for the Petitioners to pursue their restructuring strategy.

[100] They propose that the KERP Charge rank directly below the Directors' Charge.

[101] The Court may exercise its discretion under its general statutory jurisdiction under s. 11 of the *CCAA* to approve a KERP and grant a KERP Charge: *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145 at para. 27.

[102] As the Petitioners note, courts across Canada have approved key employee incentive plans in numerous *CCAA* proceedings: for example, *Nortel Networks Corp. (Re)*, [2009] O.J. No. 1044 (Ont. S.C.J.) and *U.S. Steel Canada*.

[103] In *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107, this Court stated:

> [58] Factors to be considered by the court in approving a KERP will vary from case to case, but some factors will generally be present. See for example, *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 (Ont. S.C.J.); and *U.S. Steel Canada* at paras. 28-33.

[104] In *Walter Energy* at para. 59, I discussed the *Grant Forest Products* factors, as follows:

- Is this employee important to the restructuring process?
- Does the employee have specialized knowledge that cannot be easily replaced?
- Will the employee consider other employment options if the KERP is not approved?
- Was the KERP developed through a consultative process involving the Monitor and other professionals?; and
- Does the Monitor support the KERP and a charge?

[105] More recently, in *Aralez Pharmaceuticals Inc. (Re)*, 2018 ONSC 6980 at para. 30, Justice Dunphy stated that three criterion underlie all of the considerations of key employee retention and incentive programs in insolvency proceedings as

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discussed in the relevant case law: arm's length safeguards, necessity and reasonableness of design.

[106] As Mr. Chapman describes, the KERP has been designed to facilitate and encourage the continued participation of select key employees of the Petitioners who are contemplated to either (a) provide necessary services up to the expiry of the stay period (to December 2020); or (b) guide the business through the restructuring and preserve value for stakeholders over the length of the case.

[107] The KERP consists of two independent programs: the Key Management Employee Retention Plan (the "Management KERP") and the Key Technical Employee Retention Plan (the "Technical KERP"). These plans would apply to a small number of employees: five under the Management KERP; two under the Technical KERP. Payments under the Technical KERP are conditional on the proceedings continuing on the date that each payment is to be made and do not amount to a long-term payment commitment if the restructuring fails.

[108] The Petitioners' evidence on this application fully supports an affirmative answer to all of the above questions set out in *Walter Energy*. These employees are important to the restructuring process; the Monitor describes a "knowledge and operational void" if their employment is not further secured in some fashion. Given the nature of the assets in question, I agree that these employees, both management and technical, have specialized knowledge that cannot be easily replaced.

[109] There is no evidence on this application that any of these employees are considering other employment options if the KERP is not approved. However, that lack of evidence is not fatal to approval of the KERP since that very scenario is intended to be avoided by approval of the KERP.

[110] The KERP was developed through a consultative process involving the Monitor. The Monitor supports the KERP and the KERP Charge, noting that without

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securing this "human capital", the ability of the Petitioners to restructure their affairs will be greatly impaired.

[111] The Monitor notes in particular that Mr. Chapman, a PEC employee and general manager of the Pulp Mill, is included in the KERP. The Monitor describes Mr. Chapman as a "key resource" and provides that his continued support is "critical" toward achieving a successful restructuring. Mr. Chapman has been the person providing significant evidence in support of the Petitioners in this proceeding to date, which speaks to that fact.

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[112] No stakeholder opposes this relief. In my view, such relief is appropriate. I approve the KERP and I grant the KERP Charge on the terms sought.

ADMINISTRATION / DIRECTORS' CHARGES

[113] The Petitioners have not sought an increase of the Administration Charge on this application. The Petitioners seek the continuation of the Administration Charge in its previously approved amount (not to exceed $500,000) to secure professional fees and disbursements of the Monitor, counsel to the Monitor and the Petitioners' counsel.

[114] The Petitioners have also determined that they do not require an increase of the Directors' Charge at this time. The Petitioners seek the continuation of the Directors' Charge in its previously approved amount (not to exceed $500,000) to secure the indemnity provided for in the Initial Order.

[115] Again, no opposition arises. In my view, continuing this relief from the Initial Order is appropriate and I grant it.

STAY EXTENSION

[116] The Petitioners seek an extension of the stay to December 31, 2020.

[117] Under s. 11.02(2) of the *CCAA*, the Court has broad jurisdiction to extend a stay of proceedings where the circumstances warrant and for any period the Court considers necessary. Baseline considerations include those set out in s. 11.02(3) of

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the *CCAA*, including confirmation that the debtor is acting with due diligence and in good faith and that the relief sought is appropriate.

[118] The comments of court in *Timminco Limited (Re)*, 2012 ONSC 2515 aptly set out the statutory objectives intended to be achieved by the stay:

> [15] The stay of proceedings is one of the main tools available to achieve the purpose of the CCAA. The stay provides the [debtors] with a degree of time in which to attempt to arrange an acceptable restructuring plan or sale of assets in order to maximize recovery for stakeholders. The court's jurisdiction in granting a stay extends to both preserving the *status quo* and facilitating a restructuring. See *Re Stelco Inc.*, (2005) O.J. No. 1171 (C.A.) at para. 36.

[119] Throughout this proceeding, and to this time, the Monitor confirms its view that the Petitioners have been working in good faith and with due diligence. The Monitor recommends the extension of the stay to December 31, 2020.

[120] It will be more than apparent from the discussion above and the orders I have granted, particularly as to the Interim Financing Facility, that I have concluded that an extension of the stay to December 31, 2020 is appropriate in the circumstances. As discussed above, there is somewhat of a "check" on the proceedings arising from the Monitor's report that will be filed before the end of October 2020.

[121] The stay period to December 2020 will allow the Petitioners to advance their objective of securing a restructuring option for the benefit of the stakeholders. I conclude that they should be afforded the opportunity to do so here.

UNIFOR APPLICATION

[122] Unifor seeks an order authorizing it to represent the current and former union members of the local, including pensioners, retirees, deferred vested participants, and their surviving spouses and dependants, employed or formerly employed by the Petitioners, in these proceedings. Unifor does not seek any court ordered funding to secure its participation or that of Pink Larkin, its counsel.

[123] The Petitioners support this relief and no stakeholder objects.

[124] As with much of the above relief, the Court has jurisdiction to exercise its discretion to grant the order sought under its broad statutory jurisdiction found in s. 11 of the *CCAA*.

[125] In *Canwest Publishing Inc.*, 2010 ONSC 1328, the Court discussed the factors typically considered in granting such relief. Justice Pepall (as she then was) set those out as follows:

> [21] Factors that have been considered by courts in granting these orders include:
>
> - the vulnerability and resources of the group sought to be represented;
> - any benefit to the companies under *CCAA* protection;
> - any social benefit to be derived from representation of the group;
> - the facilitation of the administration of the proceedings and efficiency;
> - the avoidance of a multiplicity of legal retainers;
> - the balance of convenience and whether it is fair and just including to the creditors of the Estate;
> - whether representative counsel has already been appointed for those who have similar interests to the group seeking representation and who is also prepared to act for the group seeking the order; and
> - the position of other stakeholders and the Monitor.

See also *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 61.

[126] I agree that these employees presently have a commonality of interest that is best represented in this proceeding as an entire group. Wanda Skinner is the president of the Unifor local. Ms. Skinner's affidavit #2 sworn July 28, 2020 supports the vulnerability of the unionized employees arising from the disastrous economic consequences to them of losing their jobs and benefits.

[127] Unifor clearly has a relationship with this cohort and is in the best position to advance the entire group's interests, at least at this time. That representation will be a benefit to the Petitioners in advancing this restructuring by facilitating discussions between them. The estate will incur no cost by reason of Unifor's representation, welcome news given the lack of cash resources available to the Petitioners.

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[128] The order sought by Unifor is consistent with the order granted in the Fraser Papers Inc. restructuring: see *Fraser Papers Inc. (Re)*, 2009 CanLII 55115 and 2009 CanLII 63589 (Ont. S.C.J.).

[129] I am satisfied that the terms of the order sought are appropriate, with one exception. In para. 3 of the draft order, Unifor seeks authority to “determine, file, advance or compromise” any claims of its current or former employees. The only change I would make to that provision is to amend it to provide that any compromise proposed to be made by Unifor will be subject to court approval. This will ensure some oversight in respect of any decisions that Unifor seeks to make for the employee group they will represent.

“Fitzpatrick J.”

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TAB 8

IN THE MATTER OF AN ARBITRATION OF THE
APRIL 17, 2017 POLICY GRIEVANCE CONCERNING THE LAYOFF
OF BARGAINING UNIT EMPLOYEES
PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT (the "CBA")

2018 CanLII 39001 (CA LA)

BETWEEN:

AMALGAMATED TRANSIT UNION, LOCAL 1374
(hereinafter the "Union")

AND:

SASKATCHEWAN TRANSPORTATION COMPANY
(hereinafter the "Employer" or "STC")

BEFORE:	William F.J. Hood, Q.C.
APPEARING FOR THE UNION:	James Fyshe
APPEARING FOR THE EMPLOYER:	Eileen V. Libby, Q.C.
HEARING DATES:	December 7 & 8, 2017 and January 12, 2018 Regina, Saskatchewan

AWARD

I. INTRODUCTION:

1. This arbitration arose due to the closure of the Employer in 2017, and the consequent elimination of bargaining unit employees.

2. The Union alleges that the Employer violated sections 212 and 214 of the *Canada Labour Code,* RSC 1985, c L-2. (the "Code"). These provisions apply to group terminations, and require the Employer to provide 16 weeks' notice of its intention to terminate employees and to establish a joint planning committee. The Union says there was a group termination and the Employer did not provide the required notice, nor did it establish a joint planning committee. The Union seeks damages for these violations, and also requests punitive damages in the amount of $500,000.

3. The Employer says the group termination provisions in the Code do not apply because the Employer did not terminate a group of fifty or more employees within a particular industrial establishment within a period of four weeks, as required by the Code to trigger these obligations.

4. The Employer operated its passenger and freight terminals in Regina, Saskatoon and Prince Albert. The Employer maintains that each these locations is a particular industrial unit. At each location, the number of employees terminated in the four-week period was less than fifty.

5. The Union says that there was one industrial unit not three, and that the Employer carried on one business from three geographical locations. The employees terminated in this business, in the four-week period, were more than required by the Code to trigger the group termination provisions.

6. The primary issue for determination is, were the employees terminated in one "industrial establishment" within the meaning of the Code?

II. FACTS:

A. Agreed Statement of Facts

7. The Union and the Employer submitted an Agreed Statement of Facts which reads as follows:

The Parties and the Grievance

1. Saskatchewan Transportation Company ("STC") is a provincial crown corporation first established by order-in-council in 1946. In 1993 STC was continued as a "CIC Crown Corporation" pursuant to *The Crown Corporations Act, 1993* and Order-in-Council 915/93. Other CIC Crown Corporations include: Saskatchewan Telecommunications, Saskatchewan Power Corporation, Sask-Energy Incorporated, Saskatchewan Water Corporation, Saskatchewan Government Insurance, Saskatchewan Gaming Corporation, Saskatchewan Opportunities Corporation. STC provided passenger and freight services throughout the province of Saskatchewan and also provided charter services beyond the provincial border. As such, STC is within the jurisdiction of federal labour law and subject to the provisions of the *Canada Labour Code.*

2. The Amalgamated Transit Union, Local 1374 is a trade union that is the bargaining agent for unionized employees of STC. The bargaining unit is more specifically defined in an order from the Canada Labour Relations Board (as it then was) attached as Exhibit "A".

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3. The Union and STC are bound by a collective agreement that covers the employees in this bargaining unit with a term commencing January 1st, 2013 and ending December 31st, 2016 (the "CBA"). Collective bargaining is ongoing with respect to the renewal of this agreement and it remains in operation at the present time. The CBA is attached as Exhibit "B".

4. As a result of the provincial government's decision to close STC (detailed below), STC is winding down its operations. With respect to its workforce, STC is in the final stages of eliminating the positions of all employees.

5. The first positions eliminated under the wind-up of STC were 95 in-scope positions on June 1, 2017. Employees in those affected positions worked in or operated buses from STC's Regina, Saskatoon, and Prince Albert terminals.

6. The Union has taken the position in this grievance that the proposed layoff of bargaining unit employees was in contravention of the group termination provisions at sections 212, 214 and following of Division IX of Part III of the *Canada Labour Code* (the "Code"). The grievance is attached as Exhibit "C".

7. STC delivered a Step A reply dated May 8, 2017 and a Step B reply dated June 7, 2017 denying the grievance. These replies are attached as Exhibit "D".

8. STC takes the position that it complied with the CBA in implementing its wind-up, including the obligations relating to closure of the business set out in article 1, section 30 of the CBA. The Union does not dispute that STC provided the Union with notice of an impending technological change under article 1, section 30 of the CBA at least 30 days prior to the date on which the change was to become effective.

9. STC takes the position that the group termination provisions of the *Canada Labour Code* are not applicable to the circumstances of this case.

10. STC did not provide 16 weeks' notice of group termination and did not establish a joint planning committee as referenced in sections 212 and 214 of the Code.

The Closure of STC

11. In the spring of 2017, the Government of Saskatchewan decided that it would not provide further grant funding for STC and that STC's operations would be wound up. That decision was announced to the public on March 22, 2017 in the provincial budget speech. In announcing the decision, the Minister stated that STC would stop accepting new freight shipments on May 19, 2017, and all vehicular services (including passenger service and delivery of remaining freight) would end later that same month, on May 31, 2017. The Government of Saskatchewan's reasons for closing STC were outlined in a news release issued that day which is attached as Exhibit "E". The decision to close STC was formally implemented by an Order-in-Council dated May 3rd, 2017 (OC 197/2017), which is attached as Exhibit "F".

12. The decision to close STC was communicated to employees at the same time it was announced to the public. To facilitate this communication STC suspended services for the afternoon of March 22, 2017. This enabled all employees to attend a meeting which coincided with the budget speech. However, no employees were terminated or given

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notice of termination at that time. STC undertook to communicate further information regarding the implementation of the wind-up to the Union at a later date.

13. As a result of the decision to close STC, and in accordance with directives from the provincial government and CIC, management developed and implemented a plan to wind-up the affairs of STC in an orderly manner. The steps taken included giving notice to terminate contracts with agency contractors providing services at locations other than Regina, Saskatoon, and Prince Albert, notifying charge account customers and terminating contracts with Greyhound relating to inter-line service as well as Greyhound's use of the Regina and Saskatoon terminals. STC surrendered its operating authority certificate to the Highway Traffic Board effective May 31, 2017. STC also developed and implemented plans to gradually reduce STC's workforce as the wind-up proceeded. While it was understood the closure would eventually result in all employees losing their jobs, the wind-up plan necessitated continuing to employ certain employees for some time after the end of vehicular services. These employees were engaged in ongoing tasks which included such duties as:

    a. Preparing STC's fleet of vehicles for sale by performing final maintenance on the vehicles, requiring approximately one month of maintenance work after vehicle service ended;
    b. Operating the Regina and Saskatoon terminals (with reduced hours) to accommodate Greyhound passenger services until September 29, 2017 (in accordance with contractual obligations to Greyhound);
    c. Attempting to collect outstanding accounts receivable;
    d. Inventorying, organizing and preparing other assets for sale;
    e. Organizing its business records and arranging for preservation of portions of those records in accordance with record keeping requirements for crown corporations;
    f. Supporting a transition audit of its financial records as mandated by CIC, which required accounting support; and
    g. Operating the Regina terminal and head office building while the above tasks were carried out; and
    h. Performing accounting, IT, clerical, human resources and other administrative support work to support the above tasks.

14. The staff complement was gradually reduced as their services were no longer required. While implementing the wind-up STC continued to deal with the Union as required by the CBA and the Code. STC has met with the Union for the purpose of bargaining. STC has responded to other legal actions taken by the Union, including an allegation of unfair labour practices filed with the Canadian Industrial Relations Board (a request for request for interim relief was denied on May 5, 2017, the final decision is still pending), and an application for judicial review of the decision to close STC (dismissed by Schwann J. on May 26, 2017, 2017 SKQB 152). STC has also responded to this grievance as well as a dispute filed relating to P&D drivers under their applicable standard business agreements with STC.

Departures of STC Employees

15. The CBA contains provisions in Article 1, Section 30 which relate to closure of a business. Those provisions have existed in substantially the same form in prior collective agreements since January 1, 2001. Excerpts from the January 1, 2001 to December 31, 2003 collective agreement are attached as Exhibit "G".

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16. STC's wind-up of labour and employment resources was a phased approach including layoffs and terminations of employees in affected in-scope and out of scope positions over an extended period. When in-scope positions were to be eliminated, STC provided the Union with a section 30 notice at least 30 days prior to the date of the elimination of the positions in accordance with article 1, section 30 of the CBA. The notice indicated the nature of the change requiring the layoffs, the date the notice was to come into effect, as well as the number, type and classification of employees to be affected by the change.

17. STC's HR department determined which specific employees would be affected based on the provisions of the CBA including employee seniority. Following the provision of the section 30 notice, STC provided the Union with a detailed notice identifying the specific names of employees to be affected, and attaching the form of individual notification to be sent to each employee. The detailed notice was also provided at least 30 days prior to the planned termination date.

18. After the Union was provided notice, STC provided individual notices to affected employees. Employees with at least 12 months of service were offered the choice of electing one of 3 options which had previously been negotiated between STC and the Union, as provided for in article 1, sections 13 and 30 of the CBA. Employees with insufficient seniority were terminated. As prescribed by the CBA, the options provided to employees were:

    a. To bump another employee with less seniority in a position for which the bumping employee was qualified (in this case the bumped employee was provided the same options as if he/she was included in the original notice);

    b. To go on lay-off with recall rights for a period of 12 months (which included payment of some benefits, with severance available at the end of the lay-off period); and

    c. To resign, and voluntarily sever all seniority, service and employment rights in exchange for the immediate payment of enhanced severance benefits beyond those mandated by the Code.

19. The closure of STC also resulted in the elimination of out-of-scope employee positions. Out-of-scope employees were terminated without cause with notice or pay-in-lieu thereof which included the severance mandated by the Code.

20. During this period STC also terminated one in-scope employee for cause.

21. A number of in-scope and out of scope employees chose to resign their positions prior to any lay-off or termination notice becoming effective. STC did not fill the positions of any employees who resigned (if necessary, duties were reassigned to other employees).

22. In effecting the required reductions in staffing through the wind-down process, STC applied the provisions of the CBA for unionized employees and effected applicable payments to unionized and non-unionized employees in accordance with the Code. In doing so, STC also considered the group termination provisions of the Code and sought advice regarding the issue. Upon consideration STC determined that these provisions did not apply because of the logistics of the number of positions required in each of Prince Albert, Saskatoon and Regina through the wind-down period.

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23. The first round of in-scope employees to be affected by STC's closure were laid-off, terminated or resigned effective June 1, 2017. These reductions affected in-scope employees and out-of-scope employees in Regina, Saskatoon and Prince Albert. STC provided the union with a notice pursuant to article 1 section 30 of the collective agreement relating to 98 in-scope employees on April 10, 2017. The notice is attached as Exhibit "H". On May 2, 2017 STC provided the Union with another notice setting out the specific names of affected employees. This notice is attached as exhibit "I".

24. In fact 95 in-scope employees and 3 out-of-scope employees were displaced from their positions on June 1, 2017 (the 3 other in-scope employees listed in the notices voluntarily resigned prior to June 1, 2017).

25. A list of affected employees and where they worked is attached as Exhibit "J" and details:
    - 36 in-scope employees, as well as 3 out-of-scope employees working out of Regina were displaced, totalling 39 employees;
    - 40 in-scope employees working out of Saskatoon were displaced; and
    - 19 in-scope employees were displaced working out of Prince Albert.

26. Summaries of the elections made by unionized employees who were displaced from their positions effective June 1, 2017 are attached as Exhibits "K" (Regina), "L" (Saskatoon), and "M" (Prince Albert). These lists do not include 6 dependent contractors whose standard business agreements were terminated by STC on May 19th, 2017. These contractors are subject to separate standard business agreements and the Union has filed a notice of dispute with respect to the termination of the same which will be adjudicated at a later date.

27. The balance of the positions occupied by in-scope employees were eliminated on a periodic basis in accordance with STC's operational requirements between July 4, 2017 until November 17, 2017. The affected in-scope employees included:

    a. 32 employees on July 4, 2017 (14 employees in Regina and 18 employees in Saskatoon);
    b. 2 employees on September 1, 2017 (both located in Regina);
    c. 30 employees on September 29, 2017 (16 employees in Regina, and 14 employees in Saskatoon);
    d. 7 employees on October 6, 2017 (3 employees in Regina, 4 employees in Saskatoon);
    e. 2 employees on October 13, 2017 (both located in Saskatoon); and
    f. 5 employees on November 17, 2017 (all located in Regina).

28. The wind-up of STC's business is nearly complete. As of the date of the hearing STC's CEO and COO are STC's only remaining employees. All remaining administrative tasks and the disposal of assets are being carried out by CIC.

29. STC has prepared summaries of the manner in which all employees left their employment with STC for any reason from the date the closure of STC was announced on March 22, 2017, up to the date of the hearing. The summaries do not include the 6 dependent contractors who are discussed above at paragraph 26. It is agreed that these summaries accurately report the names, positions, locations of work, dates on which employees ceased to be employed by STC, and the manner in which their employment was ended,

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(STC and the Union disagree on the legal consequences of the manner in which certain employees' employment was ended). Those summaries are attached as the following exhibits:

a. In-scope employees, June 1, 2017 – Exhibit "N";
b. In-scope employees, July 4, 2017 – Exhibit "O";
c. In-scope employees, September 1, 2017 – Exhibit "P";
d. In-scope employees, September 29, 2017 – Exhibit "Q";
e. In-scope employees, October 6, 2017 – Exhibit "R";
f. In-scope employees, October 13, 2017 – Exhibit "S";
g. In-scope employees, November 17, 2017 – Exhibit "T";
h. Out-of-Scope Terminations – Exhibit "U";
i. Other Resignations – Exhibit "V";
j. Dismissals for Cause – Exhibit "W";
k. A calendar summarizing Exhibits "N" through "W" – Exhibit "X".

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Facts and Documents Regarding the Business of STC

30. Prior to May 31, 2017, STC operated a bus service which transported passengers and freight in Saskatchewan. STC serviced 253 communities and service points in the province through a number of routes.

31. STC operated its bus services out of three terminals in Regina, Saskatoon, and Prince Albert. These terminals were owned and operated by STC and served as hubs through which STC traffic passed. STC employed personnel at these locations to operate the terminals, servicing passenger and freight customers. STC also owned a terminal in Moose Jaw however, the Moose Jaw terminal was operated by an agency contractor without using STC employees. Motor coach operators were based out of the Regina Saskatoon and Prince Albert terminals.

32. Attached as Exhibit "Y" is an organization chart for the business operations of STC as of December 31, 2016.

33. STC's annual report (2015-2016) identified five divisions for the purpose of publically reporting on company performance, namely Customer Services and Operations, Corporate Systems and Technology, Finance, Human Resources and Payroll; and Strategic Planning and Communications. None of these divisions is defined on a geographic basis. Attached is the STC annual report for 2015/2016 as Exhibit "Z".

34. STC had developed approximately 130 operations and human resources policies which are corporate wide policies; however, some policies make reference to the individual terminals: Regina, Saskatoon, Prince Albert.

35. STC submits one corporate tax return for its entire operation and has one business number for tax assessment purposes.

36. STC has one WCB account for its entire operation.

37. The parties agree that they may call additional evidence at the arbitration of this grievance.

8. The Grievance filed April 17, 2017, states:

This Grievance is filed against a violation of our Collective Bargaining Agreement, Section(s): Section 7
and/or any other Sections, all pertinent Sections to the Grievance Process, Past Practice, Federal and/or Provincial Laws that may be applicable.

Grievance explained:
The company provided a notice to the union on April 10th, 2017 of its intention to close its operations and lay off our bargaining unit employees. The notice indicated that 98 bargaining unit members would be laid off by June 1st, 2017. An earlier communication directly with our members indicated that operations of the company would begin to be shut down on May 19th, 2017. Section 212 of the Canada Labour Code requires the company to give notice to the Minister of Labour of a layoff of more than 50 employees in a 4 week period. S.214 and following sections require the establishment of a Joint Planning Committee to address the decision of the company to lay off its employees. These sections of the Labour Code have been violated by the company.

Proposed Remedy: Grievant to be made whole with full redress. For example but not limited to:
1 A declaration that the employees shall not be laid off until compliance with these Labour Code provisions has been met by the company. 2 The Alternative compensation for all lost wages and benefits for the period during which the company has failed to comply with the notice provisions. 3 Punitive and exemplary damages in the amount of 500,000. 4 Such other relief as is appropriate in the circumstances.

9. The news release from the Government of Saskatchewan dated March 22, 2017, (Exhibit "E" to the Agreed Statement of Facts) states:

Crown Investments Corporation (CIC) 17-880

GOVERNMENT ENDS SASKATCHEWAN TRANSPORTATION COMPANY (STC) SUBSIDY – BUS COMPANY TO BE WOUND DOWN

Crown Investments Minister Joe Hargrave today announced that operating and capital subsidies to the Saskatchewan Transportation Company (STC) will end in 2017-18, leading to the company being wound down. Freight will continue to be accepted for delivery until May 19, and passenger service will cease May 31, 2017.

"As ridership has declined and costs have increased, STC's subsidy has reached unsustainable levels," Hargrave said. "STC's per passenger subsidy has grown from $25 per passenger 10 years ago to $95 per passenger today.

"Over the next five years, STC is forecasted to require more than $85.0 million in subsidies to continue operating. Our government believes that those funds can be put to better use elsewhere in government."

A number of long-term trends have contributed to the deterioration of the sustainability of STC:

- Canadian intercity bus travel continues to decline – National trends in intercity bus travel continue to impact STC's ability to provide service. Decreased connecting

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schedules in neighbouring provinces, increased vehicle ownership, moderate fuel prices, and increased migration to urban centres have led to a decline in intercity bus travel. (Statistics Canada, The Daily, July 25, 2016)

- Provincial ridership is steadily declining – Only two out of twenty-seven routes in STC's network are profitable. The popularity of intercity bus travel in Saskatchewan peaked thirty-five years ago and has declined by 77 per cent since then.
- Competition with parcel delivery sector – Competition with private sector delivery companies has been a concern. Removing STC from the parcel delivery sector opens up the competitive process for the private sector operators.
- Efforts to limit the growth of the company's subsidies have been exhausted.

Throughout the 1990s, thirteen routes were discontinued and service frequencies were reduced. Beginning in 2012, further frequency reductions and schedule adjustments were implemented on numerous routes and three additional routes were discontinued. Despite these and other efforts, the subsidy continues to grow.

"The decision to wind down STC was not arrived at easily," Hargrave said. "Over the last number of years, our government has made a determined effort to contain the growth of the company's annual subsidy. But based on all the trends, it is clear that ridership will continue to decline, costs will continue to rise and more and more money would go into STC to keep it operating. The $85.0 million that would have been spent on STC's operations over the next five years can be redirected to other priorities."

A total of 224 staff will be impacted by the closure. STC employees will receive fair treatment in accordance with corporate policies.

OPERATIONAL NOTE: To enable STC staff to meet with management regarding the wind-down, operations will be curtailed on March 22-23:

- Beginning at 1 p.m. March 22, various scheduled trips across the network will be suspended for the remainder of the day and into the morning of March 23.
- The Regina, Saskatoon and Prince Albert terminals will remain open.
- Service will resume regular schedules during the afternoon of March 23.

Please check the website at www.stcbus.com, call 1-800-663-7181, or call your local Terminal or Agency for further information on schedules during this period. For specific details and facts, see the attached backgrounder.

For more information, contact:

...

Saskatchewan Transportation Company (STC)
Backgrounder

FACTS

- STC operates 25 routes and contracts two additional routes to a private sector operator.
- STC routes service 253 communities out of 500 urban and northern municipalities, leaving about half of Saskatchewan's municipalities without direct access.

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- Ridership has declined by 35% since 2012, and roughly 77% since 1980.
- Subsidies provided to STC in 2017-18 were expected to cover approximately 50% of the cost of service; revenues cover 50%. That is up from covering 47% of the cost of service in 2016-17 and 38% in 2015-16.
- Subsidies required to support STC operations are forecast to total more than $85M in the next 5 years; subsidies forecasted at $94 per passenger in 2017-18, up from $25 per passenger in 2007.
- Since 2007, $112M has been provided to STC to support operations and capital needs. During this period, additional capital grants were provided to complete the Regina Termination (2007-2008: $20.4M) and refurbish the Regina Garage (2014-2016: $3.4M).
- Removing STC from the parcel delivery sector opens up the competitive opportunities for private sector operators.
- Driving is by far the most popular commuting method.

...

10. The provisions of the CBA referred to in the Agreed Statement of Facts state in part:

SECTION 13 – SENIORITY, LAYOFF AND RECALL

1. Article II contains certain provisions applying to seniority for Operators only. With this one exception, all provisions concerning Seniority, Layoff and Recall are contained in this section.

The seniority of an employee shall be based on cumulative service with the Company system wide as calculated in accordance with Section 13.2 below, subject to the following:

...

c. an employee's service shall be considered broken by reason of:

...

iii. Continuous layoff up to a maximum of one year. After one consecutive year on the recall list, an employee shall receive a severance payment as provided for in the Canada Labour Code, which will mean the employee's service and seniority will be broken.

...

3. a. In the event the Company must reduce staff, employees who have not acquired seniority will be terminated.

If layoffs are still required, employees in redundant positions will be laid off in the reverse order of seniority in their respective classification at the location they are working. Following a notice of layoff, an Employee must indicate their intent to exercise one of the following options within 48 hours, to take effect on the day following the last day of work indicated on the layoff notice:

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i. Displace an employee with less seniority at the same city in the same or another classification, providing the minimum qualifications for the position are met. Part-time employees cannot bump full-time employees.

ii. Displace an employee with less seniority in the bargaining unit in the same or another classification, providing the minimum qualifications for the position are met. Part-time employees cannot bump full-time employees. There will be no relocation funds for those choosing this option.

iii. Go on layoff.

iv. Resign.

b. For those full-time employees bumped as a result of a senior employee displacing them as a result of a layoff, seniority and bumping rights must be exercised at their location and within their classification first. If additional staff is not required in the affected classification, the junior full-time employee in that classification will receive a layoff notice and exercise bumping rights accordingly. Displaced part-time employees will also bump within their own classification first, and the most junior part-time employee in the classification will receive a layoff notice and will be able to bump other part-time employees in the same manner as Section 13.3(a) above.

...

SECTION 30 – TECHNOLOGICAL CHANGE

1. For the purposes of this Agreement, technological change shall mean that a minimum of 5% of the total Company in-scope employees must be affected by:

   a. Introduction by the Company into its work, undertaking or business, of equipment or material of a different nature or kind than that previously utilized by the Company in the operation of its business, work or undertaking;

   b. A change in the manner in which the Company carries on the work, undertaking or business that is directly related to the introduction of that equipment or material, referred to in Subsection 1;

   c. Budgetary downsizing, devolution or contracting out of specific services currently provided by bargaining unit employees, or reorganization of the business;

   d. Closure or sale of the Company as a whole.

   The Company will advise the Union of an impending technological change at least thirty (30) days prior to the date on which such change is to become effective. Such notice will be in writing and will state the nature of the change, the date the proposed change will come into effect, and the number/type/classification of employees to be affected by the change.

   An employee with a minimum of 12 months service who is displaced as a result of technological change will exercise one of his/her options upon layoff as listed in Article I, Section 13.3 of the Agreement.

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> If option 3 (a)(iii) (layoff with recall) is chosen, the employee may remain on the list in accordance with the provisions of Section 13.3 (c)(iii).
>
> If option 3 (a)(iv) (resignation) is chosen or after one year on the recall list the employees [opt] to resign, employees so choosing will receive severance pay of one (1) week per year of service, to a maximum twenty-six (26) weeks. Acceptance of severance will be deemed voluntary resignation and severs all seniority, service and employment rights. If an employee on the recall list is recalled to a permanent position, no severance will be payable unless that option is chosen under the terms of subsequent layoff designated as a technological change.
>
> Reduced service/product that is season in nature resulting in temporary reductions in the workforce and incidental layoffs as a result of lack of work are not subject to the terms of this article and will only be subjected to the amount of notice and/or severance as contemplated under the Canada Labour Code. The Company will endeavor to assist, through information share with appropriate agencies, with efforts at securing relocation assistance for those employees displaced as a result of technological change.
>
> This Article will mean Sections 50, 52 and 53 and any other provisions of the Canada Labour Code addressing procedures for technological change will not apply.

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11. The notice sent by the Employer to the Union on April 10, 2017, providing notice of the elimination of 98 positions (Exhibit "H" to the Agreed Statement of Facts) states:

> The following information is provided to you further to our email communication and discussion with you on March 22, 2017 and our subsequent meeting on March 24, 2017. Although we had an additional meeting scheduled for April 4, 2017, that meeting was deferred at your request. Despite the cancellation of the meeting, I thought it might be helpful to you to have additional specific information at this time and particularly in advance of the general update on the wind-down process which I indicated would be provided on April 13, 2017.
>
> As you know, the Saskatchewan government has announced that all grant funding will cease for STC, necessitating a wind down of operations this fiscal year. Furthermore, STC has been issued a legal directive to case operating vehicles for the purpose of transporting passengers or freight. That directive is effective May 31, 2017, at which time STC will surrender its operating authority certificate to the Highway Traffic Board. STC has contractual obligations beyond May 31, 2017 with Greyhound that require STC to keep its main terminals open for a period of time after that date.
>
> As a result of these operational requirements, there will necessarily be a phased approach that is taken with regard to staff layoffs and terminations, affecting positions that are within the scope of the CBA, as well as out-of-scope positions.
>
> In accordance with Section 30 of the CBA, STC is hereby providing you with notice of an impending technological change. Although the wind down will not be fully implemented by May 31, 2017, Section 30 permits at least 30 days' notice prior to the date on which such change is to become effective.
>
> The nature of the initial change results from the operational directive to wind-down the organization, and more specifically, to cease transporting passengers and freight on May 31,

2017. As such, on June 1, 2017, STC will have redundant positions in three industrial establishments (Regina, Saskatoon and Prince Albert) in the specific number, type and classification outlined below.

Regina

26	Operator (Regular and Spareboard)
5	Express Service Attendant 1
1	Express Service Attendant 2
2	Passenger Service Attendant
2	Custodian
2	Coach Cleaner
1	Service Attendant

Saskatoon

19	Operator (Regular and Spareboard)
8	Express Service Attendant 1
3	Passenger Service Attendant
2	Custodian
2	Mechanic 1
1	Welder
2	Mechanic 2
2	Coach Cleaner
1	Service Attendant/Coach Cleaner

Prince Albert

9	Operator (Regular and Spareboard)
1	Customer Service Coordinator
2	Passenger Service Attendant
5	Express Service Attendant 1
1	Express Reporting Clerk
1	Custodian

Staff affected by the elimination of these positions, effective at the end of the business day on June 1, 2017, will shortly receive notices and in the result entitled to the elections under Section 13 and 30 of the CBA.

STC will provide you with a copy of the form of notice and the specific names to whom the notices will be provided in advance of providing the same to the affected employee. We will also communicate with you in advance of the next phase of proposed position eliminations that affect members of your bargaining unit.

12. Thirty-nine positions were eliminated in Regina, forty in Saskatoon and nineteen in Regina.

13. On May 2, 2017, the Employer provided the Union with notice of the specific names of the employees affected by the termination/layoff (Exhibit "I" to the Agreed Statement of Facts). The letter from the Employer to the Union states:

As a follow up to my letter dated April 10, 2017 providing notice of an impending technological change under Section 30 of the collective agreement, please find attached the

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list of names who are in affected positions and who are being issued notices of layoff/termination which are effective at the end of the business day on June 1, 2017. In addition, please find attached a copy of the form of the notices being issued.

14. The form of the notice issued to the affected employees not on probation or disability, and with sufficient seniority states:

> This letter is provided further to our communications of March 22 and April 13, 2017.
>
> As you know, the Saskatchewan government has announced that all grant funding will cease for STC, necessitating a wind-down of operations this fiscal year. Furthermore, STC has been issued a legal directive to cease operating vehicles for the purpose of transporting passengers or freight. That directive is effective May 31, 2017, at which time STC will surrender its operating authority certificate to the Highway Traffic Board. STC has contractual obligations beyond May 31, 2017 with Greyhound that require STC to keep its main terminals open for a period of time after that date.
>
> As a result of these operational requirements, there will necessarily be a phased approach that is taken with regard to staff layoffs and terminations, affecting positions that are within the scope of the CBA, as well as out-of-scope positions.
>
> In accordance with Section 30 of the CBA, STC provided notice of an impending technological change. Although the wind-down will not be fully implemented by May 31, 2017, Section 30 permits at least 30 days' notice prior to the date on which such a change is to become effective. STC provided the Section 30 notice to the ATU on April 10, 2017.
>
> The nature of the initial change results from the operational directive to wind-down the organization, and more specifically, to cease transporting passengers and freight on May 31, 2017. As such, on June 1, 2017, STC will have redundant positions in the industrial establishment in which you work.
>
> As a result of the wind-down of STC, this letter is to advise you that your current position in your industrial establishment has been deemed redundant and will be eliminated. As such, this letter is your official notice of layoff, pursuant to Section 30 and 13 of the STC/ATU Collective Bargaining Agreement (CBA), effective June 1, 2017 midnight. As per the CBA you will have the following options:
>
> 1. Exercise your seniority rights in accordance with Section 13 of the CBA.
>
> 2. Accept layoff and be placed on a recall list. While on the recall list, you will be notified of any openings in the classification in the location from which you were laid off, providing minimum qualifications are met. You may bid on any other posted positions; it is your responsibility to obtain the information.
>
>   As per Section 13 of the Collective Bargaining Agreement, you shall retain recall rights for a maximum of one (1) year.
>
> 3. Resign and receive severance pay of one (1) week per year of service, to a maximum of twenty-six (26) weeks, as per Section 30 of the CBA.

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In considering whether you wish to exercise your seniority rights under option 1 above, we enclose a list of positions in <Division> that will still exist after June 1, 2017 for some period of time during the wind-down period. For any position, minimum qualifications must be met. We also attach a sheet outlining how benefits will be affected in the event that you elect option 2 or 3.

In accordance with Section 13, you have forty-eight (48) hours to choose an option. Therefore, the attached form must be submitted to me by **5:30 p.m. on May 4, 2017**. If you do not inform me of a decision by that date and time, you will be deemed to have terminated your employment in accordance with the CBA.

If you have any questions, please do not hesitate to call Lavina Rieger at (306) 787-7880.

Thank you for your contribution to the people of Saskatchewan and STC.

[Emphasis in original]

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15. The summary of the elections made by the bargaining unit employees (Exhibits "K", "L", "M" and "N" to the Agreed Statement of Facts) is as follows:

	Layoff with Recall	Resign	Insufficient Seniority
Regina	14	17	5
Saskatoon	17	18	5
Prince Albert	5	13	1

16. The organization chart for the business operations of the Employer as of December 31, 2016 (Exhibit "Y" to the Agreed Statement of Facts) consist of charts for Corporate Structure, Executive Management, Human Resources, Strategic Planning & Communications, Corporate Systems & Technology, Finance Department, Customer Services & Operations Management, Operations Regina, Operations Saskatoon, Operations Prince Albert, and Maintenance Department.

17. The Corporate Structure chart indicates the CIC Board of Directors at the top, with the Saskatchewan Transportation Company Board of Directors below.

18. The Executive Management chart has at the top, Shawn Grice, President & CEO. Below Mr. Grice are Dean Madsen, Chief Operating Officer; Candace Caswell, Executive Director, Strategic Planning & Communications; Brian Roulston, Executive Director, Corporate Systems &

Technology; Lavina Rieger, Acting Executive Director, Human Resources & Payroll, and Michelle Maystrowich, Chief Financial Officer. The Executive Management, through Mr. Grice, reports to the Board of Directors of STC.

19. The Human Resources chart sets out four positions below Lavina Rieger that report to her.

20. The Strategic Planning & Communications chart identifies two positions, one of which was vacant, that report to Candace Caswell.

21. The Corporate Systems & Technology chart identifies the positions that report to Brian Roulston.

22. The Finance Department chart identifies the five positions that report to Michelle Maystrowich.

23. The Customer Service & Operations Management charts identifies the positions that report to Dean Madsen. The positions are Warren Fullerton, Director, Maintenance; Robert Bailey, Director, Business Development; Chad Demyen, Building Manager; Sean Graham, Manager, Customer Services & Operations, South; and Wayne Piper, Manager, Customer Services & Operations, North.

24. The Operations – Regina chart sets out the positions reporting to Sean Graham in Regina. The Operations – Saskatoon chart sets out the positions reporting to Wayne Piper in Saskatoon. The Operations – Prince Albert reports to Wayne Piper in Saskatoon.

25. The Maintenances Department chart identifies that the Maintenance Coordinator in Saskatoon and Regina report through to Warren Fullerton.

26. The Employer's annual report (2015-2016) (Exhibit "Z" to the Agreed Statement of Facts) speaks to the financial performance of the Company as a whole without breaking any of the financial or other information contained into Regina, Saskatoon, or Prince Albert. The report speaks to "STC's customers", "STC's team of professionals", STC having a workforce that is "representative of Saskatchewan's general population" and STC having the "bulk of the intercity bus passenger business in Saskatchewan."

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B. Evidence of Witnesses

27. Both the Union and the Employer supplemented the Agreed Statement of Facts with the evidence from witnesses.

28. Eric Carr served as the President and Business Agent of the Union at the time of the closure of STC.

29. Mr. Carr, the sole witness for the Union, confirmed all employees of the Employer (except out-of-scope employees) were members of the Union and that there was one CBA for such employees.

30. He referred to the seniority provisions in Section 13 of the CBA and said there is one system-wide seniority list for all employees. There is one wage classification, one rate schedule, one defined contribution pension plan, and one set of personnel policies.

31. He explained the bidding and bumping practices. An employee can bid wherever he wants to. In a layoff, the employee first bumps in the terminal in his or her area. If there is no position there to bump into, the employee can bump system-wide. Mr. Carr said most employees want to stay in their area, but do not have to.

32. He referred to the vacancies and promotions provisions in Section 14 of the CBA and confirmed that when jobs are posted they are posted universally system-wide.

33. Article VI of the CBA provides for Joint Labour Management Committees. Mr. Carr said there is one Joint Labour/Management Committee, one Joint Harassment Committee and one Joint Employment Equity Committee (respectively Section 62, 63 and 64 of the CBA).

34. Mr. Carr said in his five years as President and Business Agent, the only personnel he dealt with were from Human Resources in Regina until recently.

35. Mr. Carr testified that the March 22, 2017 public announcement was the first time the Union learned of the decision to close STC. He also said he had heard no one talk about the phrase "industrial establishment" before this situation arose. The first mention of "industrial establishment' was in the letter of April 10, 2017, from the Employer to the Union.

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36. The Union sent a letter to the Employer through its counsel on March 23, 2017, conveying its position that, among other complaints, the Employer was failing to fulfill its obligations under the Code. The letter states:

> I am the solicitor for Amalgamated Transit Union, Local 1374.
>
> Yesterday, Local 1374 was advised for the first time that Saskatchewan Transportation Company is ceasing its operations. In spite of several requests for details regarding this decision, they have not been provided and the union has been left in the dark, placing it in an extremely difficult position when dealing with its distressed membership.
>
> Saskatchewan Transportation sent a package to the bargaining unit employees directly (bypassing the Union) advising these employees of its decision to cease operations, providing details on the timetable for implementation of this decision and cautioning them on certain company policies that may affect their freedom of expression.
>
> It is of particular concern to the Union that these events occurred during the negotiation of a renewal collective agreement and after the delivery of a threatening letter from the Saskatchewan Minister of Finance to the Union regarding positions that might be taken in collective bargaining. It is inconceivable that such a decision could be made without lengthy prior discussions and analysis, yet no mention of this plan was made in collective bargaining.
>
> I have advised my client that these actions by your company are in violation of numerous provisions of the *Canada Labour Code*, including the obligation to respect the position of my client as the bargaining agent for non-management employees, not to demonstrate an anti-union animus and to bargain in bad faith.
>
> Finally, Saskatchewan Transportation has failed to respect its obligations under the *Canada Labour Code* to give proper notice of its decision to cease operations and to establish a joint planning committee to address the profound issues which arise from it.
>
> I have been instructed to commence legal action as soon as possible seeking relief from the Canada Industrial Relations Board with respect to the unlawful conduct of the Company. As a courtesy, we are putting you on notice of this intended legal proceeding. We expect that you will not be involved in continued violations of the act pending the outcome of the CIRB proceedings.

37. Mr. Carr said the Union held multiple meetings with employees and despite its requests for consultation with the Employer, it received no response to the March 23, 2017 letter or the Union's multiple phone calls to Ms. Anaquod, the acting HR person at the time.

38. When the closure was announced, the Union and the Employer had begun the bargaining process for the CBA that expired on December 31, 2016. As part of this process, the Union and the Employer were scheduled to and met in Regina on April 18 and 19, 2017. From the Union's perspective, this was a chance to discuss the looming closure. The Union brought an "all concerns

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list" to the bargaining table. Mr. Carr testified that it was a strange meeting because the Employer came to the meeting to discuss changes to the CBA. The Employer tabled proposals for changes to the CBA. These proposals included changes to sections in the CBA regarding the probationary period and the rights of new employees.

39. Mr. Carr was taken aback when the Employer wanted to talk about probationary employees. He testified it does not matter if the probationary period is extended when all the employees were losing their job.

40. The Union presented no proposals regarding the bargaining of the new CBA. The Union only wished to talk about employee concerns relating to the closure.

41. The Union presented multiple questions and proposals regarding the closure. Mr. Carr wanted to discuss the relocation of the employees to other crown corporations or to the other corporations operating bus routes, and providing the employees with letters of reference.

42. The Employer said closure was a separate process and refused to discuss or answer questions relating to the closure at the meeting. The Employer took the Union's issues away and told Mr. Carr someone would get back to him.

43. Mr. Carr reported the meeting to the Union membership by letter on April 20, 2017 as follows:

> Your bargaining committee met with the representatives of STC to negotiate terms regarding the closure of the business on April 18th 19 2017.
>
> The first meeting took place the afternoon of April 18th. At this meeting the company presented a number of proposed changes to the collective agreement that had nothing to do with the close of operations. Even though it was perfectly clear that operations would begin closing permanently in May 2017, the company put forward proposals regarding matters such as the hiring of new employees and the probationary period. It was apparent that the company had no intention to address any issue regarding closure of the business and was not bargaining in good faith.
>
> We put forth the following proposals and questions.
>
> 1. What are the plans for the sale of the business, and the sale of assets and runs, we informed them we still have bargaining rights.
> 2. Employees have recall rights for 1 year after termination, if severance is not taken for that one year period what is the process to hold the severance.

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3. Can the severance go to your pensions.
4. Members on LTD, WCB what's their status after May 31st.
5. Sick days not used will you pay them out (They replied NO)
6. Letter of service along with service awards
7. Will training be provided to move into other vocations
8. Jobs remaining after May 31st how many and who, we asked if they are aware of the bumping process in the CBA section 13.

We also specified sections of the CBA we wanted to negotiate section 30 enhancing the 1 week of severance for example as we believe proper notice was not given. Section 19 sick leave pay out of unused sick days and section 21 benefits extending for 6 months after closure.

The company indicated that it needed time to consider the items raised and requested we adjourn until the morning of April 19th, 2017.

We met with the company on the following morning. The company rejected out of hand or proposals or alternatives for the closure of the business. The company provided no counter proposals or alternatives. In addition, their bargaining committee indicated that they were not prepared to respond to any of the questions we raised on the previous day, simply stating they would get back to us at some future time.

We asked if their negotiating team had any authority to make decisions on issues raised in bargaining, they refused to answer.

I suggest all follow the CBA to the word review section 19 carefully and follow accordingly.

Your committee expressed its profound frustration with the lack of cooperation and the refusal to provide more information which the membership was anxious to receive. The company was indifferent to our frustration and did not respond further.

It's clear to your committee that the company has no interest in real negotiations to assist the employees with the problems that will arise from the closure of STC. It is also clear the company will do nothing in this regard unless they are forced to do so by a 3rd party.

The union will have no alternative but to proceed with court action that is available to protect the interests of its members.

44. Mr. Carr acknowledged that the Employer answered some of the Union's questions after this meeting. The Union wanted an in-person meeting to discuss outstanding questions and issues, but this did not take place.

45. Mr. Carr explained that suspending severance pay while respecting recall rights would assist employees who had ongoing grievances or were affected by court challenges; if severance was suspended for a year, then the employee would be eligible for unemployment insurance benefits in the meantime.

