Much Ado: Evaluating the Collective Agreement Amendments in the *BIA* and *CCAA*

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This article considers the effect of recent statutory amendments that recognized the legal status of the collective agreement as a binding source of rights and obligations during the employer's insolvency. The author reviews the law prior to, and after, the amendments along with interview responses of leading insolvency practitioners in determining whether those amendments unduly interfered with or prevented the successful restructuring of distressed businesses. In his view, most of the early jurisprudence setting aside collective agreements to which the debtor company was a party distorted the development of the law in this area, weakened the legitimacy of the insolvency process, and generated unnecessary conflict in the midst of restructuring efforts. By contrast, the amended provisions, by recognizing that collective agreements remain in force during an employer insolvency, have restored proper balance to the law, fostered voluntary negotiations among the parties, and reduced unnecessary litigation between debtors and unions. Importantly, the reforms have transformed court-centered conflict over the status of the collective agreement into productive negotiations focused on the rescue of distressed businesses. As a result, the paper maintains, the reforms have brought positive change to the restructuring process, by facilitating the efforts of stakeholders trying to salvage the company.

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1. INTRODUCTION

For many years, disputes between debtor employers and their trade unions over the enforceability of collective agreements generated a high-stakes contest about the legal validity of those agreements during bankruptcy. By 2009, after almost 15 years of discord in the case law, the time was ripe for legislative reform resolving the legal status of collective agreements during an insolvency. At that time, a number of amendments to bankruptcy legislation came into effect, including the addition of section 65.12 of the *Bankruptcy and Insolvency Act*[1] (*BIA*) and section 33 of the *Companies' Creditors Arrangement Act* (*CCAA*).[2] Among other things, these reforms mandated that collective agreements would remain in force during insolvency proceedings unless the parties voluntarily agreed to revise their bargain. The reforms permitted debtor employers to ask courts to issue a notice to bargain to their union(s) formally indicating a desire to bargain a new collective agreement, which then obligated parties to negotiate in good faith to reach a new agreement.

When first proposed, these reforms led insolvency professionals to express concern that they would create an incentive to simply liquidate businesses, as labour unions were not viewed as being predisposed to accept reductions in their terms and conditions of employment in order to rescue a flagging business.[3] Nonetheless,

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1 RSC 1985, c B-3.

2 RSC 1985, c C-36; see also s 32(9)(b) of the *CCAA* for a similar provision. The notice to bargain provisions are found at *BIA*, s 65.12(1) and *CCAA*, s 33(2).

3 Although the concerns of insolvency professionals, noted above, may be at odds with the history of restructuring experience in some cases, such as Algoma Steel and Air Canada, skepticism of the willingness of labour unions to voluntarily compromise their agreements formed a central reaction of those professionals to the proposed amendments. See the testimony of Andrew Kent of the Insolvency Institute of Canada, *Standing Committee on Industry, Natural Resources, Science and Technology*, 38th Parl, 1st Sess, No 064 (17 November 2005) at 11. His concerns were echoed among insolvency practitioners, who characterised the amendments as "flawed and unbalanced" because labour unions sometimes "overreached," impairing the debtor's ability to restructure. See Peter P Farkas, "To Repudiate or not?" *CA Magazine* (June-July 2008), online: <http://www.camagazine.com/archives/print-edition/2008/june-july/regulars/camagazine4797.aspx>.

Parliament enacted the amendments in the face of such misgivings, without conducting a meaningful examination of the expected effect of its proposed reforms.[4] In the ensuing years, no study has attempted to understand their practical implications.

This paper aims to review the consequences of these amendments for the law and for insolvency practice in Canada. It will evaluate the effects of adding section 65.12 to the *BIA* and section 33 to the *CCAA*. In particular, it will examine whether the amendments recognizing the legal status of the collective agreement have unduly interfered with, or generally prevented, the restructuring of unionized businesses subject to insolvency proceedings. This paper contends that, in general, distressed companies have not suffered undue hardship as a result of the reforms, nor have the reforms commonly prevented restructuring of troubled companies that are parties to a collective agreement. Instead, my analysis suggests that the amendments have reinforced the purposes of the law, fostered voluntarism among parties, and lessened unnecessary litigation between debtor employers and their labour unions. Taken together, these developments indicate that the amendments have introduced a measure of constructive change into the efforts of stakeholders to rescue distressed businesses.

The second part of this study sets the scene by reviewing the jurisprudence that challenged the status of the collective agreement in insolvency law. This brings into clear focus how case law prior to the amendments affected the ability of stakeholders to restructure failing enterprises. The final section explores how the statutory reforms have affected the law and restructuring practice in the five years following their proclamation. It begins by setting out the amendments and describing their content. It then explores the potential repercussions of Parliament's amendments on restructuring efforts and examines recent decisions implementing the amendments, in order to understand whether these alterations are being fully utilized. Finally, it

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4 Jacob Ziegel, "Canada's Dysfunctional Insolvency Reform Process and the Search for Solutions" (2010) 26 Business & Finance Law Review 63 at 73 & 75. See also Jacob Ziegel, "The Travails of Bill C-55" (2005) 42 Can Bus LJ 441, and Jacob Ziegel, "Bill C-55 and Canada's Insolvency Reform Process" (2006) 43 Can Bus LJ 76 for an excellent review of the political process informing the passage of the 2008 bankruptcy and insolvency amendments.

examines the views of several leading lawyers practising in this area in order to understand whether the legislative changes impair the ability of stakeholders to effectively restructure distressed businesses. The essay concludes by commenting on the impact of the statutory changes on the law and on the present ability of parties to pilot their way through a financial calamity.

2. BANKRUPTCY CASE LAW AND THE LEGAL STATUS OF THE COLLECTIVE AGREEMENT

Despite assertions to the contrary,[5] Canadian courts have in the past ruled that collective agreements could be terminated, disclaimed, or suspended during insolvency proceedings. As we will see, this jurisprudence permitting collective agreements to be set aside or suspended distorted the development of the law in this area, weakened the legitimacy of the insolvency process and generated unnecessary conflict during reorganization efforts. Over many years, the case law evolved to accept the opposite proposition, namely, that a collective agreement could be terminated *only* in accordance with the applicable labour relations statute in specific circumstances such as abandonment, fraud or a failure to bargain.[6] To understand the effect of bankruptcy litigation upon the law, and the effect of the subsequent statutory amendments, we must closely trace the development of the jurisprudence.

(a) Rulings that Collective Agreements Terminate upon Bankruptcy

In 1994, the Ontario Court of Appeal issued its decision in *St. Mary's Paper Inc.* — a case that greatly influenced the legal status

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5 See Ian Klaiman, "Chapter c. 47, Opening But Not Resolving Collective Bargaining: A Proposal for Mandatory Arbitration on Negotiation Impasse" (2011) 26 Business & Finance Law Review 136 at 138; Richard H McLaren, *Canadian Commercial Reorganization: Preventing Bankruptcy* (Aurora, Ont: Canada Law Book, 2006) at 3-46 to 3-51; and see Ziegel, "Bill C-55 and Canada's Insolvency Reform Process," *supra* note 4 at 85.

6 *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc*, 2006 SCC 35 at para 50, [2006] 2 SCR 123.

of collective agreements in insolvency law, even though it was, on its face, concerned with other matters.[7] This ruling was disconcerting to many insolvency practitioners as it required a trustee to pay the debtor's pension shortfall under the Ontario *Pension Benefits Act* (*PBA*).[8] The trustee in *St. Mary's Paper* had entered into an agreement to engage unionized employees of the debtor employer in order to operate a failing paper mill. This agreement reduced vacation, pension plan and other payments owed to the employees. A majority of the Court of Appeal found the trustee liable for the pension shortfall because it had operated the business and agreed to continue to make payments into the pension plan. The majority noted that the *BIA* included specific provisions limiting the trustee's personal liability in environmental matters but did not specifically "shelter a trustee from liabilities arising out of taxation or employment statutes."[9]

However, in a strongly worded dissent, Justice Rosalie Abella opined that the trustee was under no obligation in law to carry on the business of the paper mill. In her view, the trustee agreed to do so only because it disclaimed responsibility for any other obligations.[10] She noted that the trustee was not a successor employer, because it had not been declared to be one by the Ontario Labour Relations Board ("OLRB" or "Board"), and the OLRB had exclusive jurisdiction to make such a declaration with respect to unionized workplaces. Although Abella J.A. pointed out that the trustee was not at liberty to operate the business without regard to employment laws that "seek to protect workers from exploitation,"[11] she noted that "contracts of employment with the employees, including collective agreements, terminate with a bankruptcy."[12] Justice Abella's views concerning the legal status of the collective agreement would transform the evolution of the case law on this point.

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7 [1994] 19 OR (3d) 163 (CA).

8 Murray Gold & Stephen Wahl, Submissions of the Canadian Labour Congress to the Senate Banking Committee Regarding Reform of Canada's Insolvency Laws (17 September 2003) at 12-15.

9 *St. Mary's Paper*, *supra* note 7 and see s 14.06(1.2) of the *BIA* for the statute's present limitation on successor liability.

10 *Ibid* at para 4.

11 *Ibid* at para 17.

12 *Ibid* at para 18.

In *Re 588871 Ontario Ltd.*,[13] a trustee sought an order affirming that all legal proceedings against it were stayed by operation of section 215 of the *BIA*, which barred, except by leave of the court, any action "against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to" the *BIA*. The trade union representing employees of the debtor employer requested leave of the court to pursue a successor employer application before the Ontario Labour Relations Board. Citing an inherent conflict between the exclusive jurisdiction of the OLRB to attribute successor liability and what he termed "the rule" in *St. Mary's Paper* that a collective agreement terminates upon bankruptcy, Justice Spence denied the union's application. In his view, the leave provisions of the *BIA* were designed to ensure that the purposes of the statute could be achieved without undue interference arising from other proceedings. Granting leave to the trade union would be tantamount to permitting the Board to make determinations inconsistent with bankruptcy law. In Justice Spence's view, if a trustee could be found to be a successor employer, "no Trustee would ever undertake to carry on that business and that could thwart the proper operation of the BIA."[14] As a result of this ruling, Justice Abella's view that collective agreements terminate upon bankruptcy was, for the first time, adopted as the substantive basis for a decision and given the force of law.

One year later, a Nova Scotia court, in *Associated Freezers of Canada Inc.*,[15] also adopted the dissenting opinion set out in *St. Mary's Paper.* In this case, Justice MacDonald granted an application by a trustee to stay proceedings launched by a trade union at the Nova Scotia Labour Relations Board ("NSLRB" or Labour Board). Accepting Justice Abella's statement that a collective agreement terminates upon bankruptcy,[16] MacDonald J. indicated that the trade

13 [1995] OJ No 1466 (QL) (Ct J (Gen Div)). See s 215 of the *BIA*, *supra* note 1, for the entire provision.

14 *Ibid* at para 18.

15 (1995), 149 NSR (2d) 385, [1995] NSJ No 457 (QL) (SC).

16 *Ibid.*

union required leave of the court in order to pursue its applications before the NSLRB.[17] He acknowledged labour law precedent for the notion that the collective agreement does not terminate on the appointment of a court-appointed receiver,[18] but nevertheless reasoned that in bankruptcy, employment terminates, and "[w]ith no employment there can be no collective agreement."[19] This ruling was affirmed by the Nova Scotia Court of Appeal in a brief decision.[20] With these judgments, the view that collective agreements terminate with bankruptcy attained an authoritative status in law.

