

Insolvency Reform and The Role of Unions in Restructuring

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Introduction

Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts* (now enacted²) ("Bill C-55" or the "Bill")³ received Royal Assent on November 25, 2005. The Bill is not law, as it has not been proclaimed. The Bill makes a number of changes to the *Companies' Creditors Arrangement Act*⁴ ("CCAA") or the federal *Bankruptcy and Insolvency Act*⁵ ("BIA") with respect to consumer bankruptcies, and corporate bankruptcies and restructuring.

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² For ease of reference, we will refer to the relevant provisions of the Bill, as it was passed by the House, despite its recent enactment.

³ Bill C-55, *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, 1st Sess., 38th Parl., 2005, (Passed by House, November 21, 2005, passed by the Senate November 25, 2005, received Royal Assent, November 25, 2005. Under section 141, the Bill will come into force on a day to be fixed by an order of the Governor in Council. Members of the Senate were concerned that the Bill has not undergone adequate study. In a letter dated November 24, 2005, Minister of Industry, David L. Emerson informed the Senate that the government would not proclaim the Act until June 30, 2006 and would refer the matter for further study: http://www.parl.gc.ca/38/1/parlbus/chambus/senate/deb-e/100db_2005-11-25-E.htm?Language=E&Parl=38&Ses=1#28.

⁴ R.S.C. 1985, c. C-36.

⁵ R.S.C., 1985, c. B-3.

This paper will address one provision of the Bill which creates a procedure by which an employer can seek a Court order to serve notice to bargain on a trade union to enter into renegotiation of a collective agreement between the employer and the union. To do so, this paper will review the insolvency system under the CCAA and the BIA to provide the context in which this amendment. With a basic understanding of insolvency law, we turn to the amendments in Bill C-55 regarding collective agreements, and discuss how these new amendments will affect the restructuring process.

This paper will outline what this provision does, and what it does not do. The provision creates a method by which an employer may, under the restructuring process, seek from the court an order allowing it to serve upon the trade union with which it has a collective agreement a notice that requires the parties to commence bargaining of the terms and conditions of an operative collective agreement. The amendment, made to both the BIA and the CCAA, does not terminate the collective agreement; allow the court, or any other party, to unilaterally alter the provisions of the collective agreement; or require either party to agree to new provisions of the collective agreement.

Insolvency: A Primer

Companies facing insolvency may enter into restructuring through the CCAA or the BIA.⁶ As an alternative to bankruptcy, winding-up or liquidation, companies that qualify under the CCAA may attempt restructuring under Court

⁶ Restructuring may also occur under the *Winding Up and Restructuring Act*, but this statute's application is limited and used only in rare circumstances.

supervision by preventing creditors or other parties from enforcing remedies against the company during the CCAA proceedings so that the company can attempt to settle or rearrange its liabilities. Under the BIA, companies that are bankrupt may also restructure by submitting a Proposal that outlines how a company proposes to restructure rather than liquidate.

A corporate reorganization, or corporate restructuring, is an umbrella term for the outcomes and/or processes whereby a company in financial crisis salvages its business to avoid liquidation, and to safeguard the interests of stakeholders. A successful restructuring will often provide the company's creditors with a better outcome than a sale of the company or an outright liquidation or bankruptcy.

When a company is facing a serious financial crisis, it has a number of options. It may attempt to raise funds through, for example, the public or private debtor equity markets, or through agreements with lending institutions. It could also try to reorganize informally, through a private compromise with each of its creditors. Both the BIA and the CCAA provide a formal means to restructure. Formal restructuring proceedings under these statutes have the advantage of binding dissenting creditors to the CCAA plan or BIA proposal if a requisite majority of the creditors in each class of creditors vote in favour of the plan or proposal and the Court approves the plan or proposal.