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46. In cross-examination, Mr. Carr confirmed there is no issue in this grievance in regards to section 30 of the CBA. The Union accepts that the April 10, 2017 letter is proper notice under section 30. The Union accepts for this grievance that the April 10, 2017 letter contributes to the notice requirement contemplated by section 212 of the Code.

47. Mr. Carr acknowledged the Union had a sub-local chairperson for each location. He also acknowledged job postings, shift bidding, and vacation bidding and allocation are location-specific.

48. Lavina Rieger worked for the Employer from 1986 until her resignation on October 31, 2017. She was the Acting Executive Director, Human Resources and Payroll and in Regina at the time of the closure of STC.

49. Ms. Rieger said the provisions of the Collective Agreement and the Code were considered during the closure process. She said the Employer received advice that the group termination provisions did not apply because the Employer was terminating the employment of less than 50 employees at each location.

50. Ms. Rieger testified the Employer received an inquiry from Federal Labour Standards about the closure. The Employer provided this person with the information and explained that less than 50 employees were to be terminated in each location. Ms. Rieger said the Employer never heard from Federal Labour Standards after this information was provided. In cross-examination, she did not know if the Employer followed up with Federal Labour Standards.

51. Ms. Rieger was present at the meeting with the Union on April 18 and 19, 2017. She confirmed the Union had asked questions about the closure, but said the Union did not put to the Employer in that meeting the proposals referred to in the April 20, 2017 letter to the Union membership. She confirmed the Employer's position was that it was there to negotiate the Collective Agreement and not to discuss the closure. Closure was a separate issue.

52. The Employer responded to the questions in writing following the meeting.

53. Ms. Rieger explained that she resigned from the Employer and moved to another Crown Corporation in Saskatchewan where she commenced employment on November 1, 2017.

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54. In cross-examination, Ms. Rieger acknowledged the first time she had come across the phrase "industrial establishment" was when dealing with lay-offs in the closure. It was pointed out to Ms. Rieger that the phrase "industrial establishment" was suddenly used by the Employer after the March 23, 2017 letter from Union counsel. She could not explain why that happened.

55. In cross-examination, Ms. Rieger said she saw the group termination provisions in the Code, but decided it did not apply because less than 50 employees were terminated in one location and the 95 employees terminated were in three different locations.

56. It was put to Ms. Rieger in cross-examination that STC operated as "one integrated entity". She agreed, and answered "yes".

57. Ms. Rieger agreed that the laid-off employees could bump an employee working at a different terminal if a position was not available in their home terminal. She explained that the focus is on the employee's home location and it was very rare that an employee would go to a different location.

58. Mr. Madsen is the Chief Operating Officer of the Employer and when he testified, he was one of two employees still working. He worked for the Employer since 1988.

59. Mr. Madsen referred to the organization chart for the business operations of STC in the Agreed Statement of Facts. He said the organizational structure reflected functions of work. The five divisions for the functions of work (customer services and operations, strategic planning and communications, human resources, corporate systems and technology, and finance) were centralized in Regina. The five divisions operated under, and reported to, the President and Chief Executive Officer of the Employer.

60. The STC annual report referred to in the Agreed Statement of Facts talks about the agency in Moose Jaw. Mr. Madsen clarified this location is not operated by STC. STC owns the building and has contracted with an agency to run the business operations in Moose Jaw. Mr. Madsen said STC had 170 agency relationships. STC does not have employees in Moose Jaw. No STC buses terminated or started their route in Moose Jaw.

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61. Mr. Madsen referred to Saskatoon, Regina and Prince Albert as districts. He described the districts as an operation in a building with a number of employees. He disagreed that STC was one operation with three terminals. He maintained it was three districts that each have designated employees, and every district is unique.

62. Prince Albert used to have a manager. The position was removed. The manager in Saskatoon manages Saskatoon and Prince Albert. Mr. Madsen said there was a very capable coordinator in Prince Albert who looked after the day-to-day matters.

63. There is no maintenance function at Prince Albert. There is a Maintenance Coordinator in Saskatoon and Regina, but none in Prince Albert. The maintenance work is performed in Saskatoon and Regina for all the buses.

64. Mr. Madsen explained the financial statements were reported on a corporate-wide basis. He said the financial reporting is on a one entity level.

65. He said operating budgets are prepared for each location. The managers in Regina and Saskatoon proposed a budget for their respective locations to Mr. Madsen for his review and approval. The full budget for STC is prepared and presented by Mr. Madsen to the STC Board for approval.

66. In the 2015-16 Annual Report there is a discussion of Divisions of STC. The discussion shows the functions of work (customer services and operations, strategic planning and communications, human resources, corporate systems and technology, and finance). There is no discussion of the locations under Divisions.

67. Mr. Madsen said the local managers are required to comply with 130 or so operations and human resource policies referred to in the Agreed Statement of Facts. Personnel policies are system-wide. Mr. Madsen emphasized that each location manager hires and fires employees on their own, but acknowledged the centralized human resources division would have input and guidance.

68. Mr. Madsen testified that each location has their own practices for bidding holidays and shifts. He explained each district has Regular and Spareboard Operators (Section 32 CBA).

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Spareboard Operators are assigned to fill in for Regular Operators who are off in the same district. If there are not enough Spareboard Operators in the district to fill in, the Employer will look to Spareboard Operators in other districts to fill in.

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69. Employees are identified as working at specific locations in all employee payroll records. Records of employment are issued out of Regina.

70. Finance creates the general ledger for the financial line items. The managers located in the locations do not have anything to do with this.

71. Mr. Madsen stated the Employer had no ability to place either in-scope or out-of-scope employees in other Crown Corporations.

72. In cross-examination, Mr. Madsen acknowledged STC's mandate was to provide bus service in and to places, but not all places, in Saskatchewan. The manager can adjust schedules, but cannot remove a bus route or implement a schedule. Mr. Madsen said the bus schedules and routes were approved by the provincial cabinet.

73. Mr. Madsen was questioned as to whether the Employer made the lay-off decisions with the group termination provisions in mind. Mr. Madsen denied that this was true and stated his focus was on the operational needs of the Employer. He was aware of the Code. The Employer sought legal advice concerning compliance with the Code during the closure process.

74. In cross-examination, Mr. Madsen was challenged on his choice of words in calling the three locations "districts." Mr. Madsen acknowledged the Organization Chart did not refer to the operations as districts. The reference was by City. It was put to Mr. Madsen that the Annual Report did not reference districts, but rather terminals. He did not know.

75. Mr. Madsen agreed that STC was held out to the public as operating the business out of different terminals. He said he does not look at it that way.

C. Legislation

76. There are several statutes and regulations relevant to the issues.

77. Sections 212 and 214 are found within Part III Division IX (Group Termination of Employment) of the Code, and state as follows:

Notice of group termination

212(1) Any employer who terminates, either simultaneously or within any period not exceeding four weeks, the employment of a group of fifty or more employees employed by the employer within a particular industrial establishment, or of such lesser number of employees as prescribed by regulations applicable to the employer made under paragraph 227(b), shall, in addition to any notice required to be given under section 230, give notice to the Minister, in writing, of his intention to so terminate at least sixteen weeks before the date of termination of the employment of the employee in the group whose employment is first to be terminated.

Copies of notice

(2) A copy of any notice given to the Minister under subsection (1) shall be given immediately by the employer to the Minister of Employment and Social Development and the Canada Employment Insurance Commission and any trade union representing a redundant employee, and where any redundant employee is not represented by a trade union, a copy of that notice shall be given to the employee or immediately posted by the employer in a conspicuous place within the industrial establishment in which that employee is employed.

Contents of notice

(3) A notice referred to in subsection (1) shall set out

- (a) the date or dates on which the employer intends to terminate the employment of any one or more employees;
- (b) the estimated number of employees in each occupational classification whose employment will be terminated; and
- (c) such other information as is prescribed by the regulations.

Where employer deemed to terminate employment

(4) Except where otherwise prescribed by regulation, an employer shall, for the purposes of this Division, be deemed to have terminated the employment of an employee where the employer lays off that employee.

...

Establishment of joint planning committee

214 (1) An employer who gives notice to the Minister under section 212 shall forthwith thereafter establish a joint planning committee consisting of such number of members as is required or permitted by this section and sections 215 and 217.

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Minimum number of members

(2) A joint planning committee established under subsection (1) shall consist of at least four members.

Appointment of members

(3) At least half of the members of a joint planning committee shall be appointed, in accordance with subsections 215(1), (2) and (3), as representatives of the redundant employees and the rest of the members shall be appointed, in accordance with subsection 215(5), as representatives of the employer.

78. Section 166 of the Code defines "industrial establishment":

industrial establishment means any federal work, undertaking or business and includes such branch, section or other division of a federal work, undertaking or business as is designated as an industrial establishment by regulations made under paragraph 264(b);

79. Paragraph 264(b) of the Code provides for the creation of regulations:

Regulations

264 The Governor in Council may make regulations for carrying out the purposes of this Part and, without restricting the generality of the foregoing, may make regulations

...

(b) designating any branch, section or other division of any federal work, undertaking or business as an industrial establishment for the purposes of this Part or any Division thereof;

80. Sections 223 and 224 of the Code state as follows:

223 (1) Where all members of a joint planning committee who are representatives of the redundant employees agree to do so or where all members of a joint planning committee who are representatives of the employer agree to do so, those members may, after six weeks from the date of the notice to the Minister under section 212, apply jointly to the Minister for the appointment of an arbitrator if

(a) the committee has not then completed developing an adjustment program; or

(b) the committee has completed developing an adjustment program, but those members are not satisfied with the program or any part of the program.

(2) An application under subsection (1) shall be in writing and signed by the members making the application and shall set out the matters, if any, in dispute respecting the adjustment program.

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224 (1) The Minister may, on application under subsection 223(1), appoint an arbitrator to assist the joint planning committee in the development of an adjustment program and to resolve any matters in dispute respecting the adjustment program.

(2) Where an arbitrator is appointed under subsection (1), the Minister shall forthwith

(a) notify, in writing, the joint planning committee of the decision to appoint an arbitrator and of the name of the arbitrator; and

(b) if the application under subsection 223(1) sets out matters in dispute respecting an adjustment program, send to the arbitrator and to the joint planning committee a statement setting out any matters in dispute respecting the adjustment program that the arbitrator is to resolve.

(3) A statement referred to in subsection (2) shall be restricted to such of those matters set out in the application under subsection 223(1) as the Minister deems appropriate and as are normally the subject-matter of collective agreement in relation to termination of employment.

(4) An arbitrator shall assist the joint planning committee in the development of an adjustment program and the arbitrator, if sent a statement pursuant to subsection (2), shall, within four weeks after receiving the statement or such longer period as the Minister may specify,

(a) consider the matters set out in the statement;

(b) render a decision thereon; and

(c) send a copy of the decision with the reasons therefor to the joint planning committee and to the Minister.

(5) An arbitrator may not

(a) review the decision of the employer to terminate the employment of the redundant employees; or

(b) delay the termination of employment of the redundant employees.

(6) In relation to any proceeding before an arbitrator under this section, the arbitrator may

(a) determine the procedure to be followed;

(b) administer oaths and solemn affirmations;

(c) receive and accept such evidence and information on oath, affidavit or otherwise as the arbitrator sees fit, whether or not the evidence is admissible in a court of law;

(d) make such examination of documents containing personal information relating to any redundant employee and such inquiries relating to any redundant employee as the arbitrator deems necessary;

(e) require an employer to post and keep posted in appropriate places any notice that the arbitrator considers necessary to bring to the attention of any redundant employees any matter relating to the proceeding; and

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(f) authorize any person to do anything described in paragraph (b) or (d) that the arbitrator may do and to report to the arbitrator thereon.

81. The *Canada Labour Standards Regulations*, CRC, c 986 (the "CLS Regulations") contain such designations:

> **27** For the purposes of Division IX of the Act, the following are designated as industrial establishments:
>
> (a) all branches, sections and other divisions of federal works, undertakings and businesses that are located in a region established pursuant to paragraph 54(w) of the *Employment Insurance Act*; and
>
> (b) all branches, sections and other divisions listed in Schedule I.

82. Schedule I of the CLS Regulations does not include STC. Paragraph 54(w) of the *Employment Insurance Act*, SC 1996, c 23 (the "EI Act") states:

> **Regulations**
>
> **54** The Commission may, with the approval of the Governor in Council, make regulations
>
> ...
>
> (w) establishing regions appropriate for the purpose of applying this Part and Part VIII and delineating their boundaries based on geographical units established or used by Statistics Canada;

83. The *Employment Insurance Regulations* (the "EI Regulations") provide at section 18:

> **18** (1) The regions described in Schedule I are hereby established for the purposes of Parts I and VIII of the Act.

84. Schedule I of the EI Regulations provides listings of geographic regions for each province and territory in Canada. For Saskatchewan, the following regions are noted:

> **Saskatchewan**
> **9** (1) The region of Regina, consisting of the Census Metropolitan Area of Regina.
>
> (2) The region of Saskatoon, consisting of the Census Metropolitan Area of Saskatoon.
> (3) The region of Southern Saskatchewan, consisting of
>
> (a) the portion of Census Division No. 6 that is not part of the Census Metropolitan Area of Regina;

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(b) the portion of Census Division No. 11 that is not part of the Census Metropolitan Area of Saskatoon;
(c) the portion of Census Division No. 12 that is not part of the Census Metropolitan Area of Saskatoon and not part of the Census Agglomeration of North Battleford; and
(d) Census Division Nos. 1 to 5, 7 to 10 and 13.

(4) The region of Northern Saskatchewan, consisting of
(a) the portion of Census Division No. 12 that is part of the Census Agglomeration of North Battleford; and
(b) Census Division Nos. 14 to 18.

III. THE ISSUES:

85. The Employer has framed the issues as:

(a) Did STC violate the provisions of the Collective Agreement while eliminating in-scope positions?

(b) Did STC violate sections 212 or 214 of the Code?

(c) In the alternative that the grievance is allowed, what is the appropriate remedy?

86. The Employer has addressed the issue as to whether it violated section 30(1) of the CBA. The Union conceded that STC notified the Union of its intention to close at least 30 days prior to May 31, 2017. During the opening statement, counsel for the Union said there is no dispute with section 30(1). Paragraph 8 of the Agreed Statement of Facts is further clarification of this position.

87. The issue of whether STC violated the CBA is still a live issue, but it is subsumed in the second issue referred to by the Employer.

88. The substantive rights of employment-related statutes are implicit in the CBA. The Code is an employment-related statute. In *Parry Sound (District) Social Services Administration Board v O.P.S.E.U., Local 324*, [2003] 2 SCR 157, Iacobucci J., writing on behalf of the majority of the Court, stated at para 23:

> For the reasons that follow, it is my conclusion that the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction. Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the workforce are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes.

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and at para 28:

> As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.

89. The issues are therefore as follows:

(a) Did the Employer operate one "industrial establishment" within the meaning of the Code?

(b) If so, did STC violate sections 212 or 214 of the Code?

(c) If so, how should such damages be calculated, and what are the damages?

(d) Are punitive damages appropriate?

IV. POSITIONS OF THE PARTIES, LAW AND ARBITRAL JURISPRUDENCE:

A. Argument

.1 Union's Argument

90. The Union argues that the Employer had one "industrial establishment" and therefore the group termination obligations under the Code were triggered because more than 50 employees were terminated within a four-week period.

91. The Union accepts the termination date of the employees in the group for the purpose of this grievance is June 1, 2017. The Union also accepts the notice to these employees, for the purposes of the Code, is the letter from the Employer to the Union dated April 10, 2017.

92. The Code requires the notice be provided at least sixteen weeks before the date of termination. The Union submits the April 10, 2017 notice is short, and a violation of section 212 of the Code.

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93. The Union submits the Employer was required, under section 214 of the Code, to "forthwith", upon giving the April 10, 2107 notice, establish the joint planning committee with representatives of the employees and the Employer. The Union submits the Employer, in violation of the Code, took no steps to and did not set up this committee.

94. The Union submits that on June 1, 2017, 39 employees (including 3 out-of-scope employees) lost their jobs in Regina, 40 employees lost their jobs in Saskatoon, and 19 lost their jobs in Prince Albert. In this four-week period 95 in-scope employees lost their jobs. The Employer takes issue with this, and says that each of Regina, Saskatoon and Prince Albert was its own industrial establishment.

95. There lies the crux of the issue.

96. The Union takes a pragmatic approach in its argument of one "industrial establishment". It looks to how the Employer ran its business and argues the STC business was operated as one integrated unit.

97. The Union relies upon the following facts for its position that the Employer operated one industrial establishment:

(a) one collective agreement applied to all employees;

(b) one seniority regime, with some minor variations for local bidding practices;

(c) one set of personnel policies, with some minor variations for individual terminals;

(d) one wage schedule and wage classification;

(e) common method of operation and one set of core objectives;

(f) one set of working conditions;

(g) the organization is held out to the public as one entity;

(h) one organization chart (with Saskatoon and Prince Albert operating under one manager);

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(i) one senior management team;

(j) divisions were not based on geography or terminals;

(k) the terminals could not operate independently;

(l) the Employer, through Ms. Rieger in her cross-examination, admitted STC operated as one integrated entity;

(m) operations are divided between north and south, not between the main terminals;

(n) the buses were not dedicated to any particular terminal, used all over the system, were fixed in either of the two garages;

(o) the notices from the Government of Saskatchewan refer to the Employer as one company;

(p) the Employer had one financial statement, one tax return, and one WCB account; and

(q) the Employer only first referred to the three terminals as separate industrial establishments in the closure.

98. The Union says I may freely determine this question based on the evidence of how the business was organized and operated, and that my decision is not restricted by the regional designations in the legislation, and in particular, the Saskatchewan geographic regions referred to in the EI Regulations.

99. In *TWU v Telus Inc.*, 101 CLAS 275 (Glasner), telecommunication services were provided from three locations: Calgary, Edmonton and New Westminster. The services were consolidated in New Westminster and the employees in Calgary and Edmonton were terminated over a two-month period. The terminations in each of Calgary and Edmonton were less than 50, but in aggregate were more. If the locations were one industrial unit this would trigger the group termination provisions in the Code. The union argued the employees were performing the same

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kind of work at each location and were working collectively through the internet. Arbitrator Glasner found the group termination provisions did not apply. He stated at paras 26-30:

> 26 Section 27 of the *Canada Labour Standard Regulations* states:
>
> For the purposes of Division IX of the Act, the following are designated as industrial establishments:
>
> (a) all branches, sections and other divisions of federal works, undertakings and businesses that are located in a region established pursuant to paragraph 54(w) of the *Employment Insurance Act;* and
>
> (b) all branches, sections and other divisions listed in Schedule I.
>
> 27 The Employer's counsel informs me that Telus is not listed in Schedule I of the *Regulation* and therefore one must look to Section 54(w) of the *Employment Insurance Act* which states:
>
> > The Commission may, with the approval of the Governor in Council, make regulations.
> >
> > (w) establishing regions appropriate for the purpose of applying this Part and Part VIII and delineating their boundaries based on geographical units established or used by Statistics Canada;
>
> 28 The Union has suggested that by the very nature of the activity by COS employees in working in cyberspace (see *Crown Cork and Seal Canadian Inc.* [1997] OESAD No. 590), the three locations are in fact one location.
>
> 29 In the absence of the statutory authority advanced by the Employer's counsel, the Union's argument would have some merit in these circumstances having regard to the nature of the work performed by COS employees and their daily relationship with other locations.
>
> 30 Accordingly, I accept the Employer's argument that Section 212 of the Code does not apply.

100. The Union argues that the *Telus* decision is distinguishable. There, the three operations operated with a significant degree of independence and were not integrated as is the case with the three terminals of STC.

101. The Union says there is little analysis on the regulatory provisions. It is not a binding authority and I am free to depart from it. The Union submits the decision does not discuss the law with respect to statutory interpretation.

102. With respect to damages for the breach of section 212 of the Code, the Union argues that I should calculate the wage loss for all employees affected by the insufficient notice. It concedes the

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Employer did provide notice on April 10, 2017, as to the number of employees that would be affected. The Union argues the damages are pay in lieu for the insufficient notice. The actual notice was 7 weeks and 3 days. The required notice is at least 16 weeks. The Union claims pay in lieu of notice together with benefits for the 16-week period commencing April 10, 2017, less the 7 weeks and 3 days. In the opening statement the Union said the claim was for 8 weeks and 3 days. By my calculation, it is 8 weeks and 4 days.

103. The parties have agreed to bifurcate the quantum of damages if the grievance is sustained. They have asked that I retain jurisdiction to determine the damages if so ordered.

104. In addition to pay in lieu of notice for the alleged violation under section 212, the Union claims damages for the breach of section 214 of the Code. The Union argues that it lost the opportunity to negotiate with the Employer and the benefits to employees that would have or could have resulted from the joint planning committee process. For example, the Union says the process might have caused delay in the wind-down process, or employees may have been offered the chance to transfer to other crown corporations, or enhanced severance or other benefits might have been negotiated. The Union also submits that it lost its right to arbitrate the joint planning committee process as provided for under sections 223 and 224 of the Code.

105. The Union also requests significant punitive damages against the Employer in the amount of $500,000.

.2 Employer's Argument

106. The Employer submits that the obligations in sections 212 and 214 of the Code are only triggered if certain circumstances exist, and such circumstances do not exist in this case.

107. The Employer submits there are three criteria the must be met before the group termination provisions are applicable.

108. It says the first criteria is that the employment of the employees must be terminated within a four-week period. The parties agree the four-week period applies to the employees in the positions identified in the letter to the Union dated April 10, 2017, that were terminated June 1, 2017. The names of the group of employees terminated were clarified in the May 2, 2017 letter to

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the Union, and in the individual layoff letters of the same date sent to each employee in this group, providing notice of the layoff effective June 1, 2017, midnight. This is the group of the 95 in-scope and 3 out-of-scope employees referred to above that lost their jobs on June 1, 2017.

109. The Employer submits the second criteria is the requirement that the employment of 50 or more employees "employed by the employer within a particular industrial establishment" be terminated by the employer.

110. The Employer argues that it had not one, but three industrial establishments (Regina, Saskatoon and Prince Albert) which reflected both the manner in which the term "industrial establishment" is defined by the regulations, and the actual operation of STC prior to the closure announcement. It submits that STC did not terminate the employment of 50 or more employees with a four-week period from a particular one of these three industrial establishments.

111. The Employer submits that the designated regions contained in the EI Regulations referred to above apply. The designated regions in Saskatchewan are Regina, Saskatoon, Sothern Saskatchewan and Northern Saskatchewan. Prince Albert is located in Northern Saskatchewan. The Employer argues that since the three main terminals existed in three different designated regions, it was deemed to have been operating three separate "industrial establishments".

112. The effect of these regulations is that all branches, sections and other divisions of business located within the listed designated regions are "one industrial establishment" for the purpose of group termination. The Employer argues the converse of this is true. The Employer submits where employees are employed at different industrial establishments in different regions, the number of employees terminated will not be combined when considering if the group termination provisions apply. The particular regional designations in the EI Regulations operate to clarify what constitutes an "industrial establishment" of any given employer.

113. In support of this interpretation, the Employer relies upon the *Telus* decision, *supra*. In that decision, Arbitrator Glasner concluded the provisions of the Code and the Regulations dictated the acceptance of the employer's argument. The Employer submits the approach in the *Telus* decision should be followed.

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114. Further, the Employer submits section 212 of the Code refers to a "particular industrial establishment", which supports that the more particularized regional designations in Schedule I of the EI Regulations should apply.

115. Even if the legislation allows for the conclusion that the Employer had one industrial establishment, the Employer says it was operating three separate industrial establishments in Saskatoon, Regina, and Prince Albert. The Employer relies primarily on the separate geographic locations and physical workplaces of the main terminals for this argument, but also points out the following:

(a) The Collective Agreement provided that recall rights from lay-offs and bidding for vacations and shifts were location specific;

(b) Job postings were location specific;

(c) Employment records referenced the location at which the employee worked;

(d) Two managers supervised motor coach operators and terminal employees for the north district (Saskatoon and Prince Albert) and south district (Regina) operations, both reporting to the Chief Operating Officer;

(e) The two managers were responsible for three separate cost centres (Regina, Saskatoon, and Prince Albert) and budgeting was prepared separately for each location;

(f) Maintenance staff was divided into two facilities at Saskatoon and Regina, who were supervised by separate maintenance coordinators at each location; and

(g) The Union established sub-locals for each location.

116. The Employer submits the third criteria is that the group termination provisions apply to any "employer who terminates" a sufficiently large group of employees. The Employer argues that the employees in the group that resigned after receiving the official notice of layoff were not terminated by the Employer.

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117. The Employer argues the May 2, 2017 letter is not termination. It says the layoff does not take effect until June 1, 2017. It is the latter date that is the date of termination. The Employer says the resignation by employees in that group after May 2, 2017, is voluntary and not a termination by the Employer. It says the employee who voluntarily resigns in such circumstances has chosen to end the employment relationship.

118. The Employer recognizes that one of the options set out in sections 13(3)(a) and 30(1) of the CBA is to resign and receive severance pay. Section 30(1) states in part:

> Acceptance of severance will be deemed voluntary resignation and severs all seniority, service and employment rights.

119. The Employer says the resignation gave up all employment rights and rights under the CBA.

120. The Employer argues that in assessing the applicability of the group termination provisions, the employees who opted to resign after receiving the termination notice in exchange for enhanced severance should not be counted in the group of employees who were terminated on June 1, 2017.

121. With respect to damages in the event the grievance is allowed, the Employer suggests that the remedy must be limited to compensatory damages for proven losses. It says that punitive damages are not appropriate in these circumstances because it acted in good faith throughout the closure process and, in particular, sought legal advice to ensure compliance with the Code's provisions. The interpretation of the Code's provisions regarding group terminations was a reasonable conclusion, given the *Telus* decision. Further, there was no independent actionable wrong and, in any event, no malicious or outrageous conduct that requires censure in the form of punitive damages. The Employer did its best to communicate with the Union regarding the closure. The scheduling was implemented with operational concerns in mind as the company wound down its operations, and not with the intent to avoid the group termination provisions of the Code. Any damages that may be assessed with deterrence in mind would not achieve that purpose because the Employer is no longer operating its business and has no workforce at all.

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122. The Employer is generally onside with the Union for damages for pay in lieu of notice if found applicable. It says any damages for lack of notice is the equivalent of an additional 8.6 weeks of notice for the affected employees.

123. Since compensatory damages must be based on proven losses, the Employer submits that no damages should be awarded for the failure to establish a joint planning committee. It says the Union has the burden to show more than speculation as to the benefit that could have been gained from the planning and consulting process. The Employer suggests the process would have been highly unlikely to provide any value to the employees and therefore damages for this violation should be minimal or even eliminated entirely.

124. In particular, the Employer had no control over the decision to cease operations (it was mandated by government directive), had no motivation to delay the process, had no motivation to agree to enhanced severance or other benefits other than what the employees were entitled to under the CBA in the event the Employer was closed completely, and would not have had any power to arrange employment transfers to other crown corporations.

125. The Employer also submits that the Union did not lose the opportunity to arbitrate such matters if the joint planning committee process yielded unsatisfactory results. In particular, under subsection 224(5) of the Code, the arbitrator's authority would be limited to matters not including the decision to terminate employment or delay the terminations. The Employer says there is simply no convincing evidence that employees would have obtained any benefits at all from the establishment of the joint planning committee.

C. Other Law and Arbitral Jurisprudence

126. This case turns on statutory interpretation. Specifically, the meaning of "industrial establishment" in the Code, and applying the meaning to the facts.

127. In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 SCR 27, 154 DLR (4th), the Supreme Court of Canada rejected an approach to statutory interpretation founded solely on the plain meaning of the words of the provisions in the legislation. Iacobucci J. stated at para 21:

> ... *The Interpretation of Legislation in Canada* (2nd ed. 1991), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He

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recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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

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128. Counsel for the Union referred to *Re Rizzo* as the seminal case on statutory interpretation. Counsel for the Employer referred to the decision as the well-recognized "modern principle" of statutory interpretation. I agree.

129. Counsel for the Union emphasized the object of the provisions in question was for the protection of the employees who were terminated.

130. In *Re Rizzo, supra,* the legislation in question required employers to give their employees a minimum notice of termination based upon the length of service. Iacobucci J. stated at para 25:

> The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.

131. The Employer submits that while the purpose of a statute is one factor in the modern approach to statutory interpretation, it is not the overriding. The Employer agrees the object of the group termination provisions is to provide protection to groups of employees who face termination within a short period of time. The Employer argues that in implementing these protections, Parliament chose a scheme that limited their application to certain circumstances. Each criteria in section 212 of the Code must be met before the group termination provisions have any application.

132. Both parties have referred to *Canada (Human Rights Commission) v Canadian Airlines International Ltd.*, 2006 SCC 1, [2006] 1 SCR 3 [*Canadian Airlines*]. Although this decision is focused on certain provisions of the *Canadian Human Rights Act*, RSC 1985, c H-6, part of the Court's task was to interpret and apply the word "establishment" and, in doing so, the Court

discussed the introduction of the concept of "same establishment" rather than "same employer" in the Code:

> 20 In 1971, in the Act to amend the *Canada Labour (Standards) Code*, S.C. 1970-71-72, c. 50, the 1956 legislation was repealed and replaced by equal pay provisions in the *Canada Labour (Standards) Code*, S.C. 1964-65, c. 38, introducing for the first time the concept of the same establishment, rather than the same employer. The new s. 14a(1) of the Code provided:
>
>> 14a. (1) No employer shall establish or maintain differences in wages between male and female employees, employed in the same industrial establishment, who are performing, under the same or similar working conditions, the same or similar work on jobs [page15] requiring the same or similar skill, effort and responsibility.
>
> Comparisons could only be made within "the same industrial establishment".
>
> 21 In 1977, as part of the package of legislative amendments introducing the *Canadian Human Rights Act*, s. 14a (then s. 38.1) was removed from the *Canada Labour Code*, R.S.C. 1970, c. L-1. The "industrial establishment" limitation was carried forward into the "establishment" limitation in s. 11 of the Act. This amendment meant that pay equity comparators had to be found within each employer and within those sets of functions or activities which were distinct enough to be acknowledged as a separate establishment. As the Minister of Justice, the Honourable S. R. Basford, said at the time:
>
>> We used "establishment" because it has been used in the Labour Code, and there is a body of case law, both of the Labour Relations Act and of the Courts, relating to the use of those words. It was a word that caused some concern among some presenting briefs, in that employers could divide their establishments in order to set up different wage scales in those establishments. Therefore, it was urged that we use the words "same employer" but that creates real difficulties in terms of regional wage scales and regional and geographic factors.
>>
>> (House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 12, May 18, 1977, at pp. 12:19-12:20)
>
> 22 Shortly after, the Commission issued a non-binding interpretation guide limiting "establishment" by geographic boundaries:
>
>> "Establishment" refers to all buildings, works or other installations of an employer's business that are located within the limits of a municipality, a municipal [page16] district, a metropolitan area, a county or the national capital region, which ever is the largest, or such larger geographic limits that may be established by the employer or jointly by the employer and the union.
>>
>> (*Equal Pay for Male and Female Employees Who Are Performing Work of Equal Value -- Interpretation Guide for Section 11 of the Canadian Human Rights Act* (1981), at p. 4)
>
> 23 Under this interpretation guide, until the enactment of the *Equal Wages Guidelines*, 1986, "establishment" in s. 11 of the Act was understood to mean an integrated, geographically coherent business belonging to a specific employer, making the starting point of the establishment analysis under the Act an essentially corporate definition, limited only by geography. That meant that only where an employer's business represented multiple and

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> distinct undertakings, or became geographically diverse, could multiple establishments exist within an employer's business.

133. The Court in *Canadian Airlines* described how the concept evolved over the years from a focus on physical location to one that focuses on whether employees were subject to common personnel and wage policies, regardless of geographical differences:

> 34 While the final language of s. 10 of the Guidelines is somewhat different from the September 1985 proposal, the two earlier proposed drafts, when read with the language ultimately found in s. 10, reflect a consistent intention: all employees subject to the same "common set of personnel and compensation policies, regulations and procedures", "common corporate policy", or "common personnel and wage policy", will be in the same establishment, regardless of whether those employees are subject to different collective agreements and regardless of whether they are in the same geographic location. No longer were geographically diverse businesses immunized from the definitional reach of "establishment" in s. 11 of the Act, if and when a common policy applied to them.
>
> 35 This, therefore, is the key refinement polished by s. 10 of the Guidelines: regardless of regional or geographical differences, or of differences in collective agreements, employees may nonetheless be found to be in the same establishment pursuant to s. 11 of the Act if they are subject to a common wage and personnel policy.

134. The Employer argues that if an "industrial establishment" was intended to refer to the corporate identity of the employer, or the similarity of personal policies, then the regulatory changes to expand the application of pay equity rules were meaningless. Instead, the Employer submits that the phrase "industrial establishment" as used in the Code continues to refer to a geographical coherent workplace, and not the broader organization of an employer.

135. The Union argues that STC has established the geographical limits of its operation as its entire area of service for which it has one set of policies and procedures and one centralized administration. It submits that it is only for all of Saskatchewan that STC operates an integrated geographically coherent business.

V. ANALYSIS:

A. Did the Employer operate one industrial establishment?

136. On a plain reading of *Telus, supra,* the arbitrator found the regional designations in the EI Regulations were conclusive of the issue and the employer was deemed to have been operating

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two "industrial establishments" because the two offices were located in separate designated regions.

137. I take Arbitrator Glasnor comments to mean that it did not matter that evidence presented by the union had merit. He appeared to have accepted, in his brief analysis of the issue, that an employer could not have one "industrial establishment" if the branches or offices in question were located in different designated regions, as identified by statute, for the purposes of applying the group termination provisions.

138. I disagree with Arbitrator Glasnor's conclusion on this point. The plain wording of the definition of "industrial establishment" in section 166 of the Code, and the plain wording of section 27 of the CLS Regulations, do not preclude the Union's argument in this matter. I do not agree that the regional designations referred to in the Code are conclusive of the question before me.

139. For ease of reference, the definition of "industrial establishment" in section 166 of the Code reads as follows:

> ***industrial establishment*** means any federal work, undertaking or business and includes such branch, section or other division of a federal work, undertaking or business as is designated as an industrial establishment by regulations made under paragraph 264(b);
>
> [Emphasis added]

140. The phrase "and includes" obviously means the definition appearing before that phrase is broader than what follows it. The definition states that both a more general federal work, undertaking, or business, as well as a more particular branch, section or other division of a general work, undertaking, or business can be an "industrial establishment".

141. Section 27 of the CLS Regulations provides as follows:

> **27** For the purposes of Division IX of the Act, the following are designated as industrial establishments:
>
> (a) all branches, sections and other divisions of federal works, undertakings and businesses that are located in a region established pursuant to paragraph 54(w) of the *Employment Insurance Act*; and
>
> (b) all branches, sections and other divisions listed in Schedule I.

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142. It is common ground between the parties that the Employer is not listed in Schedule I, and I take subsection 27(a) to mean that if an employer has branches located within a designated region, then such branches located in that region constitute one industrial establishment by default. An employer cannot have more than one industrial establishment within the boundaries of any given region. But, this regulation does not say, and it does not follow, that an employer could not have several branches located in more than one designated region and still be operating one "industrial establishment". To put it another way, it is possible for employers governed by the Code to be characterized as operating one industrial establishment even though its branches happen to be in Regina, Saskatoon, and Prince Albert.

143. If Parliament had intended that the meaning of "industrial establishment" would be determined solely with reference to either Schedule I specifically or the regional designations generally, then section 27 of the CLS Regulations could easily have stated this. Instead, the drafters only stipulated that all branches located within a designated region constitute an industrial establishment. The statute restricts how divided an employer can be. It does not dictate how unified an employer's branches can be across regions.

144. *Telus, supra,* interpreted "industrial establishment" in the Code on the wording of the legislation alone which, for my reasons above, I disagree with. There was no consideration to the object of the provisions in question or the intention of Parliament, nor whether such interpretation was harmonious with the scheme of the Code.

145. The object of the notice requirement is to protect employees terminated on short notice in mass. The Code defines the short notice period and the mass. The notice period is designed to "cushion" the employees against the adverse sudden impact of group termination. The requirement to establish a joint planning committee intertwines with the notice period to provide the employees with an "opportunity to take preparatory measures and seek alternative employment" and develop an adjustment plan to mitigate the consequences of the group termination.

146. To accomplish this objective, the provisions ought to be interpreted in a broad and generous manner unless restricted by the statute. For the reasons set forth above, I do not find section 27 of the CLS Regulations to restrict this objective. We are not dealing with branches within a geographic designation.

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147. Therefore, the question before me is whether the Employer was operating as one industrial establishment or not. The answer requires consideration of the facts and regard to the guidance in the jurisprudence on what constitutes an "industrial establishment".

148. On this question, I have found guidance from *Canadian Airlines, supra.* While I am mindful that the Supreme Court of Canada's remarks were focused on the term "establishment" as used in the *Canadian Human Rights Act* and in the context of a wage equity case, I am of the view this guidance is sound. An employer may be operating more than one industrial establishment and this determination depends upon multiple factors not necessarily limited to geographical differences.

149. The parties were not in disagreement on the main operational features of the Employer's workforce. The Employer has emphasized several local practices existing at the three main terminals, as summarized above, but such differences are rather minor.

150. I am more convinced by the Union's evidence on the similarities at each of the main terminals, and the integration of the business as a whole. The CBA applied to all in-scope employees of the Employer, with very few variations applicable to the local terminals. Personnel policies were company-wide with a few minor local differences. The two Managers and two Maintenance Coordinators reported to the same Chief Operating Officer. Wage classifications and schedules were company-wide. The Employer's organization chart was divided into functional divisions rather than geographic distinctions.

151. In particular, the Employer held itself out as operating and operated one integrated entity, a bus system across Saskatchewan.

152. I have no hesitation in concluding that the Employer was operating one industrial establishment within the meaning of the Code.

153. After receiving the May 2, 2017 letter, many employees elected the option to resign and accept severance. The Employer argues that those who resigned after receiving this notice voluntarily resigned and were not terminated by the Employer.

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154. The May 2, 2017 letter issued to employees advised that their position was deemed redundant and will be eliminated. The positions were eliminated on June 1, 2017. The affected employees were terminated from these positions. Sections 30 and 13 of the CBA provided the affected employees who had sufficient seniority three options. Other employees with insufficient seniority were terminated outright. The employees with sufficient seniority were advised by the Employer that they could bump an employee with less seniority, accept layoff and be placed on a recall list, or resign and receive severance. The employees had 48 hours to advise which option they would choose or would be deemed terminated. The Employer provided two lists of positions that would still exist after June 1, 2017 for some period of time during the wind-down period in the current fiscal year of STC. The lists included various but not all classifications of positions in Regina and Saskatoon. No positions were available in Prince Albert after June 1, 2017. In a practical sense, there was not enough positions available for all affected employees. Nonetheless, employees could elect bump or recall, and whether they received work is another matter. Selecting bump or recall would simply delay the inevitable end result looming for all employees: elimination and termination.

155. The Employers argument also contradicts paragraph 24 of the Agreed Statement of Facts. The agreement is that only 3 in-scope employees voluntarily resigned. The out-of-scope employees were displaced from their positions on June 1, 2017. Displaced is hardly an expression one uses with voluntary.

156. It offends logic to propose those who resigned did so voluntarily. A choice was a fallacy. STC was being wound down. There was no choice that avoided termination in these circumstances. Employees who resigned are to be counted in the termination number.

157. The Employer says those employees who elect to resign and receive severance give up all employment rights. The right to be counted in the termination number is a right under the Code. That right cannot be taken away. In *Parry Sound, supra,* the Code establishes "a floor beneath which an employer and union cannot contract."

158. Given this determination, I must accordingly conclude that the group termination provisions under the Code apply because the Employer did terminate more than 50 of its employees within a four-week period and within a particular industrial establishment. The

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Employer therefore did violate sections 212 and 214 of the Code because it did not provide adequate notice to the Union, and it did not establish a joint planning committee.

B. How should damages be calculated?

159. Generally, damages for breach of a collective agreement are compensatory in nature and based on the common law principle applicable to breach of contracts generally. The non-breaching party should be placed in the position they would have been had the breach not occurred. Brown & Beatty, *Canadian Labour Arbitration*, loose-leaf (Rel 64 March 2018) 4th ed, vol 1 (Toronto: Thomson Reuters, 2017) at para 2:1505 summarized as follows:

> Unless the agreement provides otherwise, in assessing damages arbitrators have utilized the same common law principles as are applied in breach of contract cases. Thus, the basic purpose of an award of damages is to put the aggrieved party in the same position he or she would have been in had there been no breach of the collective agreement. This general principle is subject to three basic qualifying factors. In the first place, the loss claimed must not be too remote, that is, it must be "reasonably foreseeable" in the *Hadley v Baxendale* sense. Second, the aggrieved party must act reasonably to mitigate his loss. Finally, apart from nominal damages, the loss or damages must be certain and not speculative. As expressed by one arbitrator:
>
>> Stated in the abstract, the relevant principle is quite clear. The purpose of damages for breach of contract is not to punish but to compensate, and the function of compensation is to place the aggrieved party in a monetary position as near as possible to that in which he would have been had the contract been performed.

160. In its written submissions, the Employer appears to have no issue with the accepted method of calculating compensatory damages for failure to provide the requisite notice and that such calculation should be based on a calculation of the affected employee's pay in lieu of such notice.

161. It is an agreed fact that the first round of terminations occurred on June 1, 2017, and that notices were delivered to 95 in-scope positions and 3 out-of-scope positions.

162. It is an agreed fact that the Employer provided the Union with notice of the first round of terminations by letter dated April 10, 2017. That letter stated the number of positions by classification and location that would be eliminated. By letter dated May 2, 2017, the Employer provided the specific names of those employees, and those employees received individual notices of termination the same day.

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163. The Union accepted the Employer provided notice of termination on April 10, 2017, and the notice period dictated by section 212 of the Code was partially fulfilled. Therefore, the entire 16-week period should not be used to calculate damages; only that period of the 16 weeks for which notice was not provided.

164. Therefore, in accordance with the principle of compensatory damages, I award damages to the Union for the Employer's failure to provide the requisite notice under section 212 of the Code. Such damages shall be calculated according to pay in lieu of notice on the basis of wages and other benefits for the 95 affected employees for the period of 8 weeks and 4 days.

165. Quantification of damages for the Employer's failure to establish a joint planning committee under section 214 of the Code is a more difficult question.

166. The Employer has referred me to *Strategic Acquisition Corp. v Starke Capital Corp.*, 2017 ABCA 250, 59 Alta LR (6th) 16, wherein the Alberta Court of Appeal discussed damages for loss of chance. In that case, the Court concluded that evidence of loss must rise above mere speculation, and the lost chance must have had some practical value:

> 75 Courts in Ontario have developed a series of principles for the assessment of loss of chance damages for breach of contract. The general principles are set out in *Kipfinch Developments Ltd. v. Westwood Mall (Mississauga) Ltd.* (2008), 50 B.L.R. (4th) 233, [2008] O.J. No. 3373 (Ont. S.C.J.), citing *Folland v. Reardon* (2005), 74 O.R. (3d) 688 (Ont. C.A.) at paras 73-74, [2005] O.J. No. 216 (Ont. C.A.):
>
> > First, the plaintiff must establish on the balance of probabilities that but for the defendant's wrongful conduct, the plaintiff had a chance to obtain a benefit or avoid a loss. Second, the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation. Third, the plaintiff must demonstrate that the outcome, that is, whether the plaintiff would have avoided the loss or made the gain, depended on someone or something other than the plaintiff himself or herself. Fourth, the plaintiff must show that the lost chance had some practical value.
>
> 76 In applying the second part of the test, that the plaintiff must show that the chance lost was sufficiently real and significant to rise above mere speculation, the court in *Kipfinch Developments Ltd.* addressed the argument that, in order to succeed in an action based on a loss of opportunity, the plaintiff must establish it is more probable than not that the transaction would have closed. In rejecting that argument, the court said at para 114:
> I do not think this is an accurate statement of the law. Instead, I think that the plaintiff is required to meet a lower threshold, namely demonstration that the lost opportunity was sufficiently real and significant to rise above mere speculation, which lost opportunity may have a probability of occurrence as low as 15%.

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77 The *Folland* test was applied in Alberta in *Barlot v. Dudelzak*, 2005 ABQB 793, 390 A.R. 26 (Alta. Q.B.), where the trial judge noted at para 68 that if, as a result of breach of contract, the plaintiff loses the opportunity to gain a benefit, the lost opportunity may be compensable. To receive compensation, the plaintiff must show that the chance lost "was sufficiently real and significant to rise above mere speculation". Pitch and Snyder also state that a court may discount damages based on an assessment of the contingencies affecting the likelihood of opportunity, citing *Multi-Malls Inc. v. Tex-Mall Properties Ltd.* (1980), 28 O.R. (2d) 6 (Ont. H.C.), aff'd (1981), 37 O.R. (2d) 133 (Ont. C.A.), leave to appeal ref'd, [1982] SCCA No. 315 (note) (S.C.C.).

78 It is worth noting the third part of the *Folland* test, that the plaintiff must show that the outcome (whether the plaintiff would have made the gain) depended on someone or something other than the plaintiff itself. Arguably, much of the control for whether the ROFR would be exercised in this case rested with Strategic, although market conditions would clearly have an influence. Alberta courts have not taken this contingency into account and, generally, Canadian case law does not distinguish between circumstances where the chance is within or outside the plaintiff's control. The thrust of Canadian authority on breach of contract does not require the plaintiff to prove cause of damage on a balance of probabilities beyond the breach of contract itself. The overall position in contract is summarized by Pitch and Snyder at 3-12 to 3-13 ((loose-leaf 2015 Rel 4), ch 3 at sec. 2(c)):

> It should be noted, of course, that if the plaintiff has offered whatever evidence is available and, although establishing a breach of contract, has difficulty in quantifying the loss, this difficulty will not disqualify the innocent party from compensation. In this situation, assuming that the plaintiff has made the best efforts to provide all necessary evidence, the Court will make the best estimate of the damages arising from the loss, based on the evidence presented.

167. The above-noted approach appears to have been followed in *Miramar Giant Mine Ltd. v CAW-Canada, Local 2304* (2004), 135 LAC (4th) 439, 80 CLAS 107, wherein Arbitrator Jamieson declined to grant damages for lost opportunity because the loss was "speculative to say the least" and he would not "crystal ball gaze" into the possibilities of any benefit that may have been obtained by the consult process.

168. Arbitrators also appear to have awarded damages for lost opportunity with a view to deter future breaches by the Employer. In *Canadian Freightways and Western Canada Counsel of Teamsters (Service Centre Closures)*, 114 CLAS 156, 231 LAC (4th) 103, Arbitrator Kanee considered that although it may be difficult to quantify damages for lost opportunity to consult, he accepted that something more than nominal would be appropriate in order to give the employer a meaningful incentive to comply in the future. Arbitrator Kanee awarded $2,500.00, noting that the employer had deliberately breached the obligation in question. In coming to this amount, Arbitrator Kanee made reference to two other arbitration decisions, being *Weyerhaeuser Canada Ltd. v PPWC Local 10* (December 10, 1993), (Kelleher) (unreported) and *BC Rail Ltd v UA Local 170*

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(2004), 135 LAC (4th) 399, wherein $1,000.00 and $2,000.00 respectively was awarded to the unions as an incentive to the employers to comply with their obligations.

169. These damage awards can provide a meaningful incentive for an employer to comply with its obligations for fear that continued noncompliance will result greater amounts. These amounts may do little to encourage compliance by employers when there will be no next time.

170. I have considered the Employer's argument that damages aimed at deterrence are inappropriate because such damages are punitive in nature. I have also considered that future deterrence is meaningless for this Employer because it has completely shut down its operations. However, in my view, even if there is not a body of convincing evidence suggesting that the possible benefit to the Union was more than speculative, there has still been a breach of the Code. Further, the Employer acknowledged that it knew these provisions existed but, after seeking legal advice, determined they were not applicable and deliberately chose not to follow them. So, if I were to decline to award damages altogether with respect to this type of breach, then why would an employer facing a shutdown be motivated to comply with such an obligation? Presumably, the costs related to establishing the committee and completing the consultation process would serve as sufficient incentive for an employer to shirk these responsibilities if it could.

171. Having said that, I also think it unlikely the Union would have been successful in obtaining practical benefits on behalf of the impacted employees in these circumstances. The most they could likely hope for would be an opportunity to obtain answers to questions. The reality is that the Employer was directed by the Government of Saskatchewan to cease operations and I find it difficult to imagine that the Employer would have agreed to enhance employee benefits over and above what the CBA provided for in the event of a shutdown. I also accept the Employer's evidence that transfers to other crown corporations would not have been within the purview of negotiable results. In general, I accept that the Employer would have had little to no motivation to alter its plan for shutdown. It is therefore difficult to appreciate the Union's suggestion that the process could have resulted in some kind of practical benefit.

172. I am therefore left with a challenging issue to resolve: on the one hand, I have a clear breach of the Code and, on the other, I have scant evidence of any real loss sustained by the Union due to the breach.