(b) Rulings that Collective Agreements May Subsist Despite Bankruptcy

However, the initial assessment that a collective agreement did not survive the employer's bankruptcy would later be subjected to closer scrutiny by various appeal courts. In *Saan Stores Ltd.*,[21] the Nova Scotia Court of Appeal affirmed a lower court ruling that refused to quash a Labour Board decision declaring a purchaser of assets to be a successor employer bound by the debtor's collective agreement. Saan Stores acquired retail outlets from the trustee after Greenberg Stores had declared bankruptcy. Greenberg had acquired its retail stores from Metropolitan Stores in 1994, and the union had a collective agreement with Metropolitan that was recognized by Greenberg. In 1997, Greenberg declared bankruptcy in an effort to reorganize. Its

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17 Furthermore, Justice MacDonald considered whether section 69.3 of the *BIA*, which prohibited creditors from commencing any other proceeding on a claim provable in bankruptcy, precluded the trade union's application to the Labour Board. MacDonald J. concluded that matters such as vacation pay were dictated by pre-bankruptcy activities and were provable claims in bankruptcy that required a stay of proceedings. Since this ruling, the Nova Scotia Court of Appeal has specifically ruled that a successorship application does not require leave of the court and is not a provable claim in bankruptcy, because such claims are not the obligation of the bankrupt employer but of the purchaser. See *Saan Stores*, *infra* note 21 at para 58.

18 *Ibid* at para 26.

19 *Ibid* at para 28.

20 *Associate Freezers of Canada Inc*, [1996] NSJ No 202 (QL).

21 *Saan Stores Ltd v United Steelworkers of America, Local 596*, [1999] NSJ No 31 (QL).

parent company owned each of Metropolitan, Greenberg, and Saan Stores. A trustee was appointed and, on the same day, the trustee sold Greenberg's assets to Saan Stores. After the sale, Saan Stores took the position that the collective agreement and the union's certification applicable to Greenberg were terminated by the bankruptcy.

Justice Hallett, writing for a unanimous Court of Appeal, indicated that the employment of unionized employees was terminated by the bankruptcy. However, that did not in and of itself terminate the benefits to which the employees were entitled by virtue of the labour relations scheme. The Court pointed out that the sale of business provisions in the *Trade Union Act*[22] were unaffected by the bankruptcy and therefore unaltered by the termination of the employment relationship between the bankrupt and the former employees. The Court held that, by operation of the statute, the terms of employment found in the collective agreement were to govern the new employment relationship between the purchaser and the unionized employees.[23] In so ruling, Justice Hallett explicitly rejected the trustee's argument that the labour relations legislation could not apply to the situation because a disposition did not occur between the predecessor employer and the purchaser. The Court said that the *reality* (as opposed to the form) of the sale was that it was a disposition from the predecessor to Saan Stores orchestrated by their common parent company.[24] In any event, it was open to the Labour Board to find that Saan Stores was indeed the successor employer bound by the collective agreement.[25]

The conclusion that collective agreement rights could bind a purchaser of assets from a trustee *after* bankruptcy proceedings was followed by a decision recognizing the validity of the collective agreement *during* insolvency proceedings. In *Jeffrey Mine Inc.*,[26] the Québec Court of Appeal unanimously decided that a Monitor

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22 RSNS 1989, c 475.

23 *Saan Stores*, *supra* note 21 at para 66.

24 *Ibid* at para 68.

25 See also *129410 Canada Inc*, [2001] CCS No 19042 (QL), where the Québec Labour Court determined that the event of the bankruptcy itself was irrelevant to the acquisition of bargaining rights in relation to a successor employer obtaining the business from the trustee.

26 *Syndicat national de l'amiante d'Asbestos inc v Jeffrey Mine Inc*, [2003] QJ No 264 (QL).

appointed pursuant to the *CCAA was* bound by a collective agreement. The Monitor had directed the debtor business with a reduced complement of employees and eventually entered into a major new contract with a foreign company. The Monitor brought a motion[27] seeking approval to disclaim the collective agreement because of what it said were the excessive costs associated with certain benefits plans. The Monitor pointed to the pension plan, vacation days, retirees' life insurance, and other costs provided for in the collective agreement, and argued that such costs would not make the new contract economically worthwhile. The Monitor also noted that the project would allow it to recall the bulk of the workforce from layoff for the duration of the contract. The trial judge allowed the request (without rising) and issued an order that the Monitor did not have to comply with the collective agreement.

The Québec Court of Appeal held that the Monitor was in a similar situation as a liquidator and that the property and civil rights of Jeffrey Mine Inc. had not devolved to it as a consequence of the insolvency. As a result, the Monitor could not be considered the employer instead of the debtor: after all, its acts were made in the debtor's name.[28] It also concluded that as nothing in the lower court's

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27 *Ibid* at para 18.

28 *Ibid* at paras 35-37. The decision in *Jeffrey Mine* denying that employment obligations existed between the Monitor and the employees is reminiscent of the Ontario Court of Appeal's decision in *Royal Oak Mines*, [2001] OJ No 562 (QL). In that case, the Court ruled that a receiver was not responsible for contributions to the employees' pension plan because those payments remained the responsibility of the debtor employer, even though it could not afford to meet such obligations. While the receiver was, by virtue of a court order, to guide and control Royal Oak, the debtor company retained possession of the mines and continued to employ its employees. In the Court's view, the interim receiver held wide authority to manage and alienate the assets but did not come under an obligation to carry on the business affairs of Royal Oak. Consequently, Royal Oak had the obligation to pay pension benefits under the collective agreement and was required to provide notice of termination under the relevant statute. The Court further held that, pursuant to section 47(2) of the *BIA*, it had authority to issue an order relieving the employer from making payments into a pension plan. However, neither in *Royal Oak* nor in *Jeffrey Mine* did the court specifically consider whether the receiver could be considered the employer as a result of a common employer declaration under the applicable labour relations legislation.

orders terminated the trade union's certification, that certification was still in effect. Since the certification remained valid, the Monitor had to respect the union's exclusive representation rights.[29] The Court reasoned that "nothing in the CCAA authorizes the monitor or the court to unilaterally determine the consideration payable to the supplier of goods or services to the debtor."[30] It followed that the consideration payable to the workers *must* be provided for in the collective agreements, which included the salaries and other benefits payable at the time of the initial order. Justice Dalphond, writing for the Court, indicated that the difference in the terms of employment before and after the order amounted to a modification of the former employees' working conditions. In his view, a monitor could not disclaim a collective agreement, given the attendant legislative framework which makes the collective agreement a "truly original instrument rather than a mere bilateral contract."[31] Justice Dalphond's ruling entrenched the legal status of the collective agreement, by underscoring the rights flowing from the union's original certification rather than the rights arising from a successor employer declaration. Like Hallett J.A. in *Saan Stores*, Justice Dalphond found that the continued existence of the collective agreement was based on the applicable labour relations statute.

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29 *Ibid* at paras 45-46. The Court noted that the Monitor's action in dismissing 60 unionized employees who had worked for the debtor under a valid collective agreement, and then immediately rehiring them on the basis of individual contracts of employment, violated the union's representation rights and was therefore illegal.

30 *Ibid* at para 50.

31 *Ibid* at para 53.

(c) Rulings that Collective Agreements Are Suspended during Bankruptcy

At the time the decision in *Jeffrey Mine* was issued, it was widely regarded as a high-water mark[32] for the subsistence of collective agreement rights during insolvency. Soon afterwards, Ontario's highest court of record attempted to fashion its own unique view of the place of collective agreement rights during insolvency. In *Royal Crest Lifecare Group Inc.*,[33] a company operating a chain of 17 nursing and retirement homes was petitioned into bankruptcy. The court-appointed trustee proposed to carry on business while it searched for a new buyer. However, the trustee did not recognize the various collective agreements, failing to deduct or remit union dues or pension plan payments, nor did it recognize grievances filed by the trade unions. On the first day of the bankruptcy, the trustee applied to the Court for an order that it was not, among other things, bound by the debtor's collective agreements.[34] Predictably, the trade unions resisted and asked the Court for leave to apply to the OLRB for a declaration that the trustee was indeed a successor employer.

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32 Since *Jeffrey Mine*, the Québec Court of Appeal has adopted the reasoning of Justice Dalphond and applied it to contracts related to employment other than collective agreements. See also *Uniforêt inc c 9027-1875 Québec inc*, [2003] JQ no 8125 (QL) at para 1. In that decision, the Monitor suspended the employer's contribution to an entity that managed an employee profit-sharing plan, which was derived from the earnings of the insolvent company. The Québec Court of Appeal interpreted *Jeffrey Mine* to prevent the unilateral alteration of the terms and conditions of work by the Monitor where it was granted the power to continue the operation of an insolvent company. As a result, the Monitor could not simply cancel employee profit-sharing payments post-filing, as these payments were part of the employees' working conditions. See also P Bélanger, "Bankruptcy, Collective Agreements, and Employment Contracts: What Obligations are Transmitted to the Purchaser of a Bankrupt Business?" in JP Sarra, ed, *Annual Review of Insolvency Law 2004* (Toronto: Carswell, 2005) at 255-281, contending that *Uniforêt* was a very generous interpretation of *Jeffrey Mine*.

33 [2003] OJ No 756 (QL). The reader should be aware that the author was counsel to several bargaining agents in this litigation.

34 *Ibid* at para 2.

Justice Farley dismissed the trustee's motion, referring to Hallett J.A.'s opinion in *Saan Stores* as a thoughtful analysis of the situation at hand.[35] Justice Farley also questioned the statement of Abella J.A. that collective agreements terminate on bankruptcy, as no legal analysis was provided in support of that proposition.[36] As a result, Farley J. refused to issue a declaration that the trustee was not bound by the collective agreements.[37] On the other hand, he explained that it would be undesirable to "saddle"[38] the trustee with heavy personal liability, given its role as a realizer of the assets. As long as the trustee operated the debtor's business in a reasonable manner, with due dispatch in order to realize the assets, and did not slip into the role of the employer, the trustee would not be subject to successor liabilities. The unions' leave application was therefore also denied. However, if the trustee began to act more as an employer than as a diligent realizer of the debtor's assets, the motion could be re-initiated. In light of this finding, Justice Farley indicated that the collective agreement was not terminated for all purposes but rather was "put into suspended animation, to be revived if, as, and when a purchaser with a personal economic interest in the business acquires the business."[39] The trade unions appealed.

A majority of the Court of Appeal[40] noted that a party seeking to challenge a decision by a trustee must obtain the permission of the court pursuant to the leave provisions found in section 215 of the *BIA*. Justice MacPherson, writing for the majority, indicated "it was simply too early to attach formal, and final, legal labels to the relationship

35 *Saan Stores*, *supra* note 21. See J MacDonald, "Successor Employer Issues for Trustees in Bankruptcy" (2004) 16 Comm Insolvency R 43 at 44 for the proposition that Justice Farley adopted the *Saan Stores ratio* in his judgment.

36 *Royal Crest*, *supra* note 33 at para 22.

37 *Ibid* at para 33.

38 *Ibid* at para 24.

39 *Ibid* at para 30.

40 *Canadian Union of Public Employees, Locals 1712, 3009, 2225-06 and 2225-12 v Royal Crest Lifecare Group Inc*, [2004] OJ No 174 (QL), application for leave to appeal to SCC dismissed [2004] SCCA No 104 (QL).

between the trustee and the employees."[41] Even though its decision likewise permitted the unions to return to court to establish its claims, the Ontario Court of Appeal seemed to affirm the existence and importance of collective agreements while paradoxically hindering their enforcement during bankruptcy proceedings.

