COURT FILE NUMBER	2401-02664
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	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	**BOOK OF AUTHORITIES FOR BENCH BRIEF OF LAW AND ARGUMENT OF FTI CONSULTING CANADA INC., IN ITS CAPACITY AS THE COURT-APPOINTED MONITOR OF LYNX AIR HOLDINGS CORPORATION AND 1263343 ALBERTA INC. TO BE HEARD ON DECEMBER 4, 2024 AT 2:00 P.M.**

Clerk's Stamp

COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY
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Clerk's Stamp

LIST OF AUTHORITIES

STATUTES

1. *Act respecting labour standards*, CQLR c N-1.1 at s. 84.0.13

2. *Alberta Rules of the Court*, Alta. Reg 124-2010, at section 2.16;

3. *Canada Labour Code*, R.S.C. 1985, c. L-2, at sections 212(1) and (2), 228, 230(1), 235(1), and 251.01;

4. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended, at section 11;

5. *Employment Standards Act*, 2000, SO 2000, c 41 at s. 61;

6. *Employment Standards Act*, RSBC 1996, c 113 at s. 64;

7. *Employment Standards Act*, SNB 1982, c E-7.2 at s. 34;

8. *Labour Standards Code*, RSNS 1989, c 246 at s. 72;

9. *The Employment Standards Code*, CCSM c E110 at s. 77;

10. *Wage Earner Protection Program Act (Canada)*, S.C. 2005, c. 47, at sections 2(1), 2(1.2), 7(1), 8, 9, 10, 11, 12, 13, 14(1), 17, 19, 20, and 21(1);

11. *Wage Earner Protection Program Regulations* SOR/2008-222, at sections 2, 15(1), and 16;

CASE LAW

12. *Attorney General of Canada c. Former Gestion Inc.*, 2024 QCCA 1441;

13. *ATU, Local 1374 and Saskatchewan Transportation Co. (Layoff of Bargaining Unit Employees), Re*, 2018 CarswellNat 1948;

14. *Canwest Publishing Inc.*, 2010 ONSC 1328;

15. *In the Matter of The Body Shop Canada Limited,* 2024 ONSC 3871;

16. *Mountain Equipment Co-Operative (Re)*, 2020 BCSC 2037;

17. *Nortel Networks Corporation (Re)*, 2009 CanLII 26603 (ON SC);

18. *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65;

19. *R. v. Servisair Inc.*, 2011 BCPC 142;

20. *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663;

21. *T.W.U. v British Columbia Telephone Co.*, 1982 CarswellBC 228, (1982) B.C.J. No. 81 (S.C.);

22. *U.S. Steel Canada Inc. (Re)*, 2014 ONSC 6145;

23. *Urbancorp Toronto Management Inc., Re*, 2016 ONSC 5426;

24. *WestJet, an Alberta Partnership and Employees in the service of WestJet, an Alberta Partnership, Re*, 2021 CarswellNat 2450;

25. *Windsor Machine & Stamping Limited (Re)*, 2009 CanLII 39771 (ON SC), 55 CBR (5th) 241;

OTHER AUTHORITIES

26. Debates of the Senate (Hansard), 2nd Session, 39th Parliament, Volume 144, Issue 12; and,

27. Government of Canada, "Wage Earner Protection Program for trustees or receivers: Eligibility", last modified June 28, 2024, online: < https://www.canada.ca/en/employment-social-development/services/wage-earner-protection/trustee/eligibility.html>.

TAB 1

CQLR, c. N-1.1, s. 84.0.13

s 84.0.13

Currency

84.0.13
An employer who does not give the notice prescribed by section 84.0.4 or who gives insufficient notice must pay to each dismissed employee an indemnity equal to the employee's regular wages, excluding overtime, for a period equal to the time period or remainder of the time period within which the employer was required to give notice.

The indemnity must be paid at the time of the dismissal or at the end of a period of six months after a layoff of indeterminate length or a layoff expected to last less than six months but which exceeds that period.

An employer who is in one of the situations described in section 84.0.5 is, however, not required to pay an indemnity.

Amendment History
2002, c. 80, s. 49

Currency
Quebec Current to Gazette Vol. 156:16 (April 17, 2024)

End of Document

TAB 2

ALBERTA

RULES OF COURT

Alberta King's Printer
Suite 700, Park Plaza
10611 - 98 Avenue
Edmonton, AB T5K 2P7
Phone: 780-427-4952

E-mail: kings-printer@gov.ab.ca
Shop on-line at kings-printer.alberta.ca

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.

Lawyer appointed as litigation representative

2.17(1) If the Court appoints a lawyer as the litigation representative for an individual referred to in rule 2.11(a) to (d), *[Litigation representative required]*, the Court may direct that the costs incurred in performing the duties of the litigation representative be borne by

(a) the parties or by one or more of them, or

(b) any fund in Court in which the individual for whom the litigation representative is appointed has an interest.

(2) The Court may give any other direction for repayment of costs or for an advance payment of costs as the circumstances require.

Approval of settlement

2.18(1) If a settlement is proposed in an action or claim described in rule 2.16 *[Court-appointed litigation representatives in limited cases]* and some of the persons interested in the settlement are not parties to the action but are persons

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 November 11, 2024

Last amended on June 20, 2024

À jour au 11 novembre 2024

Dernière modification le 20 juin 2024

Published by the Minister of Justice at the following address:
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Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to November 11, 2024. The last amendments came into force on June 20, 2024. Any amendments that were not in force as of November 11, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 11 novembre 2024. Les dernières modifications sont entrées en vigueur le 20 juin 2024. Toutes modifications qui n'étaient pas en vigueur au 11 novembre 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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;

Waiver of application of Division

228 On the submission of any person, the Minister may, by order and subject to any terms or conditions specified in the order, waive the application of this Division, or any provision thereof, in respect of any industrial establishment or of any class of employees therein specified in the order if it is shown to the satisfaction of the Minister that the application of this Division, or any provision thereof, as the case may be, in respect of any industrial establishment

(a) would be or is unduly prejudicial to the interests of the employees therein or to any class of employees therein;

(b) would be or is unduly prejudicial to the interests of the employer of those employees;

(c) would be or is seriously detrimental to the operation of the industrial establishment; or

(d) is not necessary, because measures for the assistance of redundant employees at that establishment that are substantially the same or to the same effect as the measures established by this Division or that provision, as the case may be, have been established by collective agreement or otherwise.

R.S., c. 17(2nd Supp.), s. 16; 1980-81-82-83, c. 89, s. 33.

Exemption de l'application de la présente section

228 Sur demande, le ministre peut, par arrêté et aux conditions fixées dans celui-ci, soustraire à l'application de la présente section ou de l'une de ses dispositions un établissement particulier ou une catégorie particulière d'employés qui y travaille, s'il lui est démontré que cette application :

a) soit porte — ou porterait — atteinte aux intérêts de ces employés ou de cette catégorie d'employés;

b) soit porte — ou porterait — atteinte aux intérêts de l'employeur;

c) soit cause — ou causerait — un grave préjudice au fonctionnement de l'établissement;

d) soit n'est pas nécessaire parce qu'aux termes d'une convention collective ou pour toute autre raison, l'établissement dispose de mécanismes d'aide aux surnuméraires qui sont essentiellement semblables à ceux prévus par la présente section ou l'une de ses dispositions ou qui visent les mêmes effets.

S.R., ch. 17(2e suppl.), art. 16; 1980-81-82-83, ch. 89, art. 33.

Application of sections 214 to 226

229 (1) Sections 214 to 226 do not apply in respect of any redundant employees who are represented by a trade union if the trade union and the employer are bound by a collective agreement containing

(a) provisions that

(i) specify procedures by which any matters relating to the termination of employment in the industrial establishment at which those employees are employed may be negotiated and finally settled, or

(ii) are intended to minimize the impact of termination of employment on the employees represented by the trade union and to assist those employees in obtaining other employment; and

(b) provisions that specify that those sections do not apply in respect of the employees represented by the trade union.

Idem

(2) Sections 214 to 226 do not apply in respect of any redundant employees who are represented by a trade union if the termination of the employment of those employees is the result of technological change as defined in

Non-application des art. 214 à 226

229 (1) Les articles 214 à 226 ne s'appliquent pas aux surnuméraires qui sont représentés par un syndicat signataire d'une convention collective qui :

a) d'une part, prévoit :

(i) soit des mécanismes de négociation et de règlement définitif en matière de licenciement dans l'établissement où ces employés travaillent,

(ii) soit des mesures visant à minimiser les conséquences du licenciement pour ces employés et à les aider à trouver un autre travail;

b) d'autre part, soustrait ces employés à leur application.

Idem

(2) Les articles 214 à 226 ne s'appliquent pas aux surnuméraires représentés par un syndicat dans le cas où les licenciements sont provoqués par des changements technologiques — au sens du paragraphe 51(1) — et où le

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;

(c) defining for the purposes of this Division the absences from employment that shall be deemed not to have interrupted continuity of employment and the expression "regular hours of work".

R.S., 1985, c. L-2, s. 233; R.S., 1985, c. 9 (1st Supp.), s. 11.

(c) définir, pour l'application de la présente section, les absences qui ne sont pas réputées avoir interrompu le service chez un employeur et le sens de « nombre d'heures de travail normal ».

L.R. (1985), ch. L-2, art. 233; L.R. (1985), ch. 9 (1er suppl.), art. 11.

Application of section 189

234 Section 189 applies for the purposes of this Division.

R.S., c. 17(2nd Supp.), s. 16.

Application de l'art. 189

234 L'article 189 s'applique dans le cadre de la présente section.

S.R., ch. 17(2e suppl.), art. 16.

DIVISION XI

Severance Pay

Minimum rate

235 (1) An employer who terminates the employment of an employee who has completed twelve consecutive months of continuous employment by the employer shall, except where the termination is by way of dismissal for just cause, pay to the employee the greater of

(a) two days wages at the employee's regular rate of wages for his regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and

(b) five days wages at the employee's regular rate of wages for his regular hours of work.

Clarification

(1.1) The employer's obligation to pay and the employee's right to receive the amount 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.

Circumstances deemed to be termination and deemed not to be termination

(2) For the purposes of this Division,

(a) except where otherwise provided by regulation, an employer shall be deemed to have terminated the employment of an employee when the employer lays off that employee.

(b) [Repealed, 2011, c. 24, s. 167]

R.S., 1985, c. L-2, s. 235; R.S., 1985, c. 32 (2nd Supp.), s. 41; 2011, c. 24, s. 167; 2024, c. 17, s. 250.

SECTION XI

Indemnité de départ

Minimum

235 (1) L'employeur qui licencie un employé qui travaille pour lui sans interruption depuis au moins douze mois est tenu, sauf en cas de congédiement justifié, de verser à celui-ci le plus élevé des montants suivants :

a) deux jours de salaire, au taux régulier et pour le nombre d'heures de travail normal, pour chaque année de service;

b) cinq jours de salaire, au taux régulier et pour le nombre d'heures de travail normal.

Précision

(1.1) L'employeur est tenu de satisfaire à l'obligation prévue au paragraphe (1), et l'employé a droit aux montants mentionnés à ce paragraphe, 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).

Présomptions

(2) Pour l'application de la présente section :

a) sauf disposition contraire d'un règlement, la mise à pied est assimilée au licenciement.

b) [Abrogé, 2011, ch. 24, art. 167]

L.R. (1985), ch. L-2, art. 235; L.R. (1985), ch. 32 (2e suppl.), art. 41; 2011, ch. 24, art. 167; 2024, ch. 17, art. 250.

determine the amount owed and any payment subsequently made to the employee with respect to that amount owed.

Inspection and complaint not precluded

(8) For greater certainty, nothing in this section precludes an inspection from being made, or a complaint from being dealt with, under this Part.

False information

(9) No employer shall make a false or misleading statement in a report.

2017, c. 20, s. 358; 2018, c. 27, s. 590.

Complaints

Making of complaint

251.01 (1) Any employee may make a complaint in writing to the Head if they believe that the employer has contravened

(a) any provision of this Part or of the regulations made under this Part; or

(b) any order.

Time for making complaint

(2) A complaint under subsection (1) shall be made within the following period

(a) in the case of a complaint of non-payment of wages or other amounts to which the employee is entitled under this Part, six months from the last day on which the employer was required to pay those wages or other amounts under this Part; and

(b) in the case of any other complaint, six months from the day on which the subject-matter of the complaint arose.

Extension of time

(3) The Head may, subject to the regulations, extend the period set out in subsection (2)

(a) if the Head is satisfied that a complaint was made within that period to a government official who had no authority to deal with the complaint and that the person making the complaint believed the official had that authority;

(b) in any circumstances prescribed by regulation; or

(c) in the conditions prescribed by regulation.

Inspection ou traitement d'une plainte permis

(8) Il est entendu que le présent article n'a pas pour effet d'empêcher que soit effectuée une inspection, ou que soit traitée une plainte, au titre de la présente partie.

Faux renseignements

(9) Il est interdit à l'employeur de faire, dans son rapport, une déclaration fausse ou trompeuse.

2017, ch. 20, art. 358; 2018, ch. 27, art. 590.

Plaintes

Dépôt de la plainte

251.01 (1) Tout employé peut déposer une plainte écrite auprès du chef s'il croit que l'employeur :

a) a contrevenu à une disposition de la présente partie ou des règlements pris en vertu de celle-ci;

b) ne se conforme pas à un arrêté.

Délai

(2) La plainte doit être déposée dans les six mois qui suivent l'une ou l'autre des dates suivantes :

a) s'agissant d'une plainte portant que l'employeur n'a pas versé à l'employé le salaire ou une autre indemnité auxquels celui-ci a droit sous le régime de la présente partie, la dernière date à laquelle l'employeur est tenu de verser le salaire ou l'autre indemnité sous le régime de cette partie;

b) s'agissant de toute autre plainte, la date à laquelle l'objet de la plainte a pris naissance.

Prorogation du délai

(3) Le chef peut, sous réserve des règlements, proroger le délai fixé au paragraphe (2) :

a) dans le cas où il est convaincu que l'intéressé a déposé sa plainte à temps mais auprès d'un fonctionnaire qu'il croyait à tort habilité à la recevoir;

b) dans tout cas prévu par règlement;

c) aux conditions prévues par règlement.

Limitation

(3.1) An employee shall not make a complaint under subsection (1) if they have made a complaint that is based on substantially the same facts under any of subsections 240(1), 246.1(1) and 247.99(1), unless that complaint has been withdrawn.

Exception

(4) Despite subsection (3.1), the employee may file a complaint under subsection (1) if it relates only to the payment of their wages or other amounts to which they are entitled under this Part, including amounts referred to in subsections 230(1) and 235(1), but that complaint is suspended until the day on which the complaint made under subsection 240(1), 246.1(1) or 247.99(1), as the case may be, is withdrawn or resolved.

Limitation — section 177.1

(4.1) With respect to a request made under subsection 177.1(1), an employee may make a complaint under subsection (1) only on the grounds that the employer has refused the request on any ground other than those referred to in subparagraphs 177.1(3)(c)(i) to (v) or has failed to comply with any requirement set out in section 177.1(4).

For greater certainty

(5) For greater certainty, a complaint is not permitted under this section if it relates to a disagreement whose settlement is governed exclusively by a collective agreement under subsection 168(1.1).

2012, c. 31, s. 223; 2017, c. 33, s. 213; 2018, c. 27, s. 498; 2018, c. 27, s. 591.

Suspension of complaint

251.02 (1) If the Head is satisfied that the employee must take measures before the Head may continue to deal with the complaint made under section 251.01, the Head may, at any time, suspend consideration of the complaint, in whole or in part.

Notice

(2) If the Head suspends consideration of a complaint, the Head must notify the employee in writing and specify in the notice

(a) the measures that the employee must take; and

(b) the period of time within which the employee must take those measures.

Extension of time

(3) The Head may, upon request, extend the time period specified in the notice.

Restriction

(3.1) Si l'employé a déposé une plainte en vertu des paragraphes 240(1), 246.1(1) ou 247.99(1) il ne peut déposer, en vertu du paragraphe (1), une plainte fondée essentiellement sur les mêmes faits, à moins de retirer la première.

Exception

(4) Malgré le paragraphe (3.1), l'employé peut déposer une plainte en vertu du paragraphe (1) si elle ne vise qu'à obtenir le versement de tout salaire ou autre indemnité auxquels il a droit sous le régime de la présente partie, notamment aux termes des paragraphes 230(1) et 235(1), auquel cas elle est suspendue jusqu'à ce que la plainte visée aux paragraphes 240(1), 246.1(1) ou 247.99(1) soit retirée ou réglée.

Restriction — Article 177.1

(4.1) S'agissant de la demande faite en vertu du paragraphe 177.1(1), l'employé ne peut se prévaloir du paragraphe (1) que pour déposer une plainte portant que la raison indiquée par l'employeur pour justifier le rejet de la demande n'est pas prévue aux sous-alinéas 177.1(3)c)(i) à (v) ou qu'il y a eu manquement aux exigences prévues au paragraphe 177.1(4).

Précision

(5) Il est entendu qu'une plainte ne peut être déposée en vertu du présent article si elle porte sur un désaccord dont le règlement est assujetti exclusivement à une convention collective au titre du paragraphe 168(1.1).

2012, ch. 31, art. 223; 2017, ch. 33, art. 213; 2018, ch. 27, art. 498; 2018, ch. 27, art. 591.

Suspension de la plainte

251.02 (1) Le chef peut, à tout moment, suspendre, en tout ou en partie, l'examen de la plainte déposée en vertu de l'article 251.01 s'il est convaincu que l'employé doit prendre des mesures qui, de l'avis du chef, sont nécessaires pour mener à bien l'examen.

Avis

(2) Le cas échéant, il en avise par écrit l'employé et précise, dans l'avis :

a) les mesures que celui-ci doit prendre;

b) le délai dont il dispose pour les prendre.

Prorogation du délai

(3) Il peut, sur demande, proroger le délai précisé dans l'avis.

TAB 4

CANADA

CONSOLIDATION

CODIFICATION

Companies' Creditors Arrangement Act

Loi sur les arrangements avec les créanciers des compagnies

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

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

Current to November 11, 2024

Last amended on April 27, 2023

À jour au 11 novembre 2024

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Published consolidation is evidence

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Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

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Incompatibilité — lois

(2) Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

LAYOUT

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NOTE

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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

Ontario Statutes
Employment Standards Act, 2000
Part XV — Termination and Severance of Employment (ss. 53.2-67)
Termination of Employment

S.O. 2000, c. 41, s. 61

s 61.

Currency

61.

61(1)Pay instead of notice

An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,

(a) pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and

(b) continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive.

61(1.1)No regular work week

For the purposes of clause (1)(a), if the employee does not have a regular work week or is paid on a basis other than time, the amount the employee would have been entitled to receive under section 60 shall be calculated as if the period of 12 weeks referred to in subsection 60(2) were the 12-week period immediately preceding the day of termination.

61(2)Information to Director

An employer who terminates the employment of employees under this section and would otherwise be required to provide notices of termination under section 58 shall comply with clause 58(2)(a).

Amendment History

2001, c. 9, Sched. I, s. 1(14), (15)

Currency

Ontario Current to S.O. 2024, c. 18 and O. Reg. 259/24 (June 21, 2024)

End of Document

TAB 6

B.C. Statutes
Employment Standards Act
Part 8 — Termination of Employment (ss. 62-71)

R.S.B.C. 1996, c. 113, s. 64

s 64. Group terminations

Currency

64.Group terminations

64(1) If the employment of 50 or more employees at a single location is to be terminated within any 2 month period, the employer must give written notice of group termination to all of the following:

(a) each employee who will be affected;

(b) a trade union certified to represent, or recognized by the employer as the bargaining agent of, any affected employees;

(c) the minister.

64(2) The notice of group termination must specify all of the following:

(a) the number of employees who will be affected;

(b) the effective date or dates of the termination;

(c) the reasons for the termination.

64(3) The notice of group termination must be given as follows:

(a) at least 8 weeks before the effective date of the first termination, if 50 to 100 employees will be affected;

(b) at least 12 weeks before the effective date of the first termination, if 101 to 300 employees will be affected;

(c) at least 16 weeks before the effective date of the first termination, if 301 or more employees will be affected.

64(4) If an employee is not given notice as required by this section, the employer must give the employee termination pay instead of the required notice or a combination of notice and termination pay.

64(5) The notice and termination pay requirements of this section are in addition to the employer's liability, if any, to the employee in respect of individual termination under section 63 or under the collective agreement, as the case may be.

64(6) This section applies whether the employment is terminated by the employer or by operation of law.

Amendment History
2002, c. 42, s. 31

Judicial Consideration (1)

Currency
British Columbia Current to Gazette Vol. 66:21 (December 31, 2023)

End of Document

TAB 7

New Brunswick Statutes
Employment Standards Act
Part III — Employment Standards (ss. 9-44.1)
Notice of Termination

S.N.B. 1982, c. E-7.2, s. 34

s 34.

Currency

34.

34(1) Notwithstanding sections 30 and 32 an employer may terminate or layoff an employee without notice upon payment in lieu of notice of an amount equal to the pay the employee would have earned during the notice period provided under section 30 as though the employee were entitled to notice under that section.

34(2) Where an employer does not comply with either section 30 or subsection (1) the employer is liable to the employee for the pay the employee would have earned during the notice period.

Amendment History

1984, c. 42, s. 19; 1988, c. 59, s. 12; 2022, c. 33, s. 12

Currency

New Brunswick Current to S.N.B. 2023, c. 42 and N.B. Reg. 2024-33 / French Statutes to L.N.-B. 2024, ch. 27

TAB 8

Nova Scotia Statutes
Labour Standards Code
Termination of Employment

R.S.N.S. 1989, c. 246, s. 72

s 72.

Currency

72.

72(1)Termination of Employment by Employer

Subject to subsection (3) and Section 71, an employer shall not discharge, suspend or lay off an employee, unless the employee has been guilty of wilful misconduct or disobedience or neglect of duty that has not been condoned by the employer, without having given at least

(a) one week's notice in writing to the person if his period of employment is less than two years;

(b) two weeks' notice in writing to the person if his period of employment is two years or more but less than five years;

(c) four weeks' notice in writing to the person if his period of employment is five years or more but less than ten years; and

(d) eight weeks' notice in writing to the person if his period of employment is ten years or more.

72(2)Where Ten or more Terminated

Subject to subsection (3), and notwithstanding subsection (1), where an employer discharges or lays off ten or more persons in an establishment within any period of four weeks or less, the employer shall give notice of not less than

(a) eight weeks if the employment of ten or more persons and fewer than one hundred persons is to be terminated;

(b) twelve weeks if the employment of one hundred or more persons and fewer than three hundred is to be terminated;

(c) sixteen weeks if the employment of three hundred or more persons is to be terminated.

72(3)Exceptions

Subsections (1) and (2) do not apply to

(a) a person whose period of employment is less than three months;

(b) a person employed for a definite term or task for a period not exceeding twelve months;

(c) a person who is laid off or suspended for a period not exceeding six consecutive days;

(d) a person who is discharged or laid off for any reason beyond the control of the employer including complete or partial destruction of plant, destruction or breakdown of machinery or equipment, unavailability of supplies and materials, cancellation, suspension or inability to obtain orders for the products of the employer, fire, explosion, accident, labour disputes, weather conditions and actions of any governmental authority, if the employer has exercised due diligence to foresee and avoid the cause of discharge or lay-off;

(e) a person who has been offered reasonable other employment by his employer;

(f) a person who, having reached the age of retirement established by the employer on the basis of a *bona fide* occupational requirement for the position in which that person is employed, has his employment terminated;

(g) a person who is laid off in circumstances established by regulation as an exception to subsection (1) or (2);

(h) a person employed in the construction industry;

(i) a person employed in an activity, business, work, trade, occupational profession, or any part thereof, that is exempted by regulation.

72(4)Pay in Lieu of Notice
Notwithstanding subsections (1), (2) and (3), but subject to Section 71, the employment of a person may be terminated forthwith where the employer gives to the person notice in writing to that effect and pays him an amount equal to all pay to which he would have been entitled for work that would have been performed by him at the regular rate in a normal, non-overtime work week for the period of notice prescribed under subsection (1) or (2), as the case may be.

Amendment History
2007, c. 11, s. 3

Currency
Nova Scotia Current to Gazette Vol. 48:10 (May 17, 2024)

End of Document

TAB 9

Manitoba Statutes
The Employment Standards Code
Part 2 — Minimum Standards (ss. 6-85)
Division 10 — Termination of Employment
Subdivision 3 — Working Conditions After Notice, Payment in Lieu of Notice, Lay-offs and Complaints

S.M. 1998, c. 29, s. 77

s 77.

Currency

77.

77(1)Wage in lieu of notice

The wage in lieu of notice payable under clause 61(1)(b) must not be less than the wage the employee would have earned during

(a) the applicable notice period under subsection 61(2) or 67(1); or

(b) if a termination notice was given for less than the applicable notice period, the portion of the notice period for which notice was not given;

if the employee had worked his or her regular hours of work for the period.

77(2)Payment required despite other employment, etc.

The requirement to pay a wage in lieu of notice under clause 61(1)(b) applies whether or not the employee has obtained other employment during the notice period.

Amendment History

2006, c. 26, s. 33; 2011, c. 13, s. 6

Currency

Manitoba Current to S.M. 2024, c. 3 and Man. Reg. 43/2024 (June 14, 2024)

TAB 10

CANADA

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

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

An Act to establish a program to provide for payments to individuals in respect of wages owed to them by employers who are insolvent

[*Assented to 25th November 2005*]

Loi établissant un programme prévoyant le versement de prestations aux personnes physiques titulaires de créances salariales sur un employeur qui est insolvable

[*Sanctionnée le 25 novembre 2005*]

Short Title

Short title

1 This Act may be cited as the *Wage Earner Protection Program Act*.

Titre abrégé

Titre abrégé

1 *Loi sur le Programme de protection des salariés*.

Interpretation

Definitions

2 (1) The following definitions apply in this Act.

Board means the Canada Industrial Relations Board established by section 9 of the *Canada Labour Code*. (*Conseil*)

eligible wages means

(a) wages other than termination pay and severance pay that were earned during the longer of the following periods:

(i) the six-month period ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer,

(ii) the period beginning on the day that is six months before one of the following days and ending on the date of the bankruptcy or the first day on which there was a receiver in relation to the former employer:

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by

Dispositions interprétatives

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

Conseil Le Conseil canadien des relations industrielles constitué par l'article 9 du *Code canadien du travail*. (*Board*)

salaire Sont assimilés au salaire les gages, la commission, la rémunération pour services fournis, l'indemnité de vacances, l'indemnité de préavis, l'indemnité de départ et toute autre somme prévue par règlement. (*wages*)

salaire admissible

a) Le salaire — autre que l'indemnité de préavis et l'indemnité de départ — qui a été gagné au cours de la plus longue des périodes suivantes :

(i) la période de six mois se terminant à la date de la faillite ou de l'entrée en fonctions du séquestre,

(ii) la période se terminant à la date de la faillite ou de l'entrée en fonctions du séquestre et commençant :

or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced, and

(iii) the period beginning on the day that is six months before one of the following days and ending on the day on which a court makes a determination under subsection 5(5):

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced; and

(b) termination pay and severance pay that relate to employment that ended

(i) during the period referred to in paragraph (a), or

(ii) during the period beginning on the day after the day on which the period referred to in paragraph (a) ends and ending on the day on which the trustee is discharged or the receiver completes their duties, as the case may be. (*salaire admissible*)

wages includes salaries, commissions, compensation for services rendered, vacation pay, termination pay, severance pay and any other amounts prescribed by regulation. (*salaire*)

Precision

(1.1) For the purpose of the definition *eligible wages*, a proposal does not include a proposal for which a certificate is given under section 65.3 of the *Bankruptcy and Insolvency Act* and a notice of intention to make a proposal does not include a notice of intention in respect of a proposal for which such a certificate is given.

Meaning of *trustee*

(1.2) In this Act, ***trustee*** includes a *monitor* as defined in subsection 2(1) of the *Companies' Creditors Arrangement Act*.

(A) soit à la date précédant de six mois la date du dépôt d'une proposition concordataire visant l'employeur et faite au titre de la section I de la partie III de la *Loi sur la faillite et l'insolvabilité* ou, s'il y a dépôt d'un avis d'intention, au titre de cette section, visant l'employeur, la date précédant de six mois la date du dépôt de l'avis,

(B) soit à la date précédant de six mois la date de l'introduction de la plus récente procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*,

(iii) la période se terminant à la date de la décision du tribunal visée au paragraphe 5(5) et commençant :

(A) soit à la date précédant de six mois la date du dépôt d'une proposition concordataire visant l'employeur et faite au titre de la section I de la partie III de la *Loi sur la faillite et l'insolvabilité* ou, s'il y a dépôt d'un avis d'intention, au titre de cette section, visant l'employeur, la date précédant de six mois la date du dépôt de l'avis,

(B) soit à la date précédant de six mois la date de l'introduction de la plus récente procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*;

b) l'indemnité de préavis et l'indemnité de départ se rapportant à l'emploi qui a pris fin :

(i) soit au cours de la période visée à l'alinéa a),

(ii) soit au cours de la période commençant le jour suivant la date de la fin de la période visée à l'alinéa a) et se terminant à la date à laquelle le syndic est libéré ou à la date à laquelle le séquestre a complété l'exécution des fonctions dont il a été chargé, selon le cas. (*eligible wages*)

Précision

(1.1) Sont exclus de la définition de *salaire admissible*, les propositions qui font l'objet d'un certificat d'exécution intégrale remis en application de l'article 65.3 de la *Loi sur la faillite et l'insolvabilité* ainsi que les avis d'intention à l'égard des propositions qui font l'objet d'un tel certificat.

Sens de *syndic*

(1.2) Dans la présente loi, est assimilé au ***syndic*** le *contrôleur*, lequel s'entend au sens du paragraphe 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*.

or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced, and

(iii) the period beginning on the day that is six months before one of the following days and ending on the day on which a court makes a determination under subsection 5(5):

(A) the day on which a proposal is filed by or in respect of the employer under Division I of Part III of the *Bankruptcy and Insolvency Act* or, if a notice of intention to make a proposal is filed by or in respect of the employer under that Division, the day on which the notice of intention is filed,

(B) the day on which the most recent proceedings under the *Companies' Creditors Arrangement Act* are commenced; and

(b) termination pay and severance pay that relate to employment that ended

(i) during the period referred to in paragraph (a), or

(ii) during the period beginning on the day after the day on which the period referred to in paragraph (a) ends and ending on the day on which the trustee is discharged or the receiver completes their duties, as the case may be. (*salaire admissible*)

wages includes salaries, commissions, compensation for services rendered, vacation pay, termination pay, severance pay and any other amounts prescribed by regulation. (*salaire*)

Precision

(1.1) For the purpose of the definition *eligible wages*, a proposal does not include a proposal for which a certificate is given under section 65.3 of the *Bankruptcy and Insolvency Act* and a notice of intention to make a proposal does not include a notice of intention in respect of a proposal for which such a certificate is given.

Meaning of *trustee*

(1.2) In this Act, ***trustee*** includes a *monitor* as defined in subsection 2(1) of the *Companies' Creditors Arrangement Act*.

(A) soit à la date précédant de six mois la date du dépôt d'une proposition concordataire visant l'employeur et faite au titre de la section I de la partie III de la *Loi sur la faillite et l'insolvabilité* ou, s'il y a dépôt d'un avis d'intention, au titre de cette section, visant l'employeur, la date précédant de six mois la date du dépôt de l'avis,

(B) soit à la date précédant de six mois la date de l'introduction de la plus récente procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*,

(iii) la période se terminant à la date de la décision du tribunal visée au paragraphe 5(5) et commençant :

(A) soit à la date précédant de six mois la date du dépôt d'une proposition concordataire visant l'employeur et faite au titre de la section I de la partie III de la *Loi sur la faillite et l'insolvabilité* ou, s'il y a dépôt d'un avis d'intention, au titre de cette section, visant l'employeur, la date précédant de six mois la date du dépôt de l'avis,

(B) soit à la date précédant de six mois la date de l'introduction de la plus récente procédure sous le régime de la *Loi sur les arrangements avec les créanciers des compagnies*;

b) l'indemnité de préavis et l'indemnité de départ se rapportant à l'emploi qui a pris fin :

(i) soit au cours de la période visée à l'alinéa a),

(ii) soit au cours de la période commençant le jour suivant la date de la fin de la période visée à l'alinéa a) et se terminant à la date à laquelle le syndic est libéré ou à la date à laquelle le séquestre a complété l'exécution des fonctions dont il a été chargé, selon le cas. (*eligible wages*)

Précision

(1.1) Sont exclus de la définition de *salaire admissible*, les propositions qui font l'objet d'un certificat d'exécution intégrale remis en application de l'article 65.3 de la *Loi sur la faillite et l'insolvabilité* ainsi que les avis d'intention à l'égard des propositions qui font l'objet d'un tel certificat.

Sens de *syndic*

(1.2) Dans la présente loi, est assimilé au ***syndic*** le *contrôleur*, lequel s'entend au sens du paragraphe 2(1) de la *Loi sur les arrangements avec les créanciers des compagnies*.

Amounts Covered by Program

Amount of payment

7 (1) The amount that may be paid under this Act to an individual is the amount of eligible wages owing to the individual up to a maximum of an amount equal to seven times the maximum weekly insurable earnings under the *Employment Insurance Act*.

Reduction

(1.1) Except in the circumstances prescribed by regulation, the amount that may be paid under this Act to an individual is to be reduced by any amounts provided for by regulation.

Greatest amount

(2) If more than one situation that is described in paragraph 5(1)(b) applies to the former employer, the amount that may be paid is the greatest of the amounts determined in respect of each of those situations.

2005, c. 47, s. 1 "7"; 2007, c. 36, s. 86; 2009, c. 2, s. 345; 2017, c. 26, s. 53; 2018, c. 27, s. 631.

Application for Payment

Application

8 To receive a payment, an individual is to apply to the Minister in the manner and during the period provided for in the regulations.

2005, c. 47, s. 1 "8"; 2007, c. 36, s. 87; 2018, c. 27, s. 632(F).

Minister's determination of eligibility

9 If the Minister determines that the applicant is eligible to receive a payment, the Minister shall make the payment.

2005, c. 47, s. 1 "9"; 2007, c. 36, s. 87.

Notification

10 (1) The Minister is to inform the applicant of their eligibility or ineligibility to receive a payment.

Notification to trustee or receiver

(2) The Minister is to inform the trustee or receiver of the applicant's eligibility or ineligibility to receive a payment.

2005, c. 47, s. 1 "10"; 2007, c. 36, s. 87; 2018, c. 27, s. 633.

Prestations visées par le programme

Montant des prestations

7 (1) Le montant des prestations à verser à une personne physique au titre de la présente loi est égal au salaire admissible qui lui est dû jusqu'à concurrence de la somme correspondant à sept fois le maximum de la rémunération hebdomadaire assurable, au sens de la *Loi sur l'assurance-emploi*.

Défalcation

(1.1) Sauf dans les circonstances réglementaires, le montant visé au paragraphe (1) fait l'objet d'une défalcation de toute somme prévue par règlement.

Montant le plus élevé

(2) Si l'ancien employeur est visé par plus d'une des situations décrites à l'alinéa 5(1)b), le montant à verser est le plus élevé des montants déterminés à l'égard de chacune des situations.

2005, ch. 47, art. 1 « 7 »; 2007, ch. 36, art. 86; 2009, ch. 2, art. 345; 2017, ch. 26, art. 53; 2018, ch. 27, art. 631.

Demande de prestations

Demande

8 Pour obtenir des prestations, la personne physique présente une demande au ministre selon les modalités — de temps et autres — prévues par règlement.

2005, ch. 47, art. 1 « 8 »; 2007, ch. 36, art. 87; 2018, ch. 27, art. 632(F).

Décision du ministre relativement à l'admissibilité

9 Le ministre décide si le demandeur est admissible aux prestations et, le cas échéant, il en effectue le versement.

2005, ch. 47, art. 1 « 9 »; 2007, ch. 36, art. 87.

Notification

10 (1) Le ministre informe le demandeur de sa décision, qu'elle lui soit favorable ou non.

Notification : syndic ou séquestre

(2) Le ministre informe le syndic ou le séquestre de sa décision, qu'elle soit favorable ou non au demandeur.

2005, ch. 47, art. 1 « 10 »; 2007, ch. 36, art. 87; 2018, ch. 27, art. 633.

Amounts Covered by Program

Amount of payment

7 (1) The amount that may be paid under this Act to an individual is the amount of eligible wages owing to the individual up to a maximum of an amount equal to seven times the maximum weekly insurable earnings under the *Employment Insurance Act*.

Reduction

(1.1) Except in the circumstances prescribed by regulation, the amount that may be paid under this Act to an individual is to be reduced by any amounts provided for by regulation.

Greatest amount

(2) If more than one situation that is described in paragraph 5(1)(b) applies to the former employer, the amount that may be paid is the greatest of the amounts determined in respect of each of those situations.

2005, c. 47, s. 1 "7"; 2007, c. 36, s. 86; 2009, c. 2, s. 345; 2017, c. 26, s. 53; 2018, c. 27, s. 631.

Application for Payment

Application

8 To receive a payment, an individual is to apply to the Minister in the manner and during the period provided for in the regulations.

2005, c. 47, s. 1 "8"; 2007, c. 36, s. 87; 2018, c. 27, s. 632(F).

Minister's determination of eligibility

9 If the Minister determines that the applicant is eligible to receive a payment, the Minister shall make the payment.

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10 (1) The Minister is to inform the applicant of their eligibility or ineligibility to receive a payment.

Notification to trustee or receiver

(2) The Minister is to inform the trustee or receiver of the applicant's eligibility or ineligibility to receive a payment.

2005, c. 47, s. 1 "10"; 2007, c. 36, s. 87; 2018, c. 27, s. 633.

Prestations visées par le programme

Montant des prestations

7 (1) Le montant des prestations à verser à une personne physique au titre de la présente loi est égal au salaire admissible qui lui est dû jusqu'à concurrence de la somme correspondant à sept fois le maximum de la rémunération hebdomadaire assurable, au sens de la *Loi sur l'assurance-emploi*.

Défalcation

(1.1) Sauf dans les circonstances réglementaires, le montant visé au paragraphe (1) fait l'objet d'une défalcation de toute somme prévue par règlement.

Montant le plus élevé

(2) Si l'ancien employeur est visé par plus d'une des situations décrites à l'alinéa 5(1)b), le montant à verser est le plus élevé des montants déterminés à l'égard de chacune des situations.

2005, ch. 47, art. 1 « 7 »; 2007, ch. 36, art. 86; 2009, ch. 2, art. 345; 2017, ch. 26, art. 53; 2018, ch. 27, art. 631.

Demande de prestations

Demande

8 Pour obtenir des prestations, la personne physique présente une demande au ministre selon les modalités — de temps et autres — prévues par règlement.

2005, ch. 47, art. 1 « 8 »; 2007, ch. 36, art. 87; 2018, ch. 27, art. 632(F).

Décision du ministre relativement à l'admissibilité

9 Le ministre décide si le demandeur est admissible aux prestations et, le cas échéant, il en effectue le versement.

2005, ch. 47, art. 1 « 9 »; 2007, ch. 36, art. 87.

Notification

10 (1) Le ministre informe le demandeur de sa décision, qu'elle lui soit favorable ou non.

Notification : syndic ou séquestre

(2) Le ministre informe le syndic ou le séquestre de sa décision, qu'elle soit favorable ou non au demandeur.

2005, ch. 47, art. 1 « 10 »; 2007, ch. 36, art. 87; 2018, ch. 27, art. 633.

Review by Minister

Request for review

11 An applicant who is informed under section 10 may request a review of their eligibility or ineligibility, as the case may be.

2005, c. 47, s. 1 "11"; 2007, c. 36, s. 87.

Review

12 The Minister may confirm, vary or rescind a determination of eligibility made under section 9. If the Minister varies the determination, the Minister shall make any payment resulting from the variation.

2005, c. 47, s. 1 "12"; 2007, c. 36, s. 87.

Notification

12.1 The Minister is to inform the applicant and the trustee or receiver of a decision made under section 12.

2018, c. 27, s. 634.

Review is final

13 Subject to the right of appeal under section 14, the Minister's confirmation, variation or rescission, as the case may be, is final and may not be questioned or reviewed in any court.

2005, c. 47, s. 1 "13"; 2007, c. 36, s. 87.

Appeal to Board

Board

13.1 For the purposes of sections 14 to 20, the Board is considered to be composed of only the Chairperson and Vice-Chairpersons as its members.

2017, c. 20, s. 379.

Appeal on question of law or jurisdiction

14 (1) The applicant may appeal the decision made by the Minister under section 12 to the Board only on a question of law or jurisdiction.

Regulations

(2) The Board may make regulations respecting the period during which and the manner in which an appeal may be made.

2005, c. 47, s. 1 "14"; 2007, c. 36, s. 87; 2017, c. 20, s. 379.

Assignment or appointment

14.1 (1) The Chairperson of the Board may assign a member of the Board or appoint an external adjudicator to determine an appeal that comes before the Board.

Révision par le ministre

Demande de révision

11 Le demandeur visé par la décision peut en demander la révision.

2005, ch. 47, art. 1 « 11 »; 2007, ch. 36, art. 87.

Révision

12 Le ministre peut confirmer, modifier ou infirmer sa décision et, s'il la modifie, il verse toute prestation à laquelle le demandeur est admissible par suite de la modification.

2005, ch. 47, art. 1 « 12 »; 2007, ch. 36, art. 87.

Notification

12.1 Le ministre informe le demandeur ainsi que le syndic ou le séquestre de la décision visée à l'article 12.

2018, ch. 27, art. 634.

Caractère définitif de la révision

13 Sous réserve du droit d'appel prévu à l'article 14, toute confirmation, modification ou infirmation de la décision par le ministre est définitive et insusceptible de recours judiciaires.

2005, ch. 47, art. 1 « 13 »; 2007, ch. 36, art. 87.

Appel auprès du Conseil

Conseil

13.1 Pour l'application des articles 14 à 20, le Conseil est considéré comme n'ayant pour membres que son président et ses vice-présidents.

2017, ch. 20, art. 379.

Appel sur une question de droit ou de compétence

14 (1) Le demandeur peut interjeter appel auprès du Conseil de la décision prise par le ministre en vertu de l'article 12, et ce uniquement sur une question de droit ou de compétence.

Règlements

(2) Le Conseil peut prendre des règlements pour régir les modalités — de temps et autres — applicables à la formation des appels.

2005, ch. 47, art. 1 « 14 »; 2007, ch. 36, art. 87; 2017, ch. 20, art. 379.

Assignation ou nomination

14.1 (1) Une fois le Conseil saisi d'un appel, le président du Conseil soit assigne l'affaire à un membre du Conseil, soit nomme un arbitre externe pour statuer sur l'affaire.

Powers, duties and functions

(2) A member of the Board and an external adjudicator have all the powers, duties and functions that are conferred on the Board by any of sections 14 to 18 with respect to any matter that has been assigned to them or for which they have been appointed, as the case may be, other than the power referred to in subsection 14(2).

Decision of member or external adjudicator

(3) A decision made by a member of the Board or an external adjudicator under any of sections 14 to 18 is deemed to be a decision made by the Board.

Limitation of liability

(4) A member of the Board and an external adjudicator are not personally liable, either civilly or criminally, for anything done or omitted to be done by them in good faith in the exercise or purported exercise of any power, or in the performance or purported performance of any duty or function, conferred on them under any of sections 14 to 18.

Remuneration and expenses — external adjudicator

(5) An external adjudicator shall be paid the remuneration and the fees that may be fixed by the Chairperson of the Board and is entitled to be paid reasonable travel and living expenses incurred by them in the course of their duties while absent from their ordinary place of residence.

2017, c. 20, s. 379; 2018, c. 27, s. 652.

Minister informed of appeal

15 (1) The Board shall inform the Minister in writing when an appeal is brought and provide him or her with a copy of the request for appeal.

Documents provided to Board

(2) The Minister shall, on request of the Board, provide to the Board a copy of any document that the Minister relied on for the purpose of making the decision being appealed.

Documents provided to Minister

(3) The Board shall, on request of the Minister, provide to the Minister a copy of any document that is filed with the Board in the appeal.

Power of Minister

(4) The Minister may, in an appeal, make representations to the Board in writing.

2005, c. 47, s. 1 "15"; 2017, c. 20, s. 379.

Attributions

(2) Les membres du Conseil et les arbitres externes exercent, relativement aux affaires qui leur sont assignées ou à l'égard desquelles ils sont nommés, toutes les attributions que l'un des articles 14 à 18 confère au Conseil, à l'exception du pouvoir prévu au paragraphe 14(2).

Décisions des membres ou arbitres externes

(3) Les décisions rendues par les membres du Conseil ou les arbitres externes en vertu de l'un des articles 14 à 18 sont réputées être des décisions du Conseil.

Immunité

(4) Les membres du Conseil et les arbitres externes bénéficient de l'immunité en matière civile et pénale pour les actes ou omissions faits de bonne foi dans l'exercice effectif ou censé tel des attributions qui leur sont conférées en vertu de l'un des articles 14 à 18.

Rémunération et indemnités — arbitres externes

(5) Les arbitres externes reçoivent la rémunération et les indemnités fixées par le président du Conseil et sont indemnisés des frais de déplacement et de séjour entraînés par l'accomplissement de leurs fonctions hors de leur lieu habituel de résidence.

2017, ch. 20, art. 379; 2018, ch. 27, art. 652.

Avis au ministre

15 (1) Le Conseil informe le ministre, par écrit, lorsqu'un appel est interjeté et lui fournit copie de la demande d'appel.

Documents fournis au Conseil

(2) Le ministre fournit au Conseil, à la demande de celui-ci, une copie des documents sur lesquels il s'est fondé pour prendre la décision dont il est fait appel.

Documents fournis au ministre

(3) Le Conseil fournit au ministre, à la demande de celui-ci, une copie des documents déposés auprès du Conseil dans le cadre de l'appel.

Pouvoir du ministre

(4) Le ministre peut, dans le cadre de l'appel, présenter au Conseil ses observations par écrit.

2005, ch. 47, art. 1 « 15 »; 2017, ch. 20, art. 379.

Appeal on the record

16 The appeal is to be an appeal on the record and no new evidence is admissible.

2005, c. 47, s. 1 "16"; 2007, c. 36, s. 88.

Board's decision

17 The Board may confirm, vary or rescind the decision made by the Minister under section 12. If the Board varies the decision, the Minister shall make any payment resulting from the variation.

2005, c. 47, s. 1 "17"; 2007, c. 36, s. 88; 2017, c. 20, s. 380.

Copies of decision

18 The Board shall send a copy of its decision, and the reasons for it, to each party to the appeal, to the Minister and to the trustee or receiver.

2005, c. 47, s. 1 "18"; 2017, c. 20, s. 380; 2018, c. 27, s. 635; 2018, c. 27, s. 652.

No review by *certiorari*, etc.

19 No order may be made to review, prohibit or restrain and no process entered or proceeding taken to question, review, prohibit or restrain in any court — whether by way of injunction, *certiorari*, prohibition, *quo warranto* or otherwise — an action of the Board under any of sections 14 to 18.

2005, c. 47, s. 1 "19"; 2007, c. 36, s. 89; 2017, c. 20, s. 380; 2018, c. 27, s. 636; 2018, c. 27, s. 652.

Decision is final

20 The Board's decision is final and shall not be questioned or reviewed in any court.

2005, c. 47, s. 1 "20"; 2007, c. 36, s. 89; 2017, c. 20, s. 380.

Administration

Duties of Trustees and Receivers

General duties

21 (1) For the purposes of this Act, a trustee or a receiver, as the case may be, shall

(a) identify each individual who is owed eligible wages;

(b) determine the amount of eligible wages owing to each individual;

(c) inform each individual other than one who is in a class prescribed by regulation of the existence of the

Appel sur dossier

16 L'appel est tranché sur dossier et aucun nouvel élément de preuve n'est admissible.

2005, ch. 47, art. 1 « 16 »; 2007, ch. 36, art. 88.

Décision du Conseil

17 Le Conseil peut confirmer, modifier ou infirmer la décision prise par le ministre en vertu de l'article 12. S'il la modifie, le ministre verse toute prestation à laquelle le demandeur est admissible par suite de la décision du Conseil.

2005, ch. 47, art. 1 « 17 »; 2007, ch. 36, art. 88; 2017, ch. 20, art. 380.

Remise de la décision

18 Le Conseil transmet une copie de sa décision motivée aux parties à l'appel, au ministre ainsi qu'au syndic ou au séquestre.

2005, ch. 47, art. 1 « 18 »; 2017, ch. 20, art. 380; 2018, ch. 27, art. 635; 2018, ch. 27, art. 652.

Interdiction de recours extraordinaire

19 Il n'est admis aucun recours — notamment par voie d'injonction, de *certiorari*, de prohibition ou de *quo warranto* — visant à contester, réviser, empêcher ou limiter l'action du Conseil prise en vertu de l'un des articles 14 à 18.

2005, ch. 47, art. 1 « 19 »; 2007, ch. 36, art. 89; 2017, ch. 20, art. 380; 2018, ch. 27, art. 636; 2018, ch. 27, art. 652.

Caractère définitif des décisions

20 Les décisions du Conseil sont définitives et insusceptibles de recours judiciaires.

2005, ch. 47, art. 1 « 20 »; 2007, ch. 36, art. 89; 2017, ch. 20, art. 380.

