

Financial Services Flash

AIRD & BERLIS LLP
Barristers and Solicitors

July 7, 2010

Severance and Termination Pay: A Pre-Filing or Post-Filing Claim Under the CCAA?

In the recent case of *Re: Canwest Global Communications Corp.*, 2010 ONSC 1746, the Communications, Energy and Paperworkers' Union ("CEP") sought an order directing the CMI Entities (which include Canwest Global Communications Corp. and the other twenty-four applicants and three related partnerships) to satisfy all of their obligations in respect of severance and termination payments owed to certain terminated employees in accordance with the terms of their collective agreements. A brief summary of the relevant facts, arguments and the Court's ruling is outlined below.

On September 3, 2009, a CMI Entity employer announced nine layoffs with effective layoff dates in mid-October or December of 2009. On October 6, 2009, the Ontario Superior Court of Justice granted the CMI Entities an Initial Order which, among other things, provided protection under the *Companies' Creditors Arrangement Act* (the "CCAA") and stayed all proceedings against them. On November 12, 2009, another CMI Entity employer announced nine layoffs with the effective termination date of November 30, 2009. Although two of these latter terminations were later rescinded, all of the employees worked beyond October 6, 2009, the date of the Initial Order, and remained employed until their effective layoff dates. None of the terminated employees received any of the severance or termination payments owed as stipulated in their respective collective agreements.

CEP argued that the employees provided post-filing service to their employers by continuing to work and, pursuant to section 11.01 of the CCAA, which entitles employees to payment for post-filing service, the entire severance and termination payments owed to them should be treated as post-filing claims. Further, the employees argued that because subsection 33(1) of the CCAA states that collective agreements remain in force during CCAA proceedings, severance and termination payments should be paid immediately. Conversely, the CMI Entities argued that, because the employees were paid their full wages for every day actually worked, the terminated employees had been paid everything that was owed to them. It was argued that severance pay, which only takes effect upon the actual termination of employment and is determined by calculating past service, should not be treated as a post-filing obligation. The employers submitted that, while a collective agreement remains in force during the CCAA stay period, it does not follow that all monies owed under that agreement must be paid immediately or perhaps at all.

The Court began its analysis by examining the policy considerations behind the CCAA, concluding that the goal of the legislation is to facilitate a compromise between creditors and companies. Similarly, because the Court is able to suspend payment of various obligations, including severance and termination packages, section 11.01 of the CCAA should be read narrowly or else the goal of the legislation would be diluted. The Court cautioned that while this decision might, at first blush, appear to be contrary to employees' welfare, a closer examination suggests otherwise. By allowing companies to restructure their debt instead of fulfilling all of their financial obligations, the CCAA assists struggling companies to remain viable. In that sense, the majority of employees benefit from their continued employment in what would otherwise be a bankrupt and non-operable company.

JULY 7, 2010

The Court went on to hold that severance pay relates to prior service and, therefore, while the employees are entitled to the money, payment is stayed by virtue of the Initial Order. Further, while the CCAA mandates that collective agreements remain in force, the statute does not speak to the priorities of creditors. These employees, the Court concluded, were unsecured creditors and, therefore, they were not entitled to the full payment owed to them ahead of secured parties. Finally, the Court reasoned that there is no material difference between severance payments and termination payments and, therefore, both should be characterized as pre-filing obligations.

It should be noted that throughout the decision, the Court heavily relied upon and eventually followed the Court's recent decision in Windsor Machine & Stamping Ltd. [2009] O.J. 3195. That case involved very similar issues and leave to the Ontario Court of Appeal was recently granted. Until that time, however, the jurisprudence is consistent in that severance and termination payment obligations attributable to the period of time before the date of the Initial Order are to be treated as pre-filing claims under CCAA proceedings. Any incremental amount of termination and severance pay attributable to the period of time after the date of the Initial Order in which services were actually provided is not stayed and constitutes a post-filing claim.

The Financial Services Group at Aird & Berlis LLP has a great deal of experience in CCAA proceedings. For more information, please contact any member of the Financial Services Group. Details can be found on our [Financial Services, Insolvency and Restructuring web page](#), by clicking on [members](#).

[Click here to view our other newsletters](#) or visit www.airdberlis.com