

TRUSTEE IN BANKRUPTCY NOT ALWAYS "SUCCESSOR EMPLOYER"

In a recent decision of the Ontario Court of Appeal (In the Matter of the Bankruptcy of The Royal Crest Lifecare Group Inc., January 21, 2004), the Court found to be premature a motion brought by two unions for leave under the *Bankruptcy and Insolvency Act* ("BIA") to pursue an application before the Ontario Labour Relations Board ("OLRB") seeking the designation of a trustee in bankruptcy as a "successor employer."

FACTS

A company that operated nursing and retirement homes was petitioned into bankruptcy, and a trustee in bankruptcy was appointed. For two months immediately prior to the appointment the trustee had been operating the bankrupt company in the capacity as interim receiver. The day the trustee was appointed, the trustee and the unions representing many of the employees brought dueling motions.

The trustee asked the Court to make an order stating that it was not bound by the collective agreements between the bankrupt company and the trade unions with which the company had collective agreements. The trustee further requested the Court to find that it was not a successor employer under the Ontario *Labour Relations Act*, 1995 ("OLRA").

Under the BIA, the court must grant permission for a legal action against a bankrupt company to proceed. This includes a proceeding before the Ontario Labour Relations Board, such as a successor employer application. Accordingly, the unions brought a cross-motion seeking leave under the BIA to pursue an applica-

tion before the OLRB for an order declaring the trustee a "successor employer." The result of such an application could be an order that the trustee is bound to the same collective agreement as if it were the bankrupt company.

The bankruptcy judge dismissed both motions. The judge rejected the trustee's argument that a trustee could never be a "successor employer"

"It would be undesirable to saddle the Trustee with (heavy) personal liabilities which may arise either from a finding of 'successor employer' ... or a conclusion that a Trustee who hires personnel 'inherits an operative collective agreement.'"

and that a collective agreement automatically terminated upon bankruptcy. Instead, the judge held that the collective agreement was put into "suspended animation" until such time as the facts could allow a determination whether the trustee party had, in fact, become a "successor employer." The trustee did not appeal this ruling.

The unions' motion was dismissed "without prejudice to such a motion being brought back on again with

appropriate factual underpinning." That is, it was dismissed as being premature. The unions appealed this ruling.

THE APPEAL

The issue before the Court of Appeal was whether the bankruptcy judge erred in refusing to permit the unions to proceed to the OLRB at that time to answer the question of whether the trustee was in fact a successor employer.

The majority of the Court answered "no" to that question.

The Appeal Judges held that although the test for leave under the BIA was low, bringing the cross-motion on the first day of the bankruptcy was premature because it was "too early to attach formal, and final, legal labels to the relationship between the trustee and the employees." That is, there was insufficient evidence to demonstrate that the trustee's activities had changed from "realizer of assets" to "employer." The Court of Appeal adopted the following findings of the bankruptcy judge:

It seems to me that when one appreciates that the mandate of a trustee in bankruptcy is to maximize value of the assets vested in the trustee on a bankruptcy for the purpose of providing a dividend to the creditors... the circumstance of operating the business is merely ancillary and incidental to that function of realizing upon the assets..... It would be undesirable to saddle the Trustee with (heavy) personal liabilities which may arise either from a finding of "successor employer" against the trustee or a

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TRUSTEE...

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conclusion that a trustee who hires personnel "inherits an operative collective agreement." Simply put, what role is the trustee truly playing - is it acting qua realizer of the assets or is it acting qua employer in essence

...

There has been no allegation, let alone evidence, that the Trustee here ... has been dragging its feet or will do so. The CUPE cross-motion for leave is dismissed without prejudice to such a motion being brought back on again with appropriate factual underpinning which I would be of the view ought to demonstrate that the Trustee has slipped over from functioning qua realizer of assets in a diligent fashion to the role of being predominantly an employer in its activities.

....

The trustee will also have to appreciate that if it does not accede to the union demands for union dues, pension contributions and grievance-type procedures, then conceivably after a period of time (which may vary in length) the personnel which it has employed may become disenchanted with continuing at the

various locations and value may evaporate or start to do so unless "corrective or ameliorating" measures are taken.