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173. Nonetheless, I am of the view the Code's provisions are not to be ignored by an employer. While I am not able to determine the loss sustained by the Union, the members were prevented from the opportunity to benefit from the joint planning committee. At the very least, I can say with certainty that the Employer did not incur the expenditures related to completing the consultation process. Accordingly, I think it appropriate that the Employer compensate each affected employee in the amount of $100.00 or $9,500.00 total for its failure to establish a joint planning committee in contravention of section 214 of the Code.

C. Are punitive damages appropriate?

174. In accordance with the principles set out in *Keays v Honda Canada Inc.*, 2008 SCC 39, [2008] 2 SCR 362, punitive damages require an independent actionable wrong and conduct rising to the level of malice, high-handedness, and oppression. The Employer submits that there was no such conduct in these circumstances and that it acted in good faith throughout the closure process. The Union says the Employer was fully aware of the Code's group termination provisions and deliberately chose to ignore them. The Union also points to the Employer's resistance to consultation and refusal to meet the Union to discuss the closure process.

175. While I question why the Employer would show up at the April 18, 2017 meeting to negotiate a new CBA when all the employees were in the process of being terminated, and refuse to talk about the closure, I am not convinced there is sufficient evidence of conduct warranting a punitive damages award against the Employer. I decline to award punitive damages.

VI. CONCLUSION:

176. For the foregoing reasons, I would allow the grievance. I have found that the Employer failed to fulfill its obligations under sections 212 and 214 of the Code and violated the CBA.

177. Damages for the violation of section 212 of the Code are awarded to the Union in an amount equal to pay in lieu of notice on the basis of wages and other benefits for the 95 affected employees for the period of 16 weeks, less the period for which notice was provided being the period from April 11 to June 1, 2017. As agreed by the parties, I remain seized with jurisdiction to

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determine this quantum should the parties be unable to agree. I also award the Employer pay $9,500.00 in damages to the Union for the violation of section 214 of the Code.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 27th day of April, 2018.

William F.J. Hood, Q.C.

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TAB 9

2010 CarswellOnt 18850
Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc., Re

2010 CarswellOnt 18850

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

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.(APPLICANTS)

Pepall J.

Judgment: February 22, 2010
Docket: CV-10-8533-00CL

Counsel: Counsel — not provided

Headnote
Bankruptcy and insolvency
Labour and employment law

***Pepall J.*:**

1 *THIS MOTION*, made by the Communications, Energy and Paperworkers Union of Canada (the "Union") was heard this day at 330 University Avenue, Toronto, Ontario.

2 *ON READING* the Motion Records of the Union and on hearing submissions of counsel for the Union, the Applicants, FTI Consulting Canada Inc. in its capacity as Court-appointed monitor of the LP Entities, and other parties:

1. *THIS COURT ORDERS*, if necessary, that time for service of the notice of motion and the motion record is hereby abridged and service of the motion record by the Union is validated, such that this motion is properly returnable on February 22, 2010.

2. *THIS COURT ORDERS* that the Union is hereby authorized to continue to represent its current members and to represent former members of bargaining units represented by the Union, including pensioners, retirees, deferred vested participants and surviving spouses and dependents (the "Current and Former Members") employed or formerly employed by the Applicants or the Limited Partnership referred to in paragraph 2 of the Initial Order (collectively, the Applicants) in this proceeding and in connection with any concurrent or subsequent proceeding that may be commenced under the *Bankruptcy and Insolvency Act* ("BIA") or similar legislation (collectively, the "Proceedings").

3. *THIS COURT ORDERS* that the Union is authorized to determine, file, advance or compromise any and all claims of its Current and Former Members that exist or may arise at law or equity or pursuant to any applicable collective agreement, which may be made against the Applicants in the Proceedings in connection with any issue or matter related to any recovery, or compromise of rights or entitlements of the Current and Former Members.

4. *THIS COURT ORDERS* that the Applicants shall use their best efforts subject to the Union executing a confidentiality agreement to provide to counsel for the Union, as soon as possible after the granting of this Order, without charge, the names, last known addresses, last known phone numbers and email addresses (if any) of all Current and Former Members.

5. *THIS COURT ORDERS* that subject to any direction to the contrary by the regulatory body the Union, or their counsel on their behalf, are authorized to take all steps and to do all acts necessary or desirable to carry out the terms of this Order, including dealing with any Court or any regulatory body, other governmental ministry, department or agency (each a "Governmental Authority").

6. *THIS COURT ORDERS* that CaleyWray Labour/Employment Lawyers ("CaleyWray") is hereby authorized to act as counsel for the Current and Former Members in the Proceedings.

7. *THIS COURT ORDERS* that notice of the granting of this Order may be provided to the Current and Former Members in such form and under such terms and conditions as are deemed appropriate by the Union and its Counsel.

8. *THIS COURT ORDERS* that any individual Former Member who does not wish to be represented by the Union or CaleyWray pursuant to the terms of this Order, or all other related Orders which may subsequently be made in this Proceeding concerning the Current or Former Members or relating to the appointment of the Union and/or CaleyWray, shall within 30 days of receiving notice of this Order, notify the Monitor, the Applicants and CaleyWray in writing, and shall thereafter represent themselves as an independent individual party to these proceedings.

TAB 10

COURT FILE NO.: CV-09-8241-OOCL
DATE: 20090917

2009 CanLII 55115 (ON SC)

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO FRASER PAPERS INC., FPS CANADA INC., FRASER PAPERS HOLDINGS INC., FRASER TIMBER LTD., FRASER PAPERS LIMITED and FRASER N.H.LLC (collectively, the “Applicants” or “Fraser Papers”)

BEFORE: PEPALL J.

COUNSEL: *M. Barrack and D.J. Miller* for the Applicants
R. Chadwick and C. Costa for the Monitor
D. Wray and J. Kugler for the Communications, Energy, and Paper Workers Union of Canada and as agent for Pink Larkin
C. Sinclair for the United Steelworkers
T. McRae and S. Levitt for the Steering Committee of Fraser Papers’ Salaried Retirees Committee
M. P. Gottlieb and S. Campbell for the Committee for Salaried Employees and Retirees
M. Sims for Her Majesty the Queen in Right of the Province of New Brunswick, as represented by the Minister of Business of New Brunswick
Chris Burr for CIT Business Credit Canada Inc.
D. Chernos for Brookfield Asset Management Inc.

Pepall J.

ENDORSEMENT

Relief Requested

[1] There are four motions before me that request the appointment of representatives and representative counsel for various groups of unrepresented current and former employees and other beneficiaries of the pension plans and other retirement and benefit plans of the Applicants (“Fraser Papers”). With the exception of the motion of the United Steel,

Paper, Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Union (the "USW"), all motions include a request that Fraser Papers pay the fees and disbursements of representative counsel.

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[2] The motions are brought by the following moving parties:

(a) the USW who seeks to represent its former members. It already represents its current members.

(b) the Communications Energy and Paperworkers Union of Canada (the "CEP") who also seeks to represent its former members. It too already represents its current members.

(c) the Steering Committee of Fraser Papers' Salaried Retirees Committee who request that Nelligan O'Brian Payne LLP and Shibley Righton LLP ("Nelligan/Shibley") be appointed to act for all non-unionized retirees and their successors.

(d) the Committee of Salaried Employees and Retirees who request that Davies Ward Phillips & Vineberg LLP ("Davies") be appointed to act for all unrepresented employees, be they active or retired, and their successors.

[3] A third union, the CMAW, did not bring a motion but Mr. Wray, counsel for the CEP, acted as agent for CMAW's counsel, Pink Larkin on these motions. He advised that the CMAW will represent its current members but not its retirees who are approximately 25 in number.[1] These retirees therefore would only be encompassed by the Davies proposed retainer.

<u>Discussion</u>

[4] The Applicants employ approximately 2,500 personnel. They are located in Canada and the U.S. A substantial majority is unionized. Of the 2,500, 1,729 employees participate in five defined benefit pension plans. In addition, 3,246 retirees receive benefits from these plans. Fraser Papers maintains certain other plans and benefits including supplementary employee retirement programmes ("SERPs").

[5] On June 18, 2009, the Applicants obtained an Initial Order pursuant to the provisions of the *CCAA*. On July 13, 2009, the U.S. Bankruptcy Court for the District of Delaware designated these proceedings as foreign main proceedings pursuant to Chapter 15 of the U.S. Bankruptcy Code.

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[6] Fraser Papers is insolvent and is under significant financial pressure. Absent the DIP financing, a restructuring would be impossible. The Applicants have not generated positive cash flow from operations for three years. Their largest unsecured claims relate to the pension plans and the SERPs. Their accrued pension benefit obligations in these plans and the SERPs exceed the value of the plan assets by approximately USD $171.5 million as at December 31, 2008.

[7] Representative counsel should be appointed in this case and I have jurisdiction to do so. Section 11 of the *CCAA* and the Rules of Civil Procedure provide the Court with broad jurisdiction in this regard. No one challenges either of these propositions. The employees and retirees not otherwise represented are a vulnerable group who require assistance in the restructuring process and it is beneficial that representative counsel be appointed. The balance of convenience favours the granting of such an order and it is in the interests of justice to do so. The real issues are who should be appointed and whether Fraser Papers should fund the proposed representation.

(a) USW and CEP Motions

[8] Dealing firstly with the motions brought by the unions, the USW is the exclusive bargaining agent for the unionized employees of the Applicants working in Madawaska, Maine and Berlin- Gorham, New Hampshire. Personnel at these facilities participate in a defined benefit pension plan and a defined contribution pension plan. The U.S. law applicable to pension plans is the *Employee Retirement Income Security Act of 1974* (“ERISA”)[2]. The evidence filed by the USW suggests that a labour organization that

---

[1] This is contrary to the contents of paragraph 24 of the Monitor’s 4th Report but, being more recent, I accept counsel’s oral representation as being accurate.

[2] 29 U.S.C.

negotiated a pension plan has a role in legal proceedings involving termination of that plan. If voluntary, consent of the union is required and if involuntary, an order of the

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bankruptcy court under the appropriate provisions of U.S. bankruptcy law is necessary. The USW has extensive experience representing the rights of employees and retirees in these sorts of proceedings. It is also noteworthy that, although the collective agreements between the USW and the Applicants do not provide for retiree health and life insurance benefits, the U.S. Bankruptcy Code provides that a labour organization is deemed to be the authorized representative of retirees, surviving spouses, and dependents receiving benefits pursuant to its collective bargaining agreements, unless the union opts not to serve as the authorized representative or the bankruptcy court determines that different representation is appropriate.

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[9] In my view, the USW should be appointed as the representative for its former members who are retired subject to a retiree's ability to opt out of such representation should he or she so desire. The union already has a relationship with the USW retirees. It also has the means with which to communicate quickly with its members and former members. It is familiar with the relevant collective agreements and plans and has experience and a presence in both Canada and the U.S. De facto, the USW is already the representative of the USW retirees pursuant to the law in the U.S. Lastly, the Monitor and the Applicants support the USW's request to be appointed as representative counsel for its former members. As mentioned, the USW does not seek funding.

[10] Although CEP plays no role in Fraser Papers' U.S. operations, with that exception, for similar reasons and in the interests of consistency, the CEP should be appointed as the representative for its former members who are retirees subject to the aforementioned opt out provision. The Monitor and the Applicants are supportive of this position. Counsel for the CEP indicated that while it is unclear as a matter of law that the union is bound to represent former members in circumstances such as those facing Fraser Papers, the CEP would represent them with or without funding. Given Fraser Papers' insolvency, it seems to me that funding by the Applicants should only be provided for the benefit of those who otherwise would have no legal representation. The request for funding by CEP is refused.

(b) Nelligan/Shibley and Davies

[11] Turning to the requests of the Steering Committee of Fraser Papers Salaried Retirees Committee which favours the appointment of Nelligan/Shibley and the Committee for Salaried Employees and Retirees which favours Davies, firstly commonality of interest should be considered. In *Nortel Networks Corp. (Re)*[3], Morawetz J. applied the Court of Appeal's decision in *Re Stelco*[4] and the decision of *Re Canadian Airlines Corp.*[5] to enumerate the following principles applicable to an assessment of commonality of interest:

> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test.
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the plan] are irrelevant.
>
> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.

[12] Once commonality of interest has been established, other factors to be considered in the selection of representative counsel include: the proposed breadth of representation; evidence of a mandate to act; legal expertise; jurisdiction of practice; the need for facility in both official languages; and estimated costs.

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[3] [2009] O.J. No. 2166.
[4] 15 C.B.R. (5th) 307 (Ont. C.A.)
[5] (2000) 19 C.B.R. (4th) 12 Alta Q.B.

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[13] Davies is proposing to represent all unrepresented employees, former employees and their successors. In my view, there is a commonality of interest amongst the members of this group. In essence, they engage unsecured obligations. Arguably those proposed to be represented by the unions could also be included, and indeed absent a change of position by the CMAW, former members of the CMAW will be. That said, for the reasons outlined above, I am satisfied in this case that it is desirable to have the unions act for their members and former members if so willing. Indeed, no one took an opposing position.

[14] I am not persuaded that there is a need for separate representation as advocated by the Committee supporting the Nelligan/Shibley retainer. Appointing only Davies avoids excessive fragmentation and duplication and minimizes costs. In addition, no one will be excluded unless he or she so desires. Davies is also the only counsel whose retainer would extend to the CMAW retirees.

[15] Davies has already received a broad mandate in that it has close to 700 retainers from employees in each facet of Fraser Papers' operations and from all current and former employee groups. It has the necessary legal expertise and has offices in Toronto, Montreal and New York. It also has the necessary language capability.

[16] In contrast, Nelligan/Shibley is only proposing to represent retirees. It has a mandate of approximately 211 retirees. Clearly it has the requisite legal and language expertise but does not have the benefit associated with having offices in as many relevant jurisdictions. One may reasonably conclude from the evidence before me that the proposed fee structure would be less than that advanced by Davies although the scope of the retainer is more limited. Davies' appointment is not diminished because initially they were identified by the Applicants as appropriate counsel unlike Nelligan/Shibley whose group grew organically to use its counsel's terminology. Nor am I persuaded that Davies will be enfeebled as a result of the composition of the Steering Committee or due to past unrelated retainers by Brookfield Asset Management Inc. The Monitor supports the appointment of Davies as do the Applicants and the DIP lenders.

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[17] In the event that a real as opposed to a hypothetical or speculative conflict arises at some point in the future, parties may seek directions from the Court. As with the unions, the order appointing Davies will allow anyone to opt out of the representation.

[18] Unlike the unions, absent funding, Davies would not be expected to serve as representative counsel. Accordingly, funding is ordered to be provided by Fraser Papers. Again, the funding request is supported by the Monitor, the Applicants and the DIP lenders.

[19] The objective of my order is to help those who are otherwise unrepresented but to do so in an efficient and cost effective manner and without imposing an undue burden on insolvent entities struggling to restructure. It seems to me that in the future, parties should make every effort to keep the costs associated with contested representation motions in insolvency proceedings to a minimum. In addition, as I indicated in open court, while a successful moving party may expect to recover a good portion of the legal fees associated with such a motion, there is an element of business development involved in these motions which in my view is a cost of doing business and should not be visited upon the insolvent Applicants. I will leave it to the Monitor to address what an appropriate reduction would be and this no doubt will be addressed very briefly in a subsequent Monitor's report.

Summary

[20] In summary, the USW, CEP and Davies representation requests are granted. Only the Davies funding request is granted. The motion relating to Nelligan/ Shibley is dismissed. Counsel submitted proposed orders without prejudice to the Applicants to make submissions. Counsel should confer on the appropriate form of orders and then a representative may attend before me at a 9:30 appointment to have them approved and signed.

Pepall J.

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Released: September 17, 2009

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TAB 11

KK

COURT FILE NUMBER	2401- 02664
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended AND IN THE MATTER OF THE COMPROMISE OR ARRANGEMENT OF LYNX AIR HOLDINGS CORPORATION and 1263343 ALBERTA INC. dba LYNX AIR
DOCUMENT	**CCAA INITIAL ORDER**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**OSLER, HOSKIN & HARCOURT LLP** Barristers & Solicitors Brookfield Place, Suite 2700 225 6 Ave SW Calgary, AB T2P 1N2 Solicitors: Randal Van de Mosselaer / Julie Treleaven Telephone: (403) 260-7000 Facsimile: (403) 260-7024 Email: RVandemosselaer@osler.com / JTreleaven@osler.com File Number: 1246361

DATE ON WHICH ORDER WAS PRONOUNCED:	February 22, 2024
JUSTICE WHO MADE THIS ORDER:	The Honourable Justice Gill
LOCATION WHERE ORDER WAS PRONOUNCED:	Edmonton, Alberta

UPON THE APPLICATION of Lynx Air Holdings Corporation and 1263343 Alberta Inc. dba Lynx Air (the "**Applicants**"); **AND UPON** having read the Originating Application, the Affidavit of Michael Woodward sworn February 22, 2024 (the "**Woodward Affidavit**"), the Confidential Affidavit of Michael Woodward sworn February 22, 2024, and the Affidavit of Service of Elena Pratt, to be filed; **AND UPON** reading the consent of FTI Consulting Canada Inc. ("**FTI**") to act as Monitor; **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application and either do not oppose or alternatively consent to the within; **AND UPON** hearing counsel for Indigo Northern Ventures LP (the "**Interim Lender**"), counsel for FTI, and counsel for any other party present at the application; **IT IS HEREBY ORDERED AND DECLARED THAT**:

SERVICE

1. The time for service of the notice of application for this order (the "**Order**") is hereby abridged and deemed good and sufficient and this application is properly returnable today.

APPLICATION

2. The Applicants are companies to which the *Companies' Creditors Arrangement Act* of Canada (the "**CCAA**") applies.

PLAN OF ARRANGEMENT

3. The Applicants shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (the "**Plan**").

POSSESSION OF PROPERTY AND OPERATIONS

4. The Applicants shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

(b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") or their Property;

(c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order; and

(d) be entitled to continue to utilize the central cash management system currently in place as described in the Affidavit of Michael Woodward sworn February 22, 2024 or replace it with another substantially similar central cash management system (the "**Cash Management System**") and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as hereinafter defined) other than the Applicant, pursuant to the terms of the documentation applicable to the Cash Management System, and shall be, in its capacity as provider of the Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System.

5. To the extent permitted by law, the Applicants shall be entitled but not required to make the following advances or payments of the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case

incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the reasonable fees and disbursements of any Assistants retained or employed by the Applicants in respect of these proceedings, at their standard rates and charges, including for periods prior to the date of this Order.

6. Except as otherwise provided to the contrary herein, the Applicants shall be entitled but not required to pay all reasonable expenses incurred by the Applicants in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

(a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services; and

(b) payment for goods or services actually supplied to the Applicants following the date of this Order.

7. The Applicants shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority that are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan,

(iii) Quebec Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants in connection with the sale of goods and services by the Applicants, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicants.

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicants are hereby directed, until further order of this Court:

(a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants to any of their creditors as of the date of this Order;

(b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of their Property; and

(c) not to grant credit or incur liabilities except in the ordinary course of the Business.

RESTRUCTURING

10. The Applicants shall, subject to such requirements as are imposed by the CCAA, and such covenants as may be contained in the Definitive Documents (as hereinafter defined in paragraph 34), have the right to:

 (a) permanently or temporarily cease, downsize or shut down any portion of their business or operations and to dispose of redundant or non-material assets not exceeding $100,000 in any one transaction or $250,000 in the aggregate, provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to the Applicants (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

 (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicants and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;

 (c) disclaim or resiliate, in whole or in part, with the prior consent of the Monitor (as defined below) or further Order of the Court, their arrangements or agreements of any nature whatsoever with whomsoever, whether oral or written, as the Applicants deem appropriate, in accordance with section 32 of the CCAA, excepting any aircraft purchase agreement between the Applicants and any airplane manufacturer, as any such agreement may be amended and supplemented from time to time, which shall not be disclaimed, resiliated or amended without the prior consent of the Interim Lender and the Monitor, or upon further order of the Court.; and

 (d) pursue all avenues of refinancing of its Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants to proceed with an orderly restructuring of the Business (the "**Restructuring**").

11. Pursuant to section 5(5) of the Wage Earner Protection Program Act (Canada), SC 2005, c 47, s 1 ("WEPPA"), the Applicants and their collective former employees meet the criteria prescribed by section 3.2 of the Wage Earner Protection Program Regulations, SOR/2008-222 and are individuals to whom the WEPPA applies as of the date of this Order.

12. The Applicants shall provide each of the relevant landlords with notice of the Applicants' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants, or by further order of this Court upon application by the Applicants on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, it shall not be required to pay Rent under such lease pending resolution of any such dispute other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' claim to the fixtures in dispute.

13. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants in respect of such lease or leased premises and such landlord shall be entitled to

notify the Applicants of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY

14. Until and including March 4, 2024, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (including any airport, airport authority, Nav Canada or other air navigation service providers, travel agents, tour operators, general sales agents, ground handling services, ground handling equipment, aircraft and equipment maintenance suppliers and personnel (including Delta TechOps and Delta Air Lines, Inc.), fuel suppliers, catering, and all persons involved in the collection and distribution of monies in connection with passenger and air cargo operations) (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Applicants or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

(a) empower the Applicants to carry on any business that the Applicants are not lawfully entitled to carry on;

(b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

(c) prevent the filing of any registration to preserve or perfect a security interest;

(d) prevent the registration of a claim for lien; or

(e) exempt the Applicants from compliance with statutory or regulatory provisions relating to health, safety or the environment.

16. Nothing in this Order shall prevent any party from taking an action against the Applicants where such an action must be taken in order to comply with statutory time limitations in order to preserve their rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

NO INTERFERENCE WITH RIGHTS

17. During the Stay Period, no Person shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants, except with the written consent of the Applicants and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

18. During the Stay Period, all Persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with either of the Applicants, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services (including aircraft and equipment maintenance services), utility or other services to the Business or the Applicants

are hereby restrained until further order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be

required by the Applicants or exercising any other remedy provided under such agreements or arrangements. The Applicants shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants in accordance with the payment practices of the Applicants, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

19. Nothing in this Order has the effect of prohibiting a Person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person, other than the Interim Lender (as hereinafter defined) where applicable, be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

20. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 16 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date of this Order and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

21. The Applicants shall indemnify their directors and officers against obligations and

liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct. Without limiting the generality of the foregoing, for puroposes of this Order "officer" shall include the Applicants' contractor providing the services of a Chief Financial Officer.

22. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for the indemnity provided in paragraph 21 of this Order. The Directors' Charge shall have the priority set out in paragraphs 38 and 40 herein.

23. Notwithstanding any language in any applicable insurance policy to the contrary:

(a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

(b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 21 of this Order.

APPOINTMENT OF MONITOR

24. FTI is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business, and financial affairs of the Applicants with the powers and obligations set out in the CCAA or set forth herein. The Applicants and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the

assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

25. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants;

(c) assist the Applicants, to the extent required by the Applicants, in its dissemination to the Interim Lender and its counsel on a periodic basis as required by the Definitive Documents of financial and other information as agreed to between the Applicants and the Interim Lender which may be used in these proceedings, including reporting on a basis as reasonably required by the Interim Lender;

(d) advise the Applicants in their preparation of the Applicants' cash flow statements and reporting required by the Interim Lender, which information shall be reviewed with the Monitor and delivered to the Interim Lender and its counsel on a periodic basis, but not less than weekly, or as otherwise agreed to by the Interim Lender;

(e) advise the Applicants in their development of the Plan and any amendments to the Plan;

(f) assist the Applicants, to the extent required by the Applicants, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(g) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants to the extent that is necessary to adequately assess the Property,

Business, and financial affairs of the Applicants or to perform their duties arising under this Order;

(h) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(i) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants and any other Person; and

(j) perform such other duties as are required by this Order or by this Court from time to time.

26. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation or regulation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order be deemed to be in possession of any of the Property within the meaning of any federal or provincial environmental legislation.

27. The Monitor shall provide any creditor of the Applicants with information provided by the Applicants in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants is confidential, the

Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants may agree.

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

29. The Monitor, counsel to the Monitor, and counsel to the Applicants shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these CCAA proceedings), in each case at their standard rates and charges, by the Applicants as part of the costs of these proceedings. The Applicants are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor and counsel for the Applicants on a semi-monthly basis and, in addition, the Applicants are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicants, retainers in the respective amounts of $100,000**,** to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

30. The Monitor and its legal counsel shall pass their accounts from time to time.

31. The Monitor, counsel to the Monitor, if any, and the Applicants' counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $500,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 38 and 40 hereof.

INTERIM FINANCING

32. The Applicants are hereby authorized and empowered to obtain and borrow under a credit

facility from the Interim Lender in order to finance the Applicants' working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such credit facility shall not exceed USD$750,000 unless permitted by further order of this Court.

33. Such credit facility shall be on the terms and subject to the conditions set forth in the interim financing term sheet between the Applicants and the Interim Lender made as of February 21, 2024 (the "**Commitment Letter**").

34. The Applicants are hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (together with the Commitment Letter, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and the Applicants are hereby authorized and directed to pay and perform all of their indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.

35. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall not secure any obligation existing before this the date this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 38 and 40 hereof.

36. Notwithstanding any other provision of this Order:

(a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;

(b) upon the occurrence of an event of default under the Definitive Documents or the

Interim Lender's Charge, the Interim Lender, upon three (3) days' notice (or such other period as set out in the Definitive Documents) to the Applicants and the Monitor, may exercise any and all of its rights and remedies against the Applicants or the Property under or pursuant to the Commitment Letter, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to the Applicants and set off and/or consolidate any amounts owing by the Interim Lender to the Applicants against the obligations of the Applicants to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Applicants and for the appointment of a trustee in bankruptcy of the Applicants; and

(c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of the Applicants or the Property.

37. The Interim Lender shall be treated as unaffected in any plan of arrangement or compromise filed by the Applicants under the CCAA, or any proposal filed by the Applicants under the Bankruptcy and Insolvency Act of Canada (the "**BIA**"), with respect to any advances made under the Definitive Documents.

VALIDITY AND PRIORITY OF CHARGES

38. The priorities of the Administration Charge and the Interim Lender's Charge, as between them, shall be as follows:

First – Administration Charge (to the maximum amount of $500,000);

Second – Interim Lender's Charge;

Third – Directors' Charge (to the maximum amount of $500,000).

39. The filing, registration or perfection of the the Administration Charge, the Interim Lender's Charge, and the Directors' Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

40. Each of the Administration Charge, the Interim Lender's Charge, and Directors' Charge (each as constituted and defined herein) shall constitute a charge on the Property and subject always to section 34(11) of the CCAA the Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, and claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person. Without limiting the generality of the foregoing, and subject to further Order of this Court, the Charges shall not rank in priority to the interests of any aircraft lessor or financer as described in paragraphs 70 and 71 of the Woodward Affidavit.

41. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants shall not grant any Encumbrances over any Property that rank in priority to, or pari passu with, the Administration Charge, the Interim Lender's Charge, or the Directors' Charge unless the Applicants also obtain the prior written consent of the Monitor, the Interim Lender, and the beneficiaries of the Administration Charge and the Directors' Charge, or further order of this Court.

42. The Administration Charge, the Commitment Letter, the Definitive Documents, and the Interim Lender's Charge shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the Interim Lender thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") that binds the Applicants, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, including the Commitment Letter or the Definitive Documents, shall create or be deemed to constitute a new breach by the Applicants of any Agreement to which they are a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, the Applicants entering into the Commitment Letter, or the execution, delivery or performance of the Definitive Documents; and

(iii) the payments made by the Applicants pursuant to this Order, including the Commitment Letter or the Definitive Documents, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

ALLOCATION

43. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Charges amongst the various assets comprising the Property.

SERVICE AND NOTICE

44. The Monitor shall (i) without delay, publish in the Calgary Herald and the Globe and Mail a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants of more than $1,000 and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

45. The Monitor shall establish a case website in respect of the within proceedings at http://cfcanada.fticonsulting.com/lynxair.

GENERAL

46. The Applicants or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

47. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence. The Monitor's reports shall be filed by the Court Clerk notwithstanding that they do not include an original signature.

48. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager or a trustee in bankruptcy of the Applicant, the Business or the Property.

49. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in any foreign jurisdiction, to give effect to this Order and to assist the Applicants, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such

assistance to the Applicant and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

50. Each of the Applicants and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

51. Any interested party (including the Applicants and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

52. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

Justice of the Court of King's Bench of Alberta

TAB 12

COURT FILE NO.: 09-CL-7950
DATE: 20090527

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

2009 CanLII 26603 (ON SC)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICANTS

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

BEFORE: **MORAWETZ J.**

COUNSEL: **Janice Payne, Steven Levitt and Arthur O. Jacques for the Steering Committee of Recently Severed Canadian Nortel Employees**

Barry Wadsworth for the CAW-Canada and George Borosh and Debra Connor

Lyndon Barnes and Adam Hirsh for the Board of Directors of Nortel Networks Corporation and Nortel Networks Limited

Alan Mersky and Derrick Tay for the Applicants

Henry Juroviesky, Eli Karp, Kevin Caspersz and Aaron Hershtal for the Steering Committee for The Nortel Terminated Canadian Employees Owed Termination and Severance Pay

M. Starnino for the Superintendent of Financial Services or Administrator of the Pension Benefits Guarantee Fund

Leanne Williams for Flextronics Telecom Systems Ltd.

Jay Carfagnini and Chris Armstrong for Ernst & Young Inc., Monitor

Gail Misra for the Communication, Energy and Paperworkers Union of Canada

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

Mark Zigler and S. Philpott for Certain Former Employees of Nortel

G. H. Finlayson for Informal Nortel Noteholders Group

A. Kauffman for Export Development Canada

Alex MacFarlane for the Unsecured Creditors' Committee (U.S.)

HEARD: **April 20, 2009**

2009 CanLII 26603 (ON SC)

ENDORSEMENT

[1] On May 20, 2009, I released an endorsement appointing Koskie Minsky as representative counsel with reasons to follow. The reasons are as follows.

[2] This endorsement addresses five motions in which various parties seek to be appointed as representative counsel for various factions of Nortel's current and former employees (Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation are collectively referred to as the "Applicants" or "Nortel").

[3] The proposed representative counsel are:

(i) Koskie Minsky LLP ("KM") who is seeking to represent all former employees, including pensioners, of the Applicants or any person claiming an interest under or on behalf of such former employees or pensioners and surviving spouses in respect of a pension from the Applicants. Approximately 2,000 people have retained KM.

(ii) Nelligan O'Brien Payne LLP and Shibley Righton LLP (collectively "NS") who are seeking to be co-counsel to represent all former non-unionized employees, terminated either prior to or after the CCAA filing date, to whom the Applicants owe severance and/or pay in lieu of reasonable notice. In addition, in a separate

motion, NS seeks to be appointed as co-counsel to the continuing employees of Nortel. Approximately 460 people have retained NS and a further 106 have retained Macleod Dixon LLP, who has agreed to work with NS.

(iii) Juroviesky and Ricci LLP ("J&R") who is seeking to represent terminated employees or any person claiming an interest under or on behalf of former employees. At the time that this motion was heard approximately 120 people had retained J&R. A subsequent affidavit was filed indicating that this number had increased to 186.

(iv) Mr. Lewis Gottheil, in-house legal counsel for the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW") who is seeking to represent all retirees of the Applicants who were formerly members of one of the CAW locals when they were employees. Approximately 600 people have retained Mr. Gottheil or the CAW.

2009 CanLII 26603 (ON SC)

[4] At the outset, it is noted that all parties who seek representation orders have submitted ample evidence that establishes that the legal counsel that they seek to be appointed as representative counsel are well respected members of the profession.

[5] Nortel filed for CCAA protection on January 14, 2009 (the "Filing Date"). At the Filing Date, Nortel employed approximately 6,000 employees and had approximately 11,700 retirees or their spouses receiving pension and/or benefits from retirement plans sponsored by the Applicants.

[6] The Monitor reports that the Applicants have continued to honour substantially all of the obligations to active employees. However, the Applicants acknowledge that upon commencement of the CCAA proceedings, they ceased making almost all payments to former employees of amounts that would constitute unsecured claims. Included in those amounts were payments to a number of former employees for termination and severance, as well as amounts under various retirement and retirement transition programs.

[7] The Monitor is of the view that it is appropriate that there be representative counsel in light of the large number of former employees of the Applicants. The Monitor is of the view that former employee claims may require a combination of legal, financial, actuarial and advisory resources in order to be advanced and that representative counsel can efficiently co-ordinate such assistance for this large number of individuals.

[8] The Monitor has reported that the Applicants' financial position is under pressure. The Monitor is of the view that the financial burden of multiple representative counsel would further increase this pressure.

[9] These motions give rise to the following issues:

(i) when is it appropriate for the court to make a representation and funding order?

(ii) given the completing claims for representation rights, who should be appointed as representative counsel?

Issue 1 – Representative Counsel and Funding Orders

[10] The court has authority under Rule 10.01 of the *Rules of Civil Procedure* to appoint representative counsel where persons with an interest in an estate cannot be readily ascertained, found or served.

[11] Alternatively, Rule 12.07 provides the court with the authority to appoint a representative defendant where numerous persons have the same interests.

[12] In addition, the court has a wide discretion pursuant to s. 11 of the CCAA to appoint representatives on behalf of a group of employees in CCAA proceedings and to order legal and other professional expenses of such representatives to be paid from the estate of the debtor applicant.

[13] In the KM factum, it is submitted that employees and retirees are a vulnerable group of creditors in an insolvency because they have little means to pursue a claim in complex CCAA proceedings or other related insolvency proceedings. It was further submitted that the former employees of Nortel have little means to pursue their claims in respect of pension, termination, severance, retirement payments and other benefit claims and that the former employees would benefit from an order appointing representative counsel. In addition, the granting of a representation order would provide a social benefit by assisting former employees and that representative counsel would provide a reliable resource for former employees for information about the process. The appointment of representative counsel would also have the benefit of streamlining and introducing efficiency to the process for all parties involved in Nortel's insolvency.

[14] I am in agreement with these general submissions.

[15] The benefits of representative counsel have also been recognized by both Nortel and by the Monitor. Nortel consents to the appointment of KM as the single representative counsel for all former employees. Nortel opposes the appointment of any additional representatives. The Monitor supports the Applicants' recommendation that KM be appointed as representative counsel. No party is opposed to the appointment of representative counsel.

[16] In the circumstances of this case, I am satisfied that it is appropriate to exercise discretion pursuant to s. 11 of the CCAA to make a Rule 10 representation order.

Issue 2 – Who Should be Appointed as Representative Counsel?

[17] The second issue to consider is who to appoint as representative counsel. On this issue, there are divergent views. The differences primarily centre around whether there are inherent conflicts in the positions of various categories of former employees.

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[18] The motion to appoint KM was brought by Messrs. Sproule, Archibald and Campbell (the “Koskie Representatives”). The Koskie Representatives seek a representation order to appoint KM as representative counsel for all former employees in Nortel’s insolvency proceedings, except:

(a) any former chief executive officer or chairman of the board of directors, any non-employee members of the board of directors, or such former employees or officers that are subject to investigation and charges by the Ontario Securities Commission or the United States Securities and Exchange Commission:

(b) any former unionized employees who are represented by their former union pursuant to a Court approved representation order; and

(c) any former employee who chooses to represent himself or herself as an independent individual party to these proceedings.

[19] Ms. Paula Klein and Ms. Joanne Reid, on behalf of the Recently Severed Canadian Nortel Employees (“RSCNE”), seek a representation order to appoint NS as counsel in respect of all former Nortel Canadian non-unionized employees to whom Nortel owes termination and severance pay (the “RSCNE Group”).

[20] Mr. Kent Felske and Mr. Dany Sylvain, on behalf of the Nortel Continuing Canadian Employees (“NCCE”) seek a representative order to appoint NS as counsel in respect of all current Canadian non-unionized Nortel employees (the “NCCE Group”).

[21] J&R, on behalf of the Steering Committee (Mr. Michael McCorkle, Mr. Harvey Stein and Ms. Marie Lunney) for Nortel Terminated Canadian Employees (“NTCEC”) owed termination and severance pay seek a representation order to appoint J&R in respect of any claim of any terminated employee arising out of the insolvency of Nortel for:

(a) unpaid termination pay;

(b) unpaid severance pay;

(c) unpaid expense reimbursements; and

(d) amounts and benefits payable pursuant to employment contracts between the Employees and Nortel

[22] Mr. George Borosh and/or Ms. Debra Connor seek a representation order to represent all retirees of the Applicants who were formerly represented by the CAW (the “Retirees”) or, alternatively, an order authorizing the CAW to represent the Retirees.

[23] The former employees of Nortel have an interest in Nortel’s CCAA proceedings in respect of their pension and employee benefit plans and in respect of severance, termination pay,

retirement allowances and other amounts that the former employees consider are owed in respect of applicable contractual obligations and employment standards legislation.

[24] Most former employees and survivors of former employees have basic entitlement to receive payment from the Nortel Networks Limited Managerial and Non-negotiated Pension Plan (the "Pension Plan") or from the corresponding pension plan for unionized employees.

[25] Certain former employees may also be entitled to receive payment from Nortel Networks Excess Plan (the "Excess Plan") in addition to their entitlement to the Pension Plan. The Excess Plan is a non-registered retirement plan which provides benefits to plan members in excess of those permitted under the registered Pension Plan in accordance with the *Income Tax Act*.

[26] Certain former employees who held executive positions may also be entitled to receive payment from the Supplementary Executive Retirement Plan ("SERP") in addition to their entitlement to the Pension Plan. The SERP is a non-registered plan.

[27] As of Nortel's last formal valuation dated December 31, 2006, the Pension Plan was funded at a level of 86% on a wind-up basis. As a result of declining equity markets, it is anticipated that the Pension Plan funding levels have declined since the date of the formal valuation and that Nortel anticipates that its Pension Plan funding requirements in 2009 will increase in a very substantial and material matter.

[28] At this time, Nortel continues to fund the deficit in the Pension Plan and makes payment of all current service costs associated with the benefits; however, as KM points out in its factum, there is no requirement in the Initial Order compelling Nortel to continue making those payments.

[29] Many retirees and former employees of Nortel are entitled to receive health and medical benefits and other benefits such as group life insurance (the "Health Care Plan"), some of which are funded through the Nortel Networks' Health and Welfare Trust (the "HWT").

[30] Many former employees are entitled to a payment in respect of the Transitional Retirement Allowance ("TRA"), a payment which provides supplemental retirement benefits for those who at the time of their retirement elect to receive such payment. Some 442 non-union retirees have ceased to receive this benefit as a result of the CCAA proceedings.

[31] Former employees who have been recently terminated from Nortel are owed termination pay and severance pay. There were 277 non-union former employees owed termination pay and severance pay at the Filing Date.

[32] Certain former unionized employees also have certain entitlements including:

(a) Voluntary Retirement Option ("VRO");

(b) Retirement Allowance Payment ("RAP"); and

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(c) Layoff and Severance Payments

[33] The Initial Order permitted Nortel to cease making payments to its former employees in respect of certain amounts owing to them and effective January 14, 2009, Nortel has ceased payment of the following:

(a) all supplementary pensions which were paid from sources other than the Registered Pension Plan, including payments in respect of the Excess Plan and the SERP;

(b) all TRA agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(c) all RAP agreements where amounts were still owing to the affected former employees as at January 14, 2009;

(d) all severance and termination agreements where amounts were still owing to the affected former employees as at January 14, 2009; and

(e) all retention bonuses where amounts were still owing to affected former employees as at January 14, 2009.

[34] The representatives seeking the appointment of KM are members of the Nortel Retiree and Former Employee Protection Committee ("NRPC"), a national-based group of over 2,000 former employees. Its stated mandate is to defend and protect pensions, severance, termination and retirement payments and other benefits. In the KM factum, it is stated that since its inception, the NRPC has taken steps to organize across the country and it has assembled subcommittees in major centres. The NRPC consists of 20 individuals who it claims represent all different regions and interests and that they participate in weekly teleconference meetings with legal counsel to ensure that all former employees' concerns are appropriately addressed.

[35] At paragraph 49 of the KM factum, counsel submits that NRPC members are a cross-section of all former employees and include a variety of interests, including those who have an interest in and/or are entitled to:

(a) the basic Pension Plan as a deferred member or a member entitled to transfer value;

(b) the Health Care Plan;

(c) the Pension Plan and Health Care Plan as a survivor of a former employee;

(d) Supplementary Retirement Benefits from the Excess Plan and the SERP plans;

(e) severance and termination pay ; and

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(f) TRA payments.

[36] The representatives submit that they are well suited to represent all former employees in Nortel's CCAA proceedings in respect of all of their interests. The record (Affidavit of Mr. D. Sproule) references the considerable experience of KM in representing employee groups in large-scale restructurings.

[37] With respect to the allegations of a conflict of interest as between the various employee groups (as described below), the position of the representatives seeking the appointment of KM is that all former employees have unsecured claims against Nortel in its CCAA proceedings and that there is no priority among claims in respect of Nortel's assets. Further, they submit that a number of former employees seeking severance and termination pay also have other interests, including the Pension Plan, TRA payments and the supplementary pension payments and that it would unjust and inefficient to force these individuals to hire individual counsel or to have separate counsel for separate claims.

[38] Finally, they submit that there is no guarantee as to whether Nortel will emerge from the CCAA, whether it will file for bankruptcy or whether a receiver will be appointed or indeed whether even a plan of compromise will be filed. They submit that there is no actual conflict of interest at this time and that the court need not be concerned with hypothetical scenarios which may never materialize. Finally, they submit that in the unlikely event of a serious conflict in the group, such matters can be brought to the attention of the court by the representatives and their counsel on a *ex parte* basis for resolution.

[39] The terminated employee groups seeking a representation order for both NS and J&R submit that separate representative counsel appointments are necessary to address the conflict between the pension group and the employee group as the two groups have separate legal, procedural, and equitable interests that will inevitably conflict during the CCAA process.

[40] They submit that the pensioners under the Pension Plan are continuing to receive the full amount of the pension from the Pension Plan and as such they are not creditors of Nortel. Counsel submits that the interest of pensioners is in continuing to receive to receive their full pension and survivor benefits from the Pension Plan for the remainder of their lives and the lives of surviving spouses.

[41] In the NS factum at paragraphs 44 – 58, the argument is put forward as to why the former employees to whom Nortel owes severance and termination pay should be represented separately from the pensioners. The thrust of the argument is that future events may dictate the response of the affected parties. At paragraph 51 of the factum, it is submitted that generally, the recently severed employees' primary interest is to obtain the fastest possible payout of the greatest amount of severance and/or pay in lieu of notice in order to alleviate the financial hardships they are currently experiencing. The interests of pensioners, on the other hand, is to maintain the status quo, in which they continue to receive full pension benefits as long as possible. The submission emphasizes that issues facing the pensioner group and the non-pensioner group are profoundly divergent as full monthly benefit payments for the pensioner group have continued to

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date while non-pensioners are receiving 86% of their lump sums on termination of employment, in accordance with the most recently filed valuation report.

[42] The motion submitted by the NTCEC takes the distinction one step further. The NTCEC is opposed to the motion of NS. NS wishes to represent both the RSCNE and the NCCE. The NTCEC believes that the terminated employees who are owed unpaid wages, termination pay and/or severance should comprise their own distinct and individual class.

[43] The NTCEC seek payment and fulfillment of Nortel's obligations to pay one or several of the following:

(a) TRA;

(b) 2008 bonuses; and

(c) amendments to the Nortel Pension Plan

[44] Counsel to NTCEC submits that the most glaring and obvious difference between the NCCE and the NTCEC, is that NCCE are still employed and have a continuing relationship with Nortel and have a source of employment income and may only have a contingent claim. The submission goes on to suggest that, if the NCCE is granted a representation order in these proceedings, they will seek to recover the full value of their TRA claim from Nortel during the negotiation process notwithstanding that one's claim for TRA does not crystallize until retirement or termination. On the other hand, the terminated employees, represented by the NTCEC and RSCNE are also claiming lost TRA benefits and that claim has crystallized because their employment with Nortel has ceased. Counsel further submits that the contingent claim of the NCCE for TRA is distinct and separate with the crystallized claim of the NTCEC and RSCNE for TRA.

[45] Counsel to NTCEC further submits that there are difficulties with the claim of NCCE which is seeking financial redress in the CCAA proceedings for damages stemming from certain changes to the Nortel Networks Limited Managerial and Non-negotiated Pension Plan effective June 1, 2008 and Nortel's decision to decrease retirees benefits. Counsel submits that, even if the NCCE claims relating to the Pension Plan amendment are quantifiable, they are so dissimilar to the claims of the RSCNE and NTCEC, that the current and former Nortel employees cannot be viewed as a single group of creditors with common interests in these proceedings, thus necessitating distinct legal representation for each group of creditors.

[46] Counsel further argues that NTCEC's sole mandate is to maximize recovery of unpaid wages, termination and severance pay which, those terminated employees as a result of Nortel's CCAA filing, have lost their employment income, termination pay and/or severance pay which would otherwise be protected by statute or common law.

[47] KM, on behalf of the Koskie Representatives, responded to the concerns raised by NS and by J&R in its reply factum.

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[48] KM submits that the conflict of interest is artificial. KM submits that all members of the Pension Plan who are owed pensions face reductions on the potential wind-up of the Pension Plan due to serious under-funding and that temporarily maintaining of status quo monthly payments at 100%, although required by statute, does not avoid future reductions due to under-funding which offset any alleged overpayments. They submit that all pension members, whether they can withdraw 86% of their funds now and transfer them a locked-in vehicle or receive them later in the form of potentially reduced pensions, face a loss and are thus creditors of Nortel for the pension shortfalls.

[49] KM also states that the submission of the RSCNE that non-pensioners may put pressure on Nortel to reduce monthly payments on pensioners ignores the *Ontario Pension Benefits Act* and its applicability in conjunction with the CCAA. It further submits that issues regarding the reduction of pensions and the transfers of commuted values are not dealt with through the CCAA proceedings, but through the Superintendent of Financial Services and the Plan Administrator in their administration and application of the PBA. KM concludes that the Nortel Pension Plans are not applicants in this matter nor is there a conflict given the application of the provisions of the PBA as detailed in the factum at paragraphs 11 – 21.

[50] KM further submits that over 1,500 former employees have claims in respect of other employment and retirement related benefits such as the Excess Plan, the SERP, the TRA and other benefit allowances which are claims that have "crystallized" and are payable now. Additionally, they submit that 11,000 members of the Pension Plan are entitled to benefits from the Pensioner Health Care Plan which is not pre-funded, resulting in significant claims in Nortel's CCAA proceedings for lost health care benefits.

[51] Finally, in addition to the lack of any genuine conflict of interest between former employees who are pensioners and those who are non-pensioners, there is significant overlap in interest between such individuals and a number of the former employees seeking severance and termination pay have the same or similar interests in other benefit payments, including the Pension Plan, Health Care Plan, TRA, SERP and Excess Plan payments. As well, former employees who have an interest in the Pension Plan also may be entitled to severance and termination pay.

[52] With respect to the motions of NS and J&R, I have not been persuaded that there is a real and direct conflict of interest. Claims under the Pension Plan, to the extent that it is funded, are not affected by the CCAA proceedings. To the extent that there is a deficiency in funding, such claims are unsecured claims against Nortel. In a sense, deficiency claims are not dissimilar from other employee benefit claims.

[53] To the extent that there may be potentially a divergence of interest as between pension-based claims and terminated-employee claims, these distinctions are, at this time, hypothetical. At this stage of the proceeding, there has been no attempt by Nortel to propose a creditor classification, let alone a plan of arrangement to its creditors. It seems to me that the primary emphasis should be placed on ensuring that the arguments of employees are placed before the court in the most time efficient and cost effective way possible. In my view, this can be

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accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.

[54] It is conceivable that there will be differences of opinion between employees at some point in the future, but if such differences of opinion or conflict arise, I am satisfied that this issue will be recognized by representative counsel and further directions can be provided.

[55] A submission was also made to the effect that certain individuals or groups of individuals should not be deprived of their counsel of choice. In my view, the effect of appointing one representative counsel does not, in any way, deprive a party of their ability to be represented by the counsel of their choice. The Notice of Motion of KM provides that any former employee who does not wish to be bound by the representative order may take steps to notify KM of their decision and may thereafter appear as an independent party.

[56] In the responding factum at paragraphs 28 – 30, KM submits that each former employee, whether or not entitled to an interest in the Pension Plan, has a common interest in that each one is an unsecured creditor who is owed some form of deferred compensation, being it severance pay, TRA or RAP payments, supplementary pensions, health benefits or benefits under a registered Pension Plan and that classifying former employees as one group of creditors will improve the efficiency and effectiveness of Nortel's CCAA proceedings and will facilitate the reorganization of the company. Further, in the event of a liquidation of Nortel, each former employee will seek to recover deferred compensation claims as an unsecured creditor. Thus, fragmentation of the group is undesirable. Further, all former employees also have a common legal position as unsecured creditors of Nortel in that their claims all arise out of the terms and conditions of their employment and regardless of the form of payment, unpaid severance pay and termination pay, unpaid health benefits, unpaid supplementary pension benefits and other unpaid retirement benefits are all remuneration of some form arising from former employment with Nortel.