BIA

Under the BIA, an insolvent corporation may assign itself or be assigned by its creditors into bankruptcy. However, there is an interim step under the

Proposal process where the company commences negotiations with its creditors, divided into classes based on the nature of their claims, and files a notice of intention to file a proposal regarding the bankruptcy. A very broad stay of proceedings against the company takes effect, during which no creditor has a remedy against the debtor for the commencement or continuation of any action, execution or other proceedings for the recovery of a claim provable in bankruptcy. In addition, secured creditors are prohibited from enforcing their security and the Crown may not exercise certain tax collection remedies. Once a proposal is filed, the classes of creditors must vote to approve or reject the proposal. If the creditors approve it with the requisite majority, the Court reviews the proposal and approves or rejects it.

If the proposal is rejected, the company is automatically bankrupt. Because of this outcome, few companies seek restructuring under the BIA. A failed restructuring under the CCAA does not automatically lead to bankruptcy.

CCAA

The purpose of the CCAA is to allow qualifying companies to attempt restructuring under Court supervision by preventing creditors or other parties from enforcing remedies against the debtor during the Court proceedings so that the company can attempt to settle or rearrange its liabilities. Prior to the Bill C-55 amendments (which are not yet in force), the legislation was very short, only twenty-two sections, and its provisions are worded in broad, general terms. Under the CCAA, there is an extremely broad and high level of judicial discretion to make orders that further the restructuring process. Further, there are,

relatively speaking, fewer decided cases under the CCAA, and many decisions that exists are especially fact-driven, which gives rise to a number of decisions that address discrete issues for the first time in the jurisprudence. For these reasons, we will review the restructuring process under the CCAA in more detail than the BIA.

Under the CCAA, a corporate debtor and/or its affiliates may commence a proceeding with the Court for protection from its creditors, where the company meets the definition of "debtor company" contained in the CCAA, and where the total claims against the company exceed five million dollars.

A "debtor company" is defined in section 2 of the CCAA as any company that:

- (a) is bankrupt or insolvent;⁷
- (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
- (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
- (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent.

⁷ The issue of how to determine whether a company was "insolvent" within the meaning of the CCAA was recently raised in *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (S.C.J.). Stelco, a major steel company, applied for protection under the CCAA in January 2004. Justice James Farley applied a broad interpretation of the definition of "insolvent" under section (a) of the definition of "debtor company". Justice Farley determined that the test for insolvency under the CCAA could differ under the BIA, so that a debtor company may make use of the special circumstances of the CCAA. On this basis, Justice Farley outlined what he referred to as the "CCAA Test" for determining insolvency to include a financially troubled corporation that is reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring. This prospective test creates an elastic definition that is derived in part by facts and in part by complex assumptions.

Thus, if a corporate debtor is in bankruptcy proceedings, it may also commence proceedings under the CCAA, if the total claims against the company exceed five million dollars. As well, insolvent companies that are not bankrupt but have total debt exceeding five million dollars may apply for CCAA protection.

If a debtor company qualifies under the CCAA, the Court will make an initial order (the "Initial Order") which recognizes the right of the debtor company to seek relief under the CCAA, and which may provide for:

1. a stay of proceedings against the debtor company by creditors and parties with contracts with the debtor company;
2. the appointment of a Court officer referred to as a "Monitor" to monitor the business and financial affairs of the debtor while the Court order remains in affect;
3. leave to file a plan of compromise and arrangement with some or all of its creditors (the "Plan");
4. leave to carry on business during the order;
5. authorization to sell assets within certain parameters and to terminate contractual agreements with third parties;
6. authorization for "debtor-in-possession" financing ("DIP financing") which secures a charge over all the debtor's property.⁸

The Initial Order allows the debtor company, under Court supervision and in possession and control of its assets, to prevent creditors or other parties from enforcing remedies against it during the CCAA proceedings so that it can attempt to settle or rearrange its liabilities. Liabilities can include the claims of unsecured creditors, secured creditors and federal and provincial governments.⁹ In certain circumstances, the CCAA also allows the debtor company to compromise claims

⁸ CCAA, s. 11.

