CCAA: The Ultimate Restructure

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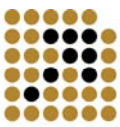

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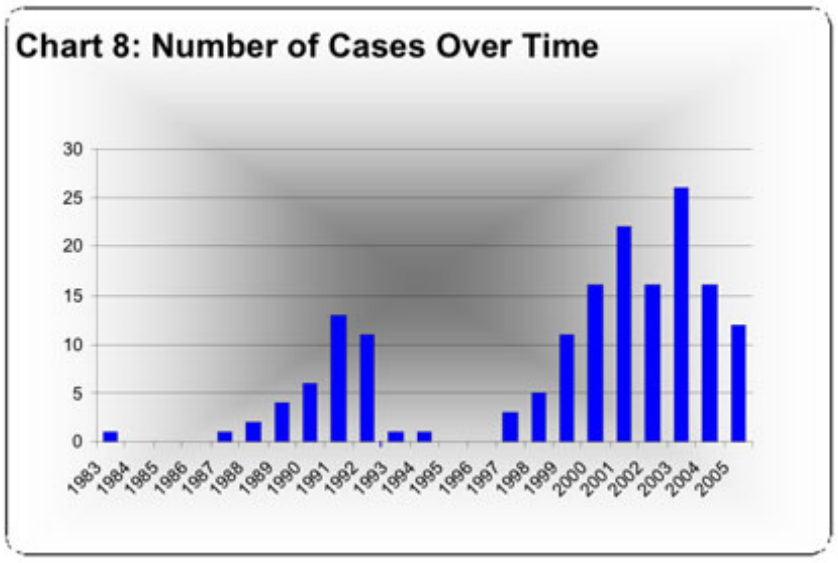
INTRODUCTION

This paper is designed to set out, in brief, some of the employment-law issues that arise during the course of a company's application under the *Companies' Creditors Arrangement Act* (or "*CCAA*"). The *CCAA* is legislation that deals with insolvent companies through a mechanism outside of the *Bankruptcy and Insolvency Act*. Although the statute dates from the 1930s, proceedings under the *CCAA* were extremely rare. However, insolvency lawyers "re-discovered" the *CCAA* in the 1990s and began to use that legislation as a tool to restructure or liquidate insolvent companies without the necessity of following the various rules applicable under the *Bankruptcy and Insolvency Act*. While there is no comprehensive database listing all *CCAA* filings in Canada, a 2006 study by Dr. Janis Sarra[1] attempted to catalogue *CCAA* filings up to 2005. The chart below shows the surge in *CCAA* filings during the recession in the early 1990s, and then a second surge in the beginning of this decade.



To give some idea about the increase in the number of *CCAA* filings since 2005, Ernst & Young Inc. (a common choice for Monitor under the *CCAA*) – according to its website – is acting as the Monitor in 51 *CCAA* proceedings.[2]

[1] Dr. Janis Sarra, *Development of a Model to Track Filings and Collect Data For Proceedings Under the CCAA*, Final Report to the Office of the Superintendent of Bankruptcy, March 2006.
[2]

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A company's decision to seek protection under the *CCAA* can have a devastating impact on employees. The *CCAA* contains no explicit provisions concerning the rights of employees after their employer files for *CCAA* protection. While amendments to the *CCAA* that are scheduled to come into force on September 18, 2009 contain some additional protection for employees, most of the descriptions of the treatment of employee rights after a *CCAA* filing are found in judicial decisions. The relatively recent increase in the use of *CCAA* means that courts have yet to develop a firm consensus about the treatment of employee rights under *CCAA*. This paper will set out the course of those judicial pronouncements to date in an effort to glean some insight into how employee rights will be treated under the *CCAA* in the future.

CCAA PROCEEDINGS

The *Companies' Creditors Arrangement Act* – as has been observed many times – is skeletal legislation.[3] As a result, the legislation provides little guidance concerning the treatment of employee rights and employment-related claims. Certain long-pending amendments to the *CCAA* – if ever proclaimed into force[4] – will provide some additional statutory direction; however, until that time the skeletal nature of the *CCAA* means that the rules that apply in *CCAA* proceedings will continue to be judge-made.

This portion of the paper will provide an overview of the *CCAA*, starting with its history and purpose, and then setting out a brief summary of the statutory provisions in the *CCAA*.