[57] The submission on behalf of KM concludes that funds in a pension plan can also be described as deferred wages. An employer who creates a pension plan agrees to provide benefits to retiring employees as a form of compensation to that employee. An underfunded pension plan reflects the employer's failure to pay the deferred wages owing to former employees.

[58] In its factum, the CAW submits that the two proposed representative individuals are members of the Nortel Pension Plan applicable to unionized employees. Both individuals are former unionized employees of Nortel and were members of the CAW. Counsel submits that naming them as representatives on behalf of all retirees of Nortel who were members of the CAW will not result in a conflict with any other member of the group.

[59] Counsel to the CAW also stated that in the event that the requested representation order is not granted, those 600 individuals who have retained Mr. Lewis Gottheil will still be represented by him, and the other similarly situated individuals might possibly be represented by other counsel. The retainer specifically provides that no individual who retains Mr. Gottheil shall be

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charged any fees nor be responsible for costs or penalties. It further provides that the retainer may be discontinued by the individual or by counsel in accordance with applicable rules.

[60] Counsel further submits that the 600 members of the group for which the representation order is being sought have already retained counsel of their choice, that being Mr. Lewis Gottheil of the CAW. However, if the requested representative order is not granted, there will still be a group of 600 individual members of the Pension Plan who are represented by Mr. Gottheil. As a result, counsel acknowledges there is little to no difference that will result from granting the requested representation order in this case, except that all retirees formerly represented by the union will have one counsel, as opposed to two or several counsel if the order is not granted.

[61] In view of this acknowledgement, it seems to me that there is no advantage to be gained by granting the CAW representative status. There will be no increased efficiencies, no simplification of the process, nor any real practical benefit to be gained by such an order.

[62] Notwithstanding that creditor classification has yet to be proposed in this CCAA proceeding, it is useful, in my view, to make reference to some of the principles of classification. In *Re Stelco Inc.*, the Ontario Court of Appeal noted that the classification of creditors in the CCAA proceeding is to be determined based on the "commonality of interest" test. In *Re Stelco*, the Court of Appeal upheld the reasoning of Paperny J. (as she then was) in *Re Canadian Airlines Corp*. and articulated the following factors to be considered in the assessment of the "commonality of interest".

> In summary, the case has established the following principles applicable to assessing commonality of interest:
>
> 1. Commonality of interest should be viewed based on the non-fragmentation test, not on an identity of interest test;
>
> 2. The interests to be considered are the legal interests that a creditor holds qua creditor in relationship to the debtor company prior to and under the plan as well as on liquidation.
>
> 3. The commonality of interests are to be viewed purposively, bearing in mind the object of the CCAA, namely to facilitate reorganizations if possible.
>
> 4. In placing a broad and purposive interpretation on the CCAA, the court should be careful to resist classification approaches that would potentially jeopardize viable plans.
>
> 5. Absent bad faith, the motivations of creditors to approve or disapprove [of the Plan] are irrelevant.

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> 6. The requirement of creditors being able to consult together means being able to assess their legal entitlement *as creditors* before or after the plan in a similar manner.
>
> *Re Stelco Inc*., 15 C.B.R. 5th 307 (Ont. C.A.), paras 21-23; *Re Canadian Airlines Corp*. (2000) 19 C.B.R. 4th 12 Alta. Q.B., para 31.

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[63] I have concluded that, at this point in the proceedings, the former employees have a "commonality of interest" and that this process can be best served by the appointment of one representative counsel.

[64] As to which counsel should be appointed, all firms have established their credentials. However, KM is, in my view, the logical choice. They have indicated a willingness to act on behalf of all former employees. The choice of KM is based on the broad mandate they have received from the employees, their experience in representing groups of retirees and employees in large scale restructurings and speciality practice in the areas of pension, benefits, labour and employment, restructuring and insolvency law, as well as my decision that the process can be best served by having one firm put forth the arguments on behalf of all employees as opposed to subdividing the employee group.

[65] The motion of Messrs. Sproule, Archibald and Campbell is granted and Koskie Minsky LLP is appointed as Representative Counsel. This representation order is also to cover the fees and disbursements of Koskie Minsky.

[66] The motions to appoint Nelligan O'Brien Payne and Shibley Righton, Juroviesky and Ricci, and the CAW as representative counsel are dismissed.

[67] I would ask that counsel prepare a form of order for my consideration.

MORAWETZ J.

DATE: May 27, 2009

TAB 13

CITATION: Re Nortel Networks Corporation et al, 2014 ONSC 5274
COURT FILE NO.: 09-CL-7950
DATE: 20140911

SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICATION UNDER THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

2014 ONSC 5274 (CanLII)

BEFORE: Newbould J.

COUNSEL: *Benjamin Zarnett* and *Graham Smith*, for the Monitor and Canadian Debtors

Ken Rosenberg, for the Canadian Creditors' Committee

Michael Barrack, D.J. Miller and *Michael Shakra,* for the UK Pension Claimants

Tracy Wynne, for EMEA Debtors

Kenneth Kraft, for the Wilmington Trust, National Association

Richard Swan, Gavin Finlayson and *Kevin Zych,* for the Ad Hoc Group of Bondholders

Shayne Kukulowicz, for the US Unsecured Creditors' Committee

John D. Marshall, for Law Debenture Trust Company of New York

Brett Harrison, for Bank of New York Mellon

Andrew Gray and *Scott Bomhof,* for the US Debtors

HEARD: July 25, 2014

AMENDED ENDORSEMENT

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[1] Nortel Networks Corporation ("NNC") and other Canadian debtors filed for and were granted protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. c-36, ("CCAA") on January 14, 2009. On the same date, Nortel Network Inc. ("NNI") and other US debtors filed petitions in Delaware under the United States Bankruptcy Code, 11 U.S.C., Chapter 11.

[2] Beginning in 1996, unsecured *pari passu* notes were issued under three separate bond indentures, first by a US Nortel corporation guaranteed by Nortel Networks Limited ("NNL"), a Canadian corporation, and then by NNL in several tranches jointly and severally guaranteed by NNC and NNI (the "crossover bonds"). Thus all of the notes are payable by Nortel entities in both Canada and the US, either as the maker or guarantor. Under claims procedures in both the Canadian and US proceedings, claims by bondholders for principal and pre-filing interest in the amount of US$4.092 billion have been made against each of the Canadian and US estates. The bondholders also claim to be entitled to post-filing interest and related claims under the terms of the bonds which, as of December 31, 2013, amounted to approximately US$1.6 billion.

[3] The total assets realized on the sale of Nortel assets worldwide which are the subject of the allocation proceedings amongst the Canadian, US, and European, Middle East and African estates ("EMEA") are approximately US$7.3 billion, and thus the post-filing bond interest claims of now more than US$1.6 billion represent a substantial portion of the total assets available to all three estates. While the post-filing bond interest grows at various compounded rates under the terms of the bonds, the US$7.3 billion is apparently not growing at any appreciable rate because of the very conservative nature of the investments made with it pending the outcome of the

insolvency proceedings. Apart from the bondholders, the main claimants against the Canadian debtors are Nortel disabled employees, former employees and retirees.

[4] The bond claims in the Canadian proceedings have been filed pursuant to a claims procedure order in the CCAA proceedings dated July 30, 2009. The order contemplated that the claims filed under it would be finally determined in accordance with further procedures to be authorized, including by a further claims resolution order. By order dated September 16, 2010, a further order was made in the CCAA proceedings that authorized procedures to determine claims for all purposes.

[5] By direction of June 24, 2014, it was ordered that the following issues be argued:

(a) whether the holders of the crossover bond claims are legally entitled in each jurisdiction to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion); and

(b) if it is determined that the crossover bondholders are so entitled, what additional amounts are such holders entitled to so claim and receive.

[6] The hearing in the US Bankruptcy Court was scheduled to proceed at the same time as the hearing in this Court but was adjourned due to an apparent settlement between the US Debtors and certain bondholders.

[7] The Monitor and Canadian debtors, supported by the Canadian Creditors' Committee, the UK Pension Claimants, the EMEA debtors, and the Wilmington Trust take the position that in a liquidating CCAA proceeding such as this, post-filing interest is not legally payable on the crossover bonds as a result of the "interest stops" rule. The Ad Hoc Group of Bondholders, supported by the Law Debenture Trust Company of New York and Bank of New York Mellon take the position that there is no "interest stops" rule in CCAA proceedings and that the right to interest on the crossover bonds is not lost on the filing of CCAA proceedings and can be the

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subject of negotiations regarding a CCAA plan of reorganization. They take the position that no distribution of Nortel's sale proceeds that fails to recognize the full amount of the crossover bondholders' claims, including post-filing interest, can be ordered under the CCAA except under a negotiated CCAA plan duly approved by the requisite majorities of creditors and sanctioned by the court.

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[8] For the reasons that follow, I accept the position and hold that post-filing interest is not legally payable on the crossover bonds in this case.

The interest stops rule

[9] In this case, the bondholders have a contractual right to interest. The other major claimants, being pensioners, do not. The Canadian debtors contend that the reason for the interest stops rule is one of fundamental fairness and that the rule should apply in this case.

[10] The Canadian debtors contend that the interest-stops rule is a common law rule corollary to the *pari passu* rule governing rateable payments of an insolvent's debts and that while the CCAA is silent as to the right to post-filing interest, it does not rule out the interest-stops rule.

[11] The bondholders contend that to deny them the right to post-filing interest would amount to a confiscation of a property right to interest and that absent express statutory authority the court has no ability to interfere with their contractual entitlement to interest. I do not see their claim to interest as being a property right, as the bonds are unsecured. See *Thibodeau v. Thibodea*u (C.A.), 104 O.R. (3d) 161, at para. 43. However, the question remains as to whether their contractual rights should prevail.

[12] It is a fundamental tenet of insolvency law that all debts shall be paid *pari passu* and all unsecured creditors receive equal treatment. See *Shoppers Trust Co. (Liquidator of) v. Shoppers Trust Co.* (2005), 74 O.R. (3d) 652 (C.A.) at para. 25, per Blair J.A. and *Indalex Ltd. (Re)* (2009), 55 C.B.R. (5th) 64 (Ont. S.C.), at para. 16 per Morawetz J. This common law principle

has led to the development of the interest stops rule. In *Canada (Attorney General) v. Confederation Life Insurance Co.*, [2001] O.J. No. 2610, (Ont. S.C.), Blair J. (as he then was) stated the following:

> **20** One of the governing principles of insolvency law - including proceedings in a winding-up - is that the assets of the insolvent debtor are to be distributed amongst classes of creditors rateably and equally, as those assets are found at the date of the insolvency. This principle has led to the development of the "interest stops rule", i.e., that no interest is payable on a debt from the date of the winding-up or bankruptcy. As Lord Justice James put it, colourfully, in *Re Savin* (1872), L.R. 7 Ch. 760 (C.A.), at p. 764:
>
> > I believe, however, that if the question now arose for the first time I should agree with the rule [i.e. the "interest stops rule"], seeing that the theory in bankruptcy is to stop all things at the date of the bankruptcy, and to divide the wreck of the man's property as it stood at that time.

[13] This rule is "judge-made" law. See *In re Humber Ironworks and Shipbuilding Company* (1869), L.R. 4 Ch. App. 643 at 647, per Sir G. M. Giffard, L.J.

[14] In *Shoppers Trust*, Blair J.A. referred to *pari passu* principles in the context of the interest stops rule and the common law understanding of those rules in liquidation proceedings. He stated:

> 25. The rationale underlying this approach rests on a fundamental principle of insolvency law, namely, that "in the case of an insolvent estate, all the money being realized as speedily as possible, should be applied equally and rateably in payment of the debts as they existed at the date of the winding-up": *Humber Ironworks, supra*, at p. 646 Ch. App. Unless this is the case, the principle of *pari passu* distribution cannot be honoured. See also *Re McDougall*, [1883] O.J. No. 63, 8 O.A.R. 309, at paras. 13-15; *Principal Savings & Trust Co. v. Principal Group Ltd. (Trustee of)* (1993), 109 D.L.R. (4th) 390, 14 Alta. L.R. (3d) 442 (C.A.), at paras. 12-16; and *Canada (Attorney General) v. Confederation Trust Co.* (2003), 65 O.R. (3d) 519, [2003] O.J. No. 2754 (S.C.J.), at p. 525 [O.R.] While these cases were decided in the context of what is known as the "interest stops" rule, they are all premised on the common law understanding that claims for principal and interest are provable in liquidation proceedings to the date of the winding-up.

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[15] The interest stops rule has been applied in winding-up cases in spite of the fact that the legislation did not provide for it. In *Shoppers Trust,* Blair J.A. stated:

> 26. Thus, it was of little moment that the provisions of the *Winding-up Act* in force at the time of the March 10, 1993 order did not contain any such term. The 1996 amendment to s. 71(1) of the *Winding-up and Restructuring Act*, establishing that claims against the insolvent estate are to be calculated as at the date of the winding-up, merely clarified and codified the position as it already existed in insolvency law.

[16] In *Abacus Cities Ltd. (Trustee of) v. AMIC Mortgage Investment Corp.* (1992), 11 C.B.R. (3d) 193 (Alta. C.A.), Kerans J.A. applied the interest stops rule in a bankruptcy proceeding under the BIA even although, in his view, the BIA assumed that interest was not payable after bankruptcy but did not expressly forbid it. He did so on the basis of the common law rule enunciated in *Re Savin,* quoted by Blair J. in *Confederation Life*. Kerans J.A. stated:

> 19. … I accept that *Savin* expresses the law in Canada today: claims provable in bankruptcy cannot include interest after bankruptcy.

[17] In *Confederation Life*, Blair J. was of the view that the Winding-Up Act and the BIA could be interpreted to permit post-filing interest. Yet he held that the common law insolvency interest stops rule applied. He stated:

> **22** This common law principle has been applied consistently in Canadian bankruptcy and winding-up proceedings. This is so notwithstanding the language of subsection 71(1) of the Winding-Up Act and section 121 of the BIA, which might be read to the contrary, in my view….
>
> **23** Yet the "interest stops" principle has always applied to the payment of post-insolvency interest, and the provisions of subsection 71(1) have never been interpreted to trump the common law insolvency “interest stops rule”.

[18] Thus I see no reason to not apply the interest stops rule to a CCAA proceeding because the CCAA does not expressly provide for its application. The issue is whether the rule should apply to this CCAA proceeding.

Nature of the CCAA proceeding

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[19] When the Nortel entities filed for CCAA protection on January 14, 2009, and filed on the same date in the US and the UK, the stated purpose was to stabilize the Nortel business to maximize the chances of preserving all or a portion of the enterprise. However that hope quickly evaporated and on June 19, 2009 Nortel issued a news release announcing it had sold its CMDA business and LTE Access assets and that it was pursuing the sale of its other business interests. Liquidation followed, first by a sale of Nortel's eight business lines in 2009-2011 for US$2.8 billion and second by the sale of its residual patent portfolio under a stalking-horse bid process in June 2011 for US$4.5 billion. The sale of the CMDA and LTE assets was approved on June 29, 2009.

[20] The Canadian debtors contend that this CCAA proceeding is a liquidating proceeding, and thus in substance the same as a bankruptcy under the BIA. The bondholders contend that there is no definition of a "liquidating" CCAA proceeding and no distinct legal category of a liquidating CCAA, essentially arguing that like beauty, it is in the eyes of the beholder.

[21] In this case, I think there is little doubt that this is a liquidating CCAA process and has been since June, 2009, notwithstanding that there was some consideration given to monetizing the residual intellectual property in a new company to be formed (referred to as IPCO) before it was decided to sell the residual intellectual property that resulted in the sale to the Rockstar consortium for US$4.5 billion. In *Re Nortel Networks Corp.*, 2012 ONSC 1213, 88 C.B.R. (5th) 111, Morawetz J. referred to his recognizing in his June 29, 2009 Nortel decision approving the sale of the CMDA and LTE assets that the CCAA can be applied in "a liquidating insolvency". See also Dr. Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act,* 2nd ed. (Toronto: Carswell, 2013) at p. 167, in which she states "increasingly, there are 'liquidating CCAA' proceedings, whereby the debtor corporation is for all intents and purposes liquidated".

[22] In *re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24 (Ont. S.C.), Farley J. recognized in para. 7 that a CCAA proceeding might involve liquidation. He stated:

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> It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company … provided the same is proposed in the best interests of the creditors generally.

[23] It is quite common now for there to be liquidating CCAA proceedings in which there is no successful restructuring of the business but rather a sale of the assets and a distribution of the proceeds to the creditors of the business. Nortel is unfortunately one of such CCAA proceedings.

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Can the interest stops rule apply in a CCAA proceeding?

[24] There is no controlling authority in Canada in a case such as this in which there is a contested claim being made by bondholders for post-filing interest against an insolvent estate under the CCAA, let alone under a liquidating CCAA process, or in which the other creditors are mainly pensioners with no contractual right to post-filing interest. Accordingly, it is necessary to deal with first principles and with various cases raised by the parties.

[25] The Canadian debtors contend that the rationale for the interest stops rule is equally applicable to a liquidating CCAA proceeding as it is in a BIA or Winding-Up proceeding. They assert that the reason for the interest stops rule is one of fundamental fairness. An insolvency filing under the CCAA stays creditor enforcement. Accordingly, it is unfair to permit the bondholders with a contractual right to receive a payment on account of interest, and thus compensation for the delay in receipt of payment, while other creditors such as the pension claimants, who have been equally delayed in payment by virtue of the insolvency, receive no compensation. They cite Sir G. M. Giffard, L.J. in *Humber Ironworks*:

> I do not see with what justice interest can be computed in favour of creditors whose debts carry interest, while creditors whose debts do not carry interest are stayed from recovering judgment, and so obtaining a right to interest.

[26] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, Deschamps J. reaffirmed that the purpose of a CCAA stay of proceedings is to preserve the *status quo*. She stated at para. 77:

> The *CCAA* creates conditions for preserving the *status quo* while attempts are made to find common ground amongst stakeholders for a reorganization that is fair to all.

[27] If post-filing interest is available to one set of creditors while the other creditors are prevented from asserting their rights and obtaining post-judgment interest, the Canadian Creditors' Committee contend that the *status quo* has not been preserved.

[28] It has long been recognized that the federal insolvency regime includes the CCAA and the BIA and that the two statutes create a complimentary and interrelated scheme for dealing dealing with the property of insolvent companies. See *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108 (C.A.), at paras. 62 and 64, per Laskin J.A.

[29] Recently the Supreme Court of Canada analysed the CCAA and indicated that the BIA and CCAA are to be considered parts of an integrated insolvency scheme, the court will favour interpretations that give creditors analogous entitlements under the CCAA and BIA, and the court will avoid interpretations that give creditors incentives to prefer BIA processes.

[30] In *Century Services*, Deschamps J. enunciated guiding principles for interpreting the CCAA. Deschamps J. also stated that the case was the first time that the Supreme Court was called upon to directly interpret the provisions of the CCAA. The case involved competing interpretations of the federal *Excise Tax Act* ("ETA") and the CCAA in considering a deemed trust for GST collections. The ETA expressly excluded the provisions in the BIA rendering deemed trusts ineffective, but did not exclude similar provisions in the CCAA. In holding in favour of a stay under the CCAA, Deschamps J. was guided in her interpretation of the relevant CCAA provision by the desire to have similar results under the BIA and CCAA.

[31] In her analysis, Deschamps J. made a number of statements, including

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> Because the CCAA is silent about what happens if reorganization fails, the *BIA* scheme of liquidation and distribution necessarily supplies the backdrop for what will happen if a CCAA reorganization is ultimately unsuccessful. (para. 23)
>
> With parallel CCAA and BIA restructuring schemes now an accepted feature of the insolvency law landscape, the contemporary thrust of legislative reform has been towards harmonizing aspects of insolvency law common to the two statutory schemes to the extent possible and encouraging reorganization over liquidation. (para. 24)
>
> Moreover, a strange asymmetry would arise if the interpretation giving the ETA priority over the CCAA urged by the Crown is adopted here: the Crown would retain priority over GST claims during CCAA proceedings but not in bankruptcy. As courts have reflected, this can only encourage statute shopping by secured creditors in cases such as this one where the debtor's assets cannot satisfy both the secured creditors' and the Crown's claims (*Gauntlet*, at para. 21). If creditors' claims were better protected by liquidation under the BIA, creditors' incentives would lie overwhelmingly with avoiding proceedings under the CCAA and not risking a failed reorganization. Giving a key player in any insolvency such skewed incentives against reorganizing under the CCAA can only undermine that statute's remedial objectives and risk inviting the very social ills that it was enacted to avert. (para. 47)
>
> Notably, acting consistently with its goal of treating both the BIA and the CCAA as sharing the same approach to insolvency, Parliament made parallel amendments to both statutes… (para. 54)
>
> The CCAA and BIA are related and no gap exists between the two statutes which would allow the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy. (para. 78)

[32] In *Re Indalex*, [2013] S.C.R. 271, a case involving a competition between a deemed trust under provincial pension legislation and the right of a lender to security granted under the DIP lending provisions of the CCAA, Deschamps J. had occasion to refer to the *Century Services* case and her statement in Century Services in para 23 referred to above. She then stated:

> In order to avoid a race to liquidation under the BIA, courts will favour an interpretation of the CCAA that affords creditors analogous entitlements.

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[33] Thus it is a fair comment taken the direction of the Supreme Court in *Century Services* and *Indalex* regarding the aims of insolvency law in Canada to say that if the common law principle of the interest stops rule was applicable to proceedings under the BIA and *Winding-Up Act* before legislative amendments to those statutes were made, (or if the comments of Blair J. in *Confederation Life* are accepted that the BIA still might be read to prevent its application but does not trump the application of the rule), there is no reason not to apply the interest stops rule in liquidating CCAA proceedings. I accept this and note that there is no provision in the CCAA that would not permit the application of the rule.

[34] There are also policy reasons for this result, and they flow from *Century Services* and *Indalex*. I accept the argument of the Canadian Creditors' Committee that to permit some creditors' claims to grow disproportionately to others during the stay period would not maintain the *status quo* and would encourage creditors whose interests are being disadvantaged to immediately initiate bankruptcy proceedings, threatening the objectives of the CCAA.

[35] In my view, there is no need for there to be a "liquidating" CCCAA proceeding in order for the interest stops rule to apply to a CCAA proceeding. The reasoning for the application of the common law insolvency rule, being the desire to prevent a stay of proceedings from militating against one group of unsecured creditors over another in violation of the *pari passu* rule, is equally applicable to a CCAA proceeding that is not a liquidating proceeding. In such a proceeding, the parties would of course be free to include post-filing interest payments in a plan of arrangement, as is sometimes done.

[36] The bondholders contend, however, that *Re Stelco Inc.*, 2007 ONCA 483, 32 C.B.R. (4th) 77 is binding authority that the interest stops rule does not apply in any CCAA proceeding. I do not agree. The facts of the case were quite different and did not involve a claim for post-filing interest against the debtor. Stelco was successfully restructured under the CCAA by a plan of compromise and arrangement approved by the creditors. The sanctioned plan did not provide for payment of post-petition interest. As among senior unsecured debenture holders, subordinated (junior) debenture holders and ordinary unsecured creditors, the plan treated all in the same class

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and *pro rata* distributions were calculated on the basis that no post-filing interest was allowed. That result was not challenged.

[37] The relevant pre-filing indenture in *Stelco* provided that in the event of any insolvency, the holders of all senior debt would first be entitled to receive payment in full of the principal and interest due thereon, before the junior debenture holders would be entitled to receive any payment or distribution of any kind which might otherwise be payable in respect of their debentures. While the plan cancelled all Stelco debentures, subject to section 6.01(2) of the plan, that section provided that the rights between the debenture holders were preserved. The plan was agreed to by the junior debenture holders. After the plan had been sanctioned, the junior debenture holders challenged the senior debt holders' right to receive the subordinated payments towards their outstanding interest.

[38] Wilton-Siegel J. rejected the argument, holding that the subordination agreement continued to operate independently of the sanctioned plan and was not affected by it. While it is not clear why, the junior Noteholders contended that interest stopped accruing in respect of the claims of the senior debenture holders against Stelco after the CCAA filing. There was no issue about a claim against Stelco for post-filing interest, as no such claim had ever been made. The issue was a contest between the two levels of debenture holders. However, Wilton-Siegel J. stated that in situations in which there was value to the equity, a CCAA plan could include post-filing interest. I take this statement to be *obiter*, but in any event, it is not the situation in Nortel as there is no equity at all. At the Court of Appeal, O'Connor A.C.J.O, Goudge and Blair JJ.A. agreed that the interest stops rule did not preclude the continuation of interest to the senior note holders from the subordinated payments to be made by the junior note holders under the binding inter-creditor arrangements.

[39] In the course of its reasons, the Court of Appeal stated that there was no persuasive authority that supports an interest stops rule in a CCAA proceeding, and referred to statements of Binnie J. in *Canada 3000 Inc., Re; Inter‑Canadian (1991) Inc. (Trustee of)*, 2006 SCC 24, [2006] 1 S.C.R. 865, [*NAV Canada*]. A number of comments can be made.

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[40] First, *Stelco* did not involve proceeding or claims against the debtor for post-filing interest. Second, the decision in *Stelco* was derived from the terms of negotiated inter-creditor agreements in the note indenture that were protected by plan. There was nothing about the common law interest stops rule that precluded one creditor from being held to its agreement to subordinate its realization to that of another creditor including foregoing its right to payment until the creditor with priority received principal and interest. That is what the Court of Appeal concluded by stating "We do not accept that there is a 'Interest Stops Rule' that precludes such a result". Third, the general statements made in *Stelco* and *NAV Canada* must now be considered in light of the later direction in *Century Services* and *Indalex*. I now turn to *NAV Canada.*

[41] In *NAV Canada*, Canada 3000 Airlines filed for protection under the CCAA. Three days later the Monitor filed an assignment in bankruptcy on its behalf. Federal legislation gave the airport authorities a right to apply to the court authorizing the seizure of aircraft for outstanding payments owed by an airline for using an airport. The contest in the case was between the airport authorities and the owners/lessors of the aircraft as to the extent that the owners/lessors were liable for those payments and whether a seizure order could be made against the aircraft leased to the airline. It was ultimately held that the owners/lessors were not liable for the outstanding payments owed by the airline but that the aircraft could be seized.

[42] Interest on the arrears was raised in the first instance before Ground J. He held that the airport authorities were entitled as against the bankrupt airline to detain the aircraft until all amounts with interest were paid in full or security for such payment was posted under the provisions of the legislation, i.e. interest continued to accrue and be payable after bankruptcy. The Court of Appeal did not deal with interest as in their view it was relevant only if the airport authorities had a claim against the owners/lessors of the aircraft, which the court held they did not.

[43] In the Supreme Court, which also dealt with an appeal from Quebec which dealt with the same issues, nearly the entire reasons of Binnie J. dealt with the issues as to whether the owners/lessors of the aircraft were liable for the outstanding charges and whether the aircraft

could be seized by the airport authorities. It was held that the owners/lessors were not directly liable for the charges owed by the airline but that the aircraft could be seized until the charges were paid.

[44] At the end of his reasons, Binnie J. dealt with interest and held that it continued to run until the earlier of payment, the posting of security, or bankruptcy. The bondholders rely on the last two sentences of the following paragraph from the reasons of Binnie J. which refer to the running of interest under the CCAA:

> **96** Given the authority to charge interest, my view is that interest continues to run to the first of the date of payment, the posting of security or bankruptcy. If interest were to stop accruing before payment has been made, then the airport authorities and NAV Canada would not recover the full amount owed to them in real terms. Once the owner, operator or titleholder has provided security, the interest stops accruing. The legal titleholder is then incurring the cost of the security and losing the time value of money. It should not have to pay twice. While a *CCAA* filing does not stop the accrual of interest, the unpaid charges remain an unsecured claim provable against the bankrupt airline. The claim does not accrue interest after the bankruptcy: ss. 121 and 122 of the *Bankruptcy and Insolvency Act*.

[45] The Quebec airline in question had first filed to make a proposal under the BIA and when that proposal was rejected by its creditors, it was deemed to have made an assignment in bankruptcy as of the date its proposal was filed. Thus the comments of Binnie J. regarding the CCAA could not have related to the Quebec airline, but only to Canada 3000, which had been under the CCAA for only three days before it was assigned into bankruptcy. It is by no means clear how much effort, if any, was spent in argument on the three days' interest issue. Binnie J. did not refer to any argument on the point.

[46] There was no discussion of the common law interest stops rule and whether it could apply during the three day period in question or whether it should apply to a liquidating CCAA proceeding. Nor was there any discussion of the definition of claim in the CCAA, being a claim provable within the meaning of the BIA, and how that might impact a claim for post-filing

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interest under the CCAA. The statement regarding interest under the CCAA was simply conclusory. It may be fair to say that the statement of Binnie J. was *per incuriam*.

[47] In my view, the statement of Binnie J. should not be taken as a blanket statement that interest always accrues in a CCAA proceeding, regardless of whether or not it is a liquidating proceeding. The circumstances in *NAV Canada* were far different from Nortel involving several years of compound interest in excess of US$1.6 billion out of a total world-wide asset base of US$7.3 billion. The statement of Binnie J. should now be construed in light of *Century Services* and *Indalex*.

Need for a CCAA plan

[48] The bondholders contend that there is no authority under the CCAA to effect a distribution of a debtor's assets absent a plan of arrangement or compromise that must be negotiated by the debtor with its creditors, and that as a plan can include payment of post-filing interest, it is not possible for a court to conclude that the bondholders have no right to post-filing interest. They assert that there is no jurisdiction for a court to compromise a creditor's claim in a CCAA proceeding except in the context of approving a plan approved by the creditors. They also assert that plan negotiations cannot meaningfully take place "in earnest" until the allocation decision as to how much of the US$7.3 billion is to be allocated to each of the Canadian, US, or EMEA estates.

[49] One may ask what is left over in this case to negotiate. The assets have long been sold and what is left is to determine the claims against the Canadian estate and, once the amount of the assets in the Canadian estate are known, distribute the assets on a *pari passu* basis. This is not a case in which equity is exchanged for debt in a reorganization of a business such as *Stelco*.

[50] However, even if there were things to negotiate, they would involve creditors compromising some right, and bargaining against those rights. What those rights are need to be determined, and often are in CCAA proceedings.

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[51] In this case, compensation claims procedure orders were made by Morawetz J. The order covering claims by bondholders is dated July 30, 2009. It was made without any objection by the bondholders. That order provides for a claim to be proven for the purposes of voting and distribution under a plan. The claims resolution order of Morawetz J. dated September 16, 2010 provides for a proven claim to be for all purposes, including for the purposes of voting and distribution under any plan. The determination now regarding the bondholders claim for post-filing interest is consistent with the process of determining whether these claims by the bondholders are finally proven. Contrary to the contention of the bondholders, it is not a process in which the court is being asked to compromise the bondholders' claim for post-filing interest. It is rather a determination of whether they have a right to such interest.

[52] It is perhaps not necessary to determine at this stage how the assets will be distributed and whether a plan, or what type of plan, will be necessary. However, in light of the argument advanced on behalf of the bondholders, I will deal with this issue.

[53] I first note that the CCAA makes no provision as to how money is to be distributed to creditors. This is not surprising taken that plans of reorganization do not necessarily provide for payments to creditors and taken that the CCAA does not expressly provide for a liquidating CCAA process. There is no provision that requires distributions to be made under a plan of arrangement.

[54] A court has wide powers in a CCAA proceeding to do what is just in the circumstances. Section 11(1) provides that a court may make any order it considers appropriate in the circumstances. Although this section was provided by an amendment that came into force after Nortel filed under the CCAA, and therefore by the amendment the new section does not apply to Nortel, it has been held that the provision merely reflects past jurisdiction. In *Century Services*, Deschamps J. stated:

> **65** I agree with Justice Georgina R. Jackson and Professor Janis Sarra that the most appropriate approach is a hierarchical one in which courts rely first on an interpretation of the provisions of the *CCAA* text before turning to inherent or

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> equitable jurisdiction to anchor measures taken in a *CCAA* proceeding (see G. R. Jackson and J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41, at p. 42). The authors conclude that when given an appropriately purposive and liberal interpretation, the *CCAA* will be sufficient in most instances to ground measures necessary to achieve its objectives (p. 94).
>
> **67** The initial grant of authority under the *CCAA* empowered a court "where an application is made under this Act in respect of a company ... on the application of any person interested in the matter ..., subject to this Act, [to] make an order under this section" (*CCAA*, s. 11(1)). The plain language of the statute was very broad.
>
> **68** In this regard, though not strictly applicable to the case at bar, I note that Parliament has in recent amendments changed the wording contained in s. 11(1), making explicit the discretionary authority of the court under the *CCAA*. Thus in s. 11 of the *CCAA* as currently enacted, a court may, "subject to the restrictions set out in this Act, ... make any order that it considers appropriate in the circumstances" (S.C. 2005, c. 47, s. 128). Parliament appears to have endorsed the broad reading of *CCAA* authority developed by the jurisprudence. (underlining added)

[55] I note also that payments to creditors without plans of arrangement or compromises are often ordered. In *Timminco Limited (Re)*, 2014 ONSC 3393, Morawetz J. noted at para. 38 that the assets of Timminco had been sold and distributions made to secured creditors without any plan and with no intention to advance a plan. In that case, there was a shortfall to the secured creditors and no assets available to the unsecured creditors. The fact that the distributions went to the secured creditors rather than to an unsecured creditor makes no difference to the jurisdiction under the CCAA to do so.

[56] In *AbitibiBowater Inc., (Re)*, 2009 QCCS 6461, Gascon J.C.S. (as he then was) granted a large interim distribution from the proceeds of a sale transaction to senior secured noteholders ("SSNs"). The bondholders opposed the distribution on the same grounds as advanced by the bondholders in this case:

> 56 The Bondholders claim that the proposed distribution violates the CCAA. From their perspective, nothing in the statute authorizes a distribution of cash to a creditor group prior to approval of a plan of arrangement by the requisite

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> majorities of creditors and the Court. They maintain that the SSNs are subject to the stay of proceedings like all other creditors.
>
> 57 By proposing a distribution to one class of creditors, the Bondholders contend that the other classes of creditors are denied the ability to negotiate a compromise with the SSNs. Instead of bringing forward their proposed plan and creating options for the creditors for negotiation and voting purposes, the Abitibi Petitioners are thus eliminating bargaining options and confiscating the other creditors' leverage and voting rights.
>
> 58 Accordingly, the Bondholders conclude that the proposed distribution should not be considered until after the creditors have had an opportunity to negotiate a plan of arrangement or a compromise with the SSNs.

[57] Justice Gascon did not accept this argument. He stated:

> 71 Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada. (underlining added)

[58] Justice Gascon was persuaded that the distribution should be made as it was part and parcel of a DIP loan arrangement that he approved. Whatever the particular circumstances were that led to the exercise of his discretion, he did not question that he had jurisdiction to make an order distributing proceeds without a plan of arrangement. I see no difference between an interim distribution, as in the case of *AbitibiBowater*, or a final distribution, as in the case of *Timminco*, or a distribution to an unsecured or secured creditor, so far as a jurisdiction to make the order is concerned without any plan of arrangement.

[59] There is a comment by Laskin J.A. in *Ivaco Inc., (Re)* (2006), 83 O.R. (3d) 108 (C.A.) that questions the right of a judge to order payment out of funds realized on the sale of assets under a CCAA process, in that case to pension plan administrators for funding deficiencies. He stated:

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> [I]n my view, absent an agreement, I doubt that the CCAA even authorized the motions judge to order this payment. Once restructuring was not possible and the CCAA proceedings were spent, as the motions judge found and all parties acknowledged, I question whether the court had any authority to order a distribution of the sale proceeds.

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[60] This was an *obiter* statement. But in any event Justice Laskin was discussing a situation in which all parties agreed that the CCAA proceedings "were spent". That is, there was effectively no CCAA proceeding any more. This is not the situation with Nortel and I do not see the *obiter* statement as being applicable. As stated by Justice Gascon , distribution orders without a plan are common in Canada.

[61] While it need not be decided, I am not persuaded that it would not be possible for a court to make an order distributing the proceeds of the Nortel sale without a plan of arrangement or compromise.

Conclusion

[62] I hold and declare that holders of the crossover bond claims are not legally entitled to claim or receive any amounts under the relevant indentures above and beyond the outstanding principal debt and pre-petition interest (namely, above and beyond US$4.092 billion).

[63] Those seeking costs may make cost submissions in writing within 10 days and responding submissions may be made in writing within a further 10 days. Submissions are to be brief and include a proper cost outline for costs sought.

Newbould J.

Date: September 11, 2014

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TAB 14

IN THE MATTER OF AN ARBITRATION

1998 CanLII 19020 (MB LA)

BETWEEN: READYFOODS LIMITED
(THE EMPLOYER)

-and-

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL NO. 832
(THE UNION)

RE: POLICY GRIEVANCE NO. 98/24831 - SEVERANCE PAY

BEFORE: HUGH R. JAMIESON, Sole Arbitrator

APPEARANCES: MR. ROBERT A. WATCHMAN, for the Employer

MR. DAVID LEWIS, For the Union

HEARD: At Winnipeg on November 27, 1998

DECISION: December 10, 1998

1998 CanLII 19020 (MB LA)

This award deals with a dispute between the Employer and the Union as to whether, in the event of a plant closure, wages paid in lieu of group termination notice under The Employment Standards Act R.S.M. 1987, c.EllO and in particular section 40 thereof, can be set off against severance pay accruing to employees under the provisions of their collective agreement.

The relevant article of the collective agreement provides:

> " 17.02 Severance Pay
>
> Any employee who is tenninated due to the permanent closing of the Company's operation or any portion of the Company's operation, or any employee who is tenninated because his or her job has become redundant, or any employee who is terminated because of the Company's decision to downsize their operation, or any employee who is terminated due to a technological change, shall receive severance pay in the amount of forty (40) hours pay at the employee's regular hourly rate of pay for each year of service with the Company. "

Section 40 of the Employment Standards Act, hereinafter referred to as the Act, provides in part:

> " Notice of group termination of employment
>
> 40(1) Any employer who terminates, either simultaneously or within any period not exceeding four weeks, the employment of a group of 50 or more employees, shall give notice to the minister in writing, of his intention to do so at least
>
> (a) 10 weeks before the date of termination of the employment of the employee in the group whose employment is first terminated where the group of employees whose employment is to be terminated does not exceed 100;
>
> (b) 14 weeks before the date mentioned in clause (a) where the group exceeds 100 but does not exceed 300; and
>
> (c) 18 weeks before the date mentioned in clause (a) where the group exceeds 300

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Copy of notice to union

40(3) A copy of any notice given to the minister under subsection (1) shall be given forthwith by the employer to any trade union certified to represent any employee in the group of employees whose employment is to be terminated or recognized by the employer as bargaining agent for any such employee; and where any employee in such group is not represented by a trade union, a copy of such notice shall be given to him or posted forthwith by the employer in a conspicuous place within the establishment in which that employee is employed.

Payment in lieu of notice

40(5) An employer may terminate the employment of an employee forthwith if the employer gives to the employee notice in writing to that effect and

(a) pays to the employee an amount equal to the wages that person would have received had he worked his regular working hours at his regular rate of pay for the period of notice mentioned in subsection (1); and

(b) pays to the employee any unpaid vacation pay to which the employee is entitled under The Vacations With Pay Act.

In the situation here, after having decided on or about August 28, 1998, to close its plant at Winnipeg, the Employer gave the Minister and the Union the notice required under the Act for group termination but opted to take advantage of section 40(5) of the Act, and terminated the affected employees immediately without notice and paid them wages in lieu thereof. However, in calculating the severance pay due to the employees under the collective agreement, the employer set off amount of wages in lieu of notice that it had paid the employees under the Act.

The facts and circumstances surrounding these actions by the Employer are set out in a "Statement of Agreed Facts" which was presented to me at the hearing on November 27, 1998, which reads as follows:

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" I. The Union is the bargaining agent for a group of employees ofReadyfoods described as all employees ofReadyfoods Limited, in the Province ofManitoba, save and except Office Employees, Production Supervisors, One (1) Maintenance Supervisor, and those excluded by the Act.

2. The Union and Readyfoods have bargained a series of Collective Agreements over the years with the most recent Collective Agreement covering the period of October 30, 1995 through April30, 1998. Attached hereto at Tab 1 is a copy of this Collective Agreement.

3. Subsequent to April30, 1998, Readyfoods continued to operate and the parties were negotiating towards a renewed Collective Agreement. The terms and conditions of employment for employees remained as set out in the Collective Agreement expiring April30, 1998.

4. Article 17.02 ofthe Collective Agreement states as follows:

17.02 Severance Pay

Any employee who is terminated due to the permanent closing ofthe Company's operation or any portion of the Company's operation, or any employee who is terminated because his or her job has become redundant, or any employee who is tenninated because of the Company's decision to downsize their operation, or any employee who is tenninated due to a technological change, shall receive severance pay in the amount of forty (40) hours' pay at the employee's regular hourly rate of pay for each year of service with the Company.

This provision first appeared in the predecessor CoUective Agreement between the parties covering the period ofMay 1, 1993 to March 30, 1996. Attached hereto at Tab 2 is the applicable Article from the predecessor Collective Agreement.

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5. On or about August 28, 1998, Readyfoods decided to close its Winnipeg plant and hand-delivered to each ofthe employees in the Union's bargaining unit a letter providing them with notice of termination. Attached hereto at Tab 3 is a letter sent to Mr. Bernard Christophe, President and ChiefExecutive Officer of the Union, from Mr. Wayne Urbonas, General Manager ofReadyfoods, notifying the Union of the plant closure, and enclosing an example copy of the letters which were delivered to all employees, a copy ofthe letter sent to the Minister ofLabour, and a calculation of the amount of severance owing to each individual employee, according to Readyfoods' formula.

6. On August 28, 1998, over fifty, but less than one hundred employees were terminated by Readyfoods.

7. *As* set out in the August 28, 1998 letter, all employees were advised that they would receive ten weeks' pay in lieu of notice in accordance with employment standards legislation. This reference to the applicable legislation is in reference to *The Employment Standards* Act R.S.M. 1987, c.El1O and in particular, Section 40 thereof Attached hereto at Tab 4 is a copy of Section 40 of *The Employment Standards* Act.

8. On September 8, 1998 the Union filed a grievance with respect to severance pay Attached hereto at Tab 5 is a copy of this grievance.

9. Readyfoods has denied the grievance as set out in their response to the grievance dated September 23, 1998. Attached hereto at Tab 6 is a copy of Readyfoods'response to the grievance.

10. On October 26, 1998, Readyfoods sent a letter to all members of the bargaining unit. Attached hereto at Tab 7 is a copy of this letter.

11. The parties agree that this Statement of Agreed Facts shall form part ofthe evidence being presented before Arbitrator Jamieson at the hearing into this matter and further agree that neither side is restricted to the facts as set out above, and in fact, can lead any other admissible evidence they feel is necessary for the furtherance of their case at the hearing of this matter.

DATED THIS 27 DAY OF NOVEMBER, 1998.

COUNSEL FOR THE UNION: COUNSEL FOR READYFOODS

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Neither party adduced any additional evidence. They relied solely on the foregoing "Statement of Agreed Facts" as well as on the attachments that are referred to therein. There are a couple of factual aspects in the said attachments that require highlighting. The first one comes from a schedule under Tab 3 showing the impact of the set off made by the Employer. For example, the most senior employee in the plant, a J. Lambert who has 28 years service, was entitled to severance pay under article 17.02 in the amount of$15,288.00. The set offofthe 10 weeks wages in lieu of group tennination under the Act reduces this amount to $9,828.00. The other fact is indicated in correspondence under Tabs 6 & 7. In response to the Union's grievance which was dated September 8, 1998, the Employer notified all of the employees in the bargaining unit that no lump sum severance payments would be made until the matter is resolved. As a result, all of these monies are being held in trust.

In justifying its actions in setting off the payments in lieu of notice under the Act against the severance pay accruing to the employees under the collective agreement, the Employer relied mainly on what it described as the paramountcy of the principle of double recovery from the same source. According to the Employer, the purpose of severance pay and wages in lieu of notice, which is often referred to as termination pay, are really one and the same. They are similar in nature and are both intended to relieve financial hardship in the event that employment relationships are terminated. They also provide some form of compensation for the loss of employment. In the Employer's view, regardless of the terminology used, i.e., severance pay,

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termination pay or wages in lieu of notice, this is really a single benefit whether it accrues from a collective agreement or under statute. In this same vein, the Employer's submits that the Act is intended only to set minimum standards and argues that it would be absurd to suggest that greater benefits included in collective agreements can be collected in addition to those prescribed under the Act. As an example, the Employer referred to maternity leave, emphasizing that this benefit clearly cannot be collected under both the Act and the collective agreement.

Against that background, the Employer claims that in the circumstances here, the setting off of the wages in lieu of notice under the Act is necessary to avoid double recovery from the same source. The Employer points out that if the set off is not allowed, the affected employees would receive 10 weeks more severance pay from the Employer than was contemplated when article 17.02 of the collective agreement was negotiated. The Employer also submitted that if the Union had intended that its members were to receive notice or wages in lieu thereof under the Act in addition to the severance pay spelled out in the collective agreement, it should have negotiated specific language to that effect in the collective agreement. In this regard, the Employer submits that the burden lies with the Union to negotiate terms that are specific where it is alleging entitlement to a monetary benefit. The Employer also added that in these situations, where the result is double recovery from the same source, with the Employer having to pay for something that it did not negotiate, any ambiguity should be resolved in favour of the Employer.

In support of its position, the Employer referred to several precedents including, Re Geoffrey

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Stevens v. The Globe and Mail (1996), 19 C.C.E.L. (2d), (Ont. C.A.), 154Be Erlund v. Quality Communication Products Ltd. et al (1972), 29 D.L.R. (3d) (Man. Q.B.) 476Re Town of Midland and Ontario Public Service Union. Local328 (1988), 2 L.A.C. (4th), 87 (Verity) British American Bank Note Inc. (Custom Forms of Canada) and Graphic Communications International Union, Locai525-M (1991), 21 L.A.C. (4th) 285 (Kelleher); ReWire Rope Industries Ltd. and United Steelworkers of America, Local3910 (1982), 4 L.A.C. {3d) 323 (Chertkow); Re Western Grocers and United Food & Commercial Workers, Local 1400 (1995), 46 L.A.C. (4th) 129 (Priel); & Canadian Labour Arbitration, (3d) Brown & Beatty, para 4:2100.

For its part, the Union argued that severance pay and wages in lieu oftennination notice are two separate and distinct benefits and that the Employer cannot set one off against the other. In this regard, the Union submits that the distinction is that severance pay is an accumulated benefit for past service. It rewards employes for past commitment and contribution to their employer. Payment in lieu of notice on the other hand, is compensation for an employer's failure to provide adequate notice of termination. According to the Union, an employer cannot avoid its obligation to pay severance pay by giving notice, and that the reverse is equally true.

In support of its position, the Union referred to several writings and precedents, including, Excerpts from Labour Arbitration Year Book, 1998, Lancaster House; Excerpts from Labour Law Terms. A Dictionary of Canadian Labour Law, Sack and Poskanzer, Lancaster House; Adams Mine and United Steelworkers. Local 6409 P & M (1990), 11 L.A.C. (4th) 214,

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(Craven); MacDonalds Consolidated Ltd, (Canada Safeway Ltd.) and Retail Wholesale Union, Local 580 (1997), 61 L.A.C. (4th) 129 (McKee); Re Telegram Publishing Co. Ltd and Zwelling and Essig (1976), 76 CCH 14,0047, (Ont. C.A.); and, Freightliner of Canada Ltd v. Canadian Association ofIndustrial. Mechanical and Allied Workers, Local 14, eta} (1982), 83 CCH 14,019 (Sup.Crt. B.C.)