Administration

Fonctions des syndics et des séquestres

Obligations générales

21 (1) Pour l'application de la présente loi, il incombe au syndic ou au séquestre, selon le cas :

a) d'identifier chaque personne physique qui est titulaire d'une créance au titre du salaire admissible;

b) de déterminer le montant du salaire admissible qui est dû à chaque personne physique;

c) d'informer chaque personne physique, sauf celle qui fait partie d'une catégorie réglementaire, de l'existence du programme établi à l'article 4 et des

program established by section 4 and of the conditions under which payments may be made under this Act;

(d) provide the Minister and each individual other than one who is in a class prescribed by regulation with the amount of eligible wages owing to the individual and any other information prescribed by regulation;

(e) inform the Minister of when the trustee is discharged or the receiver completes their duties, as the case may be.

Compliance with directions

(2) A trustee or receiver shall comply with any directions of the Minister relating to the administration of this Act.

Duty to assist

(3) A person, other than one described in subsection (4), who has or has access to information described in paragraph (1)(d) shall, on request, provide it to the trustee or the receiver, as the case may be.

Duty to assist — payroll contractors

(4) A person who is dealing at arm's length with and providing payroll services to a bankrupt or insolvent person and who has or has access to information described in paragraph (1)(d) shall,

(a) if requested by the trustee or receiver, provide the trustee or receiver with a description of the information described in paragraph (1)(d) that they have or have access to and an estimate of the cost of providing the information; and

(b) if requested by the trustee or receiver, provide the trustee or receiver with the information described in paragraph (1)(d) that they have or have access to.

2005, c. 47, s. 1 "21"; 2007, c. 36, s. 89; 2009, c. 2, s. 346; 2018, c. 27, s. 637.

Fees and expenses

22 Subject to section 22.1, the trustee's or receiver's fees and expenses, in relation to the performance of their duties under this Act, are to be paid out of the estate of the bankrupt employer or the property of the insolvent employer or by the insolvent employer.

2005, c. 47, s. 1 "22"; 2007, c. 36, s. 89; 2018, c. 27, s. 638; 2018, c. 27, s. 639.

conditions auxquelles les prestations peuvent être versées au titre de la présente loi;

d) de transmettre au ministre et à chaque personne physique, sauf celle qui fait partie d'une catégorie réglementaire, le montant du salaire admissible qui est dû à cette personne et tout autre renseignement réglementaire;

e) d'informer le ministre lorsque le syndic est libéré ou que le séquestre a complété l'exécution des fonctions dont il a été chargé.

Obligation de se conformer aux instructions

(2) Le syndic et le séquestre sont tenus de se conformer à toute instruction donnée par le ministre relativement à l'application de la présente loi.

Obligation d'assistance

(3) Sur demande, toute personne, autre que celle qui est visée au paragraphe (4), qui est en possession de renseignements visés à l'alinéa (1)d) ou a accès à de tels renseignements est tenue de les fournir au syndic ou au séquestre, selon le cas.

Obligation d'assistance — service de la paie

(4) Toute personne qui est en possession de renseignements visés à l'alinéa (1)d) ou a accès à de tels renseignements et qui fournit un service de la paie à un failli ou à une personne insolvable avec qui elle n'a aucun lien de dépendance est tenue :

a) sur demande du syndic ou du séquestre, de lui fournir une description des renseignements visés à l'alinéa (1)d) qui sont en sa possession ou auxquels elle a accès et une estimation des frais liés à la fourniture de ces renseignements;

b) sur demande du syndic ou du séquestre, de lui fournir les renseignements visés à l'alinéa (1)d) qui sont en sa possession ou auxquels elle a accès.

2005, ch. 47, art. 1 « 21 »; 2007, ch. 36, art. 89; 2009, ch. 2, art. 346; 2018, ch. 27, art. 637.

Honoraires et dépenses

22 Sous réserve de l'article 22.1, les honoraires et les dépenses entraînés par l'accomplissement des fonctions du syndic ou du séquestre en application de la présente loi sont à payer sur l'actif de l'employeur en faillite ou sur les biens de l'employeur insolvable ou par celui-ci.

2005, ch. 47, art. 1 « 22 »; 2007, ch. 36, art. 89; 2018, ch. 27, art. 638; 2018, ch. 27, art. 639.

TAB 11

CANADA

CONSOLIDATION

CODIFICATION

Wage Earner Protection Program Regulations

Règlement sur le Programme de protection des salariés

SOR/2008-222

DORS/2008-222

Current to November 11, 2024

Last amended on November 20, 2021

À jour au 11 novembre 2024

Dernière modification le 20 novembre 2021

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OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (3) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

Published consolidation is evidence

31 (1) Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

...

Inconsistencies in regulations

(3) In the event of an inconsistency between a consolidated regulation published by the Minister under this Act and the original regulation or a subsequent amendment as registered by the Clerk of the Privy Council under the *Statutory Instruments Act*, the original regulation or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (3) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1er juin 2009, prévoient ce qui suit :

Codifications comme élément de preuve

31 (1) Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

[...]

Incompatibilité — règlements

(3) Les dispositions du règlement d'origine avec ses modifications subséquentes enregistrées par le greffier du Conseil privé en vertu de la *Loi sur les textes réglementaires* l'emportent sur les dispositions incompatibles du règlement codifié publié par le ministre en vertu de la présente loi.

LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to November 11, 2024. The last amendments came into force on November 20, 2021. Any amendments that were not in force as of November 11, 2024 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 11 novembre 2024. Les dernières modifications sont entrées en vigueur le 20 novembre 2021. Toutes modifications qui n'étaient pas en vigueur au 11 novembre 2024 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

Wage Earner Protection Program Regulations

Règlement sur le Programme de protection des salariés

Interpretation

1 The following definitions apply in these Regulations.

Act means the *Wage Earner Protection Program Act*. (*Loi*)

Minister means the Minister of Labour. (*ministre*)

Wages

2 The following amounts are prescribed for the purposes of the definition ***wages*** in subsection 2(1) of the Act:

(a) gratuities accounted for by the employer;

(b) disbursements of a travelling salesperson properly incurred in and about the business of a bankrupt or the business of a person subject to a receivership; and

(c) production bonuses and shift premiums.

SOR/2016-258, s. 1.

Termination of Employment

3 An individual's employment has ended for the purposes of paragraph 5(a) of the Act if it has ended for any of the following reasons:

(a) the individual resigned or retired;

(b) the individual's employment has terminated; or

(c) the term of the individual's employment has expired.

2009, c. 2, s. 348.

Foreign Proceedings

3.1 For the purposes of subsection 5(2) of the Act, a court may determine whether the foreign proceeding is in respect of a former employer that has terminated all of its employees in Canada other than any retained to wind down its business operations.

SOR/2021-196, s. 1.

Définitions

1 Les définitions qui suivent s'appliquent au présent règlement.

Loi La *Loi sur le Programme de protection des salariés*. (*Act*)

ministre Le ministre du Travail. (*Minister*)

Salaire

2 Pour l'application de la définition de ***salaire*** au paragraphe 2(1) de la Loi, les sommes ci-après sont assimilées au salaire :

a) les pourboires comptabilisés par l'employeur;

b) les sommes régulièrement déboursées par le voyageur de commerce pour l'entreprise du failli ou de la personne faisant l'objet d'une mise sous séquestre ou relativement à cette entreprise;

c) les primes de rendement et les primes de quart.

DORS/2016-258, art. 1.

Fin d'emploi

3 Pour l'application de l'alinéa 5a) de la Loi, les motifs pour lesquels l'emploi d'une personne prend fin sont les suivants :

a) sa démission ou sa retraite;

b) son licenciement ou congédiement;

c) la fin de son emploi à durée déterminée.

2009, ch. 2, art. 348.

Instances étrangères

3.1 Pour l'application du paragraphe 5(2) de la Loi, le tribunal peut décider si l'instance étrangère vise un ancien employeur qui a congédié ou licencié tous ses employés au Canada, à l'exception de ceux dont les services

(2) The application may be submitted after the expiry of the 56-day period if circumstances beyond the control of the applicant prevented them from submitting the application during that period.

2009, c. 2, s. 352; SOR/2016-258, s. 2(E); SOR/2021-196, s. 3.

10 An application shall be made in writing using the form provided by the Minister.

Review

11 (1) An applicant shall request a review under section 11 or 32.1 of the Act in writing within 30 days after the day on which the applicant is informed under subsection 10(1) or 32(1) of the Act, as the case may be, of the Minister's determination.

(2) The request may be submitted after the expiry of the 30-day period if circumstances beyond the control of the applicant prevented them from submitting the request during that period.

SOR/2016-258, s. 3(E); SOR/2021-196, s. 4.

12 The Minister shall notify the applicant in writing of the Minister's decision.

13 [Repealed, SOR/2021-196, s. 5]

14 [Repealed, SOR/2021-196, s. 5]

Information to Be Provided to the Minister

15 (1) For the purpose of paragraph 21(1)(d) of the Act, the trustee or receiver shall provide the Minister with the following information in the form provided by the Minister:

(a) the date of bankruptcy or receivership, or the day on which a court determines that the former employer meets the criteria set out in section 3.1 or 3.2, as the case may be;

(b) the name, address, telephone number, social insurance number, employee number and job title of the individual;

(c) the dates on which wages, other than severance pay or termination pay, were earned and the basis upon which they were calculated;

(c.1) the date on which any employment in respect of which severance pay or termination pay is owing ended;

(2) La demande peut être présentée après l'expiration du délai de cinquante-six jours si des circonstances indépendantes de la volonté du demandeur l'ont empêché de la présenter avant l'expiration de ce délai.

2009, ch. 2, art. 352; DORS/2016-258, art. 2(A); DORS/2021-196, art. 3.

10 La demande doit être faite par écrit sur le formulaire fourni par le ministre.

Révision

11 (1) La demande de révision prévue aux articles 11 ou 32.1 de la Loi est présentée par écrit dans les trente jours suivant la date à laquelle le demandeur est informé de la décision prise par le ministre au titre des paragraphes 10(1) ou 32(1) de la Loi, selon le cas.

(2) Elle peut être présentée après l'expiration du délai de trente jours si des circonstances indépendantes de la volonté du demandeur l'ont empêché de la présenter avant l'expiration de ce délai.

DORS/2016-258, art. 3(A); DORS/2021-196, art. 4.

12 Le ministre informe par écrit le demandeur de sa décision.

13 [Abrogé, DORS/2021-196, art. 5]

14 [Abrogé, DORS/2021-196, art. 5]

Renseignements à transmettre au ministre

15 (1) Pour l'application de l'alinéa 21(1)d) de la Loi, le syndic ou le séquestre transmet au ministre les renseignements ci-après sur le formulaire fourni par le ministre :

a) la date de la faillite, de la mise sous séquestre ou de la décision du tribunal selon laquelle l'ancien employeur satisfait aux critères des articles 3.1 ou 3.2, selon le cas;

b) les nom, adresse, numéro de téléphone, numéro d'assurance sociale, numéro d'employé et titre du poste de la personne;

c) la date où les salaires — autres que l'indemnité de départ et l'indemnité de préavis — ont été gagnés et la base de calcul;

c.1) la date où a pris fin l'emploi qui se rapporte à la créance au titre de l'indemnité de départ ou de l'indemnité de préavis;

(d) a statement as to whether or not the individual delivered a proof of claim for wages owing under section 124 of the *Bankruptcy and Insolvency Act*; and

(e) the names of the employer's officers, directors and owners and of the person responsible for the employer's payroll.

(2) The trustee or receiver shall provide the information within

(a) 45 days after the date of bankruptcy or after the first day on which there was a receiver in relation to the former employer, as the case may be, unless circumstances beyond the control of the trustee or receiver justify a longer period; or

(b) if the trustee or receiver requests the information under subsection 21(3) or (4) of the Act, 15 days after receiving the information.

2009, c. 2, s. 353; SOR/2016-258, s. 5(E); SOR/2021-196, s. 6.

Information to Be Provided to an Individual

16 (1) For the purpose of paragraph 21(1)(d) of the Act, the trustee or receiver shall provide each individual with the following information:

(a) the date of bankruptcy or receivership, or the day on which a court determines that the former employer meets the criteria set out in section 3.1 or 3.2, as the case may be;

(b) a statement informing the individual of their requirement under section 124 of the *Bankruptcy and Insolvency Act* to deliver a proof of claim for wages owing;

(c) a copy of the information and documents that they provided to the Minister with respect to the individual; and

(d) an application form for the Wage Earner Protection Program.

(2) The trustee or receiver shall provide the information within 45 days after the date of bankruptcy or after the first day on which there was a receiver in relation to the former employer, as the case may be, unless circumstances beyond the control of the trustee or receiver justify a longer period.

2009, c. 2, s. 354; SOR/2016-258, s. 6; SOR/2021-196, s. 7.

d) une déclaration indiquant si la personne a remis ou non, aux termes de l'article 124 de la *Loi sur la faillite et l'insolvabilité*, une preuve de réclamation pour le salaire dû;

e) le nom des dirigeants, des administrateurs et des propriétaires de l'employeur, ainsi que le nom de la personne responsable de la paie de l'employeur.

(2) Le syndic ou le séquestre transmet les renseignements dans les délais suivants :

a) soit dans les quarante-cinq jours suivant la date de la faillite ou celle de l'entrée en fonctions du séquestre, sauf si des circonstances indépendantes de la volonté du syndic ou du séquestre justifient un délai plus long;

b) soit dans les quinze jours suivant la date de réception des renseignements demandés par le syndic ou le séquestre aux termes des paragraphes 21(3) ou (4) de la Loi.

2009, ch. 2, art. 353; DORS/2016-258, art. 5(A); DORS/2021-196, art. 6.

Renseignements à transmettre aux personnes

16 (1) Pour l'application de l'alinéa 21(1)d) de la Loi, le syndic ou le séquestre transmet à chaque personne concernée les renseignements suivants :

a) la date de la faillite, de la mise sous séquestre ou de la décision du tribunal selon laquelle l'ancien employeur satisfait aux critères des articles 3.1 ou 3.2, selon le cas;

b) une déclaration informant la personne de l'exigence prévue à l'article 124 de la *Loi sur la faillite et l'insolvabilité* de remettre une preuve de réclamation pour le salaire dû;

c) une copie des renseignements et des documents fournis au ministre concernant la personne;

d) un formulaire de demande de prestations du Programme de protection des salariés.

(2) Le syndic ou le séquestre transmet les renseignements dans les quarante-cinq jours suivant la date de la faillite ou celle de l'entrée en fonctions du séquestre, sauf si des circonstances indépendantes de la volonté du syndic ou du séquestre justifient un délai plus long.

2009, ch. 2, art. 354; DORS/2016-258, art. 6; DORS/2021-196, art. 7.

TAB 12

[NDLE : La traduction française de l'arrêt de la Cour se trouve à la fin des motifs.]

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No.: 500-09-031195-241
(500-11-063779-249)

DATE: November 1, 2024

BEFORE THE HONOURABLE MARTIN VAUCLAIR, J.A.

ATTORNEY GENERAL OF CANADA
APPLICANT – Impleaded Party
v.

FORMER GESTION INC.
9379-3834 QUÉBEC INC.
FORMER GROUPE INC.
FORMER MANAGEMENT INC.
BOUFFONS MONTRÉAL INC.
BOUFFONS MTL ARTS DE LA TABLE
9517-3258 QUÉBEC INC.
RESPONDENTS – Applicants / Debtors
And

PRICEWATERHOUSE COOPERS INC.
IMPLEADED PARTY – Monitor
And

SEYA ACMAZALE
ABDELLAH ATBI
ARIANNE AUGER
NEIL BANSIL
NICOLAS BRAZAO
ANNE BUSSIÈRES-GODBOUT
CATHERINE CAHILL
KYRA CARLETON

ANDRÉ COURNOYER
ISABELLE DESMARAIS
YOURI DROUADAINE
AMÉLIE DURAND
MARGO ELI
ANDRÉ JUNIOR GIRARDEAU
BRUCE HILLS
SUZANNE HINKS
MARIE-LAURENCE JACOB
ROBYN KASZOR
JESSIE KRAVITZ
LEE-ANNE LANCASTER
ÉRIC LAVOIE
AMY LEDUC-CAMERON
CHRISTOPHER MACGREGOR
FRÉDÉRIC MARCHAND
JUNIOR PATRICK MOURGAPANAIK VIRASSAMY
FRANÇOISE POIRIER-CHARETTE
THOMAS ANDREW QUIRK
ANDREW REDDICK
CHRISTINE MELKO ROSS
GABRIELLE ROSS
CHRISTINE ROZON
BRENT FRANCIS A. SCHIESS
LUCY SEGAL
LYNE THÉRIAULT
KIM THOMAS
JULIAN TISSIER
LYSANNE GAUDREAU VILLENEUVE
ROSIE WAXMAN
OZ WEAVER
IMPLEADED PARTIES – Interested Persons

JUDGMENT

---

[1] I am seized with an application by the Attorney General of Canada (“AGC”) seeking leave to appeal the decision rendered on August 27, 2024, by the Honourable Justice David R. Collier of the Superior Court, District of Montreal. The decision was rendered in connection with the restructuring of the Just for Laughs Group (“JFL Group”) under the

Companies' Creditors Arrangement Act, RSC 1985, c. C-36 ("*CCAA*"): see *Arrangement relatif à Former Gestion Inc.*, 2024 QCCS 3645.

Context

[2] The context is fully explained in the decision of Collier, J. It is sufficient for the purposes of the present application to point out that negotiations yielded a transaction with ComediHa! 24 Inc. pursuant to which (1) certain entities of the JFL Group, notably Former Gestion Inc., sold the bulk of their assets under an asset vesting order, and (2) others sold their shares and transferred certain of their liabilities to a company newly incorporated for the transaction ("ResidualCo") pursuant to a reverse vesting order (the "RVO Entities"). The transaction was made under the *CCAA*. On June 7, 2024, the Superior Court approved the transaction.

[3] The transaction agreement required that all employees of Former Gestion Inc. be terminated, and that 55 employees of five RVO Entities also be terminated and their employment liabilities transferred to ResidualCo. A difficulty arose regarding the latter group of employees.

[4] Before Collier, J., an application for declaratory relief was presented seeking to secure the application of the *WEPPA* for the terminated employees because of the concern "that Employment and Social Development Canada (ESDC), the body that administers WEPPA, may refuse to pay outstanding wages to the former employees of the RVO Entities": 2024 QCCS 3645, para. 9.

The decision

[5] Collier, J. declared that the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1 ("*WEPPA*") applied to former employees of Former Gestion Inc. and to former employees of the RVO Entities.

[6] He determined that the RVO Entities (as well as Former Gestion Inc., but this is not at issue in the proposed appeal) met the criteria prescribed by s. 3.2 of the *Wage Earner Protection Program Regulations*, SOR/2008-222 ("*WEPP Regulations*") and that the *WEPPA* applied.

[7] It is undisputed, and I agree, that according to ss. 5(1)(iv) and 5(5) of the *WEPPA* and s. 3.2 of the *WEPP Regulations*, the Superior Court, as a court seized with relevant proceedings, may determine whether the criteria prescribed by s. 3.2 of the *WEPP Regulations* are satisfied. That limited conclusion is then factored in when establishing a former employee's eligibility for payments under the *WEPPA*.

[8] Section 3.2 of the *WEPP Regulations* provides:

> 3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.
>
> 3.2 Pour l'application du paragraphe 5(5) de la Loi, le tribunal peut décider si l'ancien employeur est l'ancien employeur dont tous les employés ont été congédiés ou licenciés au Canada, à l'exception de ceux dont les services sont retenus pour cesser progressivement ses activités commerciales.

[9] It is also apparent that s. 3.2 of the *WEPP Regulations* gives the judge broad discretion to make the determination under that section.

[10] Collier, J.'s declaratory conclusion reads:

> [37] DECLARES that pursuant to section 5(5) of WEPPA, Former Gestion Inc. and the RVO Entities as defined herein are former employers that meet the criteria prescribed by section 3.2 of the WEPP Regulations, and all their former employees in Canada who have been terminated are individuals to whom WEPPA applies;

Position of the parties

[11] The applicant submits that Collier, J. went further than required by arrogating the Minister's powers to himself. By declaring that the *WEPPA* applied, he infringed the discretion of the Minister, who, according to law, is responsible for determining the eligibility of individuals under the *WEPPA*. This error allegedly transpires from Collier, J.'s reasons, where he decided "the relevant time for determining when WEPPA applies" and referred, in passing, to s. 5(1)(c) of the *WEPPA*. The applicant insisted on the words used in paragraph 34 of the decision:

> [34] The Court agrees with the Applicants that the relevant time for determining when WEPPA applies is the moment at which all an insolvent entity's employees are terminated due to a bankruptcy or restructuring. That is when the employee's entitlement to compensation arises and neither the Act nor the regulations indicate that circumstances arising after the termination are relevant. Consequently, in the event an employee is owed eligible wages by a former employer at the moment the former employer terminates all its employees, s. 5(1)(c) of WEPPA ("the individual is owed eligible wages by the former employer") is satisfied.
>
> [Underlining added]

[12] In his application for leave to appeal, the AGC argues that Collier, J. erred:

> a. by failing to decline to rule on a matter under the exclusive jurisdiction of the Minister to determine WEPP eligibility, which is subject to review only by the CIRB and the Federal Court of Appeal. The Superior Court, therefore, infringed upon the Minister's exclusive jurisdiction.
>
> b. subsidiarily, by determining that the relevant time to determine eligibility is when all of an insolvent entity's employees are terminated. The criteria used by the Superior Court to make this determination is flawed. The relevant time for determining when WEPPA applies is the moment at which all the conditions of eligibility are met.
>
> [Reference omitted]

[13] All of the respondents stress that the decision does not declare *eligibility*, but only the applicability of the *WEPPA*. Moreover, they submit, the decision is sound since it would be unfair that eligibility of terminated employees for the federal assistance program be determined by the mode of purchase, regardless of the structure or impact of the global transaction.

Leave to appeal

[14] Given the broad powers conferred on the judge in this respect, leave to appeal is granted only sparingly. Such leave is governed by s. 13 of the *CCAA*. The case law recognizes that, to obtain leave, four cumulative criteria must be met:

> [15] In a series of cases emanating first from British Columbia and then from Quebec, Alberta and Ontario, there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. The test is often expressed as a four-part one:
>
> 1. whether the issue on appeal is of significance to the practice;
> 2. whether the issue raised is of significance to the action itself;
> 3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
> 4. whether the appeal will unduly hinder the progress of the action.
>
> [References omitted]

Stomp Pork Farm Ltd., Re, 2008 SKCA 73, para. 15; see also *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351, paras. 29-30.

Analysis

[15] The applicant has failed to convince me that the appeal is *prima facie* meritorious.

[16] Again, it is undisputed, and I agree, that it is for the Minister to decide if an applicant under the *WEPPA* is *eligible* to receive a payment.

[17] Collier, J. never concluded that one or more of the employees is *eligible* to receive a payment under the *WEPPA*. The only declaratory conclusion is reproduced above, and it obviously does not speak to eligibility. Further, the applicant has failed to convince me that it does so indirectly.

[18] By declaring that the RVO Entities are former employers that meet the criteria prescribed by s. 3.2 of the *WEPP Regulations*, the judge stayed within the boundaries of the broad discretion conferred on him by law. Moreover, there is nothing wrong with the judge justifying his decision by using a time reference that is relevant to the specific realities of the case and pertinent for purposes of "determin[ing] whether the former employer is the former employer all of whose employees in Canada have been terminated", as s. 3.2 requires. Finally, since the judge came to this conclusion, it is quite evident that the terminated employees are individuals to whom the *WEPPA* applies. The judge's words to that effect seem somewhat superfluous, and in making that statement, the judge did not decide the question of *eligibility*, neither generally nor individually.

[19] In short, the judge addressed a specific situation and offered a response authorized by the *WEPPA* and its regulations. Despite the arguments ably presented by counsel for the applicant, the assertion that the decision readily qualifies all the employees as being *eligible* for a *WEPPA* payment has no merit in the circumstances.

FOR THESE REASONS, THE UNDERSIGNED:

[20] **DISMISSES** the application for leave to appeal, with legal costs.

MARTIN VAUCLAIR, J.A.

Mtre Kim Sheppard
Mtre Jonathan Bachir-Legault
DEPARTMENT OF JUSTICE CANADA
For the applicant

Mtre Ilia Kravtsov
Mtre Sandra Abitan
Mtre Jack Matthew Little
OSLER, HOSKIN & HARTCOURT
For the respondents

Mtre Denis Ferland
DAVIES WARD PHILLIPS & VINEBERG
For the impleaded party Pricewaterhouse Coopers inc.

Mtre Andrew J. Hatnay
Mtre Abir Shamim
KOSKIE MINSKY
Mtre Nicolas Brochu
FISHMAN FLANZ MELAND PAQUIN
For the impleaded parties Seya Acmazale, Abdellah Atbi, Arianne Auger, Neil Bansil, Nicolas Brazao, Anne Bussières-Godbout, Catherine Cahill, Kyra Carleton, André Cournoyer, Isabelle Desmarais, Youri Drouadaine, Amélie Durand, Margo Eli, André Junior Girardeau, Bruce Hills, Suzanne Hinks, Marie-Laurence Jacob, Robyn Kaszor, Jessie Kravitz, Lee-Anne Lancaster, Éric Lavoie, Amy Leduc-Cameron, Christopher MacGregor, Frédéric Marchand, Junior Patrick Mourgapanaik Virassamy, Françoise Poirier-Charette, Thomas Andrew Quirk, Andrew Reddick, Christine Melko Ross, Gabrielle Ross, Christine Rozon, Brent Francis A. Schiess, Lucy Segal, Lyne Thériault, Kim Thomas, Julian Tissier, Lysanne Gaudreau Villeneuve, Rosie Waxman and Oz Weaver

Date of hearing: October 22, 2024

COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-031195-241
(500-11-063779-249)

DATE : 1er novembre 2024

DEVANT L'HONORABLE MARTIN VAUCLAIR, J.C.A.

PROCUREUR GÉNÉRAL DU CANADA
REQUÉRANT – mis en cause
c.

FORMER GESTION INC.
9379-3834 QUÉBEC INC.
FORMER GROUPE INC.
FORMER MANAGEMENT INC.
BOUFFONS MONTRÉAL INC.
BOUFFONS MTL ARTS DE LA TABLE
9517-3258 QUÉBEC INC.
INTIMÉES – demanderesses-débitrices
et

PRICEWATERHOUSE COOPERS INC.
MISE EN CAUSE – contrôleur
et

SEYA ACMAZALE
ABDELLAH ATBI
ARIANNE AUGER
NEIL BANSIL
NICOLAS BRAZAO
ANNE BUSSIÈRES-GODBOUT
CATHERINE CAHILL
KYRA CARLETON

ANDRÉ COURNOYER
ISABELLE DESMARAIS
YOURI DROUADAINE
AMÉLIE DURAND
MARGO ELI
ANDRÉ JUNIOR GIRARDEAU
BRUCE HILLS
SUZANNE HINKS
MARIE-LAURENCE JACOB
ROBYN KASZOR
JESSIE KRAVITZ
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AMY LEDUC-CAMERON
CHRISTOPHER MACGREGOR
FRÉDÉRIC MARCHAND
JUNIOR PATRICK MOURGAPANAIK VIRASSAMY
FRANÇOISE POIRIER-CHARETTE
THOMAS ANDREW QUIRK
ANDREW REDDICK
CHRISTINE MELKO ROSS
GABRIELLE ROSS
CHRISTINE ROZON
BRENT FRANCIS A. SCHIESS
LUCY SEGAL
LYNE THÉRIAULT
KIM THOMAS
JULIAN TISSIER
LYSANNE GAUDREAU VILLENEUVE
ROSIE WAXMAN
OZ WEAVER
PARTIES MISES EN CAUSE – personnes intéressées

JUGEMENT

---

[1] Le procureur général du Canada (« PGC ») demande la permission d'appeler d'une décision rendue le 27 août 2024 par l'honorable David R. Collier de la Cour supérieure, district de Montréal. La décision a été rendue dans le cadre de la restructuration du groupe Juste pour rire (« Groupe JPR ») aux termes de la *Loi sur les*

arrangements avec les créanciers des compagnies, L.R.C. 1985, ch. C-36 (« *LACC* »). Voir *Arrangement relatif à Former Gestion Inc.*, 2024 QCCS 3645.

Contexte

[2] Le contexte est expliqué en détail dans la décision du juge Collier. Pour les besoins de la présente demande, il suffit de mentionner que des négociations ont donné lieu à une transaction avec ComediHa! 24 inc. selon laquelle (1) certaines entités du Groupe JPR, dont Former Gestion inc., ont vendu l'essentiel de leurs éléments d'actifs aux termes d'une ordonnance de dévolution et (2) d'autres ont vendu leurs actions et transféré une partie de leur passif à une société nouvellement constituée pour la transaction (« ResidualCo ») aux termes d'une ordonnance de dévolution inversée (les « Entités ODI »). Cette transaction a été réalisée sous l'égide de la *LACC*. Le 7 juin 2024, la Cour supérieure a approuvé la transaction

[3] Le contrat de transaction exigeait que tous les employés de Former Gestion inc. soient licenciés et que les 55 employés des cinq Entités ODI soient également licenciés et que le passif lié à leur emploi soit transféré à ResidualCo. Une difficulté s'est posée relativement au deuxième groupe d'employés.

[4] Une requête pour jugement déclaratoire a été présentée devant le juge Collier, demandant de garantir l'application de la *LPPS* aux employés licenciés en raison de leur crainte [TRADUCTION] « qu'Emploi et Développement Social Canada (EDSC), l'organisme qui administre la LPPS, refuse de verser aux anciens employés des Entités ODI leurs salaires impayés » : 2024 QCCS 3645, par. 9.

La décision

[5] Le juge Collier déclare que la *Loi sur le programme de protection des salariés*, L.C. 2005, ch. 47, art. 1 (« *LPPS* ») s'applique aux anciens employés de Former Gestion inc. et aux anciens employés des Entités ODI.

[6] Il estime que les Entités ODI (ainsi que Former Gestion inc, mais cette conclusion n'est pas contestée dans l'appel proposé) satisfont aux critères énoncés à l'art. 3.2 du *Règlement sur le Programme de protection des salariés*, DORS-2008-222 (« *RPPS* ») et que la *LPPS* s'applique.

[7] Il n'est pas contesté, et j'en conviens aussi, que selon le sous-al. 5(1)b)(iv) et le par. 5(5) de la *LPPS* et l'art. 3.2 du *RPPS*, la Cour supérieure, en tant que tribunal saisi de l'instance pertinente, est autorisée à déterminer si les critères énoncés à l'art. 3.2 du *RPPS* sont remplis. Cette conclusion limitée est ensuite prise en compte pour déterminer l'admissibilité d'un ancien employé au versement de prestations en vertu de la *LPPS*.

[8] L'article 3.2 du *RPPS* est ainsi libellé :

> 3.2 Pour l'application du paragraphe 5(5) de la Loi, le tribunal peut décider si l'ancien employeur est l'ancien employeur dont tous les employés ont été congédiés ou licenciés au Canada, à l'exception de ceux dont les services sont retenus pour cesser progressivement ses activités commerciales.
>
> 3.2 For the purposes of subsection 5(5) of the Act, a court may determine whether the former employer is the former employer all of whose employees in Canada have been terminated other than any retained to wind down its business operations.

[9] Il ressort également de l'art. 3.2 du *RPPS* que celui-ci confère au juge le large pouvoir discrétionnaire de statuer sur ce dont il est question dans cette disposition.

[10] Voici la conclusion déclaratoire du juge Collier :

> [37] DECLARES that pursuant to section 5(5) of WEPPA, Former Gestion Inc. and the RVO Entities as defined herein are former employers that meet the criteria prescribed by section 3.2 of the WEPP Regulations, and all their former employees in Canada who have been terminated are individuals to whom WEPPA applies;

Position des parties

[11] Le requérant soutient que le juge Collier est allé plus loin que nécessaire en s'arrogeant les pouvoirs du ministre. En déclarant que la *LPPS* s'applique, il a empiété sur le pouvoir discrétionnaire du ministre qui, selon la loi, est chargé de décider si une personne est admissible aux prestations prévues par la *LPPS*. Cette erreur ressortirait des motifs du juge Collier, quand il statue sur [TRADUCTION] « le moment pertinent pour déterminer quand la LPPS s'applique » et renvoie, au passage, à l'al. 5(1)c) de la *LPSS*. Le requérant insiste sur les termes employés au paragraphe 34 de la décision :

> [34] The Court agrees with the Applicants that the relevant time for determining when WEPPA applies is the moment at which all an insolvent entity's employees are terminated due to a bankruptcy or restructuring. That is when the employee's entitlement to compensation arises and neither the Act nor the regulations indicate that circumstances arising after the termination are relevant. Consequently, in the event an employee is owed eligible wages by a former employer at the moment the former employer terminates all its employees, s. 5(1)(c) of WEPPA ("the individual is owed eligible wages by the former employer") is satisfied.
>
> [Soulignements ajoutés]

[12] Dans sa demande de permission d'appeler, le PGC soutient que le juge Collier a erré :

> [TRADUCTION]
>
> a. en ne refusant pas de trancher une question relevant de la compétence exclusive du ministre – celle de déterminer l'admissibilité au Programme de protection des salariés – qui ne peut faire l'objet d'une révision que par le CCRI et la Cour d'appel fédérale. La Cour supérieure a donc empiété sur la compétence exclusive du ministre.
>
> b. subsidiairement, en déterminant que le moment pertinent pour déterminer l'admissibilité est le moment où tous les employés d'une entité insolvable sont licenciés. Le critère utilisé par la Cour supérieure pour tirer cette conclusion est erroné. Le moment pertinent pour déterminer quand la LPPS s'applique est le moment où toutes les conditions d'admissibilité sont remplies.
>
> [Renvoi omis]

[13] Toutes les parties intimées soulignent que la décision ne se prononce pas sur l'*admissibilité*, mais uniquement sur l'applicabilité de la *LPPS*. De plus, elles font valoir que la décision est bien fondée, car il serait inéquitable que l'admissibilité au programme d'aide fédérale d'employés licenciés soit déterminée selon le type d'achat, sans égard à la structure ni aux conséquences de la transaction dans sa globalité.

Permission d'appeler

[14] Étant donné les larges pouvoirs conférés au juge en la matière, la permission d'appeler sera accordée avec parcimonie. L'article 13 de la *LACC* encadre l'octroi de cette permission. La jurisprudence reconnaît que, pour obtenir la permission, quatre conditions cumulatives doivent être remplies :

> [15] In a series of cases emanating first from British Columbia and then from Quebec, Alberta and Ontario, there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. The test is often expressed as a four-part one:
>
> 1. whether the issue on appeal is of significance to the practice;
> 2. whether the issue raised is of significance to the action itself;
> 3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,
> 4. whether the appeal will unduly hinder the progress of the action.
>
> [Renvois omis]
>
> *Stomp Pork Farm Ltd., Re*, 2008 SKCA 73, par. 15; voir aussi *Bloom Lake, g.p.l. (Arrangement relatif à)*, 2015 QCCA 1351, par. 29-30.

Analyse

[15] La partie requérante ne me convainc pas que l'appel est *prima facie* bien fondé.

[16] Encore une fois, il n'est pas contesté qu'il appartient au ministre de décider si un demandeur est admissible au versement de prestations en vertu de la *LPPS*, et je partage cet avis.

[17] Le juge Collier n'a jamais conclu qu'un ou plusieurs des employés étaient *admissibles* au versement de prestations en vertu de la *LPPS*. Sa seule conclusion déclaratoire est reproduite ci-dessus, et elle ne traite manifestement pas de l'admissibilité. Le requérant ne réussit pas non plus à me convaincre qu'elle en traite indirectement.

[18] En déclarant que les Entités ODI sont d'anciens employeurs qui répondent aux critères énoncés à l'art. 3.2 du *RPPS*, le juge demeure dans les limites du large pouvoir discrétionnaire que lui confère la loi. De plus, je ne vois rien de répréhensible à justifier sa décision en ayant recours à une référence temporelle liée aux réalités propres à l'espèce et pertinente afin de « décider si l'ancien employeur est l'ancien employeur dont tous les employés ont été congédiés ou licenciés au Canada », comme l'exige l'art. 3.2. Enfin, comme le juge arrive à cette conclusion, il est assez évident que les employés licenciés sont des personnes assujetties à la *LPPS*. Les mots employés par le juge à cet effet semblent quelque peu superflus, et en faisant cette affirmation, il ne statue pas sur la question de l'*admissibilité*, que ce soit de façon générale ou individuelle.

[19] En somme, le juge examine une situation particulière et offre une réponse que la *LPPS* et son règlement autorisent. Malgré les arguments qui ont été présentés habilement par les avocats du requérant, la prétention selon laquelle la décision qualifierait l'ensemble des employés d'*admissibles* au versement des prestations prévues à la *LPPS* n'a aucun fondement dans les circonstances.

POUR CES MOTIFS, LE SOUSSIGNÉ :

[20] **REJETTE** la demande de permission d'appeler, avec frais de justice.

MARTIN VAUCLAIR, J.C.A.

Traduction française du jugement du juge Vauclair

Me Kim Sheppard
Me Jonathan Bachir-Legault
MINISTÈRE DE LA JUSTICE CANADA
Pour le requérant

Me Ilia Kravtsov
Me Sandra Abitan
Me Jack Matthew Little
OSLER, HOSKIN & HARTCOURT
Pour les intimées

Me Denis Ferland
DAVIES WARD PHILLIPS & VINEBERG
Pour la mise en cause Pricewaterhouse Coopers inc.

Me Andrew J. Hatnay
Me Abir Shamim
KOSKIE MINSKY
Me Nicolas Brochu
FISHMAN FLANZ MELAND PAQUIN
Pour les parties mises en cause Seya Acmazale, Abdellah Atbi, Arianne Auger, Neil Bansil, Nicolas Brazao, Anne Bussières-Godbout, Catherine Cahill, Kyra Carleton, André Cournoyer, Isabelle Desmarais, Youri Drouadaine, Amélie Durand, Margo Eli, André Junior Girardeau, Bruce Hills, Suzanne Hinks, Marie-Laurence Jacob, Robyn Kaszor, Jessie Kravitz, Lee-Anne Lancaster, Éric Lavoie, Amy Leduc-Cameron, Christopher MacGregor, Frédéric Marchand, Junior Patrick Mourgapanaik Virassamy, Françoise Poirier-Charette, Thomas Andrew Quirk, Andrew Reddick, Christine Melko Ross, Gabrielle Ross, Christine Rozon, Brent Francis A. Schiess, Lucy Segal, Lyne Thériault, Kim Thomas, Julian Tissier, Lysanne Gaudreau Villeneuve, Rosie Waxman et Oz Weaver

Date d’audience : 22 octobre 2024

TAB 13

Most Negative Treatment: Check subsequent history and related treatments.

2018 CarswellNat 1948
Canada Arbitration

ATU, Local 1374 and Saskatchewan Transportation Co. (Layoff of Bargaining Unit Employees), Re

2018 CarswellNat 1948, [2018] S.L.A.A. No. 5, 135 C.L.A.S. 174, 291 L.A.C. (4th) 225

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")

AMALGAMATED TRANSIT UNION, LOCAL 1374 (hereinafter the "Union") AND
SASKATCHEWAN TRANSPORTATION COMPANY (hereinafter the "Employer" or "STC")

William F.J. Hood Member

Heard: December 7, 8, 2017; January 12, 2018
Judgment: April 27, 2018
Docket: None given.

Counsel: James Fyshe, for Union
Eileen V. Libby, Q.C., for Employer

Subject: Public; Labour

Related Abridgment Classifications

Labour and employment law
I Labour law
I.10 Discipline and termination
I.10.j Reduction in work force
I.10.j.i Termination of operations

Headnote

Labour and employment law --- Labour law — Discipline and termination — Reduction in work force — Termination of operations

Table of Authorities

Cases considered by *William F.J. Hood Member*:

B.C. Rail Ltd. v. U.A., Local 170 (2004), 135 L.A.C. (4th) 399, 2004 CarswellBC 3467 (B.C. Arb.) — considered

C.U.P.E. v. Canadian Airlines International Ltd. (2006), 2006 SCC 1, 2006 CarswellNat 43, 2006 CarswellNat 44, 2006 C.L.L.C. 230-004, (sub nom. *Canadian Human Rights Commission v. Canadian Airlines International Ltd.)* 343 N.R. 308, (sub nom. *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.)* 263 D.L.R. (4th) 1, (sub nom. *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.)* [2006] 1 S.C.R. 3, (sub nom. *Canada (Human Rights Commission) v. Canadian Airlines International Ltd.)* 55 C.H.R.R. D/78 (S.C.C.) — considered

Canadian Freightways and Western Canada Council of Teamsters (Service Centre Closures), Re (2013), 2013 CarswellNat 1004, 231 L.A.C. (4th) 103 (Can. Arb.) — considered

Halloran v. Crown Cork and Seal Canada Inc. (1997), 1997 CarswellOnt 5395 (Ont. L.R.B.) — referred to

Keays v. Honda Canada Inc. (2008), 2008 SCC 39, 2008 CarswellOnt 3743, 2008 CarswellOnt 3744, 66 C.C.E.L. (3d) 159, (sub nom. *Honda Canada Inc. v. Keays)* 2008 C.L.L.C. 230-025, 376 N.R. 196, 239 O.A.C. 299, 294 D.L.R. (4th) 577, (sub nom. *Honda Canada Inc. v. Keays)* [2008] 2 S.C.R. 362, 92 O.R. (3d) 479 (note), (sub nom. *Honda Canada Inc. v. Keays)* 63 C.H.R.R. D/247 (S.C.C.) — considered

Miramar Giant Mine Ltd. v. CAW-Canada, Local 2304 (2004), 2004 CarswellNat 4981, 135 L.A.C. (4th) 439 (Can. Arb.) — considered

Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324 (2003), 2003 SCC 42, 2003 CarswellOnt 3500, 2003 CarswellOnt 3501, 2003 C.L.L.C. 220-062, (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324)* 230 D.L.R. (4th) 257, (sub nom. *Social Services Administration Board (Parry Sound) v. Ontario Public Service Employees Union, Local 324)* 308 N.R. 271, (sub nom. *Social Services Administration Board (Parry Sound District) v. Ontario Public Service Employees Union, Local 324)* 177 O.A.C. 235, 7 Admin. L.R. (4th) 177, (sub nom. *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324)* [2003] 2 S.C.R. 157, 31 C.C.E.L. (3d) 1, 47 C.H.R.R. D/182, 67 O.R. (3d) 256 (S.C.C.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — considered

Strategic Acquisition Corp v. Starke Capital Corp (2017), 2017 ABCA 250, 2017 CarswellAlta 1356, 82 R.P.R. (5th) 198, 59 Alta. L.R. (6th) 16, 416 D.L.R. (4th) 435 (Alta. C.A.) — considered

T.W.U. v. Telus Inc. (2010), 2010 CarswellNat 993 (Can. Arb.) — distinguished

Weyerhaeuser Canada Ltd. v. P.P.W.C., Local 10 (1993), 1993 CarswellBC 3136 (B.C. Arb.) — considered

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Generally — referred to

Pt. III, Div IX — referred to

s. 13 — considered

s. 30 — considered

s. 30(1) — considered

s. 166 "industrial establishment" — considered

s. 212 — considered

s. 214 — considered

s. 223 — considered

s. 224 — considered

s. 224(5) — considered

s. 264(b) — considered

Canadian Human Rights Act, R.S.C. 1985, c. H-6

Generally — referred to

Crown Corporations (Provincial Taxes and Fees) Act, R.S.C. 1970, c. C-37

Generally — referred to

Employment Insurance Act, S.C. 1996, c. 23

s. 54(w) — considered

Regulations considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Canada Labour Standards Regulations, C.R.C. 1978, c. 986

s. 27 — considered

Employment Insurance Act, S.C. 1996, c. 23
Employment Insurance Regulations, SOR/96-332

s. 18(1) — considered

GRIEVANCE by union alleging transportation company breached *Canada Labour Code* group termination provisions.

***William F.J. Hood Member*:**

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".

3. The Union and STC are bound by a collective agreement that covers the employees in this bargaining unit with a term commencing January 1 st, 2013 and ending December 31 st, 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 3 rd, 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 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".

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.

23. The first round of in-scope employees to be affected by STC's closure were kid-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 19 th , 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, (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".

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 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.

• 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:

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.

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.

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 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.

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]

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."

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.

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 antiunion 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 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 18 th 19 2017.
>
> The first meeting took place the afternoon of April 18 th . 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.
>
> 3. Can the severance go to your pensions.
>
> 4. Members on LTD, WCB what's their status after May 31 st .
>
> 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 31 st 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 19 th , 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 3 rd 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.

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.

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.

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). 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.

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.

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.

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

(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;

(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) Welfare Administration Board v. O.P.S.E.U., Local 324*, [2003] 2 S.C.R. 157 (S.C.C.), 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.

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.

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);

(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 *T.W.U. v. Telus Inc.* (2010), 101 C.L.A.S. 275 (Can. Arb.) [2010 CarswellNat 993 (Can. Arb.)] (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 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 *Halloran v. Crown Cork and Seal Canada Inc.*, [1997] O.E.S.A.D. No. 590 (Ont. L.R.B.)), 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 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 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.

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.

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.

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 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193 (S.C.C.), 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 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.

128 Counsel for the Union referred to *Rizzo & Rizzo Shoes Ltd., Re* 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 *Rizzo & Rizzo Shoes Ltd., Re*, *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 *C.U.P.E. v. Canadian Airlines International Ltd.*, 2006 SCC 1, [2006] 1 S.C.R. 3 (S.C.C.) [*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 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 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.

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.

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.

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 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.

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. L.R. (6th) 16 (Alta. C.A.), 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%.
>
> 77 The *Folland* test was applied in Alberta in *Barlot p. 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 L.A.C. (4th) 439, 80 C.L.A.S. 107 (Can. Arb.), 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 Council of Teamsters (Service Centre Closures), Re* (2013), 114 C.L.A.S. 156, 231 L.A.C. (4th) 103 (Can. Arb.), 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. P.P.W.C., Local 10* [1993 CarswellBC 3136 (B.C. Arb.)] (December 10, 1993), (Kelleher) (unreported) and *B.C. Rail Ltd. v. U.A., Local 170* (2004), 135 L.A.C. (4th) 399 (B.C. Arb.), 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.

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 S.C.R. 362 (S.C.C.), 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 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.

Grievance allowed.

TAB 14

CITATION: Canwest Publishing Inc., 2010 ONSC 1328
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100305

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Lyndon Barnes and Alex Cobb* for the Canwest LP Entities
Maria Konyukhova for the Monitor, FTI Consulting Canada Inc.
Hilary Clarke for the Bank of Nova Scotia, Administrative Agent for the Senior Secured Lenders' Syndicate
Janice Payne and Thomas McRae for the Canwest Salaried Employees and Retirees (CSER) Group
M. A. Church for the Communications, Energy and Paperworkers' Union
Anthony F. Dale for CAW-Canada
Deborah McPhail for the Financial Services Commission of Ontario

PEPALL J.

REASONS FOR DECISION

Relief Requested

[1] Russell Mills, Blair MacKenzie, Rejean Saumure and Les Bale (the "Representatives") seek to be appointed as representatives on behalf of former salaried employees and retirees of Canwest Publishing Inc./Publications Canwest Inc., Canwest Books Inc., Canwest (Canada) and Canwest Limited Partnership and the Canwest Global Canadian Newspaper Entities (collectively the "LP Entities") or any person claiming an interest under or on behalf of such salaried

employees or retirees including beneficiaries and surviving spouses (“the Salaried Employees and Retirees”). They also seek an order that Nelligan O’Brien Payne LLP and Shibley Righton LLP be appointed in these proceedings to represent the Salaried Employees and Retirees for all matters relating to claims against the LP Entities and any issues affecting them in the proceedings. Amongst other things, it is proposed that all reasonable legal, actuarial and financial expert and advisory fees be paid by the LP Entities.

[2] On February 22, 2010, I granted an order on consent of the LP Entities authorizing the Communications, Energy and Paperworker’s Union of Canada (“CEP”) 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 dependants employed or formerly employed by the LP Entities. That order only extended to unionized members or former members. The within motion focused on non-unionized former employees and retirees although Ms. Payne for the moving parties indicated that the moving parties would be content to include other non-unionized employees as well. There is no overlap between the order granted to CEP and the order requested by the Salaried Employees and Retirees.

Facts

[3] On January 8, 2010 the LP Entities obtained an order pursuant to the *Companies’ Creditors Arrangement Act* (“CCAA”) staying all proceedings and claims against the LP Entities. The order permits but does not require the LP Entities to make payments to employee and retirement benefit plans.

[4] There are approximately 66 employees, 45 of whom were non-unionized, whose employment with the LP Entities terminated prior to the Initial Order but who were still owed termination and severance payments. As of the date of the Initial Order, the LP Entities ceased making those payments to those former employees. As many of these former employees were owed termination payments as part of a salary continuance scheme whereby they would continue to accrue pensionable service during a notice period, after the Initial Order, those former

employees stopped accruing pensionable service. The Representatives seek an order authorizing them to act for the 45 individuals and for the aforementioned law firms to be appointed as representative counsel.

[5] Additionally, seven retirees and two current employees are (or would be) eligible for a pension benefit from Southam Executive Retirement Arrangements ("SERA"). SERA is a non-registered pension plan used to provide supplemental pension benefits to former executives of the LP Entities and their predecessors. These benefits are in excess of those earned under the Canwest Southam Publications Inc. Retirement Plan which benefits are capped as a result of certain provisions of the *Income Tax Act*. As of the date of the Initial Order, the SERA payments ceased also. This impacts beneficiaries and spouses who are eligible for a joint survivorship option. The aggregate benefit obligation related to SERA is approximately $14.4 million. The Representatives also seek to act for these seven retirees and for the aforementioned law firms to be appointed as representative counsel.

[6] Since January 8, 2010, the LP Entities have being pursuing the sale and investor solicitation process ("SISP") contemplated by the Initial Order. Throughout the course of the CCAA proceedings, the LP Entities have continued to pay:

(a) salaries, commissions, bonuses and outstanding employee expenses;

(b) current services and special payments in respect of the active registered pension plan; and

(c) post-employment and post-retirement benefits to former employees who were represented by a union when they were employed by the LP Entities.