⁹ Withholdings under the *Income Tax Act (Canada)*, the *Canadian Pension Plan (Canada)*, and *Employment Insurance Act (Canada)*, and other similar provincial legislation are not liabilities that can be compromised: CCAA, s. 11.4.

of creditors against its directors where the claims relate to obligations of the debtor company.¹⁰

To do so, following the Initial Order, the claims of creditors are quantified, and during the creation of the Plan, the creditors are divided into classes based on the nature of their claims (i.e. bondholders, unsecured creditors, etc). Employees and key suppliers may be classed as “unaffected creditors” where the debtor company continues to carry on business. During the CCAA proceedings, any collective agreement remains in force, although there is debate as to the ability to engage certain procedures outlined in the collective agreement.

The debtor company will attempt to negotiate the terms of the Plan with stakeholders, and garner support from its major creditors. This process can take many months. For example, the recent Air Canada restructuring took eighteen months, and Stelco’s restructuring is approaching its second year anniversary.

Once the Plan is filed, each class of creditors meets to vote to accept or reject the Plan.¹¹ Acceptance of the Plan requires a favourable vote by a majority of two-thirds of each class of creditors.¹²

Any plan for reorganization must be filed with the Court and is subject to Court approval. Once the Court has sanctioned the plan, it is binding upon the debtor and any creditors affected by the Plan. Creditors may file objections to the sanctioning of the Plan. As an alternative to a consensual restructuring, a

¹⁰ CCAA, s. 5.1.

¹¹ CCAA, ss. 4 and 5.

¹² CCAA, s. 6.

CCAA judge has the power to order a sale or all or part of the debtor company's assets under a CCAA proceeding; with or without appointing a receiver.¹³

The Role of Unions in Restructuring

The restructuring process under both the BIA and the CCAA is meant, in part, to encourage companies to restructure rather than to liquidate so as to salvage the company, protect jobs and provide the creditors with the greatest possible recovery. Restructurings are not simply commercial disputes; the CCAA, in particular, also serves a public interest function: to allow companies to survive, if possible, but also to save jobs and communities. The importance of the public interest in CCAA proceedings is well recognized. In the *Canadian Airlines* restructuring, the court held that:

In this case, the court cannot limit its assessment of fairness to how the Plan affects the direct participants. The business of the Petitioners as a national and international airline employing over 16,000 people must be taken into account.

In his often cited article, *Reorganization Under the Companies' Creditors Arrangement Act (1947)*, 24 Can. Bar. Rev. 587 at 593, Stanley Edwards stated:

Another reason which is usually operative in favour of reorganization is the interest of the public in the continuation of the enterprise, particularly if the company supplies commodities or services that are necessary or desirable to large numbers of consumers, or if it employs large numbers of workers who would be thrown out of employment by its liquidation. This public interest may be reflected in the decisions of the creditors and shareholders of the company and is undoubtedly a factor which a court would wish to consider in deciding whether to sanction an arrangement under the C.C.A.A.

¹³ *Consumers Packaging Inc., Re* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)

The economic and social impacts of a plan are important and legitimate considerations. Even in insolvency, companies are more than just assets and liabilities. The fate of a company is inextricably tied to those who depend on it in various ways.¹⁴

Employees and pensioners are beneficiaries of the public interest of the restructuring process. Where employees and pensioners are represented by a trade union, the union, on behalf of its members, are not simply financial creditors; they are key public interest and social stakeholders.

Unions, and their members, differ from other stakeholders. The provision of employment services is unlike the provision of other commodities. Labour, the Supreme Court of Canada has said, is not a commodity; a job is not just an investment.¹⁵ Further, over the long term, the workforce of a company determines the success of an enterprise, and implementing structural change on the “shop floor” requires the consensus of the workforce. Finally, unions may have very significant voting claims during the restructuring process.

Unions can also bring a unique perspective to the restructuring process by assisting in attracting capital, and pursuing alliances with other stakeholders who seek long-term viability. A union's membership may be well-placed to understand the factors leading to the need to restructure, and to recommend solutions. As well, unions may also assist in garnering the support of regulators to a restructuring plan.

¹⁴ *Canadian Airlines Corp., Re* (2000), 84 Alta. L.R. (3d) 9 at paras. 171, 172 and 174.

¹⁵ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368-9 per Dickson C.J., dissenting.

