

Case Comment: Try and Try Again CCAA Court Orders Union Members to a Second Vote

July 9, 2010

By Catherine Powell

In 2005, Justice Blair, for the Ontario Court of Appeal, cautioned courts acting pursuant to the *Companies' Creditors Arrangement Act* ("CCAA") that their jurisdiction, broad as it was, was not without limit. The setting was the restructuring of Stelco, a complicated and hotly contested affair, which by then had been ongoing for fourteen months or so.

Five years later, the extent to which the Court of Appeal's caution on the limits of the court's jurisdiction is being respected is open to question, as evidenced by a ruling made last week by the Québec Superior Court in the restructuring proceedings of AbitibiBowater Inc. ("Abitibi").

In a judgment dated June 11, 2010, Justice Gascon, sitting as a CCAA Court judge, granted Abitibi's motion for an order requiring certain union members to take a second vote on an agreement entered into between it and the Communications, Energy and Paperworkers Union regarding the amendment and renewal of collective bargaining agreements in respect of four union locals. In order to be accepted, a double-majority of union members from the four locals in question had to vote in favour of the agreement. A vote was held, and all but one of the four locals voted in favour of the agreement, such that the requisite double-majority was not achieved. Stressing the importance of the acceptance of the agreement to its restructuring, Abitibi asked the court to order the union members from the local that voted against the agreement to submit to a second vote. Interestingly, the Union supported Abitibi's position, although it admitted doing so because it was facing an impasse.

Justice Gascon acknowledged that Abitibi's request was unheard of, and that there was no precedent to support Abitibi's motion. Nevertheless, having recognized that the motion was unorthodox and that it was doubtful that Abitibi, as an employer, could have brought such a motion before a court outside of the CCAA context, Justice Gascon, relying on his broad statutory discretion and inherent jurisdiction, went on to order the four locals in question to submit to a second vote on the agreement.

In finding that the discretion contained in the CCAA and the court's inherent jurisdiction afforded the court the necessary jurisdiction to grant the relief sought, Justice Gascon started from the proposition that the CCAA is a flexible tool and remedial legislation, the purpose of which is to facilitate compromise and the successful restructuring of companies in financial distress. Justice Gascon stated that the court must, as much as it can, facilitate the development of a plan of compromise and arrangement, with the best costs and conditions possible. In light of the urgency of the matter (agreement with various unions being a pre-condition of the draft plan of compromise and arrangement currently in existence), and the possibly dramatic consequences of the rejection of the agreement in question to the restructuring, Justice Gascon held that it was appropriate for the court to exercise its jurisdiction in the manner requested.

In reaching this conclusion, the court noted that a negative vote this late in the proceedings could be a threat to a successful restructuring. Implicit in Justice Gascon's ruling was the assumption that, if the union members were told once again how crucial it was to vote in favour of the agreement, the result would be different. While the decision could, on its face, be seen as an implicit

order to the union members to vote in favour of the agreement (and, obliquely, support the draft plan of compromise and arrangement), the court drew comfort from the fact that union members would presumably still have the final word on the matter.

The application of the CCAA creates, to an unusual degree, a tension between ends and means. To achieve the goals of the CCAA, courts can be strongly tempted to push the outer boundaries of their statutory discretion and inherent jurisdiction to achieve a satisfactory restructuring, sometimes in ways that courts would not, in any other context, find acceptable, as Justice Gascon explicitly acknowledged. Justice Gascon's decision raises, once again, the difficult question of how far courts can and should go to achieve the objectives of the CCAA.

WeirFoulds^{LLP}

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110

Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110

Fax: 905.829.2035