(d) The Supreme Court Rules that Collective Agreements Retain Legal Status during Bankruptcy

Subsequently, in *T.C.T. Logistics*,[42] the Supreme Court of Canada rejected the Ontario Court of Appeal's approach in favour of one that recognized the collective agreement as a subsisting source of rights and obligations, thereby overturning case law that derogated from the legal status of a collective agreement during an insolvency. T.C.T. Logistics Inc. operated a number of sites in the United States and Canada, including a warehousing business located in Toronto, Ontario. The company became insolvent and its largest secured creditor, GMAC Commercial Credit Corporation – Canada, succeeded in obtaining an order appointing KPMG as an interim receiver. Later, KPMG was appointed trustee in bankruptcy and entered into an agreement to sell most of the debtor's warehousing business to Spectrum Supply Chain Solutions Inc.[43] The trustee terminated all employees prior to the closing of certain transactions and Spectrum re-hired a number of the employees without regard to seniority and certain pension and vacation provisions under

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41 *Ibid* at para 35. The Ontario Labour Relations Board's jurisprudence indicated that the acquisition of a business on the day of the transaction itself can resolve the question of whether collective agreement rights transfer with the business. No extra time is necessarily required to pass before a legal relationship can be firmly set in place by law in a sale proceeding. See *County of Hastings*, [2002] OLRB Rep (November/December) 1031 and *Daynes Health Care Ltd*, [1983] OLRB Rep (May) 632. The Board's approach concerning prematurity of a sale-of-business application was specifically developed in the context of bankruptcy and insolvency matters. See Jeffrey Sack, C Michael Mitchell & Sandy Price, *Ontario Labour Relations Board Law and Practice*, 3d ed (looseleaf) (Toronto: LexisNexis Butterworths, 1997) at paras 6.1 to 6.76 for a review of the sale-of-business and related-employer provisions.

42 *GMAC Commercial Credit Corp Canada v TCT Logistics Inc*, *supra* note 6, on appeal from *GMAC Commercial Credit Corp Canada v TCT Logistics Inc*, [2004] OJ No 1353 (QL) (CA).

43 *Ibid* (CA) at paras 10-16.

the existing collective agreement. The trade union responded by filing applications with the OLRB, in part to maintain its members' collective agreement rights with Spectrum. The OLRB,[44] the Superior Court[45] and the Court of Appeal[46] all declined to grant the union direct access to the Labour Board to hear its applications.

In a 7-to-1 decision, the Supreme Court of Canada held that a bankruptcy court could not deny a trade union leave to apply to the Labour Board for a declaration that a trustee or third-party purchaser was a successor employer, unless its claim was frivolous, manifestly without merit or disclosed no cause of action. Justice Rosalie Abella, writing for the majority, held that the bankruptcy judge had erred in not granting leave to the union to bring a successor employer application against the interim receiver.[47] In this connection, the majority adopted Justice MacPherson's dissenting view in the Court of Appeal that the proper test in determining a union application for leave to pursue Labour Board proceedings was that set out in *Mancini (Bankrupt) v. Falconi*.[48] In short, leave against a trustee may be granted if the action discloses a cause of action and is not frivolous, vexatious or manifestly unmeritorious. The court determining the matter need not make a final assessment of the merits of the claim before it grants leave.

Justice Abella's decision preserved the effect of the ruling from the court below in other important ways. In the Ontario Court of Appeal majority opinion, Feldman J.A. abandoned the analysis in *Royal Crest Lifecare Group* concerning the suspension of the collective agreement during bankruptcy. Rather, she approached the issue by adding an interpretive twist to Justice Abella's original proposition in *St. Mary's Paper* that "contracts of employment with the employees, including collective agreements, terminate with a bankruptcy."

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44 *Industrial Wood & Allied Workers of Canada v Spectrum Supply Chain Solutions Inc*, [2002] OLRD No 2866 (QL).

45 *GMAC Commercial Credit Corp Canada v TCT Logistics Inc*, [2003] OJ No 1603 (QL) (Sup Ct J).

46 *TCT Logistics* (CA), *supra* note 42 at para 33.

47 *TCT Logistics* (SCC), *supra* note 6 at paras 57-59 & 64.

48 (1993), 61 OAC 332. See Justice MacPherson's dissent in the Court of Appeal, *supra* note 42 at paras 113-114, asserting *Mancini* as the leading decision on determination of leave applications; see also his majority decision in *Royal Crest Lifecare Group*, *supra* note 40 at para 25, where he similarly viewed *Mancini* as the controlling authority in such matters. See *TCT Logistics* (SCC), *supra* note 6 at para 57 for a statement of the test found in *Mancini.*

In Feldman J.A.'s view, the phrase used in *St. Mary's Paper* really meant that to "the extent that an employee's contract of employment with a bankrupt employer is contained in a collective agreement, the employee's contract is terminated on bankruptcy."[49] Feldman J.A. thus concluded that although employment ceases, a collective agreement did not necessarily terminate upon bankruptcy. In the result, the Court of Appeal held that a collective agreement could *only* be terminated pursuant to the applicable labour relations statute governing specific occurrences such as abandonment, fraud or a failure to bargain.[50] In so holding, Justice Feldman expressly adopted the decisions in *Saan Stores*[51] and *Jeffrey Mine*[52] regarding the legal status of the collective agreement. In effect, the Courts of Appeal in Nova Scotia, Québec and Ontario all agreed that collective agreement rights continued to operate despite insolvency. By cautioning bankruptcy courts not to unnecessarily interfere with employee rights when interpreting insolvency statutes,[53] and by opting not to disturb the various appeal court decisions on the question of subsistence of collective agreement rights, the Supreme Court implicitly recognized that the collective agreement continued to have the force of law during insolvency.

In the three years between the decision in *T.C.T. Logistics* and the proclamation of the amendments to the *BIA*, bankruptcy courts began to accept that the collective agreement remained in force during insolvency without controversy or extensive comment.[54] Collective agreements were recognized as having legal force, yet were treated

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49 See *TCT Logistics* (CA), *supra* note 42 at para 49, and *supra* note 7 for Justice Abella's original statement.

50 *Ibid* at para 50.

51 *Saan Stores*, *supra* note 21.

52 *Jeffrey Mine*, *supra* note 26.

53 *TCT Logistics* (SCC), *supra* note 6 at para 51.

54 See *Abitibibowater inc (Arrangement relatif à)*, [2009] JQ no 4473 (QL) at paras 25-28, where the Québec Superior Court ruled that the company could not unilaterally rescind early retirement provisions it had negotiated in a collective agreement. For other cases briefly commenting upon the impact of collective agreement rights during insolvency after *TCT Logistics* but before the amendments, see *Collins & Aikman Canada Inc*, [2007] OJ No 4186 (QL) (Sup Ct J), *Textron Financial Canada Ltd v Beta Ltee/Beta Brands Ltd*, [2007] OJ No 2998 (QL) (Sup Ct J), and *Fraser Papers Inc*, [2009] OJ No 3188 (QL) (Sup Ct J). See also Sean Dewart, "Trial Level Reponses to the T.C.T. Case" (Paper delivered at Building Bridges: Discussing Labour Issues in Restructuring Proceedings, Ontario Bar Association, 24 April 2009) [unpublished].

like other contracts, in that they were made subject to the initial order of the bankruptcy court suspending debts, such as severance and termination pay, pending the resolution of the insolvency.[55] Among other things, recognition of the legal status of the collective agreement caused *CCAA* applications to flourish, as court appointees carefully avoided incurring any personal liability that could result from taking over unionized businesses under the *BIA*.[56]

(e) Implications of the Earlier Jurisprudence for Labour Relations and Restructuring

Rulings by bankruptcy judges which allowed the disclaimer of collective agreements during insolvency proceedings created a rupture in the application of labour law to distressed companies. Collective agreements are founded in statute, and they are ordinarily not required to conform to legal doctrines which might terminate their operation.[57] A collective agreement cannot operate according to its terms if common law concepts can be invoked to eradicate it even though the agreement has not statutorily expired.[58] Moreover,

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55 See *Re Nortel Networks Corp*, [2009] OJ No 2558 (QL) (Sup Ct J), where the Court denied the union's request that the debtor company be required to pay termination pay and severance pay, as well as other amounts, to former employees. The appeal was denied on its merits in *Re Nortel Networks Corp*, [2009] OJ No 4967 (QL) (CA), leave to appeal to SCC denied [2009] SCCA No 531 (QL). See also *TQS*, [2008] QJ No 7151 (QL) (CA) and *Fraser Papers Inc*, *supra* note 54, for the proposition that the court can suspend payments arising from a collective agreement if the employees did not provide service after the initial order.

56 Section 14.06 of the *BIA* now protects trustees from liability in its dealings with the debtor's employees for the period of time occurring before its appointment. If the trustee continues the business or employment of employees, the trustee is not by reason of that fact alone to be held personally liable for any claims against the debtor that arose before its appointment.

57 R MacDowell, "Labour Arbitration – The New Labour Court?" (2000) 8 CLELJ 121 at 124.

58 M Mitchnick & B Etherington, *Labour Arbitration in Canada* (Toronto: Lancaster House, 2006) at 16-4. The Court of Appeal in *Jeffrey Mine*, *supra* note 26 at para 53, made essentially the same point as did Laskin CJ in *McGavin Toastmaster Ltd v Ainscough* (1975), 54 DLR (3d) 1 (SCC) concerning the legal status of collective agreements: Dalphond JA rhetorically queried why collective agreements should be cancelled "if the certifications remain in effect and, as a result, the employer is obligated to negotiate with the appropriate union the conditions applicable to a new delivery of services by employees contemplated by the said certifications?"

the fact that *no employees* remained employed at any point in time was never sufficient to invalidate a collective agreement in labour law.[59] For some time, grievance arbitrators acknowledged this state of affairs even where each and every employee had been terminated as a result of the discontinuance of a business.[60] Bankruptcy judges differed from labour arbitrators in their approach to the validity of collective agreements in hard times. However, to invoke Lord Denning's famous *dictum*, there could not be "one law for arbitrators and another for the court" — there had to be, rather, "one law for all."[61] The jurisprudence allowing disclaimer of collective agreements created a conceptual schism which the law could not easily bear. Until *T.C.T. Logistics*, the jurisprudence suspending or derogating collective agreements symbolized the collapse of a longstanding bargain between labour and capital vital to the operation of day-to-day labour relations. The grievance arbitration procedure deemed to form part of every collective agreement ensured that unionized employees had access to an enforcement mechanism for a host of substantive rights,[62] including those based on the *Charter*[63] and on human rights and employment standards statutes.[64] The effect of a bankruptcy ruling that terminated a collective agreement was decisive, since

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59 See *Coulter Mfg Ltd and United Automobile Workers, Local 222* (1973), 1 LAC (2d) 426 (Weatherill) and *Vulcan Containers Ltd*, [1997] OLRB Rep (July/August) at para 63.

60 *Canada Safeway Ltd*, [2002] OLRB Rep (November/December) 997 at para 46.

61 See the comments of Lord Denning in *David Taylor & Sons Ltd v Barrett*, [1953] 1 All ER 843 (CA). See also *Toronto (City of) v Canadian Union of Public Employees, Local 79*, 2003 SCC 63, 3 S.C.R. 77, where LeBel J similarly noted there is only "one law for all" in overturning an arbitration ruling that had rejected a criminal court's findings in a matter arising from the same set of facts.

62 *Weber v Ontario Hydro*, [1995] 2 SCR 929. See ss 48(1) and (2) of the Ontario *Labour Relations Act, 1995*, SO 1995, c 1, Sch A, which provide, in part, "for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable."

63 *Cuddy Chicks Ltd v Ontario (Labour Relations Board)*, [1991] 2 SCR 5.

64 *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, [2003] 2 SCR 157.

there could be no breach of an agreement that was not operative.[65] Grievance arbitration hearings[66] could not lawfully be initiated on the merits of a dispute, as a valid and enforceable collective agreement enabling such litigation did not exist.[67] The lapse in enforceability of the collective agreement during insolvency pointed to a larger breakdown in the operation of law on the shop floor.