Bill C-55

Bill C-55 is the culmination of insolvency law reform which began in 1997, when the BIA and the CCAA were last amended. Both the BIA and the CCAA provide that they should be reviewed every five years.¹⁶ Bill C-55 is the result of recommendations for reform from the Senate Standing Committee on Banking, Trade and Commerce and consultation with stakeholders by Industry Canada.

The Bill was tabled for first reading in the House of Commons (the "House") on June 3, 2005. This autumn, the Bill has moved very quickly through Parliament, due to the strong possibility that an election would be called. Bill C-55 was read a second time and referred to the Standing Committee on Industry, Natural Resources, Science and Technology (the "Committee") for review. The Committee reviewed the Bill in meetings in November, 2005. The Bill was read for a third time and passed on November 21, 2005. On November 25, 2005, the Senate passed the Bill and it received Royal Assent. It is not yet in force, and will likely not come into force until June, 2006.¹⁷

The key goals of Bill C-55 include:

1. encouraging restructurings by increasing their predictability and the flexibility of the CCAA;
2. protecting workers' claims for unpaid wages and vacation in insolvency situations through the Wage Earner Protection Program ("WEPP") and amendments to the BIA;
3. amending to the BIA and the CCAA;
4. increasing the fairness and reducing abuse of the insolvency system; and
5. improving the administration of the insolvency system by clarifying and modernizing several insolvency legislation.¹⁸

¹⁶ BIA, s. 216; CCAA, s. 22.

¹⁷ See footnote 3.

¹⁸ Dave Stewart, Industry Canada, *Insolvency Reform Highlights: Bill C-55 Tabled June 3, 2005* (n.d.) p. 2.

As its name suggests, Bill C-55 established the Wage Earner Protection Program ("WEPP"), which provides for the payment of wages to individuals whose employment is terminated by employers who are bankrupt or subject to receivership, to a maximum of \$3000, by creating a super-priority claim. The Bill also proposed a number of procedural and substantive changes to the bankruptcy and restructuring processes, many of which affect the restructuring as a whole, and unionized workers in particular.

The focus of this paper is the amendment made to both the CCAA and Division I of the BIA which sets out how and when an employer can seek to open up an operative collective agreement during restructuring. This amendment, as we will address below, clarifies that the Court does not have jurisdiction to order modification of terms of the collective agreement during a restructuring or insolvency and sets out a procedure by which an employee can seek a Court order to serve a notice to bargain on the union that represents its employees.

Treatment of Collective Agreements under Bill C-55

Executory Contracts under Bill C-55

An "executory contract" in insolvency law is a contract under which both the parties have unperformed obligations at the time of bankruptcy or insolvency. Lease agreements, employment agreements, collective agreements, supply agreements and licensing agreements are all examples of executory contracts.

In general, Bill C-55 amends the BIA and CCAA to permit a debtor to disclaim these types of agreements after the commencement of restructuring by giving thirty days notice to the other party.¹⁹ However, Bill C-55 prohibits a debtor from disclaiming certain executory contracts including:

1. eligible financial contracts (as defined in the BIA and the CCAA);
2. collective agreements;
3. financing arrangements in which the debtor is the borrower; and
4. real and personal property leases where the debtor is the lessor.²⁰

Thus, although a collective agreement is an executory contract in that both the company and the union have ongoing and unperformed obligations, debtor companies under restructuring are specifically prohibited from disclaiming collective agreements. Instead, Bill C-55 amends both the BIA and the CCAA to allow the employer to request a court order to serve a notice to bargain to commence negotiations with the union with an eye to amend the terms and provisions of the collective agreement, stating:

A debtor company that is a party to a collective agreement and that is unable to reach a voluntary agreement with the bargaining agent to revise any of the provisions of the collective agreement may, on giving five days notice to the bargaining agent, apply to the court for an order authorizing the company to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent.²¹

The Notice to Bargain

¹⁹ Clauses 44 and 131 of Bill C-55, enacting ss. 62.11 and 62.12 of the BIA and ss. 32 and 33 of the CCAA.

²⁰ Clauses 44 and 131 of Bill C-55, enacting s. 65.11(2) of the BIA and s. 32(2) of the CCAA.