History and Purpose of the CCAA

The *CCAA* was enacted in 1933 both during and because of the Great Depression.[5] The British Columbia Court of Appeal has described the purpose behind the *CCAA* as follows:

[3] See, for example, *Metcalfe & Mansfield Alternative Investments II Corp., (Re)*, 2008 ONCA 587 at para. 44.
[4] These provisions are discussed briefly at the end of this paper.
[5] The then Secretary of State noted in introducing the Bill on First reading that it was necessary "because of the prevailing commercial and industrial depression.": Hon. C.H. Cahan, Secretary of State, *House of Commons Debates (Hansard)* (April 20, 1933) at 4091

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Almost inevitably, liquidation destroyed the shareholders' investment, yielded little by way of recovery to the creditors, and exacerbated the social evil of devastating levels of unemployment. The government of the day sought, through the C.C.A.A., to create a regime whereby the principals of the company and the creditors could be brought together under the supervision of the court to attempt a reorganization or compromise or arrangement under which the company could continue in business.[6]

In 1934, when deciding a reference about the authority of Parliament to enact the *CCAA*, the Supreme Court of Canada described the purpose or aim of the *CCAA* as to deal with the existing condition of insolvency, in itself, to enable arrangements to be made, in view of the insolvent condition of the company, under judicial authority which, otherwise, might not be valid prior to the initiation of proceedings in bankruptcy.[7]

The *CCAA* is not simply a statute designed to govern the arrangements between creditors and debtors. Courts have determined that the *CCAA* is "remedial" legislation, and therefore must be liberally construed in accordance with the modern purposive approach to statutory interpretation. The *CCAA* is legislation designed, in part, to address "the social evil of devastating levels of unemployment."[8] For that reason, the *CCAA* has been interpreted as being:

designed to serve a broad constituency of investors, creditors, and employees. Because of that broad constituency the court must, when considering applications brought under the Act, have regard not only to the individuals and organizations directly affected by the application, but also to the wider public interest.[9]

Judges interpreting and applying the *CCAA* have a significant amount of discretion in making decisions under that Act, and the exercise of their discretion takes into account these wider interests.

Application of the CCAA: When and How

The *CCAA* applies in respect of a debtor company or affiliated debtor companies where the total of claims against the debtor company[10] or affiliated debtor companies exceeds

[6] *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 4 C.B.R. (3d) 311 at 318 (B.C. C.A.).
[7] *Reference re: Companies Creditors Arrangement Act*, [1934] S.C.R. 659.
[8] *Chef Ready Foods*, *supra* note 4.
[9] *Elan Corp. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (C.A.) per Doherty J.A. in dissent, but adopted by Court of Appeal in *Metcalfe*, *supra* note 1 at para. 52.
[10] A company that is bankrupt or insolvent: *CCAA*, s. 2.

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five million dollars ($5,000,000).[11] A claim is simply any claim that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*.[12]

Proceedings under the *CCAA* are commenced by way of an application to the court that has jurisdiction in the province within which the head office or chief place of business of the company in Canada is situated.[13] In Ontario, this means an application to the Commercial List of the Ontario Superior Court.[14] The application typically requests an Initial Order staying proceedings against the debtor as it tries to formulate a restructuring plan. The power to stay claims against the debtor company while proceedings are pending is set out in section 11 of the *CCAA* as follows:

Powers of court

11. (1) Notwithstanding anything in the *Bankruptcy and Insolvency Act* or the *Winding-up Act*, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.

Initial application

(2) An application made for the first time under this section in respect of a company, in this section referred to as an "initial application", shall be accompanied by a statement indicating the projected cash flow of the company and copies of all financial statements, audited or unaudited, prepared during the year prior to the application, or where no such statements were prepared in the prior year, a copy of the most recent such statement.

Initial application court orders

(3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days,

> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

[11] *CCAA*, s. 3(1).
[12] *CCAA*, s. 12(1).
[13] *CCAA*, s. 9(1).
[14] *Practice Direction Concerning the Commercial List of the Superior Court of Justice*, April 1, 2002.

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(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose,

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

These orders are discretionary in that a judge is not required to make such an order. In fact, a judge shall not make an order under ss. 11(3) or (4) unless the debtor company demonstrates that "circumstances exist that make such an order appropriate" and (in the case of an extension to the 30-day stay under ss. 11(4)) the debtor "has acted, and is acting, in good faith and with due diligence."[15]

There are some limits on the powers of the court in s. 11 of the *CCAA*. Most notably for employment-related claims, s. 11.3 of the *CCAA* provides that no order shall have the effect of prohibiting a person from requiring immediate payment for goods or services, or requiring the further advance of money or credit. This provision will be discussed in greater detail below when dealing specifically with employment-related claims.

After the debtor company makes an application, the judge hearing the case must render an Initial Order. The model order subcommittee of the Commercial List Users' Committee of the Ontario Superior Court of Justice has developed two model orders for *CCAA* proceedings: a "short" form of the Initial Order and a "long" form.[16] The provisions of the Initial Order dealing specifically with employees are as follows:

[15] *CCAA*, ss. 11(6).