Going back to the Employer's argument for a moment, 1 want to expand a little on the double recovery theory as well as on the Employer's position that severance pay and wages in lieu of notice are to be viewed as a single benefit for compensation purposes on the termination of an employment contract. At the outset of its argument, the Employer stressed that the answer here does not lie in labour law, it says that this case turns purely on the consideration of the paramountcy of avoiding double recovery from the same source. One example of the authorities relied upon by the Employer is Re Town of Midland and Ontano Public Service Employees Union, Local 328 SYlm!-. where an arbitration board allowed a similar set off against an award of compensation in lieu of reinstatement in an unjust dismissal grievance under a collective agreement. The issue there and the arbitration board's finding are set out at pages 90 and 91 of the award:

> " The real dispute is whether or not the corporation is entitled to deduct the payment made to the grievor under the *Employment Standards Act.*
>
> Having reviewed the authorities submitted, the board is satisfied that the payment of wages in lieu of notice under s, 40 (7) (a) of the Ontario *Employment Standards Act* is deductible from an award of damages. To hold otherwise, we think, would allow a double recovery from the same source. "

The Employer also relied heavily on Re Geoffrey Stevens v. The Globe and Mail —, where, the Ontario Court of Appeal dealt with an appeal from a decision of a Trial Judge who had ruled that severance pay under the Ontario Employment Standards Act could not be set off against an award of damages for wrongful dismissal. The Employer here points out that in overturning that decision of the Trial Judge, the Court of Appeal reaffirmed that both termination pay and severance pay constitute "*a statutory benefit arising from the termination of employment which is payable in lieu of damages for such termination*" (page 163). The Court went on to rule that both termination pay and severance pay under the Employment Standards Act are deductible from an award of damages for wrongful dismissal and allowed the set off. Analogizing the set off principles there with what is before me, the Employer suggests that the Geoffrey Stevens v. The Globe and Mail decision is the current leading judicial authority on this issue to which I should defer.

With the utmost respect, I see a marked difference between what we have here and what was involved in both the Town of Midland and the Geoffrey Stevens matters. As I read those cases, the underlying issue was determining what compensation was to be paid for lost wages and benefits in lieu of reinstatement in an unjust dismissal grievance under a collective agreement and, determining the quantum of general damages in a wrongful dismissal suit. As I understand the practice in those situations, it is quite normal to take into account income already received from an employer such as wages in lieu of notice or severance pay in determining quantum. I know that I certainly have allowed such set offs in the many unjust dismissal case.Therefore, I really

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have no quarrel with what the arbitration board did in Town ofMidland. However, I do not see that case being of assistance to me here, where I see the issue being whether the Employer can deduct the cost of its obligation to give group termination notice to the Minister under section 40 of the Act from the severance pay accruing to the employees under article 17.02 ofthe collective agreement. In my view, this is an entirely different matter.

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Again with respect, I also do not think that the Geoffrey Stevens case is on point, or that it is going to be of much help either. As I read that decision, it appears to be another case where severance pay already received from an employer under the *Employment Standards Act* should have been routinely set off against a general damage award for wrongful dismissal. However, the stumbling block there was a provision contained in section 58 (7) of the Ontario *Employment Standards Act* that specifed that severance pay was payable ...." *in addition* to any other payments *under* the Act or contract of employment *without setoffordeduction."* This is apparently what caused the Trial Judge to reluctantly disallow the set offofthe statutory severance pay in the first place. I also note that in overturning the Trial Judge's decision, the Court of appeal observed (at page 161), that damages for wrongful dismissal are not paid *under* a contract of employment, they are paid for *breach* of contract. Consequently, the Court found that such damages did not fall within the *"in addition"* provisions of the Ontario *Employment Standards Act*. The distinction here, is that we are not dealing with damages at common law for wrongful dismissal. What we have here is an accrued benefit *under* a collective agreement. Furthermore, the provisions in the Act here are substantially different. On its face at least, the Act is silent as to whether wages

in lieu of group termination of employment under section 40 are to be paid in addition to other severance benefits accruing under collective agreements.

Taking all of the circumstances here into account, as well as the arguments of both parties and the authorities cited, it appears to me that the weakness in the Employer's position is in treating severance pay under the collective agreement and wages in lieu of group termination notice under the Act as a single compensation package payable on termination of employment In my view, this is fundamentally wrong in a labour relations sense. To illustrate this, I need go no further than two references made by the Union in its argument First, in the Labour Arbitration Year .B.QQ.k, 1998, there is a paper entitled, Severance Pay at Arbitration: A Neutral's Perspective that was presented by J.Robert W. Blair, Chair of the Alberta Labour Relations Board at the 14th Annual Labour Conference at Calgary in 1996. The summary ofthis paper reads in part:

> " Any study of severance pay, Robert Blair, the Chair of the Alberta Labour Relations Board, notes, must begin with an understanding of what severance pay is, and what it is not. It is not termination pay. Nor is it pay in lieu of notice. The obligation to pay severance pay arises on the tenninationn of the employment relationship and its purpose is to cushion economic hardship by providing some compensation for loss of a job. The obligation exists whether or not an employee finds alternative employment, and it must be paid even if an employee is given reasonable notice. "
>
> (Page 247- emphasis added)

In the same Labour Arbitration Year Book, there is another paper entitled, Severance Pay at Arbitration: A Management Viewpoint that was presented at the same conference by Management Labour Lawyer, Damon S. Bailey. Mr. Bailey wrote the following on this topic:

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> " Severance pay is money payable to an employee upon the termination of employment. It is to be distinguished from pay in lieu of notice which has a different purpose. Pay in lieu of notice compensates an employee for the employer's failure to provide adequate notice of termination. It is a form of damages. Severance pay on the other hand, rewards a departing employee for past commitment and contribution to the employer. It acknowledges the investment the employee has made in the employer's business and it is normally viewed as an earned benefit.
>
> This distinction between severance pay and pay in lieu of notice has important consequences. It means an employer cannot normally avoid its obligation to pay severance pay by giving its employees notice of termination. It also means that paying severance pay will not necessarily relieve an employer from giving notice. "
>
> (Page 260 - emphasis added)

Those comments certainly reflect my understanding of what severance pay and wages in lieu of notice are all about. No matter that they come out of the same pocket and that they can both be triggered by the tennination of an employment relationship, this does not necessarily entail double recovery. These are two separate and distinct benefits, each with different purposes:

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

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pay, to some extent, compensates the employee for that loss while notice simply gives him some advance warning of his dismissal and gives *him* a better opportunity to locate another job. Notice does not compensate the employee for the fact that he will have no seniority when he commences that new job. Moreover, the length of notice required in the case of a mass tennination is in no way related to length of service, once the basic three months' seniority has been established. Under the Act, the employee with six months of service would receive the same amount of notice as an employee with 30 years of service. This is further evidence that notice of termination serves an entirely different purpose than severance pay.

(Re Telegram Publishing Co. Ltd. and Marc Zwelling & Gottlob Essig (1972), 1 L.A.C. (2d) 1, (Carter) at pages 20- 21 -emphasis added) (upheld by the Ontario Court of Appeal- see Re Telegram Publishing Co. Ltd. and Zwelling and Essig supra.,).

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Looking at the group termination notice requirements included in section 40 of the Act, it is readily apparent that the primary purpose of *this* legislation, as it affects collective bargaining regimes, is to provide the Minister of Labour and any trade union that is affected, with advance warning of a mass lay off. This provides them with an opportunity to review the situation with the employer to see if there are ways and means to avoid the plant closure. It also provides an opportunity to find ways to minimize the impact of the termination on the affected employees and to assist them in finding other employment. In this regard, aside from advance warning, section 40 of the Act speaks of joint planning committees, employer cooperation with the Minister and with the joint planning committees. Obviously, as opposed to severance pay which compensates for past service, group termination notice provisions are aimed at the future. The purposes are to see ifthere is a remedy and to ease the personal and social impact of plant closures when masses of employees, usually with the same skills, are thrown on the job market at the same time.

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Like the Ontario group termination provisions referred to in the above paragraphs reproduced from Re Telegram Publishing Co. Ltd., supra., the Act here also has a bail out clause for employers who might have difficulty in canying on their businesses during the notice period. Rather than have the employees work out the notice period, section 40 (5) allows an employer to pay them wages in lieu of notice. In this respect, I agree with the comments of Professor Carter which I emphasized above, that this provision for wages in lieu of notice is ancillary to the main purpose of requiring advance notice to the Minister ofLabour of plant shutdowns.

Looking at the circumstances before me in that light, going back to August 28, 1998, when article 17.02 ofthe collective agreement was triggered upon the Employer's decision to close its plant. At that point, the employees were entitled to severance pay based on forty (40) hours pay at their regular rate of pay for each year of past service with the Employer. This is clearly what was contemplated by the Union and the Employer when they negotiated article 17.02.

At the same time, because the situation involved more than fifty employees, section 40 of the Act was also triggered. Responding to this statutory obligation, the Employer gave the Minister, the Union and all of the affected employees notice of the plant closure. However, for reasons undisclosed to me, the Employer decided not to permit the unionized plant employees to work out the mandatory 10 week notice period under the Act. Instead, the Employer opted to pay these employees wages in lieu of this notice period as it is entitled to do under section 40 (5). As the very words indicate, this payment was specifically in lieu of or instead of working from August

28, 1998 until November 6, 1998, which was when the non-unionized salaried employees were terminated after having worked out their notice. If there can be any doubt that the wages in lieu of notice paid to the employees was to compensate for the lost opportunity to work during the mandatory ten week notice period between August 28 and November 6, 1998, one only has to look at the how the money was paid. According to individual notices to the employees, examples of which were included at Tab 3 of the "Statement of Agreed Facts", the employees were to receive, *"a weekly deposit into your account over the next ten (10) week period, less statutory deductions* ".

Of course, I am not saying that it would have made any difference if the Employer had chosen to pay these wages in lieu of notice in a lump sum, all I am saying is that the weekly payments are just an other indication that these wages in lieu of notice paid under the Act were for a specific purpose, other than for compensation for past service. It is therefore unrelated to and can have no bearing on the severance pay credits accruing to the employees under the collective agreement. Indeed, had the employees been allowed to work out that statutory ten week notice period, there would be no question at all ofthe Employer's obligations under section 40 of the Act impacting on their severance pay.

Responding briefly to the Employer's argument about the onus being on the Union to have negotiated specific tenns that would have clearly indicated that wages in lieu of notice under the Act was to be paid in addition to the severance benefits under the collective agreement. With

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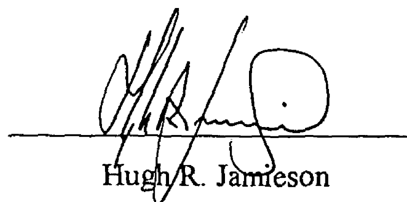
respect, I disagree. Looking at the construction of articles 17.02, the language is clear, concise and unequivocal. There can be absolutely no issue here of ambiguity arising from the wording of this article. Where the ambiguity arises is in the interplay between the collective agreeement and the Act. In this regard, I agree that the Act does set minimum standards and that in most other areas such as pregnancy leave, it would be absurd to think of someone claiming benefits under both the Act and their collective agreement However, as I have already illustrated, section 40 of the Act has purposes other that setting minimum standards. It imposes obligations on employers generally to give advance notice to the Minister of Labour in group termination situations. For my purposes here, it must be deemed that the Employer was aware of these obligations when article 17.02 first appeared in this collective agreement back in 1993. Ifthere is to be a burden on any party to ensure that group termination notice was to somehow be a combined benefit with the collective agreement provisions, it surely had to be on the Employer, who carries the burden under the Act One can hardly place an onus on a bargaining agent to negotiate downwards.

In light of all of the foregoing, I find that the employees are entitled to their full severance pay benefits accrued under article 17.02 of the collective agreement and that the Employer cailllot deduct the amount of wages paid in lieu of group termination notice under the Act therefrom. The grievance is allowed accordingly.

Dated December I0, 1998



Hugh R. Jamieson

TAB 15

1998 CanLII 837 (SCC)

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez and Lindy Wagner on their own behalf and on behalf of the other former employees of Rizzo & Rizzo Shoes Limited *Appellants*

v.

Zittrer, Siblin & Associates, Inc., Trustees in Bankruptcy of the Estate of Rizzo & Rizzo Shoes Limited *Respondent*

and

The Ministry of Labour for the Province of Ontario, Employment Standards Branch *Party*

INDEXED AS: RIZZO & RIZZO SHOES LTD. (RE)

File No.: 24711.

1997: October 16; 1998: January 22.

Present: Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Employment law — Bankruptcy — Termination pay and severance available when employment terminated by the employer — Whether bankruptcy can be said to be termination by the employer — Employment Standards Act, R.S.O. 1980, c. 137, ss. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, S.O. 1981, c. 22, s. 2(3) — Bankruptcy Act, R.S.C., 1985, c. B-3, s. 121(1) — Interpretation Act, R.S.O. 1990, c. I.11, ss. 10, 17.

A bankrupt firm's employees lost their jobs when a receiving order was made with respect to the firm's property. All wages, salaries, commissions and vacation pay were paid to the date of the receiving order. The province's Ministry of Labour audited the firm's records to determine if any outstanding termination or severance pay was owing to former employees under the *Employment Standards Act* ("*ESA*") and delivered a proof of claim to the Trustee. The Trustee disallowed the claims on the ground that the bankruptcy of an employer does not constitute dismissal from employment and accordingly creates no entitlement to sever-

Philippe Adrien, Emilia Berardi, Paul Creador, Lorenzo Abel Vasquez et Lindy Wagner en leur propre nom et en celui des autres anciens employés de Rizzo & Rizzo Shoes Limited *Appelants*

c.

Zittrer, Siblin & Associates, Inc., syndic de faillite de Rizzo & Rizzo Shoes Limited *Intimée*

et

Le ministère du Travail de la province d'Ontario, Direction des normes d'emploi *Partie*

RÉPERTORIÉ: RIZZO & RIZZO SHOES LTD. (RE)

N^o du greffe: 24711.

1997: 16 octobre; 1998: 22 janvier.

Présents: Les juges Gonthier, Cory, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE L'ONTARIO

Employeur et employé — Faillite — Indemnités de licenciement et de cessation d'emploi payables en cas de licenciement par l'employeur — Faillite peut-elle être assimilée au licenciement par l'employeur? — Loi sur les normes d'emploi, L.R.O. 1980, ch. 137, art. 7(5), 40(1), (7), 40a — Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22, art. 2(3) — Loi sur la faillite, L.R.C. (1985), ch. B-3, art. 121(1) — Loi d'interprétation, L.R.O. 1990, ch. I.11, art. 10, 17.

Les employés d'une entreprise en faillite ont perdu leur emploi lorsqu'une ordonnance de séquestre a été rendue à l'égard des biens de l'entreprise. Tous les salaires, les traitements, toutes les commissions et les paies de vacances ont été versés jusqu'à la date de l'ordonnance de séquestre. Le ministère du Travail de la province a vérifié les dossiers de l'entreprise pour déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi* (la «*LNE*») et il a remis une preuve de réclamation au syndic. Ce dernier a rejeté les réclamations pour le

ance, termination or vacation pay under the *ESA*. The Ministry successfully appealed to the Ontario Court (General Division) but the Ontario Court of Appeal overturned that court's ruling and restored the Trustee's decision. The Ministry sought leave to appeal from the Court of Appeal judgment but discontinued its application. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested and were granted an order granting them leave to appeal. At issue here is whether the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*.

Held: The appeal should be allowed.

At the heart of this conflict is an issue of statutory interpretation. Although the plain language of ss. 40 and 40*a* of the *ESA* suggests that termination pay and severance pay are payable only when the employer terminates the employment, statutory interpretation cannot be founded on the wording of the legislation alone. The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. Moreover, s. 10 of Ontario's *Interpretation Act* provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

The objects of the *ESA* and of the termination and severance pay provisions themselves are broadly premised upon the need to protect employees. Finding ss. 40 and 40*a* to be inapplicable in bankruptcy situations is incompatible with both the object of the *ESA* and the termination and severance pay provisions. The legislature does not intend to produce absurd consequences and such a consequence would result if employees dismissed before the bankruptcy were to be entitled to these benefits while those dismissed after a bankruptcy would not be so entitled. A distinction would be made between employees merely on the basis of the timing of their dismissal and such a result would arbi-

motif que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*. En appel, le ministère a eu gain de cause devant la Cour de l'Ontario (Division générale) mais la Cour d'appel de l'Ontario a infirmé ce jugement et a rétabli la décision du syndic. Le ministère a demandé l'autorisation d'interjeter appel de l'arrêt de la Cour d'appel mais il s'est désisté. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé et obtenu l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. En l'espèce, il s'agit de savoir si la cessation d'emploi résultant de la faillite de l'employeur donne naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*.

Arrêt: Le pourvoi est accueilli.

Une question d'interprétation législative est au centre du présent litige. Bien que le libellé clair des art. 40 et 40*a* de la *LNE* donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé, l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. Il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur. Au surplus, l'art. 10 de la *Loi d'interprétation* ontarienne dispose que les lois «sont réputées apporter une solution de droit» et qu'elles doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

L'objet de la *LNE* et des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. Conclure que les art. 40 et 40*a* sont inapplicables en cas de faillite est incompatible tant avec l'objet de la *LNE* qu'avec les dispositions relatives aux indemnités de licenciement et de cessation d'emploi. Le législateur ne peut avoir voulu des conséquences absurdes mais c'est le résultat auquel on arriverait si les employés congédiés avant la faillite avaient droit à ces avantages mais pas les employés congédiés après la faillite. Une distinction serait établie entre les employés sur la seule base de la date de leur

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trarily deprive some of a means to cope with economic dislocation.

congédiement et un tel résultat les priverait arbitrairement de certains des moyens dont ils disposent pour faire face à un bouleversement économique.

The use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise. Section 2(3) of the *Employment Standards Amendment Act, 1981* exempted from severance pay obligations employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent. Section 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. If this were not the case, no readily apparent purpose would be served by this transitional provision. Further, since the *ESA* is benefits-conferring legislation, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.

Le recours à l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié. En vertu du par. 2(3) de l'*Employment Standards Amendment Act, 1981*, étaient exemptés de l'obligation de verser des indemnités de cessation d'emploi, les employeurs qui avaient fait faillite et avaient perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale. Le paragraphe 2(3) implique nécessairement que les employeurs en faillite sont assujettis à l'obligation de verser une indemnité de cessation d'emploi. Si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin. En outre, comme la *LNE* est une loi conférant des avantages, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur.

When the express words of ss. 40 and 40*a* are examined in their entire context, the words "terminated by an employer" must be interpreted to include termination resulting from the bankruptcy of the employer. The impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Termination as a result of an employer's bankruptcy therefore does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *Bankruptcy Act* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. It was not necessary to address the applicability of s. 7(5) of the *ESA*.

Lorsque les mots exprès employés aux art. 40 et 40*a* sont examinés dans leur contexte global, les termes «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui sont licenciés pour quelque autre raison serait arbitraire et inéquitable. Une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. La cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. Il était inutile d'examiner la question de l'applicabilité du par. 7(5) de la *LNE*.

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Distinguished: *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725; *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1; *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343; **referred to:** *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86; *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213;

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APPEAL from a judgment of the Ontario Court of Appeal (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. No. 586 (QL), reversing a judgment of the Ontario Court (General Division) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, ruling that the Ministry of Labour could prove claims on behalf of employees of the bankrupt. Appeal allowed.

POURVOI contre un arrêt de la Cour d'appel de l'Ontario (1995), 22 O.R. (3d) 385, 80 O.A.C. 201, 30 C.B.R. (3d) 1, 9 C.C.E.L. (2d) 264, 95 C.L.L.C. ¶210-020, [1995] O.J. n° 586 (QL), qui a infirmé un jugement de la Cour de l'Ontario (Division générale) (1991), 6 O.R. (3d) 441, 11 C.B.R. (3d) 246, 92 C.L.L.C. ¶14,013, statuant que le ministère du Travail pouvait prouver des réclamations au nom des employés de l'entreprise en faillite. Pourvoi accueilli.

Steven M. Barrett and *Kathleen Martin*, for the appellants.

Steven M. Barrett et *Kathleen Martin*, pour les appelants.

Raymond M. Slattery, for the respondent.

Raymond M. Slattery, pour l'intimée.

David Vickers, for the Ministry of Labour for the Province of Ontario, Employment Standards Branch.

David Vickers, pour le ministère du Travail de la province d'Ontario, Direction des normes d'emploi.

The judgment of the Court was delivered by

Version française du jugement de la Cour rendu par

1

IACOBUCCI J. — This is an appeal by the former employees of a now bankrupt employer from an order disallowing their claims for termination pay (including vacation pay thereon) and severance pay. The case turns on an issue of statutory interpretation. Specifically, the appeal decides whether, under the relevant legislation in effect at the time of the bankruptcy, employees are entitled to claim termination and severance payments where their employment has been terminated by reason of their employer's bankruptcy.

LE JUGE IACOBUCCI — Il s'agit d'un pourvoi interjeté par les anciens employés d'un employeur maintenant en faillite contre une ordonnance qui a rejeté les réclamations qu'ils ont présentées en vue d'obtenir une indemnité de licenciement (y compris la paie de vacances) et une indemnité de cessation d'emploi. Le litige porte sur une question d'interprétation législative. Tout particulièrement, le pourvoi tranche la question de savoir si, en vertu des dispositions législatives pertinentes en vigueur à l'époque de la faillite, les employés ont le droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi lorsque la cessation d'emploi résulte de la faillite de leur employeur.

1. Facts

1. Les faits

2

Prior to its bankruptcy, Rizzo & Rizzo Shoes Limited ("Rizzo") owned and operated a chain of retail shoe stores across Canada. Approximately 65 percent of those stores were located in Ontario. On April 13, 1989, a petition in bankruptcy was filed against the chain. The following day, a receiving

Avant sa faillite, la société Rizzo & Rizzo Shoes Limited («Rizzo») possédait et exploitait au Canada une chaîne de magasins de vente au détail de chaussures. Environ 65 pour 100 de ces magasins étaient situés en Ontario. Le 13 avril 1989, une pétition en faillite a été présentée contre la

order was made on consent in respect of Rizzo's property. Upon the making of that order, the employment of Rizzo's employees came to an end.

chaîne de magasins. Le lendemain, une ordonnance de séquestre a été rendue sur consentement à l'égard des biens de Rizzo. Au prononcé de l'ordonnance, les employés de Rizzo ont perdu leur emploi.

3 Pursuant to the receiving order, the respondent, Zittrer, Siblin & Associates, Inc. (the "Trustee") was appointed as trustee in bankruptcy of Rizzo's estate. The Bank of Nova Scotia privately appointed Peat Marwick Limited ("PML") as receiver and manager. By the end of July 1989, PML had liquidated Rizzo's property and assets and closed the stores. PML paid all wages, salaries, commissions and vacation pay that had been earned by Rizzo's employees up to the date on which the receiving order was made.

Conformément à l'ordonnance de séquestre, l'intimée, Zittrer, Siblin & Associates, Inc. (le «syndic») a été nommée syndic de faillite de l'actif de Rizzo. La Banque de Nouvelle-Écosse a nommé Peat Marwick Limitée («PML») comme administrateur séquestre. Dès la fin de juillet 1989, PML avait liquidé les biens de Rizzo et fermé les magasins. PML a versé tous les salaires, les traitements, toutes les commissions et les paies de vacances qui avaient été gagnés par les employés de Rizzo jusqu'à la date à laquelle l'ordonnance de séquestre a été rendue.

4 In November 1989, the Ministry of Labour for the Province of Ontario, Employment Standards Branch (the "Ministry") audited Rizzo's records to determine if there was any outstanding termination or severance pay owing to former employees under the *Employment Standards Act*, R.S.O. 1980, c. 137, as amended (the "*ESA*"). On August 23, 1990, the Ministry delivered a proof of claim to the respondent Trustee on behalf of the former employees of Rizzo for termination pay and vacation pay thereon in the amount of approximately $2.6 million and for severance pay totalling $14,215. The Trustee disallowed the claims, issuing a Notice of Disallowance on January 28, 1991. For the purposes of this appeal, the relevant ground for disallowing the claim was the Trustee's opinion that the bankruptcy of an employer does not constitute a dismissal from employment and thus, no entitlement to severance, termination or vacation pay is created under the *ESA*.

En novembre 1989, le ministère du Travail de la province d'Ontario, Direction des normes d'emploi (le «ministère») a vérifié les dossiers de Rizzo afin de déterminer si des indemnités de licenciement ou de cessation d'emploi devaient encore être versées aux anciens employés en application de la *Loi sur les normes d'emploi*, L.R.O. 1980, ch. 137 et ses modifications (la «*LNE*»). Le 23 août 1990, au nom des anciens employés de Rizzo, le ministère a remis au syndic intimé une preuve de réclamation pour des indemnités de licenciement et des paies de vacances (environ 2,6 millions de dollars) et pour des indemnités de cessation d'emploi (14 215 $). Le syndic a rejeté les réclamations et a donné avis du rejet le 28 janvier 1991. Aux fins du présent pourvoi, les réclamations ont été rejetées parce que le syndic était d'avis que la faillite d'un employeur ne constituant pas un congédiement, aucun droit à une indemnité de cessation d'emploi, à une indemnité de licenciement ni à une paie de vacances ne prenait naissance sous le régime de la *LNE*.

5 The Ministry appealed the Trustee's decision to the Ontario Court (General Division) which reversed the Trustee's disallowance and allowed the claims as unsecured claims provable in bankruptcy. On appeal, the Ontario Court of Appeal overturned the trial court's ruling and restored the decision of the Trustee. The Ministry sought leave

Le ministère a interjeté appel de la décision du syndic devant la Cour de l'Ontario (Division générale) laquelle a infirmé la décision du syndic et a admis les réclamations en tant que réclamations non garanties prouvables en matière de faillite. En appel, la Cour d'appel de l'Ontario a cassé le jugement de la cour de première instance et rétabli la

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to appeal from the Court of Appeal judgment, but discontinued its application on August 30, 1993. Following the discontinuance of the appeal, the Trustee paid a dividend to Rizzo's creditors, thereby leaving significantly less funds in the estate. Subsequently, the appellants, five former employees of Rizzo, moved to set aside the discontinuance, add themselves as parties to the proceedings, and requested an order granting them leave to appeal. This Court's order granting those applications was issued on December 5, 1996.

décision du syndic. Le ministère a demandé l'autorisation d'en appeler de l'arrêt de la Cour d'appel, mais il s'est désisté le 30 août 1993. Après l'abandon de l'appel, le syndic a versé un dividende aux créanciers de Rizzo, réduisant de façon considérable l'actif. Par la suite, les appelants, cinq anciens employés de Rizzo, ont demandé l'annulation du désistement, l'obtention de la qualité de parties à l'instance et une ordonnance leur accordant l'autorisation d'interjeter appel. L'ordonnance de notre Cour faisant droit à ces demandes a été rendue le 5 décembre 1996.

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2. Relevant Statutory Provisions

2. Les dispositions législatives pertinentes

6

The relevant versions of the *Bankruptcy Act* (now the *Bankruptcy and Insolvency Act*) and the *Employment Standards Act* for the purposes of this appeal are R.S.C., 1985, c. B-3 (the "*BA*"), and R.S.O. 1980, c. 137, as amended to April 14, 1989 (the "*ESA*") respectively.

Aux fins du présent pourvoi, les versions pertinentes de la *Loi sur la faillite* (maintenant la *Loi sur la faillite et l'insolvabilité*) et de la *Loi sur les normes d'emploi* sont respectivement les suivantes: L.R.C. (1985), ch. B-3 (la «*LF*») et L.R.O. 1980, ch. 137 et ses modifications au 14 avril 1989 (la «*LNE*»).

Employment Standards Act, R.S.O. 1980, c. 137, as amended:

7. —

(5) Every contract of employment shall be deemed to include the following provision:

All severance pay and termination pay become payable and shall be paid by the employer to the employee in two weekly instalments beginning with the first full week following termination of employment and shall be allocated to such weeks accordingly. This provision does not apply to severance pay if the employee has elected to maintain a right of recall as provided in subsection 40a (7) of the *Employment Standards Act.*

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

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

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

Loi sur les normes d'emploi, L.R.O. 1980, ch. 137 et ses modifications:

7 . . .

(5) Tout contrat de travail est réputé comprendre la disposition suivante:

L'indemnité de cessation d'emploi et l'indemnité de licenciement deviennent exigibles et sont payées par l'employeur à l'employé en deux versements hebdomadaires à compter de la première semaine complète suivant la cessation d'emploi, et sont réparties sur ces semaines en conséquence. La présente disposition ne s'applique pas à l'indemnité de cessation d'emploi si l'employé a choisi de maintenir son droit d'être rappelé, comme le prévoit le paragraphe 40a (7) de la *Loi sur les normes d'emploi.*

40 (1) Aucun employeur ne doit licencier un employé qui travaille pour lui depuis trois mois ou plus à moins de lui donner:

a) un préavis écrit d'une semaine si sa période d'emploi est inférieure à un an;

b) un préavis écrit de deux semaines si sa période d'emploi est d'un an ou plus mais de moins de trois ans;

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

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

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

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

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

(h) eight weeks notice in writing to the employee if his or her period of employment is eight years or more,

and such notice has expired.

. . .

(7) Where the employment of an employee is terminated contrary to this section,

(a) the employer shall pay termination pay in an amount equal to the wages that the employee would have been entitled to receive at his regular rate for a regular non-overtime work week for the period of notice prescribed by subsection (1) or (2), and any wages to which he is entitled;

. . .

40*a* . . .

(1a) Where**,**

(a) fifty or more employees have their employment terminated by an employer in a period of six months or less and the terminations are caused by the permanent discontinuance of all or part of the business of the employer at an establishment; or

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

the employer shall pay severance pay to each employee whose employment has been terminated and who has been employed by the employer for five or more years.

c) un préavis écrit de trois semaines si sa période d'emploi est de trois ans ou plus mais de moins de quatre ans;

d) un préavis écrit de quatre semaines si sa période d'emploi est de quatre ans ou plus mais de moins de cinq ans;

e) un préavis écrit de cinq semaines si sa période d'emploi est de cinq ans ou plus mais de moins de six ans;

f) un préavis écrit de six semaines si sa période d'emploi est de six ans ou plus mais de moins de sept ans;

g) un préavis écrit de sept semaines si sa période d'emploi est de sept ans ou plus mais de moins de huit ans;

h) un préavis écrit de huit semaines si sa période d'emploi est de huit ans ou plus,

et avant le terme de la période de ce préavis.

. . .

(7) Si un employé est licencié contrairement au présent article:

a) l'employeur lui verse une indemnité de licenciement égale au salaire que l'employé aurait eu le droit de recevoir à son taux normal pour une semaine normale de travail sans heures supplémentaires pendant la période de préavis fixée par le paragraphe (1) ou (2), de même que tout salaire auquel il a droit;

. . .

40*a* . . .

[TRADUCTION] (1a) L'employeur verse une indemnité de cessation d'emploi à chaque employé licencié qui a travaillé pour lui pendant cinq ans ou plus si, selon le cas:

a) l'employeur licencie cinquante employés ou plus au cours d'une période de six mois ou moins et que les licenciements résultent de l'interruption permanente de l'ensemble ou d'une partie des activités de l'employeur à un établissement;

b) l'employeur dont la masse salariale est de 2,5 millions de dollars ou plus licencie un ou plusieurs employés.

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Employment Standards Amendment Act, 1981, S.O. 1981, c. 22

2. — (1) Part XII of the said Act is amended by adding thereto the following section:

. . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

Employment Standards Amendment Act, 1981, L.O. 1981, ch. 22

[TRADUCTION]

2. (1) La partie XII de la loi est modifiée par adjonction de l'article suivant:

. . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

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

121. (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

Loi sur la faillite, L.R.C. (1985), ch. B-3

121. (1) Toutes créances et tous engagements, présents ou futurs, auxquels le failli est assujetti à la date de la faillite, ou auxquels il peut devenir assujetti avant sa libération, en raison d'une obligation contractée antérieurement à la date de la faillite, sont réputés des réclamations prouvables dans des procédures entamées en vertu de la présente loi.

Interpretation Act, R.S.O. 1990, c. I.11

10. Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.

. . .

17. The repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law.

Loi d'interprétation, L.R.O. 1990, ch. I.11

10 Les lois sont réputées apporter une solution de droit, qu'elles aient pour objet immédiat d'ordonner l'accomplissement d'un acte que la Législature estime être dans l'intérêt public ou d'empêcher ou de punir l'accomplissement d'un acte qui lui paraît contraire à l'intérêt public. Elles doivent par conséquent s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables.

. . .

17 L'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit.

3. Judicial History

A. *Ontario Court (General Division)* (1991), 6 O.R. (3d) 441

3. L'historique judiciaire

A. *La Cour de l'Ontario (Division générale)* (1991), 6 O.R. (3d) 441

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7 Having disposed of several issues which do not arise on this appeal, Farley J. turned to the question of whether termination pay and severance pay are provable claims under the *BA*. Relying on *U.F.C.W., Loc. 617P v. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (Ont. S.C. in Bankruptcy), he found that it is clear that claims for termination and severance pay are provable in bankruptcy where the statutory obligation to provide such payments arose prior to the bankruptcy. Accordingly, he reasoned that the essential matter to be resolved in the case at bar was whether bankruptcy acted as a termination of employment thereby triggering the termination and severance pay provisions of the *ESA* such that liability for such payments would arise on bankruptcy as well.

Après avoir tranché plusieurs points non soulevés dans le présent pourvoi, le juge Farley est passé à la question de savoir si l'indemnité de licenciement et l'indemnité de cessation d'emploi sont des réclamations prouvables en application de la *LF*. S'appuyant sur la décision *U.F.C.W., Loc. 617P c. Royal Dressed Meats Inc. (Trustee of)* (1989), 76 C.B.R. (N.S.) 86 (C.S. Ont. en matière de faillite), il a conclu que manifestement, l'indemnité de licenciement et l'indemnité de cessation d'emploi sont prouvables en matière de faillite lorsque l'obligation légale d'effectuer ces versements a pris naissance avant la faillite. Par conséquent, il a estimé que le point essentiel à résoudre en l'espèce était de savoir si la faillite était assimilable au licenciement et entraînait l'application des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* de manière que l'obligation de verser ces indemnités prenne naissance également au moment de la faillite.

8 In addressing this question, Farley J. began by noting that the object and intent of the *ESA* is to provide minimum employment standards and to benefit and protect the interests of employees. Thus, he concluded that the *ESA* is remedial legislation and as such it should be interpreted in a fair, large and liberal manner to ensure that its object is attained according to its true meaning, spirit and intent.

Le juge Farley a abordé cette question en faisant remarquer que l'objet et l'intention de la *LNE* étaient d'établir des normes minimales d'emploi et de favoriser et protéger les intérêts des employés. Il a donc conclu que la *LNE* visait à apporter une solution de droit et devait dès lors être interprétée de manière équitable et large afin de garantir la réalisation de son objet selon ses sens, intention et esprit véritables.

9 Farley J. then held that denying employees in this case the right to claim termination and severance pay would lead to the arbitrary and unfair result that an employee whose employment is terminated just prior to a bankruptcy would be entitled to termination and severance pay, whereas one whose employment is terminated by the bankruptcy itself would not have that right. This result, he stated, would defeat the intended working of the *ESA*.

Le juge Farley a ensuite décidé que priver les employés en l'espèce du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi aurait pour conséquence injuste et arbitraire que l'employé licencié juste avant la faillite aurait droit à une indemnité de licenciement et à une indemnité de cessation d'emploi, alors que celui qui a perdu son emploi en raison de la faillite elle-même n'y aurait pas droit. Ce résultat, a-t-il dit, irait à l'encontre du but visé par la loi.

10 Farley J. saw no reason why the claims of the employees in the present case would not generally be contemplated as wages or other claims under the *BA*. He emphasized that the former employees in the case at bar had not alleged that termination pay and severance pay should receive a priority in

Le juge Farley ne voyait pas pourquoi les réclamations des employés en l'espèce ne seraient pas généralement considérées comme des réclamations concernant les salaires ou comme d'autres réclamations présentées en application de la *LF*. Il a souligné que les anciens employés en l'espèce

the distribution of the estate, but merely that they are provable (unsecured and unpreferred) claims in a bankruptcy. For this reason, he found it inappropriate to make reference to authorities whose focus was the interpretation of priority provisions in the *BA*.

n'avaient pas soutenu que les indemnités de licenciement et de cessation d'emploi devaient être prioritaires dans la distribution de l'actif, mais tout simplement qu'elles étaient des réclamations prouvables en matière de faillite (non garanties et non privilégiées). Pour ce motif, il a conclu qu'il ne convenait pas d'invoquer la jurisprudence et la doctrine portant sur l'interprétation des dispositions relatives à la priorité de la *LF*.

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Even if bankruptcy does not terminate the employment relationship so as to trigger the *ESA* termination and severance pay provisions, Farley J. was of the view that the employees in the instant case would nevertheless be entitled to such payments as these were liabilities incurred prior to the date of the bankruptcy by virtue of s. 7(5) of the *ESA*. He found that s. 7(5) deems every employment contract to include a provision to provide termination and severance pay following the termination of employment and concluded that a contingent obligation is thereby created for a bankrupt employer to make such payments from the outset of the relationship, long before the bankruptcy.

Même si la faillite ne met pas fin à la relation entre l'employeur et l'employé de façon à faire jouer les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNF*, le juge Farley était d'avis que les employés en l'espèce avaient néanmoins droit à ces indemnités, car il s'agissait d'engagements contractés avant la date de la faillite conformément au par. 7(5) de la *LNE*. Il a conclu d'une part qu'aux termes du par. 7(5), tout contrat de travail est réputé comprendre une disposition prévoyant le versement d'une indemnité de licenciement et d'une indemnité de cessation d'emploi au moment de la cessation d'emploi et d'autre part que l'employeur en faillite est assujetti à l'obligation conditionnelle de verser ces indemnités depuis le début de la relation entre l'employeur et l'employé, soit bien avant la faillite.

12

Farley J. also considered s. 2(3) of the *Employment Standards Amendment Act, 1981*, S.O. 1981, c. 22 (the "*ESAA*"), which is a transitional provision that exempted certain bankrupt employers from the newly introduced severance pay obligations until the amendments received royal assent. He was of the view that this provision would not have been necessary if the obligations of employers upon termination of employment had not been intended to apply to bankrupt employers under the *ESA*. Farley J. concluded that the claim by Rizzo's former employees for termination pay and severance pay could be provided as unsecured and unpreferred debts in a bankruptcy. Accordingly, he allowed the appeal from the decision of the Trustee.

Le juge Farley a également examiné le par. 2(3) de l'*Employment Standards Amendment Act, 1981*, L.O. 1981, ch. 22 («l'*ESAA*»), qui est une disposition transitoire exemptant certains employeurs en faillite des nouvelles obligations relatives au paiement de l'indemnité de cessation d'emploi jusqu'à ce que les modifications aient reçu la sanction royale. Il était d'avis que cette disposition n'aurait pas été nécessaire si le législateur n'avait pas voulu que les obligations auxquelles sont tenus les employeurs au moment d'un licenciement s'appliquent aux employeurs en faillite en vertu de la *LNE*. Le juge Farley a conclu que la réclamation présentée par les anciens employés de Rizzo en vue d'obtenir des indemnités de licenciement et de cessation d'emploi pouvait être traitée comme une créance non garantie et non privilégiée dans une faillite. Par conséquent, il a accueilli l'appel formé contre la décision du syndic.

B. *Ontario Court of Appeal* (1995), 22 O.R. (3d) 385

13 Austin J.A., writing for a unanimous court, began his analysis of the principal issue in this appeal by focussing upon the language of the termination pay and severance pay provisions of the *ESA*. He noted, at p. 390, that the termination pay provisions use phrases such as "[n]o employer shall terminate the employment of an employee" (s. 40(1)), "the notice required by an employer to terminate the employment" (s. 40(2)), and "[a]n employer who has terminated or who proposes to terminate the employment of employees" (s. 40(5)). Turning to severance pay, he quoted s. 40*a*(1)(*a*) (at p. 391) which includes the phrase "employees have their employment terminated by an employer". Austin J.A. concluded that this language limits the obligation to provide termination and severance pay to situations in which the employer terminates the employment. The operation of the *ESA*, he stated, is not triggered by the termination of employment resulting from an act of law such as bankruptcy.

14 In support of his conclusion, Austin J.A. reviewed the leading cases in this area of law. He cited *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (S.C. in bankruptcy), wherein Houlden J. (as he then was) concluded that the *ESA* termination pay provisions were not designed to apply to a bankrupt employer. He also relied upon *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (Ont. S.C. in bankruptcy), for the proposition that the bankruptcy of a company at the instance of a creditor does not constitute dismissal. He concluded as follows at p. 395:

> The plain language of ss. 40 and 40*a* does not give rise to any liability to pay termination or severance pay except where the employment is terminated by the employer. In our case, the employment was terminated, not by the employer, but by the making of a receiving order against Rizzo on April 14, 1989, following a peti-

B. *La Cour d'appel de l'Ontario* (1995), 22 O.R. (3d) 385

Au nom d'une cour unanime, le juge Austin a commencé son analyse de la question principale du présent pourvoi en s'arrêtant sur le libellé des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE*. Il a noté, à la p. 390, que les dispositions relatives à l'indemnité de licenciement utilisent des expressions comme «[a]ucun employeur ne doit licencier un employé» (par. 40(1)), «le préavis qu'un employeur donne pour licencier» (par. 40(2)) et les «employés qu'un employeur a licenciés ou se propose de licencier» (par. 40(5)). Passant à l'indemnité de cessation d'emploi, il a cité l'al. 40*a*(1)*a*), à la p. 391, lequel contient l'expression «l'employeur licencie cinquante employés». Le juge Austin a conclu que ce libellé limite l'obligation d'accorder une indemnité de licenciement et une indemnité de cessation d'emploi aux cas où l'employeur licencie des employés. Selon lui, la cessation d'emploi résultant de l'effet de la loi, notamment de la faillite, n'entraîne pas l'application de la *LNE*.

À l'appui de sa conclusion, le juge Austin a examiné les arrêts de principe dans ce domaine du droit. Il a cité *Re Malone Lynch Securities Ltd.*, [1972] 3 O.R. 725 (C.S. en matière de faillite), dans lequel le juge Houlden (maintenant juge de la Cour d'appel) a statué que les dispositions relatives à l'indemnité de licenciement de la *LNE* n'étaient pas conçues pour s'appliquer à l'employeur en faillite. Il a également invoqué *Re Kemp Products Ltd.* (1978), 27 C.B.R. (N.S.) 1 (C.S. Ont. en matière de faillite), à l'appui de la proposition selon laquelle la faillite d'une compagnie à la demande d'un créancier ne constitue pas un congédiement. Il a conclu ainsi, à la p. 395:

> [TRADUCTION] Le libellé clair des art. 40 et 40*a* ne crée une obligation de verser une indemnité de licenciement ou une indemnité de cessation d'emploi que si l'employeur licencie l'employé. En l'espèce, la cessation d'emploi n'est pas le fait de l'employeur, elle résulte d'une ordonnance de séquestre rendue à l'encontre de Rizzo le 14 avril 1989, à la suite d'une pétition présentée par l'un de ses créanciers. Le droit à une indemnité

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tion by one of its creditors. No entitlement to either termination or severance pay ever arose.

de licenciement ou à une indemnité de cessation d'emploi n'a jamais pris naissance.

15 Regarding s. 7(5) of the *ESA*, Austin J.A. rejected the trial judge's interpretation and found that the section does not create a liability. Rather, in his opinion, it merely states when a liability otherwise created is to be paid and therefore it was not considered relevant to the issue before the court. Similarly, Austin J.A. did not accept the lower court's view of s. 2(3), the transitional provision in the *ESAA*. He found that that section had no effect upon the intention of the Legislature as evidenced by the terminology used in ss. 40 and 40*a*.

En ce qui concerne le par. 7(5) de la *LNE*, le juge Austin a rejeté l'interprétation du juge de première instance et a estimé que cette disposition ne créait pas d'engagement. Selon lui, elle ne faisait que préciser quand l'engagement contracté par ailleurs devait être acquitté et ne se rapportait donc pas à la question dont la cour était saisie. Le juge Austin n'a pas accepté non plus l'opinion exprimée par le tribunal inférieur au sujet du par. 2(3), la disposition transitoire de l'*ESAA*. Il a jugé que cette disposition n'avait aucun effet quant à l'intention du législateur, comme l'attestait la terminologie employée aux art. 40 et 40*a*.

16 Austin J.A. concluded that, because the employment of Rizzo's former employees was terminated by the order of bankruptcy and not by the act of the employer, no liability arose with respect to termination, severance or vacation pay. The order of the trial judge was set aside and the Trustee's disallowance of the claims was restored.

Le juge Austin a conclu que, comme la cessation d'emploi subie par les anciens employés de Rizzo résultait d'une ordonnance de faillite et n'était pas le fait de l'employeur, il n'existait aucun engagement en ce qui concerne l'indemnité de licenciement, l'indemnité de cessation d'emploi ni la paie de vacances. L'ordonnance du juge de première instance a été annulée et la décision du syndic de rejeter les réclamations a été rétablie.

4. Issues

4. Les questions en litige

17 This appeal raises one issue: does the termination of employment caused by the bankruptcy of an employer give rise to a claim provable in bankruptcy for termination pay and severance pay in accordance with the provisions of the *ESA*?

Le présent pourvoi soulève une question: la cessation d'emploi résultant de la faillite de l'employeur donne-t-elle naissance à une réclamation prouvable en matière de faillite en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi conformément aux dispositions de la *LNE*?

5. Analysis

5. Analyse

18 The statutory obligation upon employers to provide both termination pay and severance pay is governed by ss. 40 and 40*a* of the *ESA*, respectively. The Court of Appeal noted that the plain language of those provisions suggests that termination pay and severance pay are payable only when the employer terminates the employment. For example, the opening words of s. 40(1) are: "No employer shall terminate the employment of an employee. . . ." Similarly, s. 40*a*(1a) begins with

L'obligation légale faite aux employeurs de verser une indemnité de licenciement ainsi qu'une indemnité de cessation d'emploi est régie respectivement par les art. 40 et 40*a* de la *LNE*. La Cour d'appel a fait observer que le libellé clair de ces dispositions donne à penser que les indemnités de licenciement et de cessation d'emploi doivent être versées seulement lorsque l'employeur licencie l'employé. Par exemple, le par. 40(1) commence par les mots suivants: «Aucun employeur ne doit

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the words, "Where . . . fifty or more employees have their employment terminated by an employer. . . ." Therefore, the question on which this appeal turns is whether, when bankruptcy occurs, the employment can be said to be terminated "by an employer".

licencier un employé . . .» Le paragraphe 40*a*(1a) contient également les mots: «si [. . .] l'employeur licencie cinquante employés ou plus . . .» Par conséquent, la question dans le présent pourvoi est de savoir si l'on peut dire que l'employeur qui fait faillite a licencié ses employés.

19 The Court of Appeal answered this question in the negative, holding that, where an employer is petitioned into bankruptcy by a creditor, the employment of its employees is not terminated "by an employer", but rather by operation of law. Thus, the Court of Appeal reasoned that, in the circumstances of the present case, the *ESA* termination pay and severance pay provisions were not applicable and no obligations arose. In answer, the appellants submit that the phrase "terminated by an employer" is best interpreted as reflecting a distinction between involuntary and voluntary termination of employment. It is their position that this language was intended to relieve employers of their obligation to pay termination and severance pay when employees leave their jobs voluntarily. However, the appellants maintain that where an employee's employment is involuntarily terminated by reason of their employer's bankruptcy, this constitutes termination "by an employer" for the purpose of triggering entitlement to termination and severance pay under the *ESA*.

La Cour d'appel a répondu à cette question par la négative, statuant que, lorsqu'un créancier présente une pétition en faillite contre un employeur, les employés ne sont pas licenciés par l'employeur mais par l'effet de la loi. La Cour d'appel a donc estimé que, dans les circonstances de l'espèce, les dispositions relatives aux indemnités de licenciement et de cessation d'emploi de la *LNE* n'étaient pas applicables et qu'aucune obligation n'avait pris naissance. Les appelants répliquent que les mots «l'employeur licencie» doivent être interprétés comme établissant une distinction entre la cessation d'emploi volontaire et la cessation d'emploi forcée. Ils soutiennent que ce libellé visait à dégager l'employeur de son obligation de verser des indemnités de licenciement et de cessation d'emploi lorsque l'employé quittait son emploi volontairement. Cependant, les appelants prétendent que la cessation d'emploi forcée résultant de la faillite de l'employeur est assimilable au licenciement effectué par l'employeur pour l'exercice du droit à une indemnité de licenciement et à une indemnité de cessation d'emploi prévu par la *LNE.*

20 At the heart of this conflict is an issue of statutory interpretation. Consistent with the findings of the Court of Appeal, the plain meaning of the words of the provisions here in question appears to restrict the obligation to pay termination and severance pay to those employers who have actively terminated the employment of their employees. At first blush, bankruptcy does not fit comfortably into this interpretation. However, with respect, I believe this analysis is incomplete.

Une question d'interprétation législative est au centre du présent litige. Selon les conclusions de la Cour d'appel, le sens ordinaire des mots utilisés dans les dispositions en cause paraît limiter l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi aux employeurs qui ont effectivement licencié leurs employés. À première vue, la faillite ne semble pas cadrer très bien avec cette interprétation. Toutefois, en toute déférence, je crois que cette analyse est incomplète.

21 Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legisla-*

Bien que l'interprétation législative ait fait couler beaucoup d'encre (voir par ex. Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3e éd. 1994) (ci-après «*Construction of Statutes*»); Pierre-André Côté, *Interprétation des lois* (2e éd.

tion in Canada (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:

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

Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 1 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.