Our modern labour relations scheme was designed to attenuate and manage labour conflict by sustaining an accord that rested upon the legal enforceability of the labour contract. In essence, unionized employees were provided with legal protection in their collective employment relationship with the employer in exchange for their subordination to the daily control of management. As a part of this exchange, government guaranteed enforceable legal agreements in the workplace that could readily resolve disputes over the employer's direction of the workforce.[68] However, when the legal recognition of

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65 Donald JM Brown & David M Beatty, *Canadian Labour Arbitration*, 3d ed (looseleaf) (Aurora, Ont: Canada Law Book, 2006) at 4-31; and see Stephen Wahl, "Bankruptcy and Insolvency: High Stakes Poker at the Collective Bargaining Table" in Janis P Sarra, ed, *Annual Review of Insolvency Law 2004* (Toronto: Carswell, 2005) at 245, where he notes that labour law in Canada recognizes the primacy of collective worker representation as the key element in the promotion of workers' rights and freedoms as well as in national economic growth. In this connection, the *BIA* provides for a regime of collective action on behalf of creditors, through the trustee, for the realization and equitable distribution of the assets of the bankrupt. The author notes that when labour relations law collides with bankruptcy and insolvency law, the interrelationship between two collective bargaining regimes is at stake. The property interests of business persons are weighed against the labour, human and employment rights of workers.

66 One arbitration award that addresses bankruptcy matters is *HJ Jones-Sons Ltd and Communications, Energy and Paperworkers Union, Local 517-G* (2008), 179 LAC (4th) 439 (Sheehan) at para 28, where the arbitrator held that section 69.3(1) of the *BIA*, which prevents actions for the recovery of a claim provable in bankruptcy, did not apply to the proceedings before him. Arbitrator Sheehan determined that "the integrity of the grievance arbitration process and an affirmation of the belief that arbitration is the only proper forum for the resolution of issues associated with analysing and applying provisions of a collective agreement" required that he assert jurisdiction over the matter.

67 Labour Law Casebook Group, *Labour & Employment Law: Cases, Materials and Commentary* (Irwin Law: Toronto, 2004) at 2.

68 *Ibid.*

the collective agreement fell into uncertainty, so did the role played by a key partner in that bargain.

The dismantling of the collective agreement interfered with the institutional role of trade unions during insolvency. Bargaining collectively with an employer to secure a collective agreement is why employees join a union, and it is why unions seek the right to represent employees.[69] Without effective bargaining agent representation, the termination or suspension of collective agreements risked pushing unionized employees into unpredictable self-help measures to resolve their disputes with debtor employers.[70]

These difficulties were further complicated by the negative economic implications for workers affected by the early jurisprudence permitting collective agreements to be disclaimed. In most cases, a decision setting aside the labour contract relieved receivers of collective agreement obligations, meaning that other stakeholders received a larger realization than would otherwise have been possible.[71] In this connection, if compliance with a collective agreement fettered the stakeholder's ability to maximize the value of the company,[72] then a trustee (or debtor employer under the *CCAA*) might be tempted to

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69 *Ibid* at 391

70 See *Royal Oak Mines*, *supra* note 28 at para 22, where the Court of Appeal noted the trustee's concern that workers would go on strike unless certain working conditions were not abided by during bankruptcy. See also *TCT Logistics*, *supra* note 42 at para 59, where the Court of Appeal, borrowing from Farley J. at paras 31-32, acknowledged the same concern in a more muted way, observing that disgruntled unions and employees could cause value to evaporate unless measures were taken to address their concerns. Of course, it can never be easily assessed at the outset of bankruptcy proceedings whether employees will voice their demands for better working conditions by taking collective action, or will simply quit. Finally, see Keith Yamauchi, "Collective Agreements in the Context of Corporate Reorganization: The Canadian and American Models" (2005) 11 CLELJ 295 at 316, where the author notes that the American courts in *Teamsters, Local 807 v Carey Transportation Inc*, 816 F (2d) 82 at 93, overtly recognized "the likelihood and consequences of a strike if the bargaining agreement is voided" during bankruptcy.

71 David E Baird & Ronald B Davis, "Labour Issues" in Stephanie Ben-Ishai & Anthony Duggan, eds, *Canadian Bankruptcy & Insolvency Law* (Markham, Ont: LexisNexis, 2007) at 91.

72 E Laius, "Trustees in Bankruptcy & Successor Employers," Bankruptcy & Insolvency Law Newsletter (Fall 2003) at 1.

ask a court to set aside a collective agreement in order to maximize available savings.[73] As a result, there was an underlying incentive for insolvent companies, senior creditors and others to resort to litigation. The "dynamic tension"[74] created by the uncertainty of such litigation might, from time to time, be leveraged into an agreement by the parties in order to avoid an unfavourable legal result for the trade union. Nonetheless, even though disclaiming collective agreements might be viewed by labour law outsiders[75] as an acceptable strategy,[76] it was not viewed as a just outcome by unionized employees, who were now bound to accept the significant burdens of bankruptcy decisions without receiving any appreciable benefit from those same rulings.

The early decisions which interfered with collective agreements helped to delegitimize the insolvency process in the eyes of trade unions, thus destabilizing and alienating a key stakeholder — one who could potentially cooperate with other stakeholders to resolve the economic crisis threatening the debtor employer. Rescue efforts that attempted to force the hands of unions by threatening their continued

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73 Standing Senate Committee on Banking, Trade and Commerce (Hon RH Kroft, Chair), *Debtors and Creditors Sharing the Burden: A Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act* (November 2003), at 11 and chap 5, did not point to any examples of a corporate insolvency in Canada that had been directly caused by collective agreement rights.

74 DJ Miller, Hugh O'Reilly, Robert Thornton & Amanda Darrach, "Charting A New Course: Best Practices When Dealing with Employees, Retirees and Union Stakeholders in a Restructuring" (Conference paper delivered at the Annual Review of Insolvency Law, 8 February 2013) at 2.

75 R MacDowell, *supra* note 57 at 152. It is widely accepted that courts have no original jurisdiction to pronounce on labour law, no particular expertise in the subject matter, no familiarity with the full range of statutes that come into play, and no experience with the institutional realities of labour law. Consequently, it should not be entirely unexpected that judges might remove a load-bearing post that supports the edifice of modern labour relations in the workplace.

76 Yamauchi, *supra* note 70, outlines a bankruptcy model, based on the American system, for Canadian restructuring negotiations that would permit a court to reject a collective agreement in the course of bankruptcy.

viability were ventures that risked failure or prolonged delay.[77] The energy and conflict expended in this contest distracted and impeded the reorganization attempts of stakeholders by burdening rescue efforts with unnecessary litigation.[78] This discord ultimately created a less efficient restructuring process for all stakeholders.

3. REFORMS TO THE *BIA* AND *CCAA* WITH RESPECT TO THE EFFECT OF COLLECTIVE AGREEMENTS

On September 18, 2009, after an extended legislative process, the statutory amendments concerning collective agreements were brought into force.[79] These changes arose in the course of a lengthy phase of bankruptcy reforms that began in about 2002. Two significant sets of amendments to Canada's insolvency legislation were brought forward in Bills C-55 and C-62. Introduced in 2005, Bill C-55 sought to implement a number of employment-related changes, including the provision of payment of unpaid wages to employees whose employer had gone into bankruptcy; other changes addressed super-priorities for wages and unremitted pension contributions. Importantly, Bill C-55 also included reforms designed to clarify the treatment of collective agreements in the *BIA* and *CCAA* during insolvency. The forging of the amendments relating to collective agreements in the midst of a larger wave of bankruptcy and insolvency reform was not without controversy.

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77 Miller *et al*, *supra* note 74 at 5.

78 Janis P Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2d ed (Toronto: Thomson Carswell, 2007) at 203.

79 See generally Stephanie Ben-Ishai, *Bankruptcy Reforms 2008* (Toronto: Thomson Carswell, 2008) at ix to xi and 107-110 for a detailed discussion of the substantive reforms noted above.

(a) Origins of the Legislative Reforms

During debates over the reforms, Members of Parliament[80] initially expressed some confusion as to whether bankruptcy judges were actually setting aside collective agreements during insolvency proceedings.[81] Joe Fontana, the Minister of Labour and Housing,[82] repeatedly indicated that there was a need to protect workers during insolvency by guarding against judicial changes to collective agreements. He then assured Parliamentarians that under the proposed legislation, "[t]he court will not have the authority to unilaterally terminate or modify the collective agreement. If the parties do not agree to amend the collective agreement the existing collective agreement remains in force."[83] Government members of Parliament and Ministers asserted that if the parties did not agree to amend the collective agreement, the existing labour contract "would remain in place and could not be changed by courts."[84]

However, the Ministerial interpretation of the reforms ignored the plain language found in the balance of the amendments. It was

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80 Compare the comments of Pat Martin (Winnipeg Centre, NDP) in *House of Commons Debates*, 38th Parl, 1st Sess, No 140 (29 September 2005) at 8196 ("we checked this out and had it confirmed recently, a judge may unilaterally and arbitrarily alter the terms and conditions of a collective agreement of the employees") with the statement of David Christopherson (Hamilton Centre, NDP) in *House of Commons Debates*, 38th Parl, 1st Sess, No 140 (29 September 2005) at 8198, who later on the same day noted: "However, we cannot adequately deal with section 33 until there is an absolute determination as to whether or not, under existing legislation in its entirety, a judge is allowed the power to step in, in the case of bankruptcies and restructuring, and unilaterally order that collective agreements be changed."

81 See Klaiman, *supra* note 5 for comments suggesting that prior to these reforms, judges did not disclaim collective agreements.

82 See the comments of Hon Joe Fontana (for the Minister of Finance), *House of Commons Debates*, 38th Parl, 1st Sess, No 140 (28 September 2005) at 8167, noting the need to protect vulnerable workers and provide fairer treatment during insolvency to employees.

83 See comments of Labour Minister Joe Fontana, Standing Committee on Industry, Natural Resources, Science and Technology, 38th Parl, 1st Sess, No 060 (1 November 2005) at 9.

84 *Ibid* at 8.

arguable that the reforms continued to permit the displacement of the terms and conditions of collective agreements during insolvency through the granting of a court motion approving the service of a notice to bargain.[85] This became clear when the insolvency amendments were reviewed in conjunction with pre-existing labour law requirements pertaining to collective agreements. The New Democratic Party therefore required two further amendments to make sure that Bill C-55 would preclude the courts from tampering with collective agreements.[86]

As a result, the Bill C-55 amendments to both the *BIA* and *CCAA*[87] recognize that "any collective agreement that the insolvent person and the bargaining agent have not agreed to revise remains in force."[88] However, if the parties do not voluntarily agree to revise any of the provisions of the collective agreement, a debtor employer may "apply to the court for an order authorizing the insolvent person to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the insolvent person and the

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85 For instance, see *BIA*, s 65.12(1), which reads, in part: "An insolvent person . . . who is a party to a collective agreement and who is unable to reach a voluntary agreement with the bargaining agent to revise any of its provisions may, on giving five days notice to the bargaining agent, apply to *the court for an order authorizing the insolvent person to serve a notice to bargain under the laws of the jurisdiction governing collective bargaining between the insolvent person and the bargaining agent* [emphasis added]. A notice to bargain is a communication by the employer or union, following certification or prior to the expiry of a collective agreement, of a desire to bargain with a view to reaching or renewing a collective agreement; after notice to bargain has been given, the parties are under a statutory obligation to bargain in good faith. See Jeffrey Sack & Ethan Poskanzer, *Labour Law Terms: A Dictionary of Canadian Labour Law* (Toronto: Lancaster House, 1984) at 105.

86 See Ziegel, "Canada's Dysfunctional Insolvency Reform Process," *supra* note 4 at 72.

87 For the legislative amendments being discussed herein, see generally the *BIA*, *supra* note 1, s 60 as amended by the *Wage Earner Protection Program Act*, SC 2005, c 47, s 44; and the *CCAA*, *supra* note 2, s 33 as amended by the *Wage Earner Protection Program Act*, *ibid*, s 131. See also the papers by Ziegel, *supra* note 4 for a detailed discussion of the legislative process.