²¹ Clauses 131 of Bill C-55, enacting s. 33(2) of the CCAA. This clause mirrors Clause 44, of Bill C-55, enacting 65.12(1) of the BIA.

Bill C-55 amends both the BIA and the CCAA to allow a company restructuring under those statutes to seek a court order authorizing it to serve a “notice to bargain” on the bargaining agent representing its employees, regardless of when the operative collective agreement is to expire.²² The context of this notice to bargain differentiates it from the familiar notice to bargain under labour relations legislation which serves as a signal to commence the negotiation of the terms of a new collective agreement or an agreement to replace an expiring agreement.

A notice to bargain serves two purposes under section 49(1) and (2) of the *Canada Labour Code*.²³ Primarily, within four months preceding the expiry of a collective agreement, it is by used either party to require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement. It may also be used to require a party to commence collective bargaining for the purpose of revising a provision of the agreement during the term of the collective agreement, but only where the collective agreement provides that the provision of the collective agreement may be revised during the term of the collective agreement. Under the amendments to the BIA and the CCAA, an insolvent company may seek such an order from the Court, on at least five business days notice to the trade union, without reference to the term of the collective agreement.

²² Clauses 44 and 131 of Bill C-55, enacting s. 65.12 of the BIA and s. 33 of the CCAA.

²³ R.S.C. 1985, c. L-2, ss. 49(1), (2).

The Test and Consequences of the Order

The Court may grant the request for the order allowing the insolvent company to serve such a notice where it is satisfied that:

- (a) the insolvent person would not be able to make a viable proposal, taking into account the terms of the collective agreement;
- (b) the insolvent person has made good faith efforts to renegotiate the provisions of the collective agreement; and
- (c) the failure to issue the order is likely to result in irreparable damage to the insolvent person.²⁴

If the Court authorizes the service of the notice, the parties are obliged to negotiate in good faith, as required by labour relations legislation.²⁵ The amendments explicitly state that any existing collective agreement will remain in force during negotiations, and continue to remain in force if not revised by the parties.²⁶

Bill C-55 also amends the *Canada Labour Code*²⁷ (the *Code*). Section 67(2) of the *Code* allows parties to a collective agreement to agree to revise any provision of the collective agreement other than a provision relating to the term of the agreement. Bill C-55 amends the *Code* to allow parties, when negotiating

²⁴ Clauses 44 and 131 of Bill C-55, enacting s. 65.12 (2) of the BIA and s. 33 (2) of the CCAA.

²⁵ For example, the *Canada Labour Code*, R.S.C. 1985, c. L-2, s. 50 states:

s. 50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement

²⁶ Clauses 44 and 131 of Bill C-55, enacting s. 65.12(6) of the BIA and s. 33(1), (7) of the CCAA.

²⁷ R.S.C. 1985, c. L-2 [the "*Code*"].

under a notice to bargain ordered in a bankruptcy or insolvency restructuring, to revise the term of a collective agreement without approval of the Canada Industrial Relations Board.²⁸

Under Bill C-55, where a collective agreement is revised, the bargaining agent may make a claim, as an unsecured creditor, for an amount equal to the value of the concession.²⁹ Labour concessions have been treated in this manner in some restructurings (i.e. Air Canada), but such treatment was subject to legal debate. These provisions confirm this approach.

The Debate

This amendment codifies once and for all that during a bankruptcy or restructuring, the supervising Court, a trustee in bankruptcy or a CCAA Monitor may not make orders that modify or disregard terms of a collective agreement. Prior to this codification, there had been debate as to whether a debtor could or should be permitted to repudiate a collective agreement during a restructuring. The issue has been raised specifically in the context of CCAA proceedings, due to the broad scope of judicial discretion in those restructurings, although it must be said that such scope has been considerably narrowed and elucidated by the Court of Appeal for Ontario in *Stelco Inc.*³⁰, nullifying the prospect, however unlikely, of any court-approved repudiation under the current legislation. Further, in the United States, courts may modify or terminate the terms of a collective

²⁸ Clause 136 of Bill C-55, enacting ss. 67(7) and (8) of the *Code*.