[7] The LP Entities intend to continue to pay these employee related obligations throughout the course of the CCAA proceedings. Pursuant to the Support Agreement with the LP Secured Lenders, AcquireCo. will assume all of the employee related obligations including existing pension plans (other than supplemental pension plans such as SERA), existing post-retirement and post-employment benefit plans and unpaid severance obligations stayed during the CCAA

proceeding. This assumption by AcquireCo. is subject to the LP Secured Lenders' right, acting commercially reasonably and after consultation with the operational management of the LP Entities, to exclude certain specified liabilities.

[8] All four proposed Representatives have claims against the LP Entities that are representative of the claims that would be advanced by former employees, namely pension benefits and compensation for involuntary terminations. In addition to the claims against the LP Entities, the proposed Representatives may have claims against the directors of the LP Entities that are currently impacted by the CCAA proceedings.

[9] No issue is taken with the proposed Representatives nor with the experience and competence of the proposed law firms, namely Nelligan O'Brien Payne LLP and Shibley Righton LLP, both of whom have jointly acted as court appointed representatives for continuing employees in the Nortel Networks Limited case.

[10] Funding by the LP Entities in respect of the representation requested would violate the Support Agreement dated January 8, 2010 between the LP Entities and the LP Administrative Agent. Specifically, section 5.1(j) of the Support Agreement states:

> "The LP Entities shall not pay any of the legal, financial or other advisors to any other Person, except as expressly contemplated by the Initial Order or with the consent in writing from the Administrative Agent acting in consultation with the Steering Committee."

[11] The LP Administrative Agent does not consent to the funding request at this time.

[12] On October 6, 2009, the CMI Entities applied for protection pursuant to the provisions of the CCAA. In that restructuring, the CMI Entities themselves moved to appoint and fund a law firm as representative counsel for former employees and retirees. That order was granted.

[13] Counsel were urged by me to ascertain whether there was any possibility of resolving this issue. Some time was spent attempting to do so, however, I was subsequently advised that those efforts were unsuccessful.

Issues

[14] The issues on this motion are as follows:

(1) Should the Representatives be appointed?

(2) Should Nelligan O'Brien Payne LLP and Shibley Righton LLP be appointed as representative counsel?

(3) If so, should the request for funding be granted?

Positions of Parties

[15] In brief, the moving parties submit that representative counsel should be appointed where vulnerable creditors have little means to pursue a claim in a complex CCAA proceeding; there is a social benefit to be derived from assisting vulnerable creditors; and a benefit would be provided to the overall CCAA process by introducing efficiency for all parties involved. The moving parties submit that all of these principles have been met in this case.

[16] The LP Entities oppose the relief requested on the grounds that it is premature. The amounts outstanding to the representative group are prefiling unsecured obligations. Unless a superior offer is received in the SISP that is currently underway, the LP Entities will implement a support transaction with the LP Secured Lenders that does not contemplate any recoveries for unsecured creditors. As such, there is no current need to carry out a claims process. Although a superior offer may materialize in the SISP, the outcome of the SISP is currently unknown.

[17] Furthermore, the LP Entities oppose the funding request. The fees will deplete the resources of the Estate without any possible corresponding benefit and the Support Agreement with the LP Secured Lenders does not authorize any such payment.

[18] The LP Senior Lenders support the position of the LP Entities.

[19] In its third report, the Monitor noted that pursuant to the Support Agreement, the LP Entities are not permitted to pay any of the legal, financial or other advisors absent consent in writing from the LP Administrative Agent which has not been forthcoming. Accordingly, funding of the fees requested would be in contravention of the Support Agreement with the LP Secured Lenders. For those reasons, the Monitor supported the LP Entities refusal to fund.

Discussion

[20] No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large CCAA proceedings. Examples include Nortel Networks Corp., Fraser Papers Inc., and Canwest Global Communications Corp. (with respect to the television side of the enterprise). Indeed, a human resources manager at the Ottawa Citizen advised one of the Representatives, Mr. Saumure, that as part of the CCAA process, it was normal practice for the court to appoint a law firm to represent former employees as a group.

[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.

[22] The evidence before me consists of affidavits from three of the four proposed Representatives and a partner with the Nelligan O'Brien Payne LLP law firm, the Monitor's Third Report, and a compendium containing an affidavit of an investment manager for noteholders filed on an earlier occasion in these CCAA proceedings. This evidence addresses most of the aforementioned factors.

[23] The primary objection to the relief requested is prematurity. This is reflected in correspondence sent by counsel for the LP Entities to counsel for the Senior Lenders' Administrative Agent. Those opposing the relief requested submit that the moving parties can keep an eye on the Monitor's website and depend on notice to be given by the Monitor in the event that unsecured creditors have any entitlement. Counsel for the LP Entities submitted that counsel for the proposed representatives should reapply to court at the appropriate time and that I should dismiss the motion without prejudice to the moving parties to bring it back on.

[24] In my view, this watch and wait suggestion is unhelpful to the needs of the Salaried Employees and Retirees and to the interests of the Applicants. I accept that the individuals in issue may be unsecured creditors whose recovery expectation may prove to be non-existent and that ultimately there may be no claims process for them. I also accept that some of them were in the executive ranks of the LP Entities and continue to benefit from payment of some pension benefits. That said, these are all individuals who find themselves in uncertain times facing legal proceedings of significant complexity. The evidence is also to the effect that members of the group have little means to pursue representation and are unable to afford proper legal representation at this time. The Monitor already has very extensive responsibilities as reflected in paragraph 30 and following of the Initial Order and the CCAA itself and it is unrealistic to expect that it can be fully responsive to the needs and demands of all of these many individuals and do so in an efficient and timely manner. Desirably in my view, Canadian courts have not typically appointed an Unsecured Creditors Committee to address the needs of unsecured creditors in large restructurings. It would be of considerable benefit to both the Applicants and

the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.

[25] The second basis for objection is that the LP Entities are not permitted to pay any of the legal, financial or other advisors to any other person except as expressly contemplated by the Initial Order or with consent in writing from the LP Administrative Agent acting in consultation with the Steering Committee. Funding by the LP Entities would be in contravention of the Support Agreement entered into by the LP Entities and the LP Senior Secured Lenders. It was for this reason that the Monitor stated in its Report that it supported the LP Entities' refusal to fund.

[26] I accept the evidence before me on the inability of the Salaried Employees and Retirees to afford legal counsel at this time. There are in these circumstances three possible sources of funding: the LP Entities; the Monitor pursuant to paragraph 31 (i) of the Initial Order although quere whether this is in keeping with the intention underlying that provision; or the LP Senior Secured Lenders. It seems to me that having exercised the degree of control that they have, it is certainly arguable that relying on inherent jurisdiction, the court has the power to compel the Senior Secured Lenders to fund or alternatively compel the LP Administrative Agent to consent to funding. By executing agreements such as the Support Agreement, parties cannot oust the jurisdiction of the court.

[27] In my view, a source of funding other than the Salaried Employees and Retirees themselves should be identified now. In the CMI Entities' CCAA proceeding, funding was made available for Representative Counsel although I acknowledge that the circumstances here

are somewhat different. Staged payments commencing with the sum of $25,000 may be more appropriate. Funding would be prospective in nature and would not extend to investigation of or claims against directors.

[28] Counsel are to communicate with one another to ascertain how best to structure the funding and report to me if necessary at a 9:30 appointment on March 22, 2010. If everything is resolved, only the Monitor need report at that time and may do so by e-mail. If not resolved, I propose to make the structuring order on March 22, 2010 on a nunc pro tunc basis. Ottawa counsel may participate by telephone but should alert the Commercial List Office of their proposed mode of participation.

Pepall J.

Released: March 5, 2010

CITATION: Canwest Publishing Inc., 2010 ONSC 1328
COURT FILE NO.: CV-10-8533-00CL
DATE: 20100305

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

REASONS FOR DECISION

Pepall J.

Released: March 5, 2010

TAB 15

CITATION: In the Matter of The Body Shop Canada Limited, 2024 ONSC 3871
ESTATE NO.: BK-24-03050418-0031
COURT FILE NO.: BK-31-3050418
DATE: 20240704

ONTARIO - SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF THE BODY SHOP CANADA LIMITED, IN THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

RE: The Body Shop Canada Limited

BEFORE: Peter J. Osborne J.

COUNSEL: *Natalie Renner, Natasha MacParland and Chenyang Li*, for The Body Shop Canada Limited

Andrew Hatnay, Abir Shamim and James Harnum, for Stephanie Hood and other terminated employees

David Bish, for Cadillac Fairview Corporation Ltd.

Linda Galessiere, for various landlords

Jane Dietrich and Alec Hoy, for the Proposal Trustee

Josh Nevsky, Proposal Trustee

HEARD: July 4, 2024

ENDORSEMENT

Representative and Representative Counsel for Terminated Employees: Relief Sought and Positions of the Parties

[1] Ms. Stephanie Hood seeks an order appointing her as Representative of all terminated employees of The Body Shop Canada Limited ("TBS Canada" or "the Company") who were employed by TBS Canada and terminated on or about March 1, 2024 and afterward (the "Terminated Canadian Employees") and who are owed and have claims in respect of termination and severance pay, health benefits, and/or other amounts (the "Claims"). She asks to be made the Representative in this *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), proceeding or in any other insolvency proceeding in relation to TBS Canada.

[2] Ms. Hood also seeks an order appointing Koskie Minsky LLP as Representative Counsel to the Terminated Canadian Employees and directing that the mandate of Representative Counsel be as set out in the Notice of Motion. This mandate includes pursuing the application of *Wage Earner Protection Program Act* ("*WEPPA*") claims on behalf of the Terminated Canadian Employees, representing the Terminated Canadian Employees in the Proceedings, and advancing their Claims for voting and distribution purposes in this or any other insolvency proceeding involving TBS Canada.

[3] Finally, Ms. Hood seeks as terms of the proposed order specific terms providing that:

a. all Terminated Canadian Employees will be represented by Representative Counsel unless they opt out of representation by that firm within a fixed period of time; and

b. neither the Representative nor the Representative Counsel shall have any liability in relation to the fulfilment of their proposed respective duties in carrying out the provisions of the proposed order, except for claims of gross negligence or wilful misconduct.

[4] The motion materials as filed provided that the opt out period within which Terminated Canadian Employees were required to opt out of representation by Representative Counsel was seven days. They also provided that the fees and disbursements of Representative Counsel were to be paid by the Company.

[5] The Motion was opposed by TBS Canada, various stakeholders, including landlords, and by the Proposal Trustee.

[6] Given the objections of various stakeholders to the relief sought, and in particular to the terms of the proposed order set out above (among others), proposed Representative Counsel advised the Court at the hearing of this motion that the relief sought was being amended to provide that the opt out period would be extended to 30 days, and that fees and disbursements of Representative Counsel were no longer sought to be paid by the Company or the estate. Proposed Representative Counsel advised that, if appointed, Representative Counsel may in the future seek court approval of fees to be paid from amounts otherwise payable to Terminated Canadian Employees, but that in no event would such fees be sought from the Company or the estate.

[7] With those two amendments to the relief sought, TBS Canada and the Proposal Trustee advised that they took no position on whether the Court ought to exercise its discretion to appoint the Representative and Representative Counsel, subject to two caveats. First, they maintained their position that the relief sought was unnecessary in this proceeding and would lead to unnecessary expense, even if that expense was borne by the employees themselves, such that the balance of convenience did not favour the relief sought. Second, if the relief was granted, they maintained their objections to the immunity from liability sought by proposed Representative Counsel.

[8] For the reasons that follow, the motion is dismissed.

The Test

[9] This Court has the authority to appoint representatives and representative counsel to terminated employees in insolvency proceedings: subsection 183(1) of the *BIA*. Subsection 126(2) of the *BIA* expressly contemplates the appointment of a "court-appointed representative" for "workers and others employed by the bankrupt" with respect to preparing a group Proof of Claim for all employees.

[10] Rule 10.01 of the *Rules of Civil Procedure* describes the proceedings and circumstances in which a representation order may be made.

[11] Justice (now Chief Justice) Morawetz of this Court has held that Representative Counsel should be appointed to enable vulnerable stakeholders (in that case, employees and retirees) to meaningfully participate in CCAA proceedings that directly affect them: *Nortel Networks Corporation (Re)* (2009), 55 C.B.R. (5th) 114 (Ont. S.C.) ("*Nortel*"), at paras. 13-16.

[12] That approach was followed by this Court in *CanWest Publishing Inc. (Re),* 2010 ONSC 1328, 65 C.B.R. (5th) 152 ("*CanWest*"), at paras. 23-24 (and this approach has been followed in other *CCAA* cases[1]).

[13] It is preferable that a representation order be issued early in the proceedings for the benefit not only of the directly affected employees and retirees, but indeed for all stakeholders. Such orders are appropriate even where there is a possibility that the individuals in issue may be unsecured creditors whose recovery may prove to be nonexistent and that, ultimately, there may be no claims process for them: *CanWest* at paras. 23 – 24.

[14] Similar representation orders have been made under the *BIA*: see *Foodora Inc.*, (8 July 8 2020), Toronto, No. BK-31-2641224 (Ont. S.C.); *The RedPin.com Realty Inc.* (11 September 2008), Toronto, No. CV-18-59964400CL (Ont. S.C.); and *Roman Catholic Episcopal Corporation of St. John's* (21 February 2022), No. 24092 (N.L. S.C.).

[15] Justice Pepall (as she then was) summarized in *CanWest*, at para. 21, the appropriate factors to be considered in a determination of whether a representation order is appropriate:

a. the vulnerability and resources of the group sought to be represented;

b. any benefit to the companies under CCAA protection;

c. any social benefit to be derived from representation of the group;

d. the facilitation of the administration of the proceeding and efficiency;

e. the avoidance of multiplicity of legal retainers;

[1] See, for example, *Target Canada Co. (Re),* 2015 ONSC 303, 22 C.B.R. (6th) 323, at paras. 60-61*; U.S. Steel Canada Inc. (Re),* 2014 ONSC 6145, 20 C.B.R. (6th) 116, at paras. 34-42; *Catalyst Paper Corporation (Re),* 2012 BCSC 451, 89 C.B.R. (5th) 292; *Fraser Papers Inc. (Re),* 2009 CanLII 55115 (ON SC); *Hollinger Canadian Publishing Holdings Co. (Re),* 2010 ONSC 4269, at para. 5; and *In the Matter of the Proposal of Metroland Media Group Ltd*., 2023 ONSC 5805 ("*Metroland*").

f. the balance of convenience and whether it is fair and just including to the creditors of the estate;

g. 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

h. the position of other stakeholders and the Monitor.[2]

Analysis of Factors as applied to this Case

[16] The background for, and context of, this bankruptcy proceeding are set out in my earlier endorsements in this matter. Defined terms in this Endorsement have the meaning given to them in those earlier endorsements and/or the motion materials, unless otherwise stated.

[17] TBS Canada filed a Notice of Intention to make a Proposal following on unforeseen steps taken by its UK parent to complete a cash sweep of the accounts of TBS Canada, thereby eliminating instantly all of its liquidity while at the same time failing to remit payment for amounts owing to the vendors, suppliers, and landlords of TBS Canada. The effect on TBS Canada of those steps was immediate and profound: it could not continue to carry on business in the circumstances, closed 33 retail stores (approximately one third of the total stores), and suspended online sales.

[18] One of the unfortunate results of all of this was that approximately 220 Canadian employees were terminated. Of those, approximately one quarter were head office salaried employees and approximately three quarters were store level employees paid on an hourly basis.

[19] Of the Terminated Canadian Employees, 38 (including the proposed Representative Ms. Hood), have already retained the firm of proposed Representative Counsel.

[20] Collectively, the Terminated Canadian Employees have claims in respect of severance pay, vacation pay and other benefits, in the approximate amount of $2.1 million.

[21] Despite the able submissions of proposed Representative Counsel, who is amply qualified to perform that role in an appropriate case, I am not persuaded that the *CanWest* factors are satisfied here.

[22] In my view, this case is distinguishable on its facts from those on which the proposed Representative relies. In particular, and while I readily acknowledge the very real impact of the terminations on those employees and their families, this proceeding, and the claims or potential claims of the Terminated Canadian Employees, are at present, and are anticipated to continue to be, relatively straightforward. This is so even if TBS Canada is granted continuing creditor protection pursuant to the *CCAA* rather than in this NOI Proceeding.[3]

[23] I am not persuaded that on the particular facts of this case, there will be any material savings of cost or time or that the process will be simplified or streamlined. Importantly, I am not persuaded

[2] *CanWest*, at para 21. See also *Nortel*, at paras. 7, and 13-15.

[3] That anticipated motion for protection under the *CCAA* is the reason the moving parties seek the representation order in this proceeding, "or in any other insolvency proceeding involving the Company".

that any of the Terminated Canadian Employees will be prejudiced by the absence of a Representative or Representative Counsel or that an analysis of the CanWest factors, considered holistically and in the aggregate, favours the appointment of a Representative or Representative Counsel.

[24] I pause to observe what in my view is obvious from *CanWest* itself and the numerous subsequent cases that have considered that decision and the issue: the factors enumerated by Pepall J. (as she then was) are neither exhaustive nor mandatory. Factors not enumerated in *CanWest* may be relevant to the analysis in a particular case, and each and every one of the CanWest factors need not be satisfied before the court can conclude that the appointment of Representative Counsel may be appropriate. Rather, as Pepall J. stated, the factors enumerated are considerations in what is to be a holistic analysis informed by the particular circumstances of each case.

[25] Moreover, in this case, counsel for the moving parties made vigourous submissions with respect to the two terms of the proposed order challenged by the company, the Proposal Trustee and the other stakeholders as being inappropriate, even if the representation order were made: expansive immunity from liability for the Representative and Representative Counsel, and a mandatory opt-out mechanic for the Terminated Canadian Employees, rather than an opt-in structure. Counsel for the moving parties submitted that each of these terms was critical to the relief sought, such that if this Court were not inclined to grant the proposed order with both of those terms included, the terms of representation would be ineffective and unworkable, such that that Court should dismiss the motion altogether.

[26] While I do not agree that a representation order can be or is ineffective and unworkable without these terms in an appropriate case, I would not be prepared to grant them in this particular case, even if I were otherwise persuaded that a representation order was appropriate.

[27] The proposed order would require Terminated Canadian Employees to proactively opt out of joint representation (now within 30 days), failing which they would be deemed to be represented by the Representative and Representative Counsel and, effectively, be "bound as part of the class". The company, the Proposal Trustee and other stakeholders such as the landlords, submit that the opposite mechanism should be imposed: Terminated Canadian Employees should have the ability to opt in if they elect to do so, but should not be compelled to do so.

[28] I recognize that there are many insolvency cases (both NOI and *CCAA* proceedings) in which Representative Counsel has been appointed, and in which proposed class or group members have been required to opt out, failing which, by default, they were included in the group or class. I also recognize and agree with the submission made by counsel for the moving parties to the effect that in many cases, this makes good sense, ensuring that the class or group can be bound by positions taken and determinations made in the proceeding so that the efficiencies and benefits that are said to be the rationale for such an order in the first place can actually be realized.

[29] An opt-out mechanic may also be appropriate in circumstances where the fees of representative counsel are being borne by the company: in exchange for incurring that cost, the company wants the benefit of the default of inclusion in the class or group. That factor falls away where the company is not bearing those costs.

[30] However, that is not this particular case. Here, the universe of potential class members is relatively small (approximately 220), of which approximately one seventh have already "opted in" by choosing individually to retain the proposed Representative Counsel. The others have not elected to do so. Interestingly, the evidence is that very few of them have even made inquiries about their claims or potential claims to the company or to the Proposal Trustee, notwithstanding the ability to do so through promoted websites, contact telephone numbers and other means.

[31] Moreover, the evidence on this record suggests that the claims or potential claims of the Terminated Canadian Employees are and will be relatively straightforward. The company is not currently anticipating further headcount reductions, nor has it proposed or implemented any changes to the terms and conditions of employment of the current employees, other than making retention payments to certain key employees.

[32] Most of the Terminated Canadian Employees did not have claims for accrued vacation pay and other benefits. The claims they do have have been identified and calculated. Upon receiving the motion materials, counsel for TBS Canada delivered to proposed Representative Counsel a series of inquiries, including a request to identify the Former Employees who had already retained that firm, in order that TBS Canada could address their respective employment claim values. Proposed Representative Counsel did so, and also provided to the company a list of the employment claim calculations prepared by counsel and an accountant, whom they had retained.

[33] There are only two groups within the Terminated Canadian Employees: those paid hourly and those paid by salary. All were paid their wages or salary in accrued and unused vacation pay as at the date of their termination of employment. There are no unionized employees, no retirement or pension plans, and no defined-benefit plans. There are not, unlike in a number of the cases on which the Moving Parties rely, complex pension issues involving actuarial evidence or the calculation of present value pension obligations.

[34] Accordingly, the claims and potential claims relate to statutory termination and severance pay, pay in lieu of health benefits coverage, group RRSP contributions, vacation pay, bonuses, and, with respect to some employees, pay in lieu of reasonable notice at common law.

[35] TBS Canada, together with the Proposal Trustee, has performed its own calculations of those claims which, as noted above, are estimated to total approximately $2.1 million. In so doing, the company and the Proposal Trustee applied uniformly the rules and principles for retail employment claims established in the recent *Nordstrom Canada Retail Inc. (Re)*, Toronto, CV-23-00695619-00CL (Ont. S.C.), insolvency proceeding (which was managed by the Chief Justice of this Court) to assess the employee claims here.

[36] Perhaps ironically, the calculations performed by the company and the Proposal Trustee yield higher claims than those performed by proposed Representative Counsel in respect of 26 of the 38 former employees already represented. In the aggregate, and while recognizing that the assessments are provisional and preliminary on both sides, the delta between the two calculations is approximately $460,000, with the calculations performed by the company and the Proposal Trustee yielding the higher result. That delta represents almost 25% of the estimated aggregate claims in their entirety.

[37] Proposed Representative Counsel submits that it can provide assistance in this case in a number of ways. In my view, however, much of that work has already been done or is being done.

[38] As noted above, the preliminary assessment of the relevant claims has already been completed. The company held a town hall meeting on the Filing Date, provided termination letters to all former employees that gave them a single point of contact for any inquiries, and issued a press release with directions to source additional information concerning this proceeding, and information regarding claims. The Proposal Trustee has also created a dedicated webpage with information for former employees.

[39] Once the company makes final determinations about the claims of Terminated Canadian Employees, it intends to send to each such individual an employee claims package that includes a single, omnibus proof of claim reflecting the aggregate claim of all Former Employees; a letter explaining the single claim and advising recipients that they may (but are not required to) submit their own proof of claim; a summary of the Former Employee's individual entitlement and how it was calculated; and contact information for the Proposal Trustee to address any questions that the Former Employee may have in respect of the single claim or individual entitlement. The Proposal Trustee is committed to assisting the company in this process.

[40] In the result, and for these reasons, I am not satisfied that the process will be streamlined or simplified if the relief is granted (such as might be the case in a situation involving thousands of employees, or any large number of employees with unique and complex claims). I am also not persuaded that any Terminated Canadian Employees will be prejudiced if the relief is not granted. The company and the Proposal Trustee are able (and willing) to field inquiries from former employees, of which there have been very few to date. In any event, the company and the Proposal Trustee have put in place mechanics to deal with future inquiries and issues if they arise. They have also engaged with Service Canada in respect of possible *WEPPA* claims notwithstanding the position taken by Service Canada that such benefits are not available in the circumstances of this case.

[41] In addition, there is no evidence of significant diverging interests between or among different employee groups, such as was present in many of the cases relied upon by the moving parties in which Representative Counsel was appointed. In those cases, diverging interests included, for example, groups of unionized versus non-unionized employees, as well as complex pension value issues and obligations. In unionized environments, the issuance of representation orders can operate so as to equalize the playing field between unionized employees (who already have the benefit of group representation through their union by default) and nonunionized employees who might otherwise be unrepresented. See, for example: *CanWest*, *Nortel*, and *Metroland.*

[42] Finally, with respect to the proposed fees of Representative Counsel, the moving parties have been clear as noted above, that they will not seek to have any fees or disbursements borne by the Company or the estate. However, and not surprisingly, they advised that they may in the future seek Court approval for fees and disbursements from amounts otherwise payable to the Terminated Canadian Employees. It is expected that there will be distributions in the future.

[43] Proposed Representative Counsel has declined to reveal in the public record, or to disclose to the company and the Proposal Trustee, its proposed fee arrangements with respect to Terminated Canadian Employees it would represent if the proposed relief is granted.

[44] I accept the submission of the responding parties that where the claims of the individual Terminated Canadian Employees are expected to be relatively modest, the fact that they will likely be subjected to what is in effect a mandatory discount to the amounts they would otherwise recover (albeit undisclosed as to quantum) - which is the practical effect of the proposed opt-out mechanic - is another factor favouring an opt-in mechanic rather than an opt-out.

[45] Since the amounts at issue are modest, and particularly since the preliminary calculations from the Company are higher than those of the accountant retained by proposed Representative Counsel, and further that in any event, the claims are relatively straightforward, it is reasonable to expect that some employees may elect to receive the gross amount of their claim as offered by the company. Moreover, those who do not so elect are not prejudiced: they are free to opt-in to the representative group if they wish, or retain their own counsel, and in either event have the benefit of that advice.

[46] For all of these reasons, I am not persuaded that it would be appropriate to include as a term of the proposed order the opt out mechanic, even if it were granted. As noted above, the moving parties submit that there is no point in granting the motion without that term since, in their submission, many employees would not proactively opt in, and the benefits of having Representative Counsel would not be achieved.

[47] Finally, I accept the submission of the responding parties that the proposed scope of immunity from liability is too broad in this case. It would seek to immunize the Representative and Representative Counsel from any liability related to "its duties in carrying out the provisions of [the order sought]".

[48] The moving parties submit that such immunity, or limitation on liability, is routinely granted in representation orders made in insolvency or bankruptcy proceedings, as well as in class proceedings. They further submit that this term is also essential and they do not pursue the representation order at all if this is not a term included.

[49] They submit that such immunity is appropriate for Court officers, such as monitors, receivers, proposal trustees or representative counsel. Such immunity is common and well-founded for court officers such as monitors, receivers, and proposal trustees. Those officers of the Court have a mandate from, and report to, the Court. Monitors, for example, are often referred to as the "eyes and ears of the Court". While representative counsel clearly have duties to the Court (as indeed do all counsel), they are not Court officers in the same class as the other examples given. Their mandate flows, quite properly, from their retainer by their client group, and their principal fiduciary duty is owed to that group and includes acting in the best interests of its members.

[50] That is fundamentally different from the role of a Court officer, the duties of whom are owed to the Court, the process, and all of the stakeholders, to fulfil their mandate in a manner that is fair, reasonable and transparent. It is also fundamentally different from the role of *amicus curiae*, and I do not accept the submission of the moving parties that the role of Representative Counsel

is the same. It is not. *Amicus curiae* may have a mandate to represent a particular interest or perspective, but they are appointed by the Court and owe their duty to the Court and its process.

[51] Moreover, such immunity as is proposed here may well be appropriate in cases (examples in this Court and other courts are many) where the class or group being represented includes a large number of individuals who, as contemplated in Rule 10, are not ascertained or identified, and whom Representative Counsel is compelled to represent. Even if I were persuaded to grant some immunity in the particular circumstances of this case, I would accept the submission of the responding parties that such immunity should extend only to employee claims of those Terminated Canadian Employees who are compelled into representation by proposed Representative Counsel.

[52] The scope of the term, as sought by the moving parties, would immunize counsel from any liability associated with claims of its current clients - those who have voluntarily and individually elected to retain the firm. I do not see any basis to impose such a limitation on liability here, and thereby impose a term amending the bargain freely and voluntarily entered into by private parties.

[53] As noted above, the moving parties submit that without the Court-ordered immunity, they do not pursue the principal relief in any event.

[54] I also observe that Rule 10.01(1) on which the moving parties rely, provides that a representation order *may* be made by a judge (it is discretionary) appointing "one or more persons to represent any person or class of persons …who have a present, future, contingent or on ascertained interest in or may be affected by the proceeding and *who cannot be readily ascertained, found or served*." [Emphasis added].

[55] On its face, I am far from certain the Rule has any application to the particular circumstances of this case. Here, of the approximately 220 Terminated Canadian Employees, 38 have already retained the firm proposed as Representative Counsel. The balance cannot be described as persons or a class of persons who cannot be readily ascertained, found or served.

[56] Indeed, they are the opposite: they are an entirely known, discrete, and relatively small class of approximately 180 employees. The fact that they are known and can readily be found is illustrated by the fact that TBS Canada naturally has Human Resources records for each of its own employees, and also by the fact that the relief sought by the moving parties includes production from the company of this very contact information for each individual. The identity and contact information for every single member of the proposed group or class is readily available.

[57] In my view, Rule 10 does not assist the moving parties here.

Result and Disposition

[58] For all of these reasons, and having considered all of the *CanWest* factors as against the particular circumstances of this case, I am not persuaded that the proposed Representative or Representative Counsel should be appointed to fulfil those respective roles.

[59] Even if I were persuaded that such relief were appropriate, I am not persuaded that an opt-out mechanic or the proposed limitation on liability of the Representative and Representative

Counsel would be appropriate terms of such an order, and the moving parties submit that such terms are integral to the relief sought, to which there is no point if they are not included.

[60] Accordingly, the motion is dismissed. No costs were sought, and none are awarded.

[61] Order to go to give effect to these reasons.

Osborne J.

TAB 16

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mountain Equipment Co-Operative (Re),* 2020 BCSC 2037

Date: 20201221
Docket: S209201
Registry: Vancouver

In the Matter of the *COMPANIES' CREDITORS ARRANGEMENT ACT,* R.S.C. 1985, C. C-36, as amended

- AND -

In the Matter of 1077 HOLDINGS CO-OPERATIVE and 1314625 ONTARIO LIMITED

Petitioners

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment (Representative Counsel / Charge)

Counsel for the Petitioners, 1077 Holdings Co-Operative and 1314625 Ontario Limited:	H. Gorman, Q.C. S. Boucher
Counsel for the Monitor, Alvarez & Marsal Canada Inc.:	M.I.A. Buttery, Q.C. H.L. Williams
Counsel for Lorne Hoover, on his own behalf and on behalf of former MEC employees:	C. Gusikowski
Place and Date of Hearing:	Vancouver, B.C. November 24 and 27, 2020
Place and Date of Decision:	Vancouver, B.C. December 21, 2020

INTRODUCTION

[1] Lorne Hoover is a former employee of the petitioner, Mountain Equipment Co-operative ("MEC"). MEC has since changed its name to 1077 Holdings Co-operative.

[2] Mr. Hoover seeks an order appointing Victory Square Law Office ("VSLO") as representative counsel for all of MEC's former employees in relation to claims that will be advanced by them in this *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 ("*CCAA*") proceeding.

[3] In addition, Mr. Hoover seeks a court ordered charge in the amount of $85,000 against MEC's assets to secure that representation, with priority over all claims, save for certain court ordered charges that have already been court approved (such as the Administrative Charge, the D&O Charge and the KERP).

[4] MEC opposes this relief as unnecessary and unwarranted. The Monitor has raised similar concerns, also stating that the relief may be redundant and unnecessary in the circumstances.

BACKGROUND FACTS

[5] On October 2, 2020, I granted the Sale Approval and Vesting Order (SAVO) by which the Court approved a sale of substantially all of MEC's assets: *Mountain Equipment Co-Operative (Re),* 2020 BCSC 1586.

[6] On October 30, 2020, the sale transaction closed. Fortunately, the purchaser took over more retail locations than initially forecast, such that 21 of the 22 retail stores are to continue. In addition, the purchaser retained over 90% of MEC's active employees who worked in those locations across Canada.

[7] MEC received net sale proceeds of approximately $22.9 million. Further amounts (approximately $7.5 million) remain held in escrow pending final accounting adjustments to be completed under the sale.

[8] In November 2020, Mr. Hoover's application was filed. His application was heard with MEC's own applications toward addressing the next steps in this proceeding.

[9] On November 27, 2020, I granted a Claims Process Order (the "CPO") and a further order to enhance the Monitor's powers in relation to these proceedings (the "Enhanced Powers Order"). The Enhanced Powers Order was necessary because of steps taken by MEC following the sale. MEC terminated all of its management personnel effective November 30, 2020. In addition, MEC's board of directors intended to resign and those resignations were to become effective immediately after the granting of this order.

[10] The Enhanced Powers Order allows the Monitor to assume responsibility for the administration of the remainder of MEC's assets and importantly, the administration of a Claims Process.

THE CLAIMS PROCESS

[11] Under the Enhanced Powers Order, the Monitor was authorized to initiate and administer the Claims Process. The Monitor anticipates that the Claims Process will involve a determination of a variety of claims, including the substantial claims of landlords whose leases were disclaimed and employees' claims arising from their termination.

[12] The features of the Claims Process, as established by the CPO, are:

a) Claims affected by the CPO will be all Pre-filing Claims, Restructuring Period Claims, Employee Claims and D&O Claims. The Claims Process will not affect certain claims not relevant to this application;

b) By December 11, 2020, the Monitor will deliver Claims Packages and Employee Claims Packages to all known Claimants and Employee Claimants, respectively;

c) The Employee Claims Packages will include MEC's calculations of each Employee Claim and, if available in MEC's records, any relevant employment contract. A negative process will be in place such that an affected employee will only be required to file any materials if they dispute MEC's proposed assessment of their claim;

d) In the usual fashion, the Claims Process will be widely advertised in national papers and on the Monitor's Website;

e) Claimants with Pre-filing Claims and D&O Claims, and Employee Claimants who dispute their assessed Employee Claims, will have until February 10, 2021 (the "Claims Bar Date") to file Proofs of Claim or D&O Proofs of Claim with the Monitor;

f) Claimants with Restructuring Period Claims will have until the later of (i) 45 days after the date on which the Monitor sends a Claims Package with respect to a Restructuring Period Claim and (ii) the Claims Bar Date;

g) The Monitor shall review all Proofs of Claim and D&O Claims in consultation with MEC and the Directors and Officers named in respect of any D&O Claim, and shall accept, revise or reject each Claim;

h) If the Monitor intends to revise or reject a Claim, the Monitor shall send a Notice of Revision or Disallowance (NORD) to the Claimant or Employee Claimant by no later than March 22, 2021, unless otherwise ordered by this Court on application by the Monitor;

i) Any Claimant or Employee Claimant who intends to dispute a NORD shall deliver a Notice of Dispute of Revision or Disallowance to the Monitor within 30 days of receiving the NORD;

j) The Monitor may refer any Claims to Herman Van Ommen, Q.C., the Claims Officer, or the Court, for adjudication at its election by sending written notice to the Claimant or Employee Claimant; and

k) For any Claims adjudicated by a Claims Officer, the Claimant, Employee Claimant, Monitor or Petitioners may file a notice of appeal of the Claims Officer's determination within ten days of receiving notice of the same. Appeals will be conducted as true appeals and not as hearings *de novo*.

[13] Approximately 210 of MEC's employees were terminated after the commencement of these *CCAA* proceedings. This group included 103 head office staff and 107 retail staff, all of whom received outstanding wages, vacation pay and benefits to the date of termination. Certain former MEC employees were terminated prior to the commencement of these *CCAA* proceedings but were on salary continuance. MEC and the Monitor expect that most of these employees will have claims for unpaid severance.

[14] In its Fourth Report dated November 23, 2020 (the "Fourth Report"), the Monitor indicates that MEC's management has already undertaken significant efforts to prepare a preliminary calculation of the severance and termination amounts owing to former employees, with oversight and input from the Monitor. This would include an assessment of the applicable provincial statutory requirements (including those arising from any group terminations), which the Monitor states would apply to the majority of these employees. The Monitor considers that approximately 34 employees are entitled to contractual and/or common law notice.

[15] MEC's assessments of all the former employee claims will be included in the Employee Claims Packages that each of them will receive and review. As above, if any employee disputes MEC's assessment of his/her claim amount, the claim will be reviewed by the Monitor and, if necessary, determined by the Claims Officer or the Court.

[16] Although uncertain at this point, the initial indications are that the unsecured creditors could receive between 30%-50% of their claims.

REPRESENTATIVE COUNSEL

[17] Mr. Hoover was employed by MEC for just over 21 years. He was terminated on October 14, 2020. He believes that one or more contracts governed his terms of employment. He states that he is uncertain as to his contractual status.

[18] Mr. Hoover's status in relation to the remainder of MEC's other terminated employees arises from a Facebook group called "Former MEC Staffers". This Facebook group is comprised of approximately 85 members who purport to be former MEC employees.

[19] Mr. Hoover states that he is unaware of any other organized group of former MEC employees with claims who are involved in the *CCAA* proceedings. Mr. Hoover has been told that the Administrator of the Facebook group has advised the members of his application before the Court. Mr. Hoover has been advised that no member of the Facebook group has expressed concern about the application.

[20] Mr. Gusikoski, counsel for Mr. Hoover from VSLO, has been in contact with approximately 35 former employees who are members of the Facebook group, many of whom have no written contracts. In addition, Mr. Gusikoski has reviewed the contracts of many employees. Since the filing of Mr. Hoover's application, Mr. Gusikoski has received numerous emails from former MEC employees, expressing their wish that he represent them in these proceedings.

[21] Mr. Gusikoski is of the view that there is a complex array of legal and factual issues likely to arise in relation to the employee claims to be addressed in the Claims Process. Those issues include:

a) Employment Standards: He agrees with MEC that the provincial employment standards legislation applies to employees who have

been terminated, and that group termination provisions may be applicable;

b) Common Law Severance: He agrees with MEC that there are former employees who will be entitled to file claims for common law severance. There is no dispute that the issue will be a determination of what is "reasonable notice" in the circumstances, as that phrase is discussed in the case authorities. It is uncontroversial that the assessment of reasonable notice will be highly fact specific in relation to each former employee;

c) Contractual Severance Provisions: He asserts that there are a variety of contractual terms dealing with severance. Many contractual provisions are simply to the effect that the notice period is as set out in the legislation, however, he asserts that common law severance may still be available. Other contractual provisions refer not only to the legislated minimum notice periods, but also further entitlements (i.e. Separation Payments). He similarly takes the view that this language only sets a further minimum entitlement without waiving an employee's right to pursue damages at common law; and

d) Application of Written Contracts: He raises other issues that may also become relevant to an employee's claim. The first issue raised is whether any contract is even in force, arising from the contention that a number of employees were not offered fresh consideration when they signed a new contract in mid-employment. The second issue relates to long-term employees and whether the changed nature of their employment over time has negated the legal effect of termination provisions in an earlier employment contract, citing *Rasanen v. Lisle-Metrix Ltd.* (2001), 17 C.C.E.L. (3d) 134 at para. 41 (Ont. S.C.J.); aff'd (2004) 33 C.C.E.L. (3d) 47 (Ont. C.A.).

Legal Principles for Appointing Representative Counsel

[22] Appointment of representative counsel in *CCAA* proceedings is not entirely unusual. There is no dispute here that the Court has jurisdiction to appoint representative counsel under its general power set out in s. 11 of the *CCAA*, if such relief is appropriate in the circumstances.

[23] Many case authorities discuss the factors to be considered by the courts in determining whether the appointment of representative counsel is appropriate. Generally, these cases refer to the well known non-exhaustive factors set out in *Canwest Publishing Inc. (Re)*, 2010 ONSC 1328 at para. 21, as adopted by this Court in *Re League Assets Corp. (Re)*, 2013 BCSC 2043 at para. 72:

> - 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.

[24] For the purposes of this application, analysis of the *Canwest Publishing* factors can be addressed under three broad categories: (1) the former employee group, (2) the benefit of their representation in this proceeding, and (3) the balancing of stakeholder interests.

The Former Employee Group

[25] Mr. Hoover submits that the former employees are a financially vulnerable group dispersed throughout Canada, but concentrated in western Canada. He confirms that the former employees have severance claims, only a portion of which are expected to be returned. He asserts that the former employees are disproportionately affected by MEC's *CCAA* proceedings, in that they have not only

suffered immediate losses, but loss of income going forward. Mr. Hoover says that the former employees have little financial resources available to fund any "sophisticated" defence of their interests. He says that a "social benefit" will be derived from ensuring this vulnerable group of employees is represented by legal counsel.

[26] MEC asserts that there is insufficient evidence to support that these former employees could not retain a law firm, either individually or as a group. However, later emails sent by many former MEC employees to VSLO mention that the termination of their employment has caused financial stress in their lives. This is not entirely surprising, whether this is a short-term or longer-term situation.

[27] Certainly, the negative economic consequences of the COVID-19 pandemic have caused significant hardship to many Canadians, despite the government support available to them. For the purpose of this application, I accept that Mr. Hoover has established some evidence to the effect that, generally speaking, the former employees have been left in a vulnerable position arising from the loss of their jobs.

[28] Courts have appointed representative counsel in numerous *CCAA* proceedings for current and/or former employees and retirees: see *Nortel Networks Corp. (Re)* (2009), 53 C.B.R. (5th) 196 at paras. 10–16 (Ont. S.C.J.); *Fraser Papers Inc. (Re)*, 2009 CanLII 55115 and 2009 CanLII 63589 (Ont. S.C.J.); *Target Canada Co. (Re)*, 2015 ONSC 303 at para. 61. However, the circumstances in those cases were significantly different than those here. An important factor in those restructurings was that literally thousands of former and current employees or retirees sought representation in the early days of those complex *CCAA* proceedings.

[29] In *1057863 B.C. Ltd. (Re),* 2020 BCSC 1359 at paras. 122-129, this Court appointed the union to represent hundreds of laid-off employees in the early days of the Northern Pulp restructuring.

[30] In *Canwest Publishing*, a smaller number (75) of former employees and retirees sought representation. Justice Pepall (as she then was) agreed that a representation order was appropriate because, among other factors, the vulnerable employee group was facing what was to be a complex *CCAA* restructuring, particularly given the sales process that was underway.

[31] The circumstances relating to MEC and this Claims Process represent a far different scenario than was addressed in the above cases. At present, what remains to be advanced is the distribution of the monies in the Monitor's hands in accordance with the Claims Process. Of particular note are the following factors in relation to the Employee Claimants:

a) There is no reason to question the good faith efforts of MEC's management to gather the applicable facts and documents and assess what MEC considers to be the termination entitlement of each employee. This effort is subject to the involvement and oversight of the Monitor;

b) The majority of the 210 employees will be subject to the applicable provincial legislation, where the calculation of severance entitlement, including in the event of a group termination, is fairly straightforward;

c) With respect to the former employees who have contracts or are entitled to common law notice, their entitlement will be based on the specific facts and circumstances unique to them, indicative of a unique analysis, as opposed to common issues to be advanced on behalf of all or most of them;

d) It remains to be seen whether common issues arise with respect to the former employees that would justify joint representation on the contract or common law issues;

e) Mr. Hoover argues that "information asymmetries" between employees would lead to obvious and manifest unfairness. However, there is no

evidence that the employees who are clearly not subject to the legislation could not band together to fund joint representation to present common or individual issues, whether through VSLO or another law firm: *Urbancorp Inc. (Re)*, 2016 ONSC 5426 at para. 16;

f) It may be that VSLO's representation of all the employees would present a conflict, since advocating for one employee may increase his or her claim to the detriment of others who will share in the same pot of monies: *Urbancorp* at para. 20;

g) Mr. Hoover argues that many employees are or may be unaware of significant legal interests they have without representation. However, Mr. Gusikoski has already been in contact with 35 employees. In addition, copies of Mr. Hoover's application materials, which identify various legal issues, can be posted on the Facebook group or other social media; and

h) Mr. Hoover also argues that some employees may not be aware of common law severance rights, which could increase their claim significantly. Again, VSLO and/or Mr. Hoover can identify the issues for the Facebook group and identify sources of legal resources for use by them, just as many self-represented parties use in other litigation before the Court.

Benefit of Representation in this Proceeding

[32] Many of the above factors are brought into sharper focus in relation to whether there is some benefit in appointing representative counsel to promote the efficient administration of these proceedings for the benefit of all stakeholders.

[33] This proceeding is not in its early days; rather, it is in its final days as the Claims Process begins toward determining the proportionate sharing of the remaining monies as between the creditors. The Claims Process is a comprehensive one that will lead unsecured creditors toward that final outcome. Each former

employee will have a full opportunity to either accept MEC's proposed assessment of his/her claim or contest that assessment within the specific procedures set out in the CPO.

[34] In that event, I agree with MEC's counsel that there seems to be little utility in appointing representative counsel even before that process is underway.

[35] Mr. Hoover submits that VSLO possesses specialized expertise in labour and employment law matters and, of that, I have no doubt. Mr. Hoover also submits that VSLO can work with MEC's counsel or the Monitor to sharply consolidate issues and streamline dispute resolution processes before the Claims Officer. However, it is far from clear what issues may need to be "consolidated" and it is far from clear whether there will be need for counsel to act for employees to streamline the process to determine their claims if they dispute MEC's assessment.

[36] Mr. Hoover argues that the former employees have not been involved with legal counsel in these proceedings. Furthermore, Mr. Hoover says that they have not been provided with timely advice about the *CCAA* proceedings which relate directly to their interests. That may be the case, but former employees have full access to the materials filed in these proceedings which have been posted online from the outset. I expect that, in large part, many of the stakeholders, including the former employees, have been awaiting the outcome of the sale process to see what amounts might be available to them as unsecured creditors.

[37] Mr. Hoover cites *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65 at paras. 9 and 16 as confirming that representative counsel can provide effective communication to stakeholders regarding the *CCAA* proceedings and ensure that their interests are brought to the attention of the Court.

[38] As I see it, MEC and the Monitor are very much alive to the interests of the Employee Claimants and the Claims Process has been designed to specifically address their unique interests. Further, leaving aside Mr. Hoover's Facebook group,

the Employee Claims Package that each of them will receive will describe in detail the stage of these proceedings and how their claims are to be addressed.

[39] Mr. Gusikoski asserts that many former employees are entitled to both statutory and contractual/common law notice periods. He asserts that many of the written contracts have similar legal issues which could apply to many participants, which could be more efficiently grouped and adjudicated within the Claims Process in a manner most efficient to the resolution of all issues. As such, Mr. Hoover argues that granting a representative counsel is the *only way* in which to ensure the former employees' claims are determined in the fairest, consistent and efficient manner possible.

[40] At paras. 62-63 in *Nortel Networks*, in assessing appointment of representative counsel, the court considered the "commonality of interest" test that is commonly referred to in respect of classification of creditors. Justice Morawetz (as he then was) found that the former employees had a "commonality of interest" that could benefit the proceeding by the appointment of one representative counsel.

[41] Mr. Hoover refers to authorities where representative counsel were appointed in relation to claims processes. In *Target Canada Co. (Re)*, 2015 ONSC 1028 at paras. 32-40, the court appointed, with limited funding, counsel for certain franchisees who were facing "similar circumstances". The role of counsel in that event was with respect to several matters, one of which related to participating in the claims process. In *TBS Acquireco Inc. (Re)*, 2013 ONSC 4663 at paras. 33-37, the court declined any appointment and funding to allow terminated employees to advance *Wage Earner Protection Program* claims.

[42] I accept that there may be circumstances to justify appointing representative counsel for the purpose of pursuing claims in a claims process. Mr. Hoover's arguments may be valid at some point in the Claims Process. However, until the Claims Process is underway and the former employees respond, it is completely unknown as to which of them might dispute MEC's assessment and, if so, on what

basis. In that event, it is largely premature as to whether any common issues will emerge that may support a representative counsel appointment.

[43] I have no doubt that the Monitor will be attuned to any common issues as may emerge in the Claims Process and will consider the most efficient manner of adjudicating those issues. At that time, it may be the case that representative counsel makes sense to coordinate the former employees' arguments so as to avoid a multiplicity of retainers within the Claims Process.

Balancing of Stakeholder Interests

[44] MEC filed a Response opposing the appointment of representative counsel and the granting of a charge in favour of representative counsel. In addition, the Monitor filed a Response indicating that it was not supportive of this relief. No other stakeholder took a position on this application.

[45] The Monitor's position was addressed in more detail in the Fourth Report. At para. 11.5, the Monitor states that it views the relief sought as possibly redundant and not necessary in the circumstances. The Monitor states, in part:

> d) the Monitor, as an independent officer of the Court, will be adjudicating claims and any disputed claims that are unable to be settled will be referred to the independent Claims Officer and/or the Court for resolution. Any third-party legal counsel engaged to prepare and calculate the Former Employees' claims when a negative claims process is being administered by the Court's officer is duplicative and impacts potential recoveries to the estate and affected creditors including non-former employee claimants; and
>
> e) the Employee Claims are unsecured claims that should be treated equitably with other unsecured claims in the Claims Process, of which such claimants (primarily landlord claims in respect of disclaimed leases) have not been granted a charge for their respective legal counsel.

[46] Mr. Hoover takes great umbrage at the Monitor's stated position, either in the Response or the Fourth Report, asserting that the Monitor has "entered the fray" by failing to act impartially in relation to the former employees. In addition, Mr. Hoover asserts that, in doing so, the Monitor has acted outside the scope of its duties as prescribed by this Court.

[47] The comments found in *Ernst & Young Inc. v. Essar Global Fund Limited*, 2017 ONCA 1014 are well accepted in describing the role of a monitor in *CCAA* proceedings, in that:

> [109] . . . the monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the *CCAA* and its restructuring purpose.

[48] Having reviewed the Monitor's statements in context, I consider that Mr. Hoover's submissions on this point are misplaced. The Monitor has considered the particular circumstances of the former employees, but importantly, the Monitor has also considered the relief sought by them more generally in the present circumstances of this *CCAA* restructuring proceeding. To do so is entirely appropriate, since the interests of the former employees cannot be considered in isolation in terms of the balancing of interests of all stakeholders.