88 *BIA*, s 65.12(6) and *CCAA*, ss 33(1) and (8). See also *CCAA*, s 32(9)(d), which deems collective agreements to be an exception to the types of executory contracts that can be disclaimed.

bargaining agent."[89] In order for such an application to be granted, the debtor employer must prove that a viable compromise or plan could not be arrived at under the existing collective agreement, that it made good faith efforts to renegotiate the agreement, and that the failure to provide a notice to bargain would cause irreparable damage to the employer.[90] If the notice to bargain order is granted, the union may obtain its own order requiring disclosure of financial information relevant to collective bargaining with the debtor employer.[91] After proceedings have commenced, and if the parties to the collective agreement agree to revise it, the "bargaining agent that is a party to the agreement has a claim, as an unsecured creditor, for an amount equal to the value of concessions granted by the bargaining agent with respect to the remaining term of the collective agreement."[92] Finally, the vote of the creditors regarding a plan of arrangement or a proposal may not be delayed solely because the period provided in the laws of the particular jurisdiction governing collective bargaining has not expired.[93]

These reforms respect the sanctity of the collective agreement and establish the conditions under which a judge might require the debtor employer and the union to negotiate a revised labour contract.[94] The wording of section 65.12(6) of the *BIA* and sections 33(1) and 33(8) of the *CCAA* seems straightforward: the collective agreement *status quo* prevails in insolvency unless the debtor employer and trade union voluntarily agree otherwise. The wording employed

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89 *BIA*, s 65.12(1) and *CCAA*, s 33(2). See also s 17 of the Ontario *Labour Relations Act, 1995*, *supra* note 62, which imposes similar disclosure obligations on the parties during collective bargaining.

90 *BIA*, s 65.12(2) and *CCAA*, ss 33(2) and (3).

91 *BIA*, s 65.12(5) and *CCAA*, s 33(6).

92 *BIA*, s 65.12(4) and *CCAA*, s 33(5). A similar claim for compensation on account of concessions by the bargaining unit was advanced in the Air Canada restructuring prior to the amendments. See #2 Interview of Insolvency Counsel by Author (4 December 2012).

93 *BIA*, s 65.12(3) and *CCAA*, s 33(4).

94 Paul H Meier, "Companies' Creditors Arrangement Act ("*CCAA*") Reform and the Treatment of Collective Agreements in the Restructuring Process," Canadian Bar Association National Labour and Employment Law Section Newsletter (August 2006), online: <http://www.cba.org/cba/newsletters/lab-2006/PrintHtml.aspx?DocId=11013>.

by the statutory reforms in the *BIA* and *CCAA* prevents courts from terminating, disclaiming, suspending or otherwise altering the collective agreement.[95] Although the court cannot issue such orders, the debtor employer and the bargaining agent may negotiate revisions modifying the existing agreement. These provisions preclude lenders, or other third parties, from interfering in any collective bargaining which may take place in order to rework the labour contract.[96]

On the other hand, the amendments allow judges to issue an order which may eventually have the effect of setting aside the terms and conditions of the collective agreement. This outcome was not explicitly contemplated by legislators during the public review of the statute enacting these changes. Where a debtor employer and its union fail to freely revise provisions of the collective agreement, the court has jurisdiction to grant an order authorizing the debtor to serve a "notice to bargain" on the bargaining agent.[97] In other words, the statutes create a mechanism for the debtor employer to force the employees' union to meet and bargain with it even though the collective agreement has not come to an end in law.[98] This subjects the union to a compulsory legislative timetable and statutory bargaining obligations.[99] Where a "notice to bargain" has been served on a party to a collective agreement, it triggers a statutory duty to bargain under labour laws that require parties to negotiate in good faith and to make

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95 Roderick J Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009) at 374.

96 Sarra, *supra* note 78 at 203.

97 *BIA*, s 65.12(1) and *CCAA*, s 33(2).

98 Wood, *supra* note 95 at 375. Unlike notice to bargain provisions in Canadian labour legislation, the provisions in the *BIA* and the *CCAA* are only open to use by employers. Normally, both parties to a collective agreement in labour law may initiate formal bargaining pursuant to the relevant labour statute. There was no rationale provided in the Parliamentary debates or the *BIA* and *CCAA* Briefing Books (*infra* note 105) for the extension of these provisions to employers but not to unions. As we will see below, the advent of open collective agreements during restructuring gives trade unions increased bargaining leverage in restructuring negotiations with debtor employers, which may help to explain why access to this process was denied to unions.

99 The provisions noted herein on negotiating a collective agreement are largely extracted from Labour Law Casebook Group, *supra* note 67 at 391-393.

"every reasonable effort" to reach a collective agreement.[100] The parties remain under the duty to bargain — that is, to continue to try to reach a settlement — until they attain a new collective agreement. During this time the terms and conditions of employment that apply during bargaining cannot be unilaterally altered if those items are typically the subject of negotiations. As a result, the employer must go to the bargaining table and seek to negotiate changes prior to altering working conditions.[101] This "bargaining freeze" terminates when a new collective agreement is executed or when the parties reach a legal impasse.[102] Upon the termination of the freeze, even though the duty to bargain in good faith continues to apply, the employer may unilaterally change the terms and conditions of work if there is no collective agreement in force. Of course, the bargaining agent is not required to accept unilateral changes instigated by the employer. However, at that point in restructuring negotiations, the practical choice facing the union is either to accept the unilateral changes or to engage in a work stoppage that will risk the liquidation of the debtor company. The underlying purpose of these legislative changes was to promote bargaining between debtors and unions in order to salvage distressed companies. If the employer views the labour contract as being too burdensome, the *BIA* and *CCAA* permit parties to bargain their own solution to the insolvency within the terms of traditional

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100 See *Royal Oak Mines v Canada (Labour Relations Board)*, [1996] 1 SCR 369, where the content of the duty to bargain in good faith and the reasonable efforts obligation were explained by the Supreme Court of Canada. Note that the duty to bargain may not apply to collective agreement negotiations in insolvency situations, as section 65.12(6) of the *BIA* and section 33(8) of the *CCAA* indicate that the existing collective agreement "remains in force." In cases where a collective agreement exists, there can be no violation of the duty to bargain. See *St. Raphael's Nursing Home*, [1983] OLRB Rep (August) 1370 and *Ready Bake Foods Inc*, [2007] OLRB Rep (January/February) 166.

101 For an Ontario case, see *Royal Ottawa Health Care Group*, [1999] OLRB Rep (July/August) 711.

102 The way in which the bargaining freeze may be terminated varies across Canadian jurisdictions. For instance, under the Alberta *Labour Relations Code*, RSA 2000, c L-1, s 128, and the British Columbia *Labour Relations Code*, RSBC 1996, c 244, s 45(2), the freeze operates until there is an actual lawful strike or lockout, whereas under the Ontario *Labour Relations Act, 1995*, *supra* note 62, s 86(1), and the Newfoundland and Labrador *Labour Relations Act*, RSNL 1990, c L-1, s 74(b), the freeze remains in effect only until such time as a strike or lockout would be lawful.

labour law. In this way, the legislature endorsed Canada's public policy commitment to voluntary collective bargaining, by placing the economic challenges facing the failing business in the hands of the parties and removing courts from collective agreement disputes.[103]

In addition, other provisions in the reforms support efforts by the parties to reach a compromise with respect to collective agreement obligations. For instance, by enabling unions to acquire more financial information regarding the debtor company through a disclosure order,[104] bargaining agents are provided with an opportunity to make informed decisions in order to help them reach agreements with their employers.[105] As well, the amendments provide bargaining

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103 *Ibid*. In this connection, the federal government specifically considered and rejected including a provision in the reforms along the lines of §1113 of the United States *Bankruptcy Code*, which allows the debtor company to disclaim or modify an existing collective agreement. See the comments of Minister Joe Fontana, Standing Committee on Industry, Natural Resources, Science and Technology, 38th Parl, 1st Sess, No 060 (1 November 2005) at 10 & 14. See also Yamauchi, *supra* note 70 for a comprehensive treatment of the American model, and Andrew B Dawson, "Collective Bargaining Agreements in Corporate Reorganizations" (2010) 84 Am Bank LJ 101 for a critique of the U.S. system, noting that the standard interpretation of the U.S. *Bankruptcy Code always* results in the same finding: debtors are allowed to reject their collective agreements.

104 *BIA*, s 65.12(5) and *CCAA*, s 33(6). As of the end of November 2014, there was no case law regarding these sections. However, it may be difficult to determine the existence of a concession when alterations are made to a pension plan incorporated in a collective agreement, as it would depend upon the effect of the concession on plan members. Furthermore, the creation of a new claim in favour of unions in respect of concessions made in bargaining may affect the voting on a plan of arrangement. Normally, although pension plans vote their claims, concessions provided by unions may affect the identity of the party holding the claim and create an important advantage for trade unions in restructuring talks. See Miller *et al*, *supra* note 74 at 18-19.

105 Briefing Book, *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*, *CCAA* s 33 at 3 (online: <http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00826.html>) [hereinafter "*CCAA* Briefing Book"] and Briefing Book, *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*, *BIA* s 65.12 at 9 (online: <http://www.ic.gc.ca/eic/site/cilp-pdci.nsf/eng/cl00859.html>) [hereinafter "*BIA* Briefing Book." Note that the *CCAA* and *BIA* Briefing Books suggest that courts will impose confidentiality restrictions and trading prohibitions in the case of public companies.

agents with a right to an unsecured claim against the debtor in a value equivalent to that of concessions made in collective bargaining. Not only does this provision treat unions like other parties to an agreement with the debtor, it introduces an incentive to agree to contract revisions, as a portion of any concession granted may be partially recouped through the claims process.[106] As a result, like other collective agreement claims that were unsecured prior to the stay of proceedings, bargained concessions cannot be collected from the distribution pool until the conclusion of the insolvency process.

In summary, under the statutory amendments, the existing collective agreement between the parties can be altered in only one of two ways. First, the parties may voluntarily agree to amend the existing collective agreement.[107] Second, if the debtor employer is permitted to serve a notice to bargain on the bargaining agent, it may engage in hard bargaining, unilaterally insisting on changes to the point of impasse, which may permit the terms and conditions of the collective agreement to be displaced if the labour contract expires during bargaining. In such a situation, the parties may or may not ultimately agree on the terms of a new collective agreement. However, in either event, the labour contract will be displaced (and possibly replaced) as a direct result of the "notice to bargain" issued by the bankruptcy court. Consequently, the reforms do allow for further discord where federal or provincial labour law permits the terms and conditions of the previous collective agreement to be displaced after bargaining to impasse. However, as noted below, given the realities at play in current work-out talks, this situation may not arise for some time.

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106 *BIA* Briefing Book and *CCAA* Briefing Book, *ibid*, at 9 and 3, respectively.

107 A patchwork of regulation exists across Canada regarding the early termination of collective agreements. For instance, seven jurisdictions require the Labour Board's consent in the first year of the collective agreement's operation. In Ontario and New Brunswick, the Labour Board can order early termination at any time upon the joint application of the parties. See George W Adams, *Canadian Labour Law*, 2d ed (looseleaf) (Aurora, Ont: Canada Law Book, 2013) at para 12.400; and *Kitchener Frame Ltd v National Automobile, Aerospace, Transportation and General Workers Union of Canada and its Local 1451*, [2011] OLRD No 3348 (QL) for an example of an early termination application arising from insolvency in Ontario.

(b) Recent Litigation Interpreting the Statutory Amendments

Recent judgements applying the statutory amendments have focused on the effect of the legal status of the collective agreement upon employer insolvency. In the five-year period immediately after the implementation of the collective agreement reforms to the *BIA* and the *CCAA*, the courts have had very few opportunities to interpret and apply the amended statutory provisions.[108] In *Re Canwest Global Communications Corp.*,[109] the Ontario Superior Court considered the implications of the addition of section 33(1) to the *CCAA*.[110] Justice S.E. Pepall (as she then was) dismissed a motion by a union for an order to have the debtor satisfy severance and termination pay obligations in accordance with the collective agreements. The union had taken the position that the employees in question had provided post-filing service and were entitled to the payments in accordance with their labour contracts. The debtor submitted that the employees' employment entitlements were not converted into post-filing obligations simply because they had been actively employed following the initial order. In the Court's judgment, the amendments did not alter long-established law,[111] as set out in *Jeffrey Mine*, stipulating that the collective agreement remains in effect during insolvency.[112] In the Court's view, the issue raised by the union's argument was whether section 33 altered the treatment of termination and severance obligations as unsecured claims. Rejecting the union's position, Justice Pepall held that while section 33 maintains the terms and conditions contained in the collective agreement, it does not alter the priorities or status of the claims in question.[113] She stated that if Parliament had

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108 As of the end of November 2014, there were no *BIA* cases interpreting the amendments and only two decisions interpreting the *CCAA* provisions found in s 33(1).