²⁹ Bill C-55, clauses 44 and 131, enacting s. 65.12(6) of the BIA and s. 33(5) of the CCAA.

³⁰ *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.). See below.

agreement in certain circumstances (which will be further addressed below). In an era of increased cross-border insolvency, this amendment makes clear that Canadian courts are not to adopt this jurisprudence.

It is organized labour's position that the Courts do not have jurisdiction to interfere with collective agreements during restructuring; Bill C-55 makes this clear and entrenched in legislation, and provides a procedure by which an employer can compel negotiation, but not agreement. A collective agreement is not a simple contract, and common law contract doctrines of repudiation and fundamental breach do not apply.³¹ A collective agreement is a unique instrument reflecting, among other things, the singular and encompassing statutory framework in which it is situate, and the particularity of labour as a commodity compensated after it is used, according to promises made before usage.

The Courts are hesitant to interfere with free collective bargaining, whether such interference has been requested by the employer or the union. For example, in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, the Supreme Court of Canada analyzed the jurisdiction of the Canadian Labour Relations Board (the "Board") to order that an employer tender the tentative agreement which it had put forward earlier (and which had been rejected) with the exception of four issues about which the employer had changed its position.³² The employer and union were given thirty days of bargaining to settle the outstanding issues after which compulsory mediation would be imposed.

³¹ *Ainscough v. McGavin Toastmaster Ltd.*, [1976] 1 S.C.R. 718.

³² [1996] 1 S.C.R. 369 [*"Royal Oak Mines"*].

The order was a result of a violent and lengthy strike during which the employer had failed to bargain in good faith. The majority of the Court was clear that, while the order was within the jurisdiction of the Board and did not constitute the imposition of a collective agreement on the parties, the remedy was only appropriate because of the unique circumstances:

It is trite to observe that the factual situation which has given rise to the case at bar could never be described as the "usual course of events". On the contrary, the length, violence and community consequences make this dispute one of extraordinary circumstances. I still hold to the view that the Board should not readily intervene in the free collective bargaining process. Nor should it routinely impose a collective agreement or key terms of an agreement on the parties. However, it would be wrong to say that a situation will never arise where more extreme measures will have to be taken in fashioning a remedial order. This is precisely such a case.³³

The Court was split narrowly (4-3) on this issue. We acknowledge that the context of *Royal Oak Mines* is quite distinct from the restructuring process under the CCAA or the BIA; nevertheless, this case is an example of the reluctance of the Courts to countenance intrusion upon collective bargaining, even when such intrusion is at the instance of the Board with specialized expertise in the field. It provides support for the argument that a Court supervising a restructuring does not have inherent jurisdiction to impose or disregard terms of a collective agreement.

Similarly, in a decision in the Stelco restructuring, the Court of Appeal of Ontario ruled that judges presiding over CCAA proceedings should exercise their discretion in a manner that respects legislative frameworks (in that instance,

³³ *Ibid.*, at para. 80.

procedures in corporations legislation regarding directors).³⁴ The supervising court's jurisdiction is limited unless there is a 'functional gap' in the legislative code. Labour relations legislation constitutes a complete statutory code governing the collective bargaining between employers and employees. Thus, the *Stelco Inc.* decision also provides strong support for the position that a judge presiding over a CCAA proceeding does not have jurisdiction to amend or modify the terms of a collective agreement.³⁵

Beyond these cases, there is very little case law directly relating to jurisdiction to modify the terms of a collective agreement. The end of the judicial trail is probably the Quebec Court of Appeal decision in *Syndicat national de l'amiante d'Asbestos inc. v. Jeffrey Mines Inc.*:

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.

...

The collective agreements continue to apply like any contract of successive performance not modified by mutual agreement after the initial order or not disclaimed (assuming that to be possible in

³⁴ *Stelco Inc. (Re)*, [2005] O.J. No. 1171 (C.A.).