[16] See http://www.ontariocourts.on.ca/scj/en/commerciallist/ExpNote.htm for a discussion of these Orders and links to both the Short Form and Long Form Initial Orders.

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6. THIS COURT ORDERS that the Applicant shall be entitled **but not required** to pay the following expenses whether incurred **prior to or after this Order**:

> (a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay, bonuses and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and
> (b) the fees and disbursements of any Assistants retained or employed by the Applicant in respect of these proceedings, at their standard rates and charges. [emphasis added][17]

11. THIS COURT ORDERS that the Applicant shall, subject to such covenants as may be contained in the Definitive Documents (as hereinafter defined), have the right to

> (b) terminate the employment of such of its employees or temporarily lay off such of its employees as it deems appropriate on such terms as may be agreed upon between the Applicant and such employee, or failing such agreement, to deal with the consequences thereof in the Plan;[18]

The Initial Order also sets out the terms of the Directors' and Officers' Indemnification and Charge, and appoints a Monitor. The Monitor under the Initial Order is a true "monitor" of the business: it has full rights to information but does not, by way of example, have the power to take possession or control of the debtor's business.

Ultimately, claims against the debtor are subject to a compromise pursuant to sections 4-6 of the *CCAA*. A compromise or an arrangement (commonly referred to as the "plan of arrangement") is proposed between a debtor company and its creditors, and then the court orders a meeting of the creditors or class of creditors to vote on the compromise or arrangement.[19] The compromise or arrangement must then be approved by a majority of

[17] The equivalent provision in the Short Form Initial Order is in paragraph 5.
[18] There is no similar provision in the Short Form Initial Order. The propriety of these orders was the subject of dispute in *Collins & Aikman Automotive Canada Inc.*, (2007) 37 C.B.R. (5th) 282 (Ont. SCJ). In that case, the United Steelworkers proposed that paragraph 6 be amended by deleting the words "but not required" and that paragraph 11 be made subject to any collective agreements and the Ontario *Labour Relations Act*. They were unsuccessful in that motion, but the Ontario Court of Appeal has granted leave to appeal.
[19] *CCAA*, s. 4 deals with unsecured creditors; *CCAA*, s. 5 deals with secured creditors.

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creditors representing two-thirds in value of the creditors.[20] Finally, the *CCAA* also contemplates a limited ability to compromise claims against directors of the insolvent debtor, but that ability does not include claims that relate to a contractual right of the creditor so are largely irrelevant to employee claims.[21]

EMPLOYMENT ISSUES UNDER *CCAA*

Statutory Provisions: s. 11.3 (pay for current service)

The most important provision of the *CCAA* for the purposes of employment issues is s. 11.3 (s. 11.01 of the amended *CCAA* that will come into force on September 18, 2009 is identical). That provision reads:

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

The leading authority on the impact of s. 11.3 of the *CCAA* is a decision of the Quebec Court of Appeal in *Jeffrey Mines*.[22] The court ruled that an employer continued to be bound by the terms of a collective agreement for those employees who continued to provide services after the company sought *CCAA* protection. In that case, Jeffrey Mines sought *CCAA* protection and then laid off its entire unionized workforce. The company then attempted to re-hire a number of unionized workers on terms less favourable than those set out in the collective agreement (in particular, no health or other insurance benefits). The Court of Appeal ruled that the company remained bound by the collective agreement for those employees who continued to work, but that the company was not obligated to pay amounts that became owing as a result of services rendered prior to the date the company sought *CCAA* protection (particularly, payments required to offset the pension fund deficit and maintain retiree insurance plans):

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[20] *CCAA*, s. 6.
[21] *CCAA*, s. 5.1(1).
[22] *Syndicat national de l'amiante d'Asbesos inc. v. Jeffrey Mines Inc.* (2003), 40 C.B.R. (4th) 95 (Que. C.A.).

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

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

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

As will be seen below when discussing specific types of employment claims, courts have generally taken *Jeffrey Mines* and s. 11.3 as differentiating between amounts owing as a

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result of service performed before the *CCAA* application, and amounts owing as a result of service performed after the *CCAA* application.

Priority Between CCAA and Other (Employment) Legislation

On several occasions, courts have concluded that – as federal legislation – the *CCAA* is paramount over provincial legislation.[23] Thus, where the exercise of a court's discretion under the *CCAA* conflicts with the mandatory provisions of provincial legislation, the *CCAA* prevails. However, where there is no inconsistency between federal and provincial law, the doctrine of paramountcy does not apply. Courts have not yet conclusively resolved the issue of the extent to which the *CCAA* has (federal) paramountcy over provincial employment standards or pension legislation; however, courts have concluded that the scheme of distribution under the *Bankruptcy and Insolvency Act* is paramount over deemed trusts in provincial pension legislation.[24]

In one case, a court concluded that the *CCAA* is paramount over the (federal) *Canada Labour Code*. In *Hawkair Aviation Services Ltd*,[25] the court concluded that the *CCAA* ought to prevail over the *Code*, stating:

There is no indication that the broad scope of the *Act* [*CCAA*] should not prevail over the procedures and the rights given to employees and unions as set out in the *Canada Labour Code*. It would have been easy for the *Canada Labour Code* or the *Act* to have excluded the possibility that the *Act* would not apply.