109 [2010] OJ No 2544 (QL).

110 *CCAA*, s 33(1). As noted above, this section provides that "any collective agreement that the company has entered into as the employer remains in force, and may not be altered except as provided in this section or under the laws of the jurisdiction governing collective bargaining between the company and the bargaining agent."

111 For example, see *Re Nortel Networks*, *supra* note 55.

112 *Ibid* at para 16.

113 *Ibid* at para 32.

intended to effect such a "significant amendment," whereby severance and termination payments (and all other payments under a collective agreement) would take priority over secured claims, it would have done so expressly.[114] Accordingly, employees were entitled to termination and severance payments but the obligation to pay those unsecured claims was stayed and subject to compromise in the plan of arrangement.

At about the same time, the Québec Superior Court faced a similar issue relating to insurance premiums. In *White Birch Paper Holding Co.*,[115] Justice Robert Mongeon denied a union's motion to declare that a debtor was bound to continue insurance payments for the health and welfare benefits of former employees. The union argued that the obligation to pay insurance premiums arose from the collective agreement, which had not been revised by the parties, so the suspension of payments constituted a violation of section 33 of the *CCAA*, which maintains the legal force of the collective agreement during insolvency.[116] The debtor employer responded that the provisions did not form part of the collective agreement, but even if they did, the persons at issue were retirees, not employees.[117] After the Court determined that it (as opposed to a grievance arbitrator) had the jurisdiction to deal with the dispute, given that the matter was fundamentally about the effect of an initial order,[118] the judge turned to the question of the scope of the reforms recognizing the legal status of the collective agreement found in section 33 of the *CCAA*.

In the Court's view, the union's argument would require all employment obligations (including incorporated pension plans) to be enforced despite the initial order, which would entail excluding "the entire collective labour relations process from the application of the *CCAA*," except with respect to a court issuing a notice to bargain under the Act.[119] The Court expressed the view that the amendments merely codified the existing case law binding debtor companies to honour collective agreements under the *CCAA*.[120] After considering

114 *Ibid* at para 33.
115 [2010] QJ No 5701 (QL).
116 *Ibid* at paras 3-16.
117 *Ibid* at para 15.
118 *Ibid* at paras 20-29.
119 *Ibid* at para 32.
120 *Ibid* at para 36.

Minister Fontana's remarks about the operation and effect of the *CCAA* collective agreement reforms, the Court, relying on prior case law,[121] concluded that collective agreements continued to apply during insolvency "provided that they refer only to employees who *continue* to work."[122] In Justice Mongeon's view, Parliament did not intend to extend the operation of collective agreements beyond these principles, because that would have given unions complete power over the success or failure of any restructuring under the *CCAA*.[123] If the *CCAA* is interpreted according to its purpose, which is to enable distressed companies to avoid the pressure of their contractual obligations, then section 33 could not "be made so inflexible that the Union would be, for all practical purposes, in a near absolute position of control over the restructuring process."[124] Consequently, section 33 should be applied to situations where "employees of a bargaining unit *continue* to perform work after an initial order has been issued. Otherwise, the spirit of the entire corporate reorganization process under the *CCAA* would suffer as a result."[125]

There are some lessons worth noting in these decisions. To date, union requests to enforce a collective agreement according to its strict terms, despite the initial bankruptcy or insolvency order, have been denied by the courts. In light of these decisions, and the absence of other case law, the reforms cannot be said to have had an important effect upon priorities set by insolvency laws. However, Mongeon J. did not need to suggest that the collective agreement applies only to *active* employees. The case law,[126] the *BIA* and *CCAA* amendments, and labour statutes across Canada are clear — the collective agreement continues to apply despite insolvency, unless very specific and limited conditions are met. The continued legal status of collective agreements is of course important to bargaining unit employees, even if the immediate effects of many of its terms are postponed by the stay. The terms and conditions found in collective agreements assist

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121 Specifically, he relied upon *Jeffrey Mine*, *supra* note 26, *Re Nortel Networks*, *supra* note 55 and *Royal Oak Mines*, *supra* note 28.

122 *White Birch*, *supra* note 115 at para 47.

123 *Ibid* at para 48.

124 *Ibid* at para 59.

125 *Ibid* at para 61.

126 For instance, see *TCT Logistics* (CA), *supra* note 42, *Saan Stores*, *supra* note 21, and *Jeffrey Mine*, *supra* note 26 and accompanying text.

unions to establish the parameters of their claims for employees during insolvency, whether or not actively employed, and also establish the rates of pay and terms of work for employees who are retained to provide services after an initial order.

(c) Restructuring Negotiations in Unionized Workplaces

To understand the true impact of the statutory reforms on rescue efforts, one must turn from an examination of principles applied in the courtroom to an investigation of the work-out arrived at by the principals in the boardroom.[127] Bankruptcy plans devised by stakeholders normally advance or reject numerous proposals prior to seeking approval of the courts for a specific rescue plan.[128] As a result, much of the "real action" during insolvency takes place during informal bargaining sessions between debtor and creditors. To understand the actual consequences of the statutory amendments, it is necessary to appreciate their impact on rescue talks.[129]

The author conducted detailed interviews with leading counsel about the effects, if any, on rescue talks of the legal status of the collective agreement and the new notice to bargain provisions.[130] The interviews focused on whether the legal status of the collective agreement placed significant obstacles before debtors and unions in arriving at revised collective agreements, and if so, what those obstacles were and whether they tipped rescue negotiations toward failure. Based on these interviews, this part of the paper outlines the nature of restructuring discussions after the amendments, and then offers an analysis of the effect of the reforms.

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127 Miller *et al*, *supra* note 74 at 1.

128 *Ibid*.

129 Ronald Coase, "The Problem of Social Cost" (1961a) 3 JL & Econ 1, demonstrating that parties will bargain around legal rules in order to achieve more efficient results.

130 A survey of members of the Canadian Bar Association and the Canadian Insolvency Foundation was circulated which attempted to build on the interviews but did not garner enough responses to produce a statistically valid result. The results of that survey are available at <http://www.cairp.ca/about-cairp/lloyd-houlden-memorial-research-fellowship>.

The goal of the interviews was to acquire a sophisticated understanding of the dynamics afoot in post-amendment restructuring negotiations addressing collective agreement matters. In addition, the interviews were meant to provide a forum for a frank assessment of the impact of the reforms, if any, upon insolvency practice from the perspectives of both debtor and union counsel. A small target population was identified that possessed significant experience in this area of law. Twelve insolvency lawyers across Canada were contacted to participate in a 90- to 120-minute, non-attributable, face-to-face interview with the author. The contact list was constructed from published decisions in insolvency law, public speaking engagements on insolvency matters and peer-reviewed ratings of counsel practising insolvency law. The list was evenly divided between counsel representing business stakeholders (debtors, secured creditors, lenders and so on) and those representing trade unions.

Seven counsel agreed to an interview, of whom four exclusively represented trade unions, two exclusively represented debtors, and one represented both unions and debtors. The interviews were conducted in the first week of December 2012. Approximately half of the interviewees had more than 20 years' experience practising insolvency law in cases where collective agreement rights had been at stake. One counsel had less than 10 years' experience at the bar. The balance of counsel possessed between 10 and 20 years' experience dealing with insolvency and collective agreement issues. All but one counsel had appeared at all levels of court litigating insolvency and labour law matters. Finally, four insolvency lawyers spent between 10 and 30 percent of their practice dealing with insolvency and labour law matters, while three lawyers devoted between 70 and 100 percent of their practice to these issues. In addition, these individuals all had experience with one or more of the most noteworthy commercial restructurings in recent memory that involved collective agreement rights. The interview respondents, on the whole, can fairly be characterized as leading counsel in insolvency law, with significant involvement in insolvencies where collective agreements played a role.

The author posed 15 questions[131] focused on the intersection of insolvency law and labour law, which were used as departure points

131 *Ibid*, Appendix A.

to foster an in-depth discussion of the realities of restructuring negotiations in light of the statutory amendments. The questions were oral and open-ended, and centered on the respondents' insolvency experience with collective agreements and the effect of reforms upon rescue talks. The responses were recorded and transcribed by the author and reviewed for errors. The substance of the answers was reviewed to identify general themes and any evident trends that might exist. The content was organized thematically to reveal any patterns in the answers. The findings of the in-depth interviews suggest that difficult, yet successful, restructuring negotiations continue to take place after the statutory reforms.

(d) The Nature of Work-Out Talks Involving Collective Agreement Rights, Post-Amendments

The creation of a rescue plan is largely a bargaining process among creditors, in which the debtor seeks the informal support of influential creditors for the plan before filing it with the court. While the form of these agreements varies widely, they tend to include some combination of approaches: extending the time for repaying debts; accepting only a partial debt repayment; and converting debt into equity or liquidating some of the debtor's assets in order to pay down arrears.

Normally, wage costs arising from a collective agreement are not the dominant factor that contributed to the insolvency. Rather, the cost of contract administration, along with unionized work rules and the presence of any defined benefit pension plans, tends to elevate debtor costs above the cost structure of competitor companies.[132]

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132 #1 Interview of Insolvency Counsel by Author (4 December 2012), #2 Interview of Insolvency Counsel by Author (4 December 2012), #3 Interview of Insolvency Counsel by Author (5 December 2012), #5 Interview of Insolvency Counsel by Author (6 December 2012), #6 Interview of Insolvency Counsel by Author (6 December 2012). Although not typical, some insolvencies negotiations, such as that at Air Canada, focused significantly on the reduction of financial aspects of the collective agreement. Interviews #3 and #4 represented debtor employers and other business stakeholders exclusively, while the balance of interviews mainly, but not exclusively, represented trade unions in insolvency matters. One of the lawyers who represented trade unions also represented secured creditors and other business stakeholders.

Managing excessive costs attributable to the collective agreement then becomes an important factor in rescuing the business.[133]

If the debtor employer cannot undertake a balance sheet restructuring, it will usually explore revising the collective agreement in order to trim costs.[134] In the past, the potential for an order disclaiming the collective agreement led some stakeholders to repudiate the labour contract and to unilaterally impose concessions in unionized workplaces.[135] However, the amendments changed that dynamic, replacing unilateral action with a requirement to enter bilateral and sometimes multilateral discussions with trade unions. In these situations, the debtor employer's need for collective agreement concessions will usually lead its legal counsel, along with the Chief Restructuring Officer, to involve the union(s) in talks designed to revise certain aspects of the collective agreement.[136] The decision to negotiate by the debtor employer is directly influenced by its ability to use key aspects of the statutory amendments.

The combination of subsections 65.12(1), (2) and (6) of the *BIA*, and subsections 33(1), (2), (3) and (8) of the *CCAA* — which ensures that the collective agreements remain in force during insolvency and permits a court to allow a notice to bargain to be issued to the union — has widely caused debtor companies to forego litigation with their unions and to turn rather to collective agreement negotiations.[137] While the provisions maintaining the status of the collective

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133 However, interviews indicated that if labour costs seem to have played a significant role in the insolvency, and a collective agreement(s) is in effect, then debtor counsel will normally engage in-house counsel or human resources professionals to analyse the effect of the labour contract upon the competitiveness of the distressed company.

134 #1 Interview with Insolvency Counsel by Author (4 December 2012), #2 Interview with Insolvency Counsel by Author (4 December 2012), #3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012), #5 Interview with Insolvency Counsel by Author (6 December 2012), #6 Interview with Insolvency Counsel by Author (6 December 2012). See *Collins & Aikman Canada*, *supra* note 54, as an example of a pre-amendment insolvency that required no revisions to any of a number of collective agreements in order to restructure.