³⁵ Robert A. Centa and Jeffrey Larry, "Unions continue to play an important role in insolvencies and restructurings" *The Lawyers Weekly* 25:18 (16 September, 2005) 15.

the case of collective agreements). Neither the monitor nor the court can amend them unilaterally. That said, distinctions need to be made with regard to the payment of the resulting debts.

Thus, unionized employees kept on or recalled are entitled to be paid immediately by the monitor for any service provided after the date of the order (s. 11.3), in accordance with the terms of the original version of the applicable collective agreement or with the terms of an amended agreement approved by the union concerned. However, the obligations not honoured by Jeffrey Mine Inc. with regard to services provided prior to the order constitute debts of Jeffrey Mine Inc. for which the monitor cannot be held liable (s. 11.8 CCAA) and which the employees cannot demand be paid immediately (s. 11.3 CCAA).³⁶

This issue was raised, but not formally decided, in the Air Canada restructuring under the CCAA. Air Canada and Air Canada Jazz sought an order giving them relief from certain of the legal obligations under the existing collective agreements. They attributed part of their financial difficulties to restrictions imposed by uncompetitive collective agreements, whose terms pre-dated market transformations that caused a decline in the airline industry.

On April 1, 2003, Justice James Farley made an order (the "Initial Order") in response to the Applicant's application. The Initial Order permitted Air Canada and Air Canada Jazz to, among other things,:

- (a) contract out work contrary to collective agreement provisions;
- (b) disregard collective agreement provisions governing employee remuneration;
- (c) negotiate the terms of severance directly with unionized employees;
- (d) disregard collective agreement provisions regarding pension and benefit plans; and
- (e) unilaterally terminate collective agreements in their entirety.

Further, the Initial Order stayed all grievance and arbitration proceedings that had been or could be taken pursuant to the terms of the collective

³⁶ [2003] Q.J. No. 264 at paras. 52, 60, 61 (C.A.).

agreements and the *Canada Labour Code*, and restrained any person from enforcing any decision or award obtained through such proceedings.

A number of unions which were party to collective agreements with Air Canada and Air Canada Jazz filed a motion in response to the term of the Initial Order, asserting that the Initial Order had to be varied such that Air Canada and Air Canada Jazz continue to be subject to fulfill their obligations under the *Canada Labour Code*, the *Pension Benefits Standards Act*, and the collective agreements to which they are parties. The issue of jurisdiction to make such an order was never decided, as Justice Farley ordered the parties to enter into mediation on these issues.

*The U.S. Position*³⁷

The amendments allowing the company to require negotiations during the term of a collective agreement can be contrasted with the similar provisions in the *U.S. Bankruptcy Code*, which explicitly permit the modification or termination of provisions of a collective agreement in certain circumstances.³⁸ In *N.L.R.B. v. Bildisco*, the U.S. Supreme Court acknowledged that collective agreements are unlike other executory contracts, but that the policy behind restructuring legislation required that the Court have jurisdiction to approve the termination or alteration of a collective agreement.³⁹

³⁷ This section relies heavily on the article by David Byers and Timothy Banks, *Arguments in Support of Court Jurisdiction in a CCAA Proceeding to Impose Interim Terms on Parites to a Collective Agreement*, presented at the Turnaround Management Association, February, 26, 2004.

³⁸ Section 1113 of Ch. 11 of the *U.S. Bankruptcy Code* (11 U.S.C. §§ 101 - 1330).

³⁹ 465 U.S. 513, 521-27 (1984) per Rehnquist J. [*Bildisco*].

In *Bildisco*, the Court created a three-part test which a company must demonstrate to be permitted to terminate a collective agreement:

1. There has been reasonable efforts to negotiate a modification of the collective agreement. The company is not required to show that bargaining has hit an impasse;
2. The termination of the collective agreement would assist in the successful rehabilitation of the company; and
3. The balance of equities between the company, creditors, and employees favours the termination of the collective agreement. At this part, the Court must look to the degree and quality of hardship faced by each party.⁴⁰

Since *Bildisco*, the test for Court intervention in collective agreement has become more nuanced:

1. The company must make a proposal to the union to modify the collective bargaining agreement. The proposal must be based on the most complete and reliable information available at the time of the proposal;
2. The proposed modifications must be necessary to permit the reorganization of the debtor;⁴¹
3. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably;
4. The company must provide to the union such relevant information as is necessary to evaluate the proposal;
5. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective agreement the debtor must meet at reasonable times with the union. At the meetings, the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective agreement;
6. The union must have refused to accept the proposal without good cause; and

⁴⁰ *Ibid.*

⁴¹ There has been some debate in the Circuit courts as to whether "necessary modifications" are only those essential to avoid liquidation (*Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir., 1986) or may also include those necessary to assist the company in rehabilitating itself (*Truck Drivers Local 807 v. Carey Transportation Inc.*, 816 F. 2d 82 (2d Cir., 1987).

7. The balance of the equities must clearly favour rejection of the collective agreement, determined by looking at, among other things, the likelihood and consequences of liquidation or a strike.

With Bill C-55, Canada has chosen not to follow the U.S. model. As Minister of Labour and Housing stated during Committee discussions on Bill C-55, the legislation was intended to clarify the Canadian position that a Court did not have jurisdiction to amend or disregard terms of a collective agreement:

So if one is accessing the CCAA or bankruptcy, we're trying to make sure we don't go to the American model--if I can put it that way--and throw out the collective agreement that essentially respects, as part 1 of the Labour Code does, that the two parties, employers and employees, have come to an agreement on how they will deal with certain issues. We want to maintain that standard. To ensure that the collective agreements are respected, even under receivership or bankruptcy, they can't just be holus-bolus thrown out by a particular judge, and so on. That's why I think we've put in place some greater clarity as to what the responsibilities would be.⁴²

Conclusion

This paper has addressed the consequences of the amendments to Bill C-55 regarding collective agreements within Canadian insolvency law. It is our position that Bill C-55 has clarified an area of insolvency law that was previously contentious; that is, whether a court supervising a restructuring had the jurisdiction to amend or terminate a collective agreement, or at the least the legislation has codified the positions of the Courts immanent in recent rulings reviewed above. Having chosen not to follow the U.S. model, and instead to adopt the procedure set out Bill C-55, Parliament has chosen to create a process

⁴² Hon. Joe Fontana (Minister of Labour and Housing), Statement made to the Standing Committee on Industry, Natural Resources, Science and Technology Tuesday (1 November, 2005); online: Parliament of Canada, History of Bill C-55, Evidence to Standing Committee <<http://www.parl.gc.ca>>

in which the employer can request renegotiation of a collective agreement with court approval in a manner that retains the freedom to contract between the employer and the union.

As noted above, unions play an important role in the restructuring process, and Bill C-55 acknowledges their unique stakeholder status. But what is to be made of the procedure under Bill C-55? When an employer has served a notice to bargain through the procedure set out in Bill C-55, both the union and employer are required to bargain in good faith. Further, the company will be required to produce financial information to assist in the negotiations.

“Concession bargaining” is perhaps the most difficult type of bargaining for both union and employer and may be sought by an employer in a restructuring. This need not be the case however, as Stelco shows. Unions are critically important stakeholders in insolvencies; they are powerfully motivated to reach long-term solutions that will save jobs during a restructuring, to protect collective agreements freely bargained, and the larger communities in which their jobs are situated, and to protect pensions and other post employment benefits.

Thus, it will be interesting to see the effect of this amendment in CCAA and BIA proceedings. It is yet unclear how zealously employers will make requests to serve a notice to bargain during restructuring, and how willingly Courts will be to grant such requests. Unions will likely be wary of the use of such notices as employers seek to use them to advantage: the legislation creates a situation where the timing of bargaining may no longer be mutually arrived at,

but can be determined by the intersection of the winds of economic fortune, the jurisdiction of the Courts and the strategic and tactical motivations of employers.

It may well be that the greatest effect of the Court granting an order the open up the collective agreement for further negotiations will be to provide further tools in the “real time” legal and political manoeuvres which constitute insolvency law. The jurisdiction to order the service of a notice of bargain provides another tool to the supervising Court to encourage stakeholders to “make a deal.” Let’s see what hands are dealt.