That case involved a union's attempt to certify a bargaining unit for an employer who had recently applied for *CCAA* protection. The court's reasoning in that case has not been adopted elsewhere, and that decision did not employ the usual rules for determining which of two conflicting statutes prevail.[26]

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[23] See, for example, *Metcalfe*, *supra* note 1 at para. 104; *Clear Creek Contracting Ltd. v. Skeena Cellulose Inc.*, 2003 BCCA 344.
[24] *Abraham v. Canadian Admiral Corp. (Receiver of)* (1998), 39 O.R. (3d) 176 (C.A.); *Ivaco (Re)*, 83 O.R. (3d) 108 (C.A.).
[25] [2006] B.C.J. No. 938.
[26] Those rules were summarized in *Lévis (City) v. Fraternité des policiers de Lévis Inc.*, [2007] 1 S.C.R. 591: "Where there is no express indication of which law should prevail, two presumptions have developed in the jurisprudence to aid in this task. These are that the more recent law prevails over the earlier law and that the special law prevails over the general." Using the first of those two presumptions, the *Code* is more recent than the *CCAA* (the *CCAA* was introduced in 1933; the earliest possible date for the *Code* is from its predecessor the *Industrial Disputes Investigation Act* in 1948).

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Specific Types of Employment-Related Claims

Wages

There is some judicial authority suggesting that wages and benefits earned in the course of restructuring, prior to the termination of employment, could be subject to compromise upon termination of employment in the course of the *CCAA* proceeding.[27] However, the better view is that section 11.3 means that employees are entitled to demand immediate payment for any services provided after the initial *CCAA* application. Section 11.3 does not, however, entitle employees to demand immediate payment for services provided prior to the *CCAA* application – in other words, any wages owing upon the initial application are subject to compromise.

As a practical matter, however, barring events leading to an unexpected termination of the *CCAA* proceeding, wages tend to be paid in the usual course. There are several reasons why this may be the case: for example, payment of that expense is contemplated in the cash flow statements submitted by the debtor in the course of the *CCAA* proceedings; unpaid wages may give rise to directors' liability; and a company that wants to emerge from *CCAA* (either restructured or liquidated) with any value will need the continued cooperation and goodwill of at least some employees.

Vacation Pay

While there is some authority for the proposition that vacation pay of terminated employees is also subject to compromise and does not need to be paid out immediately[28], there have not been many cases involving vacation pay in *CCAA* proceedings. Again, there are practical reasons for this, including: vacation pay is often an insignificant or at least a manageable amount; it may be necessary to promise to pay out vacation pay to motivate employees to remain[29]; and vacation pay may give rise to directors' liability.

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[27] *Air Canada (Re)* (2004), 2 C.B.R. (5th) 18 (Ont. SCJ), where Justice Farley concluded that claims under Part III of the *Canada Labour Code* could be compromised under the *CCAA*.

[28] *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070 at para. 42-43, leave to appeal denied (1992) 15 C.B.R. (3d) 265.

[29] In the Royal Oak Mines *CCAA* proceeding, the miners threatened to cease providing services in the absence of assurances that their vacation pay would be paid. The decision of the court authorizing this payment is not reported, but it is referenced in *Royal Oak Mines Inc. (Re)*, [1999] O.J. No. 4397 at para. 3.

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Post-employment benefits: Statutory Notice, Common-Law Notice, and Severance

There are not many cases dealing with whether post-employment benefits (typically statutory minimum payments, pay in lieu of notice, or severance pay under a collective agreement) are subject to compromise. There is a body of case law to date that tends to state that these benefits are subject to compromise and do not need to be paid immediately;[30] however, some courts have permitted debtor companies to pay various severance and termination entitlements.[31] Recently, however, the Ontario court has heard two cases where terminated employees requested immediate payment of termination and severance pay entitlements outstanding.