[49] As with many issues, the Monitor is uniquely situated to comment on the overall circumstances so as to assist the Court in the balancing exercise. Indeed, the very authorities that are cited by all parties here, including the former employees, as to the applicable test in appointing representative counsel (*Canwest Publishing*), specifically sets out that one factor to be considered is the position of the Monitor.

[50] The Monitor's comments and its position emphasize that the Claims Process has been put in place and is a comprehensive process for the determination of the claims to be advanced against MEC. As with other claims processes granted in *CCAA* proceedings, it is intended to afford an efficient and expeditious means of resolving claims, including those of the former employees, to allow distribution to the creditors as soon as possible.

[51] With the Enhanced Powers Order, the Monitor has assumed conduct of the Claims Process and has full access to MEC's books and records as may be relevant to that task. Further, the Monitor, as a court appointed officer, can be expected to address claims in a fair manner, including those relating to former employees.

[52] The Claims Process is intended to benefit all stakeholders, not just the former employees. Many other creditors will participate in the Claims Process without legal representation as they wish. The Claims Process is expected to be easily understood in terms of how the process works, and how disputes are to be raised and addressed. As noted by the court in *Urbancorp* at para. 18, it is a "normal process" for a Monitor to deal with claimants.

[53] In all of the circumstances, I am not convinced that a representative counsel appointment is appropriate at this time. If certain issues emerge in the Claims Process that might support a more coordinated resolution of common issues, either the Monitor or any of the former employees have leave to reapply for such relief.

REPRESENTATIVE COUNSEL CHARGE

[54] I will also address Mr. Hoover's request for a court ordered charge for representative counsel if I had acceded to his request for representative counsel and to address any future application that might arise.

[55] Mr. Hoover seeks a charge of $85,000 against MEC's property to secure what he expects will be VSLO's anticipated fees so as to allow for the former employees' "effective participation" in the Claims Process.

[56] Section 11.52(1)(c) of the *CCAA* allows the court to grant a charge on a petitioner's assets to secure payment of the legal fees and disbursements for representative counsel who may be appointed:

> 11.52(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> . . .
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> . . .

> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[57] The Court must be satisfied that the charge is necessary for the effective participation of representative counsel in the proceedings: *Urbancorp* at para. 14.

[58] Factors to consider in approving an administrative charge include those set out in *Canwest Publishing Inc. (Re)*, 2010 ONSC 222 at para. 54, as adopted by this Court in *Walter Energy Canada Holdings, Inc. (Re)*, 2016 BCSC 107 at para. 42:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwanted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and,
>
> (f) the position of the Monitor.

[59] MEC's business was large and complex, but that was in the past. Having now sold the business, MEC's interests are simply to administer a sum of money for distribution to its creditors under the Claims Process, now a role assumed by the Monitor.

[60] The Claims Process has been designed to provide as streamlined a process as possible for the former employees. The process is not complex or difficult.

[61] Mr. Hoover argues that, while the Monitor is a representative of the Court and has an obligation to all stakeholders, it does not have the time or resources to properly advise the former employees. I disagree and would respond that this is not a correct characterization of the Monitor's role in the Claims Process.

[62] The Monitor will have an impartial and important role in that process, and it is to be expected that the Monitor will provide assistance to all claimants, as necessary and appropriate. In that sense, I am of the view that the Monitor's comments about this relief being redundant and unnecessary have some merit given present

circumstances: *Homburg Invest Inc. (Arrangement relatif a)*, 2014 QCCS 980 at para. 100 (see factors a and b).

[63] In addition, MEC argues that the proposed charge for the former employees is unnecessary and would adversely affect MEC's other stakeholders, including its landlords, suppliers and vendors, and other unsecured creditors. Just as the Monitor has in this case, the monitor in *Urbancorp* argued that the court would be wrong to allow funding that was solely in the interest of one group of stakeholders (para. 18). This argument was accepted by Justice Newbould, who noted:

> [24] Estate funds should be spent for the benefit of the estate as a whole, not for the benefit of one group whose interests are contrary to the interests of the estate as a whole. . . .

[64] No other unsecured creditor or creditor group has sought funding from MEC's estate for their participation in the Claims Process. While certainly some of them will have more substantial resources than the former employees individually, certainly some of them will not.

[65] Further, it is difficult to assess the reasonableness of the quantum of the proposed charge. This is because it is difficult to say which of MEC's assessments might be contested and, if so, on what basis. For example, if only a few employees advance a dispute within the Claims Process, it will be apparent that estate resources are being spent on only a relatively small subset of stakeholders. This is arguably unreasonable, particularly since those funds would be spent to increase those few employees' slice of the pie to the detriment of others who do have the benefit of estate funded representation.

[66] In my view, weighing all the above factors leads me to conclude that, even if I had appointed representative counsel, the proposed charge to secure that representation is not appropriate in the present circumstances.

CONCLUSION

[67] Mr. Hoover's application is dismissed. Mr. Hoover and the Monitor have leave to bring this issue forward in the future, if further steps taken within the Claims Process dictate a further consideration of the issues.

"Fitzpatrick J."

TAB 17

COURT FILE NO.: 09-CL-7950
DATE: 20090527

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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**

E N D O R S E M E N T

[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.

[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.

[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

(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

(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

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.

[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

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

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.

> 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.

[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 18

SUPREME COURT OF NOVA SCOTIA
Citation: *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65

Date: 20190219
Docket: HFX484742
Registry: Halifax

In the Matter of:

The Application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies" and the "Applicant"), for relief under the *Companies' Creditors Arrangement Act*

REPRESENTATIVE COUNSEL DECISION

Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated **March 14, 2019**.
Judge:	The Honourable Justice Michael J. Wood
Heard:	February 14, 2019, in Halifax, Nova Scotia
Counsel:	Maurice Chiasson QC and Sara Scott, for the Applicants
	Elizabeth Pillon, Lee Nicholson, and Sharon Hamilton for the Monitor
	Raj Sahni, Ben Durnford and John Stringer, for an informal committee of users of the Quadriga platform
	Jeremy Dacks, Evan Thomas, Robert Purdy QC, and Michael Scott, for an informal committee of users of the Quadriga platform
	Gregory Azeff and Gavin MacDonald, for Parham Pakjou
	Brendan O'Neill, for Goodmans LLP

By the Court:

[1] On February 5, 2019, the Court granted the application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. ("the Applicants") for an initial order and stay under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*"). Ernest & Young Inc. was appointed as Monitor.

[2] The Applicants operated a platform to facilitate the purchase and sale of cryptocurrencies. As set out in the materials filed in support of the initial application, users of the platform are owed approximately $250,000,000. The total number of users was estimated to be 115,000.

[3] The sole officer and director of the Applicants passed away in December 2018 and, as of the end of January 2019, the majority of the Applicants' cryptocurrency assets had not been located. The resulting insolvency lead to the granting of the initial order on February 5, 2019.

[4] The Court has received competing motions by or on behalf of users of the Applicants' platform. They all seek essentially the same relief, which is:

1. appointment of a representative creditors committee of users;
2. appointment of representative legal counsel to act on behalf of affected users on the instructions of the representative committee; and
3. providing access to the existing administrative charge over the assets of the Applicants to secure payment of the reasonable fees and disbursements of the representative counsel.

[5] Appointment of representative counsel and stakeholder representative committees are not unusual in complex *CCAA* proceedings. The authority for doing so is found in s. 11 of the Act which reads as follows:

> **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.

[6] As stated in *Re Nortel Networks*, 2009 ONSC 3028, the Court has a wide discretion to appoint representatives under this provision. It is usually done where the affected group of stakeholders is large and, without representation, most members would be unable to effectively participate in the *CCAA* proceeding. Representative counsel can make the proceeding more efficient and cost effective for all parties by providing a clear mechanism for communicating with the stakeholders and avoiding a multiplicity of potentially conflicting retainers.

[7] In *Re Fraser Papers Inc.*, 2009 ONSC 6169, the Court described why it was prepared to appoint representative counsel for retirees and employees:

> 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. ...

[8] In *Nortel Networks*, the Court appointed representative counsel for employees and retirees because that vulnerable group had little means to pursue a claim in the complex *CCAA* proceedings. The Court described the benefit of such an order as follows:

> 13 … 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.

[9] There are two primary rationales given for the appointment of representatives and representative counsel in *CCAA* proceedings. The first is to provide effective communication with stakeholders and ensure that their interests are brought to the attention of the Court and other *CCAA* participants. The second is to bring increased efficiency and cost effectiveness to the proceeding as a whole. This latter objective can be attainted by streamlining notification to stakeholders through their representatives and eliminating the need for multiple counsel to be retained by individual stakeholders to represent their interests. The following judicial comments illustrate these principles:

> 53 … 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 accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims.
>
> (*Nortel Networks*)

> 24 ... It would be of considerable benefit to both the Applicants and the Salaried Employees and Retirees to have Representatives and representative counsel who could interact with the Applicants and represent the interests of the Salaried Employees and Retirees. In that regard, I accept their evidence that they are a vulnerable group and there is no other counsel available to represent their interests. Furthermore, a multiplicity of legal retainers is to be discouraged. In my view, it is a false economy to watch and wait. Indeed the time taken by counsel preparing for and arguing this motion is just one such example. The appointment of the Representatives and representative counsel would facilitate the administration of the proceedings and information flow and provide for efficiency.
>
> (*Re Canwest Publishing Inc.*, 2010 ONSC 1328)

> 38 Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.
>
> (*Re U.S. Steel Canada Inc.*, 2014 ONSC 6145)

[10] Representatives and representative counsel should not have an open-ended retainer to undertake any inquiry or investigation they may wish, particularly where the fees are to be paid out of the assets of the applicant company. The appointment is specifically for purposes of the *CCAA* proceeding and to ensure that the stakeholders' interests are effectively taken into account by the decision makers. In some cases there are specific limitations placed on the scope of the representative counsel appointment. For example, in *Canwest Publishing* the funding approved for representative counsel excluded any investigation of claims against the corporate directors of the applicant company.

[11] In cases, such as here, where there are competing applications for appointment of representatives, the Court must evaluate the proposals to determine which will best achieve the objectives described above. In *Fraser Papers* the Court considered factors such as proposed breadth of representation, the extent of counsel's mandate to act, their legal expertise, jurisdiction of practice, facility in French and English and estimated costs (see para. 12).

[12] In this case all counsel are members of local and national law firms, with extensive insolvency experience. Each has been contacted by a significant number

of users who support their appointment as representative counsel. All seek to be appointed on behalf of all affected users. In my view, what will determine who should be appointed as representative counsel is the manner in which they propose to approach their role and how that accords with the objectives of effective communication and efficiency.

[13] The role of representative counsel will differ depending upon the nature of the applicant company and the characteristics of the group of stakeholders to be represented. For example, acting on behalf of employees and retirees for large manufacturers such as Fraser Papers or U.S. Steel, would be very different than the affected users in this case. The Applicants have no physical office, no employees and the trading platform was run by one individual who engaged a handful of third party contractors. The business is currently suspended, and may never resume, although that remains to be determined. The biggest task for the Monitor will be to locate and recover the Applicants' assets.

[14] There are more than 100,000 affected users. They range from small creditors who are owed $100, to others who are owed many millions. Privacy is a great concern and many users do not wish to be publicly identified in any fashion. If the affidavits filed in support of the representation motions are indicative, a number of users profess to have technical expertise in cryptocurrencies and are interested in offering their services to the Monitor to assist in the asset investigation process.

[15] Perhaps because of the nature of the cryptocurrency world, there has apparently been a great deal of discussion in various social media and online forums about the Applicants and their difficulties. The affidavits filed in this proceeding, refer to speculation about what may have happened with the Applicants' assets.

[16] All of this leads me to conclude that the most important role for representative counsel is to provide accurate information and advice about the *CCAA* proceeding to all users, and to ensure that their legitimate interests are taken into account throughout the proceeding. It is not to undertake their own investigation with respect to the Applicants and their assets, that is the responsibility of the court appointed Monitor, who is required to provide written reports on the results of their work.

Nature of the Motions

[17] The three motions were brought on behalf of affected users and supported by individual affidavits. I will identify the motions by the law firms they nominate to act as representative counsel.

Bennett Jones/McInnes Cooper

[18] Bennett Jones would act as lead counsel and McInnes Cooper as local counsel to the committee of affected users, the members of which are to be identified by representative counsel. The committee and counsel were proposed to act as a "check and balance" on the companies activities and provide a mechanism to "develop restructuring alternatives and solutions".

[19] The initial brief filed in support of the motion describes the role of representative counsel as follows:

> 34. The participation of the Representative Counsel will be critical to ensure that the interests of the Affected Users are represented in the Companies' *CCAA* proceedings, and as described previously, will facilitate the restructuring of the Companies under the *CCAA*. As descried in the Robertson Affidavit, there are several complex factual, legal and financial issues that must be addressed in order to successfully restructure the business of the Companies. The knowledge and the essential legal services provided by the proposed Representative Counsel and other professionals that are the beneficiaries of the Administration Charge will be necessary in order to, among other things, properly investigate the operation and current state of Companies' assets, verify relevant legal and financial information, adequately represent (without an unwarranted duplication of roles) the interests of the Affected Users, and otherwise navigate these *CCAA* proceedings to completion.

Miller Thomson/Cox & Palmer

[20] The motion proposes to appoint Miller Thomson as lead counsel with Cox & Palmer as local counsel, to represent the proposed representative committee of users. The membership of that committee would include the moving party, Mr. Pakjou and additional members selected by him and representative counsel.

[21] The motion brief proposes that representative counsel perform the following functions:

- managing communications with users;
- acting as user liaison for the Monitor;
- advocating for user interests before the Court;

- identify potential conflicting interest amongst users; and
- advocating for user privacy.

[22] With respect to the fees of representative counsel, the brief says:

> 30. The Moving Party proposes that Representative Counsel Fees be subject to approval by this Honourable Court, having regard to the reasonableness of same in the performance of the mandate prescribed by this Honourable Court. As such, it is respectfully submitted that the most effective manner in which to minimize Representative Counsel Fees will be for this Honourable Court to carefully prescribe the duties and responsibilities of representative counsel in an Order.

Osler, Hoskin & Harcourt/Patterson Law

[23] Osler, Hoskin & Harcourt LLP would be lead counsel with Patterson Law as local counsel acting on behalf of a representative committee of users. That committee would be composed of the three users who filed affidavits in the motion and two others selected by them in consultation with the Applicants and the Monitor.

[24] The initial brief describes their proposed approach to the case as follows:

> 30(d) Approach to Case
>
> (i) The proposed committee members emphasize the importance of communication with Affected Users to dispel misinformation, reduce anxiety, and permit the proceedings to advance in an orderly and efficient manner. They have identified communication channels most likely to reach the Affected Users, and Osler and Patterson have the resources to ensure that accurate information is disseminated effectively and that Affected Users can easily communicate their views. This emphasis on communication, combined with the committee's and Osler's knowledge of cryptocurrency and blockchain technology, would assist the Monitor in communicating complex technical information to a disparate group of individuals.
>
> (ii) The proposed committee members have considerable technical expertise and relationships that may be of assistance to the Monitor and the Applicants. There are many others who wish to help. The proposed committee and its representative counsel can organize and focus any such assistance to ensure it is provided efficiently.

Positions of the Parties

Bennett Jones/McInnes Cooper

[25] At the hearing counsel indicated that they were supported by 181 users, whose claims totaled approximately $22,000,000. Both firms have significant *CCAA* experience and have already been working to advance the interests of the affected users, including appearing at the initial hearing.

[26] They have experience in communicating with diverse groups of stakeholders and disagree with the approach of some other counsel who suggest that applications such as Reddit and Telegram, should be used to provide information to users. They propose to use web sites and third party communication firms as they have in other large insolvencies.

[27] Counsel suggests that members of the users committee be identified by representative counsel in consultation with the Monitor.

[28] They agree with avoiding duplication of work already being done by the Monitor. It would not be their role to act as an "armchair quarterback" overlooking the Monitor's activities. They do not think it is appropriate to have an initial cap on fees of representative counsel because the scope of work is uncertain and the costs of returning to amend the cap in the future would not be warranted. Representative counsel has accountability to the Court and members of the user group.

Miller Thomson/Cox & Palmer

[29] This group has the support of 252 creditors with claims of approximately $15,000,000. They believe that representative counsel should be selected based upon a role that reflects efficiency, collaboration and cost effectiveness.

[30] The two firms both have extensive insolvency experience and will divide work based upon expertise with Cox & Palmer taking the lead on civil procedure and court appearances, and Miller Thomson on project management, communication and cryptocurrencies. The work would be organized to minimize the number of lawyers and Toronto counsel would only appear in court in Halifax if their expertise were required.

[31] Counsel observed that all of the professional fees being incurred were likely coming out of funds that would otherwise be available to the affected users and as a result should be minimized to the extent possible.

[32] Their communication plan includes, posting information in chat rooms and on social media. The rationale is that users are already discussing the Quadriga

issue in those places, and it is important to have accurate information available to them. With respect to fees, they propose specific limits on the scope of representative counsel's mandate and an initial cap on fees of $250,000 with an ongoing budget process.

Osler, Hoskin & Harcourt/Patterson Law

[33] Osler, Hoskin & Harcourt would be the lead firm, with Patterson Law providing local input with respect to civil procedure and litigation in Nova Scotia. Osler has significant experience in legal issues related to cryptocurrency and blockchains. They are supported by 134 users with claims in excess of $19,000,000.

[34] Their approach would be complimentary to, and not duplicative of, the work done by the Monitor, recognizing that the users would ultimately be responsible for the expenses. They would have no objection to a defined mandate for representative counsel, nor a cap on fees with the ability to seek modification. With the firm's existing expertise in technical issues, there would be no need to incur costs in familiarizing themselves with those matters.

[35] They believe communication through social media is necessary because that is the location where members of the users group can be found. They would use their experience in communicating with large investor groups in other cases.

Goodmans LLP

[36] Goodmans did not bring forward a motion, although Mr. O'Neill, on their behalf, provided written submissions and appeared at the hearing. He proposed a mechanism whereby the representative committee be established by the Court and Monitor after soliciting expressions of interest in membership. That committee should then have the responsibility of selecting representative counsel. The theory is that the users ought to have a say in which law firm will represent them.

The Applicants

[37] Mr. Chiasson emphasized the importance of having representative counsel appointed quickly and prior to the comeback hearing on March 5, 2019. He believed it was important to have input from the affected users in that process and advocated for immediate appointment of the representative committee using the

individuals who had filed affidavits in support of the three motions before the Court. That committee could then have input into the selection of representative counsel.

[38] The Applicants' also emphasized the financial considerations and in particular, the importance of limiting expenses, which will ultimately be borne by users. They advocate a restriction on the scope of the representative counsel's mandate.

The Monitor

[39] Ms. Pillon pointed out that a number of firms had contacted her prior to the initial application, expressing interest in appointment as representative counsel. She asked them to delay those motions in order to allow the Applicants to bring the initial application before the Court. For this reason she did not believe there should be any consideration given to the fact that Bennett Jones/McInnes Cooper had been in attendance on February 5, 2019, seeking to be appointed as representative counsel and the other firms were not.

[40] The Monitor emphasized the importance of having a representative committee that reflects the diversity of users and that it may take some time to determine what this would require. They were not opposed to appointing a preliminary committee with the possibility of substitution of members at a future point in time. That preliminary group could make recommendations about representative counsel.

[41] The Monitor is concerned with ensuring that there is no duplication of work between representative counsel and counsel to the Monitor and Applicants. For this reason they recommend that consideration be given to a limited scope of mandate in the appointment order. It was suggested that there should be a cap on representative counsel fees of $100,000 to be applied to work going forward, but not in relation to the preparation of the appointment motion. The amount of the cap could be revisited as the *CCAA* process unfolds.

Analysis

[42] All counsel acknowledged that the three proposed counsel groups are well qualified and have the necessary experience to carry out the mandate of representative counsel. They each have the support of many users with millions of dollars in outstanding claims.

[43] This *CCAA* proceeding is unique in the sense that there is no operating business of any significant size in terms of physical assets, employees, third party suppliers or secured creditors. There is, however, a very large group of diverse users who have no access to many millions of dollars in assets which they had given to the Applicants. The anecdotal evidence at the hearing is that many people are extremely upset, angry and concerned about dishonest and fraudulent activity. There are reports of death threats being made to people associated with the Applicants. All parties agree that this user group needs representation as soon as possible. That representation will give them accurate information and the knowledge that their interests are being properly represented throughout this process.

[44] Another unusual feature is that the only creditors of any significance are the users. The one secured creditor agreed to advance $300,000 in order to get the *CCAA* process underway. The plan is to repay the money as soon as assets become available. The lack of any secured creditors means that the users' money is effectively funding all of the professional fees being incurred. It is extremely important to manage those, in order to maximize recovery for the users. This requires a commitment on all parties to have this issue front and centre while, at the same time, not compromising on the work necessary to advance the interests of the users and recover assets for their benefit.

[45] In my view, the criteria to be used in assessing which of the groups should be representative counsel, is somewhat subjective. It requires a consideration of their approach to the issues of efficiency, communication and cost effectiveness. I am satisfied that the submissions of counsel have allowed me to gain insight into the approaches which each group proposes to undertake. There are strengths and weaknesses in each and legitimate debates about which communication strategies might be most effective in the circumstances.

[46] A number of counsel suggested that the final selection of representative counsel should be deferred until the users committee is in place so that they can offer their opinion on the issue. Competing with that philosophy is the sense of urgency conveyed by all in having the committee and counsel appointed as soon as possible. I am not satisfied that delaying selection of representative counsel until the committee is in place is reasonable. I agree with the Monitor that the committee needs to reflect the diversity of the user group and should only be appointed after soliciting expressions of interest from the users. I also believe that having input from representative counsel on behalf of the users would be important in the selection of committee members. That decision should not be left to the Monitor and the Court alone.

[47] There are three legal teams, who are obviously qualified and capable of doing the work who are supported by many users, and I am not sure on what basis members of the representative committee could chose among them. It is unrealistic to think that these individuals would have a real appreciation of the issues of efficiency and cost effectiveness in a *CCAA* proceeding. At a minimum, it would seem that they would have to be educated about these matters before they could engage in a meaningful consideration of the somewhat subtle differences between the competing firms.

[48] When I consider all of these factors I believe it is in the best interests of all of the users that the issue of representative counsel be decided now and that I am in the best position to do so. Any of the proposed counsel teams have the capability of performing the work required.

[49] Having assessed all of the information provided on the motions and considering the issues of efficiency, communication and cost effectiveness I believe that the Miller Thomson/Cox & Palmer team is the best choice, and I would appoint them as representative counsel. My reasons for selecting them are as follows:

1. Both the local and national firms have extensive insolvency and *CCAA* experience. Miller Thomson has additional depth in certain areas, including larger *CCAA* proceedings and cryptocurrency.
2. The relationship between the two firms has been thought out carefully with a view to minimizing costs. Cox & Palmer will deal with their areas of expertise, including local litigation practice and court appearances. Miller Thomson will provide expertise in dealing with large creditor groups and cryptocurrency technology.
3. The communication strategy proposed is reasonable, including the idea that some presence in social media and online discussion groups is necessary in order to reach the user group members.
4. The understanding of the financial implications for users has permeated their submissions from the beginning. They propose a limited initial mandate and a cap on counsel fees in recognition of the reality that it is the users who will ultimately be paying.
5. They recognize the efficiency to be gained by working collaboratively with the Monitor and demonstrated this by respecting the request that they defer their motion for appointment as representative counsel until after the initial order was dealt with.

[50] Many of these same factors apply to one or more of the other legal teams, however, on balance, the combination of all of these characteristics in the Miller Thomson/Cox & Palmer presentation, makes them the best choice.

Appointment of Representative Committee

[51] With the selection of representative counsel, the appointment of members of the representative committee should proceed expeditiously. The Monitor suggested that notice be given inviting expressions of interest for membership to the user group and that, once received, the Monitor and representative counsel could review these with the view to making a recommendation on membership to the Court. I agree with that procedure, and would direct that it commence without delay.

Conclusion

[52] Having selected representative counsel and given directions for appointment of the representative committee, the formal order reflecting these decisions can be finalized. I would expect that representative counsel, the Monitor and the Applicants should be able to come to an agreement on most, if not all, of the terms of the order which could then be presented to the Court for consideration. In the event that there remains some disagreement between the parties, those matters can be dealt with by the Court at or before the comeback hearing on March 5, 2019.

Wood, J.

SUPREME COURT OF NOVA SCOTIA
Citation: *Quadriga Fintech Solutions Corp. (Re)*, 2019 NSSC 65

Date: 20190219
Docket: HFX484742
Registry: Halifax

In the Matter of:

The Application of Quadriga Fintech Solutions Corp., Whiteside Capital Corporation and 0984750 B.C. Ltd. dba Quadriga CX and Quadriga Coin Exchange (collectively referred to as the "Companies" and the "Applicant"), for relief under the *Companies' Creditors Arrangement Act*

ERRATUM Dated March 14, 2019

Judge: The Honourable Justice Michael J. Wood

Heard: February 14, 2019, in Halifax, Nova Scotia

Counsel: Maurice Chiasson QC and Sara Scott, for the Applicants

Elizabeth Pillon, Lee Nicholson, and Sharon Hamilton for the Monitor

Raj Sahni, Ben Durnford and John Stringer, for an informal committee of users of the Quadriga platform

Jeremy Dacks, Evan Thomas, Robert Purdy QC, and Michael Scott, for an informal committee of users of the Quadriga platform

Gregory Azeff and Gavin MacDonald, for Parham Pakjou

Brendan O'Neill, for Goodmans LLP

Erratum

Throughout the decision the spelling of the name of the firm, Miller Thompson, has been changed to Miller Thomson.

TAB 19

2011 BCPC 142
British Columbia Provincial Court

R. v. Servisair Inc.

2011 CarswellBC 1550, 2011 BCPC 142, [2011] B.C.W.L.D. 5302, [2011] B.C.W.L.D. 5303, 2011 C.L.L.C. 210-025

Regina v. Servisair Inc.

Margaret E. Rae Prov. J.

Heard: February 16, 2011
Judgment: May 10, 2011
Docket: Richmond 53987

Counsel: D. Kier, Q.C., for Crown
G. Heywood, J. Kondopulos, for Defendant

Subject: Employment; Public
Related Abridgment Classifications
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.b Notice
II.6.b.i Entitlement
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.c Remedies
II.6.c.i Damages
II.6.c.i.B Entitlement to specific heads of damage
Headnote
Labour and employment law --- Employment law — Termination and dismissal — Notice — Entitlement
Labour and employment law --- Employment law — Termination and dismissal — Remedies — Damages — Entitlement to specific heads of damage
Table of Authorities
Cases considered by *Margaret E. Rae Prov. J.*:
CanadianOxy Chemicals Ltd. v. Canada (Attorney General) (1999), 1999 CarswellBC 776, 1999 CarswellBC 777, 171 D.L.R. (4th) 733, 29 C.E.L.R. (N.S.) 1, 23 C.R. (5th) 259, 122 B.C.A.C. 1, 200 W.A.C. 1, 133 C.C.C. (3d) 426, [1999] 1 S.C.R. 743 (S.C.C.) — considered
Nowegijick v. R. (1983), *(*sub nom. *Nowegijick v. Canada)* [1983] 1 S.C.R. 29, 1983 CarswellNat 520, 83 D.T.C. 5041, 46 N.R. 41, [1983] 2 C.N.L.R. 89, [1983] C.T.C. 20, 144 D.L.R. (3d) 193, 1983 CarswellNat 123 (S.C.C.) — considered
T.W.U. v. British Columbia Telephone Co. (1982), 1982 CarswellBC 228, [1982] 6 W.W.R. 97, 39 B.C.L.R. 175, 83 C.L.L.C. 14,001, 140 D.L.R. (3d) 135 (B.C. S.C.) — referred to
T.W.U. v. British Columbia Telephone Co. (1982), 1982 CarswellBC 299, 84 C.L.L.C. 12124, [1983] 2 W.W.R. 274, 40 B.C.L.R. 379, 5 D.L.R. (4th) 15, 84 C.L.L.C. 14,031 (B.C. C.A.) — referred to
T.W.U. v. British Columbia Telephone Co. (1985), 1985 CarswellBC 738, 1985 CarswellBC 811, [1985] 1 S.C.R. 840, [1985] 4 W.W.R. 455, 13 Admin. L.R. 68, 59 N.R. 161, 18 D.L.R. (4th) 626, 85 C.L.L.C. 14,034 (S.C.C.) — referred to
Statutes considered:
Canada Labour Code, R.S.C. 1985, c. L-2

Generally — referred to

s. 13 — referred to

s. 71(2) — referred to

s. 212 — referred to

s. 212(1) — referred to

s. 213 — referred to

s. 213(2) — referred to

s. 256 — referred to

s. 256(2) — referred to

s. 256(2)(a) — referred to

s. 258(2) — referred to

s. 258(2)(a) — referred to

***Margaret E. Rae Prov. J.*:**

1 The accused Company has plead guilty to two counts under the *Canada Labour Code*. They have plead guilty on count one to an offense under section 212(1) of failing to give notice to the Minister of Labour of its intention to terminate a group of fifty or more employees sixteen weeks prior to the termination of said employees, and under count two of an offense under section 213 (2) of failing to provide a statement in writing to each employee two weeks before the termination setting out the particulars of the employment of each of the said employees, and thereby committing offenses under section 256(2) (a) and liable to a penalties under section 258(2)(a).

Background

2 Section 212 (1) provides as follows:

> 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

3 Section 256 (2) provides that the penalty for each of these offenses, where the crown proceeds by way of summary conviction, is a fine not exceeding ten thousand dollars.

4 Section 258 (2) provides as follows:

> Where an employer has been convicted of an offense under this part in respect of the discharge of an employee, the convicting court may, in addition to any other punishment, order the employer
>
> to pay compensation for loss of employment to the employee not exceeding such sum as in the opinion of the court is equivalent to the wages that would have accrued to the employee up to the date of conviction but for such discharge; and

to reinstate the employee in his employ at such date as in the opinion of the court is just and proper in the circumstances and in the position that the employee would have held but for such discharge.

Agreed Facts

5 The parties have submitted an agreed statement of facts.

6 The accused (hereinafter referred to as "the Company") is an international provider of aviation ground services and operates at ten airports in Canada. Vancouver International Airport is one of those airports serviced by the Company. They have several divisions which include ramp services, de-icing service, ground handling service, cabin grooming service and general customer service. The division which is in question in this case is the cabin grooming service.

7 The employees in this division are unionized and their certified bargaining agent is the International Union of Machinists and Aerospace Workers ("the Union"). These employees were covered by a collective agreement which ran from September 1, 2005 to August 31, 2009.

8 Some time in 2007, the Company determined that their cabin grooming division was not profitable given the highly competitive market in which the Company operated. The Company wrote a letter to the Union on June 17, 2007, setting out the options available to the Company. Those options were (1) to reduce the costs of the collective agreement by 25%; (2) to outsource the cabin grooming division which would mean the cabin grooming employees would be terminated; (3) eliminate the cabin grooming division which would potentially jeopardize some of the more profitable services provided by the Company; or (4) to withdraw completely from Vancouver International which would result in all of the Company's employees in all divisions would lose their jobs. The letter made it clear that the Company wished to work collaboratively with the Union.

9 In the summer of 2007, there was a change in the Union management and the Union representative who was designated to work with the Company met with Company representatives and indicated that the Union was not willing to agree to the changes that the Company thought were necessary in order to deal with their financial challenges.

10 At about the same time, the Company sent letters to the cabin grooming service employees at Vancouver International Airport.

11 The Company sent a follow up letter to the Union on September 13 outlining again the financial difficulties they were experiencing and asking again for the co-operation of the Union and its employees. They warned the Union that it would only be fair to advise the employees that their jobs were in jeopardy unless some accommodations were made.

12 On September 25, 2007, the Company provided notice to all of the cabin grooming service employees that the Company would likely be outsourcing the cabin grooming division to a third party by the end of the year.

13 At this point, the Union agreed to discuss changes to the collective agreement in order to make the division financially viable. Negotiations with the Union resulted in a concessionary wage package. The Union presented the package to the members for ratification, but on December 20, 2007, the members voted the package down.

14 At that point, the Company decided to close the cabin grooming division down. They were aware of their obligation under section 212 of the *Canada Labour Code*, but at that time, the Company did not have a fixed date for the closure. On January 4, 2008, the Company gave notice to the employees that the division would be closing, but they did not have a specific date for the closure. They further advised that they would provide updates as they became available.

15 The Company decided to outsource the cabin grooming service and began to search for potential candidates. An agreement was concluded with Avex Flight Support Inc. (Avex) to take over the service as of May 26, 2008. The agreement was signed on April 17, 2008, and notice was given to the one hundred and twenty employees on April 18, 2008. This allowed less than six weeks for the Company to give written notice to the Minister as required under section 212.

16 On April 18, the Company provided the required notice to the Minister, advising that the employees would be terminated as of May 25, 2008. At the same time, the Company applied to the Minister for a waiver of the notice requirement. The application was forwarded to the North West Pacific Region office of Human Resources and Skills Development Canada's Labour Program. An investigation ensued from around May 5 to May 15. During that period, the Company provided a letter elaborating on its reasons for making the waiver application.

17 On May 16, 2008, an investigation report recommending that the waiver application be denied was forwarded to the Minister for consideration. On the same date, a letter was forwarded to the Company advising them they should not take action to effect the group termination until advised of the Minister's decision.

18 On May 16, 2008, the Company sent individual termination letters to each employee but none of these letters contained the detailed statements of benefits required by section 213(2) of the *Canada Labour Code*. On June 11, 2008, the Minister advised the Company that the waiver application had been denied.

19 On June 25, the Company received a letter from the North West Pacific Region demanding the information required by section 213 and that information was provided by the Company on July 11, 2008.

20 Fifty two of the one hundred and twenty employees found alternate employment at Vancouver International Airport.

21 On August 15, 2007, the Company sent a letter to the Federal Minister of Labour applying for a waiver of the notice requirement for group termination of employment at Pearson International Airport with respect to a termination the Company was planning to effect on October 1, 2007.

22 The circumstances of that application were substantially the same as the application the company made with respect to the employees at Vancouver International Airport on April 18, 2008. That waiver application was granted in part. The Company was not exempted from establishing a joint planning committee and they were required to issue a statement of benefits pursuant to section 213.

23 The projected date of termination would have been August 7, 2008 had the required notice been provided. The Crown has calculated wages owing to the employees from May 26, 2008 to August 7, 2008 at $466,953.84 which is exclusive of any amounts for overtime, vacation pay, holiday pay, or pay in lieu of notice provided to employees.

Issues

24 There are two issues. The first issue is whether the notice requirement in section 212 (1) refers only to notice to the Minister, or whether a failure to provide the required notice invokes section 258 (2) which gives the Court the discretion to order that the Company pay compensation to the employees up to an amount equivalent to the wages they would be entitled to had the proper notice been given. The second issue is a determination of an appropriate penalty for the failure to provide notice to the Minister and the failure to provide the required benefit statements within the timeframe set out in the legislation. The Crown is proceeding by way of summary conviction and the maximum penalty is a fine not exceeding ten thousand dollars for each count.

Analysis

25 I am advised by Counsel that although this section has been in force with substantially the same wording for thirty five years, there has never been a reported case as to an appropriate fine under section 256 for convictions under sections 212 and 213.

26 The Crown says that the words "in respect of" in section 258 (2) are broad enough to connect section 258 with convictions under section 212 and 213. He quotes Supreme Court of Canada authority in the decisions of *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)* (1999), 133 C.C.C. (3d) 426 (S.C.C.) and *Nowegijick v. R.*, [1983] 1 S.C.R. 29 (S.C.C.) at p. 39 for the proposition that the words "in respect of" are the widest of any expression intended to convey some connection between two related subject matters.

27 The Crown says that the offenses that the Company has plead guilty to are offenses which involve the discharge of employees, and therefore section 258 applies.

28 Counsel for the Company relies on *T.W.U. v. British Columbia Telephone Co.* (B.C. S.C.); appeal allowed on other grounds (B.C. C.A.); appeal dismissed (S.C.C.).

29 In that case, the issue before the Court was whether or not a particular regulation that was related to the section requiring notice to the Minister was ultra vires. In the Supreme Court of British Columbia, Mr. Justice Spencer found the regulation to be ultra vires. However, prior to making that ruling, he dealt with a preliminary objection raised by the employees and considered a number of sections under the *Code*, including section 71 (2) which is the predecessor to section 258, and which at that time had substantially the same wording. He made the following comments at paragraph 8:

> "If an employer is convicted of an offence for failing to give the required notice to the Minister under s 60 (1), I do not think that is an offence referred to in s. 71 (2). It is not an offence "in respect of the discharge of an employee", although the events surrounding the offence involve a termination. Rather, it is an offence in respect to the failure to give notice, either to the Minister under s 60 (1) or to the employee or his representative under s 60 (2).
>
> I am therefore of the opinion that a criminal court convicting an employer of that offence does not have the jurisdiction to order the offending employer to pay compensation for loss of employment or to reinstate an employee pursuant to the provisions of s 71 (2) (a) or (b). Thus no remedy is provided by the Canada Labour Code to an employee or class of employees who have been deprived of their statutory right to have the Minister notified and themselves to receive notice under the provisions of s 60 of the Act". (para 8)

30 Mr. Justice Spencer was over turned in both the British Columbia Court of Appeal and the Supreme Court of Canada, both of which found that the regulation which was the focus of the appeal, was intra vires. Neither of the appeals dealt with the preliminary objection, and as a result, I find that his comments are good law, and binding on this Court.

31 If I am wrong on that point, I would adopt his findings on that issue. I find that in order to link the notice to the Minister required by section 212 and the statement of wages and benefits as required by section 213 to section 258, the Crown must show some causal connection between the essence of the offense, which in my view is "notice to the minister" and the "discharge of the employee" as required by section 258. The notice to the Minister (s 212), and the statement of wages and benefits (s 13) come about as a result of the termination of the employees. The termination of the employees triggers the requirement to provide the notice to the Minister and the statement of wages and benefits within a particular time frame, but I do not see any clear relationship between termination notice to the employees and the notice to the Minister. In fact, here the employees were aware as early as January, 2008 when the negotiated wage package was voted down, that their department would be closing and their jobs terminated at some point in the near future.

32 The result of the interpretation of section 258 urged upon me by the Crown would be that an employee who had given significantly longer than sixteen weeks notice of termination to an employee would be required to provide an extra sixteen weeks notice for failing to provide the required notice, and conversely, if the notice to the Minister were tied to a required notice to the employees, then the Minister could waive that notice period entirely on application by the employer without the employees having the opportunity to make any representations. I cannot accept that Parliament intended such a result.

33 In any event, the application of section 258 is discretionary, and given the circumstances of this case, I would not exercise my discretion to award wages to the employees for the period between May 26 and August 7. The purpose of section 212 is to give the parties an opportunity to reconsider other options before terminating redundant employees. I am satisfied that the Company made extensive, good faith efforts to address other options with the employees and the union well in advance of May 26 and the employees and the Union rejected those options. The employees were well aware at least a year before May 26 that their jobs were in jeopardy, and had received an informal notice of termination on January 4. Although a final date of termination had not been determined at that time, the employees were put on notice that their jobs were going to be terminated. Approximately one half of the employees found work at the airport. There is no information as to when the new

employment commenced, or what the wages and benefits in the new employment were. There is no information as to the length of employment of the individuals who were terminated. The issue of what, if any compensation, if any, that ought to be awarded to these employees ought to be pursued through whatever civil remedies are available to them.

34 I find that convictions under sections 212 and 213 (2) are not offenses in respect of the discharge of an employee.

Conclusion

35 The Crown says that the legislation should be given some teeth where a large company is concerned and the welfare of their employees is at issue. Crown says that the Company engaged in a shortcut, and that their notice was six weeks short of the requirement. Crown says that general deterrence should be a factor and that the penalty should be in the $10,000 range for each offense.

36 Defense says that there are no cases in which a penalty has been imposed under this section, so there is little by way of guidance with respect to similar offenses committed under similar circumstances.

37 In looking at the relevant circumstances, I find that this is not the gravest of offenses that might conceivably occur in similar circumstances. The purpose of section 212 is to allow for some intervention in order to possibly avert the termination of a large number of employees. Here, the Company made lengthy attempts, in good faith, to negotiate a resolution with the members. They made it clear that their jobs were in jeopardy. They outlined their options which involved closing down the department with the loss of approximately 120 employees, or closing down the entire operation at Vancouver Airport resulting in the loss of many more jobs. They approached the Union very early on, almost a year prior to the termination in order to attempt to work out a solution. The Union was not prepared to talk to them until notice of impending termination went out to the members some three months later. That resulted in some serious negotiations and a conciliatory wage package that the members rejected. In January, 2008, the employees were given notice that the department would be closing and their jobs terminated. The Company did not give an exact date, because they had not yet contracted out the service, but a final termination notice was provided approximately six weeks prior to the termination. I am satisfied that the employees had reasonable notice that their jobs were in jeopardy and were given a reasonable opportunity to address the issues that were of concern to the Company.

38 In addition, the Company applied for a waiver of the Notice to the Minister as soon as the contract had been signed with the new service. They had some reasonable expectation that the waiver would be granted, given that they had obtained such a waiver under similar circumstances at Pearson Airport in Ottawa a year or so earlier. The worst that one can say here is that they terminated their employees and took a chance that the waiver would be granted, and their application was turned down at a point where they could not reverse their decision.

39 Given all of the above, I cannot say that the Company was cavalier in their actions with respect to the section 212 notice.

40 As to the offense under section 213, there is nothing to suggest that any employee was adversely affected by the failure to provide the statements of benefits and wages within the required time limits. The information was available to employees on request, and all of the required information was provided promptly to the Minister on request.

41 While these offenses are in my view at the lower end of the scale in terms of seriousness, they are not insignificant. In my view the Company could have avoided much of this problem had they provided the Notice to the Minister in a timely fashion. Even though they did not have a definite termination date, they did have the intent to terminate the employees well within the required time frame, and for whatever reason, decided to take the chance that they could get a waiver. They are a large Company, and other like minded organizations need to understand that these requirements need to be taken seriously. Their over confidence with respect to their expectation that a waiver of the Notice to the Minister would be forthcoming is in my view the more serious of the two offenses, and a fine of $3,000 would be appropriate on count one.

42 There is little information as to the failure to provide the statement of wages and benefits within the required time frame. However, I am satisfied that the employees suffered little, if any consequences as a result. The information was available upon request, and it was provided promptly on demand. In my view, a fine of $1500 would be appropriate on count two.

End of Document

TAB 20

CITATION: TBS Acquireco Inc. (Re), 2013 ONSC 4663
COURT FILE NO.: CV-13-10018-00CL
DATE: 20130710

SUPERIOR COURT OF JUSTICE – ONTARIO

COMMERCIAL LIST

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 TO TBS ACQUIRECO INC., THE BARGAIN! SHOP HOLDINGS INC. and TBS STORES INC.

BEFORE: D. M. Brown J.

COUNSEL: A. Merskey and D. Pearlman, for the Applicants, TBS Acquireco Inc., The Bargain! Shop Holdings Inc. and TBS Stores Inc.

M. Laugesen, for Wells Fargo Capital Finance Corporation Canada

J. Sirivar, for BlackRock Kelso Capital Corporation

L. Galessiere, for Loblaw Properties Ltd., OPB Realty Inc. and Highland Park Shopping Centre Inc.

E. Lamek, for the Monitor

D. Yiokaris, A. Scotchmer and J. Harnum, for Certain Terminated Employees

HEARD: July 9, 2013

REASONS FOR DECISION

I. Motions in a *CCAA* proceeding to approve a sale, assign contracts and appoint representative counsel for terminated employees

[1] On February 26, 2013, this Court made an order granting the application of TBS Acquireco Inc. ("TBS") and certain of its direct Canadian subsidiaries, The Bargain! Shop Holdings Inc. ("TBSHI") and TBS Stores Inc. ("TBSI"), for relief under the *Companies' Creditors Arrangement Act* ("*CCAA*") (the "Initial Order"). The Initial Order appointed Ernst & Young Inc. as monitor. The applicants operate a chain of general merchandise retail stores under

the names "The Bargain! Shop" and "Red Apple". The stores largely are located in smaller communities across Canada.

[2] In previous orders this Court approved a sale and investment solicitation process ("SISP") and the liquidation of a large number of stores the applicants had decided to divest as part of their restructuring under the *CCAA* process.

[3] The applicants moved for (i) approval of the transaction with BlackRock Kelso Capital Corporation contemplated pursuant to an agreement of purchase and sale dated as of June 10, 2013 between the applicants, as sellers, and BlackRock Kelso, or its designate, as purchaser (the "Transaction"). As well, the applicants sought approval under section 11.3 of the *CCAA* for the assignment of certain Acquired Store Leases and Designated Contracts.

[4] In addition, Ms. Lucy Zita, a former employee of the applicants, moved for an order appointing her as a representative of terminated employees of the applicants, appointing representative counsel and requiring that the legal fees incurred on behalf of such terminated employees to ensure maximum recovery under the *Wage Earner Protection Program Act* be paid out of some of the proceeds of the BlackRock Kelso transaction.

[5] Yesterday morning I granted the applicants' motion and I dismissed the motion by the Terminated Employees, with these written Reasons to follow.

II. The BlackRock Transaction

[6] Section 36(1) of the *CCAA* governs: see, also, *Re White Birch Paper Holding Company*, [2010] Q.J. No. 10469, paras. 48-49.

[7] Proper notice of this approval motion was given to all interested parties by service of those on the service list, including secured creditors who were likely to be affected by the proposed sale. No interested party opposed the relief sought. The senior secured creditor, Wells Fargo Capital Finance Corporation Canada, supported the applicants' motion.

A. The sale process

[8] By order made April 25, 2013, this Court approved the SISP. The approved process permitted a secured lender to make a credit bid.

[9] Both the applicants and the monitor filed detailed evidence describing the steps taken during the SISP. In addition to utilizing a standard solicitation/confidentiality agreement/electronic data room due diligence marketing process, the applicants, after consultation with the Monitor, established a special SISP Committee comprised of senior management which assisted the Monitor in administering the SISP without the need for involving the applicants' boards. This structure was put in place because most members of the boards were related, had expressed interest in submitting an offer under the SISP, or otherwise were involved with potential SISP participants.

[10] The evidence filed disclosed that the applicants followed the SISP procedures approved by this Court.

[11] The Monitor reported that in its view the timelines in the SISP were commercially reasonable and all interested parties had a reasonable opportunity to participate in the SISP and to submit an offer.

[12] I conclude that the process leading to the proposed sale was reasonable in the circumstances, the securing of court approval of the SISP enabled creditors to comment on the sale process chosen, and the Monitor supported and actively participated in the process leading to the proposed sale.

B. The BlackRock Transaction

[13] By the bid deadline the applicants had received two bids: a financing offer from a Toronto asset-based lender that was subject to further due diligence and negotiation and the BlackRock Kelso going-concern offer. Eric Claus, President of the applicants, deposed the BlackRock Kelso offer "represented the best alternative for the Applicants' business and its numerous stakeholders, including approximately 1,800 employees, landlords for 165 locations and many suppliers across the country." The Monitor reported that the BlackRock Transaction "offered financial terms that were clearly superior to the other bid that was received and the Monitor is satisfied that the consideration to be received for the assets is fair and reasonable in the circumstances".

[14] Under the Transaction, a subsidiary of BlackRock Kelso will purchase substantially all of the applicants' assets and is committed to continuing running 165 of the applicants' stores. The purchaser will offer employment to all employees of the applicants, save for those who worked at stores that have been closed or liquidated, and will offer employment to all senior management of the applicants. The purchase price contains several components:

(i) The payment in cash on closing of the applicants' debt to Wells Fargo of approximately $20 million;

(ii) Settlement of the applicants' debt to BlackRock Kelso of approximately $23 million, save for about $500,000;

(iii) The purchaser's commitment, supported by BlackRock Kelso, to transition funding pursuant to a Funding and Transition Agreement, including a commitment to fund certain Priority Payables ($1.2 million) and CCAA Completion Costs ($1.8 million). The Priority Payables consist largely of unremitted HST and PST and a cash collateralization of the administrative reserve; and,

(iv) The assumption by the purchaser of certain obligations of the applicants to its employees and customers, including ordinary course of business obligations to employees who accept employment with the purchaser, obligations under the Acquired Store Leases and Designated Contracts, and honouring gift cards and

> certificates and obligations incurred post-filing in connection with open purchase orders and goods in transit (all estimated at approximately $3.6 million).

The BlackRock Agreement of Purchase and Sale contains certain conditions, including the obtaining of all consents necessary for the assignment of Acquired Store Leases and Designated Contracts (largely IT service and equipment rental contracts).

[15] The purchase price will not be sufficient to offer any consideration to the applicants' unsecured creditors for amounts owing prior to the commencement of this *CCAA* proceeding.

[16] In light of the credit bid component of the BlackRock offer, the Monitor obtained security opinions from its legal counsel concerning the validity, perfection and enforceability of the BlackRock Kelso security. The Monitor reported that "subject to the standard qualifications and assumptions, the security opinions conclude that the BlackRock Kelso security is valid and enforceable, and is properly perfected in each of the Reviewed Provinces where the security is registered against a particular Applicant". The priority of security between BlackRock Kelso and Wells Fargo is subject to an intercreditor agreement.

[17] The Monitor reported that in its view "the proposed Transaction will maximize value for all stakeholders of the Applicants, including their creditors, employees, suppliers and other stakeholders as opposed to a liquidation under a bankruptcy, as well as to ensure the continued employment of numerous employees of Applicants".