1990)), Elmer Driedger dans son ouvrage intitulé *Construction of Statutes* (2e éd. 1983) résume le mieux la méthode que je privilégie. Il reconnaît que l'interprétation législative ne peut pas être fondée sur le seul libellé du texte de loi. À la p. 87, il dit:

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution: il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'esprit de la loi, l'objet de la loi et l'intention du législateur.

Parmi les arrêts récents qui ont cité le passage ci-dessus en l'approuvant, mentionnons: *R. c. Hydro-Québec*, [1997] 1 R.C.S. 213; *Banque Royale du Canada c. Sparrow Electric Corp.*, [1997] 1 R.C.S. 411; *Verdun c. Banque Toronto-Dominion*, [1996] 3 R.C.S. 550; *Friesen c. Canada*, [1995] 3 R.C.S. 103.

22

I also rely upon s. 10 of the *Interpretation Act*, R.S.O. 1980, c. 219, which provides that every Act "shall be deemed to be remedial" and directs that every Act shall "receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit".

Je m'appuie également sur l'art. 10 de la *Loi d'interprétation*, L.R.O. 1980, ch. 219, qui prévoit que les lois «sont réputées apporter une solution de droit» et doivent «s'interpréter de la manière la plus équitable et la plus large qui soit pour garantir la réalisation de leur objet selon leurs sens, intention et esprit véritables».

23

Although the Court of Appeal looked to the plain meaning of the specific provisions in question in the present case, with respect, I believe that the court did not pay sufficient attention to the scheme of the *ESA*, its object or the intention of the legislature; nor was the context of the words in issue appropriately recognized. I now turn to a discussion of these issues.

Bien que la Cour d'appel ait examiné le sens ordinaire des dispositions en question dans le présent pourvoi, en toute déférence, je crois que la cour n'a pas accordé suffisamment d'attention à l'économie de la *LNE*, à son objet ni à l'intention du législateur; le contexte des mots en cause n'a pas non plus été pris en compte adéquatement. Je passe maintenant à l'analyse de ces questions.

24

In *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, at p. 1002, the majority of this Court recognized the importance that our society accords to employment and the fundamental role that it has assumed in the life of the individual. The manner in which employment can be terminated was said to be equally important (see also *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701). It was in this context that the majority in *Machtinger* described, at p. 1003, the object of the *ESA* as being the protection of ". . . the interests of employees by requiring employers to comply with

Dans l'arrêt *Machtinger c. HOJ Industries Ltd.*, [1992] 1 R.C.S. 986, à la p. 1002, notre Cour, à la majorité, a reconnu l'importance que notre société accorde à l'emploi et le rôle fondamental qu'il joue dans la vie de chaque individu. La manière de mettre fin à un emploi a été considérée comme étant tout aussi importante (voir également *Wallace c. United Grain Growers Ltd.*, [1997] 3 R.C.S. 701). C'est dans ce contexte que les juges majoritaires dans l'arrêt *Machtinger* ont défini, à la p. 1003, l'objet de la *LNE* comme étant la protection «. . . [d]es intérêts des employés en exigeant que

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certain minimum standards, including minimum periods of notice of termination". Accordingly, the majority concluded, at p. 1003, that, ". . . an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not".

les employeurs respectent certaines normes minimales, notamment en ce qui concerne les périodes minimales de préavis de licenciement». Par conséquent, les juges majoritaires ont conclu, à la p. 1003, qu'«. . . une interprétation de la Loi qui encouragerait les employeurs à se conformer aux exigences minimales de celle-ci et qui ferait ainsi bénéficier de sa protection le plus grand nombre d'employés possible est à préférer à une interprétation qui n'a pas un tel effet».

25 The objects of the termination and severance pay provisions themselves are also broadly premised upon the need to protect employees. Section 40 of the *ESA* requires employers to give their employees reasonable notice of termination based upon length of service. One of the primary purposes of this notice period is to provide employees with an opportunity to take preparatory measures and seek alternative employment. It follows that s. 40(7)(a), which provides for termination pay in lieu of notice when an employer has failed to give the required statutory notice, is intended to "cushion" employees against the adverse effects of economic dislocation likely to follow from the absence of an opportunity to search for alternative employment. (Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (2nd ed. 1993), at pp. 572-81.)

L'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes repose de manière générale sur la nécessité de protéger les employés. L'article 40 de la *LNE* oblige les employeurs à donner à leurs employés un préavis de licenciement raisonnable en fonction des années de service. L'une des fins principales de ce préavis est de donner aux employés la possibilité de se préparer en cherchant un autre emploi. Il s'ensuit que l'al. 40(7)a), qui prévoit une indemnité de licenciement tenant lieu de préavis lorsqu'un employeur n'a pas donné le préavis requis par la loi, vise à protéger les employés des effets néfastes du bouleversement économique que l'absence d'une possibilité de chercher un autre emploi peut entraîner. (Innis Christie, Geoffrey England et Brent Cotter, *Employment Law in Canada* (2e éd. 1993), aux pp. 572 à 581.)

26 Similarly, s. 40*a*, which provides for severance pay, acts to compensate long-serving employees for their years of service and investment in the employer's business and for the special losses they suffer when their employment terminates. In *R. v. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, Robins J.A. quoted with approval at pp. 556-57 from the words of D. D. Carter in the course of an employment standards determination in *Re Telegram Publishing Co. v. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), at p. 19, wherein he described the role of severance pay as follows:

De même, l'art. 40*a*, qui prévoit l'indemnité de cessation d'emploi, vient indemniser les employés ayant beaucoup d'années de service pour ces années investies dans l'entreprise de l'employeur et pour les pertes spéciales qu'ils subissent lorsqu'ils sont licenciés. Dans l'arrêt *R. c. TNT Canada Inc.* (1996), 27 O.R. (3d) 546, le juge Robins a cité en les approuvant, aux pp. 556 et 557, les propos tenus par D. D. Carter dans le cadre d'une décision rendue en matière de normes d'emploi dans *Re Telegram Publishing Co. c. Zwelling* (1972), 1 L.A.C. (2d) 1 (Ont.), à la p. 19, où il a décrit ainsi le rôle de l'indemnité de cessation d'emploi:

> Severance pay recognizes that an employee does make an investment in his employer's business — the extent of this investment being directly related to the length of

> [TRADUCTION] L'indemnité de cessation d'emploi reconnaît qu'un employé fait un investissement dans l'entreprise de son employeur — l'importance de cet investis-

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the employee's service. This investment is the seniority that the employee builds up during his years of service. . . . Upon termination of the employment relationship, this investment of years of service is lost, and the employee must start to rebuild seniority at another place of work. The severance pay, based on length of service, is some compensation for this loss of investment.

27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40*a* of the *ESA* are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

28 The trial judge properly noted that, if the *ESA* termination and severance pay provisions do not apply in circumstances of bankruptcy, those employees "fortunate" enough to have been dismissed the day before a bankruptcy would be entitled to such payments, but those terminated on the day the bankruptcy becomes final would not be so entitled. In my view, the absurdity of this consequence is particularly evident in a unionized workplace where seniority is a factor in determining the order of lay-off. The more senior the employee, the larger the investment he or she has made in the employer and the greater the entitlement to termination and severance pay. However, it is the more senior personnel who are likely to be employed up

sement étant liée directement à la durée du service de l'employé. Cet investissement est l'ancienneté que l'employé acquiert durant ses années de service [. . .] À la fin de la relation entre l'employeur et l'employé, cet investissement est perdu et l'employé doit recommencer à acquérir de l'ancienneté dans un autre lieu de travail. L'indemnité de cessation d'emploi, fondée sur les années de service, compense en quelque sorte cet investissement perdu.

À mon avis, les conséquences ou effets qui résultent de l'interprétation que la Cour d'appel a donnée des art. 40 et 40*a* de la *LNE* ne sont compatibles ni avec l'objet de la Loi ni avec l'objet des dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi elles-mêmes. Selon un principe bien établi en matière d'interprétation législative, le législateur ne peut avoir voulu des conséquences absurdes. D'après Côté, *op. cit.*, on qualifiera d'absurde une interprétation qui mène à des conséquences ridicules ou futiles, si elle est extrêmement déraisonnable ou inéquitable, si elle est illogique ou incohérente, ou si elle est incompatible avec d'autres dispositions ou avec l'objet du texte législatif (aux pp. 430 à 432). Sullivan partage cet avis en faisant remarquer qu'on peut qualifier d'absurdes les interprétations qui vont à l'encontre de la fin d'une loi ou en rendent un aspect inutile ou futile (Sullivan, *Construction of Statutes*, *op. cit.*, à la p. 88).

Le juge de première instance a noté à juste titre que, si les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la *LNE* ne s'appliquent pas en cas de faillite, les employés qui auraient eu la «chance» d'être congédiés la veille de la faillite auraient droit à ces indemnités, alors que ceux qui perdraient leur emploi le jour où la faillite devient définitive n'y auraient pas droit. À mon avis, l'absurdité de cette conséquence est particulièrement évidente dans les milieux syndiqués où les mises à pied se font selon l'ancienneté. Plus un employé a de l'ancienneté, plus il a investi dans l'entreprise de l'employeur et plus son droit à une indemnité de licenciement et à une indemnité de cessation d'emploi est fondé. Pourtant, c'est le personnel ayant le plus d'ancienneté qui risque de travailler

until the time of the bankruptcy and who would thereby lose their entitlements to these payments.

29 If the Court of Appeal's interpretation of the termination and severance pay provisions is correct, it would be acceptable to distinguish between employees merely on the basis of the timing of their dismissal. It seems to me that such a result would arbitrarily deprive some employees of a means to cope with the economic dislocation caused by unemployment. In this way the protections of the *ESA* would be limited rather than extended, thereby defeating the intended working of the legislation. In my opinion, this is an unreasonable result.

30 In addition to the termination and severance pay provisions, both the appellants and the respondent relied upon various other sections of the *ESA* to advance their arguments regarding the intention of the legislature. In my view, although the majority of these sections offer little interpretive assistance, one transitional provision is particularly instructive. In 1981, s. 2(1) of the *ESAA* introduced s. 40*a*, the severance pay provision, to the *ESA*. Section 2(2) deemed that provision to come into force on January 1, 1981. Section 2(3), the transitional provision in question provided as follows:

2. . . .

(3) Section 40*a* of the said Act does not apply to an employer who became a bankrupt or an insolvent person within the meaning of the *Bankruptcy Act* (Canada) and whose assets have been distributed among his creditors or to an employer whose proposal within the meaning of the *Bankruptcy Act* (Canada) has been accepted by his creditors in the period from and including the 1st day of January, 1981, to and including the day immediately before the day this Act receives Royal Assent.

31 The Court of Appeal found that it was neither necessary nor appropriate to determine the intention of the legislature in enacting this provisional

jusqu'au moment de la faillite et de perdre ainsi le droit d'obtenir ces indemnités.

Si l'interprétation que la Cour d'appel a donnée des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi est correcte, il serait acceptable d'établir une distinction entre les employés en se fondant simplement sur la date de leur congédiement. Il me semble qu'un tel résultat priverait arbitrairement certains employés d'un moyen de faire face au bouleversement économique causé par le chômage. De cette façon, les protections de la *LNE* seraient limitées plutôt que d'être étendues, ce qui irait à l'encontre de l'objectif que voulait atteindre le législateur. À mon avis, c'est un résultat déraisonnable.

En plus des dispositions relatives à l'indemnité de licenciement et de l'indemnité de cessation d'emploi, tant les appelants que l'intimée ont invoqué divers autres articles de la *LNE* pour appuyer les arguments avancés au sujet de l'intention du législateur. Selon moi, bien que la plupart de ces dispositions ne soient d'aucune utilité en ce qui concerne l'interprétation, il est une disposition transitoire particulièrement révélatrice. En 1981, le par. 2(1) de l'*ESAA* a introduit l'art. 40*a*, la disposition relative à l'indemnité de cessation d'emploi. En application du par. 2(2), cette disposition entrait en vigueur le 1er janvier 1981. Le paragraphe 2(3), la disposition transitoire en question, était ainsi conçue:

[TRADUCTION]

2. . . .

(3) L'article 40*a* de la loi ne s'applique pas à l'employeur qui a fait faillite ou est devenu insolvable au sens de la *Loi sur la faillite* (Canada) et dont les biens ont été distribués à ses créanciers ou à l'employeur dont la proposition au sens de la *Loi sur la faillite* (Canada) a été acceptée par ses créanciers pendant la période qui commence le 1er janvier 1981 et se termine le jour précédant immédiatement celui où la présente loi a reçu la sanction royale inclusivement.

La Cour d'appel a conclu qu'il n'était ni nécessaire ni approprié de déterminer l'intention qu'avait le législateur en adoptant ce paragraphe

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subsection. Nevertheless, the court took the position that the intention of the legislature as evidenced by the introductory words of ss. 40 and 40*a* was clear, namely, that termination by reason of a bankruptcy will not trigger the severance and termination pay obligations of the *ESA*. The court held that this intention remained unchanged by the introduction of the transitional provision. With respect, I do not agree with either of these findings. Firstly, in my opinion, the use of legislative history as a tool for determining the intention of the legislature is an entirely appropriate exercise and one which has often been employed by this Court (see, e.g., *R. v. Vasil*, [1981] 1 S.C.R. 469, at p. 487; *Paul v. The Queen*, [1982] 1 S.C.R. 621, at pp. 635, 653 and 660). Secondly, I believe that the transitional provision indicates that the Legislature intended that termination and severance pay obligations should arise upon an employers' bankruptcy.

provisoire. Néanmoins, la cour a estimé que l'intention du législateur, telle qu'elle ressort des premiers mots des art. 40 et 40*a*, était claire, à savoir que la cessation d'emploi résultant de la faillite ne fera pas naître l'obligation de verser l'indemnité de cessation d'emploi et l'indemnité de licenciement qui est prévue par la *LNE*. La cour a jugé que cette intention restait inchangée à la suite de l'adoption de la disposition transitoire. Je ne puis souscrire ni à l'une ni à l'autre de ces conclusions. En premier lieu, à mon avis, l'examen de l'historique législatif pour déterminer l'intention du législateur est tout à fait approprié et notre Cour y a eu souvent recours (voir, par ex., *R. c. Vasil*, [1981] 1 R.C.S. 469, à la p. 487; *Paul c. La Reine*, [1982] 1 R.C.S. 621, aux pp. 635, 653 et 660). En second lieu, je crois que la disposition transitoire indique que le législateur voulait que l'obligation de verser une indemnité de licenciement et une indemnité de cessation d'emploi prenne naissance lorsque l'employeur fait faillite.

32

In my view, by extending an exemption to employers who became bankrupt and lost control of their assets between the coming into force of the amendment and its receipt of royal assent, s. 2(3) necessarily implies that the severance pay obligation does in fact extend to bankrupt employers. It seems to me that, if this were not the case, no readily apparent purpose would be served by this transitional provision.

À mon avis, en raison de l'exemption accordée au par. 2(3) aux employeurs qui ont fait faillite et ont perdu la maîtrise de leurs biens entre le moment où les modifications sont entrées en vigueur et celui où elles ont reçu la sanction royale, il faut nécessairement que les employeurs faisant faillite soient de fait assujettis à l'obligation de verser une indemnité de cessation d'emploi. Selon moi, si tel n'était pas le cas, cette disposition transitoire semblerait ne poursuivre aucune fin.

33

I find support for my conclusion in the decision of Saunders J. in *Royal Dressed Meats Inc.*, *supra*. Having reviewed s. 2(3) of the *ESAA*, he commented as follows (at p. 89):

> . . . any doubt about the intention of the Ontario Legislature has been put to rest, in my opinion, by the transitional provision which introduced severance payments into the E.S.A. . . . it seems to me an inescapable inference that the legislature intended liability for severance payments to arise on a bankruptcy. That intention would, in my opinion, extend to termination payments which are similar in character.

Je m'appuie sur la décision rendue par le juge Saunders dans l'affaire *Royal Dressed Meats Inc.*, précitée. Après avoir examiné le par. 2(3) de l'*ESAA*, il fait l'observation suivante (à la p. 89):

> [TRADUCTION] . . . tout doute au sujet de l'intention du législateur ontarien est dissipé, à mon avis, par la disposition transitoire qui introduit les indemnités de cessation d'emploi dans la L.N.E. [. . .] Il me semble qu'il faut conclure que le législateur voulait que l'obligation de verser des indemnités de cessation d'emploi prenne naissance au moment de la faillite. Selon moi, cette intention s'étend aux indemnités de licenciement qui sont de nature analogue.

34

This interpretation is also consistent with statements made by the Minister of Labour at the time

Cette interprétation est également compatible avec les déclarations faites par le ministre du

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he introduced the 1981 amendments to the *ESA*. With regard to the new severance pay provision he stated:

> The circumstances surrounding a closure will govern the applicability of the severance pay legislation in some defined situations. For example, a bankrupt or insolvent firm will still be required to pay severance pay to employees to the extent that assets are available to satisfy their claims.
>
> . . .
>
> . . . the proposed severance pay measures will, as I indicated earlier, be retroactive to January 1 of this year. That retroactive provision, however, will not apply in those cases of bankruptcy and insolvency where the assets have already been distributed or where an agreement on a proposal to creditors has already been reached.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 4, 1981, at pp. 1236-37.)

Moreover, in the legislative debates regarding the proposed amendments the Minister stated:

> For purposes of retroactivity, severance pay will not apply to bankruptcies under the Bankruptcy Act where assets have been distributed. However, once this act receives royal assent, employees in bankruptcy closures will be covered by the severance pay provisions.

(*Legislature of Ontario Debates*, 1st sess., 32nd Parl., June 16, 1981, at p. 1699.)

35 Although the frailties of Hansard evidence are many, this Court has recognized that it can play a limited role in the interpretation of legislation. Writing for the Court in *R. v. Morgentaler*, [1993] 3 S.C.R. 463, at p. 484, Sopinka J. stated:

> . . . until recently the courts have balked at admitting evidence of legislative debates and speeches. . . . The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporeal body, but that is equally true of other forms of legisla-

Travail au moment de l'introduction des modifications apportées à la *LNE* en 1981. Au sujet de la nouvelle disposition relative à l'indemnité de cessation d'emploi, il a dit ce qui suit:

> [TRADUCTION] Les circonstances entourant une fermeture régissent l'applicabilité de la législation en matière d'indemnité de cessation d'emploi dans certains cas précis. Par exemple, une société insolvable ou en faillite sera encore tenue de verser l'indemnité de cessation d'emploi aux employés dans la mesure où il y a des biens pour acquitter leurs réclamations.
>
> . . .
>
> . . . les mesures proposées en matière d'indemnité de cessation d'emploi seront, comme je l'ai mentionné précédemment, rétroactives au 1er janvier de cette année. Cette disposition rétroactive, toutefois, ne s'appliquera pas en matière de faillite et d'insolvabilité dans les cas où les biens ont déjà été distribués ou lorsqu'une entente est déjà intervenue au sujet de la proposition des créanciers.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 4 juin 1981, aux pp. 1236 et 1237.)

De plus, au cours des débats parlementaires sur les modifications proposées, le ministre a déclaré:

> [TRADUCTION] En ce qui a trait à la rétroactivité, l'indemnité de cessation d'emploi ne s'appliquera pas aux faillites régies par la Loi sur la faillite lorsque les biens ont été distribués. Cependant, lorsque la présente loi aura reçu la sanction royale, les employés visés par des fermetures entraînées par des faillites seront visés par les dispositions relatives à l'indemnité de cessation d'emploi.

(*Legislature of Ontario Debates*, 1re sess., 32e Lég., 16 juin 1981, à la p. 1699.)

Malgré les nombreuses lacunes de la preuve des débats parlementaires, notre Cour a reconnu qu'elle peut jouer un rôle limité en matière d'interprétation législative. S'exprimant au nom de la Cour dans l'arrêt *R. c. Morgentaler*, [1993] 3 R.C.S. 463, à la p. 484, le juge Sopinka a dit:

> . . . jusqu'à récemment, les tribunaux ont hésité à admettre la preuve des débats et des discours devant le corps législatif. [. . .] La principale critique dont a été l'objet ce type de preuve a été qu'elle ne saurait représenter «l'intention» de la législature, personne morale, mais

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tive history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation.

c'est aussi vrai pour d'autres formes de contexte d'adoption d'une loi. À la condition que le tribunal n'oublie pas que la fiabilité et le poids des débats parlementaires sont limités, il devrait les admettre comme étant pertinents quant au contexte et quant à l'objet du texte législatif.

36

Finally, with regard to the scheme of the legislation, since the *ESA* is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant (see, e.g., *Abrahams v. Attorney General of Canada*, [1983] 1 S.C.R. 2, at p. 10; *Hills v. Canada (Attorney General)*, [1988] 1 S.C.R. 513, at p. 537). It seems to me that, by limiting its analysis to the plain meaning of ss. 40 and 40*a* of the *ESA*, the Court of Appeal adopted an overly restrictive approach that is inconsistent with the scheme of the Act.

Enfin, en ce qui concerne l'économie de la loi, puisque la *LNE* constitue un mécanisme prévoyant des normes et des avantages minimaux pour protéger les intérêts des employés, on peut la qualifier de loi conférant des avantages. À ce titre, conformément à plusieurs arrêts de notre Cour, elle doit être interprétée de façon libérale et généreuse. Tout doute découlant de l'ambiguïté des textes doit se résoudre en faveur du demandeur (voir, par ex., *Abrahams c. Procureur général du Canada*, [1983] 1 R.C.S. 2, à la p. 10; *Hills c. Canada (Procureur général)*, [1988] 1 R.C.S. 513, à la p. 537). Il me semble que, en limitant cette analyse au sens ordinaire des art. 40 et 40*a* de la *LNE*, la Cour d'appel a adopté une méthode trop restrictive qui n'est pas compatible avec l'économie de la Loi.

37

The Court of Appeal's reasons relied heavily upon the decision in *Malone Lynch*, *supra*. In *Malone Lynch*, Houlden J. held that s. 13, the group termination provision of the former *ESA*, R.S.O. 1970, c. 147, and the predecessor to s. 40 at issue in the present case, was not applicable where termination resulted from the bankruptcy of the employer. Section 13(2) of the *ESA* then in force provided that, if an employer wishes to terminate the employment of 50 or more employees, the employer must give notice of termination for the period prescribed in the regulations, "and until the expiry of such notice the terminations shall not take effect". Houlden J. reasoned that termination of employment through bankruptcy could not trigger the termination payment provision, as employees in this situation had not received the written notice required by the statute, and therefore could not be said to have been terminated in accordance with the Act.

La Cour d'appel s'est fortement appuyée sur la décision rendue dans *Malone Lynch*, précité. Dans cette affaire, le juge Houlden a conclu que l'art. 13, la disposition relative aux mesures de licenciement collectif de l'ancienne *ESA*, R.S.O. 1970, ch. 147, qui a été remplacée par l'art. 40 en cause dans le présent pourvoi, n'était pas applicable lorsque la cessation d'emploi résultait de la faillite de l'employeur. Le paragraphe 13(2) de l'*ESA* alors en vigueur prévoyait que, si un employeur voulait licencier 50 employés ou plus, il devait donner un préavis de licenciement dont la durée était prévue par règlement [TRADUCTION] «et les licenciements ne prenaient effet qu'à l'expiration de ce délai». Le juge Houlden a conclu que la cessation d'emploi résultant de la faillite ne pouvait entraîner l'application de la disposition relative à l'indemnité de licenciement car les employés placés dans cette situation n'avaient pas reçu le préavis écrit requis par la loi et ne pouvaient donc pas être considérés comme ayant été licenciés conformément à la Loi.

38

Two years after *Malone Lynch* was decided, the 1970 *ESA* termination pay provisions were

Deux ans après que la décision *Malone Lynch* eut été prononcée, les dispositions relatives à l'in-

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amended by *The Employment Standards Act, 1974*, S.O. 1974, c. 112. As amended, s. 40(7) of the 1974 *ESA* eliminated the requirement that notice be given before termination can take effect. This provision makes it clear that termination pay is owing where an employer fails to give notice of termination and that employment terminates irrespective of whether or not proper notice has been given. Therefore, in my opinion it is clear that the *Malone Lynch* decision turned on statutory provisions which are materially different from those applicable in the instant case. It seems to me that Houlden J.'s holding goes no further than to say that the provisions of the 1970 *ESA* have no application to a bankrupt employer. For this reason, I do not accept the *Malone Lynch* decision as persuasive authority for the Court of Appeal's findings. I note that the courts in *Royal Dressed Meats*, *supra*, and *British Columbia (Director of Employment Standards) v. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (B.C.S.C.), declined to rely upon *Malone Lynch* based upon similar reasoning.

39 The Court of Appeal also relied upon *Re Kemp Products Ltd.*, *supra*, for the proposition that although the employment relationship will terminate upon an employer's bankruptcy, this does not constitute a "dismissal". I note that this case did not arise under the provisions of the *ESA*. Rather, it turned on the interpretation of the term "dismissal" in what the complainant alleged to be an employment contract. As such, I do not accept it as authoritative jurisprudence in the circumstances of this case. For the reasons discussed above, I also disagree with the Court of Appeal's reliance on *Mills-Hughes v. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), which cited the decision in *Malone Lynch*, *supra*, with approval.

40 As I see the matter, when the express words of ss. 40 and 40*a* of the *ESA* are examined in their entire context, there is ample support for the con-

demnité de licenciement de l'*ESA* de 1970 ont été modifiées par *The Employment Standards Act, 1974*, S.O. 1974, ch. 112. Dans la version modifiée du par. 40(7) de l'*ESA* de 1974, il n'était plus nécessaire qu'un préavis soit donné avant que le licenciement puisse produire ses effets. Cette disposition vient préciser que l'indemnité de licenciement doit être versée lorsqu'un employeur omet de donner un préavis de licenciement et qu'il y a cessation d'emploi, indépendamment du fait qu'un préavis régulier ait été donné ou non. Il ne fait aucun doute selon moi que la décision *Malone Lynch* portait sur des dispositions législatives très différentes de celles qui sont applicables en l'espèce. Il me semble que la décision du juge Houlden a une portée limitée, soit que les dispositions de l'*ESA* de 1970 ne s'appliquent pas à un employeur en faillite. Pour cette raison, je ne reconnais à la décision *Malone Lynch* aucune valeur persuasive qui puisse étayer les conclusions de la Cour d'appel. Je souligne que les tribunaux dans *Royal Dressed Meats*, précité, et *British Columbia (Director of Employment Standards) c. Eland Distributors Ltd. (Trustee of)* (1996), 40 C.B.R. (3d) 25 (C.S.C.-B.), ont refusé de se fonder sur *Malone Lynch* en invoquant des raisons similaires.

La Cour d'appel a également invoqué *Re Kemp Products Ltd.*, précité, à l'appui de la proposition selon laquelle, bien que la relation entre l'employeur et l'employé se termine à la faillite de l'employeur, cela ne constitue pas un «congédiement». Je note que ce litige n'est pas fondé sur les dispositions de la *LNE*. Il portait plutôt sur l'interprétation du terme «congédiement» dans le cadre de ce que le plaignant alléguait être un contrat de travail. J'estime donc que cette décision ne fait pas autorité dans les circonstances de l'espèce. Pour les raisons exposées ci-dessus, je ne puis accepter non plus que la Cour d'appel se fonde sur l'arrêt *Mills-Hughes c. Raynor* (1988), 63 O.R. (2d) 343 (C.A.), qui citait la décision *Malone Lynch*, précitée, et l'approuvait.

Selon moi, l'examen des termes exprès des art. 40 et 40*a* de la *LNE*, replacés dans leur contexte global, permet largement de conclure que les

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clusion that the words "terminated by the employer" must be interpreted to include termination resulting from the bankruptcy of the employer. Using the broad and generous approach to interpretation appropriate for benefits-conferring legislation, I believe that these words can reasonably bear that construction (see *R. v. Z. (D.A.)*, [1992] 2 S.C.R. 1025). I also note that the intention of the Legislature as evidenced in s. 2(3) of the *ESAA*, clearly favours this interpretation. Further, in my opinion, to deny employees the right to claim *ESA* termination and severance pay where their termination has resulted from their employer's bankruptcy, would be inconsistent with the purpose of the termination and severance pay provisions and would undermine the object of the *ESA*, namely, to protect the interests of as many employees as possible.

mots «l'employeur licencie» doivent être interprétés de manière à inclure la cessation d'emploi résultant de la faillite de l'employeur. Adoptant l'interprétation libérale et généreuse qui convient aux lois conférant des avantages, j'estime que ces mots peuvent raisonnablement recevoir cette interprétation (voir *R. c. Z. (D.A.)*, [1992] 2 R.C.S. 1025). Je note également que l'intention du législateur, qui ressort du par. 2(3) de l'*ESAA*, favorise clairement cette interprétation. Au surplus, à mon avis, priver des employés du droit de réclamer une indemnité de licenciement et une indemnité de cessation d'emploi en application de la *LNE* lorsque la cessation d'emploi résulte de la faillite de leur employeur serait aller à l'encontre des fins visées par les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi et minerait l'objet de la *LNE*, à savoir protéger les intérêts du plus grand nombre d'employés possible.

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In my view, the impetus behind the termination of employment has no bearing upon the ability of the dismissed employee to cope with the sudden economic dislocation caused by unemployment. As all dismissed employees are equally in need of the protections provided by the *ESA*, any distinction between employees whose termination resulted from the bankruptcy of their employer and those who have been terminated for some other reason would be arbitrary and inequitable. Further, I believe that such an interpretation would defeat the true meaning, intent and spirit of the *ESA*. Therefore, I conclude that termination as a result of an employer's bankruptcy does give rise to an unsecured claim provable in bankruptcy pursuant to s. 121 of the *BA* for termination and severance pay in accordance with ss. 40 and 40*a* of the *ESA*. Because of this conclusion, I do not find it necessary to address the alternative finding of the trial judge as to the applicability of s. 7(5) of the *ESA*.

À mon avis, les raisons qui motivent la cessation d'emploi n'ont aucun rapport avec la capacité de l'employé congédié de faire face au bouleversement économique soudain causé par le chômage. Comme tous les employés congédiés ont également besoin des protections prévues par la *LNE*, toute distinction établie entre les employés qui perdent leur emploi en raison de la faillite de leur employeur et ceux qui ont été licenciés pour quelque autre raison serait arbitraire et inéquitable. De plus, je pense qu'une telle interprétation irait à l'encontre des sens, intention et esprit véritables de la *LNE*. Je conclus donc que la cessation d'emploi résultant de la faillite de l'employeur donne effectivement naissance à une réclamation non garantie prouvable en matière de faillite au sens de l'art. 121 de la *LF* en vue d'obtenir une indemnité de licenciement et une indemnité de cessation d'emploi en conformité avec les art. 40 et 40*a* de la *LNE*. En raison de cette conclusion, j'estime inutile d'examiner l'autre conclusion tirée par le juge de première instance quant à l'applicabilité du par. 7(5) de la *LNE*.

42

I note that subsequent to the Rizzo bankruptcy, the termination and severance pay provisions of the *ESA* underwent another amendment. Sections

Je fais remarquer qu'après la faillite de Rizzo, les dispositions relatives à l'indemnité de licenciement et à l'indemnité de cessation d'emploi de la

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74(1) and 75(1) of the *Labour Relations and Employment Statute Law Amendment Act, 1995*, S.O. 1995, c. 1, amend those provisions so that they now expressly provide that where employment is terminated by operation of law as a result of the bankruptcy of the employer, the employer will be deemed to have terminated the employment. However, s. 17 of the *Interpretation Act* directs that, "[t]he repeal or amendment of an Act shall be deemed not to be or to involve any declaration as to the previous state of the law". As a result, I note that the subsequent change in the legislation has played no role in determining the present appeal.

LNE ont été modifiées à nouveau. Les paragraphes 74(1) et 75(1) de la *Loi de 1995 modifiant des lois en ce qui concerne les relations de travail et l'emploi*, L.O. 1995, ch. 1, ont apporté des modifications à ces dispositions qui prévoient maintenant expressément que, lorsque la cessation d'emploi résulte de l'effet de la loi à la suite de la faillite de l'employeur, ce dernier est réputé avoir licencié ses employés. Cependant, comme l'art. 17 de la *Loi d'interprétation* dispose que «[l]'abrogation ou la modification d'une loi n'est pas réputée constituer ou impliquer une déclaration portant sur l'état antérieur du droit», je précise que la modification apportée subséquemment à la loi n'a eu aucune incidence sur la solution apportée au présent pourvoi.

6. Disposition and Costs

43 I would allow the appeal and set aside paragraph 1 of the order of the Court of Appeal. In lieu thereof, I would substitute an order declaring that Rizzo's former employees are entitled to make claims for termination pay (including vacation pay due thereon) and severance pay as unsecured creditors. As to costs, the Ministry of Labour led no evidence regarding what effort it made in notifying or securing the consent of the Rizzo employees before it discontinued its application for leave to appeal to this Court on their behalf. In light of these circumstances, I would order that the costs in this Court be paid to the appellant by the Ministry on a party-and-party basis. I would not disturb the orders of the courts below with respect to costs.

6. Dispositif et dépens

Je suis d'avis d'accueillir le pourvoi et d'annuler le premier paragraphe de l'ordonnance de la Cour d'appel. Je suis d'avis d'y substituer une ordonnance déclarant que les anciens employés de Rizzo ont le droit de présenter des demandes d'indemnité de licenciement (y compris la paie de vacances due) et d'indemnité de cessation d'emploi en tant que créanciers ordinaires. Quant aux dépens, le ministère du Travail n'ayant produit aucun élément de preuve concernant les efforts qu'il a faits pour informer les employés de Rizzo ou obtenir leur consentement avant de se désister de sa demande d'autorisation de pourvoi auprès de notre Cour en leur nom, je suis d'avis d'ordonner que les dépens devant notre Cour soient payés aux appelants par le ministère sur la base des frais entre parties. Je suis d'avis de ne pas modifier les ordonnances des juridictions inférieures à l'égard des dépens.

Appeal allowed with costs.

Solicitors for the appellants: Sack, Goldblatt, Mitchell, Toronto.

Solicitors for the respondent: Minden, Gross, Grafstein & Greenstein, Toronto.

Solicitor for the Ministry of Labour for the Province of Ontario, Employment Standards Branch: The Attorney General for Ontario, Toronto.

Pourvoi accueilli avec dépens.

Procureurs des appelants: Sack, Goldblatt, Mitchell, Toronto.

Procureurs de l'intimée: Minden, Gross, Grafstein & Greenstein, Toronto.

Procureur du ministère du Travail de la province d'Ontario, Direction des normes d'emploi: Le procureur général de l'Ontario, Toronto.

TAB 16

In the Matter of an Arbitration pursuant to Division IX, Part III
of the *Canada Labour Code*, R.S.C. 1985, c. L-2 As Amended ("the *Code*")

BETWEEN:

WestJet, an Alberta Partnership

("WestJet" or the Employer)

and

Employees in the service of WestJet, an Alberta Partnership, who are subject to a group termination dated October 14, 2020, pursuant to the *Code*

(the "Calgary Corporate Employees")

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DECISION

Arbitrator:	Mark L. Asbell, Q.C.
For the Employer:	Laura Mensch (Counsel), Courtenay Mercier (In-House Counsel), Virginia Swindall (Labour Relations Manager)
For the Employees:	Matthew Bobawsky (Counsel), Robert Trumper, Lorne Mackenzie, Stephen Fast, Chad Thompson
Location of Hearing:	By Virtual Platform
Date of Hearing:	April 26-27, 2021 and by written submission
Date of Decision:	June 1, 2021

DECISION

I. Introduction and Overview

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[1] This Decision addresses an application to decide the appropriate severance package and recall rights (the Adjustment Program) of a group termination under Part III, Division IX, section 224 of the *Canada Labour Code* (the *Code*).

[2] In 2020, the Employer (WestJet) issued termination notices to 3,333 employees making up about 30% of its workforce across Canada. The mass terminations followed the precipitous loss of 90-95% of WestJet's passenger business and revenue as a consequence of the COVID-19 pandemic (the Pandemic). As of the date of this Decision, WestJet has not resumed operations beyond a smattering of its pre-Pandemic flight volume and has not rehired or recalled the terminated employees as the Pandemic and travel restrictions continue.

[3] The mass terminations occurred over the span of several months in 2020 and involved five different groups of employees. The groups were created by WestJet based on the date of termination together with the employee's location. As required by Division IX of the *Code*, representatives of each group were required to attempt negotiation of an acceptable Adjustment Program providing a severance package and recall rights as necessary for the employees in the group. Four of the groups successfully reached agreement. The last group, the subject of this Decision and referred to as the Calgary Corporate Employees, did not achieve an agreement with WestJet. Under the *Code*, the federal Minister of Labour (the Minister) ordered that the terms of an appropriate Adjustment Program for the Calgary Corporate Employees be developed and implemented. This is the subject of this Decision.

[4] On October 14, 2020, the Calgary Corporate Employees received termination notices effective February 3, 2021. The notice period of 16 weeks was pursuant to section 212(1) of the *Code.* Making up about 2% of the total of WestJet's terminated employees, the 68 employees forming the Calgary Corporate Employees group are diverse in positions, responsibilities, levels of education, skillsets, age, and tenure. 30% of the group were former managers at various levels of management in the company. The only similarities within this group are their non-union status, that each was employed under a written or implied individual employment contract, and that all were based out of Calgary. In a labour relations context, there is no community of interest within this group of employees.

[5] Together with the continuing impact of the Pandemic on WestJet's business, the diversity and employment status of the Calgary Corporate Employees complicate the determination of an appropriate Adjustment Program. While each employee has an

individual employment contract, these contracts take multiple forms with several different termination and severance provisions. Some contracts purport to limit severance to the *Code's* statutory minimum; some contain no clauses speaking to severance at all; some have implied contracts; and one contract stipulates specified weeks per year of employment together with a top-off of additional monies for lost benefits.

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[6] The issues at the heart of this application require a review of the legislation governing group terminations, a review of the Adjustment Programs achieved by the four other terminated groups of former WestJet employees, how the 16-week notice of termination period should be factored, and the impacts of the individual employment contracts in a group termination setting.

[7] WestJet argues the previous package agreed to with the First Corporate Group is reasonable and appropriate for the Calgary Corporate Employees. As the groups are comparable, WestJet urges me to adopt the same Adjustment Program based on two weeks severance per year of employment. The Calgary Corporate Employees say they are not comparable to the First Corporate Group and, further, I must apply their individual employment contracts and the concept of reasonable notice. While reasonable notice is typically an individual concept, as this is a group termination, they argue that I should apply the average notice period to each member of the group as a whole, which they suggest, is four weeks' severance per year of employment. This payment would be over and above their outstanding wages which are due and owing.

[8] For the reasons that follow, I find WestJet's offer of two weeks severance per year of employment, together with a wage top-up for the 16-week statutory group notice period, to be fair and reasonable in the circumstances. For any employees who perceive that they remain inadequately compensated, the *Code* provides they may bring an individual action to seek additional compensation.

II. Background

[9] The parties entered a comprehensive Agreed Statement of Facts at the start of the hearing. In addition to the exhibits referenced in the Agreed Statement of Facts, the parties submitted six more exhibits by consent during the hearing. The Agreed Statement of Facts together with these exhibits constitute the entirety of the evidence put before me. I attach the Agreed Statement of Facts as Appendix A to this Decision. The list of exhibits is attached as Appendix B.

[10] The Agreed Statement of Facts establishes that the Pandemic caused a huge loss of business and revenue to WestJet, reducing its flights and passenger numbers by between 90-95%. The decreased air travel and revenue loss continues well over a year later.

[11] Shortly after the start of the Pandemic, the Prime Minister and health officials across Canada began encouraging Canadians to stay home and not travel. They also encouraged airlines to reduce their flights and flight capacities. WestJet's business dropped precipitously. WestJet first eliminated about 500 contractors and then, beginning in April 2020, began laying off employees. As of July 2020, 6,715 WestJet employees, including most of the Calgary Corporate Employees, had been temporarily laid-off.

[12] Starting April 30, 2020, WestJet was able to access the Government of Canada's Canada Emergency Wage Subsidy Program (CEWS). CEWS provides funds to employers to be directed to eligible employees up to a certain percentage of that employee's eligible earnings. Under the CEWS Program, about 6400 employees were recalled and placed back on WestJet's payroll, albeit on reduced wage.

[13] On June 24, 2020, WestJet announced the permanent elimination of 3,333 jobs representing 30% of its workforce.

[14] WestJet began issuing termination notices to groups of its employees on June 25, 2020 and continued through termination notices to the Calgary Corporate Employees on October 14, 2020. During the time from notification of termination, right up to the date of termination, employees continued to receive their CEWS payments. Given the breadth of WestJet's employee terminations, WestJet established five different employee groups for the purposes of negotiating group termination severance provisions. In addition to the creation of the Calgary Corporate Employees group, the four other groups include:

- The Contact Centre Group including 396 contact center employees across Canada issued their termination notice on June 25, 2020;
- The Tier 1 Airport Group including 1,289 Tier 1 airports employees across Canada issued their termination notice on July 7, 2020;
- The First Corporate Group including 504 corporate employees in Calgary and Toronto issued their termination notice on July 28, 2020; and,
- The Tier 2 Airport Group including 520 Tier 2 airports employees across Canada issued their termination notice on September 28, 2020.

[15] As noted, all groups except the Calgary Corporate Employees group were able to reach agreement on their respective Adjustment Program.

III. Overview of Process and Legislation Relating to Group Terminations

[16] As required by Division IX of the *Code*, when terminations of 50 or more employees occur, representatives of the employer and employees are first appointed or

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elected to meet as a Joint Planning Committee (JPC) to negotiate an acceptable Adjustment Program. Section 221(1) sets out the object of the adjustment program. In the matter before me, section 221(1)(b) is pertinent. The section reads:

> 221(1) It is the object of a joint planning committee to develop an adjustment program to
>
> > (b) minimize the impact of the termination of employment on the redundant employees and to assist those employees in obtaining other employment.

[17] Section 221(2) is a key provision as it restricts which matters may be considered by the JPC. It provides:

> 221(2) In attaining its object under subsection (1), a joint planning committee may, unless the members of the committee agree otherwise, deal only with such matters as are normally the subject-matter of collective agreement in relation to the termination of employment. (Emphasis added)

[18] If the JPC is unsuccessful in reaching an agreement, section 223 of the *Code* provides for an application to the Minister for the appointment of an arbitrator to determine an acceptable severance package.

> **Application to Minister for arbitrator**
>
> 223 (1) Where all members of a joint planning committee who are representatives of the redundant employees agree to do so or where all members of a joint planning committee who are representatives of the employer agree to do so, those members may, after six weeks from the date of the notice to the Minister under section 212, apply jointly to the Minister for the appointment of an arbitrator if
>
> > (a) the committee has not then completed developing an adjustment program; or
> >
> > (b) the committee has completed developing an adjustment program, but those members are not satisfied with the program or any part of the program.

[19] Section 224 not only sets out the Minister's power of appointment of an arbitrator, but also sets out the duty, restrictions, and powers of an arbitrator. It provides:

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Appointment of arbitrator

224 (1) The Minister may, on application under subsection 223(1), appoint an arbitrator to assist the joint planning committee in the development of an adjustment program and to resolve any matters in dispute respecting the adjustment program.

The Minister shall notify and send a statement of matters in dispute

(2) Where an arbitrator is appointed under subsection (1), the Minister shall forthwith

> …
>
> (b) if the application under subsection 223(1) sets out matters in dispute respecting an adjustment program, send to the arbitrator and to the joint planning committee a statement setting out any matters in dispute respecting the adjustment program that the arbitrator is to resolve.

Restriction on matters included in statement

(3) A statement referred to in subsection (2) shall be restricted to such of those matters set out in the application under subsection 223(1) as the Minister deems appropriate and as are normally the subject-matter of collective agreement in relation to termination of employment.

Duty of arbitrator

(4) An arbitrator shall assist the joint planning committee in the development of an adjustment program and the arbitrator, if sent a statement pursuant to subsection (2), shall, within four weeks after receiving the statement or such longer period as the Minister may specify,

> (a) consider the matters set out in the statement;
>
> …

Restriction

(5) An arbitrator may not

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(a) review the decision of the employer to terminate the employment of the redundant employees; or

(b) delay the termination of employment of the redundant employees.

[20] After five unsuccessful meetings and a further attempt at mediation, the WestJet JPC members applied to the Minister for the appointment of an arbitrator to determine the terms of the Adjustment Program for the group.

[21] On March 3, 2021, I was appointed Arbitrator by the Minister under section 224 to hear evidence and argument from the parties and determine:

1. Contents of a separation package including, without limitation, severance, travel privileges (including retirement travel privileges), benefits and outplacement services; and
2. Recall rights.

[22] Following my appointment, and pursuant to section 224(4) the parties agreed neither further meetings of the JPC nor mediation would be useful. Accordingly, they agreed to proceed directly to arbitration of the matters referred to me by the Minister. The Minister requested a Decision by June 1, 2021.

IV. Balanced Approach Required

[23] The *Code* provides limited guidance to an arbitrator in crafting an acceptable Adjustment Program. The guidance provided in section 224(3) limits the review to those matters the Minister deems appropriate and as "normally the subject-matter of collective agreement in relation to termination employment".

[24] Unfortunately, a review of the applicable caselaw provides limited assistance. Division IX group terminations are infrequent as demonstrated by the dearth of decisions in the area. The parties referred to two decisions issued under section 224 including a decision from 2000 issued by Arbitrator Bruce Outhouse involving the closure of the Cape Breton Development Corporation (*Devco*),[1] and the 2008 decision of Arbitrator Brian Keller between CUPE and Air Canada (*Air Canada*)[2]. While each decision involved a group termination, each was quite fact specific with limited applicability to the facts before me. The *Devco* case, in particular, involved the complete closure of employer operations; involved specific legislation dedicated to and governing the employer, and; as it was a government entity, there was a significant amount of money provided by government to assist the affected employees.

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[1] *Cape Breton Development Corporation (Devco)*, 2000 CanLII 29389, para 38.
[2] 2008 CarswellNat 3985

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[25] Both cases do, however, provide some assistance in how to approach my task. Arbitrator Outhouse in *Devco* states that the legislation requires that an arbitrator craft their award in a manner that a reasonable and competent JPC might have done:

> For purposes of this arbitration, I accept that I should strive, insofar as possible, to decide the matters in dispute in the same manner that the JPC members, acting reasonably, might have done. In other words, I should try to replicate the Adjustment Program which the JPC process would likely have produced had it functioned properly.[3]

[26] Arbitrator Brian Keller in *Air Canada* agrees with this proposition but adds that an arbitrator must assess the matter in the same manner as what the JPC members, "being fully aware of all the facts and implication of their decisions, acting reasonably, might have done".[4]

[27] Arbitrator Keller's added phrase is significant. While arguably it could be "read-in" that JPC members, *acting reasonably*, would consider all the facts and implications of their decisions, Arbitrator Keller in *Air Canada* highlights that an arbitrator's role in Division IX *must* consider outside factors and consequences, including the broader economic factors facing the employer, together with how these factors impact not only the terminated employees, but also the employer's ongoing viability. In this sense, Arbitrator Keller accentuates that the arbitrator's role – and jurisdiction – is more closely aligned to that of an interest arbitrator rather than determining employee rights under a collective agreement.

[28] Flowing out of this core jurisdictional determination, Arbitrator Keller considered what the impact his Adjustment Program decision would have, not only on the dismissed group of employees, but also on the remaining employee complement and the employer as a whole. The latter considerations were not inconsequential as Air Canada was, at that point in time, facing significant financial hardship due to unanticipated record high fuel prices forcing higher costs to passengers which, in turn, resulted in fewer passengers and decreased revenues for the airline. As noted by Arbitrator Keller "the issues facing this employer, and its reaction to those issues have been reflected, as well, in virtually every major airline in the world".[5]

[29] Recognizing that the object of section 221 is to minimize the impact of the termination of employment on the redundant employees and to assist those employees in obtaining other employment, Arbitrator Keller stated "the focus of the mitigation had to be to assist the greatest number of employees … while not unduly compromising

[3] *Devco*, para 38.
[4] *Air Canada,* para 4.
[5] *Air Canada*, para 10.

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the economic position of the employer."[6] The "mitigation measure and their costs could not be so onerous as to jeopardize the financial position of the employer".[7]

[30] I agree with Arbitrator Keller than an arbitral award arriving at an appropriate Adjustment Program is similar to an interest arbitration. It requires that I take a balanced approach and avoid an assessment through a singular lens focussed solely on the employees. Rather, I must consider the object of the legislation to minimize the impact of termination of employment on the terminated employees while also being aware of and considering the economic well-being of the employer and its ability to continue active operations.

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V. Adjustment Program Considerations

[31] The parties raised a number of issues requiring determination in achieving an appropriate Adjustment Program. These include:

a. economic considerations;
b. CEWS shortfall complaint;
c. what constitutes "subject-matter of collective agreement" for non-union employees;
d. evidence of other WestJet adjustment programs;
e. the effect of individual contracts of employment, common law, and severance principles;
f. the interpretation of the *Code's* saving provision, section 168.