In *Nortel Networks Corp.*[32], both unionized and non-unionized former employees brought motions (heard together) that Nortel be required to pay severance and termination entitlements notwithstanding the *CCAA* Initial Order. The unionized employees argued that section 11.3 of the *CCAA* means that Nortel is required to make payments resulting from present service provided by the bargaining unit, and that it precludes the court from authorizing Nortel to make selective determinations as to which parts of the Collective Agreement it will abide by. By failing to abide by the terms of the Collective Agreement, the unionized employees argued that Nortel acted as if the contract has been amended to the extent that it is no longer bound by all of its terms and need merely address any loss through the plan of arrangement. The non-unionized employees argued that they were also entitled to termination pay, particularly the minimum payments required by the *Employment Standards Act*. The court rejected those arguments, focusing on its characterization of the unionized and non-unionized employees' claims as non-secured claims without any statutory priority in the *CCAA*. The court concluded that claims for breach of the collective agreement or *Employment Standards Act* were unsecured claims and thus the employees could not demand immediate payment resulting from those breaches. The same judge of the Ontario court came to the same conclusion in *Windsor Machine and Stamping*,[33] again basing his decision upon the fact that employee claims

[30] See, for example, *Westar Mining Ltd. (Re)* (1992), 14 C.B.R. (3d) 95 (B.C.S.C.) where the court did not permit the company to use available credit to pay severance or termination pay claims; *Pacific National Lease Holding Corp.*, *supra* note 26 where the court refused a request by the debtor company to pay severance; *Mirant Canada Energy Marketing Ltd., Re* (2004), 1 C.B.R. (5th) 252 (Alta. Q.B.) where the court refused to order immediate payment of severance to a terminated employee; and *Communications, Energy, Paperworks, Local 721G v. Printwest Communications Ltd.*, 2005 SKQB 331 where a union's request for severance payments to be considered outside of the claims process was dismissed.

[31] *Montreal Trust Company of Canada Ltd. v. Smoky River Coal Limited*, 2001 ABCA 209.

[32] [2009] O.J. No. 2558 (Ont. SCJ). Leave to appeal this decision was granted, and the appeal is scheduled to be heard in October 2009.

[33] [2009] O.J. No. 3195 (Ont. SCJ).

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are unsecured and reasoning that those claims should not receive preference to other unsecured claims that may be left unpaid as a result of the *CCAA* procedure.

In *Nortel Networks Corp.*, the motions judge recognized the hardship suffered by a number of former employees who were left in dire circumstances as a result of their former employer's refusal to pay termination pay. Further, most of the creditors were unsecured creditors and there was a strong indication that there would be some payout to unsecured creditors at the end of the *CCAA* process. As a result, the judge ordered the parties to develop a "hardship protocol" whereby former employees who were suffering particular hardship as a result of not receiving termination pay could apply for a partial distribution of the termination pay owing to them. In *Windsor Machine and Stamping*, by contrast, the same judge refused to consider a partial distribution on the basis of hardship because the financial position of the company was such that there would not be a meaningful distribution to the unsecured creditors at the end of the *CCAA* process.

Another issue that has arisen with respect to post-employment claims is whether those claims must be pursued through the *CCAA* claims process, or whether a terminated employee may file a civil claim after the *CCAA* claims process has completed. In *Esau v. West Bay SonShip Yachts Ltd.*[34] an employee was terminated from his employment after the company filed for *CCAA* protection. The employee sued for wrongful dismissal but did not file a proof of claim under the *CCAA*. The company's plan of arrangement stated that it applied to claims that arose before the *CCAA* filing (i.e. "pre-filing claims") and to claims under "executory contracts arising subsequent to the Filing Date as a result of the termination of such contracts." The employee argued that his claim was a post-filing claim (because he was terminated after the *CCAA* filing) and that a contract of employment is not an "executory contract" because when it was terminated the only remaining performance to be tendered was the payment of money. The chambers judge held that the employee's claim for wrongful dismissal was a contingent liability at the filing date, and as such, fell within the definition of a claim in the plan. She concluded that the appellant's claim was a pre-filing claim and accrued from the outset of his employment, and was therefore a liability of West Bay on the filing date.

The Court of Appeal overturned that ruling, concluding that the claim was a post-filing claim and that there was no "contingent liability" until the actual termination of

[34] 2009 BCCA 31.

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employment without adequate notice. Nevertheless, the Court of Appeal sided with the company and agreed that a contract of employment is an "executory" contract on the date of *CCAA* filing because both parties to an ongoing employment relationship have obligations that are yet to be completed. While it is important to read the terms of the order establishing the claims procedure in each case, the *West Bay SonShip Yachts* decision means that a claim for wrongful dismissal resulting from a post-filing termination should, under most claims orders, be pursued through the claims procedure and not through a civil action.