C. Analysis

[18] Based upon my review of the evidence, the BlackRock Transaction should be authorized. The SISP was approved by this Court and was followed. The applicants seek approval of the superior bid. Although the transaction only will offer consideration to secured creditors, it will see the continuation of a substantial portion of the applicants' business, albeit under the ownership of the purchaser, with the preservation of approximately 1,800 jobs and the continuation of 165 store leases: *Nortel Networks Corp. (Re)* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.), para. 47. I therefore authorize the BlackRock Transaction under *CCAA* s. 36.

III. Assignment of Acquired Store Leases and Designated Contracts

[19] The affidavit of Mr. Klaus and the Monitor's report described in detail the efforts made to secure the consents of the landlords to the assignment to the purchaser of the store leases for the locations to be assumed under the BlackRock Transaction (the "Acquired Store Leases") and to secure the consents of the counterparties to several IT servicing and equipment rental contracts, the so-called Designated Contracts. As part of the dealings with the landlords and contract counterparties, the applicants, with the assistance of the Monitor, sought to identify the amount of the cure costs owing in respect of each location or contract. Detailed information packages were sent to each landlord and contract counterparty, and negotiations ensued.

[20] As of the date of the hearing, the applicants, through Monitor's counsel, had received 149 consents to the assignment of leases, out of the proposed 165 locations. Agreements on cure

costs have been reached, but a few landlords have not delivered consents. However, those landlords did not oppose the assignment of their leases to the purchaser.

[21] The Monitor reports that if consents to assign leases were not received before the hearing, it would be "appropriate to order the assignment of the leases of each of the Reconciled Locations to the Purchaser". Schedule "C" to the proposed Approval and Vesting Order identified the cure cost amount for each of what were termed the "Reconciled Locations".

[22] As to the Designated Contracts, the applicants have resolved issues with the counterparties to a sufficient extent that those counterparties which have not signed consents do not oppose the relief sought by the applicants. The Monitor recommends that "the Designated Contracts be assigned to the Purchaser by the court at the agreed cure costs amount or, failing which, at the amount of the cure costs reflected in the applicants' books and records." Schedule "D" to the proposed Approval and Vesting Order identified each Designated Contract and the cure cost amount for each.

[23] The Monitor approves of the proposed assignment of the Acquired Store Leases and Designated Contracts to the purchaser:

> Absent the assignment to the Purchaser, the applicable leases and Designated Contracts would be disclaimed pursuant to the provisions of the *CCAA* and the inventory at that location would be liquidated, the employees would be terminated and the relevant store would be closed. The Purchaser, a wholly-owned subsidiary of BlackRock Kelso, has the financial resources necessary to carry out the obligations under the Acquired Store Leases, Acquired Option Store Leases and the Designated Contracts. Since the Purchaser will be continuing to carry on the real business operated by the Applicants and will be in a stronger financial position than the Applicants given the reduced debt and closing of unprofitable stores, it is, in the Monitor's view, appropriate to assign the Acquired Store Leases and Acquired Option Stores Leases to the Purchaser, together with the Designated Contracts.

[24] At the hearing, agreement was reached between the applicants and certain of the landlords on language dealing with the rights of a counterparty to a Lease or Designated Contract to exercise any right or remedy in respect of any non-monetary default under the contract. The agreed upon language now forms paragraph 6 of the Approval and Vesting Order which reads:

> THIS COURT ORDERS that no counterparty to an Acquired Premises Lease, or Designated Contract shall terminate a Scheduled Contract as against the Purchaser as a result of the Applicants' insolvency or the Applicants' CCAA proceedings. In addition, no counterparty shall terminate a Scheduled Contract as against the Purchaser as a result of the Applicants having breached a non-monetary obligations unless such non-monetary breach arises or continues after the Scheduled Contract is assigned to the Purchaser, such non-monetary default is capable of being cured by the Purchaser and the Purchaser has failed to remedy the default after having received notice of such default pursuant to the terms of the applicable Scheduled Contract. For clarification purposes, no counterparty

shall rely on a notice of default sent to the Applicants to terminate a Scheduled Contract to terminate the Scheduled Contract as against the Purchaser.

[25] Section 11.3 of the *CCAA* governs on this issue. I am satisfied that the applicant has given notice of its request to seek a court-authorized assignment of the Acquired Store Leases and Designated Contracts to every party to such agreements. As noted above, the Monitor approves the proposed assignments. The evidence disclosed that the purchaser would be able to perform the obligations under the contracts, and I think the large number of consents received by the applicants from the landlords attested to their perception of the purchaser's ability on that score, as did the lack of any opposition at the hearing to the sought assignments. In those circumstances, it would be appropriate to assign the rights and obligations to the purchaser under the Acquired Store Leases and Designated Contracts. That would result in the continuation of business in the greatest number of stores and the continued employment of the greatest number of people. Finally, the identification in the Approval and Vesting Order of the cure amounts required to be paid to the counterparties on the assignment of the contracts indicates that all monetary defaults will be remedied on or before closing, save for those arising by reason only of the company's insolvency, the commencement of proceedings under this Act or the applicants' failure to perform a non-monetary obligation: *CCAA*, s. 11.3(4). Consequently, I granted the assignment order sought by the applicants.

IV. Appointment of representative counsel

A. The request and the context

[26] Lucy Zita had been a long-term employee of the applicants. Her employment was terminated shortly after this *CCAA* proceeding was commenced.

[27] Ms. Zita deposed that since the commencement of this proceeding the applicants have closed about 66 Bargain! Shop stores and terminated between 450 and 650 employees. From counsel's submissions I understand that some of the terminated employees may have been working on a part-time basis. Ms. Zita stated that there are substantial severance and termination pay amounts owing to those former employees. She deposed that the terminated employees would be entitled to payments for eligible wages under the *Wage Earner Protection Program Act*, S.C. 2005, c. 47 ("*WEPPA*").

[28] Given that eligibility for payments under *WEPPA* arises on the bankruptcy or receivership of an employer, Ms. Zita deposed that "we want to ensure that a bankruptcy or receivership takes place as soon as possible so that we can apply for and receive WEPP payments". According to Ms. Zita, "since most Bargain! Shop employees are lower income people and have to look for another job, it is hard to raise money to hire a lawyer and we do not have any extra cash". She therefore asks to be appointed as the representative of those employees who have claims against the applicants arising out of their employment with them and seeks the appointment of the firm of Koskie Minsky LLP as representative counsel to act in this proceeding. Her motion contemplated that Koskie Minsky would provide legal advice to employees on employment claims, set up a hotline for employees/former employees answered by

trained staff, set up an information webinar for the employees, ensure that a timely bankruptcy occured so that employees could receive their WEPPA payments, calculate and verify severance claim calculations to ensure maximum WEPPA recovery, assist employees in completing WEPPA claims and secure payment of WEPPA claims.

[29] Ms. Zita requests that the funds for representative counsel be paid out of the CCAA Completion Costs which form part of the consideration contained in the BlackRock Kelso APA. At the hearing, proposed representative counsel requested that up to $125,000 from the CCAA Completion Costs be authorized for its work.

[30] The applicants opposed the motion submitting that no need had been demonstrated for the appointment of a representative and representative counsel to deal with the identified employment issues.

[31] Counsel for the Monitor submitted that no cash is left in the applicants' system at the end of each day; all receipts are swept into an account established under one of their borrowing facilities. As a result, the applicant companies have no money to fund a representative counsel and any funding would have to come from part of the purchase price consideration under the BlackRock Kelso APA. Monitor's counsel noted that under the terms of the Funding and Transition Agreement which forms part of the Transaction, funding advances by the purchaser under that agreement, which will include advances to pay CCAA Completion Costs, are to be held in a Funding Account under the control of the Monitor. Sections 4.5 and 4.6 of the Funding and Transition Agreement provide that if any excess funds (as defined in that agreement) remain in the Funding Account either on a weekly basis or at the termination of that agreement, then they are to be returned to the purchaser. Since the Funding and Transition Agreement therefore creates a contractual obligation to use funds advanced by the purchaser for specified purposes, including the CCAA Completion Costs, the Monitor submitted it would not be appropriate for this Court to require that they be used for other purposes.

[32] Monitor's counsel also observed that it is contemplated the applicants will be placed in bankruptcy following the completion of the transition of operations to the purchaser, likely sometime in August, and at that time the Trustee will become responsible to deal with *WEPPA* claims as specified in section 21 of the *WEPPA* and its accompanying regulations. The Monitor submitted that there was no need to appoint a representative counsel to perform that work.

B. Analysis

[33] A few months after Nortel Networks Corporation filed under the *CCAA*, several motions were brought to appoint representative counsel for pensioners, former employees and current employees of the applicant companies. The monitor in that proceeding supported the appointment of representative counsel in light of the large number of former employees of the applicants because:

> 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.[1]

[34] In that case the Court appointed representative counsel. It did so because it agreed with the following submissions made by one of the proposed representative counsel:

> 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*.[2]

[35] Representative counsel for former employees and retirees also was appointed in the *Canwest CCAA* proceeding.[3] Again, the motion for such an appointment was brought only a few months following the making of the initial order under the *CCAA* and before the Court was asked to approve any sale or plan. As the Court observed in that case:

> No one challenged the court's jurisdiction to make a representation order and such orders have been granted in large *CCAA* proceedings. Examples include *Nortel Networks Corp.*, *Fraser Papers Inc.*, and *Canwest Global Communications Corp.* (with respect to the television side of the enterprise)...
>
> 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

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[1] *Nortel Networks Corporation*, 2009 CanLII 26603 (Ont. S.C.J.), para. 7.
[2] *Ibid.*, para. 13, emphasis added.
[3] *Canwest Publishing Inc.*, 2010 ONSC 1328.

representation and who is also prepared to act for the group seeking the order; and the position of other stakeholders and the Monitor.[4]

[36] I accept the principles set out in the *Nortel* and *Canwest* cases, but their application to the specific facts of this case leads to a different result. The present *CCAA* proceeding does not bear the degree of complexity as did those in *Nortel* and *Canwest*. A SISP process was approved by this Court back on April 25, 2013, a fair sales and marketing process was run, and it resulted in only one going-concern offer to purchase. Under that Transaction, no sales proceeds will be available for unsecured creditors. From the evidence filed in this Court, that was the best result achievable under the particular circumstances of these applicant companies. This representation motion has been brought only at the end of that process.

[37] While the loss of a job by any person is devastating to that person, the remedies available to a terminated employee are defined in the law. In the present case no money will be available for pre-filing unsecured claims. The Monitor submitted that a bankruptcy will follow upon the completion of the transition of business operations to the purchaser, and *WEPPA* claims can be advanced at that time. Given that *WEPPA* imposes duties on a trustee in respect of such claims, I have difficulty understanding what significant extra "value-added" representative counsel could bring to the employment-related claims process at this very late stage of this proceeding. In addition, counsel for the Monitor indicated that the Monitor had committed to completing the bankruptcy proceeding for about $50,000, a much lower amount than that sought for representative counsel. Finally, the applicant companies have no money to fund representative counsel. To fund representative counsel out of the contractual CCAA Completion Costs portion of the purchase price would result in the purchaser underwriting the legal fees of one class of unsecured creditors. In light of the duties imposed on a trustee to deal with *WEPPA* claims, I do not regard as fair the proposal of the moving party that the Court, in effect, amend the proposed agreement of purchase and sale - following its submission in a court-approved SISP and following its conditional acceptance by the applicants - to use part of the purchase price for such a purpose. Consequently, I dismissed the motion brought by the Terminated Employees.

V. Other matters

[38] I approved the Monitor's Eleventh Report.

[39] A few hours after the hearing I signed the formal order granting the motion brought by the applicant companies.

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[4] *Ibid.*, paras. 20 and 21.

D. M. Brown J.

Date: July 10, 2013

TAB 21

Most Negative Treatment: Reversed
Most Recent Reversed: T.W.U. v. British Columbia Telephone Co. | 1982 CarswellBC 299, [1983] B.C.W.L.D. 101, 84 C.L.L.C. 12124, 84 C.L.L.C. 14,031, 5 D.L.R. (4th) 15, 24 A.C.W.S. (2d) 224, [1983] 2 W.W.R. 274, [1982] B.C.J. No. 33, 40 B.C.L.R. 379 | (B.C. C.A., Nov 26, 1982)

1982 CarswellBC 228
British Columbia Supreme Court

T.W.U. v. British Columbia Telephone Co.

1982 CarswellBC 228, [1982] 6 W.W.R. 97, [1982] B.C.W.L.D. 1725, [1982] B.C.J. No. 81, [1983] B.C.W.L.D. 160, 140 D.L.R. (3d) 135, 16 A.C.W.S. (2d) 281, 39 B.C.L.R. 175, 83 C.L.L.C. 14,001

TELECOMMUNICATION WORKERS UNION et al. v. BRITISH COLUMBIA TELEPHONE COMPANY et al.

Spencer J.

Heard: August 3 and 4, 1982
Judgment: August 5, 1982
Docket: Vancouver No. A822240

Counsel: *M. D. Shortt*, for petitioners.
J. M. Giles, Q.C., and *B. T. Gibson*, for respondents.

Subject: Labour; Employment; Public
Related Abridgment Classifications
Labour and employment law
I Labour law
I.3 Unfair labour practices
I.3.b Employer practices
I.3.b.i Interference with union activities
I.3.b.i.C Termination of employment
I.3.b.i.C.2 Layoff
Labour and employment law
III Employment standards legislation
III.13 Termination of employment
III.13.a Termination of employment by employer
III.13.a.iv Statutory notice requirements
Headnote
Employment Law --- Termination and dismissal — Sufficiency of notice — Statutory requirements
Labour Law --- Unfair labour practices — Employer practices — Interference with union activities — Termination of employment — Layoff
Statutes — Particular classes of statutes — Conferring new rights and remedies — Section 60(1) of Canada Labour Code conferring private right of action for injunction.
Master and Servant — Termination — Statutory termination — Notice of termination — Section 60(1) of Canada Labour Code requiring employer to give 16 weeks' notice of lay-off to minister — Regulations varying notice requirement — Regulations ultra vires — Court having jurisdiction to grant injunction and declaration as no remedy provided in Code.

The petitioner employees received notice of lay-off from the respondent employers. The employees sought an order enjoining the employers from laying them off until the employers had given 16 weeks' notice of intent to lay off to the Federal Minister of Labour pursuant to s. 60(1) of the Canada Labour Code. They also sought a declaration that Reg. 30(*c*)(i), (ii) under the Code, which purported to delay the effectiveness of s. 60(1), was ultra vires.

Held:

Injunction and declaration granted.

The court had jurisdiction to hear the petition because s. 60(1) intended to convey private rights, no remedy having been provided in the Code. Furthermore, even if the section could be enforced by prosecution, that did not remove the court's discretion to take jurisdiction.

The employers could not rely on the regulations to relieve them of their duty to give the 16 weeks' notice. The regulations were of no effect as they were contrary to the spirit and intent of division V.2 of the Code and were therefore ultra vires the powers conferred by s. 60.2 of the Code.

Table of Authorities

Cases considered:

Alvarez v. Min. of Manpower & Immigration, [1979] 1 F.C. 149, 22 N.R. 85 (C.A.) — *referred to*

Belanger v. R. (1916), 54 S.C.R. 265, 20 C.R.C. 343, 34 D.L.R. 221 — *referred to*

Blevins v. Walker Stores Ltd., [1952] O.R. 205, [1952] 2 D.L.R. 142 (H.C.) — *distinguished*

Cutler v. Wandsworth Stadium, [1949] A.C. 398, [1949] 1 All E.R. 544 (H.L.) — *applied*

Gen. Teamsters of Int. Brotherhood of Teamsters, etc. of Amer. v. Midland Superior Express Ltd., [1974] 2 W.W.R. 490, [1974] 43 D.L.R. (3d) 540 (Alta. C.A.) — *considered*

Goutiere v. Herdacor Ltd., B.C.S.C., Vancouver No. C786089, 16th October 1979 (not yet reported) — *distinguished*

Green v. Marsh, [1892] 2 Q.B. 330 (C.A.) — *referred to*

Orpen v. Roberts, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101*referred to*

Pateman v. Ray's Ambulance Service Ltd., [1973] 5 W.W.R. 709, 38 D.L.R. (3d) 709 (Sask. Q.B.) — *distinguished*

Patent Agents Institute v. Lockwood, [1894] A.C. 347 (H.L.) — *considered*

Poirier v. Kovats (1976), 14 N.B.R. (2d) 262, 69 D.L.R (3d) 466 (C.A.) — *referred to*

Pugliese v. Nat. Capital Comm., [1979] 2 S.C.R. 104, 8 C.C.L.T. 69, 97 D.L.R. (3d) 631, 25 N.R. 498 — *referred to*

Pulp & Paper Wkrs. of Can. v. A.G.B.C. (1968), 63 W.W.R. 497, 67 D.L.R. (2d) 378 (B.C.S.C.) — *referred to*

Rabbitt v. Craigmount Mines Ltd. (1963), 42 W.W.R. 157 (B.C.S.C.) — *considered*

R. v. Norfolk County Council (1891), 60 L.J.Q.B. 379 (Div. Ct.) — *referred to*

Simmonds v. Newport Abercarn Black Vein Steam Coal Co., [1921] 1 K.B. 616 (C.A.) — *applied*

Simpson v. Moffat Communications Ltd., B.C.S.C., Vancouver Registry, 26th June 1981 (not yet reported) — *distinguished*

Stewart v. Park Manor Motors Ltd., [1968] 1 O.R. 234, 66 D.L.R. (2d) 143 (C.A.) — *referred to*

Stilling, Re (1961), 35 W.W.R. 164, 28 D.L.R. (2d) 102 (B.C.S.C.) — *referred to*

Tpt. Labour Relations v. Gen. Truck Drivers etc. Union (1974), 54 D.L.R. (3d) 457 (B.C.S.C.) — *referred to*

Vanderhelm v. Best-Bi Food Ltd. (1967), 62 W.W.R. 201, 65 D.L.R. (2d) 537 (B.C.S.C.) — *distinguished*

Ulin v. R., [1973] F.C. 319, 35 D.L.R. (3d) 738 — *referred to*

Statutes considered:

Canada Labour Code, R.S.C. 1970, c. L-1, Pt. III, Divisions I, II, II.1, III, IV, V, V.1, V.2, ss. 60 [re-en. 1970, c. 17 (2nd Supp.), s. 16] (l) [am. 1976-77, c. 28, s. 21(2)], (2)[re-en. 1976-77, c. 54, s. 74], (3), (4), 60.1 [en. R.S.C. 1970, c. 17 (2nd Supp.), s. 16; am. 1976-77, c. 28, s. 49(2) (Sched.)], 60.2 [en. R.S.C. 1970, c. 17 (2nd Supp.), s. 16], 61 [re-en. R.S.C. 1970, c. 17 (2nd Supp.), s. 16; am. 1976-77, C. 28, s. 49(2) (Sched.)], 69 [re-en. R.S.C. 1970, c 17 (2nd Supp.), s. 18], 70 [am. 1977-78, c. 27, s. 26], 71 [am. 1978-79, c. 27, s. 27], 72, 73.

Regulations considered:

Canada Labour Standards Regulations, C.R.C. 1978, c. 986, Reg. 30(*a*), (*b*), (*c*)(i)(ii).

Authorities considered:

E.A. Driedger, The Construction of Statutes (1974), c. 5.

Action for injunction and declaration that regulation ultra vires.

***Spencer J.*:**

1 The petitioners represent what I am told are approximately 1,800 employees who have received notice that they are laid off from their employment for a period of six months commencing 4th August 1982. They seek an order enjoining the respondent employers from laying them off until the employers have given 16 weeks' notice of their intent to lay off to the Federal Minister of Labour pursuant to s. 60(1) [en. R.S.C. 1970, c. 17 (2nd Supp.), s. 16; am. 1976-77, c. 28, s. 21(2)] of the Canada Labour Code, R.S.C. 1970. c. L-1. In addition, they seek a declaration that the Canada Labour Standards Regulations, C.R.C. 1978, c. 986, Reg. 30(*c*)(i) and (ii), enacted under the Canada Labour Code, are inoperative, invalid or ultra vires the Governor in Council.

2 At the outset of the hearing Mr. Giles, for the respondents, took a preliminary objection that this court has no jurisdiction to hear the petition. I shall deal with that objection first. The objection was based upon two grounds, each of which was said to give rise to a similar result. First Mr. Giles said that the provisions of s. 60(1) of the Canada Labour Code are not intended to have as their principal purpose the conferring of any benefit upon an individual so that the individual can have a civil cause of action to enforce the statute, but are intended simply to confer a benefit upon the public at large. Second, Mr. Giles says that, even if rights are conferred by that section upon private individuals, the enforcement of those rights is completely spelled out in the statute itself, which therefore becomes a complete code for its own enforcement. Thus it is said there is no alternative way of enforcing the Act by resort to this court for an injunction or declaration. Mr. Giles argued that if he is correct upon either of those grounds, then it must follow that this court is without jurisdiction to entertain this petition.

3 Dealing with the first of those grounds Mr. Giles cited to me a series of cases: *Orpen v. Roberts*, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101; *Cutler v. Wandsworth Stadium*, [1949] A.C. 398, [1949] 1 All E.R. 544 (H.L.); *Pugliese v. Nat. Capital Comm.*, [1979] 2 S.C.R. 104, 8 C.C.L.T. 69, 97 D.L.R. (3d) 631, 25 N.R. 498; *Patent Agents Institute v. Lockwood*, [1894] A.C. 347 (H.L.). From a reading of those cases I understand that the question of whether a statute is intended to convey only a public benefit which no individual may seek to enforce by action, or a private benefit which he may enforce, depends upon a proper construction of the statute in question. That appears to be the ground upon which Lord Watson put his judgment in the *Lockwood* case at p. 363 when he said:

> I do not think it was intended by the Act of 1888 to create in the patent agents whose names were on the register a right which they were to defend against those who were using the term "patent agent" without having their names on the register, by means of a resort to the Court of Session. On the contrary, I think it was the plain meaning of the legislature that, when a man whose name was not on the register chose to hold himself forth as a patent agent, the full measure of punishment to be inflicted upon him should be a fine within the sum limited, viz., twenty pounds, to be fixed by a summary court of criminal jurisdiction.

4 In the *Cutler* case Lord Simonds at pp. 408-409 clearly examined the statute there in question to gather its intent from a reading of it as a whole.

5 Upon a reading of Pt. III of the Canada Labour Code as a whole it is clear that many of its provisions fall into the category of statutes which were enacted for the benefit of individuals or of classes of individuals in the same way that many statutes regulating safe working conditions for miners were found to be for their individual or class benefit: see the judgment of Lord Normand in the *Cutler* case at p. 413. The provisions of divisions I, II, II.1, III, IV, V.1 and V.2 of Pt. 3 of this Act would appear to fall into that category, but in those instances the second ground of Mr. Giles' argument probably applies. In my judgment a proper reading of division V.2 of the Act, including the questioned s. 60(1), leads to the conclusion that one of its principal intentions was to benefit the classes of workmen referred to therein. It cannot, I think, be read without a reference to s. 60(2) [re-en. 1976-77, c. 54, s. 74] which requires that a copy of any notice given to the ministers under subs. (1) shall be given to the employees affected or to their representative. I do not think the intention of the legislation was simply to enable the minister to take steps within the periods set out in s. 60(1)(*a*), (*b*) or (*c*) to try and minimize, for the community, the effect of large scale unemployment. Rather, I think its principal intent was to enable the minister to take those steps on behalf of the terminated employees and also to enable those employees in any way they could, either individually or through a trade union, to take steps for themselves over the longer periods of time provided by s. 60(1)(*a*), (*b*) and (*c*) to overcome the difficulty of finding

other employment, that difficulty being substantially increased because of the larger number of persons terminated at one time. That is an additional benefit conveyed upon a class of employees over and above the benefit of two weeks' notice conferred by s. 60(4) [en. R.S.C. 1970, c. 17 (2nd Supp.), s. 16] of the Act. I doubt, however, that Mr. Shortt is correct in saying that the combined effect of those two sections is to add the notice required by s. 60(4) to the notice required by s. 60(1). I think a proper interpretation of those two sections is to extend the two weeks' notice to the periods provided by s. 60(1). Of course, the employee would not necessarily receive the full 16 weeks' notice referred to in s. 60(1)(*c*), since under the provisions of s. 60(2) he does not receive notice at the same time as the minister but only "forthwith" after the minister has received it.

6 I turn to consider the second ground of Mr. Giles' objection. In addition to the cases previously cited in these reasons Mr. Giles referred me also to *Rabbitt v. Craigmount Mines Ltd.* (1963), 42 W.W.R. 157 (B.C.S.C.); *Simpson v. Moffat Communications Ltd.*, B.C.S.C., Vancouver Registry, 26th June 1981 (not yet reported); *Vanderhelm v. Best-Bi Food Ltd.* (1967), 62 W.W.R. 201, 65 D.L.R. (2d) 537 (B.C.S.C.); *Pateman v. Ray's Ambulance Service Ltd.*, [1973] 5 W.W.R. 709, 38 D.L.R. (3d) 709 (Sask. Q.B.): *Goutiere v. Herdacor Ltd.*, B.C.S.C., Vancouver No. C786089, 16th October 1979 (not yet reported); *Stewart v. Park Manor Motors Ltd.*, [1968] 1 O.R. 234, 66 D.L.R. (2d) 143 (C.A.); *Kovats v. Poirier* (1976), 14 N.B.R. (2d) 262, 69 D.L.R. (3d) 466 (C.A.); *Gen. Teamsters of Int. Brotherhood of Teamsters, etc. of Amer. v. Midland Superior Express Ltd.*, [1974] 2 W.W.R. 490, 43 D.L.R. (3d) 540 (Alta. C.A.); and *Tpt. Labour Relations v. Gen. Truck Drivers etc. Union* (1974), 54 D.L.R. (3d) 457 (B.C.S.C.).

7 Based upon the foregoing cases, Mr. Giles urged upon me the proposition that, because the Labour Code sets up in ss. 69 [re-en. R.S.C. 1970, c. 17 (2nd Supp.), s. 18], 70 [am. 1977-78, c. 27, s. 26], 71 [am. 1977-78, c. 27, s. 27], 72 and 73 provisions for penalties for its breach and for summary orders for its enforcement, the intent of Parliament was clearly that those provisions should be exclusive and that there should be no jurisdiction in this court to enforce the Code by civil action at the suit of an employee. The principle is to be found stated in Lord Simonds' judgment in the *Cutler* case, supra, at pp. 407-408 as follows:

> The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For, if it were not so, the statute would be but a pious aspiration. But "where an Act" (I cite now from the judgment of Lord Tenterden C.J. in *Doe d. Rochester (Bp.) v. Bridges* (1831), 1 B. & Ad. 847, 109 E.R. 1001), "creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner". This passage was cited with approval by the Earl of Halsbury L.C. in *Pasmore v. Oswaldtwistle Urban District Council*, [1898] A.C. 387 (H.L.). But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in *Black v. Fife Coal Co. Ltd.*, [1912] A.C. 149 (H.L.): "If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in *Atkinson v. Newcastle Waterworks Co.* (1887), 2 Ex. D. 441 (C.A.), and by Lord Herschell in *Cowley v. Newmarket Loc. Bd.*, [1892] A.C. 345 (H.L.), solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it was intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention." An earlier and a later example of the application of this principle will be found in *Groves v. Wimborne (Lord)*, [1898] 2 Q.B. 402 (C.A.), and *Monk v. Warbey*, [1935] 1 K.B. 75 (C.A.), in the former of which cases the Act in question was described by A.L. Smith L.J. as "a public Act passed in favour of the workers in factories and workshops to compel their employers to do certain things for their protection and benefit."

8 The *Cutler* case is a leading authority in this area but from the foregoing quotation it is apparent that one must look carefully at the statute to determine its intent. The mere existence of penalties imposed by the statute does not necessarily preclude an individual right of enforcement by action. In my judgment, the cases advanced by Mr. Giles in his careful and thorough argument, in which a right of recourse to the courts was refused, are distinguishable from the present case. The distinction, I think, turns upon the difference between a penalty imposed for non-observance of the statute and a remedy accorded to one who would have benefitted had the statute been observed. The distinction is noted in the judgment of Prowse J.A. in the *Midland Superior Express* case, supra, at p. 565. In some of Mr. Giles' authorities statutory remedies were provided and a mandatory means of enforcement was included in the scope of the statute. Such cases include *Simpson v. Moffat Communications Ltd., Vanderhelm v. Best-Bi Food Ltd., Pateman v. Ray's Ambulance Service Ltd.*, all supra, *Blevins v. Walker Stores Ltd.*, [1952] O.R. 205, [1952] 2 D.L.R. 142 (H.C.) (cited in *Pateman* at p. 715), and *Goutier v. Herdacor Ltd.*, supra. The inadequacy of a penalty to redress a grievance of one who should have benefitted under the Act is pointed to in *Simmonds v. Newport Abercarn Black Vein Steam Coal Co.*, [1921] 1 K.B. 616 at 625 (C.A.), in the judgment of Bankes L.J. where he said:

> The only so-called remedy provided for breach of s. 96(2) of the Act of 1911 is a fine, no portion of which is payable to the plaintiff; it is purely in the nature of a penalty and affords no remedy to the plaintiff for the wrong of which he complains. Much reliance was placed on *Barraclough v. Brown*, [1897] A.C. 615 (H.L.), and *Patent Agents Institute v. Lockwood* [supra]. In *Barraclough v. Brown* an infringement of the statutory duty involved a penalty; but the penalty was a sum of money recoverable by the person complaining, though recoverable only in a court of summary jurisdiction.

9 On this branch of Mr. Giles' objection I have carefully considered the provisions of ss. 69, 70 and 71 of the Canada Labour Code. The failure to give notice to the minister under s. 60 (1) attracts a heavy fine under s. 69(2) but, as Mr. Shortt pointed out and as Mr. Gibson agreed during the course of argument, the respondents' daily payroll is greater than the amount of the maximum $100,000 fine. The amount of the fine, although substantial, must be considered in that light. If an employer is convicted of an offence for failing to give the required notice to the minister under s. 60(1), I do not think that is an offence referred to in s. 71(2). It is not an offence "in respect of the discharge of an employee", although the events surrounding the offence involve a termination. Rather, it is an offence in respect to the failure to give notice, either to the minister under s. 60(1) or to the employee or his representative under s. 60(2). I am therefore of the opinion that a criminal court convicting an employer of that offence does not have jurisdiction to order the offending employer to pay compensation for loss of employment or to reinstate an employee pursuant to the provisions of s. 71(2)(*a*) or (*b*). Thus no remedy is provided by the Canada Labour Code to an employee or class of employees who have been deprived of their statutory right to have the minister notified and themselves to receive notice under the provisions of s. 60 of the Act.

10 On this branch of the case Mr. Giles argued that, since there is power granted to a criminal court to order recompense to an employee for breaches of the other divisions of Pt. III of the Canada Labour Code, s. 71(2) must be construed as giving such a court jurisdiction to award compensation for failure to give a notice under s. 60(1). His argument was that the provision of such a power to redress wrongs under the other divisions of Pt. III indicates Parliament's intention that, if there is a private right granted to an employee under division V.2, it also should be redressed under the Code and not otherwise. I do not think such a power can be found in a criminal court by analogy. For such a court to have the power to order compensation, such power must clearly be spelled out in the terms of the Code itself. As I have said, I do not think a breach of the notice requirements of s. 60(1) are in respect of the discharge of an employee but rather in respect of a failure to give notice. Mr. Giles then turned his argument around and said that, if there is no power set out in the Code to redress a breach of s. 60(1), then the absence of such power compared with the existence of the power with respect to the other divisions of Pt. III of the Code is further proof that private rights are intended to be conveyed by those other divisions but are not intended to be conveyed by s. 60(1). That is an argument which merits consideration when endeavouring to find the intent of the statute as a whole. Upon considering it, however, I am unable to say that it persuades me that private rights are not intended to be conveyed by s. 60(1), as already indicated in these reasons.

11 If I am wrong in my conclusion that s. 71(2) does not give jurisdiction to a criminal court to order, in its discretion, compensation for loss of employment or reinstatement of employment, I nonetheless am of the view that this court still has jurisdiction over this matter. In *Rabbitt v. Craigmount Mines Ltd.*, supra, Brown J. dealt with a case under the Metalliferous

Mines Regulations Act, R.S.B.C. 1960, c. 242 [repealed 1967, c. 25, s. 32], which provided for the prosecution of employers who breached the Act but that such prosecution, if brought by or on behalf of an employee, should be only with the written consent of the minister. His Lordship dismissed the applicant's motion brought in this court to determine whether there was a breach of the Act, in limine, not because he thought this court had no jurisdiction but because he thought it proper, under the arrangements set out in the Act, that the applicants should first apply to the minister for consent to a prosecution. That learned judge clearly did not hold the view that the discretionary prosecution under the Act deprived this court of all jurisdiction. At p. 160 he said:

> If there had been a specific refusal by the minister to consent to a prosecution, I should have no hesitation in finding against the respondent in its objection based on the law in *Patent Agents Institute v. Lockwood, supra*. However, it does not appear from the material that the minister has ever been asked to consent to a prosecution, and, in my opinion, an attempt to prosecute ought to be made before the procedure here is invoked.

What Brown J. did in effect was to exercise his discretion to refuse to hear the case until and unless the procedure under the Act, which depended upon the exercise of a discretion by the minister in granting his consent to a prosecution, had been tried and rejected. The exercise of that discretion is inconsistent with the concept that no jurisdiction at all exists in this court. So in the case at bar. If a conviction of an offence for breach of the notice provisions of s. 60(1) of the Canada Labour Code is a breach "in respect of the discharge of an employee", then under s. 71(2) the granting of an order for compensation or reinstatement is discretionary in the convicting judge. This court's jurisdiction in these proceedings is not precluded by it. I exercise my discretion to exercise my jurisdiction over this case without directing it first be the subject of a prosecution to see if there is a conviction and if the convicting judge will make an order under s. 71(2), because this large number of employees has now been laid off and in the economic circumstances of the time they should know as quickly as possible what their status is. Similarly, if I am to rule on the merits of the case that they were wrongly deprived of notice under s. 61 [re-en. R.S.C. 1970, c. 17 (2nd Supp.), s. 16] and if I am to grant an injunction against this lay-off, then their employer should know as quickly as possible that it has to continue paying them so that it may return them to work and obtain a benefit from their services for the time for which they must be paid.

12 Accordingly I dismiss the preliminary objection and proceed to the petition on its merits.

13 The petitioners say that to lay them off in numbers exceeding 300 at a time without first giving 16 weeks' notice to the minister under s. 60(1) of the Canada Labour Code is an infringement of their private right which should be enjoined. In argument Mr. Shortt added to that position that the lay-off, without a copy of the minister's notice being given to the employees or to the trade union, was an infringement of private rights also. To overcome the provisions of Reg. 30(*c*)(ii), Mr. Shortt says that it is inconsistent with the provisions of division V.2 and therefore ultra vires the Governor in Council and invalid. At this stage it is appropriate to set out some provisions of the legislation. Section 60(4) of the Code reads:

> (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 he lays off that employee.

14 Section 60.2(*d*) [en. R.S.C. 1970, c. 17 (2nd Supp.), s. 16] reads:

> 60.2 The Governor in Council may make regulations for carrying out the purposes and provisions of this Division and, without restricting the generality of the foregoing, may make regulations ...
>
> (*d*) prescribing circumstances in which a lay-off of an employee shall not be deemed to be a termination of his employment by his employer.

15 The regulation in issue here reads as follows:

> 30. For the purposes of Divisions V.2, V.3 and V.4 of the Act, a lay-off of an employee shall be deemed not to be a termination of his employment by his employer where
>
> (*a*) the lay-off is a result of a strike or lock-out;
>
> (*b*) the term of the lay-off is three months or less;

(*c*) the term of the lay-off is more than three months and the employer

(i) notifies the employee at or before the time of the lay-off that he will be recalled to work on a fixed date or within a fixed period neither of which shall be more than 6 months from the date of the lay-off, and

(ii) recalls the employee to his employment in accordance with subparagraph (i).

16 For the respondents Mr. Giles' position is that Reg. 30(*c*)(ii) is not contrary to the spirit and intent of Pt. III of the Canada Labour Code. He agrees, on the authorities cited by Mr. Shortt, that the Governor in Council is not competent to pass a regulation which contradicts the Act: see *Belanger v. R.* (1916), 54 S.C.R. 265, 20 C.R.C. 343, 34 D.L.R. 221; *Alvarez v. Min. of Manpower & Immigration*, [1979] 1 F.C. 149, 22 N.R. 85 (C.A.); *Ulin v. R.*, [1973] F.C. 319, 35 D.L.R. (3d) 738; *Pulp & Paper Wkrs. of Can. v. A.G.B.C.* (1968), 63 W.W.R. 497, 67 D.L.R. (2d) 378 (B.C.S.C.); and *Re Stilling* (1961), 35 W.W.R. 164, 28 D.L.R. (2d) 102 (B.C.S.C.).

17 Mr. Giles' argument goes as follows. He says that s. 60(4), by deeming an employee who is laid off to have been terminated, does not mean that a lay-off and a termination are one and the same thing. Rather, the difference between them is recognized but in spite of that difference they are, for the purposes of division V.2, to be treated as the same thing. I think that is correct and it is supported by *R. v. County Council of Norfolk* (1891), 60 L.J.Q.B. 379 (Div. Ct.), and *Green v. Marsh*, [1892] 2 Q.B. 330 (C.A.). Next Mr. Giles says that Reg. 30(*c*)(ii) has nothing to do with s. 60(1) of the Act. It does not turn what was a lay-off, but has by s. 60(4) to be treated as if it were a termination, back into a lay-off. It has no effect contrary to s. 60(1). Instead, it identifies an occasion when a lay-off is not to be deemed, that is to say not to be treated, as a termination *in the first place*. By that argument Mr. Giles says that Reg. 30(*c*)(ii) does not modify s. 60(1) but instead modifies s. 60(4), a section which has nothing to do with the giving of notice.

18 With great respect to the thoughtful analysis which lies behind that very carefully constructed argument, it fails, in my opinion, to deal with division V.2 as a whole. I do not think the statute should be construed simply by dissecting it into its minute parts but rather, by considering its provisions and its intention as a whole. A collection of cases supporting that proposition is to be found at c. 5 of Mr. E. A. Driedger's work "The Construction of Statutes" (1974). Read as a whole, division V.2 has four operative provisions. They are ss. 60(1), 60(2), 60(3) [en. R.S.C. 1970, c. 17 (2nd Supp.), s. 16] and 60.1 [en. R.S.C. 1970, c. 17 (2nd Supp.), s. 16; am. 1976-77, c. 28, s. 49(2) (Sched.)]. The remaining sections, ss. 60(4) and 60.2, simply provide fo the passage of regulations to carry out the purpose of the former provisions of the division, s. 60(4) itself being in the nature of a definition section. In dealing with the respondents' first ground of preliminary objection, I have already expressed my view that one of the primary intentions of the operative provisions of division V.2 of the Act is to assist the class of employees, which includes these petitioners, in finding other employment by giving the minister and themselves through the trade union a longer opportunity to find other employment. If the notice is not given to the minister or to them, they are deprived of that opportunity to which they are statutorily entitled. Regulation 30(*c*)(ii) has the practical effect of making the employees wait until after the end of the 16-week period specified in s. 60(1)(*c*) for notice to the minister and until after the time in which they or their trade union are entitled to a copy of that notice, before knowing whether they were entitled to have notice given to the minister and to themselves in the first place. Each of the petitioning employees here has been recalled to work effective 1st February 1983, according to the affidavit of Mr. Smith filed herein. They must therefore wait 25 weeks before they know whether Reg. 30(*c*)(ii) saves this lay-off from being a deemed termination under s. 60(4), because if they are not in fact recalled by then the purported saving power of the regulation is ineffective. If that happens, it is then too late to give the notice which it then transpires ought to have been given.

19 I accept Mr. Shortt's submission that the s. 60(1)(*c*) notice is to be given 16 weeks before termination and that a regulation such as Reg. 30(*c*)(ii), which purports to delay the possible effectiveness of s. 60(1)(*c*) until substantially after the termination, is inconsistent with the spirit and intent of division V.2 of the Code. Such a "now you see it now you don't" result can scarcely have been what Parliament intended by division V.2. I think Parliament intended, and has expressed the intent, that employees should know at once if they are being terminated or if they are only being laid off, and if terminated in numbers exceeding 300 that they should have the benefit of the notice. With very great respect to the Governor in Council. I therefore find Reg. 30(*c*)

(ii) to be ultra vires the powers conferred by s. 60.2 of the Code and to be invalid. Accordingly an order and declaration will go as prayed in the petition with costs to the petitioners.

20 Before leaving this matter, I wish to express my gratitude to counsel for their very able and careful arguments. I also express regret that I did not have the assistance of counsel representing the Attorney General for Canada in reaching a decision which may have effect elsewhere than in these proceedings. I also wish to repeat what was said by Mr. Shortt, counsel for the employees, that this is not a case in which an employer has acted in a high-handed manner, but rather a case where it has relied upon the apparent provisions of the regulation under the Canada Labour Code only to be told by this ruling that it is ultra vires.

Action allowed.

End of Document

TAB 22

CITATION: U.S. Steel Canada Inc. (Re), 2014 ONSC 6145
COURT FILE NO.: CV-14-10695-00CL
DATE: 20141022

SUPERIOR COURT OF JUSTICE - ONTARIO

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO U.S. STEEL CANADA INC.

BEFORE: Mr. Justice H. Wilton-Siegel

COUNSEL: *R. Paul Steep, Jamey Gage and Heather Meredith*, for the Applicant

Kevin Zych, for the Monitor

Michael Barrack, Robert Thornton and Grant Moffat, for United States Steel Corporation and the proposed DIP Lender

Gale Rubenstein, Robert J. Chadwick and Logan Willis, for Her Majesty the Queen in Right of Ontario and the Superintendent of Financial Services (Ontario)

Ken Rosenberg and Lily Harmer, for the United Steelworkers International Union and the United Steelworkers Union, Local 8782

Sharon L.C. White, for the United Steelworkers Union, Local 1005

Shayne Kukulowicz and Larry Ellis, for the City of Hamilton

Steve Weisz and Arjo Shalviri, for Caterpillar Financial Services Limited

S. Michael Citak, for various trade creditors

Kathryn Esaw and Patrick Corney, for the Independent Electricity System Operator

Andrew Hatnay, for certain retirees and for the proposed representative counsel

HEARD AND ENDORSED: October 8, 2014
RELEASED: October 22, 2014

ENDORSEMENT

[1] U.S. Steel Canada Inc. (the "Applicant") brought an application for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "CCAA") on September 16, 2014, and was granted the requested relief pursuant to an initial order of Morawetz R.S.J. dated

September 16, 2014 (the "Initial Order"). The Initial Order contemplated that any interested party, including the Applicant and the Monitor, could apply to this court to vary or amend the Initial Order at a comeback motion scheduled for October 6, 2014 (the "Comeback Motion").

[2] The Comeback Motion was adjourned from October 6, 2014 to October 7, 2014, and further adjourned on that date to October 8, 2014. On October 8, 2014, the Court heard various motions of the Applicant and addressed certain other additional scheduling matters, indicating that written reasons would follow with respect to the substantive matters addressed at the hearing. This endorsement constitutes the Court's reasons with respect to the five substantive matters addressed in two orders issued at the hearing.

[3] In this endorsement, capitalized terms that are not defined herein have the meanings ascribed to them in the Initial Order.

DIP Loan

[4] The Applicant seeks approval of a debtor-in-possession loan facility (the "DIP Loan"), the terms of which are set out in an amended and restated DIP facility term sheet dated as of September 16, 2014 (the "Term Sheet") between the Applicant and a subsidiary of USS (the "DIP Lender").

[5] The Term Sheet contemplates a DIP Loan in the maximum amount of $185 million, to be guaranteed by each of the present and future, direct or indirect, wholly-owned subsidiaries of the Applicant. The Term Sheet provides for a maximum availability under the DIP Loan that varies on a monthly basis to reflect the Applicant's cash flow requirements as contemplated in the cash flow projections attached thereto. Advances bear interest at 5% per annum, 7% upon an event of default, and are prepayable at any time upon payment of an exit fee of $5.5 million together with the lender's fees and costs described below. The Term Sheet provides for a commitment fee in the amount of $3.7 million payable out of the first advance. The Applicant is also obligated to pay the lender's legal fees and any costs of realization or disbursement pertaining to the DIP Loan and these CCAA proceedings.

[6] The Term Sheet contains a number of affirmative covenants, including compliance with a timetable for the CCAA proceedings. The DIP Loan terminates on the earliest to occur of certain events, including: (1) the implementation of a compromise or plan of arrangement; (2) the sale of all or substantially all of the Applicant's assets; (3) the conversion of the CCAA proceedings into a proceeding under the *Bankruptcy and Insolvency Act*; (4) December 31, 2015, being the end of the proposed restructuring period according to the timetable; and (5) the occurrence of an event of default, at the discretion of the DIP lender.

[7] A condition precedent to funding under the DIP Loan is an order of this Court granting a charge in favour of the DIP lender (the "DIP Lender's Charge") having priority over all security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (herein, collectively "Encumbrances") other than the Administration Charge (Part I), the Director's Charge and certain permitted liens set out in the Term Sheet, which include existing and future purchase money security interests and certain equipment financing security registrations listed in a schedule to the Term Sheet (the "Permitted Priority Liens").

[8] The terms and conditions of the DIP Loan, as set out in the Term Sheet, have been the subject of extensive negotiation in the period prior to the hearing of this motion. The DIP Loan is supported by the monitor and USS, and is not opposed by any of the other major stakeholders of the Applicant, including the Province of Ontario and the United Steelworkers International Union and the United Steelworkers Union, Locals 1005 and 8782 (collectively, the "USW").

[9] The existence of a financing facility is of critical importance to the Applicant at this time in order to ensure stable continuing operations during the CCAA proceedings and thereby to provide reassurance to the Applicant's various stakeholders that the Applicant will continue to have the financial resources to pay its suppliers and employees, and to carry on its business in the ordinary course. As such, debtor-in-possession financing is a pre-condition to a successful restructuring of the Applicant. In particular, the Applicant requires additional financing to build up its raw materials inventories prior to the Seaway freeze to avoid the risk of operating disruptions and/or sizeable cost increases during the winter months.

[10] The Monitor, who was present during the negotiations regarding the terms of the DIL Loan, the Chief Restructuring Officer (the "CRO") and the Financial Advisor to the Applicant have each advised the Court that in their opinion the terms of the DIP Loan are reasonable, are consistent with the terms of other debtor-in-possession financing facilities in respect of comparable borrowers, and meet the financial requirements of the Applicant. The Monitor has advised in its First Report that it does not believe it likely that a superior DIP proposal would have been forthcoming.

[11] The Court has the authority to approve the DIP Loan under s. 11 of the CCAA. I am satisfied that, for the foregoing reasons, it is appropriate to do so in the present circumstances.

[12] The Court also has the authority under s. 11.2 of the CCAA to grant the requested priority of the DIP Lender's Charge to secure the DIP Loan. In this regard, s. 11.2(4) of the CCAA sets out a non-exhaustive list of factors to be considered by a court in addressing such a motion. In addition, Pepall J. (as she then was) stressed the importance of three particular criteria in *Canwest Global Communications Corp. (Re)*, 2009 CarswellOnt 6184 at paras. 32-34 (S.C.), [2009] O.J. No. 4286 [*Canwest*]. In my view, the DIP Lender's Charge sought by the Applicant is appropriate based on those factors for the reasons that follow.

[13] First, notice has been given to all of the secured parties likely to be affected, including USS as the only secured creditor having a general security interest over all the assets of the Applicant. Notice has also been given broadly to all PPSA registrants, various governmental agencies, including environmental agencies and taxing authorities, and to all pension and retirement plan beneficiaries pursuant to the process contemplated by the Notice Procedure Order.

[14] Second, the maximum amount of the DIP Loan is appropriate based on the anticipated cash flow requirements of the Applicant, as reflected in its cash flow projections for the entire restructuring period, in order to continue to carry on its business during the restructuring period. The cash flows to January 30, 2015 are the subject of a favourable report of the Monitor in its First Report.

[15] Third, the Applicant's business will continue to be managed by the Applicant's management with the assistance of the CRO during the restructuring period. The Applicant's board of directors will continue in place, a majority of whom are independent individuals with significant restructuring and steel-industry experience. The Applicant's parent and largest creditor, USS, is providing support to the Applicant by providing the DIP Loan through a subsidiary. Equally important, the existing operational relationships between the Applicant and USS will continue.

[16] Fourth, for the reasons set out above, the DIP Loan will assist in, and enhance, the restructuring process.

[17] Fifth, the DIP Lender's Charge does not secure any unsecured pre-filing obligations owed to the DIP lender or its affiliates. It will not prejudice any of the other parties having security interests in property of the Applicant. In particular, the DIP Charge will rank behind the Permitted Priority Liens. Although it will rank ahead of any deemed trust contemplated by the *Pension Benefits Act*, R.S.O. 1990, c. P.8, the DIP Loan contemplates continued payment of the pension contributions required under the Pension Agreement dated as of March 31, 2006, as amended by the Amendment to Pension Agreement dated October 31, 2007 (collectively, the "Stelco Pension Agreement") and Ontario Regulation 99/06 under the *Pension Benefits Act* (the "Stelco Regulation").

[18] Based on the foregoing, it is appropriate to grant the DIP Charge having the priority contemplated above. As was the case in *Timminco Ltd. (Re)*, 2012 ONSC 948 at paras. 46-47, [2012] O.J. No. 596 [*Timminco*], it is not realistic to conceive of the DIP Loan proceeding in the absence of the DIP Lender's Charge receiving the priority being requested on this motion, nor is it realistic to investigate the possibility of third-party debtor-in-possession financing without a similar priority. The proposed DIP Loan, subject to the benefit of the proposed DIP Lender's Charge, is a necessary pre-condition to continuation of these restructuring proceedings under the CCAA and avoidance of a bankruptcy proceeding. I am satisfied that, in order to further these objectives, it is both necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex Finance, LLC v. United Steel Workers*, 2013 SCC 6, [2013] 1 S.C.R. 271 [*Sun Indalex*] such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of the DIP Lender's Charge.