[32] I review each in turn before turning to the Adjustment Program for the Calgary Corporate Employees under section 224.

a. Economic Considerations

[33] There is no doubt that WestJet's termination of employment of approximately 30% of its workforce was a direct response to the sudden, unforeseeable, and unprecedented loss of between 90-95% of its passenger business and revenue brought about because of the Pandemic. With mandated containment measures, government restrictions including the closure of borders and travel restrictions, and messaging from government and health officials to limit, or stop entirely, international and inter-provincial travel, the airline industry has suffered significant losses and has been, remains, and will continue to be, one of the hardest hit sectors in our Canadian economy.

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[6] *Air Canada*, para 33.
[7] *Air Canada*, para 22.

[34] Whereas several national governments around the world negotiated terms of financial assistance with airline companies based in their respective countries, the Government of Canada has been slow to follow and only recently came to terms for providing specific financial assistance for the airline industry with two of WestJet's competitors: Air Canada and Air Transat. The financial assistance package for Air Canada was agreed to just prior to the hearing into our matter and the package with Air Transat was reached after the parties completed their case and while this Decision was being written. When I questioned whether any such similar specific industry assistance would be offered to WestJet, WestJet provided no information as to whether it was in discussions with the Government, let alone that a package was imminent.

[35] While the Calgary Corporate Employees argue that the current economic conditions facing WestJet should not be taken into consideration in my determination of an appropriate Adjustment Program, current economic realities facing an employer must be a relevant factor in the consideration of an appropriate package. To ignore the impact of the Pandemic on WestJet is to ignore a very large elephant in a tightly confined space. In May 2020, WestJet was flying at 8% or its capacity. As of April 1, 2021, nearly a full-year later, WestJet remains at 8% of its capacity it operated at in April 2019. With such an overwhelming loss of business, WestJet has seen a dramatic drop in its revenues for in excess of a year. Over this period, WestJet implemented many cost-cutting measures including cutting contracts, securing reductions from vendors, deferring discretionary projects, wage reductions, layoffs, hiring freezes, and terminations.

[36] WestJet argues an arbitrator cannot render an award which jeopardizes the very future of the employer. As held by Arbitrator Keller in *Air Canada*, "the focus of the mitigation had to be to assist the greatest number of employees … while not unduly compromising the economic position of the employer."[8] It is a balancing exercise requiring an arbitrator to "act on the side of prudence" even where it means rendering an award that does not mitigate the effects on affected employees to the extent that the employees would like.[9]

[37] Although I received no direct evidence relating to the financial wherewithal of WestJet and its ongoing viability in the marketplace, the facts and implemented measures clearly establish significant loss of capacity and revenue and a significant ongoing impact on WestJet.

[38] However, unlike Arbitrator Keller's decision in *Air Canada* and his concern that his decision could impact the employer's ongoing ability to continue operations, given the size of this group termination (68 employees), my Decision has comparatively little impact on WestJet's continued viability.

[8] *Air Canada* at para. 33
[9] *Air Canada* at para 32

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[39] In *Air Canada*, the employer had only recently come out of bankruptcy protection and there was evidence of multiple interest arbitration awards involving multiple unions acknowledging and accounting for the fragile nature of Air Canada at the time. I received no evidence of such concern other than the evidence of significant loss of business and the ongoing struggle facing the company because of the Pandemic. I was not made aware, nor were alarm bells sounded, that my Decision could seriously threaten or jeopardize the airline's very survival; only that it had experienced huge revenue losses.

[40] Although the arbitrator in *Air Canada* found that his balancing act "must be tilted in favour of the employer, if for no other reason than to ensure that it keeps flying",[10] my balancing act is more nuanced, keeping in mind the object of the legislation is to assist employees and minimize the impact of the termination of their employment. Suffice it to say, many group terminations arise because of financial difficulties facing employers. Financial difficulties alone cannot tilt the balance in favour of an employer.

[41] While the impact of the Pandemic on the employer must still be given significant weight, the impact of the Pandemic has also cost the jobs, and livelihoods, of the employees. While the employees may have skills and abilities to fill jobs in other sectors, the impact of the Pandemic has curtailed available jobs in not only the airline industry, but industries right across the spectrum. The ability to find comparable employment has been, and will remain for a period of time, impacted by the Pandemic.

[42] With these considerations in mind, I am not convinced that this Award will significantly impact WestJet's viability, so as to attenuate the focus of minimizing the impact on the employees.

b. CEWS Shortfall

[43] The Calgary Corporate Employees suggest a key component of the Adjustment Program must include payment of their outstanding wages and salary due under their contracts. They argue WestJet breached their contracts by unilaterally and wrongfully paying them only the CEWS amount received from the federal government as opposed to their full wages and salary, when they were recalled.

[44] Section 224(3) restricts my decision to such "matters as the Minister deems appropriate and as are normally the subject-matter of collective agreement in relation to termination of employment". As set out earlier, the scope of my mandate shall include the "Contents of a separation package including, without limitation, severance, travel privileges (including retirement travel privileges), benefits and outplacement services; and Recall rights".

[10] *Air Canada*, paras 27.

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[45] Both parties agree my jurisdiction is limited to that set out by the Minister but disagree on what the Minister intended to include in the separation package.

[46] WestJet contends my jurisdiction is limited to matters that are normally the subject-matter of collective agreement which relate to a separation package. It argues a "separation package" relates to monetary and other benefits moving forward from the date of termination and does not include claims for outstanding wages. Further, the negotiations at the JPC focused solely on the severance component and did not include any discussion of outstanding wages indicating that the parties did not consider this to be a significant issue.

[47] The Calgary Corporate Employees contend the Minister's order empowers me to award the outstanding salary component due and owing to the employees under their employment contracts because of the reference to "without limitation" in my appointment. To this end, the employment contracts contemplate WestJet paying its employees their salary up to the employee's last day of work if their employment is terminated, whether for cause or without cause.

[48] There is no doubt the employees received less than their normal wage from April 16, 2020 onwards when the first lay-offs in the Calgary Corporate Employees group occurred. All of the employees received only a percentage of their salaries through the federal government's CEWS program during their notice period from October 14, 2020 to the date of their termination, February 3, 2021.

[49] As discussed later, a key consideration in WestJet's offer of two weeks severance per year of employment, and my acceptance of its position, is that employees also received 16 weeks notice of their termination as required by section 212 of the *Code.* WestJet relied on this provision to describe and justify the generosity of its offer. By example, WestJet indicated a 5-year employee would receive a very generous 26 weeks notice under its offer, comprised of the 16 weeks notice already provided as required under section 212, plus an additional 10 weeks as per its offer. WestJet argued that a severance of 26 weeks or approximately six months for a 5-year employee is well in excess of what an employee with such tenure would normally receive.

[50] I am satisfied my jurisdiction includes consideration of section 212 and the 16-week statutory notice period. WestJet used the 16-week statutory notice period as part of its consideration for its separation package offer and an indication of the generosity of its offer. Thus, WestJet itself considered it to be inclusive within the separation package. The "contents of a separation package" are not limited; to the contrary, the wording provides a non-exhaustive list of considerations.

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[51] Although section 212 sets out the 16-week notice, unlike section 230 (which it refers to), section 212 does not specifically set out that employees are entitled to their regular rate of wages for the notice period. Despite the fact the section does not reference payment to employees of their regular rate of wages, this is the logical presumption.

[52] I am of the view that WestJet can only equitably rely on the provision of the 16-week notice as evidence of its "fair and reasonable offer" if the employees received full salary for that period. They did not and the employees are entitled to receive an appropriate top up to make them whole for this 16-week period.

[53] Further, Part IX should be viewed purposively. The group termination provisions within the *Code* are intended to reasonably compensate the greatest number of employees in an efficient and timely manner. Little is served by leaving the issue of the CEWS shortfall for another day, as WestJet suggests. A potential plethora of claims following determination of the Adjustment Program is a stated concern of WestJet. All parties would welcome finality to the extent possible.

[54] With the above in mind, I conclude that the Adjustment Program should include a top-up for all of the Calgary Corporate Employees of the difference in monies received under the CEWS program and what their regular wages or salary under the general pay band and contract otherwise entitled them to.

c. What Constitutes "Subject-Matter of Collective Agreement" for Non-Union Employees

[55] While both parties agree that sections 215(2) and (3) of the *Code* make it clear that Division IX applies to both union and non-unionized employees, they disagree on how the statutory provisions are to be read in light of the non-unionized status of the Calgary Corporate Employees. A key point of disagreement is how to interpret the individual contracts of employment in light of section 224(3) which limits the review to matters "normally the subject-matter of collective agreement in relation to termination of employment".

[56] Without going through an exhaustive review of "collective agreement" as used in Division IX, I am satisfied that the proper interpretation of this section is that "normally the subject-matter" qualifies collective agreement such that the focus is not on the collective agreement document itself, but, instead, on the subject-matter or material normally covered by a collective agreement relating to terminations. The phrase is expansive allowing for a broader and more substantive consideration. Thus, I am not hampered by the fact the parties do not have an actual collective agreement between them and can consider matters that would normally be contained or included in such an agreement in relation to termination of employment.

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[57] In the case before me, the individual employment contracts have terms and provisions relating to termination and severance. Termination and severance are subject-matter normally found in a collective agreement. Thus, while the individual employment contracts themselves are not necessarily determinative of the severance and other aspects relating to the Adjustment Program, I find these contracts inform the fashioning of an appropriate Adjustment Program. I address this further below.

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d. Evidence of Other WestJet Adjustment Programs

[58] The role of the arbitrator under Division IX is to strive, insofar as possible, to decide the matters in dispute as would the JPC members, being fully aware of all the facts and implications of their decisions and acting reasonably. The evidence of other Adjustment Programs reached with other employee groups of the employer are therefore relevant.

[59] As noted in paragraphs 39 to 41 in the Agreed Statement of Facts, WestJet successfully negotiated Adjustment Programs with four other groups of employees. These four groups account for 98% of WestJet's terminated employees. The Calgary Corporate Employees constitute the remaining 2% of the terminated employees.

[60] Each of the groups negotiated Adjustment Programs including severance, travel privileges, and outplacement services. Recall or rehire rights were either inapplicable or limited. Similarly, profit sharing was either according to Company policy or inapplicable.

[61] The parties agree three of the four groups (the Contract Centre Employees, the Tier 1 Airport Employees, and the Tier 2 Airport Employees) have less in common with the Calgary Corporate Employees than the First Corporate Group. WestJet contends the First Corporate Group is very similar in composition and classification to that of the Calgary Corporate Employees.

[62] The only evidence I received about the comparison between the two corporate employee groups comes from paragraphs 8-12 of the Agreed Statement of Facts, together with exhibits 1-4. Exhibits 2-4 discuss WestJet's compensation philosophy, the compensation overview, and its performance award policy. Exhibit 1 contains two spread sheets: one for the Calgary Corporate Employees and the other for the First Corporate Group. Each spread sheet lists the employees by employee number together with their position, their pay-band (Step or General), their level on the pay band, whether they were a leader or individual contributor, if they were a leader what their role was, whether they had a termination clause in their employment contract, and their salary. The spreadsheets are summarized as follows:

Group	Calgary Corporate Employees	First Corporate Group
Date of Group Termination	February 3, 2021	December 15, 2020
Number of employees	68	504
Managerial/Team Lead	20	96
% managerial/group	29.4%	19.0%
General Band employees	68	470
% General Band/group	100%	93.25%
Step Band employees	0	34
% Step Band/group	0%	6.75%
Average Salary	$69,111.65	$67,183.74
Highest Salary	$153,400	$149,884
Lowest Salary	$36,276	$7,742

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[63] The Calgary Corporate Employees highlight the differences in the number of employees employed on the Step Band as well as the percentage differences of managerial personnel between the two groups, arguing these differences distinguish them. For the reasons that follow, I conclude that these differences are inconsequential.

i. Distinction Between Step Band and General Band Employees

[64] The Calgary Corporate Employees argue the inclusion of 34 step band employees in the First Corporate Group clearly differentiates the two groups. While there are 34 employees in the First Corporate Group, I do not see a sharp distinction based on the numbers and percentages of the step band employees to general band employees.

[65] First, while all of the Calgary Corporate Employees are general band, the 34 step band employees only account for 6.7% of the First Corporate Group. This is not a statistically high number.

[66] Second, there is no indication in the Adjustment Program reached with the First Corporate Group that the inclusion of step employees had any influence on the negotiated Adjustment Program.

[67] Third, if the Calgary Corporate Employees are suggesting the inclusion of the step band employees somehow lowers the responsibility or salary level of the First Corporate Group, a review of the latter in Exhibit 1 belies this.

[68] Review of the listed salaries indicates the lowest paid employees in the First Corporate Group are, without exception, all general band employees and by a sizable number. While some of the salaries may suggest either casual or part-time status or perhaps that the employee only worked a partial year, there is nothing in the evidence

before me indicating this. Some of these low general band salaries include employees receiving $7,742, $13,415, $15,272, $19,558, and $26,452. By comparison, the lowest step band salary listed in the First Corporate Group is one employee at $39,000.

[69] Conversely, five employees in the Calgary Corporate Employees group earned more than $100,000 annually. This equals 7% of the total employee complement in the Calgary Corporate Employees group. By comparison, 49 of the 504 in the First Corporate Group earned greater than $100,000 annually equalling 9.7% of the total. Breaking down the salary of the First Corporate Group one further step, 38 of the 470 general band employees within this group earned greater than $100,000 (8.1%) while 11 of the 34 step band employees within the same group earned greater than $100,000 (32%). The highest paid step band employee in the First Corporate Group topped all but one of the general band Calgary Corporate Employees.

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[70] A salary comparator between the terminated general band and step band employees or between the slight difference in average salary of the First Corporate Group and the Calgary Corporate Employees does not reveal a clear distinction between the two groups of terminated employees.

ii. Not Enough Difference in Managerial Numbers Disclosed

[71] The Calgary Corporate Employees also argue a distinction must be drawn given the sizeable number, percentage-wise, of managerial and leaders in their group as compared to the First Corporate Group. They argue they were kept on longer than the First Corporate Group for a reason, whether because of positional requirements or perceived value to the company.

[72] The perception, however, is supposition. I received no evidence that WestJet considered the Calgary Corporate Employees to be different in any meaningful way from the earlier group of corporate employees forming the First Corporate Group. While percentage-wise, 29% (or 30 employees in total) of the Calgary Corporate Employees filled leadership roles, 19%, or 96 employees, of the First Corporate Group were likewise in leadership positions. Even though the numbers are lower percentage-wise, the difference in raw numbers between the two groups still means there are a significantly higher number of overall employees in leadership roles in the First Corporate Group. I am not convinced the percentage difference significantly differentiates the groups, especially given the much larger size of the First Corporate Group.

e. The Effect of Individual Contracts of Employment, Common Law, and Severance Principles

[73] The Calgary Corporate Employees argue the correct test for determining severance under section 224 for non-unionized employees must be their individual employment contracts and the common law.

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[74] WestJet, on the other hand, submits it is not within the arbitrator's jurisdiction to make determinations on contractual or common law notice entitlements under the auspices of this arbitration. This would not be consistent with developing a program that benefits the greatest number of employees within the context of limited resources. Nonetheless, WestJet agrees that individual employment agreements provide relevant evidence because they demonstrate what the parties have already previously agreed should happen in the event of a termination occurring in typical circumstances. I agree.

[75] The question in this dispute is how, and to what extent do the individual employment contracts inform the appropriate Adjustment Program.

[76] The Calgary Corporate Employees point out they fall into one of four employment contracts with WestJet:

i. 52 written agreements with termination provisions limiting employee severance to statutory minimums. Of these agreements, WestJet utilized three different termination provisions depending on which year the contract was executed in;
ii. eight employees have written agreements with WestJet entered into prior to 2004 which have no termination provisions or any provisions purporting to limit their right to reasonable notice;
iii. seven employees without written employment contracts; and
iv. a single written agreement with Lorne Mackenzie entitling him to specified notice per year of employment and additional compensation.

i. Contracts with Termination Provisions

[77] The majority of the employees in the group (52) are subject to contracts restricting severance to statutory minimums. The Calgary Corporate Employees argue that for a termination provision to effectively extinguish an employee's entitlement to common law reasonable notice, the law requires that the language in the employment contract must clearly and unambiguously specify a different period.[11]

[78] The employees argue that courts have interpreted the phrase "in accordance with" to be an agreement about minimal notice under the legislation[12], citing the Alberta

[11] *Holm v AGAT Laboratories Ltd.*, 2018 ABCA 23.
[12] *Gillespie v 1200333 Alberta Ltd.*, 2012 ABQB 105 at para 40.

Court of Appeal decision of *Kosowan v Concept Electric Ltd*[13]. The Court considered the phrase "in accordance with" in the following termination provision:

> The company reserves the right to terminate your employment at any time. … Should you be terminated for reasons other than just cause then you will be entitled to advance notice or severance pay thereof in accordance with the Employment Standards Act of Alberta.[14]

[79] The Court held at para 4, that the clause, on its face, did not confine the employee to compensation under the minimum severance provisions of sections 56 and 57 of the *Employment Standards Code* because section 3 of that Act provided that "nothing in this Act affects any civil remedy of an employee or an employer".

[80] In the case before me, all termination provisions in the 52 employment agreements restrict severance based on the following term:

> … by providing you with advanced working notice, or pay in lieu of notice and severance pay <u>in accordance with</u> the statutory minimums provided for in the *Canada Labour Code.* (Emphasis added)

[81] Section 168(1) of the *Code*, (discussed below), like section 3 of the Alberta *Employment Standards Code*, contains a saving provision.

[82] The Calgary Corporate Employees' reliance on *Kosowan*, however, fails to consider the entirety of WestJet's severance clause. *Kosowan* states at para 4, that by failing to reference specific sections in the *Employment Standards Code*, "the choice of language leaves open to the employee the ability to pursue an action" through accessing section 3 of that legislation. Saying the employee was entitled to severance "in accordance with the *Employment Standards Code*" meant the employee could access all of the legislation's provisions, including the saving provision, allowing the employee to sue for any civil remedy.

[83] *Kosowan* is distinguishable. WestJet's clause <u>does</u> specify clauses within the *Code*. It refers specifically to limiting severance pay "in accordance with <u>the statutory minimums</u> provided for" in the *Code*. Although the WestJet termination clause does not refer to specific section numbers, the employee is limited to the minimums set out in the legislation. I am not troubled by the lack of reference to specific section numbers. Legislation gets amended from time to time and section numbers get altered as a consequence, even if the substance of the section itself does not change. For clarity, and to reduce confusion in the event there are future changes to legislative numbering,

[13] *Kosowan v Concept Electric Ltd.*, 2007 ABCA 85.

[14] *Kosowan v Concept Electric Ltd*., para 1.

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contract language often references the subject-matter contained in the provision they wish to incorporate as opposed to the specific section number itself.

[84] Here, the parties agreed to limit notice and severance pay to the statutory minimums within the *Code*. By referencing "the statutory minimums" they have specifically referenced the provisions containing these terms and no others. Thus, the saving provision within section 168 under the *Code* is not triggered.

[85] The Calgary Corporate Employees also challenge the enforceability of the contract generally. While contractual terms, including restrictions on severance, may be found inapplicable in certain cases, without evidence to the contrary, the contract is presumed valid and binding. No such contrary evidence was presented.

[86] On the limited evidence before me, I find the minimum statutory severance provisions contained in the 52 individual employment contracts binding on these employees.

[87] For comparator purposes, and without making binding rulings on the full amounts that may be payable under the employment contracts, a rough calculation of the contracts with restrictive terms provides as follows. First, the statutory minimums are normally restricted to sections 230 and 235. Section 230 sets out that employees are entitled to receive two weeks notice of the employer's intention to terminate their employment or two weeks wages at their regular rate of wages. Section 235 sets out the minimum rate for severance pay. Under this provision employees are entitled to two days wages for each completed year of employment, plus five days wages.

[88] Normally, these two sections provide the full compensation for employees receiving statutory minimums under the *Code.* However, as this is a group termination, section 212 also comes into play. It adds to the statutory minimum entitlement of a terminated employee in a group setting. Section 212 states:

> 212 (1) Any employer who terminates, … the employment of a group of 50 or more employees employed by the employer within a particular industrial establishment, … shall, in addition to any notice required to be given under section 230, give notice to the Head, in writing, of his intention to so terminate at least 16 weeks before the date of termination of the employment of the employee in the group whose employment is first to be terminated (emphasis added).

[89] Thus, in a group termination scenario – as here – an employee receiving statutory minimums is to receive payments under section 230 and 235, as well as 16-weeks notice as per section 212.

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[90] Using the longest serving employee in this category of contract as an example[15], and using her tenure of 16.42 years as the basis for my calculations, the amount owing to her would be as follows:

Section	Notice	Severance	Total (Converted to weeks)
212	16 weeks		16 weeks
230	2 weeks		2 weeks
235		2 days/year of employment = 2 days x16 years	32 days/5 days per week = 6.4weeks
235		5 days	1 week
Total Notice and Severance			25.4 weeks
Less Notice Received			-16 weeks
Owed			9.4 weeks

[91] Using the above calculations, and applying the termination provisions restricting severance to the statutory minimums, I conclude that the most senior employee in this category of contract would only be entitled to 9.4 weeks owed under her contract of employment.

ii. The Common Law Contracts

[92] Different considerations come into play for the seven employees without a contract and the eight other employees who have contracts which do not include termination provisions. The Calgary Corporate Employees argue these contracts must be interpreted using the common law principles of pay in lieu of reasonable notice. They rely on the factors set out in *Bardal v Globe and Mail*[16] including age, length of employment, character of employment, and availability of similar employment.

[93] The brief filed by the Calgary Corporate Employees shows that for the seven employees without contracts, the tenure of service ranges from a low of 1.58 years for a 30 year old Distribution Centre Agent performing labourer functions to a 40 year old Learning Leader designated as a manager with 9 years of experience. The balance of

[15] Based on information provided in Appendix A in the Calgary Corporate Employee's Brief of Argument. Angelena Holmes: Team Lead CBS dismissed after 16.42 years of service.

[16] 1960 CarswellOnt 144 (Ont. H.C.).

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the employees in this group had tenure with WestJet of 2.33, 2.33, 2.67, 3.67, and 5 years. Only the Learning Leader had a managerial position.

[94] The eight employees with no termination provisions in their contracts were all long-term; two employees with 18 years experience, one with 19, three with 20, and one each with 24 and 25 years of experience. Five of these employees were managers.

[95] Common law notice is typically longer than statutory minimum notice. It is based on the concept of how long a person with a similar background would reasonably require to get back into a similar job. The calculation of reasonable notice is more of an art form than a science. While typically assessing various factors including the employee's age and tenure, factors also include the character of the employee's position and responsibilities, and the availability of similar employment having regard to the experience, training and qualifications of the employee.

[96] While the Calgary Corporate Employees encourage me to adopt a purported average notice period based on their review of case law, the assessment of reasonable notice is driven by individual, independent factors, and is highly fact specific; it is not merely a "plug and play" concept. An assessment cannot be done merely by looking at an employee's age, tenure with the company, and position title.

[97] Further, defenses such as mitigation and frustration of contract may come into play. There are simply too many variables and unknowns in applying the concept of reasonable notice applicable to an individual litigant within a large, diverse group to make such an exercise practical or principled.

iii. Specified Term Contract

[98] Lorne Mackenzie's contract is the lone outlier within the group. With a specified term of one month severance per year of employment together with a 25% top-up for the loss of benefits, the contract clearly articulates the monies due and owing to Mr. Mackenzie. As Mr. Mackenzie is an 11-year employee, he is entitled to receive 11 months salary plus an additional 25% of its value. What is less clear is whether the monies owed to him under the contract should take into account the 16 weeks notice he already received.

f. The *Code's* Saving Provision: Section 168

[99] Section 168 of the *Code* specifically preserves an employee's rights and benefits to file claims they may otherwise have which are more favourable to the award they receive under my Decision. While an award under section 224 would, no doubt, have to be considered by a future adjudicator in determining any amounts payable, an

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employee's ability to file for such a claim is unimpeded by an order under section 224. Section 168 states:

> **Saving more favourable benefits**
>
> **168 (1)** This Part and all regulations made under this Part apply notwithstanding any other law or any custom, contract or arrangement, but nothing in this Part shall be construed as affecting any rights or benefits of an employee under any law, custom, contract or arrangement that are more favourable to the employee than his rights or benefits under this Part.

[100] Notwithstanding section 168, section 224 contemplates a decision that "minimizes the impact of termination of employment" on the employees. By extension, this should include consideration of their full claim for compensation so they have a "one-stop shop" as opposed to requiring a plethora of claims under different pieces of legislation and court proceedings. I should structure my Award in such a way as to minimize the impact of multiple proceedings and consider such claims or possible claims in my ultimate decision, while still ensuring the Award has the hallmarks of reasonableness.

VI. The Adjustment Program Award

[101] Applying all the above, I conclude that the Adjustment Program for the Calgary Corporate Employees shall contain the following items:

i. A financial bridge in the form of severance;
ii. Travel privileges;
iii. Benefits;
iv. Outplacement services to assist in job searches; and
v. Recall rights to ensure that employees would be recalled to WestJet in the event of an improvement in WestJet's business.

[102] I adopt the main components of the Adjustment Program put forth by WestJet including severance based on two weeks per year of employment based on the employee's regular rate of wages and hours worked per week. In addition, the Calgary Corporate Employees are entitled to their regular rate of wages and hours of work in a week for the 16-week notice period (October 14, 2020 – February 3, 2021) less amounts received under CEWS. I also agree with WestJet that its appropriate to insert default provisions in the event employees fail to make their selections in a timely manner. I address this below.

[103] Summarized, I conclude the Calgary Corporate Employees' Adjustment Program provides as follows:

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Company Service	Severance	Travel Privileges
‹ 1 Year	No pay	2 years
	1 week	None
1-5 years	1 day per year of service	1 year per year of service
	1 week per year of service	6 months per year of service
	2 weeks per year of service	None
6-10 years	1 day per year of service	18 months per year of service
	1 week per year of service	1 year per year of service
	2 weeks per year of service	None
11-14 years	1 day per year of service	2 years per year of service
	1 week per year of service	18 months per year of service
	2 weeks per year of service	None
15+ years	1 day per year of service	Lifetime
	1 week per year of service	2 years per year of service
	2 weeks per year of service	None
Eligible for "Early Retirement" with 2-year bridge		
	Severance	2 weeks per year of service
	Travel Privileges	Lifetime WS/WR standby
Eligible for Retirement		
	Severance	2 weeks per year of service
	Travel Privileges	According to Company Policy
Employees entitled to their regular rate of wages week for the 16-week notice period (October 14, 2020 – February 3, 2021) less amounts received under CEWS		
Recall pool – 12 months		
Profit Share – According to company policy		
Outplacement Services – Lifetime; provided by RiseSmart		
Employee and Family Assistance Program – extended 6 months after termination		

[104] The full Adjustment Program is attached as Appendix C to this Decision. The Adjustment Program includes severance capped at two weeks severance for each year of service. It also includes optional travel privileges based on years of service. Travel privileges are included despite WestJet's position that these privileges are not normally available to terminated employees. Employees are given choices in which they are to elect options within time lines set out.

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[105] Despite the Calgary Corporate Employees stating recall rights are unimportant to them, I have included an optional recall pool in the Adjustment Program. The Recall Pool was provided as an option for the First Corporate Group and I have likewise provided it here. The Recall Pool shall remain available for a period of 12 months.

[106] Additional items include Profit Share which shall be available according to WestJet policy, Outplacement Services, and the Employee and Family Assistance Program.

[107] I have also inserted a default provision to ensure an employee's option is finalized in a timely and reasonable period. Whereas WestJet proposed the option with the combination of severance and travel, the Calgary Corporate Employees indicated they placed higher value on severance over travel privileges. As such, I believe the better default position here is that of full severance as opposed to a combination of severance and travel privileges. Therefore, in the event employees do not make their option known within the time frame set out, they shall be entitled to the full severance amounts payable for their grouping. Thus, where eligible, they shall receive severance pursuant to option three (3) in the event they do not respond.

[108] WestJet also proposed limiting the Calgary Corporate Employees from any and all other claims and entitlements they may have under the *Code* or common law reasonable notice claims. This was specifically before me regarding the impact and interpretation of section 168. Section 168 of the *Code* provides that an award under Part III does not take away any right or benefit an employee may have under any law or arrangement that are more favourable to the employee than their rights or benefits under Part III. I am aware that at least one employee arguably has rights or benefits under their employment contract which may be more favourable to their entitlement under this Adjustment Program. I am also aware that employees contend they are owed outstanding contractual wages because of their layoffs and subsequent receipt of partial wages through the CEWS payments. I made no ruling on the outstanding wages. Given the intention of this application is to provide assistance to the terminated group in a timely fashion, and given section 168 and my refusal to follow the position of the Calgary Corporate Employees in seeking to calculate and rely on both their outstanding wages and reasonable notice claims, I do not believe it is appropriate to restrict the rights of employees from bringing such further action.

Dated this 1st day of June, 2021.

Mark L. Asbell, Q.C.
Arbitrator

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AGREED STATEMENT OF FACTS
The Parties

1. The Employer, WestJet, an Alberta Partnership (“**WestJet**”), was founded in 1996 and is Canada’s second largest airline. WestJet is one of a group of companies owned by WestJet Airlines Ltd. WestJet Airlines Ltd. is owned by a subsidiary of Onex Corporation.

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2. The Employees (the “**Corporate Employees”)** consist of 68 of WestJet’s former non-unionized employees. They held various positions in WestJet’s corporate office in Calgary under the terms of individual written employment agreements.

3. The parties agree to admit the following facts and exhibits in evidence at the outset of this arbitration hearing, without the requirement of further proof. In an effort to ensure the efficiency of the hearing in light of the significant time constraints involved, the parties have agreed to admit these facts but reserve the right to submit that some facts are not relevant to the matters in issue.

4. A list of the Corporate Employees and the First Corporate Group (referred to and defined later in this Agreed Statement of Facts and Exhibits) is attached as **Exhibit 1**. Exhibit 1 provides the following employee information for the Corporate Employees and First Corporate Group, with the exception that the information for the First Corporate Group does not contain the date of hire:

a. Employee Number;
b. Position/title;
c. Leader or non-leader role;
d. WestJet General Band number;
e. Salary; and
f. Date of hire/length of service.

5. WestJet has approximately 90 Directors and Vice-Presidents who comprise the Global Leadership Team and approximately 6 positions that comprise the Executive Leadership Team. The Executive Leadership Team employees hold the highest positions in the company. Global Leadership Team roles include authority to bind WestJet in certain circumstances and offer higher salaries and short and long-term incentive plans. Global Leadership roles tend to have a greater number of employees reporting to them and tend to report directly to a member of the Executive Leadership Team.

6. The vast majority of WestJet employees are not part of the Global and Executive Leadership Teams. These remaining WestJet employees are classified into two bands: “General Band” and “Step Band”. Approximately 20% are General Band employees and approximately 80% are Step Band employees.

7. All Corporate Employees were in WestJet's General Band category.

8. General Band consists of positions generally found in finance, "people" (human resources), information technology, marketing and other corporate areas. Within the General Band category, WestJet designates a number from 2 to 10 based on factors related to the job such as skillset, training, academic qualifications, and years of experience needed. WestJet uses these factors to designate band number. Higher band 3 numbers are associated with higher position status and salary range; lower band numbers are associated with lower position status and salary range.

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9. WestJet establishes a salary range for each number category in the General Band, but the employee's salary is considered both in relation to the band range as well as the employee's individual performance.

10. Step Band positions are administered on a step or incremental structure typically found in operation and front-line areas such as customer service, gate service and turnaround crew at airports, technical operations, inflight service and flight operations. Compensation increases with length of service.

11. WestJet's approach to compensation and evaluation is described in its "Compensation Philosophy & Administration: A guide to WestJet compensation administration" [**Exhibit 2**]. A description of the General and Step Bands is contained in WestJet's Compensation 101 document [**Exhibit 3**].

12. All employees in both the General and Step Bands are entitled to participate in WestJet's Owner's Performance Award program, Employee Share Purchase Plan, and Profit Share Plan. Additional information is contained in the Owners' Performance Award Policy and the WestJet Savings Plan compensation document [**both documents attached as Exhibit 4**].

13. Approximately 30% of the Corporate Employees were considered to be in management positions but were not part of the Global Leadership Team or Executive Leadership Team. They did not receive salary or incentive payments that were different from, or more favourable than, the other employees in the General Band category. Some employees in these management positions had direct reports but some did not. Some earned higher salaries than other employees in the General Band category.

Circumstances Leading to Group Termination

14. Prior to the Pandemic, WestJet had more than 14,000 employees and contractors across Canada. It flew to more than 100 destinations in North America, Central America, the Caribbean and Europe. It flew more than 22 million passengers per year on over 700 flights per day, with a fleet of more than 150 aircraft.

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15. In March and April of 2020, WestJet eliminated approximately 500 contractors.

16. As of April 16, 2020, 49 of the Corporate Employees were temporarily laid off or began voluntary leaves of absence. As of July 2020, 6,715, WestJet employees, including most of the Corporate Employees, had been temporarily laid off. Four Corporate Employees remained active for varying periods between April and November 2020. Seven Corporate Employees were either on maternity/parental or medical leave and were therefore not laid off until their leaves had ended.

17. Corporate Employees on layoff or leave of absence were eligible to continue extended health and prescription drug benefit coverage for up to 3 months following the start of their layoff or leave of absence in accordance with the terms and conditions of WestJet's benefit plans, which required the Corporate Employees to continue to pay 100% of the premium. Travel privileges were continued indefinitely. Coverage for other employee group benefits 4 was not continued during the layoff or leave of absence in accordance with the terms and conditions of WestJet's benefits plans.

18. On or about April 1, 2020, the federal government implemented the Canada Emergency Wage Subsidy Program ("**CEWS**"). CEWS provides an eligible employer with funds to be directed to eligible employees up to a certain percentage of that employee's eligible earnings.

19. On April 9, 2020, WestJet issued a communication to the Corporate Employees regarding the CEWS program and advised that WestJet would return almost 6,400 employees to WestJet's payroll upon government approval of its application to the CEWS program. **Exhibit 5** is a copy of the April 9, 2020 communication.

20. On April 15 and 22, 2020, WestJet issued further communications to its employees regarding the CEWS program [**Exhibit 6 and 7, respectively**]. Employees received their first CEWS payment on April 30, 2020.

21. On July 7, 2020, WestJet issued a communication to Corporate Employees respecting entitlements during layoff [**Exhibit 8, Follow-Up Communication on Layoff Entitlements**].

22. In July 2020, WestJet issued notices of recall to the Corporate Employees for recall dates of either September 1, 2020 or November 1, 2020 [**Exhibit 9, Example Notice of Recall**].

23. On July 27, 2020, the federal government passed legislation entitled An Act Respecting further COVID-19 Measures. The effect of this legislation was to differentiate CEWS amounts that could be claimed for active and inactive employees. The changes were to become effective in the first pay period following September 15,

2020. This legislation resulted in the reduction of the CEWS payments that the Corporate Employees received. WestJet issued a communication to the Corporate Employees regarding this change [**Exhibit 10, Communications – CEWS, August 2020**].

Group Termination

24. On June 24, 2020, WestJet announced the permanent elimination of 3,333 jobs, representing approximately 30% of its workforce.

25. Between June 25, 2020 and October 14, 2020, pursuant to section 212 of the Canada Labour Code ("**CLC**"), WestJet issued notices to the federal Minister of Labour (the "**Minister**") of its intentions to terminate the employment of more than 50 people in one group. The notices to the Minister were issued as follows:

a. on June 25, 2020 respecting the termination of approximately 396 contact center employees across Canada;
b. on July 7, 2020 respecting the termination of approximately 1,289 Tier 1 airports employees across Canada;
c. on July 28, 2020 respecting the termination of approximately 556 corporate employees in Calgary and Toronto (the "**First Corporate Group**");
d. on September 28, 2020, respecting the termination of approximately 520 Tier 2 airports employees across Canada; and
e. on October 14, 2020, respecting the termination of 81 corporate employees in Calgary (the "**Notice**").

26. As at October 14, 2020, all but 4 of the Corporate Employees were inactive employees and were receiving CEWS payments. Active Corporate Employees were active as outlined below and continued to receive CEWS until their termination:

a. Oksana Tsvetkova was active from September 1 to November 30, 2020;
b. Robert Gagnon was active from September 1 to November 16, 2020;
c. Oksana Chumak was active from September 1 to October 20, 2020;
d. Lorne Mackenzie was active from April 1 until October 30, 2020. He worked reduced hours from April 1 to August 31, 2020, and full-time hours from September 1 to October 30, 2020.

27. After October 14, 2020, WestJet was able to recall 13 of the 81 employees who were the subject of the Notice, the last of whom was Jody Gregorash who was recalled to WestJet in a new role on February 9, 2021. The Corporate Employees who are the subject of this Arbitration consist of the remaining 68 employees who were not recalled to work.

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28. The Corporate Employees represent approximately 2% of the workforce whose employment was terminated by WestJet in response to the Pandemic.

29. On October 14, 2020, 16 weeks before the effective date of termination, each Corporate Employee was sent an e-mail message notifying them that their employment with WestJet would terminate on February 3, 2021 (the "**Termination Notice E-mail**"). A copy of the standard Termination Notice E-mail is attached as **Exhibit 11**. Corporate Employees continued to receive their CEWS payments during the 16-week notice period.

30. On or about February 26, 2021, the Corporate Employees were provided with payment for outstanding vacation and severance pursuant to section 235 of the CLC. Their notice, pursuant to section 230 of the CLC, was included in the 16-week notice period referenced above.

Joint Planning Committee

31. On October 23, 2020, pursuant to s. 214(1) of the CLC, WestJet established a joint planning committee ("**JPC**") with respect to the Notice.

32. Pursuant to s. 215(5) of the CLC, WestJet appointed as its representatives on the JPC the following persons:

a. Aaron McKay (co-chairperson);
b. Katie Kerry;
c. Emily Laing; and
d. Virginia Swindall ("**Employer Representatives**").

33. Pursuant to ss. 215(2) and (4) of the CLC, the Corporate Employees elected as their representatives on the JPC the following persons:

a. Lorne Mackenzie (co-chairperson);
b. Robert Trumper;
c. Chad Thompson; and
d. Stephen Fast ("**Employee Representatives**").

34. The JPC met on the following dates:

a. October 27, 2020;
b. November 5, 2020;
c. November 13, 2020;
d. November 23, 2020; and
e. December 3, 2020.

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35. Minutes of the JPC meetings are attached as **Exhibit 12**. A comparison of the proposals discussed and exchanged as a result of the JPC meetings is attached as **Exhibit 13**.

36. The JPC meetings did not result in agreement on any terms. A mediation was scheduled for February 10 and 11, 2021. The parties attended on February 10, 2021.

37. On December 8, 2020, the Employer Representatives sent a letter to the Minister applying for the appointment of an arbitrator [**Exhibit 14**].

38. On March 3, 2021, the Minister referred this matter for arbitration. A copy of the Minister's letter and attached Statement under section 224(2) of the CLC are attached as **Exhibit 15**. The Minister determined that "the following matters in dispute are normally the subject-matter of collective agreement in relation to termination of employment and are appropriate for referral to arbitration…:"

> a. Contents of a separation package including, without limitation, severance, travel privileges (including retirement travel privileges), benefits and outplacement services; and
> b. Recall rights.

39. JPCs were established for each of the 5 groups of employees who were terminated. The other 4 groups all reached agreement. A summary of the separation packages negotiated in each group is attached as **Exhibit 16**.

40. The adjustment program agreement ("**APA**") for the First Corporate Group was executed on October 28, 2020 after a 3-day mediation. The APA reached between WestJet and the First Corporate Group is attached as **Exhibit 17**. At the JPC meetings, WestJet offered the Corporate Employees the same terms as those contained in the APA between WestJet and the First Corporate Group.

41. The other 3 groups reached agreements that were less favourable to the employees than the APA reached between WestJet and the First Corporate Group. The First Corporate Group was collectively represented by 3 legal counsel.

Individual Employment Agreements, Collective Agreements and Prior Settlements

42. From 2004 onward, WestJet has included a standard termination provision in all employment agreements, aside from those of the Global Leadership Team and Executive Leadership Team (the "**Clause**").

43. **Exhibit 18** consists of the Corporate Employees' employment agreements that contained the Clause.

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44. Below is a list of the Corporate Employees who did not sign the form of employment agreement containing the Clause, along with their start dates:

a. Jo-An McNary, January 30, 1996;
b. Monika Czekaj, February 14, 1997;
c. James Baker, January 6, 2000;
d. Angelika Richter, March 20, 2000;
e. Glenn Young, January 22, 2001;
f. Dale Gordon, May 14, 2001;
g. Jennifer Gayle, January 7, 2002;
h. Angie Holmes, August 30, 2004; and
i. Aaron Evans, November 1, 2002.

45. Of the 68 Corporate Employees, 58 had a form of employment agreement containing the Clause, and 9 had an agreement without the Clause (and without any termination provision).

46. One employee, Lorne Mackenzie, signed an agreement with a specific termination provision providing for 4 weeks of notice for every year of service to a maximum of 18 months, and an additional 25% to compensate for loss of health care benefits. A copy of the employment agreement with the specific termination provision is attached as **Exhibit 19**. At the time that Mr. Mackenzie signed his employment agreement, he was a member of WestJet's Global Leadership Team. In 2016, Mr. Mackenzie was reorganized to a lower 8 status position, but WestJet did not request that his employment agreement be amended to reflect that reduced status.

47. WestJet pilots, cabin crew members and dispatchers are unionized. Their collective agreements provide recall rights and reasonable notice for the termination of employment.

48. The collective agreement covering pilots, WestJet and Swoop, Inc. (negotiated with the Air Line Pilots Association) provides for layoff pay of 2 weeks' pay for each full year of service, to a maximum of 20 weeks. Excerpts from this collective agreement are attached as **Exhibit 20**.

49. The collective agreement covering pilots and WestJet Encore, Ltd. (negotiated with the Air Line Pilots Association) is silent on layoff pay. Excerpts from this collective agreement are attached as **Exhibit 21**.

50. The collective agreement covering dispatchers (negotiated with the Canadian Air Line Dispatchers Association) provides payment of the statutory minimum in the event of layoff. Excerpts from this collective agreement is attached as **Exhibit 22**.

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51. Unionized WestJet employees are not permitted to waive extended recall in favour of termination of employment.

52. In 2018, in advantageous economic times, WestJet discontinued a department called "Air Supply," triggering the termination of over 150 employees across Canada. All employees were offered other positions within WestJet. They had the choice to take the new position, elect termination, or elect to pursue an opportunity with Gate Gourmet (the provider replacing Air Supply) with the promise they would be offered a position there if they passed training and physical ability assessments.

53. The separation package for terminated Air Supply employees included severance of 2 weeks per year of service, and 8 "buddy passes". It did not include travel privileges, a bridge to retirement eligibility, or recall rights. The Air Supply employees were not terminated in response to financial concerns or any economic decline in the airline industry or a general economic decline. The elimination of these positions was a business decision made by WestJet.

Economic Conditions and the Global Pandemic

54. On March 12, 2020, the World Health Organization declared the COVID-19 outbreak a worldwide pandemic ("**Pandemic**"). Shortly thereafter, governments around the world mandated containment measures. In Canada, the federal government closed borders to all international travel, imposed a 14-day quarantine for anyone entering Canada, and directed the cessation of all non-essential travel. More than one year later, those restrictions remain in place.

55. Immediately subsequent to the declaration of a Pandemic, air travel declined. WestJet's guest loads dropped 95%. WestJet went from flying approximately 65,000 guests per day in March 2019 to approximately 3,000 per day in March 2020 [**Exhibit 23, WestJet Network Statistics**].

56. WestJet reduced the number of flights overall, and introduced seat distancing in aircrafts to adhere to social distancing guidelines, further reducing capacity. WestJet flew its last transborder flight on March 26, 2020, only resuming limited transborder services in July of 2020.

57. In response to the Pandemic, WestJet drastically cut its costs. In March 2020, it implemented the following measures:

a. Cancellation or pause of the majority of its contractor and consulting contracts;
b. Securing of 20% reductions on the cost of services from most vendors;
c. Deferral of all discretionary projects;
d. Voluntary 50% reduction of Executive Leadership Team salaries;
e. Voluntary 25% reduction of Global Leadership Team salaries;

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f. Deferral of May 2020 profit share to November 2020;
g. Freezing of WestJet Savings Plan;
h. Implementation of hiring freeze;
i. Employee layoffs described earlier in this Agreed Statement of Facts and Exhibits, and application for the Canada Emergency Wage Subsidy (CEWS).

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58. In addition, WestJet implemented a program inviting interested employees to volunteer for early retirement, departure, a leave of absence or a reduced work week in exchange for various incentives.

59. WestJet also approved voluntary leaves of absence and effected temporary layoffs across its operations on March 25, April 1, and May 15, 2020. 60. In May 2020, WestJet was flying at 8% of usual capacity. However, in the summer of 2020, government-mandated containment measures appeared to have reduced the number of COVID-19 cases. On July 28, 2020, when WestJet advised the First Corporate Group that it was eliminating their jobs, positive COVID-19 cases had been stabilizing in Canada.

61. In July 2020, WestJet re-introduced 5 routes to the US and one flight to Mexico to test the market. In August 2020, WestJet began service to Jamaica, London and Paris in an attempt to stimulate demand. Guest loads remained low. Most Canadians continued to avoid travel both domestically and internationally [**Exhibit 24, Perceptions of Flying, August 2020**].

62. In August of 2020, NAV Canada raised the rates it charges airlines for air traffic services by 29.5%. Airports across Canada, including Toronto, Winnipeg and Halifax, increased their airport improvement fees (AIF) to make up for losses. Increases to AIF's are passed along to passengers. This has had the effect of increasing the cost of flying to passengers and further lowering demand for air travel.

63. By the end of the summer of 2020, the number of positive COVID-19 infections began to rise dramatically. On September 24, 2020, Prime Minister Trudeau stated that a "second wave" was underway. In September 2020, WestJet decreased its schedule to align with stagnating demand for flight travel [**Exhibit 25, September Schedule**].

64. On October 14, 2020, WestJet's CEO, Ed Sims announced that WestJet had plateaued in its ability to increase capacity and passenger numbers. The airline industry had not received any government financial support and quarantine restrictions remained in place. WestJet indefinitely suspended operations in four Maritime airports and Quebec City, and significantly reduced service to Halifax and St. John's [**Exhibit 26, WestJet Media Release "WestJet pulls back from Atlantic Canada"**].

65. On October 27, 2020, WestJet opened the WestJet Elevation Lounge in Calgary.

66. By November 1, 2020, most provinces had once again mandated containment measures including limiting the sizes of gatherings and closing non-essential services such as restaurants. These measures discouraged air travel and tourism.

67. On November 10, 2020, Prime Minister Trudeau called on Canadians to stay home and avoid non-essential travel. He also called on provincial premiers to strengthen their Covid-19 restrictions.

68. In November 2020, WestJet reduced its scheduled flights by 24% in response to reduced demand.

69. On December 7, 2020, WestJet secured financing for 8 of the 9 737 Max 8 aircrafts purchased under a purchase and leaseback agreement. WestJet's primary reason for this business decision was to ensure that it maintained enough cash to continue its operations.

70. On December 14, 2020, Mr. Sims was interviewed by Amanda Stephenson of Post Media. The article arising from that interview was published in the Calgary Herald on December 28, 2020. On December 14, 2020, Mr. Sims told the Calgary Herald [**Exhibit 27, Calgary Herald article**]:

> WestJet will be here for many, many generations to come, and I wasn't sure I could say that so boldly back in May. It is a relief that I can talk both internally and externally now about the speed of our recovery, rather than a question mark about the nature of our survival…
>
> We're committed to taking that full delivery of 10 [Dreamliners] during the course of 2021, which we wouldn't do if I was waking up every night worried about the company's viability.

71. On December 20, 2020, after the interview given by Mr. Sims, but before the Calgary Herald article was published, the federal government banned flights from the United Kingdom after a mutated strain of COVID-19 was discovered.

72. The Christmas season is typically WestJet's high season. However, on December 23, 2020, Prime Minister Trudeau requested that Canadians not travel for Christmas. He stated that this was not the time for a vacation abroad, and said, "Even if you travel every winter, please rethink your plans." WestJet's scheduled flights in December 2020 were 31% lower than September 2020.

73. On December 30, 2020, the federal government announced that, effective January 7, 2021, Transport Canada would require all passengers entering Canada from international destinations to present a negative COVID-19 polymerase chain reaction (**"PCR"**) or a reverse transcription loop-mediated isothermal amplification (**"RT-LAMP"**)

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test result taken 72 hours from the scheduled departure time before boarding. Rapid antigen or antibody tests were not acceptable. Each passenger was responsible for sourcing and paying for their own PCR or RT-LAMP test.