135 #1 Interview of Insolvency Counsel by Author (4 December 2012).

136 #4 Interview of Insolvency Counsel by Author (5 December 2012).

137 *BIA*, s 65.12(2) and *CCAA*, ss 33(2) & (3).

agreement operate automatically, those permitting a notice to bargain are discretionary in nature. The likelihood that a debtor employer will be allowed to use the notice to bargain provisions is encumbered by their exacting terms.

First, the existence of sincere voluntary negotiations would obviate the need for, and make unavailable, an order compelling the union to bargain — rendering the provision inoperable in all but the most extreme cases of a recalcitrant union rejecting all solicitations from the debtor employer to bargain. Although that outcome may reflect Parliament's intention to allow alteration of collective agreements only where both parties agreed, it significantly restricts the ability of a debtor to rely on the notice to bargain provisions if voluntary talks fail.

Second, the debtor employer must demonstrate "irreparable damage to the company" before the court can permit the issuing of a notice to bargain. Based upon the plain meaning of the words in the statutes, a court should find that irrecoverable harm or irremediable impairment is likely before an order can be granted. Yet the mere possibility of voluntary discussions between the parties must weaken claims that irreversible harm is probable, because it would be conceivable that collective agreement revisions could still be achieved. The debtor's task of proving that irreparable damage would likely occur is made more difficult by the mere fact of ongoing negotiations, since such negotiations hold out the possibility of avoiding permanent harm to the employer. Determining the probability that further collective bargaining negotiations would probably not yield an adequate arrangement is an extremely difficult undertaking for even the most seasoned labour expert. If the likelihood of irreparable harm seems unclear, a court may want to act prudently and exhaust the possibility that the parties may resolve their financial difficulties on their own, instead of issuing an order that forces mandatory negotiations when voluntary bargaining has yet to run its course.

Third, if a trade union is engaged in voluntary negotiations with the debtor employer (a precondition for a notice to bargain order), agreement to just one revision of the collective agreement will undermine the employer's ability to later compel further collective bargaining. As the inability to agree on *any collective agreement revisions* is the standard debtors must meet as a condition precedent to using the notice to bargain provisions, voluntary bargaining

sessions that agree to even minimal alterations will place those talks beyond the scope of an order. As the amendments require the parties to attempt to voluntarily bargain revisions to the collective agreement before requesting court assistance, unions are provided with a strategic opportunity to block recourse to the notice provisions by agreeing to minor concessions if they decide significant concessions must be avoided.[138] As it is extremely rare for a trade union to flatly refuse to discuss revisions to its collective agreements,[139] debtor employers may find that voluntary negotiations preclude them from later turning to a judge to issue a notice to bargain order if they are not satisfied with the extent of concessions acquired from the union.

Finally, and most importantly, although it is possible for a debtor to overcome the legal formalities involved in obtaining the order, the prospect of the debtor doing so seems somewhat remote, given the preference of stakeholders for "real time" rescue talks.[140] The time involved in obtaining such an order, along with the time required to force a reluctant union to compromise its agreement through litigation by obtaining a mandatory bargaining order, significantly erodes the incentive of a debtor employer to seek an order in the first place.[141] The statutory timetable mandated by collective bargaining is not an expedited process. Moreover, the debtor risks harming negotiation with its union(s) when it forces them into mandatory discussions, even if it can bear the timetable associated with that litigation. The prospect of a rescue based on union concessions becomes more remote with delay and increased labour tension. As a result, the failure of the reforms to provide a practicable legal process to "kick start" collective bargaining through the notice to bargain provisions has forced the parties to begin that dialogue on their own.

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138 *BIA*, ss 65.12(1) & (2) and *CCAA*, ss 33(2) & (3).

139 #1 Interview of Insolvency Counsel by Author (4 December 2012) and #3 Interview of Insolvency Counsel by Author (5 December 2012). During the Stelco restructuring, the United Steelworkers, Local 1005, located in Hamilton, Ontario, adamantly refused to negotiate alterations to its collective agreement with the debtor employer. However, the union's complete rejection of revisions to the labour contract is likely explained by the odd reality that the employer began to be profitable shortly after *CCAA* proceedings were initiated.

140 #3 Interview of Insolvency Counsel by Author (5 December 2012) and #4 Interview of Insolvency Counsel by Author (5 December 2012).

141 *Ibid*.

Restructuring talks necessitate a pragmatic discussion if the distressed business is to survive, as there may be no prospect of bargaining after bankruptcy. As a result, the debtor employer is left with the reality that the most practical way to alter the agreement is to persuade the union to voluntarily negotiate a new, cost-effective labour contract.[142] Consequently, debtor employers have had to adjust their normal bargaining tactics to engage labour unions in meaningful collective bargaining. As the legislation makes it improbable that a debtor company could open a collective agreement in a timely way through the use of notice to bargain provisions, debtor employers tend to take a "lay all your cards on the table and make a reasonable proposal" approach with the union.[143] Given the fact that many large unions today have prior insolvency experience to guide them in negotiations, they are often well equipped to make the necessary trade-offs to rescue a business.[144] Though the statutory reforms do not require unions to negotiate labour contract changes with the debtor employer, as a practical matter, looming economic disaster and trade unions' need to protect their members encourages bargaining to revise collective agreements.

Prior to the enactment of the reforms, business-oriented stakeholders and others[145] argued that trade unions would be provided with

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142 #1 Interview with Insolvency Counsel by Author (4 December 2012), #2 Interview with Insolvency Counsel by Author (4 December 2012), #3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012), #5 Interview with Insolvency Counsel by Author (6 December 2012), #6 Interview with Insolvency Counsel by Author (6 December 2012) and #7 Interview with Insolvency Counsel by Author (6 December 2012).

143 #3 Interview of Insolvency Counsel by Author (5 December 2012).

144 *Ibid.*

145 See the testimony of Andrew Kent, *supra* note 3 at 6-7. See also Legislative Review Task Force (Commercial) of the Insolvency Institute of Canada and the Canadian Association of Insolvency and Restructuring Professionals, *Report on the Commercial Provisions of Bill C-55*, online: <http://www.insolvency.ca/papers/LRTF%20Report_final_Oct-14-05.pdf. For an academic perspective, proposing a process in which a "Judicial Mediator/Arbitrator" would oversee a final-offer selection arbitration, subject to court approval, see Janis Sarra, *Proposed Model of a Federal Insolvency Collective Bargaining Process: Final Report to Industry Canada* (Vancouver: University of British Columbia Faculty of Law, 2005).

a "functional veto" over rescue talks, as the labour-related reforms did not include a third-party mechanism to impose an agreement if a recalcitrant union refused concessionary bargaining. Counsel representing debtor employers and senior creditors complained that the amendments removed the "dynamic tension" that was present in rescue talks when the court could impose an unfavourable outcome upon trade unions — i.e. by setting aside their collective agreements. The possibility that a collective agreement would be terminated provided a significant incentive to negotiate reductions. It was feared that if the statutory amendments gave iron-clad protection to a labour union's collective agreements, they would permit the bargaining agent to simply sit on its hands and do nothing but risk liquidation.[146]

Despite the absence of a third-party neutral with the power to legally impose an agreement, trade unions have come to appreciate that it is in their "collective interests to bargain for a timely and positive outcome."[147] This realization is borne out of the trade union's tactical and strategic self-interest in rescue talks.

First, if a restructuring agreement has crystallized without union input, and is then presented to the bargaining agent as a *fait accompli*, the interests of unionized employees will not likely be well represented in the agreement. Practically speaking, the pressure in court to accept a plan or compromise that was approved by all stakeholders, except the union(s), will be enormous. Bargaining agents put in this position will have been tactically outmaneuvered in the contest to influence the rescue of the distressed company. Typically, a union will want to avoid that situation and to influence negotiations in such a way as to preserve as many unionized jobs as possible while maximizing protection for key employee benefits such as a pension plan.[148] As a result, it is important for union counsel to quickly insert their client into rescue negotiations so that the debtor employer and the secured creditors take account of the union's priorities at the front

146 #3 Interview of Insolvency Counsel by Author (5 December 2012), #4 Interview of Insolvency Counsel by Author (5 December 2012).

147 Sarra, *supra* note 78 at 203.

148 #1 Interview of Insolvency Counsel by Author (4 December 2012), #2 Interview of Insolvency Counsel by Author (4 December 2012) and #6 Interview of Insolvency Counsel by Author (6 December 2012).

end of the bargaining process.[149] The only means by which the debtor will want to address the union's priorities is to voluntarily "open the collective agreement" for bargaining. Otherwise, the union has little to offer the other parties in the reorganization talks.[150] This approach is widely employed by unions that are trying to avoid being marginalized in restructuring discussions. Rescue talks allow unions a significant opportunity to maximize the economic security of their members post-rescue. However, the ability of unions to achieve their goals is moderated by the economic and legal realities of insolvency.

Many labour unions appreciate that they are in a perilous place in restructuring talks. For example, the debtor may use its extensive management rights under the *existing* collective agreement to direct its enterprise and unilaterally terminate or permanently reduce its operations without any consultation.[151] In addition, the debtor and other creditors may set the agenda by bargaining over where, when, and how much to invest in the distressed company, without union input.[152] Moreover, as labour is dependent upon capital for employment, no responsible union[153] can easily dismiss a legitimate demand to alter the terms of work so as to retain as much of its members' employment as possible. In this context, if the union is to affect the outcome of restructuring talks, it must act quickly and insert itself into the negotiations by having something to offer its counterparts.[154] In this way, unions become meaningful players in a restructuring.

To have bargaining strength in dealing with other stakeholders, unions must open their collective agreements to revisions. Opening a collective agreement provides the union with real leverage by trading potential concessions for a commanding position in the rescue

149 *Ibid.*

150 *Ibid.*

151 Sarra, *supra* note 78 at 200.

152 Harry Glasbeek, "Voluntarism, Liberalism, and Grievance Arbitration: Holy Grail, Romance, and Real Life" in Geoffrey England, ed, *Essays in Labour Relations Law* (Don Mills, Ont: CCH Canadian, 1986) 57 at 84-86.

153 See the submission by the United Steelworkers of America to Canada, Senate, Standing Committee on Banking, Trade & Commerce, *Proceedings of the Standing Committee on Banking, Trade & Commerce*, Issue 24 (17 September 2003) at 24.

154 #1 Interview of Insolvency Counsel by Author (4 December 2012) and #5 Interview of Insolvency Counsel by Author (6 December 2012).

talks.[155] By using the "chip of the open collective agreement," the bargaining agent may be able to act as if it were, in effect, the first secured creditor — sometimes to the "horror of secured creditors."[156] For instance, a union might propose hefty wage and benefit increases in an open collective agreement to potential buyers it does not favour, but an economically appropriate collective agreement to other bidders, as long as they are willing to accept certain employment and benefit assurances in a renewed collective agreement.[157] Like an entrepreneur, it may even demand an ownership share in the debtor employer in exchange for its consent to collective agreement changes. Alternatively, it may scuttle the ownership aspirations of purchasers by rejecting concessions required by a buyer it does not favour.[158] In other words, unions can manipulate economic uncertainty[159] pertaining to the insolvency in order to ensure that a rescue plan takes account of the workplace concerns of bargaining unit employees in a revised collective agreement.

However, the aspirations of a union to control the restructuring will be strongly resisted by debtor employers. They will temper union demands by threatening to liquidate the business and to publicly tie the failure of rescue talks to the demands of the union.[160] The union will weigh the possibility of that outcome prior to reaching any restructuring agreement. A union's agreement to a rescue plan, like buy-in from other stakeholders, largely hinges on the plan's economic appeal to its principals.

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155 #5 Interview of Insolvency Counsel by Author (6 December 2012).