Administration Charge and Director's Charge

[19] The Initial Order provides for an Administration Charge (Part I) to the maximum amount of $6.5 million, a Director's Charge to a maximum amount of $39 million, and an Administration Charge (Part II) to a maximum amount of $5.5 million plus $1 million. On this motion, the Applicant seeks to amend the Initial Order, which was granted on an *ex parte* basis, to provide that the Administration Charge (Part I) and the Director's Charge rank ahead of all other Encumbrances in that order, and the Administration Charge (Part II) ranks ahead of all Encumbrances except the prior-ranking court-ordered charges and the Permitted Priority Liens.

[20] The Court's authority to grant a super-priority in respect of the fees and expenses to be covered by the Administration Charge (Part I) and the Administration Charge (Part II) is found in s. 11.52 of the CCAA. Similarly, s. 11.51 of the CCAA provides the authority to grant a

similar charge in respect of the fees and expenses of the directors to be secured by the Director's Charge.

[21] As discussed above, the Applicant has fulfilled the notice requirements in respect of those provisions by serving the motion materials for this Comeback Motion to the parties on the service list and by complying with the requirements of the Notice Procedure Order.

[22] It is both commonplace and essential to order a super-priority in respect of charges securing professional fees and disbursements and directors' fees and disbursements in restructurings under the CCAA. I concur in the expression of the necessity of such security as a pre-condition to the success of any possible restructuring, as articulated by Morawetz R.S.J. in *Timminco* at para. 66.

[23] In *Canwest*, at para. 54, Pepall J. (as she then was) set out a non-exhaustive list of factors to be considered in approving an administration charge. Morawetz R.S.J. addressed those factors in his endorsement respecting the granting of the Initial Order approving the Administration Charge (Part I) and the Administration Charge (Part II). Similarly, Morawetz R.S.J. also addressed the necessity for, and appropriateness of, approving the Director's Charge in such endorsement.

[24] In my opinion, the same factors support the super-priority sought by the Applicant for the Administration Charge (Part I), the Director's Charge and the Administration Charge (Part II). Further, I am satisfied that the requested priority of these charges is necessary to further the objectives of these CCAA proceedings and that it is also necessary and appropriate to invoke the doctrine of paramountcy, as contemplated in *Sun Indalex*, such that the provisions of the CCAA will override the provisions of the *Pension Benefits Act* in respect of the priority of these Charges. I am satisfied that the beneficiaries of the Administration Charge (Part I) and the Administration Charge (Part II) will not likely provide services to the Applicant in these CCAA proceedings without the proposed security for their fees and disbursements. I am also satisfied that their participation in the CCAA proceedings is critical to the Applicant's ability to restructure. Similarly, I accept that the Applicant requires the continued involvement of its directors to pursue its restructuring and that such persons, particularly its independent directors, would not likely continue in this role without the benefit of the proposed security due to the personal exposure associated with the Applicant's financial position.

The KERP

[25] The Applicant has identified 28 employees in management and operational roles who it considers critical to the success of its restructuring efforts and continued operations as a going concern. It has developed a key employee retention programme (the "KERP") to retain such employees. The KERP provides for a cash retention payment equal to a percentage of each such employee's annual salary, to be paid upon implementation of a plan of arrangement or completion of a sale, upon an outside date, or upon earlier termination of employment without cause.

[26] The maximum amount payable under the KERP is $2,570,378. The Applicant proposes to pay such amount to the Monitor to be held in trust pending payment.

[27] The Court's jurisdiction to authorize the KERP is found in its general power under s. 11 of the CCAA to make such order as it sees fit in a proceeding under the CCAA. The following factors identified in case law support approval of the KERP in the present circumstances.

[28] First, the evidence supports the conclusion that the continued employment of the employees to whom the KERP applies is important for the stability of the business and to assist in the marketing process. The evidence is that these employees perform important roles in the business and cannot easily be replaced. In addition, certain of the employees have performed a central role in the proceedings under the CCAA and the restructuring process to date.

[29] Second, the Applicant advises that the employees identified for the KERP have lengthy histories of employment with the Applicant and specialized knowledge that cannot be replaced by the Applicant given the degree of integration between the Applicant and USS. The evidence strongly suggests that, if the employees were to depart the Applicant, it would be very difficult, if not impossible, to have adequate replacements in view of the Applicant's current circumstances.

[30] Third, there is little doubt that, in the present circumstances and, in particular, given the uncertainty surrounding a significant portion of the Applicant's operations, the employees to be covered by the KERP would likely consider other employment options if the KERP were not approved

[31] Fourth, the KERP was developed through a consultative process involving the Applicant's management, the Applicant's board of directors, USS, the Monitor and the CRO. The Applicant's board of directors, including the independent directors, supports the KERP. The business judgment of the board of directors is an important consideration in approving a proposed KERP: see *Timminco Ltd. (Re)*, 2012 ONSC 506 at para.73, [2012] O.J. No. 472. In addition, USS, the only secured creditor of the Applicant, supports the KERP.

[32] Fifth, both the Monitor and the CRO support the KERP. In particular, the Monitor's judgment in this matter is an important consideration. The Monitor has advised in its First Report that it is satisfied that each of the employees covered by the KERP is critical to the Applicant's strategic direction and day-to-day operations and management. It has also advised that the amount and terms of the proposed KERP are reasonable and appropriate in the circumstances and in the Monitor's experience in other CCAA proceedings.

[33] Sixth, the terms of the KERP, as described above, are effectively payable upon completion of the restructuring process.

Appointment of Representative Counsel for the Non-USW Active and Retiree Beneficiaries

[34] The beneficiaries entitled to benefits under the Hamilton Salaried Pension Plan, the LEW Salaried Pension Plan, the LEW Pickling Facility Plan who are not represented by the USW, the Legacy Pension Plan, the Steinman Plan, the Opportunity GRRSP, RBC's and RA's who are not represented by the USW and beneficiaries entitled to OEPB's who are not represented by the USW (collectively, the "Non-USW Active and Retiree Beneficiaries") do not currently have representation in these proceedings. The defined terms in this section have the meanings ascribed thereto in the affidavit of Michael A. McQuade referred to in the Initial Order.

[35] The Applicant proposes the appointment of six representatives and representative counsel to represent the interests of the Non-USW Active and Retiree Beneficiaries. The Court has authority to make such an order under the general authority in section 11 of the CCAA and pursuant to Rules 10.01 and 12.07 of the *Rules of Civil Procedure*. I am satisfied that such an order should be granted in the circumstances.

[36] In reaching this conclusion, I have considered the factors addressed in *Canwest Publishing (Re)*, 2010 ONSC 1328, [2010] O.J. No. 943. In this regard, the following considerations are relevant.

[37] The Non-USW Active and Retiree Beneficiaries are an important stakeholder group in these proceedings under the CCAA and deserve meaningful representation relating to matters of recovery, compromise of rights and entitlement to benefits under the plans of which they are beneficiaries or changes to other compensation. Current and former employees of a company in proceedings under the CCAA are vulnerable generally on their own. In the present case, there is added concern due to the existence of a solvency deficiency in the Applicant's pension plans and the unfunded nature of the OPEB's.

[38] Second, the contemplated representation will enhance the efficiency of the proceedings under the CCAA in a number of ways. It will assist in the communication of the rights of this stakeholder group on an on-going basis during the restructuring process. It will also provide an efficient and cost-effective means of ensuring that the interests of this stakeholder group are brought to the attention of the Court. In addition, it will establish a leadership group who will be able to organize a process for obtaining the advice and directions of this group on specific issues in the restructuring as required.

[39] Third, the contemplated representation will avoid a multiplicity of retainers to the extent separate representation is not required. In this regard, I note tha,t at the present time, there is a commonality of interest among all the non-USW Active and Retiree Beneficiaries in accordance with the principles referred to in *Nortel Networks Corp. (Re)*, 2009 CarswellOnt 3028 at para. 62 (S.C.), [2009] O.J. No. 3280 [*Nortel*]. In particular, at the present time, none of the CRO, the proposed representative counsel and the proposed representatives see any material conflict of interest between the current and former employees. In these circumstances, as in *Nortel*, I am satisfied that representation of the employees' interests can be accomplished by the appointment of a single representative counsel, knowledgeable and experienced in all facets of employee claims. If the interests of such parties do in fact diverge in the future, the Court will be able to address the need for separate counsel at such time. In this regard, the proposed representative counsel has advised the Court that it and the proposed representatives are alert to the possibility of such conflicts potentially arising and will bring any issues of this nature to the Court's attention.

[40] Fourth, the balance of convenience favours the proposed order insofar as it provides for notice and an opt-out process. The proposed representation order thereby provides the flexibility to members of this stakeholder group who do not wish to be represented by the proposed representatives or the proposed representative counsel to opt-out in favour of their own choice of representative and of counsel.

[41] Fifth, the proposed representative counsel, Koskie Minsky LLP, have considerable experience representing employee groups in other restructurings under the CCAA. Similarly, the proposed representatives have considerable experience in respect of the matters likely to be addressed in the proceedings, either in connection with the earlier restructuring of the Applicant or in former roles as employees of the Applicant.

[42] Sixth, the proposed order is supported by the Monitor and a number of the principal stakeholders of the Applicant and is not opposed by any of the other stakeholders appearing on this motion.

Extension of the Stay

[43] Lastly, the Applicant seeks an order extending the provisions of the Initial Order, including the stay provisions thereof, until January 23, 2015. Section 11.02(2) of the CCAA gives the Court the discretionary authority to extend a stay of proceedings subject to satisfaction of the conditions set out in s. 11.02(3). I am satisfied that these requirements have been met in the present case, and that the requested relief should be granted, for the following reasons.

[44] First, the stay is necessary to provide the stability required to allow the Applicant an opportunity to work towards a plan of arrangement. Since the Initial Order, the Applicant has continued its operations without major disruption. In the absence of a stay, however, the evidence indicates the Applicant will have a cash flow deficiency that will render the objective of a successful restructuring unattainable. As mentioned, the Monitor has advised that, based on its review, the Applicant should have adequate financial resources to continue to operate in the ordinary course and in accordance with the terms of the Initial Order during the stay period.

[45] Second, I am satisfied that the Applicant is acting in good faith and with due diligence to facilitate the restructuring process. In this regard, the Applicant has had extensive discussions with its principal stakeholders to address significant objections to the initial draft of the Term Sheet that were raised by such stakeholders.

[46] Third, the Monitor and the CRO support the extension.

[47] Lastly, while it is not anticipated that the restructuring will have proceeded to the point of identification of a plan of arrangement by the end of the proposed stay period, the Applicant should be able to make significant steps toward that goal during this period. In particular, the Applicant intends to commence a process of discussions with its stakeholders as well as to explore restructuring options through a sales or restructuring recapitalization process (the "SARP") contemplated by the Term Sheet. An extension of the stay will ensure stability and continuity of the applicant's operations while these discussions are conducted, without which the Applicant's restructuring options will be seriously limited if not excluded altogether. In addition, the Applicant should be able to take steps to provide continuing assurance to its stakeholders that it will be able to continue to operate in the ordinary course during the anticipated restructuring period, without interruption, notwithstanding the current proceedings under the CCAA.

[48] Accordingly, I am satisfied that an extension of the Initial Order will further the purposes of the Act and the requested extension should be granted.

Wilton-Siegel J.

Date: October 22, 2014

TAB 23

CITATION: Urbancorp Inc. (Re), 2016 ONSC 5426
COURT FILE NO.: CV-16-11389-00CL
DATE: 20160829

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 URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (collectively, the "Applicants") AND THE AFFILIATED ENTITIES IN SCHEDULE "A" HERETO

Court File No.: 31-2114850
Court File No.: 31-2114850

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (WOODBINE) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF URBANCORP (BRIDLEPATH) INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BEFORE: Newbould J.

COUNSEL: *Lisa S. Corne and David P. Preger,* for the moving parties
Edmond F. B. Lamek, for the Urbancorp interests
Robin B. Schwill, for the KSV Kofman Inc., the Monitor and Proposal Trustee
Adam Slavens, for Tarion Warranty Corporation
Vern W. DaRe, for Stefano Serpa and Adrian Serpa
James M. Wortzman, for Atrium Mortgage Investment Corporation
Trent Morris, for several purchasers
Monique Sassi, for Mattamy Homes Limited
Dominique Michaud, for Terra Firma Capital Corporation.
Kenneth D. Kraft, for Guy Gissin, the Foreign Representative of Urbancorp Inc.

Chris Burr, for Laurentian Bank

HEARD: August 25, 2016

ENDORSEMENT

[1] This is a motion brought at the request of 40 different purchasers of residential units from Urbancorp (Lawrence) Inc. ("Lawrence"), Urbancorp (St. Clair Village) Inc. ("St. Clair"), Urbancorp (Woodbine) Inc. ("Woodbine"), and Urbancorp (Bridlepath) Inc. ("Bridlepath") for the appointment of Dickinson Wright LLP ("Dickinson Wright") as their representative counsel in the CCAA and BIA NOI proceedings and for an order that their legal fees and disbursements capped at $150,000 be paid and secured by an administrative charge against the four properties.

[2] The motion is supported by Tarion. It is opposed by KSV, the Monitor and Proposal Trustee, and by Mr. Gissin, the Foreign Representative of Urbancorp Inc. appointed by the Israeli Court. It is also opposed by the Urbancorp entities and with respect to the Bridlepath project by two purchasers of units and Atrium, a secured lender on that project.

[3] For the reasons that follow, the motion is granted in part.

[4] The four properties in question are vacant properties which Urbancorp intended to develop for residential use. No construction has been commenced and the properties consist of raw land. Each of the Urbancorp companies pre-sold freehold homes and received deposits from home buyers in connection with the home sales. The deposits were $3.7 million on the Lawrence property, $3.3 million on the St. Clair property, $1.9 million on the Woodbine property and $5.6 million on the Bridlepath property. The Urbancorp companies did not hold the deposits in trust and they have all been spent. As the projects involved the construction of freehold homes, there was no legislation requiring home buyer deposits to be segregated or held in trust.

[5] On June 30, 2016, orders were made in the CCAA proceedings and the NOI proceedings approving sale processes for the properties[1]. Offers were due on August 16, 2016. Multiple offers were received for each of the properties. As of the date of August 23rd, offers had been accepted for the Lawrence and Bridlepath properties and the sale process is advancing for the other properties. Any transaction will be subject to approval by this Court.

[6] All of the leading offers received in the sale process required that clean title be vested in the purchaser free of all obligations, including the agreements of purchase and sale entered into between the Urbancorp companies and home buyers. The agreements of purchase and sale are obligations of the Urbancorp companies and do not attach to the real estate owned by them.

[7] In the event that the contemplated transactions are completed, KSV states that it appears that the sale proceeds from each transaction will be sufficient to repay in full the amount of the deposits as well as any registered liens and mortgages. KSV as Monitor and Proposal Trustee is in the process of commencing a claims process in the CCAA and NOI proceedings, so further claims may be identified. However, no creditor not already known to KSV has contacted KSV advising that they may have a material claim against one or more of the Urbancorp companies.

[8] Ms. Corne advises that forty buyers have either retained her firm Dickinson Wright or requested it to bring this motion for a representative order and a charge for legal fees and disbursements. Buyers that have signed retainer engagements had agreements for the purchase of homes on three of the projects, being St. Clair, Lawrence and Bridlepath. None of the Woodbine purchasers have signed engagement letters but Dickenson Wright has been asked by 11 of the purchasers to represent their interests. Some of the purchasers wish to just get their deposits back while others would like to see that the homes they purchased be built and their contract accepted by any purchaser of the lands. There are a total of approximately 183 purchasers of pre-

[1] The order covered more than the four projects in question. This endorsement covers only the four properties which are the subject of this motion.

construction homes who have lost their deposits. Some have retained other firms. Fogler Rubinoff has been retained by two purchasers of the Bridlepath property and Mr. Morris has been retained by five undisclosed purchasers of one or more of the four properties.

[9] The agreements of purchase and sale are in a standard form and provide that in the event that the construction of a dwelling has not been completed by the closing date, the vendor shall not be liable for any damages or costs other than the costs paid by Tarion, which has a maximum coverage of $40,000 per purchaser.

Legal framework

[10] The authority to appoint representative counsel in CCAA proceedings is undoubted under section 11 of the CCAA and rules 10.01 and 12.07 of the rules of practice in Ontario. See *Re Target Canada Co.* (2015), 22 C.B.R. (6th) 323 and *Re Nortel Networks Corporation*, 2009 CanLII 26603. I agree with Justice Wilton-Siegel in *Re Kitchener Frame Limited*, July 7, 2011 unreported, that there is no reason why the same should not pertain to a proposal under the BIA.

[11] In *Re CanWest Publishing Inc.* (2010), 65 C.B.R. (5th) 152, Pepall J. (as she then was) stated that 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.

[12] As the issue of whether to appoint a representative counsel is one of equity, there can be no hard and fast rules governing any particular case, but these factors need be considered.

[13] So far as granting a charge to secure the fees and disbursements of a representative counsel, this is covered by section 11.52 (1)(c) of the CCAA which provides:

> 11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the debtor company is subject to a security or charge - in an amount that the court considers appropriate - in respect of the fees and expenses of
>
> > (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> (2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

[14] Thus the court must be satisfied that the security or charge is necessary for the effective participation of representative counsel in the proceedings. In considering this issue. Pepall J. in *Re CanWest Publishing Inc.* (2010), 63 C.B.R. (5th) 115 stated that factors that might be considered would include:

> (a) the size and complexity of the businesses being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is an unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

Analysis

[15] It is contended that the purchasers are an especially vulnerable and disparate group of creditors and that without representation counsel who can advocate for their rights, they will be prejudiced. It is said that with such a large group of purchasers, it is administratively preferable to have one representative counsel who can deal with the purchasers of the properties and with KSV rather than have a multiplicity of individual legal retainers and the inefficiencies that would involve.

[16] It is argued that for the majority of purchasers, it would not be economical to retain their own legal counsel to represent their interests in these proceedings. However, the evidence to support this is very meagre. There are two purchasers, one from the St. Clair project and one from the Lawrence project, who state in affidavits that they cannot afford to retain counsel individually to represent them. However, there is no evidence that the purchasers could not together retain any law firm to represent all of them, as Dickinson Wright seeks to do on this motion. If all 185 purchasers retained a law firm with a cap on fees and disbursements of $150,000, it would amount to approximately $800 per purchaser.

[17] A group retaining one law firm is not unknown to the Urbancorp saga. In the Leslieville project that was being developed by an Urbancorp entity, Dickinson Wright was retained by a group of approximately 35 purchasers of residential townhouse condominium units. Due to Urbancorp's failure to complete the construction and sale of the Leslieville homes, these purchasers retained Dickinson Wright to commence an application for the appointment of an investigative receiver of Urbancorp Leslieville. That application prompted Urbancorp Leslieville's senior secured creditor to seek the appointment of a receiver of Urbancorp Leslieville. Dickinson Wright is continuing to represent these purchasers in respect of the ongoing receivership proceedings of Urbancorp Leslieville.

[18] KSV, the Monitor and Proposal Trustee, is opposed to the appointment of representative counsel and an administration charge against the properties for the legal fees. It does not believe

that $150,000 is well spent taken that it is likely that all purchasers will get their deposits back. It says that there is no question but that the purchasers are in an unfortunate position because of the Urbancorp insolvency, as is the case for unsecured creditors in any insolvency, and that it will be the purchasers' interests to be represented by counsel. It says that the issue is really one of asking the estates to fund the purchasers, and that as funding has to be fair to all stakeholders, it would be wrong to have funding that would be solely in the interest of one group of stakeholders. Funding the purchasers' lawyers would not assist in maximizing the assets or in negotiating a plan of compromise in this liquidating proceeding. So far as dealing with claims of the purchasers, that is a normal process for a Monitor or Proposal Trustee to deal with claimants.

[19] Ms. Corne says that the majority or nearly all of the purchasers who have contacted Dickinson Wright will want to try to hold on to whatever equity there is in their agreements caused by the increasing market values, and will want a seat at the table to sit down with prospective purchasers of the properties to attempt to negotiate some arrangement to continue with their purchase agreements, perhaps by way of paying some top-up. It is pointed out by KSV and Urbancorp that what is being sold is raw land and there is no knowledge of what the purchasers of the land will intend to build on the land. To suggest that the purchasers of the pre-construction units will be able to save their purchase agreements in some way is speculative at this stage.

[20] I have considerable doubt that appointing a representative counsel by whom all 185 purchasers are to be represented unless they opt out is warranted. It is likely that their interests are not all similar. Some may be prepared to simply walk from the situation if they get back their deposit, which appears in all likelihood will be the case. Some are investors whose interests might be quite different. Some want to negotiate with a purchaser of the raw land. Already there have been two other lawyers retained by some purchasers, albeit a small number. I recognize however that whether a conflict will exist is to some extent hypothetical at this stage.

[21] This is not a situation such as *Target* in which representative counsel was appointed to represent some 17,600 employees or in *Nortel* in which there were many thousands of affected employees and representative counsel was obviously needed to represent their interests.

[22] I recognize that purchasers are better off if they have legal advice and be represented by counsel. This issue is really whether the Urbancorp estates should fund representative counsel. I am not at all satisfied that a security or charge against the Urbancorp properties is necessary for the effective participation of purchasers in these proceedings. There is no evidence of any financial inability of the purchasers to jointly engage counsel to represent them. Two purchasers of the Bridlepath project are opposed to representative counsel being appointed for the Bridlepath purchasers. On that project the pre-sales for the then proposed 37 units averaged approximately $1.18 million.[2] Purchasers in the Urbancorp Leslieville insolvency were able to jointly retain Dickenson Wright and there is no evidence that the purchasers on the four Urbancorp projects in question could not do the same.

[23] Taken that all purchasers are likely to get back their deposits, legal representation for further action would likely be to negotiate with the known or potential purchasers of the raw lands to agree to some arrangement that would result in purchasers obtaining some part of their equity in their deals being preserved[3]. There would be nothing wrong in their attempting to do so. However to do that with estate funds could well be contrary to the interests of the insolvent estates. Any purchaser of the raw lands would want the lands free and clear of any claims, and the best prices offered have reflected that. If such a purchaser were to provide to any of the pre-sale construction buyers some of the equity in their agreements, that no doubt would reduce what a purchaser would be willing to pay for the raw land and be against the interests of the estates as

[2] The average purchase price for the St. Clair Village project was approximately $800,000 and for the Lawrence project approximately $652,000. I do not believe the average price for the Woodbine project is in the record.

[3] During argument Ms. Corne said that her firm had no intention of commencing litigation against the Urbancorp entities in question. In light of the contractual provisions, that is understandable. It does not mean that some purchaser might not want to do that however.

a whole. As well, KSV points out that there is no certainty that purchasers would have bid for the properties in the sales process if they were required to construct homes conforming to the requirements in the agreements with the home buyers.

[24] Estate funds should be spent for the benefit of the estate as a whole, not for the benefit of one group whose interests are contrary to the interests of the estate as a whole. If there is some equity available after all creditors of these Urbancorp entities have been paid, there are other interests entitled to share in such equity, including other Urbancorp entities under cross-collateralization agreements and Urbancorp Inc., represented by its Foreign Representative Mr. Gissin, which owes approx. $64 million plus interest on debentures issued in Israel and which is the shareholder of many of the Urbancorp insolvent entities.

[25] Thus it is not at all clear that funding a representative of the purchasers will be for the benefit of the companies in question.

[26] It is said that the amount of funding and the security for it is minimal, being $150,000. That may be but the issue is whether in principle it should be ordered. As well, it is by no means clear that representative counsel would not come back and later ask for that amount to be increased. Originally they proposed a total of $300,000 but later reduced that to $150,000.

[27] In all of the circumstances, I am prepared to make an order appointing Dickenson Wright as representative counsel for the purchasers of the four projects in question, but rather than having an opt-out provision as requested, the order shall provide an opt-in process in which purchasers are clearly advised that they will be represented by Dickenson Wright only if they choose to do so.

[28] I am not prepared to make an order that the fees and disbursements of Dickenson Wright be paid from the estates or secured by a charge. Counsel for KSV contended that if any representative order is made, the fees and disbursements could be paid by the estates from the distributions to be made to the purchasers who opted in. That would align the interests of

whatever purchaser wanted to retain Dickenson Wright with the steps taken on behalf of such purchasers. I accept that position and the order may provide that Dickenson Wright is entitled to be paid its fees and disbursements by the particular estates from the distributions to be made to those purchasers who choose to be represented by Dickenson Wright. The notice to purchasers advising them of their right to opt-in shall make this payment provision clear.

Newbould J.

Date: August 29, 2016

TAB 24

2021 CarswellNat 2450
Canada Adjudication (Canada Labour Code Part III)

WestJet, an Alberta Partnership and Employees in the service of WestJet, an Alberta Partnership, Re

2021 CarswellNat 2450

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")

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")

Mark L. Asbell Member

Heard: April 26, 2021; April 27, 2021
Judgment: June 1, 2021
Docket: None given

Counsel: Laura Mensch, Courtenay Mercier, for Employer
Matthew Bobawsky, for Employees

Subject: Public; Employment
Related Abridgment Classifications
Labour and employment law
II Employment law
II.6 Termination and dismissal
II.6.a Termination of employment by employer
II.6.a.iv Miscellaneous
Headnote
Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Miscellaneous
Over several months in 2020, airline employer issued termination notices to 30 per cent of its Canadian workforce consisting of 3,333 employees across five different employee groups after loss of passenger business and revenue due to COVID-19 pandemic — Four of employee groups negotiated a severance package and recall rights successfully under Division IX of Canada Labour Code, but non-union Calgary Corporate Employees group was unable to reach agreement with employer — Calgary Corporate Employees group comprised two per cent of employers' terminated employees who received termination notices on October 14, 2020 effective February 3, 2021 — Minister of Labour ordered that terms of appropriate Adjustment Program be developed and implemented by arbitrator under s. 224(1) of Code for Calgary Corporate Employees — Order accordingly — Arbitrator established Adjustment Program for Calgary Corporate Employees containing: financial bridge in form of severance; travel privileges; benefits; outplacement services to assist in job searches; and recall rights in event of improvement in employer's business — Severance entitlement and travel privileges increased with individual employees' length of service — Severance entitlement was capped at two weeks severance for each year of service — Adjustment Program established 12-month recall pool, lifetime outplacement services and extended Employee and Family Assistance Program for six months after termination.
Table of Authorities
Cases considered by *Mark L. Asbell Member*:
Air Canada v. C.U.P.E. (2008), 2008 CarswellNat 3985 (Can.Adjud.(CLC Part III))
Bardal v. Globe & Mail Ltd. (1960), [1960] O.W.N. 253, 24 D.L.R. (2d) 140, 1960 CarswellOnt 144 (Ont. H.C.)
Cape Breton Development Corp. (Devco), Re (June 2, 2000), Bruce Outhouse Member (Can. Arb.)

Gillespie v. 1200333 Alberta Ltd. (2012), 2012 ABQB 105, 2012 CarswellAlta 206, 98 C.C.E.L. (3d) 147, 2012 C.L.L.C. 210-052, 545 A.R. 28 (Alta. Q.B.)

Holm v. AGAT Laboratories Ltd (2018), 2018 ABCA 23, 2018 CarswellAlta 88, 64 Alta. L.R. (6th) 4, 45 C.C.E.L. (4th) 1, 422 D.L.R. (4th) 588, 2018 C.L.L.C. 210-028 (Alta. C.A.)

Kosowan v. Concept Electric Ltd. (2007), 2007 ABCA 85, 2007 CarswellAlta 310, 404 A.R. 8, 394 W.A.C. 8 (Alta. C.A.)

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2

Generally

Pt. III, Div. IX

Pt. IX

s. 168

s. 168(1)

s. 212

s. 212(1)

s. 215(2)

s. 215(3)

s. 215(4)

s. 215(5)

s. 221

s. 221(1)

s. 221(1)(b)

s. 221(2)

s. 223

s. 223(1)

s. 224

s. 224(1)

s. 224(2)

s. 224(2)(b)

s. 224(3)

s. 224(4)

s. 224(4)(a)

s. 224(5)

s. 230

s. 235

Employment Standards Code, R.S.A. 2000, c. E-9

Generally

s. 3

s. 56

s. 57

ORDER by Minister of Labour that arbitrator develop Adjustment Program under s. 224(1) of Canada Labour Code.

***Mark L. Asbell Member*:**

I. Introduction and Overview

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.

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 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:

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

(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.

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 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.

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.

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.

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".

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.

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.

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.

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

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.

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.

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 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 in accordance with 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 *does* specify clauses within the *Code*. It refers specifically to limiting severance pay "in accordance with *the statutory minimums* 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, 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.

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 ?16 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 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 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:

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.

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.

Order accordingly.

AppendixA — 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.

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.

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.

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.

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.

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.

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*.

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;

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).

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"*) 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."

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"*].

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).

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.

AppendixB — 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);

    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

AppendixC — ADJUSTMENT PROGRAM AWARD CALGARY CORPORATE EMPLOYEES

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.

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.

(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**").

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, 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.

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.

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.

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

Graphic 1

Footnotes

1 *Cape Breton Development Corporation (Devco)*, 2000 CanLII 29389, para 38.

2 2008 CarswellNat 3985

3 *Devco*, para 38.

4 *Air Canada*, para 4.

5 *Air Canada*, para 10.

6 *Air Canada*, para 33.

7 *Air Canada*, para 22.

8 *Air Canada* at para. 33

9 *Air Canada* at para 32

10 *Air Canada*, paras 27.

11 *Holm v AGAT Laboratories Ltd.* 2018 ABCA 23.

12 *Gillespie v 1200333 Alberta Ltd.*, 2012 ABQB 105 at para 40.

13 *Kosowan v Concept Electric Ltd.* 2007 ABCA 85.

14 *Kosowan v Concept Electric Ltd.*, para 1.

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.).

End of Document

TAB 25

COURT FILE NO.: CV-08-7672-00CL
DATE: 20090727

SUPERIOR COURT OF JUSTICE – ONTARIO
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WINDSOR MACHINE & STAMPING LIMITED, LIPEL INVESTMENTS LTD., WMSL HOLDINGS LTD., 442260 ONTARIO LTD., WINMACH CANADA LTD., PRODUCTION MACHINE SERVICES LTD., 538185 ONTARIO LTD., SOUTHERN WIRE PRODUCTS LIMITED, PELLUS MANUFACTURING LTD., TILBURY ASSEMBLY LTD., ST. CLAIR FORMS INC., CENTROY ASSEMBLY LTD., PIONEER POLYMERS INC., G&R COLD FORGING INC., WINDSOR MACHINE DE MEXICO, WINMACH INC., WINDSOR MACHINE PRODUCTS, INC. WAYNE MANUFACTURING INC. AND 383301 ONTARIO LIMITED

Applicants

BEFORE: **MORAWETZ J.**

COUNSEL: **Andrew Hatnay & Andrea McKinnon, for United Auto Workers Local 251**

Daniel Dowdall & Jane Dietrich, for Bank of Montreal

Joseph Marin, for the Applicants

Tony Reyes, for RSM Richter Inc., Monitor

Raong Phalavong, for Saginaw Pattern

HEARD: **MARCH 6 and 10, 2009**

E N D O R S E M E N T

INTRODUCTION

[1] International Union, United Automobile Aerospace & Agricultural Implement Workers of America ("United Auto Workers, Local 251" or the "Union") bring this motion for an order requiring the Applicants to pay termination and severance pay that is due and owing to the unionized employees of Tilbury Assembly Ltd. ("Tilbury") and Pellus Manufacturing Limited ("Pellus") under the *Employment Standards Act*, 2000 ("ESA") as result of terminations that occurred subsequent to the filing of proceedings by the Applicants under the *Companies' Creditors Arrangement Act* ("CCAA").

[2] The motion was opposed by Bank of Montreal (the "Bank"), the secured creditor of the Applicants and by the Applicants.

[3] The amount owing to the Tilbury employees for termination pay is approximately $23,000 and the amount owing for severance pay is approximately $216,000. These amounts are not in dispute.

[4] The amount claimed to be owing to the Pellus employees (assuming that the employees were terminated on February 20, 2009) is approximately $132,000 and the amount claimed to be owing for severance pay as of that date is approximately $326,000. This amount is disputed by Pellus.

[5] The Union submits that the Applicants should be required to pay the termination pay and severance pay owing to the Tilbury and Pellus employees for the following reasons:

(a) The ESA sets out a comprehensive code that requires an employer who terminates an employee to give the employee prior notice of termination, or if such notice is not given, pay in lieu of notice (commonly referred to as "termination pay"). The ESA also requires that an additional amount (referred to as "severance pay") be paid to certain long service employees if criteria in the ESA are met.

(b) The Amended and Restated Initial CCAA Order and the consent orders issued by this Court dated October 29, 2008, do not authorize the company to avoid paying termination pay and severance pay. The October 29, 2008 consent orders state that "the *Employment Standards Act, 2000* continues to apply".

(c) Section 5 of the ESA expressly states that no employer can contract out or waive an employment standard in the ESA and that any such contracting out or waiver is void.

(d) The Supreme Court of Canada has held that federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights, as long as the doctrine of paramountcy is not triggered. In the

absence of paramountcy, a provincial law such as the ESA continues to apply in insolvency proceedings.

(e) For the Tilbury and Pellus employees who continued to work for the Company after it went into CCAA protection and who were subsequently terminated, the payment of termination pay and severance pay is an ordinary course payment by the Company. It is to be paid the same way wages, benefits and other aspects of employee compensation are paid.

(f) The payment of termination pay and severance pay in a CCAA proceeding is not a re-ordering of priorities among creditors nor is it giving a higher rank to unsecured employee creditors. Termination pay and severance pay that arises on the termination of employees post-CCAA filing is not pre-filing debt. It is an ordinary course payment.

(g) The payment of termination pay and severance pay in the case at bar is within the reasonable expectations of the parties because:

(i) Company management represented to the Union employees from the outset of the CCAA proceedings that it would continue to pay all contractual amounts due to employees who worked during the CCAA proceedings, which would include amounts for termination pay and severance pay; and

(ii) The Company, the Bank and the Monitor consented to the terms of court orders that expressly state that the "*Employment Standards Act 2000* continues to apply".

(h) The employees have no recourse to be compensated for the unpaid termination pay and severance pay. There will be no Plan of Compromise.

(i) The *Wage Earner Protection Plan* (WEPP) is not available to the employees because the Company is in CCAA proceedings and the WEPP is only available to terminated employees if their employer is a bankrupt or in receivership.

(j) The amount of termination pay and severance pay owing is relatively low.

(k) The Company has the cash to pay the termination pay and severance pay that is owing.

(l) The payment of termination pay and severance pay will not jeopardize the Company's restructuring which is to be a Proposed Transaction involving a purchase of the company by its controlling shareholders.

(m) The Company has not drawn on the DIP Facility throughout the CCAA proceedings.

(n) The Company should not be able to use the CCAA to avoid its employee termination pay and severance pay obligations under the ESA.

(Note: In the excerpt from the factum, counsel to the Union references "Applicants", and the "Company". Hereafter, the collective reference is to "Applicants".)

[6] The Bank submits that the Union's motion for the payment of termination and severance claims should be dismissed because:

(a) the termination and severance claims are unsecured obligations of Tilbury and Pellus which are not afforded any priority under the Amended and Restated Initial Order, or any other orders that have been made in the CCAA proceeding, and are therefore unsecured claims subordinate to the claims of the Bank as a secured creditor. Any amount paid in respect of the termination and severance claims is a direct deduction from recoveries for the secured creditors; and

(b) the provisions of the Amended and Restated Initial Order granted by this Court on September 2, 2009 (the "Amended and Restated Initial Order") do not permit the Applicants to pay termination and severance claims at this time.

[7] The Applicants submit that the Union's motion should be dismissed because:

(a) the provisions of the Amended and Restated Initial Order do not permit the Applicants to pay the termination and severance claims in the circumstances in which the Union is seeking such payment;

(b) the Union has not sought to amend the Amended and Restated Initial Order at any time during these proceedings to require the Applicants to pay the termination and severance claims; and

(c) the effect of granting the relief to the Union would be to accord termination and severance claims a special status over the claims of other unsecured creditors of the Applicants and would result in the payment of such claims in priority to the claims of the Applicants' secured creditors.

FACTS

[8] The Union represents employees at four facilities of the Applicants: Tilbury, Pellus, G&R Cold Forging Inc. and Pioneer Polymers Inc. The Union represents approximately 180 employees out of the total workforce of 300 employees.

[9] On August 1, 2008, Windsor Machine & Stamping Ltd. ("WMSL"), 538185 Ontario Ltd. (Pellus Tool), Pellus, Tilbury, G&R Cold Forging Inc. and 383301 Ontario Limited (the "BIA Proposal Proponents") each filed a notice of intention ("NOI") to make a proposal pursuant to s. 50.4(1) of the *Bankruptcy and Insolvency Act* ("BIA").

[10] On August 6, 2008, the Applicants (including the BIA Proposal Proponents) were granted protection under the CCAA.

[11] As of the date of the initial CCAA order on August 6, 2008, the Monitor reported that the Bank was owed approximately $16.25 million comprised of approximately $8.1 million under an operating line of credit and approximately $8.15 million under a term loan. The Bank agreed to make available up to an additional $2 million to fund the Applicants' operations during the CCAA proceedings under a DIP Loan Agreement.

[12] The amount owing to various vendors as of the date of the NOI Filing was approximately $6.5 million.

[13] The DIP Facility was extended to the Applicants under the terms of a DIP Loan Agreement. The DIP Facility was approved under the terms of the Initial Order at the outset of the CCAA proceedings.

[14] The provisions of the DIP Loan Agreement provide that advances from the Bank to WMSL could be loaned to Pellus and Tilbury, (among other Applicants) to fund ordinary course operations of those affiliates. Counsel to the Applicants submits that as Tilbury and Pellus have no funds to pay any termination or severance pay to the employees at Tilbury and Pellus represented by the Union (the "Tilbury Union Employees" and "Pellus Union Employees"), respectively, and they would have to ask that WMSL lend them sufficient funds for that purpose.

[15] Under the terms of the Amended and Restated Initial Order, counsel to the Applicants submit that the right of the Applicants to negotiate the terms on which termination and severance payments may be made upon termination of the employment of the Applicants' employees was subject to the covenants which are contained in the DIP Loan Agreement and that the Applicants, with limited exceptions that do not include the making of termination and severance payments, are not permitted to do anything which adversely affects the ranking of the obligations of WMSL to the Bank under either the DIP Loan Agreement or under the Amended and Restated Credit Agreement that governs the terms of loans made by the Bank to the WMSL prior to the commencement of the CCAA proceedings.

[16] On October 8, 2008 a sales process was approved by court order. The deadline for submission of offers to the Monitor was November 18, 2008. On November 18, 2008 there were no offers received, however, certain parties continued to express an interest in the Applicants' operations.

[17] Orders were made in these proceedings on October 29, 2008 (the "October 29 Orders") at the time that access agreements with two major customers of the Applicants were approved by the court. The October 29 Orders included provisions stating that the notice of one week for termination of the employment of employees on the expiry of the access periods under the Access Agreements would not operate to neutralize or suspend the provisions of the ESA.

[18] In September or October, 2008, the Union was informed of the possibility of the closure of the Tilbury facility. The Union advised the Applicants at that time that should the

employment of any Tilbury Union Employees be terminated, those employees should be paid termination and severance pay as required under the ESA.

[19] The efforts of the Applicants in October and early November, 2008, were directed to securing sources of funding for the Applicants' restructuring initiatives from prospective purchasers, financial institutions and other providers of capital as strategic partners and investors. The Applicants submit that they considered filing a plan of arrangement during that period if their efforts to secure funding had been successful.

[20] When no offer was received to purchase the assets of the Applicants, the principals of WMSL (the "Shareholders") negotiated with the Bank and with Export Development Canada ("EDC") to obtain financing from the Bank and from EDC for two newly incorporated corporations ("New Cos") to be controlled by the Shareholders which would purchase the Applicants' assets, properties and undertakings on a going-concern basis (the "Proposed Sale").

[21] The Applicants were of the view that the Proposed Sale was the only alternative to a liquidation sale or auction of the Applicants' assets and properties.

[22] The Applicants acknowledge that they are not in a position to proceed with a plan of arrangement that would see value paid to their unsecured creditors.

[23] At the end of November 2008, the management of Tilbury determined that a transfer of the employment of any of the Tilbury Union Employees was no longer economically feasible because of the decline in current and projected volume for the Applicants. The Union was advised of this decision and effective December 5, 2008, the Applicants terminated 47 Tilbury Union Employees at the Tilbury plant. The Tilbury Union Employees did not receive termination pay and severance pay.

[24] On January 21, 2009, the Applicants informed the Pellus Union Employees that the operations of Pellus would be closed down and that their employment would be terminated. The closure date was subsequently extended to late February 2009. The number of Pellus Union Employees whose employment will be terminated as a result of the closure of the Pellus facility is 43, of whom 40 are Pellus Union Employees.

[25] Pellus advised the Union of its position that under the provisions of the ESA, the Pellus Union Employees are not entitled to be paid severance pay because each Pellus Union Employee is not one of 50 or more employees who will have had the employment relationship with Pellus severed within a six-month period and Pellus does not have a payroll of $2.5 million of more. The adjudication of this issue is not before me at this time.

[26] In January 2009, the Applicants paid $2.8 million toward the Bank operating line as a repayment of pre-filing debt. In addition, as a result of asset sales and collections a further $1.2 million was also paid to the Bank toward its term loan facilities.

[27] The Monitor's Sixth Report is dated February 23, 2009 and at that date, the Applicants had approximately $3.4 million in cash and at the end of April 2009, the Applicants were

expected to have $3 million. The Applicants has not drawn the DIP Facility throughout the CCAA proceedings.

[28] Periodically during the CCAA proceedings, the Applicants returned to court and obtained orders extending the CCAA proceedings. Extensions were granted, under s. 11(4) of the CCAA based upon the court making required findings that the Applicants were operating in good faith and with due diligence such as to justify an extension of the stay.

ISSUES AND ANALYSIS

[29] The issue to be determined on this motion is: Should the Applicants, in these CCAA proceedings, be required to pay termination pay and severance pay to the Tilbury Union Employees and the Pellus Union Employees.

[30] This issue was recently considered in *Nortel Networks Corp., Re*, 2009 CanLII 31600 (On. S.C.) in the context of proceedings commenced by Nortel Networks Corp., et al (the "Nortel Applicants") under the CCAA (the "Nortel CCAA Proceedings").

[31] In the Nortel CCAA Proceedings, both unionized and non-unionized employees brought motions seeking an order to vary the Initial Order to require the Nortel Applicants to pay, among other things, termination pay and severance pay, in accordance with the applicable collective agreement and/or the *Employment Standards Act*. The motions were dismissed.

[32] The initial order in the Nortel CCAA Proceedings (the "Nortel Initial Order") was similar to the Amended and Restated Initial Order. Both were based on the Model Order.

[33] The applicable order in each case, (a) entitles but did not require the Applicants to pay outstanding and future wages, salaries, vacation pay,…, in each case incurred in the ordinary course of business; (b) provides that the Applicants were entitled to terminate the employment or lay off any of its employees and to deal with the consequences in the Plan.

[34] Many of the submissions raised by the Union at [5], were considered in the Nortel decision.

[35] Included in the conclusions in Nortel were statements to the effect that:

(i) claims for termination pay and severance pay are unsecured claims. These claims do not have any statutory priority;

(ii) Section 11.3 of the CCAA is an exception to the general stay provisions authorized by Section 11 and as such should be narrowly construed;

(iii) Section 11.3 applies to services provided after the date of the Initial Order;

(iv) the triggering of the payment obligations for termination and severance pay may have arisen after the Initial Order but it does not follow that a service was

provided after the Initial Order. The claims for termination and severance pay are based, for the most part, on services that were provided pre-filing.

(v) a key factor is whether the employee provided services after the date of the Initial Order. If so, he or she, is entitled to compensation benefits for such services.

(vi) the court has the jurisdiction to order a stay of outstanding termination pay and severance pay obligations under Section 11 of the CCAA.

(vii) the failure to pay outstanding termination pay and severance pay obligations does not amount to a case of contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. The ESA applies, but during the stay period, there is a stay of the enforcement of the payment obligation.

[36] In my view, these conclusions are equally applicable to this motion.

[37] The submissions of the Union which are addressed in the Nortel decision are as follows:

(i) Payment of termination pay and severance pay are subject to the stay provisions.

(ii) The failure to pay outstanding termination pay and severance pay obligations does not amount to a contracting out of the ESA. Rather, it is a case of whether immediate payout resulting from a breach of the ESA is required to be made. The ESA applies, but during the stay period, there is a stay of the enforcement of the payment obligations.

(iii) The ESA continues to apply but there is a stay of the enforcement of the payment obligations.

(iv) The triggering of the payment obligations for termination and severance pay may have arisen after the Initial Order but it does not follow that a service was provided after the Initial Order. The claims for termination and severance pay are based, for the most part, on services that were provided pre-filing.

(v) A key factor is whether the employee provided services after the date of the Initial Order. If so, he or see, is entitled to compensation benefits for such services.

[38] Two additional points that are not directly addressed in the Nortel decision are as follows:

(i) Counsel to the Union submitted that the recent case of *Re West Bay SonShip Yachts Ltd.* (2009) B.C.C.A. 31 stands for the proposition that claims for termination and severance pay becomes owing to the employees at the point where their employment was terminated during the post-filing period and

> therefore such claims are post-filing claims. In my view, this case can be distinguished. The claim in *West Bay* involved a common law claim for damages for wrongful dismissal. This type of claim is distinct from a claim for severance pay or termination pay under employment standards legislation, as noted by Levine J.A. at paragraph [14].
>
> (ii) Tilbury Union Employees and Pellus Union Employees did provide services after the date of the CCAA application. Any incremental increase in termination pay and severance pay attributable to the period of time after the Applicants went into CCAA protection may justify treatment as a post-filing claim.

[39] This motion raises an interesting question. Should the Applicants be faulted for commencing proceedings under the CCAA, even though it turns out that no plan can be proposed which provides value to the unsecured creditors. In this case, the alternative to filing under the CCAA would have been to continue with the NOI under the BIA. In light of the acknowledgment that no CCAA plan can be presented which would be of benefit for the unsecured creditors, it follows that no viable proposal could have been made under the BIA. The failure to file a proposal under the BIA would have resulted in a bankruptcy and likely a receivership. In a receivership/bankruptcy, the termination pay and severance pay claims of the Tilbury Union Employees and the Pellus Union Employees would rank as unsecured claims and subordinate to the secured creditors.

[40] In turn, this raises a further question. Should the priority status of the Tilbury Union Employees and Pellus Union Employees be different in the context of CCAA proceedings as opposed to a receivership or bankruptcy.

[41] In this case, the Monitor reports that certain secured creditors will suffer a loss. Any amount paid in respect of termination and severance pay claims would be as a result of a direct deduction from recoveries for the secured creditors. In my view, the effect of granting the requested relief would be to accord the termination and severance pay claims special status over the claims of other unsecured creditors of the Applicants and would also result in the payment of such claims in priority to the claims of the Applicants' secured creditors.

[42] In addition to my conclusions as set out in *Nortel*, I have not been persuaded that the requested relief can be justified in this case on the following grounds.

[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.

[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 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.

[48] Counsel to the Union also submitted that paragraph 11(d) of the Amended and Restated Initial Order only allows the company to terminate employees on terms agreed to by the employees or "to deal with the consequences thereof in the plan". Counsel to the Union submits that there is no agreement in this case and there is no plan and consequently paragraph 11(d) does not authorize the company not to pay termination pay and severance pay.

[49] In my view, the Applicants provide a complete response to this argument in their submission summarized at [15] which I accept and at paragraph 32 of their factum by noting that the Applicants could have proposed a Plan that would not have seen value paid to the unsecured creditors and that could have effected the Proposed Sale through a Plan, and to require that the Applicants propose a Plan in order to effect the sale would be an overly technical requirement inconsistent with the CCAA's remedial objective. I also accept these submissions. In my view, this is not a case where the Applicants have used the CCAA to avoid termination and severance pay obligations under the ESA. The fact that these claims will not be paid is a result of legal priorities as opposed to any specific action of the Applicants.

[50] I also note the CCAA proceedings are ongoing and the Applicants have brought forth a motion to propose a plan directed only at the secured creditors, but such a plan has been accepted in other cases. (See *Anvil Range Mining Corp.* (2001), 25 C.B.R. (4th) page 1 (Ont. S.C.J.), aff'd 2002, 34 C.B.R. (4th) 157 (Ont. C.A.)) This motion has yet to be heard.

DISPOSITION

[51] In the result, I have not been persuaded that the facts of this case are such that would justify an outcome different from that of *Nortel*. The claims for termination pay and severance pay are unsecured claims and enforcement proceedings are stayed, save and except for any incremental amount of termination pay and severance pay attributable to the period of time after the Applicants went into CCAA protection.

[52] Counsel to the Bank also raised the issue that Tilbury and Pellus do not have the funds to pay the termination and severance claims as all cash is held by WMSL. Counsel to the Bank submits that if an order were to be made that WMSL were required to pay or to loan money to Tilbury or Pellus so that they could then pay the termination and severance pay claims, such would be equivalent to a common employer finding without a proper trial of such issue. I accept this position and to the extent that I have erred in my conclusions and this issue becomes relevant, it would be necessary, in my view, to have a hearing to determine whether WMSL, Tilbury and Pellus are a common employer. This possibility is recognized at paragraph 38 of the Reply Factum served by counsel to the Union.

[53] For the foregoing reasons, subject to the caveat in [51], the motion is dismissed.

MORAWETZ J.