74. The PCR/RT-LAMP test supplements but does not replace the requirement for health questionnaires, temperature checks, face masks and a 14-day quarantine upon return to Canada.

75. The PCR testing mandate was implemented without consultation with the aviation industry.

76. Following the introduction of the PCR/RT-LAMP test requirement, WestJet experienced declines in new bookings and increases in cancellations similar to those that occurred in March of 2020.

77. On January 5, 2021, Prime Minister Trudeau again stated that "No one should be vacationing abroad right now."

78. On January 8, 2021, Mr. Sims announced that the new PCR/RT-LAMP testing rules had made air travel increasingly unaffordable, unfeasible and unattainable for many Canadians, and had renewed the headwinds WestJet had hoped to leave behind in 2020. Due to significantly weakened demand for transborder, sun and domestic flying, WestJet cut approximately 30% of its schedule through February and March. WestJet returned to operating levels not seen since June 2001.

79. WestJet also announced a corresponding workforce restructure, with temporary layoffs, unpaid leaves, and reduced hours affecting 1,000 WestJet employees [**Exhibit 28, WestJet Media Release, "WestJet Slashes Capacity in Response to Rushed Government Testing Regime"**]. These additional measures resulted in an 80% overall reduction in passenger air travel year-over-year, including a 94% reduction year over year in international passenger travel.

80. On January 29, 2021, the Government of Canada ordered new accommodation and quarantine measures with respect to international flights, requiring incoming travelers to reserve a room in a Canadian hotel for up to 14 nights at their own cost while they await test results.

81. The government's website on the topic stated, "We strongly advise Canadians to cancel or postpone non-essential travel plans outside of Canada. **Now is not the time to travel**" (emphasis in original). Prime Minister Trudeau, in his broadcasted announcement on January 29, 2021 stated that the new measures were intended to discourage non-essential travel, saying, "…now is just not the time to be flying."

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82. The Government of Canada then asked WestJet to cease flying to sun destinations. On January 29, 2021, Mr. Sims announced that, in response to a request from the government, WestJet would cease flying to 14 destinations in Mexico and the Caribbean. The suspension began on January 31, 2021 and is in place until April 30, 2021 [**Exhibit 29, WestJet Media Release, "WestJet cuts flying to Mexico and Caribbean at request of Canadian government"**].

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83. The Canadian government, unlike governments globally, has not provided direct funding to aid airlines [**Exhibit 30, "IATA Worldwide Government Aid"**]. This remains true at the time of filing this Agreed Statement of Facts and Exhibits. WestJet has applied for and received CEWS payments which have been used to pay employee wages. Eligibility for CEWS is not specific to the airline industry.

84. As of February 21, 2021, the unemployment rate in Calgary was 10.4%. As of October 31, 2020, when the First Corporate Group was terminated, the unemployment rate in Calgary was 11.6%.

85. On March 24, 2021, WestJet announced that it would restore flights to the communities of Charlottetown, Fredericton, Moncton, Sydney, and Quebec City. The planned network resumption for its St. John's to Halifax route is May 6, 2021. Services between Toronto and Charlottetown, St. John's Fredericton, Quebec City and Moncton, and between Sydney and Halifax are set to resume between June 24 and June 30, 2021.

86. On March 26, 2021, WestJet announced new domestic routes across Western Canada, including new nonstop service for 15 communities across Alberta, British Columbia, Saskatchewan, Manitoba and Ontario. The new routes are expected to stimulate air travel among Canadians within Canada to aid in kick starting Canada's economic recovery. These additional routes represent about a 1% increase in WestJet's flying.

87. Near the end of March 2021, WestJet obtained 732 slots at London's Heathrow airport for daily flights to Calgary and Vancouver. These slots were offered to WestJet for free because other larger carriers had returned them due to depressed demand.

88. As of April 1, 2021, WestJet remains at 8% of the capacity it operated in April 2019, and 0% of its capacity to Europe.

89. The materials listed below summarize the economic effect of the Pandemic and government measures on airlines globally, and WestJet in particular [**Exhibit 31**]:

a. Canada domestic bookings from May 2020 to December 2020;
b. Canada international bookings from May 2020 to December 2020;
c. IATA – Canada's quarantine impact on air travel;

d. Angus Reid – Canadian Air Travel Intention and Sentiment, June 3, 2020;
e. Angus Reid – Future Travel Expectations;
f. NAV Canada Air Traffic Impact Visualizations (April 2020);
g. IATA Economics – Worldwide flight decreases (April 2020);
h. LEK Global Situation Report (April 2020);
i. IATA Confidence Survey (July 2020);
j. IATA Covid-19 Updated Impact Assessment (April 2020);
k. Q2 Earnings (global airlines);
l. Q2 operating expense reductions (global airlines);
m. Skift McKinsey – The Travel Industry Turned Upside Down;
n. The Business Times article – Airlines Impacted
o. Aviation – Impacts of Covid-19 (October 2020);
p. CBC article, "WestJet shuts down most of its operations in Atlantic Canada" (October 14, 2020).

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Arbitrator's Jurisdiction

90. The Arbitrator has been properly appointed and has jurisdiction to hear and determine the issues outlined in the Minister's Statement [**Exhibit 15**].

The parties reserve the right to tender additional evidence at the arbitration hearing.

Agreed to this 14th day of April, 2021.

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LIST OF AGREED EXHIBITS

1. List of Corporate Employees subject to October 14, 2020 and July 28, 2020 group terminations (Excel Spreadsheet)

2. WestJet Compensation Philosophy & Administration: A guide to WestJet compensation administration

3. WestJet Compensation 101

4. WestJet Owners' Performance Award Policy and Savings Plan Compensation Document

5. April 9, 2020 communication regarding CEWS program

6. April 15, 2020 communication regarding CEWS program

7. April 22, 2020 communication regarding CEWS leave date

8. July 7, 2020 communication respecting entitlements during layoff

9. July 2020, Example Notice of Recall

10. August 2020, Communication re changes to CEWS

11. Termination Notice E-mail provided to Corporate Employees on October 14, 2020

12. Minutes of Joint Planning Committee for meetings on:

a. October 27, 2020;

b. November 5, 2020;

c. November 13, 2020;

d. November 23, 2020;

e. December 3, 2020.

13. Summary of proposals exchanged between parties during Joint Planning Committee meetings

14. WestJet letter to Minister of Labour, December 8, 2020

15. Statement of Minister of Labour with attached letter, March 3, 2021

16. Summary of separation packages negotiated with other employee groups pursuant to their respective Joint Planning Committee meetings

17. Adjustment Program Agreement negotiated between WestJet and First Corporate Group

18. Bundle of 59 Corporate Employee employment agreements containing termination clause

19. Employment agreement – Lorne Mackenzie

20. Excerpts from Collective Agreement – Pilots, WestJet, Swoop, Inc.

21. Excerpts from Collective Agreement – Pilots, WestJet Encore, Ltd.

22. Excerpts from Collective Agreement – Dispatchers

23. WestJet Network Statistics

24. Perceptions of Flying

25. September Schedule

26. WestJet Media Release "WestJet pulls back from Atlantic Canada"

27. December 28, 2020 Calgary Herald Article – Interview with Ed Sims

28. WestJet Media Release "WestJet Slashes Capacity in Response to Rushed Government

Testing Regime"

29. WestJet Media Release, "WestJet cuts flying to Mexico and Caribbean at request of

Canadian government"

30. IATA Worldwide Government Aid

31. Bundle of Economic Information:

   a. Canada domestic bookings from May 2020 to December 2020; b. Canada international bookings from May 2020 to December 2020;

   c. IATA – Canada's quarantine impact on air travel;

   d. Angus Reid – Canadian Air Travel Intention and Sentiment, June 3, 2020;

   e. Angus Reid – Future Travel Expectations;

   f. NAV Canada Air Traffic Impact Visualizations (April 2020);

   g. IATA Economics – Worldwide flight decreases (April 2020);

   h. LEK Global Situation Report (April 2020);

   i. IATA Confidence Survey (July 2020);

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j. IATA Covid-19 Updated Impact Assessment (April 2020);

k. Q2 Earnings (global airlines);

l. Q2 operating expense reductions (global airlines);

m. Skift McKinsey – The Travel Industry Turned Upside Down;

n. The Business Times article – Airlines Impacted;

o. Aviation – Impacts of Covid-19 (October 2020);

p. CBC article, “WestJet shuts down most of its operations in Atlantic Canada” (October 14, 2020).

32. WestJet Travel Privileges Policy

33. WestJet Retirement Policy

34. Employee Contracts

35.Ed Sims Video

36.Excel Spread Sheet for additional employees showing age, original hire date, termination date, months of service and years of service.

37. Unpaid Wage Claim filed by Lorne MacKenzie

38. Email exchange between Loren MacKenzie and Craig Iwata

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ADJUSTMENT PROGRAM AWARD

Applicable to: Employees in the service of WestJet, an Alberta Partnership ("the Company") who were subject to a notice of group termination dated October 14, 2020 (the "Calgary Corporate Employees")

WHEREAS:

A. The Company has experienced an unprecedented decrease in demand for air travel as a result of the impact of COVID-19 on domestic and international travel (the "**Pandemic Impact**"), including the imposition of public health protocols and government-mandated containment measures;

B. The Company has mitigated the need for permanent staffing reductions arising out of the Pandemic Impact by utilizing voluntary and involuntary options, including work shortage leaves of absence, early retirements, reduced hours, early outs, and temporary layoffs;

C. Despite these mitigation measures, the Company has determined that it is necessary to permanently reduce staff count across the Company;

D. Pursuant to Division IX of the *Canada Labour Code*, the Company issued a notice of group termination to the federal Minister of Labour on October 14, 2020 (the "**Group Notice**") with respect to the Calgary Corporate Employees, setting out an intended termination date between February 3, 2021 and March 3, 2021;

E. The Calgary Corporate Employees subject to termination were terminated from their employment on February 3, 2021 (the "**Termination Date**");

F. The Company issued a statement of benefits pursuant to section 213(2) of the *Canada Labour Code* to the Calgary Corporate Employees on February 3, 2021;

G. A joint planning committee comprised of employee representatives and Company representatives (the "**JPC**"), was established pursuant to Division IX of the *Canada Labour Code* to develop an adjustment program for the Calgary Corporate Employees but was unable to do so within the timeframe allotted under the *Canada Labour Code*; and

H. The Company representatives applied for arbitration pursuant to s. 223 of the *Canada Labour Code* on December 8, 2020, and the parties participated in an arbitration, which arbitration resulted in the adjustment program as described herein.

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NOW THEREFORE: The Calgary Corporate Employees' adjustment program (the "**AP**") is as follows:

Eligibility

1. Calgary Corporate Employees subject to the Group Notice who were terminated between February 3 and March 3, 2021 are eligible for a separation package in accordance with their years of service with the Company, as outlined below (the "**Separation Package**").

Top-up of Differential of Notice of Termination Period

2. WestJet shall pay to each Calgary Corporate Employee their regular rate of wages and hours of work in a week for the 16-week notice period (October 14, 2020 – February 3, 2021), less amounts already received. Such amount shall be paid at the same time as the balance of the severance which follows.

Severance (General)

3. A "week's pay" for the purposes of the AP shall be calculated using the Employee's regular rate of wages and hours of work in a week.

4. The severance payment entitlements available for each Corporate Employee are set out below and are subject to all deductions prescribed by law.

Severance and Travel Privileges

5. On or before **June 8, 2021**, each Corporate Employee subject to the AP shall be emailed a letter (the "**Letter**") outlining the Separation Package for which they are eligible in accordance with their Company service profile. The Separation Package will be provided in the form of options that include both severance and travel privileges ("**Severance Option(s)**").

6. Each Corporate Employee must follow the directions in the Letter and elect their preferred option from the Severance Options outlined for their specific Company service profile by **June 15, 2021**.

7. The Severance Options, in accordance with Company service profile, are as follows:

a. A Corporate Employee with less than one year of continuous employment with the Company as of their Termination Date may elect to receive either one of the following Severance Options:

(i). **Option 1** – One (1) week's pay.

A Corporate Employee accepting this Option 1 is not entitled to travel benefits.

(ii). **Option 2** – No pay.
A Corporate Employee accepting this Option 2 shall be entitled to two (2) years of Company standby travel benefits for themselves, their designated travel companion, and their eligible dependents.

b. A Corporate Employee with at least one (1) year but less than six (6) years of continuous employment with the Company as of their Termination Date may elect to receive one of the following Severance Options:

(i). **Option 1** – Two (2) weeks' pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 1 is not entitled to travel benefits.

(ii). **Option 2** – One (1) week's pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 2 shall also be entitled to six (6) months of Company standby travel benefits for themselves, their designated travel companion, and their eligible dependents for each completed year of continuous employment the Employee has with the Company as of their Termination Date.

(iii). **Option 3** – One (1) day's pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 3 shall also be entitled to one (1) year of Company standby travel benefits for themselves, their designated travel companion, and their eligible dependents for each completed year of continuous employment the Employee has with the Company as of their Termination Date.

c. A Corporate Employee with at least six (6) years but less than eleven (11) years of continuous employment with the Company as of their Termination Date may elect to receive one of the following Severance Options:

(i). **Option 1** – Two (2) weeks' pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 1 is not entitled to travel benefits.

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(ii). **Option 2** – One (1) week's pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 2 shall also be entitled to one (1) year of Company standby travel benefits for themselves, their designated travel companion, and their eligible dependents for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

(iii). **Option 3** – One (1) day's pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 3 shall also be entitled to eighteen (18) months of Company standby travel benefits for themselves, their designated travel companion, and their eligible dependents for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

d. A Corporate Employee with at least eleven (11) years but less than fifteen (15) years of continuous employment with the Company as of their Termination Date may elect to receive one of the following Severance Options:

(i). **Option 1** – Two (2) weeks' pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 1 is not entitled to travel benefits.

(ii). **Option 2** – One (1) week's pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 2 shall also be entitled to eighteen (18) months of Company standby travel benefits for themselves, their designated travel companion, and their eligible dependents for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

(iii). **Option 3** – One day's pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 3 shall also be entitled to two (2) years of Company standby travel benefits for themselves, their designated travel companion, and their eligible dependents for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

e. A Corporate Employee with at least fifteen (15) years of continuous employment with the Company as of their Termination Date may elect to receive one of the following Severance Options:

(i). **Option 1** – Two (2) weeks' pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 1 is not entitled to travel benefits.

(ii). **Option 2** – One (1) week's pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 2 shall also be entitled to two (2) years of Company standby travel benefits for themselves, their designated travel companion, and their eligible dependents for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

(iii). **Option 3** – One (1) day's pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

A Corporate Employee accepting this Option 3 shall also be entitled to Company standby travel benefits for themselves, their designated travel companion, and their eligible dependents for the Corporate Employee's lifetime.

f. A Corporate Employee who, in the two (2) year period following their Termination Date, would have become eligible for retirement pursuant to the Company's Retirement Policy may, instead of the Options set out in Paragraphs a. to e. above, elect to receive two (2) weeks' pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date (the "**Early-Retirement Option**").

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A Corporate Employee accepting this Early-Retirement Option shall also be entitled to standby travel privileges for themselves, their designated travel companion, and their eligible dependents for the Corporate Employee's lifetime.

g. A Corporate Employee who, as of their Termination Date, is eligible for retirement pursuant to the Company's Retirement Policy may, instead of the Options set out in Paragraphs a. to f. above, elect to receive two (2) weeks' pay for each completed year of continuous employment the Employee has with the Company as of their Termination Date (the "**Retirement Option**").

A Corporate Employee accepting this Retirement Option shall also be entitled to travel privileges according to the Company's Retirement Policy.

8. The use of Company travel benefits by a Corporate Employee, or by their eligible dependents or designated travel companions, shall be governed by and must be in compliance with the Company's Travel Privileges Policy, as it may be amended.

9. In the event a Corporate Employee, who has accepted the Severance Option under Paragraph 6(a) to 6(f) above, is rehired by the Company following their Termination Date, the Corporate Employee shall forfeit their access to travel benefits as described in that Severance Option and shall instead be entitled to travel privileges as outlined in the Company's Travel Privileges Policy, as it may be amended.

Recall Pool

10. The Company shall establish a recall pool ("**Recall Pool**"), in which all Calgary Corporate Employees eligible to receive a Separation Package are eligible to participate, at their election.

11. Calgary Corporate Employees who elect to participate in the Recall Pool ("**Pool Employees**") must indicate this decision to the Company on or before **June 15, 2021** and in doing so are subject to the terms and conditions specified below.

12. On or before **June 15, 2021**, in concurrence with their election to participate in the Recall Pool, Pool Employees must select their Severance Option as outlined in paragraph 6 above.

13. The period during which Pool Employees are eligible for recall is June 1, 2021 to February 3, 2022 ("**Recall Period**").

14. Pool Employees who are in compliance with this agreement and who are not recalled to work by February 3, 2022 will be terminated effective February 3, 2022 ("**Recall End Date**"), at which time their Severance Option becomes payable and activated and will be processed in accordance with the Company's Travel Privileges Policy and normal payroll practices. For the avoidance of doubt, the Termination Date,

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as that term is used herein, is the date upon which a Pool Employee's employment terminated. The Recall End Date is not to be construed as the date upon which a Pool Employee's employment terminated for any purpose, including for the purposes of calculating years of service.

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15. The method of recall to work is at the Company's sole discretion, and in exercising its discretion, the Company may take into account the following factors, in no particular order and without limitation:

   a. operational requirement;
   b. skill set;
   c. length of service with the Company overall;
   d. length of service in the role being recalled into; and
   e. experience and training qualifications.

16. If a Pool Employee is recalled to the role they held as at the Termination Date ("**Original Role**"), or to a role commensurate with the Original Role, a failure to accept the recall will be deemed a resignation from the Company. The Pool Employee will have 72 hours to make this decision, and a failure to communicate a decision within 72 hours will be deemed a resignation.

17. If a Pool Employee is recalled to a role substantially different from the Original Role (the "**New Role**"), they may decline to be recalled into the New Role and will remain in the Recall Pool without penalty. If the Pool Employee accepts the New Role, they are consenting to recommence work in the New Role on an indefinite basis under the terms offered for the New Role, and there will be no expectation by either party that the Pool Employee be returned to the Original Role at any other time. The Pool Employee will have 72 hours to make this decision, and a failure to communicate a decision within 72 hours will mean the Pool Employee has declined the recall and they will be returned to the Recall Pool.

18. Subject to the Company's discretion to agree otherwise, a Pool Employee who has been recalled to work and accepted the recall must return to work at the Company within 7 days of accepting the recall, or will be deemed to have resigned.

19. A Pool Employee who has secured, or secures during the Recall Period, any type of alternate employment, including self-employment, consulting and contract employment ("**Alternate Employment**"), must notify the Company of that employment by **June 15, 2021** or within 10 days of commencing Alternate Employment.

20. Resignation during the Recall Period by any means will result in a forfeiture of the Severance Option selected by the resigning Pool Employee.

21. Pool Employees who are engaged in Alternate Employment that is permanent (which, for the avoidance of doubt, includes employment for a fixed term that ends after the Recall End Date) and full-time in nature, and for which the Pool Employee will

receive income, remuneration, fees or revenue of any nature whatsoever that equals 80% or more of the Pool Employee's base salary in their Original Role with the Company, and which is commensurate with their Original Role in respect of duties and title, will be deemed to have resigned from the Company, subject to the Company's sole discretion to determine otherwise.

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22. Pool Employees who are engaged in Alternate Employment that violates the Company's Code of Business Conduct will be deemed to have resigned from the Company, subject to the Company's sole discretion to determine otherwise.

23. For clarity, Alternate Employment of a nature that does not meet the limitations set out in section 20 or in section 21 is permitted during the Recall Period.

24. At all times, Pool Employees remain subject to the Company's Code of Business Conduct. In particular, Pool Employees remain subject to the conflict of interest reporting requirements under the Company's Code of Business Conduct.

25. Pool Employees must maintain a current email address and telephone number with the Company. A Pool Employee who is recalled to work in accordance with this agreement but has not maintained a current email address or telephone number with the Company will be deemed to have received proper notice of recall 72 hours after delivery of a recall notice to their last known email address. The Company will make best efforts to contact the Pool Employee so impacted through other means within the 72-hour period prior to relying on this section 24.

26. During the Recall Period:

a. Pool Employees are not eligible for personal travel privileges of any kind but are eligible to travel on the travel privileges of another individual with active travel privileges; and

b. Pool Employees will not have Company IT access, including to view Company webinars.

27. If a Pool Employee is recalled to work during the Recall Period:

a**.** they will be considered to have remained a continuous employee for the purpose of calculating vacation. For clarity, Pool Employees' eligibility for vacation time based on years of service once they are recalled to work is not affected by their termination of employment on the Termination Date; and

b. they will not be considered to have accrued service during the Recall period for the purposes of pay progression or paid vacation.

28. Nothing in this agreement limits the Company's ability to hire employees outside of the Recall Pool.

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FAILURE TO SELECT A SEVERANCE OPTION

29. A Corporate Employee's failure to elect a Severance Option by **June 15, 2021** will result in a default severance being provided, as follows:

a. A Corporate Employee with less than one year of continuous employment with the Company as of their Termination Date will be provided with: one (1) week's pay.

b. A Corporate Employee with at least one (1) year will be provided with two (2) week's pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date.

c. A Corporate Employee who, in the two (2) year period following their Termination Date, would have become eligible for retirement pursuant to the Company's Retirement Policy will be provided with: two (2) weeks' pay for each completed year of continuous employment the Corporate Employee has with the Company as of their Termination Date and standby travel privileges for themselves, their designated travel companion, and their eligible dependents for the Corporate Employee's lifetime.

d. A Corporate Employee who, as of their Termination Date, is eligible for retirement pursuant to the Company's Retirement Policy will be provided with: two (2) weeks' pay for each completed year of continuous employment the Employee has with the Company as of their Termination Date and travel privileges according to the Company's Retirement Policy.

30. In the event that a Corporate Employee who is provided with a default Severance Option under Paragraph 28(a) to (d) above is rehired by the Company following their Termination Date, the Corporate Employee shall forfeit their access to travel benefits as described above and shall instead be entitled to travel privileges as outlined in the Company's Travel Privileges Policy, as it may be amended.

OUTPLACEMENT SERVICES

31. Calgary Corporate Employees are eligible for outplacement service benefits provided through RiseSmart. This benefit includes access to workshops and online materials to develop skills in the areas of job search, resume preparation, and interview participation.

EFAP

32. Calgary Corporate Employees are eligible for Employee and Family Assistance Program (EFAP) benefits as contracted by the Company until November 1, 2021.

RESIGNATION

33. For the avoidance of doubt, any resignation of employment from the Company will result in the forfeiture of Severance.

BENEFITS

34. Green Shield provides several individual products Calgary Corporate Employees may be interested in personally purchasing through their ZONE or LINK offerings. Options through LINK provide guaranteed coverage (no medical questions required) for individuals that are switching from a group benefit plan. Applications must be submitted and received by Green Shield by **August 1, 2021**.

Other Terms

35. Where a conflict exists between the terms of this Agreement and the terms contained in any other agreement(s) between the Company and the Corporate Employee(s) or between the Company and the Technical Administrative and Professional Support (TAPS) employee association, the terms of this Agreement shall govern.

36. If any provision of this Agreement shall be held to be invalid or unenforceable for any reason, the remaining provisions shall continue to be valid and enforceable. If a court or arbitrator of competent jurisdiction finds that any provision of this Agreement is invalid or unenforceable, but that by limiting such provision, it would become enforceable, then such provision shall be deemed to be written, construed, and enforced as so limited.

Dated this 1st day of June, 2021

Mark L. Asbell, Q.C.
Arbitrator

2021 CanLII 58975 (CA LA)

TAB 17

38th Edition, 2023

LexisNexis

PART II

LABOUR STANDARDS

«Pt. II»•¶ 2000»

1 Canadian Master Labour Guide ¶ 2000 (2023)

¶ 2000

INTRODUCTION

The terms and conditions of employment were once considered a private matter, properly left to the determination of the employee, employer, and the marketplace. However, by the early 1900s exploitation in the workplace, resulting in widespread worker unrest, prompted the passage of labour welfare legislation such as minimum wage laws.

Today, all jurisdictions in Canada, whether federal, provincial, or territorial, have in place labour standards legislation providing not only for minimum wages, but also for minimum age for industrial employment, maximum hours of work, overtime pay rates, entitlement to annual paid vacations, statutory holidays, leaves of absence, and protection on termination of employment.

Labour standards legislation is designed to do two things. First, it provides protection to the individual worker, and second, it creates certainty in the labour market by requiring basic employment practices. The legislation requires that all employers establish employment conditions that meet at least the minimum standards set out in the legislation.

When reading the material that follows, it should be remembered that these are minimum standards only, and that none of the legislation prohibits the granting of greater benefits. Should the terms of a collective agreement or individual business and employer practices provide greater employment benefits, then it will be those terms and conditions which govern the employment relationship.

TAB 18

EMPLOYMENT LAW IN CANADA

Fourth Edition

Geoffrey England
Roderick Wood
Innis Christie

§ 14.14

The concept of "notice" is defined in order to ensure that employees will know exactly when their jobs are to end and so be able to take preparatory measures. Thus, the legislation commonly requires a written form,[1] and the courts have held that even if there is no statutory duty on employers to specify the exact date when employment is to end, this is implicit in the concept of "notice" itself.[2] The policy of ensuring that employees are in no doubt when their jobs will end is advanced by the unique provision in British Columbia declaring ineffective a purported notice of termination which coincides with the period an employee is on annual vacation, leave of absence, medical leave, or is unavailable for work due to a strike or lockout.[3]

[1] *E.g.*, British Columbia *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 63(3)(a) and (b).

[2] *Newberry Energy Ltd. v. Saskatchewan (Director of Labour Standards)*, [1987] S.J. No. 772, 65 Sask. R. 241 (Q.B.), at 243.

[3] British Columbia *Employment Standards Act*, R.S.B.C. 1996, c. 113, s. 67 (1)(a).

§ 14.17

The second feature common to the legislation in all jurisdictions, is that an employer which does not wish to retain an employee during the notice period, or which has already dismissed the employee without due notice, can pay wages in lieu of notice.[1] Receiving wages in lieu will normally "cushion" the employee as effectively as would receiving advance notice and may even make it easier for the worker to search for alternative employment since he or she will not have to attend work. In order to safeguard employees who are covered by benefit plans such as pension and sickness and disability insurance, some provinces expressly require the employer to continue making contributions to such a plan so that it actually remains in force throughout the notice period that the employee would have received had he or she not been given pay in lieu.[2] In the absence of such a provision, the employee clearly would be entitled to receive the value of any employer contributions as part of his or her "wages."

[1] *E.g.*, Alberta *Employment Standards Code*, R.S.A. 2000, c. E-9, s. 57; Manitoba *Employment Standards Code*, C.C.S.M. c. E110, s. 77; Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 61.

[2] *E.g.*, Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41, s. 61(1)(b).

TAB 19

Termination, layoff or dismissal

From: Employment and Social Development Canada

Note: for the purpose of this web page, reference to “employee(s)” includes persons that are often referred to as “interns”. The reference to “employee(s)” excludes “student interns” who are undertaking internships to fulfill the requirements of their educational program.

On this page

- Termination of employment
    - Individual termination
    - Progressive discipline
    - Employee terminating employment
    - Group termination
- Temporary lay-off
    - When a lay-off becomes termination
    - Employer obligations
- Severance pay
    - Employer obligations
    - Exceptions
- Unjust dismissal
    - Reasons for dismissal

- Mediation
- Decision of the Board
- Constructive dismissal
- Pursuing a civil remedy against your employer
- Contact us

Termination of employment

The *Canada Labour Code* outlines requirements when an employer initiates a termination of employment. There are different requirements for individual termination and group terminations of employment.

Individual termination

If you are an employer and choose to terminate the employment of an employee, you must:

- provide the employee with a minimum of 2 weeks' written notice. For an employee who has completed at least 3 years of service, the minimum notice requirement is equivalent to 1 week per completed year of employment, up to a maximum of 8 weeks of notice, or
- pay the employee their regular wages in lieu of notice

A combination of notice and wages in lieu of notice is permitted.

Notice of termination of employment or pay in lieu of notice is not required if the employee:

- has not completed 3 consecutive months of continuous employment
- terminates their own employment
- is dismissed for just cause

- is on a temporary lay-off that does not constitute a termination of employment
- has signed an employment contract that provides a specific end date and that the work ends on that specified date

Employers are also required to provide a statement of benefits to any employee whose employment is terminated, that details their:

- wages
- vacation pay
- severance pay, and
- any other benefits and pay arising from their employment

> The Statement of Benefits template (LAB1214), outlines the information that employers will be required to provide to employees on termination. The Statement of Benefits template (LAB1214) is an optional tool to assist employers in applying these provisions. As such, its use is not mandatory to satisfy the requirements under the Code. Employers may fulfill this obligation by means of another document, or a combination of documents, containing the required information.

If the employee has completed 12 consecutive months of continuous employment, you must also provide the employee with severance pay.

Progressive discipline

As an employer, if you have concerns with an employee's work performance, you should apply "progressive discipline" to clarify objectives and outline how the employee can improve performance.

For more information and guidance, please consult the progressive discipline page.

Employee terminating employment

As an employee, the *Canada Labour Code* does not require you to provide notice of termination to your employer. However, if you have signed an employment contract, it may contain requirements for you to do so.

Group termination

In this section

- Notice of group termination
- Additional requirements
- Requests for Waiver
- Joint planning committee
- Calculating the 4 consecutive week period

A group termination is the termination of employment of 50 or more employees working at a single industrial establishment either:

- on the same date, or
- within any 4-week period

In calculating the number of employees, the following are not included:

- employees employed on a seasonal basis, or
- employees employed on an irregular basis under an arrangement whereby the employee may decide to work or not to work when

requested

Notice of group termination

If you are an employer planning a group termination of employment, you must:

- notify the Labour Program's Head of Compliance and Enforcement in writing at least 16 weeks before the termination of employment is to take effect, and
- immediately give a copy of the notice to:
    - the Minister of Employment and Social Development Canada (ESDC)
    - the Canada Employment Insurance Commission, and
    - any union representing the affected employees, or
    - to the employees if they are not represented by a union, or
        - immediately post the notice in a visible place within the workplace in which your employees are employed. This may include electronic posting if all affected employees can readily access the notice

This notice must include:

- the name of the employer
- location or establishment where the termination is to take place
- the nature of the industry of the employer
- number of affected employees (both unionized and non-unionized)
- date or dates of termination of employment
- union information, if applicable, and
- the reason(s) for the group termination of employment

Additional requirements

As an employer, when a group termination of employment occurs, you are required to:

- establish a joint planning committee with an employee representative
- cooperate with the Canada Employment Insurance Commission, and
- provide affected employees with a statement of benefits, which includes information on the employee's:
    - wages
    - vacation pay
    - severance pay, if applicable, and
    - any other benefits and pay arising from employment

You must provide the statement of benefits not later than 2 weeks before the date of termination or earlier, if possible.

You must also give your employees the following pay:

- all outstanding wages, including overtime pay and general holiday pay owed
- vacation pay
- pay in lieu of notice of termination, if 2 weeks written notice was not provided, and
- severance pay if they had more than 12 months of continuous service

> **Note:** In addition to providing the notice of group termination of employment, employers must follow the requirements for individual notice of termination of employment.

Requests for waiver

As an employer, you may request that the Minister of Labour waive certain requirements. Three types of waivers may be granted, including the requirement to:

- give 16 weeks' notice
- provide employees with a written statement of benefits, and/or
- establish a joint planning committee when you can show that:
    - it would be unduly prejudicial to your interests or of the affected employees
    - it would be seriously detrimental to the operation of the industrial establishment
    - similar measures are already in place

Note:

You may complete the form "Notice to the Head of Compliance and Enforcement of a group termination of employment and Request for waiver under the *Canada Labour Code*, Part III (ESDC-LAB1197)" to:

- provide notice to the Labour Program's Head of Compliance and Enforcement
  and/or
- make an application to the Minister of Labour for a waiver of the group termination provisions

Any waiver granted will not exceed 6-months duration.

Joint planning committee

As an employer, you must establish a joint planning committee when a group termination of employment occurs. This should be done immediately upon giving notice.

The purpose of a joint planning committee is to:

- eliminate or reduce the need for the terminations of employment, or
- minimize the impact of the terminations of employment on affected employees and assist them in finding new employment

The committee must consist of at least 4 members. At least half must represent the affected employees, and the rest representing the employer. The members must hold their first meeting within 2 weeks of when the employer gave the notice to the Labour Program's Head of Compliance and Enforcement (Head).

Within 6 weeks of when the employer gave notice, the committee must complete an adjustment program for affected employees setting out the adjustment measures.

In the event of a disagreement between the parties, the employees or employer representative may ask the Minister of Labour to appoint an arbitrator to help resolve the matter. This can be requested:

- 6 weeks after the employer submitted the notice to the Head, and if
    - the joint planning committee has not completed the adjustment program, or
    - the adjustment program has been developed but some members are not satisfied with the proposed program in part or in whole

Calculating the 4 consecutive week period

As an employer, you must calculate the 4-week period from the date of termination of employment of the first employee in the group whose:

- employment is to be terminated, and
- ends 4 weeks after

Example 1

Week	Number of terminated employments (employees)
Week 1	1
Week 2	0
Week 3	0
Week 4	48
Total =	**49**

In the case of example 1, a group termination of employment did not occur because there are fewer than 50 employees affected during the 4-week period. In this example, 49 employees were affected.

Example 2

Week	Number of terminated employments (employees)
Week 1	48
Week 2	49
Week 3	0
Week 4	1

Total =	98

In the case of example 2, a group termination of employment occurred because there are more than 50 employees affected during the 4-week period. In this example, 98 employees were affected.

Example 3

Week	Number of terminated employments (employees)
Week 1	1
Week 2	49
Week 3	0
Week 4	0
Total =	**50**

In the case of example 3, a group termination of employment occurred because there are 50 employees affected during the 4-week period.

Temporary lay-off

As an employer, you may decide to lay off an employee from work for a short term with the intention to recall the employee back to work. This is called a temporary lay-off and it can happen for reasons such as a lack of work.

Examples of lay-offs that do not constitute a termination of employment are:

- when a lay-off is a result of a strike or lockout

- when the duration of the lay-off is 3 months or less
- when the duration of the lay-off is for more than 3 months but not more than 12 months, and the employee maintains recall rights under a collective agreement

The full list of lay-offs that do not constitute a termination of employment can be found in the *Canada Labour Standards Regulations*.

When a lay-off becomes termination

A lay-off becomes a termination of employment when the conditions of temporary lay-off no longer apply. A lay-off can also become a termination if an employee does not return to work when recalled. If this occurs, the employee is considered to have terminated their employment.

Employer obligations

If a lay-off becomes a termination of employment, the individual termination of employment requirements apply.

Severance pay

Employer obligations

As an employer, if you terminate the employment of an employee, you must provide the employee who has completed at least 12 consecutive months of continuous employment with severance pay.

Employees, who have 12 consecutive months of employment, that were subject to a lay-off or dismissal (due to lack of work or the end of a work function) that resulted in a termination of employment, are entitled to

severance pay.

Severance pay is the greater of the following:

- 2 days wages, at the employee's regular rate of wages, for each full year that an employee has worked for an employer before they were terminated, or
- 5 days wages at the employee's regular rate of wages

In addition, you must provide a notice of termination or a pay in lieu of notice.

Exceptions

As an employer, you are required to pay severance pay in instances of individual and group termination of employment.

Severance pay is not required when:

- the employee's lay-off does not result in a termination of employment
- the employee's employment contract contains an end date and the contract ends
- the employee is dismissed for just cause, or
- the employee terminates their own employment

Unjust dismissal

Part III of the *Canada Labour Code* prohibits the unjust dismissal of employees who:

- have completed at least 12 months of continuous employment with the same employer, and

- who are not covered by a collective agreement

Federally regulated employers found to have unjustly dismissed their employees may be ordered to reinstate and/or compensate the affected employees.

Affected employees who believe they have been unjustly dismissed can file an unjust dismissal complaint with the Labour Program.

For more information, please consult the eligibility and timelines requirements.

Reasons for dismissal

Upon receipt of an unjust dismissal complaint, the complainant or the Labour Program’s Head of Compliance and Enforcement may request in writing that the employer provide a written statement. The statement must give the reasons for the dismissal, and it must be provided within 15 days after the request is made.

It is the employer’s responsibility to demonstrate that the complainant’s dismissal was for valid reasons (disciplinary, etc.).

Mediation

The Labour Program will first attempt to resolve the complaint. This may include assisting the parties to settle the complaint through mediation.

If the parties choose not to participate in mediation or cannot resolve the complaint, the Head of Compliance and Enforcement will send the complaint to the *Canada Industrial Relations Board* (Board) who will hear the matter and make a determination.

Decision of the Board

If the Board decides that a complainant has been unjustly dismissed, the Board may, by order, require the employer who dismissed the complainant to:

- pay the complainant compensation, not higher than the amount of money that is equal to what would have been paid by the employer if they had not dismissed them
- reinstate the complainant in their employment, and
- order the employer, in a fair way, to resolve or reduce any consequences of the dismissal

Constructive dismissal

Unjust dismissal may also include cases of “constructive dismissal”. A constructive dismissal is when an employer makes numerous or significant changes to the terms of employment that the employee does not agree with, which results in the employee terminating their employment.

In these circumstances, the affected employees may file a monetary complaint for termination pay and/or severance pay or an unjust dismissal complaint.

For technical guidance on constructive dismissal, please consult the Constructive Dismissal (IPG-033).

Pursuing a civil remedy against your employer

As an employee, filing a complaint under the *Canada Labour Code* does not prohibit you from filing civil action against your employer for wrongful dismissal while the Labour Program investigates your unjust

dismissal complaint.

Contact us

For more information, contact the Labour Program.

Related links

- Interpretations, Policies and Guidelines (IPGs)
- Progressive discipline
- Unjust dismissal – Mediation process
- Unjust dismissal – A guide to the hearing process
- Constructive Dismissal (IPG-033)

Date modified:
2024-04-24

TAB 20

The Construction of Statutes

SEVENTH EDITION

Ruth Sullivan

LexisNexis

CHAPTER 2

The Modern Principle

§ 2.01. Analysis of the Modern Principle

[1] Introduction

In the first edition of *The Construction of Statutes*, published in 1974, Elmer Driedger described an approach to statutory interpretation which he called the modern principle:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[1]

In the years following that first edition, the modern principle was frequently cited and relied on, and in 1998, in *Re Rizzo & Rizzo Shoes Ltd.*, it was declared to be the preferred approach of the Supreme Court of Canada. Speaking for the Court, Iacobucci J. wrote:

> Although much has been written about the interpretation of legislation ... Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone.[2]

Since the Rizzo case, the modern principle has been the starting point for statutory interpretation in innumerable decisions by Canadian courts. It has been applied in interpreting Indian band by-laws,[3] constitutions and election codes enacted by self-governing Indigenous communities,[4] municipal bylaws,[5] as well as Quebec's Civil Code.[6]

In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court of Canada emphasized the importance of the modern principle in judicial review of statutory interpretation where the standard of review is reasonableness. It wrote:

> This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context.... Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

> ... The specialized expertise and experience of administrative decision makers may sometimes lead them to rely, in interpreting a provision, on considerations that a court would not have thought to employ but that actually enrich and elevate the interpretive exercise.
>
> But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision.[7]

Cases such as *Vavilov* make it clear that the modern principle governs the process of statutory interpretation in Canada. But it is not self-evident what the principle entails.

« Ch. 2 », • § 2.01 », « [2] »

[2] Elements of the modern principle

The chief virtue of the modern principle is its insistence on the complex, multi-dimensional character of statutory interpretation. In interpreting a legislative provision, a court must form an impression of the meaning of its text. But to infer what rule the legislature intended to enact, it must also take into account the purpose of the provision and all relevant context. It must do so regardless of whether the legislation is considered ambiguous.[8]

The first dimension emphasized is textual meaning. Although texts issue from an author and a particular set of circumstances, once published they are detached from their origin and take on a life of their own — one over which the reader has substantial control. Research in linguistics has shown that the way readers understand a text depends not only on shared linguistic conventions but crucially on the presuppositions that individual readers bring to the text, rooted in their knowledge, beliefs, values and experience, what linguists refer to as encyclopedic knowledge. The content of a reader's mind constitutes the most important context in which legislation is read and influences in particular their impression of ordinary meaning — what Driedger calls the grammatical and ordinary sense of the words.

A second dimension emphasized by the modern principle is legislative intent. All texts, indeed all utterances, are made for a reason. Authors want to communicate their thoughts and they may further want their readers to adopt different views or adjust their conduct as a result of the communication. In the case of legislation, the law-maker wants to communicate the law that it intended to enact because that law, as set out in the provisions of a statute or regulation, is the means chosen by the law-maker to achieve a set of desired goals. Law-abiding readers (including those who administer or enforce the legislation and those who resolve disputes) try to identify the intended goals of the legislation and the means devised to achieve those goals, so that they can act accordingly. This aspect of interpretation is captured in Driedger's reference to the scheme and object of the Act and the intention of Parliament.

A third dimension referred to in the modern principle is compliance with established legal norms. These norms are part of the "entire context" in which the words of an Act must be read. They are also part of legislative intent, as that concept is explained by Driedger. In the second edition he wrote:

> It may be convenient to regard "intention of Parliament" as composed of four elements, namely
>
> - the expressed intention — the intention expressed by the enacted words;
> - the implied intention — the intention that may legitimately be implied from the enacted words;
> - the presumed intention — the intention that the courts will in the absence of an indication to the contrary impute to Parliament; and

- the declared intention — the intention that Parliament itself has said may be or must be or must not be imputed to it.[9]

Presumed intention embraces the body of evolving legal norms which contribute to the legal context in which official interpretation occurs. These norms are found in Constitution Acts, in constitutional and quasi-constitutional legislation and in international law, both customary and conventional. Another source, one that is likely to become increasingly important in the future, is Indigenous law. Historically, however, the primary source was the common law.[10] Over the centuries courts have identified certain values that are deserving of legal protection and these have become the basis for the strict and liberal construction doctrine and the presumptions of legislative intent. Norms are part of the context in which legislation is made and read.

« Ch. 2 », • § 2.01 », « [3] »

1 Sullivan on the Construction of Statutes, 6ed § 2.01[3] (2022)

[3] Shortcomings of the modern principle

The modern principle says that the words of a legislative text must be read in their ordinary sense *harmoniously* with the scheme and objects of the Act and the intention of the legislature. In an easy case, textual meaning, legislative intent and relevant norms all support a single interpretation. In hard cases, however, these dimensions are vague, obscure or point in different directions. In the hardest cases, the textual meaning seems plain, but cogent evidence of legislative intent (actual or presumed) makes the plain meaning unacceptable. A serious weakness of the modern principle is its failure to acknowledge and address the dilemma created by hard cases.

The modern principle may also be criticized for encouraging the assumption that statutory interpretation consists of resolving doubt about the meaning of words. A significant number of interpretation disputes involve attempts to read down clear, but over-inclusive provisions or to supplement clear, but under-inclusive ones. Other disputes address the relationship between overlapping provisions or between legislation and the common law. Occasionally the issue is whether the drafter has made a mistake or there is a gap in the legislative scheme.

« Ch. 2 », • § 2.01 », « [4] •

1 Sullivan on the Construction of Statutes, 6ed § 2.01[4] (2022)

[4] Relation of the modern principle to the rules of statutory interpretation

Under the modern principle, an interpreter who wants to determine whether a provision applies to particular facts must address the following questions:

- what is the meaning of the legislative text?
- what did the legislature intend? That is, when the text was enacted, what law did the legislature intend to adopt? What purposes did it hope to achieve? What specific intentions (if any) did it have regarding facts such as these?
- what are the consequences of adopting a proposed interpretation? Are they consistent with the norms that the legislature is presumed to respect?

In answering these questions, interpreters are guided by the so-called “rules” of statutory interpretation. They describe the evidence relied on and the techniques used by courts to arrive at a legally acceptable result. The rules associated with textual analysis, such as implied exclusion or the same-words-same-meaning rule, assist interpreters to determine the meaning of the legislative text. The rules governing the use

of extrinsic aids indicate what interpreters may look at, apart from the text, to determine legislative intent. Strict and liberal construction and the presumptions of legislative intent help interpreters infer purpose and test the acceptability of outcomes.

At the end of the day, after taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of legislative intent; and (c) its acceptability, that is, the outcome complies with accepted legal norms; it is reasonable and just.[11]

These several dimensions of statutory interpretation are not accidental or arbitrarily chosen. As Driedger indicated in his initial formulation of the modern principle, they reflect the common law evolution of statutory interpretation over many centuries.

Footnotes — § 2.01:

[1] Elmer A. Driedger, *The Construction of Statutes* (Toronto: Butterworths, 1974) at 67. This principle was reproduced in the second edition, published in 1983, without modification at 87.

[2] [1998] S.C.J. No. 2 at para. 21, [1998] 1 S.C.R. 27 at 41 (S.C.C.). For a comprehensive and critical analysis of the modern principle, see Stéphane Beaulac & Pierre-André Côté, "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimation" (2006) 40 Thémis 131-172. See also Nicholas Hooper, "Notes Toward a Postmodern Principle" (2018) 31 Can. J.L. & Jur. 33-60.

[3] See *Musqueam Indian Band v. Musqueam Indian Band (Board of Review)*, [2016] S.C.J. No. 36, 2016 SCC 36 at para. 16 (S.C.C.).

[4] See *Boucher v. Fitzpatrick*, [2012] F.C.J. No. 1102, 2012 FCA 212 at para 25 (F.C.A.); *Edzerza v. Kwanlin Dün First Nation*, [2008] Y.J. No. 38, 2008 YKCA 8 at para. 24 (Y.T.C.A.); *Henry v. Roseau River Anishinabe First Nation Government*, [2017] F.C.J. No. 1093, 2017 FC 1038 at paras. 45-47 (F.C.); *Boucher-Chicago v. Porter*, [2019] F.C.J. No. 1549, 2019 FC 1627 at paras. 26-29 (F.C.).

[5] *2222868 Ontario Inc. v. Grimsby (Town)*, [2020] O.J. No. 2654, 2020 ONCA 376 at para. 32 (Ont. C.A.).

[6] See *Montréal (Ville) v. Lonardi*, [2018] S.C.J. No. 29, 2019 SCC 29 at para. 22 (S.C.C.); *Montréal (City) v. Dorval*, [2017] S.C.J. No. 32, 2017 SCC 48 at para. 32 (S.C.C.); *Épiciers Unis Métro-Richelieu Inc., division "Éconogros" v. Collin*, [2004] S.C.J. No. 55, [2004] 3 S.C.R. 257 at para. 20*ff*. (S.C.C.).

[7] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] S.C.J. No. 6, 2019 SCC 6 at paras. 118-120 (S.C.C.). See also *Michel v. Graydon*, [2020] S.C.J. No. 24, 2020 SCC 24 at para. 21 (S.C.C.); *Canada Post Corp. v. Canadian Union of Postal Workers*, [2019] S.C.J. No. 67, 2019 SCC 67 at para. 43 (S.C.C.).

[8] *R. v. Ali*, [2019] O.J. No. 6435, 2019 ONCA 1006 at paras. 47-48 (Ont. C.A.); *Geophysical Service Inc. v. EnCana Corp.*, [2017] A.J. No. 419, 2017 ABCA 125 at para. 78 (Alta. C.A.), leave to appeal refused [2019] S.C.C.A. No. 32 (S.C.C.); *Rooney v. ArcelorMittal S.A.*, [2016] O.J. No. 4347, 2016 ONCA 630 paras. 10-21 (Ont. C.A.).

[9] Elmer A. Driedger, *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 106. [Bullets added.]

[10] This is true in Quebec in matters of public law, which is derived from common law sources. In matters of private law, the *Civil Code of Québec* is the primary source of legal norms.

[11] *R. v. Alex*, [2017] S.C.J. No. 37, 2017 SCC 37 at paras. 31-33 (S.C.C.); *Sparks v. Nova Scotia (Assistance Appeal Board)*, [2017] N.S.J. No. 432, 2017 NSCA 82 at para. 61 (N.S.C.A.); *P. (R.) v. Alberta (Director of Child, Youth and Family Enhancement Act)*, [2015] A.J. No. 542, 2015 ABCA 171 at para. 68 (Alta. C.A.); *Axcess Capital Partners Inc. v. Allsteel Builders(2) Ltd.*, [2015] S.J. No. 153, 2015 SKCA 33 at para. 72 (Sask. C.A.); *Manitoba Housing v. Amyotte*, [2014] M.J. No. 155, 2014 MBCA 54 at para. 51 (Man. C.A.); *M. & M. Engineering Ltd. v. International Brotherhood of Electrical Workers, Local 2330*, [2004] N.J. No. 179, 2004 NLCA 31 at para. 27 (N.L.C.A.).