Pension Claims

Unlike other post-employment claims, there are a significant number of cases addressing various pension-related issues in the *CCAA* process. The *Pension Benefits Act*[35] ("*PBA*"), which governs Ontario pension plans, sets out the requirements for employers who sponsor pension plans to fund those plans. In particular, Regulation 909 to the *PBA* requires the sponsor of every pension plan to make contributions in respect of the normal cost of the plan ("normal cost contributions") and any going-concern unfunded liability and solvency deficiency under the pension plan ("special payments"). Normal cost payments are made in monthly installments within 30 days after the month for which the contributions are payable, and special payments are made in equal monthly installments over a period of either fifteen years (for a going-concern unfunded liability) or five years (for a solvency deficiency).[36] Other jurisdictions in Canada have similar provisions, and sometimes collective agreements contain specific rules concerning normal cost contributions or special payments to a pension plan. The *PBA* also creates a "deemed trust" in favour of employees for certain contributions that have yet to be paid into the pension plan, including regular monthly employee contributions that are held by the employer, employer contributions due but not yet paid, and (in the case of a wind-up) contributions accrued and owed by an employer as of the date of the wind-up.[37]

There have been a number of cases concerning the relative priority of these pension obligations and the *CCAA*. The *Jeffrey Mines* case discussed above is an example of this. The Court of Appeal concluded that s. 11.3 of the *CCAA* required the employer to pay the wages and benefits under the collective agreement for employees still performing labour, but that the *CCAA* did not require the employer to continue to make contributions to the

[35] R.S.O. 1990, c. P-8.
[36] R.R.O. 1990, Reg. 909, s. 5. As part of the 2009 Ontario budget, the solvency deficiency may be paid down over ten years instead of five with the consent of members of the pension plan.
[37] *PBA*, s. 57.

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pension plan on behalf of non-active employees. Courts have, generally, remained unsympathetic to the plight of pensioners caught when their former employer seeks *CCAA* protection.

In *Ivaco Inc.*[38] the Ontario Court of Appeal ruled on the impact of the "deemed trust" in the *PBA*. Ivaco and its related group of companies became insolvent in 2003. In September 2003, Ivaco sought and obtained court-ordered protection under the *CCAA*. All claims of creditors were stayed. A later order stayed Ivaco's obligation to pay outstanding past service contributions and special payments to the non-union pension plans. Ivaco was unable to restructure, and in late 2004, virtually all of its assets were sold. The Superintendent of Financial Services, representing the employees and retirees, brought a motion for an order that part of the sale proceeds be used to satisfy the unpaid past service and special contributions, which Ivaco is deemed to hold in trust for the beneficiaries of the pension plans under the *PBA*. Alternatively, the Superintendent sought an order segregating this amount in a separate account. The Court of Appeal rejected those claims, holding instead that the *CCAA* and *Bankruptcy and Insolvency Act* create a complementary and interrelated scheme which ousts the application of provincial legislation.[39] While the Court of Appeal recognized that this result was unfair for pensioners, it refused to make a decision on that basis, stating:

The third aspect of unfairness on which the Superintendent relies is that the motions judge's order fails to take account of the law's "special solicitude" for pensioners. Certainly provincial pension legislation has shown this solicitude. It has recognized the importance of ensuring that retirees have income security. Thus, it has legislated statutory trusts and liens to protect their pension claims. But federal insolvency law has not shown the same solicitude. It does not accord the claims of "sympathetic" creditors more weight than the claims of "unsympathetic" ones. Subject to specified exceptions, the BIA aims to distribute a bankrupt debtor's estate equitably among all of the estate's creditors. There are undoubtedly compelling policy reasons to protect pension rights in an insolvency. But, as I have said, it is for Parliament, not the courts, to do so.[40]

[38] 83 O.R. (3d) 108 (C.A.). Leave to appeal to the SCC was granted, but the appeal was eventually withdrawn.
[39] The Court of Appeal came to a similar conclusion in *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600 when it concluded that s. 57 of the *PBA* did not make a pension plan administrator a secured creditor under the *Bankruptcy and Insolvency Act.*
[40] *Ivaco*, *supra* note 36 at para. 75.

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Courts have also ruled on the validity of the trend by debtor companies to stop making special payments in the course of *CCAA* proceedings. In *Collins & Aikman*[41] the Ontario Superior Court ruled that it had the jurisdiction under the *CCAA* to permit the debtor company to stop making special payments to a pension plan. It concluded that s. 11.3 of the *CCAA* did not prevent such an order because it could not be said that the special payments related exclusively to the continuing employees, stating:

The most that can be said on the basis of the material now before the Court is that the fact that Automotive continues to operate with employment services being provided by Plan members may occasion some change in the amounts that were due and the payments that were required to be made as at the time of the CCAA filing, but what that amount might be and how, if at all, it could be attributed materially to the continuing service as opposed to other factors such as plan asset valuation is impossible to determine.[42]

The Court also stated that, to the extent of any inconsistency between the *PBA* and the *CCAA*, the *CCAA* (as federal legislation) has precedence.