156 *Ibid.*

157 *Ibid.*

158 Consider the Stelco insolvency, in which the bargaining agents took an active role in bringing in a financer to the negotiation table and offered amenable collective agreement terms due to the financier's bid (#1 Interview with Author, 6 December 2012). In the Air Canada bankruptcy, the unions' active opposition to Trinity Time Investments $650-million investment led the financer to walk away from its proposal, given that the unions would not agree to additional benefits concessions. See Air Canada Timeline, *CBC News* (2 April 2004), online: <http://www.cbc.ca/news/background/aircanada/timeline.html>.

159 #2 Interview of Insolvency Counsel by Author (4 December 2012).

160 #1 Interview of Insolvency Counsel by Author (4 December 2012), #2 Interview of Insolvency Counsel by Author (4 December 2012) and #5 Interview of Insolvency Counsel by Author (6 December 2012).

In this back-and-forth, unions tend to agree to collective agreement concessions when their officers and members believe that the employer's claims of hardship are credible, that concessions could save employment and reverse the economic misfortunes of the employer, and that reductions will not be needed again, or at least not in the foreseeable future.[161] However, if concessions are viewed as excessive or if there is seething dissatisfaction among union members arising from prior labour-management relations, unions will resist concessionary bargaining, thereby risking both job loss and company liquidation.[162]

This unique form of voluntary collective bargaining therefore places an extraordinary premium on the successful revision of labour contracts by the parties. If they fail, the parties jeopardize the viability of the debtor company, its bargaining agents, and all employment. Notably, however, it has not been the experience of counsel interviewed that rescue talks have been negatively influenced by the preservation of the legal status of the collective agreement and the notice to bargain provisions. Although none of the legal counsel categorically ruled out the possibility that disputes over a labour contract could scuttle a rescue plan, the consensus among employer and union counsel was that this risk was not a predominant feature of post-amendment insolvency practice.[163] Furthermore, with one exception, all insolvency counsel interviewed suggested that the statutory reforms regarding the status of collective agreements had not caused excessive or undue hardship preventing stakeholders from rescuing a distressed company.[164]

In this respect, the experience of the majority of insolvency counsel interviewed is consistent with the views of a wide cross-section

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161 Gary Chaison, "Airline Negotiations and the New Concessionary Bargaining" (2007) 28:4 J Labor Res 642 at 647.

162 *Ibid* at 653. See also note 176 *infra*.

163 *Ibid.*

164 *Ibid*. The only insolvency counsel who felt that the reforms had resulted in undue hardship based this view upon the idea that they gave unions a functional veto over the restructuring. However, even he could not point to a single instance since the reforms when a collective agreement had prevented successful restructuring. See #4 Interview of Insolvency Counsel by Author (5 December 2012).

of insolvency professionals across Canada, who reported that they have not encountered problems with either the statutory requirements that preserve the legal force of collective agreements or the provisions that provide for collective bargaining during an insolvency proceeding.[165] In light of the foregoing, it does not seem plausible that the statutory reforms recognizing the legal status of the collective agreement have widely upended the efforts of stakeholders to restructure unionized debtors. If the experience of leading insolvency counsel is to be believed, these reforms have, on the contrary, assisted restructuring efforts by providing an impetus to parties to negotiate a rescue plan that amends the labour contract as a means of saving the distressed business.

(e) Evaluating the Broader Effect of the Reforms Respecting Collective Agreements

Professor Paul Weiler has observed that bargaining the terms and conditions of a collective agreement is an "intrinsically valuable experience in self-government."[166] In the vernacular of the Supreme Court, collective bargaining promotes the "values of human dignity, equality, liberty, and respect for the autonomy of the person."[167] Bargaining gives employees an opportunity to influence the establishment of workplace rules and provides them with a level of control over their lives.[168] As a result, collective bargaining "emerges as the

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165 Janis Sarra, "Examining the Insolvency Toolkit: Report of the Public Meetings on the Canadian Commercial Insolvency Law System" (July 2011) at 141, online: Canadian Association of Insolvency and Restructuring Professionals (CAIRP) <http://www.cairp.ca/about-cairp/lloyd-houlden-memorial-research-fellowship>. Professor Sarra explained in her report that she held eleven public meetings across Canada in 2011 to discuss a variety of insolvency issues, attended by 586 lawyers, judges, accountancy professionals, turnaround experts, financiers, scholars, government policy staff, union and pension counsel. The participants generally expressed the view that they had not had difficulty working with the amendments.

166 Paul Weiler, *Reconcilable Differences: New Directions in Canadian Labour Law* (Toronto: Carswell, 1980) at 32.

167 *Health Service and Support-Facilities Bargaining Ass'n v British Columbia*, 2007 SCC 27 at para 82, [2007] 2 SCR 391.

168 *Ibid* at para 83.

most significant collective activity through which freedom of association is expressed in the labour context."[169] It is a fundamental legal right of employees, one which includes a good faith obligation on the part of employers to recognize unions and engage in genuine negotiations and to respect the bargain entered into by the parties.[170] These rights encompass a voluntary process of discussion that should generally be free from the unilateral imposition of law.[171] By preventing the termination of the labour contract, Parliament in its package of reforms endorsed the purposes of collective bargaining, and the fruit it may yield, as important institutions entitled to the positive protection of the law.[172] In turn, the validation of collective bargaining contained in the reforms operates to bolster work-out efforts.

On the face of the reforms, the provisions permitting the court to authorize a debtor company to issue a notice to bargain[173] to the union held out the potential of further conflict between the parties. The statutory amendments invited the use of court proceedings as a means to force negotiated concessions or even, in limited circumstances, to displace the existing terms and conditions of the collective agreement. However, the notice to bargain provisions in the *BIA* and *CCAA* have not been widely used. Debtors appear to consider them impracticable.

Restoring collective agreements to their full effect in law appears instead to have the effect of requiring debtor employers facing labour costs issues to engage in voluntary collective bargaining with their unions. Basic economic and legal considerations motivate unions and debtor employers to reach agreement. On the one hand, the reforms require debtor employers to deal with unions if, going forward, they want labour costs to be reduced. On the other hand, the company's impending bankruptcy forces bargaining agents to carefully consider which collective agreement rights might be altered to help rescue the business. Debtor employers now use the threat of liquidation in order to leverage a "savage process of forced concessions"[174] designed to

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169 *Ibid* at para 66.

170 *Ibid* at para 77.

171 *Ibid.*

172 Weiler, *supra* note 166.

173 *BIA*, ss 65.12(1) & (2) and *CCAA*, ss 33(2) & (3).

174 Courtney Pratt & Larry Gaudet, *Into the Blast Furnace: The Forging of a CEO's Conscience* (New York: Random House, 2008) at 81.

pare down the terms of the labour contract when necessary.[175] The interviews suggest that unions have generally responded by opening their collective agreements and leveraging the uncertainty involved in rescue talks to advance their strategic goals on behalf of their members, rather than by obstructing efforts to trim provisions of the collective agreement.[176]

Contrary to the concern expressed by some insolvency professionals before the passage of the reforms, the absence of court intervention has not undermined the willingness of trade unions to reopen collective agreements. The interviews also suggest that the voluntary restructuring talks occurring post-amendments have not resulted in widespread liquidations or undue hardship for debtor employers that prevent collective agreements from being revised. Debtor employers and their unions appear to have been able to successfully address insolvency issues since the reforms took effect. The contest between the parties has been transformed from one of pursuing their rights in court into voluntary negotiation over the terms on which the business will be run post-rescue.

In this way, the heightened prominence of voluntarism in restructuring negotiations affords trade unions a rare opportunity to address issues that lie at the core of entrepreneurial control of the debtor employer, thereby permitting them to positively contribute to the competitiveness of the business going forward.[177] In other words, the debtor employer and union move closer to an equal partnership[178] during rescue talks than would have occurred if the collective agreement had been discarded in law. In fact, rescue agreements that adroitly balance the interests of each party may actually contain

175 Wahl, *supra* note 65 at 245.

176 See "Union Turns Down Final Offer," *Sault Ste. Marie News Leader* (22 March 2007) 1 for an example of a union's overwhelming rejection of an employer's concessionary demand for a long-term wage cut, in the face of the bankruptcy court's prior liquidation order that would close the facility within 40 days.

177 Katherine Van Wezel Stone "The Post-War Paradigm in American Labor Law" (1981) 90 Yale LJ 1509 at 1510.

178 Brian Langille, "'Equal Partnership' in Canadian Labour Law" (1983) 21 Osgoode Hall LJ 496.

improvements for employees and employers alike.[179] Whatever the specific terms of a settlement,[180] the statutory reforms provide the debtor with a clear incentive to engage in discussion with its union(s), thus enlisting their help in salvaging the business.[181]

4. CONCLUSION

The early insolvency case law that challenged the legal status of the collective agreement created uncertainty surrounding its legal effect during insolvency. Those decisions not only interfered with the normal adjudication of labour law disputes arising from collective agreements during an insolvency, but also affected the restructuring of unionized businesses. This jurisprudence overturned a longstanding arrangement between capital and labour concerning the proper resolution of workplace disputes. In the eyes of unions, these decisions undermined the legitimacy of the insolvency process, as already vulnerable employees would be rendered more vulnerable[182] to market forces when they received less from an insolvency proceeding. Bankruptcy jurisprudence thus threatened the institutional role of unions in the workplace. Unions reacted to such decisions by resorting to litigation in order to defend the force and effect of collective agreements, thereby delaying, or risking the failure of, the restructuring effort. The heightened conflict between debtors and unions meant that parties were distracted by litigation when they should have focused on negotiating a renewed labour contract that had the potential to help expeditiously resolve the insolvency.

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179 A negotiating process between the receiver, trustee or monitor involving trade unions has always held out some promise of improving rights for bargaining unit employees. See Wahl, *supra* note 65 at 251 and note 180, *infra*, for an example of such a pre-amendment agreement.

180 In December 2007, a settlement agreement in *TCT Logistics* between the union and Spectrum Supply Chain Solutions was ratified. The resolution required the union to abandon its representational rights with the employer in exchange for a payment that equalled about 90% of the monies owed to bargaining unit employees at the time of the employer's closure.

181 Wood, *supra* note 95 at 310.

182 *Wallace v United Grain Growers Ltd*, [1997] 3 SCR 701 at paras 93-95.

However, by shielding "all employment rights" in insolvency situations,[183] the Supreme Court of Canada's decision in *T.C.T. Logistics* implicitly ensured that the collective agreement would again be the foundation of the terms and conditions of work for organized employees.[184] Amendments to the *BIA* and *CCAA* now explicitly recognize the legal status of the collective agreement during insolvency, and provide statutory machinery to issue a notice to bargain a new collective agreement. Parliament has reinforced the incentives for debtor employers and their unions to voluntarily bargain a resolution to the insolvency. A debtor employer that wishes to alter the collective agreement as part of a strategy for saving the business is now required to negotiate changes with its union(s). In fact, the interviews with insolvency counsel that are summarized in this paper strongly suggest that debtor employers have forgone use of the notice to bargain provisions to mandate such negotiation, given the numerous practical impediments that would arise. It appears, rather, that employers choose to engage voluntarily in collective bargaining. On the other hand, though the reforms permit unions to formally maintain their collective agreements with the debtor employer, in practice they appear to participate voluntarily in restructuring negotiations and to open collective agreements in the interests of improving their members' prospects post-restructuring. Importantly, post-amendment collective agreement negotiations do not appear to have prevented restructuring or impeded rescue efforts. The reforms have replaced a recurring legal dispute about the place of the collective agreement during insolvency with a system that provides incentives for meaningful negotiation to rescue distressed businesses facing bankruptcy. In light of the foregoing, Parliament's collective agreement amendments have introduced positive change to the restructuring process, by helping stakeholders to rescue unionized employers facing financial ruin.

183 *TCT Logistics* (SCC), *supra* note 6 at paras 43-51.

184 Weiler, *supra* note 166 at 30-32.