DATE: **July 27, 2009**

TAB 26

CANADA

Debates of the Senate

2nd SESSION • 39th PARLIAMENT • VOLUME 144 • NUMBER 12

OFFICIAL REPORT
(HANSARD)

Thursday, November 15, 2007

THE HONOURABLE NOËL A. KINSELLA
SPEAKER

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THE SENATE

Thursday, November 15, 2007

The Senate met at 1:30 p.m., the Speaker in the chair.

Prayers.

[*Translation*]

SENATORS' STATEMENTS

OFFICIAL LANGUAGES

LINGUISTIC POLICY AT CANADIAN FORCES BASE BORDEN

Hon. Maria Chaput: Honourable senators, the struggle to enable francophones in Canada to live in French in their very own country is a never-ending one. One often gets the feeling that we are taking two steps forward and one step back. In a letter to General Hillier, Yves Côté, the National Defence and Canadian Forces Ombudsman, revealed that, on the military base in Borden, recruits: remained unaware of their linguistic rights; did not know how to report problems; had not received support from the chain of command; were facing longer waiting periods than their anglophone peers for occupational training; and were not provided meaningful assignments or English language training.

Canada's language policy has been in place for nearly 40 years, and it has had a positive impact from coast to coast. In order to make up for lost time, the Canadian Forces will have to modernize their institution to fully integrate both official languages.

Today, it is unacceptable to find a francophone who functions exclusively in English in a federal government workplace. Frankly, it is embarrassing for a bilingual country such as ours. The Canadian Armed Forces have been ignoring the Official Languages Act and getting away with it for far too long.

I would like to congratulate Yves Côté for having raised this serious issue, and I hope that he will continue to be in contact with Graham Fraser, the Commissioner of Official Languages, to ensure that everything possible will be done to resolve this inequality.

• (1335)

[*English*]

ABORIGINAL REPRESENTATION IN POST-SECONDARY SCIENCES

Hon. Lillian Eva Dyck: Honourable senators, in October I was one of the keynote speakers at the Canadian Aboriginal Science and Technology Conference held in Calgary. I spoke about the areas of post-secondary study and the gaps in the numbers of Aboriginals, especially women, specializing in the sciences compared to non-Aboriginals. The data that I analyzed came from the 2001 Canadian census, and I focused on Saskatchewan.

The area chosen most frequently for study by both Aboriginals and non-Aboriginals, aged 25 to 44, was that comprised of the applied science technologies and trades. The two areas chosen least often were the engineering and applied sciences and the mathematical, computer and physical sciences.

The percentage of Aboriginals who specialized in the engineering, mathematical and physical sciences was markedly less than that of the non-Aboriginal population. Only 0.5 per cent of the Aboriginals, compared to 2.1 per cent of the non-Aboriginal population, chose to specialize in the engineering and applied sciences; and only 0.7 per cent of the Aboriginal population, compared to 2.4 per cent of the non-Aboriginal population, specialized in the mathematical, computer and physical sciences.

In addition, men and women made different choices in their areas of study and there were similar patterns in the Aboriginal and non-Aboriginal populations. In both populations, men chose the applied technologies and trades at about 10 times the rate for women; and men also studied most sciences at much higher rates than women, except for the health sciences where women dominated. However, what was surprising was the relatively greater under-representation of Aboriginal women compared to non-Aboriginal women in the engineering, mathematical, computer and physical sciences.

My key messages were: Aboriginals were under-represented in the physical sciences — mathematics, computer science, physical and engineering sciences — compared to non-Aboriginals; and while it is well known that women are under-represented in the physical sciences, the gender gap was even more pronounced in the Aboriginal population.

What accounts for this low percentage of Aboriginals, especially Aboriginal women, specializing in these sciences? Many theories have been advanced, and it is generally accepted that a lack of role models and an unwelcoming or unfriendly educational environment are important factors. The environment apparently still favours white males.

Honourable senators, the statistics that I presented reinforce the idea that achieving educational equity for Aboriginals and for women in the engineering, mathematical, computer and physical sciences will require improving and even transforming the educational environment to ensure that every student can succeed and achieve his or her full potential.

THE LATE JOHN ARPIN

Hon. Francis William Mahovlich: Honourable senators, I wish to take a moment to mark the passing of John Arpin, who died last Thursday, November 8, at the age of 70 after a lengthy battle with cancer. John Arpin was a musician, recording artist and composer and was regarded as one of the world's top ragtime and among Canada's most innovative musicians.

John Arpin was born in Port McNicoll, Ontario. He graduated from the Royal Conservatory of Music at the age of 16 and later attended the University of Toronto. His first professional

performances were with fellow music popularizers, including Howard Cable from CBC and Leo Romanelli, who played in summertime bands at the Bigwin Inn up in the Lake of Bays and also at the Manoir Richelieu in Murray Bay.

Generations of Canadian children were first introduced to Arpin's piano style through the theme of the popular show, *Polka Dot Door*, where he was a writer, director and performer. CBC radio listeners became familiar with one of his most notable compositions, "Jogging Along," which was the theme song for Peter Gzowski's *Morningside* program in the late-1970s.

During the last two decades of his life, Arpin's name graced the programs of southern Ontario's smaller orchestras, as well as summer festival events.

• (1340)

One of his final public concerts was at Collingwood Music Festival on June 21. In a career that spanned 50 years, Arpin released 67 albums and collected three Juno nominations. Whether playing his signature ragtime or venturing into jazz, Broadway show tunes or even the great arias of opera, John Arpin's playing was a model of poise and elegance. He will be fondly remembered as a great Canadian and a great popularizer of music.

[*Translation*]

ROLE OF WOMEN IN ARMED FORCES

Hon. Lucie Pépin: Honourable senators, officers' mess walls at our military bases and schools are generally covered with photographs honouring only male officers. However, I was pleased to see that this is starting to change.

Last week, a colloquium entitled "Women, Armies and Wars" was held at the military college in Saint-Jean-sur-Richelieu, providing a platform for dialogue on the role of women and their experience within the armed forces.

The Canadian Armed Forces has one of the highest percentage of women to men in the world. In the regular forces, only 17.3 per cent of soldiers are women. However, in Canada, with the exception of the Roman Catholic chaplaincy, women can enrol in all occupations and corps of the army, even in combat units.

Even more interesting is the fact that more and more women are penetrating into the command of the Canadian Forces. At the colloquium in Saint-Jean-sur-Richelieu, the opening remarks were given by Brigadier General Christine Whitecross. Ms. Whitecross is the first woman to command Joint Task Force North. I also had the distinct pleasure of meeting Colonel Karen Ritchie, henceforth in command of 5 Area Support Group, Quebec. She is also the first woman to hold that position. You can imagine to what extent these trailblazers were the topic of discussion at the colloquium. Nonetheless, the integration of women into the armed forces still has its obstacles.

Armed forces have transformed themselves to adapt to the arrival of women. However, their clearly masculine traditions, procedures and codes are delaying the evolution of mentalities. Women must prove that they meet the requirements and that they remain dedicated to their career.

There are initiatives within the Canadian Forces designed to eliminate discrimination. However, as indicated by the Canadian Forces ombudsman, changing military culture is somewhat like changing the course of a ship; it is not something that can be done in an instant.

In today's society, some people still believe that women do not belong in the war. These people believe that the presence of women affects the efficiency of operations. Often, physical and psychological differences are brought up. Of course there are differences. However, it has been shown that these differences are not significant constraints. According to experts, women have management styles and social attitudes that can be effective, for example, in negotiations. These same studies showed that some women are comparable to men when it comes to strength and endurance. Furthermore, it has been suggested that women receive extra training sessions to make up for their physical limitations.

The integration of women from here and elsewhere is based on stereotypes that contradict both the willingness of women to participate and the research on the subject. Despite everything, we can be proud of the gains these women have made. The strength these women showed in paving the way and the achievements of women in uniform today give us hope for the future.

[*English*]

DARFUR

Hon. Yoine Goldstein: Honourable senators, yesterday, in the course of Senators' Statements, I went over my time, for which I apologize. I did not have a chance to complete what I was saying.

I wish to inform honourable senators that you will receive notices for various events from the All-Party Parliamentary Group for the Prevention of Genocide and other Crimes Against Humanity. I urge honourable senators to attend these events to make a statement with respect to your concern about what is taking place in Darfur.

That point provides a segue to an additional element that I wish to draw to honourable senators' attention again, the rapidly changing situation in Darfur. As honourable senators may be aware, the conflict in the region has escalated significantly this summer. A dangerous new dimension emerged when one of the rebel movements attacked an African Union peacekeeping base, killing at least 100 soldiers.

However, there is also some cause for hope. A new European Union peacekeeping mission will soon be deployed to protect Darfuri refugees in Chad and the Central African Republic, and the Security Council has approved the creation of a hybrid African Union-United Nations peacekeeping force with 26,000 personnel to protect civilian populations within Darfur.

• (1345)

In response to these events, the All-Party Parliamentary Group for the Prevention of Genocide and other Crimes Against Humanity has agreed to a resolution that calls for both the Sudanese government and the rebel groups to fully cease all

hostilities and to ensure that humanitarian agencies have complete and secure access to the people of the region. We are also calling for the Government of Sudan to cooperate with the investigation by the International Criminal Court and for the rebel movement to make a genuine commitment as well to the peace process.

As for our own government, the resolution acknowledges Canada's engagement in the past, for which everyone is grateful, but also calls for quick answer in response to recent developments. It calls on the government to do the following: first, to provide further support for the peace process and work to promote participation by unarmed groups, especially those representing women; second, to put more pressure on both the Sudanese government and rebel groups to end the conflict, possibly through the tightening of economic measures; third, help to provide the new hybrid peacekeeping mission with the heavy equipment it requires; fourth, assign a high-level official to represent Canada in the peace process; and, fifth, expand the humanitarian assistance that it now gives to assist those displaced by the most recent fighting.

I propose to put into each honourable senator's email a copy of that resolution. I hope honourable senators will find time to engage in this humanitarian crisis.

The famous theologian, Martin Niemöller, speaking of the Second World War, said that first they came to get the Jews, and he was not a Jew, so he did not say anything. They then came to get the trade unionists, and he was not a trade unionist, so he did not say anything. They then came for the communists, and he was not a communist, so he did not say anything. They then came for the gypsies, and he was not a gypsy, so he did not say anything. They then came for the homosexuals, and he was not a homosexual, so he did not say anything. And then they came for him, and there was no one left to say anything.

NATIONAL CHILD DAY CELEBRATIONS IN THE SENATE

Hon. Jim Munson: Before beginning my statement, I wish to tell the Honourable Senator Goldstein that he gave a nice statement.

Honourable senators, I want to take a moment to remind you of an annual event that transforms the Senate into a place of youthful energy. That event is National Child Day. Next Monday, November 19, this chamber will be filled with children from across this city who will gather to celebrate the contributions they make to our society. The theme of this year's event, "Include us . . . Include us all," will be expressed through performances and presentations from children who have faced adversity and surmounted obstacles to achieve excellence and to give back to others.

For example, Christina Campbell, whom I met in Shanghai, Canada's gold medalist in rhythmic gymnastics at the Special Olympics in Shanghai, will perform and talk about her proud moment as part of her Special Olympics team. Josh Bortolotti, who some honourable senators might remember as a witness for our autism inquiry, will speak as well. We will hear from Josh Sacobie, a tremendous athlete and star quarterback of the University of Ottawa Gee-Gees, who will talk about his journey from the Maliseet First Nation in New Brunswick to Ottawa, where he was named recently the most valuable player of the Ontario University Athletics, after leading the Gee-Gees to an undefeated regular season.

Honourable senators, music and dance will fill this chamber. Performances by Lucas Haneman, a visually impaired jazz guitarist; Jessie Huggett, an accomplished interpretive dancer and speaker with Down's syndrome; and Anastasia Matsell-Savage, a singer with cerebral palsy.

[*Translation*]

The Senate has been celebrating National Child Day for seven years. This event was instituted by Senator Landon Pearson and fills this place with youthfulness, energy and inspiration.

I am very proud to continue this tradition with my honourable colleagues, Senators Keon and Mercer, as well as the honourable Speaker of the Senate.

• (1350)

[*English*]

I cannot promise you any seats on Monday; they will be filled with young people. However, I can promise you a good time, even a rocking good time. We have a lot of fun here for the start of our work week next week, so do not forget National Child Day. "Include us . . . Include us all."

[*Translation*]

ROUTINE PROCEEDINGS

STUDY ON INTERNATIONAL OBLIGATIONS REGARDING CHILDREN'S RIGHTS AND FREEDOMS

GOVERNMENT RESPONSE TO REPORT OF HUMAN RIGHTS COMMITTEE TABLED

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, pursuant to rule 28(3), I have the honour of tabling, in both official languages, the government response to the tenth report of the Standing Senate Committee on Human Rights entitled *Children: The Silenced Citizens, Effective Implementation Of Canada's International Obligations With Respect To The Rights Of Children*, tabled in the Senate on April 25, 2007.

[*English*]

BANKING, TRADE AND COMMERCE

REPORT PURSUANT TO RULE 104 TABLED

Hon. W. David Angus: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour to table the first report of the Standing Senate Committee on Banking, Trade and Commerce. This report outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 123*.)

CANADA-UNITED STATES TAX CONVENTION ACT, 1984

BILL TO AMEND—REPORT OF COMMITTEE

Hon. W. David Angus, Chair of the Standing Senate Committee on Banking, Trade and Commerce, presented the following report:

Thursday, November 15, 2007

The Standing Senate Committee on Banking, Trade and Commerce has the honour to present its

SECOND REPORT

Your Committee, to which was referred Bill S-2, An Act to amend the Canada-United States Tax Convention Act, 1984, has, in obedience to the Order of Reference of Tuesday November 13, 2007, examined the said Bill and now reports the same without amendment.

Respectfully submitted,

W. DAVID ANGUS
Chair

The Hon. the Speaker: Honourable senators, when shall this report be taken into consideration?

On motion of Senator Angus, report placed on the Orders of the Day for consideration at the next sitting of the Senate.

[*Translation*]

LEGAL AND CONSTITUTIONAL AFFAIRS

REPORT PURSUANT TO RULE 104 TABLED

Hon. Joan Fraser: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour of tabling the first report of the Standing Senate Committee on Legal and Constitutional Affairs, which outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 125*.)

[*English*]

ABORIGINAL PEOPLES

REPORT PURSUANT TO RULE 104 TABLED

Hon. Gerry St. Germain: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour to table the first report of the Standing Senate Committee on Aboriginal Peoples. This report outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 126*.)

FOREIGN AFFAIRS AND INTERNATIONAL TRADE

REPORT PURSUANT TO RULE 104 TABLED

Hon. Consiglio Di Nino: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour to table the first report of the Standing Senate Committee on Foreign Affairs and International Trade. This report outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 127*.)

AGRICULTURE AND FORESTRY

REPORT PURSUANT TO RULE 104 TABLED

Hon. Joyce Fairbairn: Honourable senators, pursuant to rule 104 of the *Rules of the Senate*, I have the honour to table the first report of the Standing Senate Committee on Agriculture and Forestry. This report outlines the expenses incurred by the committee during the First Session of the Thirty-ninth Parliament.

(*For text of report, see today's* Journals of the Senate, *p. 128*.)

SCRUTINY OF REGULATIONS

FIRST REPORT OF JOINT COMMITTEE PRESENTED

Hon. J. Trevor Eyton, Joint Chair of the Standing Joint Committee on Scrutiny of Regulations, presented the following report:

Thursday, November 15, 2007

The Standing Joint Committee for the Scrutiny of Regulations has the honour to present its

FIRST REPORT

Your Committee reports that in relation to its permanent reference, section 19 of *the Statutory Instruments Act*, R.S.C. 1985, c. S-22, the Committee was previously empowered "to study the means by which Parliament can better oversee the government regulatory process and in particular to enquire into and report upon:

1. the appropriate principles and practices to be observed

(*a*) in the drafting of powers enabling delegates of Parliament to make subordinate laws;

(*b*) in the enactment of statutory instruments;

(*c*) in the use of executive regulation — including delegated powers and subordinate laws;

and the manner in which Parliamentary control should be effected in respect of the same;

2. the role, functions and powers of the Standing Joint Committee for the Scrutiny of Regulations.

Your Committee recommends that the same order of reference together with the evidence adduced thereon during previous sessions be again referred to it.

Your Committee informs both Houses of Parliament that the criteria it will use for the review and scrutiny of statutory instruments are the following:

Whether any Regulation or other statutory instrument within its terms of reference, in the judgement of the Committee:

1. is not authorized by the terms of the enabling legislation or has not complied with any condition set forth in the legislation;

2. is not in conformity with the Canadian Charter of Rights and Freedoms or the Canadian Bill of Rights;

3. purports to have retroactive effect without express authority having been provided for in the enabling legislation;

4. imposes a charge on the public revenues or requires payment to be made to the Crown or to any other authority, or prescribes the amount of any such charge or payment, without express authority having been provided for in the enabling legislation;

5. imposes a fine, imprisonment or other penalty without express authority having been provided for in the enabling legislation;

6. tends directly or indirectly to exclude the jurisdiction of the courts without express authority having been provided for in the enabling legislation;

7. has not complied with the Statutory Instruments Act with respect to transmission, registration or publication;

8. appears for any reason to infringe the rule of law;

9. trespasses unduly on rights and liberties;

10. makes the rights and liberties of the person unduly dependent on administrative discretion or is not consistent with the rules of natural justice;

11. makes some unusual or unexpected use of the powers conferred by the enabling legislation;

12. amounts to the exercise of a substantive legislative power properly the subject of direct parliamentary enactment;

13. is defective in its drafting or for any other reason requires elucidation as to its form or purport.

Your Committee recommends that its quorum be fixed at four members, provided that both Houses are represented whenever a vote, resolution or other decision is taken, and that the Joint Chairmen be authorized to hold meetings to receive evidence and authorize the printing thereof so long as three members are present, provided that both Houses are represented; and, that the Committee have power to engage the services of such expert staff, and such stenographic and clerical staff as may be required.

Your Committee further recommends to the Senate that it be empowered to sit during sittings and adjournments of the Senate.

Your Committee, which was also authorized by the Senate to incur expenses in connection with its permanent reference relating to the review and scrutiny of statutory instruments, reports, pursuant to Rule 104 of the *Rules of the Senate,* that the expenses of the Committee (Senate portion) during the First Session of the Thirty-ninth Parliament were as follows:

Professional and Other Services	$ 703.29
Transport and Communications	0.00
All Other Expenses	$ 1,490.49
Total	**$ 2,193.78**

A copy of the relevant Minutes of Proceedings and Evidence (Issue No. 1, Second Session, Thirty-ninth Parliament) is tabled in the House of Commons.

Respectfully submitted,

J. TREVOR EYTON
Joint Chair

• (1355)

The Hon. the Speaker: When shall this report be taken into consideration?

On motion of Senator Eyton, report placed on the Orders of the Day for consideration at the next sitting of the Senate

NATIONAL BLOOD DONOR WEEK BILL

FIRST READING

Hon. Ethel Cochrane, for Senator Mercer, presented Bill S-220, An Act respecting a National Blood Donor Week.

Bill read first time.

The Hon. the Speaker: Honourable senators, when shall this bill be read the second time?

On motion of Senator Cochrane, bill placed on the Orders of the Day for second reading two days hence.

• (1400)

BANKING, TRADE AND COMMERCE

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO ENGAGE SERVICES

Hon. W. David Angus: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Banking, Trade and Commerce have power to engage services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject matters of bills and estimates as are referred to it.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY ISSUES DEALING WITH INTERPROVINCIAL BARRIERS TO TRADE AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. W. David Angus: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report on issues dealing with interprovincial barriers to trade in Canada, in particular:

- the economic and trade barriers that exist between provinces in Canada;
- the extent to which such interprovincial barriers are limiting the growth and profitability of the affected sectors of the economy as well as the ability of businesses in affected provinces, jointly and with relevant U.S. states, to form the economic regions that will enhance prosperity; and
- measures that could be taken by the federal and provincial governments to facilitate the reduction or the elimination of such interprovincial trade barriers in order to enhance trade, develop a national economy, and strengthen Canada's economic union; and

That the papers and evidence received and taken on the subject during the First Session of the Thirty-ninth Parliament and any other relevant Parliamentary papers and evidence on the said subject be referred to the Committee; and

That the Committee submit its final report no later than December 31 2008, and that the Committee retain until March 31, 2009 all powers necessary to publicize its findings.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO PERMIT ELECTRONIC COVERAGE

Hon. W. David Angus: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY PRESENT STATE OF DOMESTIC AND INTERNATIONAL FINANCIAL SYSTEM AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. W. David Angus: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Banking, Trade and Commerce be authorized to examine and report upon the present state of the domestic and international financial system; and

That the papers and evidence received and taken on the subject during the First Session of the Thirty-ninth Parliament and any other relevant Parliamentary papers and evidence on the said subject be referred to the Committee; and

That the Committee submit its final report no later than December 31, 2008, and that the Committee retain until March 31, 2009 all powers necessary to publicize its findings.

LEGAL AND CONSTITUTIONAL AFFAIRS

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO ENGAGE SERVICES

Hon. Joan Fraser: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Legal and Constitutional Affairs have power to engage services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject matters of bills and estimates as are referred to it.

[*Translation*]

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO PERMIT ELECTRONIC COVERAGE

Hon. Joan Fraser: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

[*English*]

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY INCLUDING IN LEGISLATION NON-DEROGATION CLAUSES RELATING TO ABORIGINAL TREATY RIGHTS AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSIONS

Hon. Joan Fraser: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on the implications of including, in legislation, non-derogation clauses relating to existing Aboriginal and treaty rights of the Aboriginal peoples of Canada under s.35 of the *Constitution Act, 1982*;

That the papers and evidence received and taken on the subject and the work accomplished during the Second Session of the Thirty-seventh Parliament, the First Session of the Thirty-eighth Parliament and the First Session of the Thirty-ninth Parliament be referred to the committee; and

That the committee present its report to the Senate no later than December 20, 2007.

SOCIAL AFFAIRS, SCIENCE AND TECHNOLOGY

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY STATE OF EARLY LEARNING AND CHILD CARE AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Wilbert J. Keon: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Social Affairs, Science and Technology be authorized to examine the state of early learning and child care in Canada in view of the OECD report *Starting Strong II*, released on September 21-22, 2006 and rating Canada last among 14 countries on spending on early learning and child care programs, which stated ". . . national and provincial policy for the early education and care of young children in Canada is still in its initial stages. . . . and coverage is low compared to other OECD countries;"

That the Committee study and report on the OECD challenge that ". . . significant energies and funding will need to be invested in the field to create a universal system in tune with the needs of a full employment economy, with gender equity and with new understandings of how young children develop and learn."; and

That the papers and evidence received and taken and work accomplished by the Committee on this subject since the beginning of the First Session of the Thirty-Ninth Parliament be referred to the Committee.

• (1405)

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY IMPACT AND EFFECTS OF SOCIAL DETERMINANTS OF HEALTH AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Wilbert J. Keon: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Social Affairs, Science and Technology be authorized to examine and report on the impact of the multiple factors and conditions that contribute to the health of Canada's population — known collectively as the social determinants of health — including the effects of these determinants on the disparities and inequities in health outcomes that continue to be experienced by identifiable groups or categories of people within the Canadian population;

That the Committee examine government policies, programs and practices that regulate or influence the impact of the social determinants of health on health outcomes across the different segments of the Canadian population, and that the Committee investigate ways in which governments could better coordinate their activities in order to improve these health outcomes, whether these activities involve the different levels of government or various departments and agencies within a single level of government;

That the Committee be authorized to study international examples of population health initiatives undertaken either by individual countries, or by multilateral international bodies such as (but not limited to) the World Health Organization;

That the papers and evidence received and taken and work accomplished by the Committee on this subject since the beginning of the First Session of the Thirty-Ninth Parliament be referred to the Committee; and

That the Committee submit its final report no later than June 30, 2009, and that the Committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY CURRENT SOCIAL ISSUES OF LARGE CITIES AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Wilbert J. Keon: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Social Affairs, Science and Technology be authorized to examine and report on current social issues pertaining to Canada's largest cities. In particular, the Committee shall be authorized to examine:

(*a*) poverty

(*b*) housing and homelessness

(*c*) social infrastructure

(*d*) social cohesion

(*e*) immigrant settlement

(*f*) crime

(*g*) transportation

(*h*) the role of the largest cities in Canada's economic development

That the study be national in scope, with a focus on the largest urban community in each of the provinces;

That the study report propose solutions, with an emphasis on collaborative strategies involving federal, provincial and municipal governments;

That the papers and evidence received and taken and work accomplished by the Committee on this subject since the beginning of the First Session of the Thirty-Ninth Parliament be referred to the Committee; and

That the Committee submit its final report no later than June 30, 2009, and that the Committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

AGRICULTURE AND FORESTRY

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY PRESENT STATE AND FUTURE OF AGRICULTURE AND FORESTRY AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Joyce Fairbairn: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Agriculture and Forestry be authorized to examine and report on the present state and the future of agriculture and forestry in Canada;

That the papers and evidence received and taken on the subject and the work accomplished during the First Session of the Thirty-ninth Parliament be referred to the Committee;

That the Committee submit its final report to the Senate no later than December 31, 2008.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO STUDY RURAL POVERTY AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Joyce Fairbairn: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Agriculture and Forestry be authorized to examine and report on rural poverty in Canada. In particular, the Committee shall be authorized to:

(*a*) examine the dimension and depth of rural poverty in Canada;

(*b*) conduct an assessment of Canada's comparative standing in this area, relative to other OECD countries;

(*c*) examine the key drivers of reduced opportunity for rural Canadians;

(*d*) provide recommendations for measures mitigating rural poverty and reduced opportunity for rural Canadians; and

That the papers and evidence received and taken on the subject and the work accomplished during the First Session of the Thirty-ninth Parliament be referred to the Committee;

That the Committee submit its final report to the Senate no later than June 30, 2008; and

That the Committee retain until September 30, 2008 all powers necessary to publicize its findings.

• (1410)

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO ENGAGE SERVICES

Hon. Joyce Fairbairn: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Agriculture and Forestry have power to engage the services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject matters of bills and estimates as are referred to it.

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO PERMIT ELECTRONIC COVERAGE

Hon. Joyce Fairbairn: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Agriculture and Forestry be authorized to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

[*Translation*]

FOREIGN AFFAIRS AND INTERNATIONAL TRADE

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO PERMIT ELECTRONIC COVERAGE

Hon. Consiglio Di Nino: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

That the Standing Senate Committee on Foreign Affairs and International Trade be empowered to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

[*English*]

NOTICE OF MOTION TO AUTHORIZE COMMITTEE TO ENGAGE SERVICES

Hon. Consiglio Di Nino: Honourable senators, I give notice that, at the next sitting of the Senate, I will move:

> That the Standing Senate Committee on Foreign Affairs and International Trade have power to engage the services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject matters of bills and estimates as are referred to it.

QUESTION PERIOD

HON. MARJORY LEBRETON

LETTERS TO CHARLOTTETOWN *GUARDIAN* REGARDING CANADA PENSION PLAN

Hon. Catherine S. Callbeck: Honourable senators, my question is for the Leader of the Government in the Senate.

Last week, she wrote a letter to *The Guardian*, a major newspaper in my home province of Prince Edward Island. In that letter she made false accusations about facts that I used in this chamber when I launched an inquiry into the Canada Pension Plan. In part, the letter read as follows:

> Senator Catherine Callbeck regularly uses such misinformation in the Senate. Now she is using The Guardian to spread more falsehoods. As usual, she has gotten her facts wrong and has misinformed Island seniors yet again.

The facts I used in the Canada Pension Plan speech came from the Minister of Human Resources, the Honourable Monte Solberg, as well as from documents that I received through access to information.

Will the Leader of the Government in the Senate retract her false accusations and apologize for making them in the first place?

Some Hon. Senators: Hear, hear!

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I thank the honourable senator for the question. For quite some time I have watched the honourable senator use *The Guardian* as a personal bulletin, and I responded to the letter. The honourable senator responded again and now I have responded. I do not know whether my further response was printed. The information used by the honourable senator was based on information from the previous Liberal government in 2005, and my purpose in writing *The Guardian* was to make it clear that the attacks against the government and the explanations of what we are doing for seniors are quite incorrect.

Some Hon. Senators: Hear, hear!

Senator Callbeck: The leader has accused me of using misinformation.

• (1415)

The information I used in my Canada Pension Plan speech came from the honourable senator's own minister, the Honourable Monte Solberg, and from documents that I received through access to information.

My question is: Is the honourable senator refusing to retract these false accusations and apologize because the honourable senator simply does not believe her own minister?

Some Hon. Senators: Hear, hear!

Senator LeBreton: Honourable senators, the information that has been attributed to this government in the honourable senator's attacks on the good work that has been done for seniors is based on information that actually belongs to the opposition. I was simply setting the record straight.

Some Hon. Senators: Hear, hear!

Senator Callbeck: I will send the honourable senator copies of the documents that I have received from the Honourable Monte Solberg, as well as the documents that I have received through access to information. Once I have done so, will the honourable senator review those documents and withdraw her false accusations and apologize when she realizes that the information I used was accurate?

Senator LeBreton: Senator Callbeck can send me anything she wishes. I will be happy to look at it, but I do not believe it will change the tenor of her ongoing attacks in *The Guardian* against this government. As I said earlier, the honourable senator uses that newspaper as her own personal bulletin on Prince Edward Island. Since she is a former premier and a prominent person, I imagine *The Guardian* would print her material.

I feel duty bound, as the Leader of the Government in the Senate and the Secretary of State for Seniors, to put into proper context the information that is provided. Facts and figures regarding the treatment of seniors are being attributed to this government when in fact the material used is from 2005, when we had a Liberal government. I have sent a letter to this effect to *The Guardian*. I do not know if they printed it.

Hon. Lowell Murray: Honourable senators, those of us who are not regular readers of *The Guardian* would like one of the disputants in this controversy to arrange to table the letters in question. Can this be done so that we may judge for ourselves?

Senator LeBreton: Certainly.

SECRETARY OF STATE FOR SENIORS

RESPONSIBILITY OF MINISTER

Hon. Sharon Carstairs: Honourable senators, my question is to the Leader of the Government in the Senate and more particularly with respect to her responsibilities as Secretary of State for Seniors.

While I am appalled at the treatment the honourable senator has afforded Senator Callbeck, who is a most distinguished member of this chamber, I am equally disturbed by her lack of recognition of her responsibilities as Secretary of State for Seniors. Does the minister not believe that her most fundamental responsibility is to seniors? Does this not imply that she should ensure that each and every senior in this country is entitled to the fullest support that they can be given?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I believe that since I assumed the responsibility of Secretary of State for Seniors last January that this government has done more for seniors in 21 months than the previous government did in 13 years.

EFFORTS TO INFORM POTENTIAL RECIPIENTS OF GUARANTEED INCOME SUPPLEMENT AND CANADA PENSION PLAN

Hon. Sharon Carstairs: Honourable senators, is the honourable minister prepared to tell this chamber that every single senior entitled to the annual Guaranteed Income Supplement is receiving it? Also, is every senior entitled to Canada Pension Plan benefits receiving them? If the honourable minister cannot give that assurance, will she indicate what is being done about the situation?

• (1420)

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): I can tell the honourable senator that the government has gone to great lengths to try to capture all of the seniors that are entitled to their benefits, including another 32,000. We have used every possible means to communicate with seniors about their entitlements. Service Canada has almost 600 offices across the country, many of them mobile that travel into smaller, more remote areas. A piece of government legislation passed here allows seniors to make a one-time application for the GIS. Once they file their income tax return, a prepared application form that they simply have to sign is ready for submission. Seniors do not need to reapply for the GIS once that application is on file.

I fully realize that this is an issue in areas where people thought that they should have been eligible for GIS and were not receiving it. This government and the previous government have followed pension income actuarial advice on limiting retro-payments to one year once these people are captured into the system. As well, we are communicating the information to seniors in person at seniors' homes and through the mail from Service Canada. We have done everything possible to reach out.

In addition, before they turn 65 years of age, people receive a communication from the government that explains the various services and benefits to which they are entitled as senior citizens.

Senator Carstairs: The minister indicates that the government has done all of these things, but allow me to offer one simple suggestion. The poorest of the poor in this country are Aboriginal people. Has there been any attempt by the minister's government to print any of these forms in any of the Aboriginal languages, such as Inuktitut, so that they can understand the forms in order to make their applications?

Senator LeBreton: Within the Department of Indian and Northern Affairs, there is a concerted effort to reach out to people in more remote areas north of 60 and other Aboriginal communities. As well, I understand we have tried to inform the various leadership groups of the services available so that they can inform their members. I know it is difficult for Senator Carstairs to accept this, but the government is doing everything that is humanly possible to ensure that all eligible seniors receive the GIS and other benefits to which they are entitled.

VETERANS AFFAIRS

ACCESS TO MENTAL HEALTH CARE

Hon. Michael A. Meighen: Honourable senators, my question is for the Leader of the Government in the Senate. In his recent 2006-07 report, the Department of National Defence and Canadian Forces Ombudsman indicated that he was committed to monitoring the effects of the Afghan military operation on military members and their families. In that context, I note that the subject of mental health care and mental illness has long carried such a strong stigma that people have been unwilling to seek assistance. It is only in recent times that we have seen a significant change in the prevailing attitude. Now we have the extensive report of the work done by the Standing Senate Committee on Social Affairs, Science and Technology under the former Chair, Senator Kirby, and his Deputy Chair, Senator Keon. The report is entitled, *Mental Health, Mental Illness and Addiction*.

We also have the subsequent report recommending that a mental health care commission be established. Such a commission was established by this government this year with our former colleague Senator Kirby as chair. The government clearly has mental health care on its agenda and requiring attention.

During a week in which we observed Remembrance Day, I note that a recent survey indicated that a significant number of veterans had to deal with psychological problems resulting from military service, including post-traumatic stress disorder.

My question is: Has the government taken steps to ensure that members of the military, our veterans and their families have appropriate access to mental health care professionals? Can she indicate whether more individuals are taking greater advantage of that access than they did in the past?

• (1425)

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, this is a serious issue, and one that we are hearing more about as our soldiers are returning from theatre in Afghanistan. The great majority of the Canadian Forces who return from deployment, even from difficult areas like Afghanistan, are in good health. Members with mental health problems are encouraged to seek care, and we continue to work on ways to improve mental health programs.

A measure of the success of our various mental health programs is that members with mental health problems now seek care a lot more quickly than they did in the past. Canadian Forces

programs are now set up to capture them. The Armed Forces do rigorous pre- and post-deployment interviews and questionnaires to identify mental health concerns. Then there is a follow-up to monitor the conditions of the soldiers. Across Canada, mental illness health teams are in place, including those specializing in psychiatry, psychology, mental health nursing, addictions counselling — because there is a significant amount of that as well — clinical social work and pastoral counselling. There are also mental health professionals in Afghanistan, as part of the health care team set up to support the troops.

Between 2004 and 2009, $198 million has been earmarked for a new approach to mental health; and the number of mental health professionals is being increased in the Canadian Forces.

Also, as the honourable senator may remember, Budget 2007 provides $10 million a year to establish five new operational stress injury clinics to assist Canadian Forces members and veterans in dealing with stress-related injuries connected to their service and, most important, to provide improved support for their families so that they can assist the returning soldiers to work through this serious illness — and it is an illness.

PUBLIC WORKS AND GOVERNMENT SERVICES

COMPETITION FOR LOCATION OF NATIONAL PORTRAIT GALLERY

Hon. Jim Munson: Honourable senators, in keeping with the civility of the afternoon, I have a question for the unelected, unaccountable, appointed Conservative senator, the Minister of Public Works and Government Services.

Last week we learned about this lottery or competition for Canada's national portrait gallery. We heard Minister Verner talk about Canadians deserving to see the portraits that depict the great figures of our country, past and present. I could not agree more.

However, this city is called the "national capital." There is the national Parliament, the National Gallery of Canada, the national Canadian Museum of Civilization, the national Canadian War Museum and the national cenotaph.

I am curious to find out if this is the Conservatives' version of decentralization in terms of picking only eight cities and saying "Let us compete." Within these eight cities some have a crumbling infrastructure, a lack of child care spaces, a lack of affordable housing, and smog and congestion. Now you are saying to these cities, "Come on with the private sector; let us bid on something so that Canadians can travel to some other part of the country." This is Canada's national capital.

Hon. Michael Fortier (Minister of Public Works and Government Services): Honourable senators, I thank the honourable senator for his question. As a matter of fact, we are talking of nine cities, and they do include the city of Ottawa. It is possible that a developer here in Ottawa would be chosen, depending on the type of proposal that is being tabled.

I understand that the honourable senator may have issues with this proposal. However, the reality is that we are talking about one museum, which is a new museum. We are not talking about moving current museums and national assets that are already here in Ottawa.

I am sorry Senator Joyal is not here because I consider him to be the Liberal Party's beacon on cultural affairs. Before 1,000 people in Montreal on Tuesday, he applauded the decision to offer this opportunity to nine cities across Canada.

Senator Munson: If the honourable senator is going that far, in terms of being discriminatory, why just nine cities? Charlottetown is the home of Confederation. Why not Moncton? Why not Saint-Louis-du-Ha! Ha! Why not St. John's? Why not my home area? Why not Saskatoon or Regina? What is wrong? What happened within the bureaucracy or within the Conservative mindset that excluded those cities from being allowed to compete? At the end of the day, it still must be remembered that this is Canada's national capital, where we as Canadians have the opportunity and right to visit and to see something of worth and value that is still being hidden away by this Conservative government.

An Hon. Senator: Just because you live here.

• (1430)

Senator Fortier: Honourable senators, nine cities were chosen on the basis of population and tourist potential. I know the honourable senator knows that. I refer here not only to the ability for the base population of those nine cities to support the museum, but also the ability for some of these cities, particularly the smaller ones, to have additional tourist draws. When one looks at the situation objectively, it makes sense that we chose those nine cities. No one is talking about changing the capital of our country; it is still Ottawa.

There are tremendous museum offerings in this city. I am sure honourable senators have visited many, if not all, of them. The fact that the portrait gallery may or may not be in Ottawa is not something about which one ought to become excited.

[*Translation*]

DECENTRALIZATION OF EXISTING MUSEUMS IN OTTAWA

Hon. Francis Fox: Honourable senators, I am glad to see that the minister takes an interest in museum policy. I congratulate him, especially for his excellent contribution to the Montreal Museum of Fine Arts. In his decentralization policy, would the minister be willing to consider expanding the network of museums across Canada and, specifically, granting a longstanding request to make the Pointe-à-Callière Museum a national museum of Canada?

Hon. Michael Fortier (Minister of Public Works and Government Services): Honourable senators, it is not the same thing. We are looking at decentralizing museums, but there is absolutely no question of moving museums that are already in Ottawa. I want to make that clear.

Creating additional museums is not part of my portfolio. I will face the Speaker's wrath. My colleague, Josée Verner, already said that she was open to discussing museum proposals with stakeholders across Canada. When she has announcements to make in that regard, she will make them.

SUPPORT FOR NEW PLANETARIUM IN MONTREAL

Hon. Francis Fox: Honourable senators, I would like to come back to that question. There are all sorts of museums. Planetariums could be considered museums. In this case, the minister himself — correct me if I am wrong — signed a letter saying that he would support the development of a new planetarium in Montreal. When is he going to make good on that promise?

Hon. Michael Fortier (Minister of Public Works and Government Services): The honourable senator knows that I have been very busy with the Montreal Museum of Fine Arts, the theatre district and the announcement of public transit between Dorval and downtown to improve transportation in Montreal's western suburbs. Although I have been especially busy in recent months, please know, honourable senators, that I have publicly supported the call for a new planetarium. I have done so publicly, because I would very much like to see one developed.

[*English*]

PUBLIC SAFETY

BORDER SERVICES AGENCY—CROSSING DELAYS

Hon. Francis William Mahovlich: Honourable senators, I rise today to add my voice to the growing concern about the Canada-U.S. border crossing situation. Senator Grafstein recently spoke on this same topic, relating horror stories that are transpiring at border crossings nationwide. One statement that particularly struck me was that this year was a summer from hell, due to incredibly long delays at the border. This is not a description one would like to hear when thinking of travelling to our largest trading partner.

There are programs in place to help those who cross the border on a regular basis, such as the FAST program, which helps to ensure speedy crossings for truckers. These programs, however, do not seem to be working efficiently. Some of those enrolled in the FAST program are still facing secondary screenings. What is the point of such a program if it does not do what it is intended to do?

When I was a member of the Detroit Red Wings and living in Windsor, I used the Ambassador Bridge on a regular basis. In those years, about 30 years ago, the only time there was a traffic jam was when the Montreal Canadiens or the Toronto Maple Leafs were playing.

• (1435)

Today, the Ambassador Bridge is the busiest border crossing in North America, with about 25 per cent of Canada-U.S. merchandise making its way across this single bridge. That amount is expected to double by 2030.

With the Canadian dollar at record highs versus the U.S. dollar, the lineups at the border crossings will, I am sure, reach highs as well. Furthermore, as early as next summer, the U.S. government is expected to start requiring passports at both land and sea crossings. This will no doubt make a bad situation even worse. With wait times of up to one hour at some border crossings, what does the government intend to do to alleviate the current waiting lines and to prevent them from getting worse?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): I wish to thank the honourable senator for that question. Actually, I used to be a Detroit Red Wings fan.

An Hon. Senator: Move them to Windsor!

An Hon. Senator: Oh, no!

Senator LeBreton: Yes, I was. Actually, it was when Gordie Howe, Ted Lindsay, Alex Delvecchio, Terry Sawchuk and all those guys were playing.

Thank you, Senator Mahovlich. That is a very serious question on an issue that consumes a lot of the time and attention of the government.

I mentioned a couple of weeks ago that the Minister of Industry, Minister Prentice, was in Washington. Ambassador Wilson is also focusing almost exclusively on the "thickening of the border," as they call it. The Detroit-Windsor corridor, as you know, is extremely busy. Regarding infrastructure, they are working on a new Windsor-to-Detroit passage. The problem has been compounded by some of the political events south of the border in terms of certain individuals on certain television networks in the United States who have whipped up a lot of concerns about security at the border, which gets in the way of commerce — for example, and fire trucks that attempt to cross over to help put out a fire in the northern states. That is the kind of thing that happens. This is all compounded by the strength of the Canadian dollar and the long lineups at the borders.

Honourable senators, through Minister Day, Minister Cannon and Minister Prentice there are several programs in place including, as the honourable senator mentioned, the fast-track lane for truckers. The problem is this: With the long lineups now at the border with all of the other people waiting to cross, sometimes the truckers cannot even get into the fast-track lane.

It is a very complex question that the honourable senator has asked. The government is doing many things. I would be happy to provide more detailed, department-by-department analysis for the honourable senator about what each department — namely, industry, transport and public safety —, are doing to try to deal with this ongoing problem at our borders.

THE RIGHT HONOURABLE BRIAN MULRONEY

ALLEGED CASH PAYMENTS—PUBLIC INQUIRY—TERMS OF REFERENCE

Hon. Yoine Goldstein: Honourable senators, my question is for the Leader of the Government in the Senate. At the end of Question Period yesterday, the honourable leader characterized my question as a disgrace. Of course she did not answer it, because she could not. I now understand why this portion of our sessions is called Question Period by Senator Lowell Murray — because it is not an "Answer Period".

Could the leader break with the tradition she has single-handedly created in this chamber and answer the following question? A typical set of terms of reference for a

judicial inquiry is three pages, including the boilerplate — or four pages, tops. The operative part of any inquiry and any term of reference is no more than a page at maximum. Does it take a person of Dr. Johnston's stature two months to draft a couple of pages, or was this two-month time period allotted by the Prime Minister as a further and more transparent attempt on the part of the government to stall, delay and postpone the inevitable? Is this not a disgrace?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I thank the honourable senator for his question. I think the appointment of Dr. Johnston has been very well received. He is an eminent Canadian who will address these issues seriously. The terms of reference for his responsibilities have already been posted. They are publicly available, and I would be happy to provide the honourable senator with the terms of reference with which Dr. Johnston will work.

• (1440)

As the Prime Minister announced last Friday, it was clear that the government was planning to appoint an independent third-party adviser. Then, as events evolved over the weekend and the demand for a public inquiry was added to it, it only made sense to have this same independent third party draw up these terms of reference. Given the state of the allegations, the counter allegations and the rumours, there is probably not a person in this place or, certainly, in this city, who could objectively deal with the terms of reference for what this inquiry will eventually entail.

Senator Goldstein: Of course, there has been no answer to that question.

ALLEGED CASH PAYMENTS— SCOPE OF PUBLIC INQUIRY

Hon. Yoine Goldstein: Honourable senators, the mandate of Dr. Johnston makes no reference whatsoever to the role of the government in the handling of the Mulroney-Schreiber affair. Is it not rather obvious that the government is doing everything it can to hide that role from the Canadian people, and is that not a disgrace?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, what the honourable senator has suggested is quite false.

As I have said many times in this place, this particular dispute between Mr. Mulroney and Mr. Schreiber has nothing to do with the government. As I predicted yesterday and as was shown in a poll last night, 66 per cent of Canadians agree with that view.

2009 WORLD POLICE AND FIRE GAMES

GOVERNMENT SUPPORT

Hon. Gerry St. Germain: Honourable senators, I have a short question to the Leader of the Government in the Senate. The World Police and Fire Games are scheduled to take place in Vancouver, British Columbia, between July 31 and August 9, 2009. I am in somewhat of a conflict because, having been a former policeman, I have been solicited to support the participants in this great effort. This event is a prelude to the 2010 Olympics. According to the information I received — I am not certain how accurate it is — the event will attract more people to Vancouver than the Olympics. They are seeking support, and they have spoken to the former and present governments, and I hope that my friends on the police forces, the fire departments, the paramedics and all the people involved can gain the support of our government. Would the minister be prepared to support this event?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, I certainly would not want to tell Senator St. Germain that I would not support him and his friends involved in the World Police and Fire Games. The government, Canadians and especially the people in British Columbia are very much looking forward to the World Police and Fire Games in 2009. As Senator St. Germain said, it is anticipated that this event will attract thousands of participants from all over the world. Those of us who have any opportunity to spend time in British Columbia know that they will be the great hosts they have always been.

• (1445)

The Government of Canada is supportive of the games and is interested in contributing to their overall success. I can assure honourable senators that federal officials are in contact with the organizers of the event in order to assess how the activities and components of the games can be funded through federal government programs.

THE RIGHT HONOURABLE BRIAN MULRONEY

ALLEGED CASH PAYMENTS—PUBLIC INQUIRY— MANDATE OF THIRD-PARTY ADVISER

Hon. Joan Fraser: Honourable senators, my question is directed to the Leader of the Government in the Senate and is on the matter of the third-party adviser.

I was pleased that David Johnston was named for this position. He is widely respected as a person of fairness, intelligence and competence. His mandate, however, instructs him to review only allegations respecting financial dealings between Karlheinz Schreiber and Brian Mulroney. If this government is so sure that there is nothing to hide, nothing to worry about, why was it not prepared to seek a mandate for a broad inquiry that would look at all relevant matters concerning anyone who had served in or for the Government of Canada then and/or now? How can you expect Canadians not to think this appointment is set up to be a cover-up?

Hon. Marjory LeBreton (Leader of the Government and Secretary of State (Seniors)): Honourable senators, many rumours and much information have been flying around. As a matter of fact, I watched the Mike Duffy show on television last night. One of Senator Fraser's own colleagues from the other place told Mike Duffy that he had been lunching with Mr. Schreiber — plotting — so obviously he was getting information from Mr. Schreiber. If it was so important, why did he not, as a privy councillor, turn this information over to the authorities?

Many stories have been going around for years. The thing that changed, as all honourable senators know, is that Mr. Schreiber swore an affidavit last Thursday or Friday, which became public on Friday. As it impacted upon the Office of the Prime Minister, the Prime Minister immediately announced that he would appoint an independent third-party adviser. That affidavit started the whole thing. As the Prime Minister said yesterday, Dr. Johnston will report and the government will follow the recommendations he makes.

ORDERS OF THE DAY

BANKRUPTCY AND INSOLVENCY ACT COMPANIES' CREDITORS ARRANGEMENT ACT WAGE EARNER PROTECTION PROGRAM ACT

BILL TO AMEND—SECOND READING

Hon. Michael A. Meighen moved second reading of Bill C-12, An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005.

He said: Honourable senators, it is my pleasure to rise today to open the second reading debate on Bill C-12.

[*Translation*]

Bill C-12 makes a number of technical amendments to the aforementioned legislation in order to correct a wide range of flaws and to allow the government to implement the wage earner protection program.

• (1450)

[*English*]

Honourable senators will recall that the Standing Senate Committee on Banking, Trade and Commerce expressed serious reservations about chapter 47 — or Bill C-55, as it then was — and urged the government of the day not to bring it into force until amendments such as those proposed in this bill were made.

I will begin by highlighting the purpose of chapter 47, which consists of reforms to bankruptcy and insolvency laws in Canada and includes the introduction of a wage earner protection program. Following that, I will share some of the key technical changes the government proposes to make to this legislation so as to meet many if not all of the concerns raised by honourable senators and others.

Even in good economic times, bankruptcies are a fact of life in a free market economy. Businesses fail for many reasons and, when they do, workers are among the most vulnerable due to the uncertainties that ensue.

Anyone who has worked at a company that has experienced a bankruptcy or insolvency will express that it is an unsettling business. Not only are workers left wondering about future employment, but many are troubled with doubts about whether they will receive money owed to them. This bill is another step in helping to resolve those doubts.

Legislation was passed by Parliament in 2005 to address this issue. However, as I indicated earlier, certain technical amendments were required to ensure that insolvency reform and wage earner protection measures will function as intended. The bill now under consideration contains the requisite technical amendments.