The Quebec court has come to a similar conclusion in *AbitibiBowater*[43], as has a later Ontario court decision involving *Fraser Papers*.[44]

The trend towards not making special payments during *CCAA* proceedings is not universal, and it may be coming to an end. In the *Nortel Networks Corp.* proceedings, for example, the company is continuing to make special payments. This may be in part due to a recent Ontario Court of Appeal decision[45] holding that directors and officers of a debtor company are acting as agents and employees of the debtor company as administrator of the plan. As a result, in that case the directors were precluded from taking the benefit of releases contemplated by a *CCAA* plan of compromise and arrangement when sued for misfeasance in the operation of a pension plan. As with wages and vacation, the possibility of directors' liability may lead more debtor companies to respect special payments due to a pension plan. In *Fraser Papers*, this possibility of directors' liability led the company to seek (and obtain) a specific order

[41] *Supra* note 16.
[42] *Ibid.* at para. 88.
[43] 2009 QCCS 2028.
[44] *Fraser Papers Inc. (Re)*, [2009] O.J. No. 3188.
[45] *Morneau Sobeco Ltd. Partnership v. Aon Consulting Inc.*, 2008 ONCA 196.

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permitting it to stop special payments and to immunize Directors from liability for this decision.[46]

Courts have also held that claims for payment of non-statutory pension benefits (often referred to as Supplemental Executive Retirement Plans or "SERPs") are also stayed during the *CCAA* process. In *Indalex Ltd.*[47], the debtor company ceased payment of SERPs after filing for *CCAA* protection. The motions judge – relying upon his earlier decision in *Nortel Networks Corp.* – concluded that SERP obligations are pre-filing unsecured obligations and therefore are not entitled to any priority.

Changes to existing terms and conditions of employment

The *Jeffrey Mines* case discussed above remains the leading authority on this point, and held that an employer cannot change existing terms and conditions of employment for employees who remain at work after an application under the *CCAA*. Section 11.3 of the *CCAA* – which allows a person to make an immediate demand for payment for services provided post-filing – includes employee claims. It remains an open question whether an employer may unilaterally announce a change to existing terms and conditions of employment where the previous terms did not require immediate payment of a particular benefit. For example, most bonus plans require an employer to make periodic payments instead of regular payments. For example, if an employer announced in January (post-filing) that it is changing the terms of the bonus plan for the coming year and, under the old plan, the bonuses did not have to be paid until December, courts have not yet ruled on whether that unilateral amendment violates s. 11.3 of the *CCAA*.

Transfer of Employees to a New Employer (Asset Sale)

Often, a restructuring under the *CCAA* turns into a liquidation of assets by an employer.[48] Those assets may be sold in a manner that permits the purchaser to operate a part of the insolvent company's business as a going concern, thus allowing some employees to transfer their employment to the new employer. The *CCAA* does not contain any special provisions governing those circumstances. Instead, employees must look to their

[46] *Supra* note 42.
[47] (Unreported) (July 24, 2009), Ontario (Commercial List) CV-09-8122-00CL.
[48] It can also begin as a liquidation: see *Collins & Aikman*, *supra* where the company applied for *CCAA* protection for the purpose of facilitating its liquidation.

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statutory[49] and common law[50] entitlements upon a transfer resulting from an asset sale and then pursue those claims against their former employer using the claims procedure.

Is the Monitor a Successor Employer?

The usual form of an Initial Order under the *CCAA* used to include a provision stipulating that the Monitor was not a successor employer with respect to the debtor company.[51] In *GMAC Commercial Credit Corporation*, the Supreme Court of Canada concluded that a bankruptcy court does not have jurisdiction to decide whether an interim receiver is a successor employer; notwithstanding that decision, in *Collins & Aikman*,[52] the court approved of the following terms of an initial order over the objections of a union that argued that the determination that the *CCAA* Monitor is not an employer should be made by a labour relations board:

THIS COURT ORDERS that the Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof – or be deemed to have been or become an employer of any of the Applicant's employees.

The Stay of Labour Relations Proceedings

There is some dispute over the extent to which a stay in section 11 of the *CCAA* freezes various labour relations events. Generally, labour relations boards have deferred to the *CCAA* stay, requiring unions and employees to obtain an order lifting the stay in order to permit various proceedings to occur. For example, in *Guelph Products Collins & Aikman*[53] the Ontario Labour Relations Board ruled that the *CCAA* stay prevented the Minister from appointing a conciliator under the Ontario *Labour Relations Act*.

There is no general consensus from labour arbitrators yet about whether arbitrations under a collective agreement are stayed by s. 11 of the *CCAA*. Arguably, the stay in s. 11 of the *CCAA* should be interpreted in light of s. 12. Section 12 of the *CCAA* establishes

[49] The Ontario *Employment Standards Act* provides that, in many circumstances, employees who are transferred to a new employer by way of an asset sale are not entitled to notice or severance pay: see s. 9, and *Abbott v. Bombardier Inc.*, 2007 ONCA 233.
[50] Under the common law, a transfer of employment resulting from an asset sale is a termination of employment and the employee is entitled to reasonable notice of that termination. However, the value of any claim for pay in lieu of reasonable notice would be offset by the income the employee receives from his or her new employer.
[51] See, for example, *Air Canada (Re)*, [2003] O.J. No. 1157.
[52] *Supra* note 16.
[53] [2009] OLRB Rep. March/April 243

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the claim process for those amounts owing prior to the *CCAA* filing. Sections 11 and 12 of the *CCAA* should be read together: s. 11 stays matters that are then dealt with under the claims procedure established by s. 12. Section 12 defines claims as "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy and Insolvency Act*." There are a number of decisions in which arbitrators have concluded that an arbitration is not a proceeding for a claim provable in bankruptcy.[54] The matter only becomes a "claim provable in bankruptcy" after the arbitration has been completed and the winning party is trying to enforce the result. Thus, arguably, the term "proceeding" in s. 11(3) of the *CCAA* should be read down to include only those matters that will result in a "claim provable in bankruptcy" – in other words, that ss. 11 and 12 of the *CCAA* should be read together to refer to the same types of proceedings. This would mean that an arbitration could continue (because it is not a "claim provable in bankruptcy"), but could not be enforced.

The amendments to the *CCAA* mentioned immediately below include a provision stipulating that the stay of proceedings does not affect "an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court."[55] A "regulatory body" is a body that has powers, duties, or functions relating to the enforcement or administration of an Act of Parliament or the legislature of a province. Thus, the new provisions in the *CCAA* mean that a labour relations board is likely to be able to continue proceedings involving a company under *CCAA* protection. It is less certain whether a labour arbitrator appointed under a collective agreement is a "regulatory body" that is immune from the *CCAA* stay.

Amendments to CCAA Soon To Be In Force

As mentioned briefly above, there are provisions of the *CCAA* that have been passed and scheduled to come into force on September 18, 2009.[56] These provisions will provide some relief for employees. A revised section 6 will require a compromise or arrangement to guarantee the amounts that have a priority under sections 81.4 and 81.5 of the

[54] See, for example, *Steel Master Tool Co. and CAW, Local 195* (1999), 81 L.A.C. (4th) 124 (Watters); *Marvic Concrete & Drain Ltd. and Nordel Concrete & Drain Ltd. and LIUNA, Local 183* (2004), 126 L.A.C. (4th) 328 (Herman); and *CAW, Local 195 and Central Chrysler Plymout (1981) Ltd.*, [2004] O.L.A.A. No. 864 (Etherington).
[55] This will be the revised s. 11.1 of the *CCAA*.
[56] SI/2009-68, *Order Fixing September 18, 2009 as the Date of the Coming into Force of Certain Sections of the Acts*.

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Bankruptcy and Insolvency Act (subject to the company's ability to pay for those amounts), namely: $2000 worth of wages earned prior to the filing date, all wages earned after the filing date, deductions from employees' wages for pension contributions, and the normal cost of the pension plan (but not the special payments).[57] There are also provisions governing the process of collective bargaining for unionized employees that guarantee that a collective agreement cannot be amended by the court, but permitting the debtor company to serve a notice to bargain under the appropriate provincial labour laws.[58]

These amendments take effect for bankruptcies or restructurings that formally commence under the *CCAA* on or after September 18, 2009.

Wage Earner Protection Program

The provisions of the *Wage Earner Protection Program Act*[59] apply when a terminated employee's former employer (from whom the employee is owed wages) is "bankrupt."[60] Therefore, employees are not eligible for payments under the wage earner protection program unless and until their former employer makes an assignment for bankruptcy or an order under the *Bankruptcy and Insolvency Act* is taken out against it. To obtain a payment[61] an employee would have to apply to the court for an order lifting the stay imposed by the *CCAA* for the purpose of petitioning the company into bankruptcy.

[57] S.C. 2005, c. 47, s. 127.
[58] S.C. 2007, c. 36, s. 67.
[59] S.C. 2005, c. 47, s. 1.
[60] *Wage Earners Protection Program Act*, s. 5.
[61] The payments are limited to $3000 or four times the maximum weekly insurable earnings under the *Employment Insurance Act* (whichever is greater) for lost wages (including commissions, compensation for services rendered, vacation pay, severance pay, and termination pay) earned during the six-month period leading to the bankruptcy: s. 7.

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