[*Translation*]

The government has promised to help all Canadians and their families and the companies that employ them. It is determined to treat all parties fairly and is succeeding in doing so with Bill C-12.

[*English*]

The wage earner protection program will help to safeguard workers in companies facing bankruptcy or receivership. It will ensure that workers will receive their money when they need it most.

Currently, provisions in the Canada Labour Code provide some recourse for workers whose employers do not pay the wages owing. Provincial labour laws also have similar provisions. However, when an employer declares bankruptcy or is subject to receivership, insolvency laws take precedence, and, in a bankruptcy, unpaid wages become a debt of the employer's estate. This places an unfair burden on workers because, unlike other creditors, workers do not generally have other sources of income to fall back on.

Even worse, honourable senators, current laws do not guarantee that insolvent employers will pay claims of unpaid wages owed to their workers. As matters stand, those claims can only be paid after the claims of secured creditors have been resolved. As a result, many workers who find themselves in this position, through no fault of their own, never receive all of the wages owed to them.

One estimate, honourable senators, indicates that only 13 cents on the dollar in unpaid wages are ever recovered. In most cases, that is, three quarters of unpaid wage earners receive absolutely nothing. Just as noteworthy, 70 per cent of corporate bankruptcies are small businesses, companies that have fewer than 10 employees, and many of these are in the retail, food services and accommodation industries, where wages are generally lower than in other areas.

Our government is bringing greater fairness to circumstances such as these. The wage earner protection program guarantees reimbursement of unpaid wages within a reasonable time frame. Earned but unused vacation pay will also be protected.

The program will pay workers an amount up to the equivalent of four weeks' maximum insurable earnings under the Employment Insurance Act. That sum is currently about $3,000. The expectation is that this sum will cover amounts owing for wages and vacation pay in full 97 per cent of the cases. Not only will this program protect workers in the federal jurisdiction, honourable senators, but it will also protect all Canadian workers.

Payment will no longer depend upon the amount of assets in an employer's estate. Workers will be paid what is owed to them in a timely manner.

That brings me to another important consideration about this program, which is the price tag. The program will be very affordable, honourable senators. Annual costs are estimated at $35 million, reaching $50 million in the event of serious economic downturn. However, given the super-priority established in the legislation, the government will be able to recover a large part of its payment from the assets of the insolvent business.

Under the wage earner protection program, payment will be provided in a timely way. Government will wait, as it should, to recover the money from insolvent businesses.

The program will be delivered by Service Canada, in collaboration with trustees in bankruptcy and receivers. The trustee or receiver will inform prospective claimants of eligibility and will provide Service Canada, as well as the unpaid worker, with information on unpaid wages and vacation pay. Service Canada will determine the amount and make the payment.

[*Translation*]

Honourable senators, the wage earner protection program is a good legislative measure that is well thought out and well designed. We were very proud to propose it and adopt it.

Every party in Parliament supported the program during debate on the original bill.

The unions also support it, as do bankruptcy experts. They have witnessed first-hand the need to better protect workers in these circumstances.

Furthermore, this is a program Canadian workers have been asking for. Many of them were surprised to learn that such a protective measure did not already exist.

[*English*]

Honourable senators, as I indicated earlier, key adjustments are being proposed to this important new program. The adjustments include ensuring that standard deductions are made from program payments just as they are for wages; enhancing the fairness of the conditions of eligibility; allowing trustees, receivers and other persons a defence of due diligence when they have proven that they have done everything in their power to fulfil their duties under the act but were unable to do so; and ensuring that people who have acquired payroll information will assist trustees and receivers in performing their duties.

Eligibility requirements are being adjusted to safeguard against those who might attempt to abuse the program. For instance, it is proposed that applicants not be related, whether by marriage, blood or adoption, to the main decision-makers of a company facing insolvency, but those who are excluded, honourable senators, will have an opportunity to prove that their family relationship is not related to their employment relationship. In such cases, an applicant could be eligible for the program.

Measures must also be taken, honourable senators, to ensure that insolvency professionals are supported and properly paid for their work under the program. In cases where a company's assets are modest, insolvency professionals could otherwise decline to take on the bankruptcy, concerned perhaps that they would not recover enough money to cover their fees. That would prevent wage earners from receiving assistance from the program. In turn, this could reduce the number of wage earners eligible for the program and create inequities among unpaid wage earners. This would run counter to the program's intent, which is to protect vulnerable workers.

The amendments contained in Bill C-12 in relation to the wage earner protection program are carefully considered, and I do commend them to the attention of honourable senators.

I now turn to the broader scope of insolvency and bankruptcy reforms proposed in this bill. A smoothly running economy depends on having rules governing businesses that are both fair and balanced. Canada's insolvency system is no exception. It must be fair. It must be predictable as far as being able to assess risk. It must be transparent so creditors can defend their interests, and it must be efficient, ensuring that there are appropriate incentives while deterring abuse.

Building on measures first introduced in Parliament in 2005, as I mentioned earlier, the bill before us today will complete the modernization of Canada's insolvency system. It also addresses technical errors in the previous legislation that prevented it from operating as was intended. The bill makes it easier for financially troubled companies to restructure. It makes the system fairer. The proposed amendments will also reduce the possible abuse by those debtors who might be tempted to dispose of their assets prior to filing insolvency proceedings.

For example, honourable senators, the new rules will deter selling or transferring ownership of assets at unreasonable prices — I believe it is called "transfers undervalued" — to a spouse or family member to reduce the ability of creditors to recover unpaid claims.

Another amendment will help to protect trustees. There was some concern that trustees might be held personally responsible for debts and obligations resulting from the debtor's conduct prior to the trustee's appointment. This was clearly not what was intended, and the amendment clarifies this situation. This will help to encourage insolvency professionals to participate in restructuring efforts and accordingly will help to protect employment.

• (1500)

[*Translation*]

In the past, student loan debt was non-dischargeable if the bankruptcy occurred within 10 years after studies ended. Under the proposed reforms, that period would be reduced to seven years for a normal bankruptcy process and to five years in cases of proven financial difficulty.

[*English*]

In addition, there was an unforeseen deficiency in the earlier legislation. The current wording does not allow the changes to be applied retrospectively, as had originally been intended.

A student loan recipient who filed for bankruptcy before the coming into force of chapter 47 would be required to re-file for bankruptcy in order to apply to the court for hardship under the new five-year rule. The purpose of the amendment to the Bankruptcy and Insolvency Act is to ensure that the new seven and five-year discharge provisions are immediately available to individuals for whom the benefits were intended.

Insolvency laws should prevent the abuse of the rules intended to help honest but unfortunate debtors, but some people try to use bankruptcy to avoid paying income tax while they reap the benefits of keeping that money. That is unfair to the vast majority of Canadians who do pay their taxes.

The plan in chapter 47 was to address this problem by prohibiting an automatic discharge for those debtors with over $200,000 in income tax debt representing 75 per cent or more of their total debt. Debtors would instead be required to go before a judge and explain why their debts should be discharged. A judge could refuse a discharge or order a repayment of a portion or all of the debts. The amendments in Bill C-12 ensure that those who find themselves liable for a tax debt of a third party are not captured inadvertently by these provisions.

Honourable senators, the proposed measures we are contemplating in this chamber today are equitable, balanced and efficient. If brought into force in conjunction with these technical amendments, chapter 47 is an appropriate response, it seems to me, to the many calls heard from Canadians for a more modern insolvency system, and it extends important new provisions to safeguard workers' wages in the event of a bankruptcy or receivership on the part of their employer.

The proposed new measures address technical deficiencies found in previous legislation. By remedying these deficiencies they allow chapter 47 to protect jobs by ensuring that companies have every opportunity to restructure rather than closing their doors.

Honourable senators, this bill does not pretend to be a perfect solution to every issue, but it does make it possible to bring into force some long-awaited improvements to our insolvency and bankruptcy laws. I look forward, both here and probably in committee, to the comments in this regard of Senator Goldstein. Our colleague, as many of you know, is a widely acknowledged expert in matters of bankruptcy and insolvency whose talents I came to admire and respect during the years that I practiced law before the bar of Montreal.

[*Translation*]

In conclusion, honourable senators, I would ask that you carefully consider this important bill, and I urge you to pass it quickly at second reading.

[*English*]

Hon. Yoine Goldstein: Honourable senators, Senator Meighen has given us a splendid overview of Bill C-12 and its history, and I thank him for his very kind and thoroughly unjustified words. I would like to hope that he would have occasion to repeat them to my wife.

Honourable senators, I do not intend to repeat any of what Honourable Senator Meighen has said so very eloquently, nor do I intend to speak for more than just a few minutes. Because of the very important nature of this legislation, I hope that there will be a motion today to refer the bill to committee so that the Standing Senate Committee on Banking, Trade and Commerce, under the supervision, guidance and the presidency of Senator Angus, can give it the study it deserves and move it along. It has been long delayed, and it is time that Canada's bankruptcy legislation were updated.

Before I enter into the few remarks that I intend to make, I want to state for the record that, as Senator Meighen has suggested, I was very active in another life in bankruptcy and insolvency matters. I remain loosely associated with a law firm that handles bankruptcy and insolvency matters. I am occasionally asked questions — not that I have all the answers — about bankruptcy and insolvency, and I answer them.

I say this because I would like to assume and hope that no one in this chamber will think that I am dealing with this legislation, either here or in the committee, in a way suitable to my interests and not suitable to the interests of the people of Canada. My sole interest is to have excellent legislation for the excellent people of Canada.

Honourable senators, bankruptcy law is framework legislation. It is essential to have an updated bankruptcy law for the commercial welfare of Canada. Trade is increasingly cross border or borderless, and unless Canada has a modern and efficient bankruptcy and insolvency system, we cannot be players in this competitive commercial world of ours.

However, independent of commercial insolvency, there remains a generically different type of insolvency, one that directly affects almost a quarter of a million Canadians each and every year. I am talking about personal bankruptcy and insolvency. Honourable senators, almost a hundred thousand Canadians go into bankruptcy each and every year. Many of them — perhaps most of them — have spouses. Many of them have children. All of them obviously have creditors. The net result is that personal insolvency touches, directly and immediately, well over a quarter of a million different Canadians each and every year.

It is therefore essential that the provisions dealing with personal insolvency be fair, humane, equitable, and achieve a reasonable balance between the interests and the needs of creditors who advance credit on the one hand and individual debtors who are unable to cope with the credit system upon which our entire economy relies.

Honourable senators, we faced a dilemma, as almost all of you will recall, in November of 2005. On the one hand, everyone was very anxious to pass the wage earner protection program. On the other hand, that plan was not readily severable from the rest of the bill, and the rest of the bill contained numerous failings. Many of them were technical failures, but some of them were quite substantive. I do not intend to deal with all of them because that would be lengthy, and I do not intend to touch upon the ones with which Honourable Senator Meighen has already dealt.

However, I do want to point out, as the honourable senator has done, that the current legislation effectively precludes students from declaring bankruptcy any earlier than ten years from the date that they finish their studies. That is inhuman and is unknown in the entire Western world. That provision for ten years in the desert was put into the Bankruptcy and Insolvency Act in 1998 without notice or the knowledge of anyone at the behest of, I suppose, certain stakeholders who had a particular interest in so doing. It has wrought untold misery to many students in this country, those who are unfortunate enough to not be able to get the jobs which would allow them to repay their indebtedness.

There is presently pending before this honourable chamber a private member's bill — modesty prevents me from telling you who the sponsor is — that seeks the possibility of students making an application to a court of competent jurisdiction, where there is significant and terrible hardship in the repayment of a student loan, to allow that student to repay only part of that loan, or perhaps none of it, depending on the circumstances and depending on the discretion of the judge and the explanations of that student. I would like to hope that that aspect, which is covered by the bill, will receive further study by the committee.

Another matter which is incomplete is with respect to businesses that are undergoing reorganization and need to borrow money. That is called, for a variety of reasons, "DIP financing." In other words, debtor-in-possession financing. DIP financing is covered by the bill, but incompletely so, in the minds of some stakeholders, and therefore some stakeholders who will be appearing before the committee will be seeking amendments to that clause.

• (1510)

Certain other matters require consideration, and I hope the Standing Senate Committee on Banking, Trade and Commerce will be able to provide legislation to address them as quickly as possible.

The Hon. the Speaker *pro tempore*: Continuing debate?

Senator Comeau: Question!

[*Translation*]

The Hon. the Speaker *pro tempore*: Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to and bill read second time.

REFERRED TO COMMITTEE

The Hon. the Speaker *pro tempore*: Honourable senators, when shall this bill be read the third time?

On motion of Senator Meighen, bill referred to the Standing Senate Committee on Banking, Trade and Commerce.

PROPOSED REGULATIONS AMENDING THE CITIZENSHIP REGULATIONS (ADOPTION) AND REGULATORY IMPACT ANALYSIS STATEMENT

MOTION TO REFER TO SOCIAL AFFAIRS, SCIENCE AND TECHNOLOGY COMMITTEE ADOPTED

Hon. Gerald J. Comeau (Deputy Leader of the Government), pursuant to notice of November 14, 2007, proposed:

> That the document entitled *Proposed Regulations Amending the Citizenship Regulations (Adoption) and Regulatory Impact Analysis Statement*, tabled in the Senate on Wednesday, November 14, 2007, be referred to the Standing Senate Committee on Social Affairs, Science, and Technology for review and report.

Motion agreed to.

[*English*]

CANADA PENSION PLAN

SENIORS' BENEFITS—INQUIRY—DEBATE CONTINUED

On the Order:

> Resuming debate on the inquiry of the Honourable Senator Callbeck, calling the attention of the Senate to the thousands of Canadian seniors who are not receiving the benefits from the Canada Pension Plan to which they are entitled.—(*Honourable Senator Robichaud, P.C.*)

Hon. Elizabeth Hubley: Honourable senators, I would like to thank Honourable Senator Robichaud, who is allowing me to speak today. When I complete my presentation, I would like the adjournment to remain in his name.

Honourable senators, it is my pleasure to participate in this inquiry calling the attention of the Senate to the thousands of Canadian seniors who are not receiving the benefits to which they are entitled from the Canada Pension Plan.

Senator Callbeck is to be commended for raising this issue, as it is an important one that affects seniors across the country. It is also important for many thousands more Canadians who are approaching retirement age.

The issue is straightforward. According to the government's own statistics, tens of thousands of Canadians have failed to apply for a Canada Pension Plan benefit for which they qualify, whether it is the retirement benefit or the survivor's benefit. This failure to apply appears to result mainly from the fact that beneficiaries do not realize they are eligible.

As Senator Callbeck has pointed out, the problem seems to affect women disproportionately. This situation is particularly true for women who may have participated in the workforce for only a few years, or who may have left the workforce long before reaching retirement age. Often, women in these circumstances are not aware that they are eligible for a benefit.

Honourable senators, I recall a similar problem with the Guaranteed Income Supplement. Often, seniors failed to apply, either because they did not know the GIS existed or they did not know they qualified.

I understand that the situation with the GIS improved after the government implemented measures to promote awareness. Steps were also taken to make direct interventions as the opportunity arose when seniors contacted government through Service Canada and other access points.

These outreach measures were the right thing to do for the GIS, which is simply a benefits program funded entirely by the taxpayer. I know the government makes similar efforts with the CPP, but clearly, there are still people who do not receive the message.

Unlike the GIS, the Canada Pension Plan is funded by obligatory contributions. People who made contributions and who have not applied for benefits are missing out on something they have paid for, something that belongs to them. All the more reason, then, for the government to redouble its efforts to reach out to Canadians who fail to apply for their CPP entitlements, and to take every step necessary to bring application rates into line with the levels achieved in the Quebec Pension Plan.

Honourable senators, Senator Callbeck has provided a service for seniors by voicing the message that people need to apply. I was disappointed at the reaction last week of the Leader of the Government in the Senate and Secretary of State for Seniors.

Last week, Senator LeBreton took issue with an editorial published by *The Guardian* newspaper in Prince Edward Island. In her letter to the editor, the Secretary of State for Seniors missed an opportunity to reinforce the message that many seniors are not aware of their entitlements, and that they need to apply. Quite the contrary, her letter suggested that all was well with seniors programs.

What is truly unfortunate is that the Secretary of State for Seniors used the occasion to attack the integrity and honesty of Senator Callbeck. I think that attack is a shame because Senator Callbeck's approach had been non-partisan and constructive. She called attention to a problem to create greater awareness. By doing so, she helped to coax the department into augmenting its outreach efforts.

At the same time, her message was no doubt reaching individual Canadians, which is what needs to happen if we want to improve application rates. Her efforts on behalf of seniors did not merit the personal attack from Senator LeBreton.

Honourable senators, not every speech by a Liberal is a partisan swipe at the Conservative government. We are here to work together on behalf of our regions and on behalf of all Canadians. Naturally, in a democracy, there are differences among political parties, but the letter to the editor by the Secretary of State for Seniors went too far. It was an unwarranted attack on the integrity of a good senator who works hard on behalf of her province. It was a disproportionate and disappointingly partisan response to a constructive effort to improve results for seniors.

Honourable senators, earlier this week, a public meeting was held in Charlottetown where the principal investigator for the Atlantic Seniors Housing Research Alliance project presented data gathered from a survey of 1,702 Atlantic Canadian seniors.

According to the Canada Mortgage and Housing Corporation housing affordability standards, Canadians should not need to spend more than 30 per cent of their household income on shelter costs, including rent, mortgage, electricity, heating costs and water.

• (1520)

However, this survey shows that almost 50 per cent of Atlantic seniors spend 30 per cent or more of their income on shelter costs. Almost 20 per cent are spending over 40 per cent of their household income on shelter costs. This is a housing affordability crisis for our seniors. Ensuring Canadians are receiving benefits to which they are entitled is part of the solution to this problem.

I hope that the Secretary of State for Seniors will abandon her defensive partisan posture and acknowledge that there is still much work to be done and take up the call to improve outreach to Canadian seniors. Seniors have paid into a system with their hard-earned wages; they have every reason to expect that more will be done. For their sake, I invite the minister responsible for their welfare to join with Senator Callbeck and others in working towards ensuring that every Canadian who qualifies will receive their Canadian Pension Plan benefit.

On motion of Senator Hubley, for Senator Robichaud, debate adjourned.

CHARTER OF RIGHTS AND FREEDOMS

RECOGNITION OF TWENTY-FIFTH ANNIVERSARY—INQUIRY—DEBATE ADJOURNED

Hon. Sharon Carstairs rose pursuant to notice of October 17, 2007:

> That she will call the attention of the Senate to the 25th anniversary of the *Canadian Charter of Rights and Freedoms*.

She said: Honourable senators, I introduce this inquiry because I believe that all Canadians are concerned with the importance of our Charter in its twenty-fifth anniversary year. Cast your mind back to where you were in 1982. All of us can remember the Prime Minister and the Queen of Canada on Parliament Hill signing our new Constitution, which included the Charter of Rights and Freedoms.

I was teaching in a community well-known to Senator Stratton at the time, St. Norbert, and I decided it was important that each of my students understand this new document called the Charter of Rights and Freedoms. I ordered enough copies for every one of my students; I had the documents laminated so they would not get all dog-eared, and I went through every single one of the newly listed rights and freedoms with my students. They may have been somewhat bored. They did not appear to be. It was important for them, as Canadians, to understand the richness of this new Charter which had been given to them.

The people of St. Norbert were particularly interested in francophone and equality rights. Some Aboriginal Canadians in that classroom were concerned about their rights. We spent several weeks talking about what it was that had been enshrined in the Constitution in 1982, although I know that Senator Nancy

Ruth would be quick to point out that some of those provisions did not take effect until 1985, but they were taught to expect them within three years.

Among other principles, I taught that the principle of justice cannot be served in a criminal process if the accused person has no legal counsel. Likewise, I pointed out the rights guaranteed under the Charter are largely meaningless if an individual or group lacked the resources to seek a remedy should their rights be infringed or denied. That is why many Canadians were disappointed by the decision of the current government to eliminate the Court Challenges Program of Canada. The program not only helped to shape our understanding of human rights in a modern democratic society, but it also helped to foster the clarification of those rights. Whether challenges were successful or not, bringing important legal questions before the court for determination was always of great value. This process had the additional benefit of effectively reducing the cost of litigation for those who would later seek redress for grievances in similar situations and effectively help to ensure universal access to the justice system.

Honourable senators, in order that you might better understand the history of the Court Challenges Program of Canada, I wish to go back a moment to its important contribution to the development of a modern egalitarian society where human rights are a core value shared by all Canadians.

The program actually extends prior to the adoption of the Charter. It first came into being in 1978, principally as a means of assisting linguistic minorities in Canada. The program fell under the supervision of the Secretary of State, and it assisted in deferring the legal costs of groups pursuing court challenges to provincial laws and programs that infringed upon linguistic rights. The criteria for funding test cases centred on legal merit and the national importance of the questions of law at issue. Cases were only funded if they involved more than one person.

Many will recall one of the landmark cases for linguistic minorities in the 1980s, which centred on the status of the laws of my home province of Manitoba, which were enacted in English only. This was not a Charter case, but it was nonetheless an important question of legal rights of linguistic minorities under the laws of the province, including the provincial Constitution.

Many observers at the time said that despite the black letter of the law the court simply could not take the enormous step of invalidating the entire statute book of the province of Manitoba. In the end, the Supreme Court of Canada surprised observers when it ruled in the case *Reference re Manitoba Language Rights*, declaring that the laws and regulations not published in both official languages in the province of Manitoba were invalid. However, the court deemed the unilingual versions to be temporarily valid for the minimum period of time necessary for their translation, re-enactment, printing and publication.

The province undertook the important work with all due diligence and, since that time, I am proud to say the laws of Manitoba and the regulations which accompany them have been passed and published in both official languages.

To many of us this result was not only the illustration of the strong foundations of the rule of law in Canada; it demonstrated that Canada's commitment to human rights was more than just rhetoric. Moreover, in this case, the minorities whose rights were affected were not left to fend for themselves. Early in the process, before it reached the highest court in the land, the federal government provided the needed resources, without which a viable challenge might not have been mounted. A few years later, with the inception of the Charter, the program was expanded beyond its origins as a tool for protecting linguistic minorities. Beginning in 1982, the program's mandate was enlarged to include challenges in cases involving Charter rights, particularly the provisions that came into force in 1985. In addition, funding was no longer limited to provincial matters. Cases would be eligible for funding even where the respondent was to be the federal government.

In 1985, a subcommittee of the other place commented on the program in a report called *Equality For All: Report of the Parliamentary Committee on Equality Rights*. The committee was chaired by the respected Progressive Conservative Patrick Boyer, and the report had unanimous support. As I recall, the Liberal representative in the committee was our former Senate colleague Sheila Finestone, who was then the member of Parliament for Mount Royal. The committee pointed to the need to provide assistance to litigants if the implementation of the Charter was to be meaningful. The report stated:

> In the short time since section 15 came into force on April 17, 1985, there have been many lawsuits initiated on the basis of this provision of the Charter. They involve individuals on the one side and, generally speaking, government departments or agencies on the other side. The imbalance in financial, technical and human resources between the opposing parties constitutes a serious impediment to those who might wish to claim the benefit of section 15, thus reducing the effectiveness of resorting to the courts as a means of obtaining redress.

Thus the value of the program and the importance of funding litigants were acknowledged by all parties in Parliament at that time. Despite the change in government that occurred in 1984, funding was sustained. Since then, the program has assisted in dozens of cases, many of which resulted in landmark rulings from the Supreme Court of Canada. These cases have not only settled the legal questions in individual cases but have helped shape a body of Charter jurisprudence that makes it easier for everyone in Canada to understand, respect, defend and enforce basic human rights in their everyday lives.

• (1530)

At the same time, the elements of the program's original mandate remained. It continued to include cases, particularly linguistic rights, involving legal rights not rooted in the Charter. Fourteen years after its inception, the program in 1992 was abruptly cancelled by then-Secretary of State, Robert de Cotret. The decision to cut the program was revealed through the tabling of the estimates. As I understand it, the rationale for the decision was that the program had accomplished its objective, and funding for litigants was no longer needed. The House of Commons Standing Committee on Human Rights and the Status of Disabled Persons swiftly denounced the decision, and scarcely a year later, the leader of the Progressive Conservative Party reversed the decision. As the Right Honourable Kim Campbell went to the polls to seek a fresh mandate as Prime Minister of Canada, she promised to reinstate the program.

In 1994, shortly after taking office, the new government of the Right Honourable Jean Chrétien reinstated the Court Challenges Program. This time, it was done as an arm's-length non-profit organization funded by contributions through the Department of Canadian Heritage. Funding continued for another 12 years.

Not long after the Conservative government took office, the Minister of Finance and President of the Treasury Board announced the termination of the program on September 26, 2006, as part of a long list of program cuts and spending reductions. Many people were puzzled that the government was willing to undermine its commitment to human rights by sacrificing this tiny program. They listed the savings from the decision as a mere $5.6 million per year, about half of 1 per cent of the savings objective, and this in the context of a ballooning budget surplus. It is revealing that the program was lumped in with lists of other programs that, according to the government's media release, "weren't providing value for money."

This conclusion is surprising as the most recent Canadian Heritage evaluation of the program in 2003 identified no such concerns. In announcing the elimination of the program, the government has not produced any analysis or evaluation that sustains its conclusion.

Honourable senators, it is hard to measure or account for "value for money" in the field of basic human rights and fundamental equality. It is hard to know where to begin when confronted with such an attitude. There are too many cases to mention here today, but let me remind honourable senators of a few that illustrate the contributions made by the Court Challenges Program to our advances in human rights.

One recent example is the 2004 *Iness* case in Ontario, where the practice of charging welfare recipients higher rents in cooperative housing than other subsidized tenants was successfully challenged. A 1999 Supreme Court ruling in *Corbiere* struck down the residency requirements of the Indian Act that prevented off-reserve band members from voting in band elections. This discriminatory practice disenfranchised many Aboriginal persons, and affected women disproportionately. Other cases include the 1995 decision in *Egan* and the 1998 decision in *Rosenberg* that opened the door to the extension of spousal benefits to same-sex couples. These examples are where the Court Challenges Program helped clarify human rights law throughout Canada with a targeted application of a small budget.

Honourable senators, Canada is regarded as an international leader in human rights. I have the honour to serve as Chair of the Inter-Parliamentary Union Committee on the Human Rights of Parliamentarians. In the relatively short time that I have served in that role, it has become clear to me that Canada's commitment — both principled and pragmatic — to the ideal for the respect of human rights has been an inspiration to many countries that have been involved in drafting constitutions and modernizing legal systems and institutions in the past few decades. Many have profited from our experience and our jurisprudence as they develop their own basic laws and institutions.

Canada is an example to others because our experiment with constitutionally entrenched human rights has been a resounding success. Our success in implementing the Charter — in making it a meaningful and enforceable document that Canadians cherish — was largely dependent on the practical decision to fund challenges. Without such funding, our progress in shaping a society that respects and values human rights would have been much slower, our jurisprudence would be far less advanced and we would not be able to say that we have minimized the barriers that prevent people from gaining access to the justice system.

Honourable senators, I hope that those on the other side who have influence in the government will prevail; that the decision to cut the program will be reconsidered before long and acknowledged as a mistake. Nearly 15 years ago, the Progressive Conservative Party realized its error, and set out to correct it. When Mr. Baird and Mr. Flaherty announced their decision to de-fund the program last year, it was in its twenty-eighth year. As we reflect upon the 25 years of Charter rights in Canada, I urge the honourable senators on both sides of this house to reflect on what value we would place on the Charter today if it had not been for the Court Challenges Program.

On motion of Senator Comeau, for Senator Oliver, debate adjourned.

THE SENATE

MOTION TO AUTHORIZE INTERNAL ECONOMY, BUDGETS AND ADMINISTRATION COMMITTEE TO STUDY POLICIES IN ORDER TO REDUCE GREENHOUSE GAS EMISSIONS—DEBATE ADJOURNED

Hon. Nick G. Sibbeston, pursuant to notice of November 1, 2007, moved:

> That the Standing Committee on Internal Economy, Budgets and Administration be authorized to examine and report on changes to Senate policies necessary to incorporate into the 64-point travel system for individual senators and into committee travel budgets the costs of purchasing carbon offsets that meet the goal of reducing greenhouse gas emissions and also meet internationally recognized standards and certification processes;
>
> That the committee also evaluate, as a further means to reduce greenhouse gas emissions, the possibility of expanding the use of teleconferencing and other technological systems to reduce the need for witness travel to Ottawa; and
>
> That the committee present its final report to the Senate no later than December 12, 2007.

He said: Honourable senators, I have spoken a number of times about the effects of global warming on the North. In my visits to various communities last spring, people said they were experiencing real climate change. The spring had come earlier and the winters were warmer; they have experienced unpredictable weather throughout the course of the year.

The North is seeing species of animals, birds and insects that have not been seen before. The honourable senators will have seen reports about the extent of open waters in the Northern Passage as well as the prevalence of thinner ice. These stories and the facts are becoming more prominent in the news.

Some things have been done to reduce the impact of climate change. The government, over the last few years, has had various programs and measures to reduce greenhouse gases. The Prime Minister said recently he will take a leadership role in fighting climate change. Many measures will take a long time to implement and even longer to effect. This delay is understandable; it takes time to replace infrastructure and develop new technologies to move us toward a low-carbon economy. It is possible to do something now, however. The Senate can be a leader in this matter. The modest steps that we take will immediately reduce the amount of greenhouse gases being put into the atmosphere. It is estimated that air travel is responsible for 2 per cent of all greenhouse gases in the air and, according to a noted Canadian environmental economist, Marc Jaccard, that share is likely to grow. The fuel for airplanes is very powerful and cannot be replaced with ethanol or biodiesel, or even with hydrogen. Even with improved technology, we might always need fossil fuels to power our planes.

• (1540)

What is the solution? One thing we can do is purchase carbon offsets for each flight that we take. The cost is fairly low and is estimated at between $20 and $30 per person for a return flight from Ottawa to Fort Simpson in the Northwest Territories. Carbon offsets can be as simple as planting trees that will absorb the carbon from the air as they grow. However, this is not the best approach because trees do not necessarily survive; they might eventually be cut down and burned. Investments in fuel, and switching from high carbon to lower carbon fuels or in the development of renewable energy makes more sense in the long run, even if they cost a little more in the short run. Organizations in Canada and internationally have studied the best way to offset carbon. This is one area that the committee can look into.

Purchasing carbon offsets will make us aware of this issue. Every time we travel we will be conscious of contributing to greenhouse gas emissions and what we are paying to offset them. Just like the hydrogen bus that transports us on Parliament Hill, it will be a concrete example of something that we can do. It is impressive and noticeable, and every time we have people from the North here, I tell them about the hydrogen bus. They are amazed that it does not use gas and can move along the road fuelled by hydrogen. If we get involved in the carbon offset program, however modest, it will send a positive message that senators are doing something about the problem.

British Columbia and Manitoba have already adopted a policy to buy carbon offsets for government travel. This year, they both joined the Western Climate Initiative, which includes a number of U.S. states. Some municipalities have taken similar steps in B.C. and joined the Climate Change Charter, which is committed to carbon neutrality by the year 2012. This fall, a press release stated that 62 communities have joined a plan to deal with greenhouse gases. They established the Western Climate Initiative and set up a climate registry to keep note of all these things.

Yellowknife in the Northwest Territories has taken steps to reduce carbon emissions by 20 per cent by the year 2010. Carbon offsets will play a role in achieving these goals. However, to date, eight provinces and the federal government have not moved in this direction to deal with greenhouse gases.

The Senate can take leadership on this issue. It behoves the Senate to do something positive in this realm. The motion is that the Internal Economy Committee look into the matter and report to the house by December 12, 2007. It is my hope that all honourable senators will support this motion.

On motion of Senator Comeau, debate adjourned.

ENERGY, THE ENVIRONMENT AND NATURAL RESOURCES

COMMITTEE AUTHORIZED TO ENGAGE SERVICES

Hon. Tommy Banks, pursuant to notice of November 14, 2007, moved:

> That the Standing Senate Committee on Energy, the Environment and Natural Resources have power to engage the services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject-matters of bills and estimates as are referred to it.

Motion agreed to.

COMMITTEE AUTHORIZED TO PERMIT ELECTRONIC COVERAGE

Hon. Tommy Banks, pursuant to notice of November 14, 2007, moved:

> That the Standing Senate Committee on Energy, the Environment and Natural Resources be empowered to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

Motion agreed to.

COMMITTEE AUTHORIZED TO STUDY ISSUES RELATED TO MANDATE AND REFER PAPERS AND EVIDENCE FROM PREVIOUS SESSION

Hon. Tommy Banks, pursuant to notice of November 14, 2007, moved:

> That the Standing Senate Committee on Energy, the Environment and Natural Resources be authorized to examine and report on emerging issues related to its mandate:
>
> (*a*) The current state and future direction of production, distribution, consumption, trade, security and sustainability of Canada's energy resources;
>
> (*b*) Environmental challenges facing Canada including responses to global climate change, air pollution, biodiversity and ecological integrity;
>
> (*c*) Sustainable development and management of renewable and non-renewable natural resources including but not limited to water, minerals, soils, flora and fauna; and

(*d*) Canada's international treaty obligations affecting energy, the environment and natural resources and their influence on Canada's economic and social development.

That the papers and evidence received and taken and work accomplished by the Committee on this subject during the First Session of the Thirty-ninth Parliament be referred to the Committee;

That the Committee report to the Senate from time to time, no later than June 30, 2009, and that the Committee retain until September 30, 2009, all powers necessary to publicize its findings.

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, I have a brief question for the chairman of the committee. The mandate of the Energy Committee states:

(*a*) The current state and future direction of production, distribution, consumption, trade, security and sustainability of Canada's energy resources;

I am assuming that the words "trade" and "security," given that we have other committees that look after security issues, would be considered apart from matters under the mandate of the Standing Senate Committee on National Security and Defence, or the Standing Senate Committee on Foreign Affairs and International Trade. I would like to know whether there might be overlapping mandates of committees; whether you have discussed this with the chairs of those committees; and whether, in your view, the mandate of the Energy Committee might be encroaching on or interfering with the work of other committees?

Senator Banks: Honourable senators, needless to say, this motion has been approved by the committee in its application to the Senate. The word "security" is in reference to the supply of energy, in the sense that there are two "countries" in Canada as far as oil supply is concerned. Most of the oil processed from Quebec and the East comes from outside Canada, from places where supplies might not be secure one day. In the West, there is a security of supply but an enormous amount of that oil is exported to western parts of the United States. Thus, we have a division down the middle of North America. When the matter is addressed, it will be on the security of supply of not only oil and gas but also other forms of energy in Canada. It does not refer to security in the sense of protecting the infrastructure from terrorism or that kind of thing and, therefore, does not intrude on the mandates of other committees.

The Hon. the Speaker *pro tempore***:** Are honourable senators ready for the question?

Senator Carstairs: Question!

The Hon. the Speaker *pro tempore***:** Is it your pleasure, honourable senators, to adopt the motion?

Motion agreed to.

RULES, PROCEDURES AND THE RIGHTS OF PARLIAMENT

COMMITTEE AUTHORIZED TO ENGAGE SERVICES

Hon. Wilbert J. Keon, pursuant to notice of November 14, 2007, moved:

That the Standing Committee on Rules, Procedures and the Rights of Parliament have power to engage the services of such counsel and technical, clerical, and other personnel as may be necessary for the purpose of its examination and consideration of such bills, subject-matters of bills and estimates as are referred to it.

Motion agreed to.

COMMITTEE AUTHORIZED TO PERMIT ELECTRONIC COVERAGE

Hon. Wilbert J. Keon, pursuant to notice of November 14, 2007, moved:

That the Standing Committee on Rules, Procedures and the Rights of Parliament be empowered to permit coverage by electronic media of its public proceedings with the least possible disruption of its hearings.

Motion agreed to.

MOTION TO AUTHORIZE COMMITTEE TO REQUEST TRANSCRIPTS OF IN CAMERA MEETINGS WITHDRAWN

On Motion No. 26, by Honourable Senator Keon:

That the Chair and Deputy Chair be authorized to request transcripts for in camera meetings be produced, when deemed necessary, for the use of the Chair, Deputy Chair, the members of the committee, the Clerk of the Committee and its analysts in accurately reflecting the discussions of the Committee in minutes and draft reports; and

That these transcripts be destroyed at the end of a session.

Hon. Wilbert J. Keon: Honourable senators, I wish to advise the Senate that I am withdrawing Motion No. 26 on the Notice Paper.

The Hon. the Speaker *pro tempore***:** Senator Keon does not need leave. It was just a Notice of Motion so it does not require leave to be withdrawn. Are honourable senators agreed?

Hon. Senators: Agreed.

Motion withdrawn.

• (1550)

[*Translation*]

ADJOURNMENT

Leave having been given to revert to Government Notices of Motions:

Hon. Gerald J. Comeau (Deputy Leader of the Government): Honourable senators, with leave of the Senate and notwithstanding rule 58(1)(h), I move:

That when the Senate adjourns today, it do stand adjourned until Tuesday, November 20, 2007, at 2 p.m.

The Hon. the Speaker: Honourable senators, is leave granted?

Motion agreed to.

The Senate adjourned to Tuesday, November 20, 2007, at 2 p.m.

THE SENATE OF CANADA
PROGRESS OF LEGISLATION

(*indicates the status of a bill by showing the date on which each stage has been* ***completed***)

(2nd Session, 39th Parliament)

Thursday, November 15, 2007

(**Where royal assent is signified by written declaration, the Act is deemed to be assented to on the day on which the two Houses of Parliament have been notified of the declaration.*)

GOVERNMENT BILLS
(SENATE)

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-2	An Act to amend the Canada-United States Tax Convention Act, 1984	07/10/18	07/11/13	Banking, Trade and Commerce	07/11/15	0			
S-3	An Act to amend the Criminal Code (investigative hearing and recognizance with conditions)	07/10/23	07/11/14	Special Committee on Anti-terrorism					

GOVERNMENT BILLS
(HOUSE OF COMMONS)

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
C-10	An Act to amend the Income Tax Act, including amendments in relation to foreign investment entities and non-resident trusts, and to provide for the bijural expression of the provisions of that Act	07/10/30							
C-11	An Act to give effect to the Nunavik Inuit Land Claims Agreement and to make a consequential amendment to another Act	07/10/30							
C-12	An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005	07/10/30	07/11/15	Banking, Trade and Commerce					
C-13	An Act to amend the Criminal Code (criminal procedure, language of the accused, sentencing and other amendments)	07/10/30							

COMMONS PUBLIC BILLS

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
C-280	An Act to Amend the Immigration and Refugee Protection Act (coming into force of sections 110, 111 and 171)	07/10/17							
C-292	An Act to implement the Kelowna Accord	07/10/17							
C-293	An Act respecting the provision of official development assistance abroad	07/10/17							
C-299	An Act to amend the Criminal Code (identification information obtained by fraud or false pretence)	07/10/17							

SENATE PUBLIC BILLS

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-201	An Act to amend the Financial Administration Act and the Bank of Canada Act (quarterly financial reports) (Sen. Segal)	07/10/17							
S-202	An Act to amend certain Acts to provide job protection for members of the reserve force (Sen. Segal)	07/10/17	07/11/13	Legal and Constitutional Affairs					
S-203	An Act to amend the Criminal Code (cruelty to animals) (Sen. Bryden)	07/10/17							
S-204	An Act respecting a National Philanthropy Day (Sen. Grafstein)	07/10/17							
S-205	An Act to amend the Bankruptcy and Insolvency Act (student loans) (Sen. Goldstein)	07/10/17							
S-206	An Act to amend the Food and Drugs Act (clean drinking water) (Sen. Grafstein)	07/10/17							
S-207	An Act to repeal legislation that has not come into force within ten years of receiving royal assent (Sen. Banks)	07/10/17							
S-208	An Act to require the Minister of the Environment to establish, in co-operation with the provinces, an agency with the power to identify and protect Canada's watersheds that will constitute sources of drinking water in the future (Sen. Grafstein)	07/10/17		Subject matter 07/11/13 Energy, the Environment and Natural Resources					
S-209	An Act to amend the Criminal Code (protection of children) (Sen. Hervieux-Payette, P.C.)	07/10/17							
S-210	An Act to amend the Criminal Code (suicide bombings) (Sen. Grafstein)	07/10/17							
S-211	An Act to regulate securities and to provide for a single securities commission for Canada (Sen. Grafstein)	07/10/17							

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.
S-212	An Act to amend the Parliamentary Employment and Staff Relations Act (Sen. Joyal, P.C.)	07/10/18							
S-213	An Act to amend the Criminal Code (lottery schemes) (Sen. Lapointe)	07/10/23							
S-214	An Act to amend the Income Tax Act and the Excise Tax Act (tax relief for Nunavik) (Sen. Watt)	07/10/24							
S-215	An Act to protect heritage lighthouses (Sen. Carney, P.C.)	07/10/30							
S-216	An Act to amend the Access to Information Act and the Canadian Wheat Board Act (Sen. Mitchell)	07/10/30							
S-217	An Act to amend the International Boundary Waters Treaty Act (bulk water removal) (Sen. Carney, P.C.)	07/10/31							
S-218	An Act to amend the Immigration and Refugee Protection Act and to enact certain other measures, in order to provide assistance and protection to victims of human trafficking (Sen. Phalen)	07/10/31							
S-219	An Act to amend the Public Service Employment Act (elimination of bureaucratic patronage and establishment of national area of selection) (Sen. Ringuette)	07/11/13							
S-220	An Act respecting a National Blood Donor Week (Sen. Mercer)	07/11/15							

PRIVATE BILLS

No.	Title	1st	2nd	Committee	Report	Amend	3rd	R.A.	Chap.

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ORDERS OF THE DAY

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TAB 27

Government of Canada / Gouvernement du Canada

Wage Earner Protection Program for trustees or receivers: Eligibility

From: Employment and Social Development Canada

7. Trustee/Receiver payment

2. Eligibility

Obtaining payroll information

Trustees/receivers require access to payroll information to help identify individuals and calculate eligible wages. Payroll officer(s) or any person in possession of payroll records must provide assistance within 10 days of your request for information.

When payroll information is not available, use “due diligence” in locating for the information needed. You should call the WEPP information line at 1-866-683-6516 (TTY: 1-800-926-9105) if you encounter issues or have questions.

Types of eligible wages

The following amounts are considered eligible wages under the WEPP:

- wages (salaries, commissions, compensation for services rendered, gratuities accounted for by the former employer, production bonuses and shift premiums) that were earned during the eligibility period
- disbursements of a travelling salesperson properly incurred in and about the business of the former employer earned during the eligibility period
- vacation pay earned during the eligibility period
- termination pay and severance pay for employment that ended either during the eligibility period or prior to the discharge of the

trustee/receiver

Calculating eligible wages

Wages, vacation pay and disbursements of a travelling salesperson are restricted to amounts earned during the eligibility period. For example, if an employee is entitled to 2 weeks of vacation per year (in other words 10 days), the amount they could receive for vacation pay under the WEPP would be only the portion of the vacation pay that was earned during the eligibility period. If the eligibility period is for 6 months, then in this example only 1 week of vacation pay would be eligible, and not the full year.

To calculate termination pay and severance pay, refer to the applicable Federal, Provincial or Territorial Labour Standards legislation. Alternatively, these entitlements may also be set out in an employment contract or a collective agreement.

For each individual, you must determine eligible wages owed, inform them of the WEPP and submit a Trustee Information Form (TIF) including in circumstances where:

- an individual is on maternity, parental or sick leave at the time of the bankruptcy or receivership because the employment relationship does not generally end as a result of being on leave
- an individual worked for a sole proprietorship or partnership
- an individual was a manager, an officer or a director of their former employer
- an individual had a controlling interest in the business of their former employer payment or non-payment of wages by their former employer
- an individual was not dealing at arm's length with any person who would be ineligible according to any of the previous criteria

Other WEPP qualifying insolvency proceedings

As per the changes to the *WEPP Regulations*, 3 other WEPP qualifying insolvency proceedings have been introduced:

- proposal under the *Bankruptcy & Insolvency Act* (BIA) (Division 1 Part III). Note: this also includes a Notice of Intention to file a proposal under the BIA (Division 1 Part III)
- certain *Companies' Creditors Arrangement Act* (CCAA) proceedings
- certain foreign proceedings

For these other proceedings, the former employer must have terminated all of its employees, in Canada, other than any retained to wind down its business operations. The trustee/receiver appointed may be required to provide Court documents to validate these proceedings.

For foreign proceedings, if you do not have an Estate ID (that is, Office of the Superintendent of bankruptcy number), please contact the WEPP information line at 1-866-683-6516 for help.

Eligibility period

The wages, other than termination pay and severance pay, owed to the individual must have been earned during the eligibility period. The WEPP eligibility period is the 6-month period before the bankruptcy or receivership, or other qualifying insolvency proceeding.

WEPP qualifying restructuring proceedings

WEPP qualifying **restructuring proceedings** are:

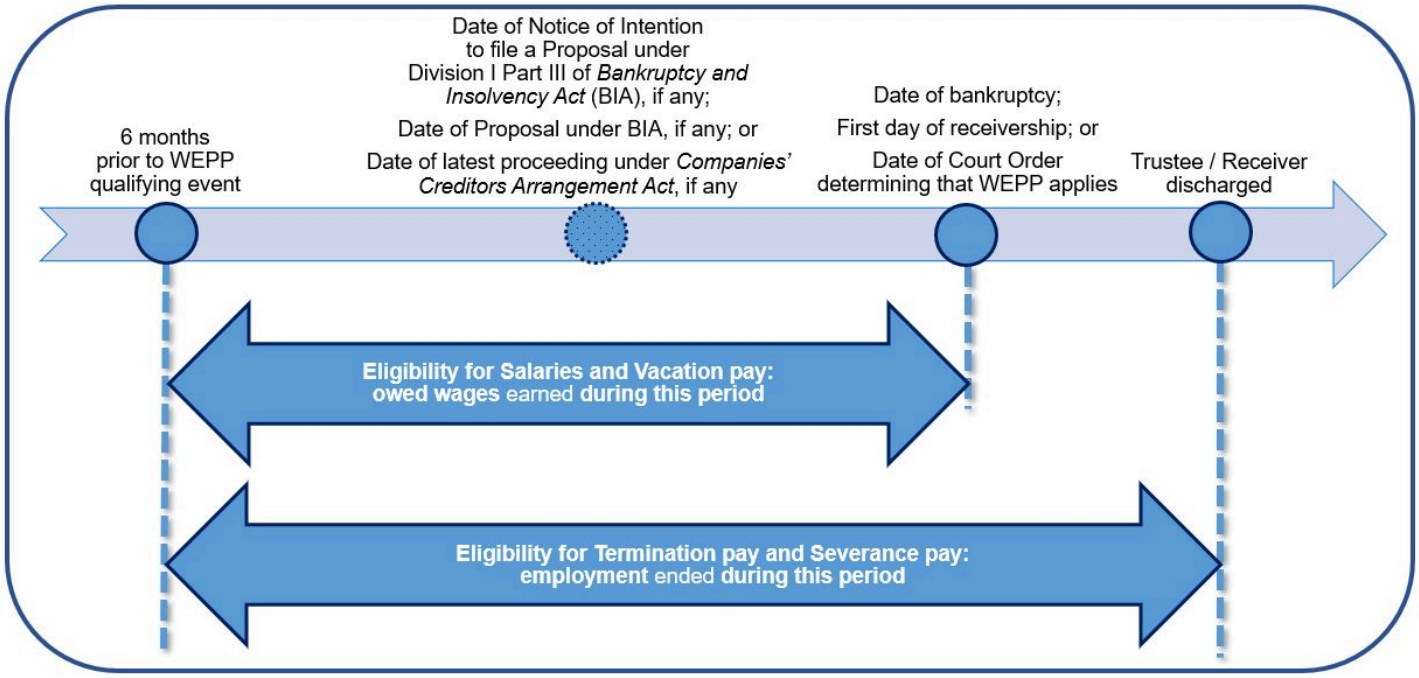
- Notice of Intention (NOI) to make a proposal under Division I Part III of the BIA, and/or
- a proposal under Division I Part III of the BIA, and/or

- proceedings under the CCAA

If the bankruptcy, receivership, or other WEPP qualifying insolvency proceeding is preceded by a WEPP qualifying restructuring proceeding, then the eligibility period would be:

- the period starting 6 months before the restructuring proceeding, and
- ending on the date of the bankruptcy, receivership, or date the court determined that all former employees in Canada had been terminated, other than any retained to wind down its business operations

Timeline of WEPP eligibility



▶ Text description

Continued to work for the trustee/receiver after the date of the bankruptcy, receivership, or other WEPP qualifying insolvency proceeding

Employees sometimes continue to work after the date of the bankruptcy/receivership/ date the court determined that all former employees in Canada had been terminated, other than any retained to

wind down its business operations. These individuals are eligible for WEPP when their employment ends, as long as it is prior to the trustee/receiver being discharged.

For WEPP enquiries, call the information line at 1-866-683-6516 (TTY: 1-800-926-9105) or visit a Service Canada Centre.

Employee entitlements in the case of an employer subject to 2 WEPP qualifying insolvency proceedings

The *Wage Earner Protection Program Act* provides that when 2 WEPP qualifying insolvency proceedings occur (for example, bankruptcy and receivership), the amount to be paid is the greater amount.

The trustee/receiver is required to provide a Trustee Information Form for each employee under both proceedings. Service Canada will then determine the most beneficial payment.

Income tax

Income tax is not deducted directly from WEPP payments. However, individuals will be informed by Service Canada that they are required to report their WEPP payment as taxable income on their annual tax return. Service Canada will issue to WEPP recipients, a T4A slip and a Relevé 1 for Quebec residents by February 28th of the year following the payment.

Statement of crown debt repaid

In the event of an overpayment, the amount reported on T4A/T4AQ would not change.

When the debt is re-paid, a separate document called a Statement of crown debt repaid will be issued.

Definitions

▶ Employee

▶ Managerial position

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Date modified:

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