THE DISSENT

In a strongly worded dissent, one Court of Appeal Judge concluded that the bankruptcy judge had erred legally and factually - legally, as a matter of statutory interpretation (the OLRA ought to have trumped the BIA) and factually, because in this case the trustee's employment of personnel was more than merely "incidental" to its function of realizing assets and protecting stakeholder interests - it was central to that role. As such the dissenting Judge held that the question of whether the trustee was a "successor employer" was not factually premature, but rather supported by an abundance of evidence that the trustee was in fact running the company no differently than any other employer. The OLRB ought therefore to have been given the opportunity to decide the issue:

In my opinion, the unions'... application was timely and prudent. Nothing about the application was premature. The unions should not be faulted for bringing it on the day that the court appointed [the trustee] in bankruptcy. It was brought in response to [the trustee's] appli-

cation for a declaration that it be deemed not to be a successor employer. [The trustee] was no stranger to the business operation of the [bankrupt company]. For two months prior to its appointment as trustee, as interim receiver it had operated the nursing home business with [the bankrupt company's] employees. The employees had statutory rights which the unions believed required recourse to the OLRB for their protection. Had the bankruptcy judge granted the unions' application for leave to apply to the OLRB, or, indeed, should this court do so, the work of the trustee in administering the estate would not have been delayed or frustrated as it would have continued its operation of the nursing homes, thereby benefiting both the creditors and the residents, while it continued its search for a purchaser of the business as a going concern. At the same time, the unions would have been able to prepare their application to the OLRB.

If you would like to discuss how this important case might impact upon your organization, please contact any member of our legal team.

Breakfast Seminar

Next in our series of employment and labour law update seminars:

TOPIC: Preventing and Addressing Violence in the Workplace

DATE: Thursday, May 13th, 2004, 7:30 a.m. – 9:00 a.m.
(program to start at 8:00 a.m.; breakfast provided)

VENUE: Four Points by Sheraton (NOTE: NEW LOCATION)
6090 Dixie Road, Mississauga, Ontario 905.670.0050

HReview
Seminar Series

Watch for your faxed invitation the week of April 11th, 2004 or call 416.603.0700 to request an invitation.

"EMPLOYMENT FOR LIFE" LEGAL BUT DIFFICULT TO PROVE

In a recent decision of the Ontario Court of Appeal the Court held that a contract of employment "for life" was enforceable but only if there is clear and explicit proof that this was the parties' intention [*Foreman v. 818329 Ontario Ltd.* [2003] O.J. No. 3327 (OCA)].

FACTS OF THE CASE

The employee, Ms Foreman, was employed by Mr. Kirby (a lawyer with whom Ms Foreman was romantically involved) to manage two bingo halls. The parties did not have a written employment agreement. Ms Foreman was compensated in part by salary and in part from profits earned from the sale of lottery tickets sold at the halls.

After a year of employment, Ms Foreman learned that Mr. Kirby intended to sell the bingo halls to another party who had a history and reputation of replacing employees with friends and family members.

Ms Foreman sought to secure her employment. She asked Mr. Kirby to prepare a written employment agreement between Ms Foreman and the new owner. Among other things, the agreement the parties signed stated that the bingo halls "shall not dismiss"

Ms Foreman. Significantly, the agreement did not include a clause allowing termination "for cause" (although the lawyer for the new owner initially

“The (\$712,000) amount reflected the Judge's finding that the employment agreement was a fixed term contract for life.”

sought its inclusion).

Nine months after the change in management Ms Foreman, age 32, was fired. She commenced an action for wrongful dismissal.

THE TRIAL

The trial judge found that Ms Foreman had been dismissed without

cause and awarded her \$712,000 in damages. The amount reflected the Judge's finding that the employment agreement was a fixed term contract for life. The Judge considered the applicability of s.2 of the *Employers and Employees Act*, R.S.O. 1990, c. E.12 (formerly the *Master and Servant Act*, R.S.O. 1980, c. 257) which limits the term of employment contracts to nine years and concluded that the parties had waived this limitation period as permitted for managers under s.11(2) of that Act.

The amount of damages was determined on the basis of Ms Foreman's remuneration for the remainder of her life, less mitigation. To this end, the Judge held that:

- Ms Foreman would likely have chosen to remain employed by the bingo halls until age 65, resulting in lost wages - including profit from lottery tickets - of \$192,000; and
- Ms Foreman was entitled to further damages arising from her lost opportunity to profit from another form of lottery ticket sales which became legal two years after her termination- these damages were estimated to

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DID YOU KNOW...?

On March 31st 2004, *Bill C-45 - An Act to Amend the Criminal Code (Criminal Liability of Organizations)*, which criminalizes certain conduct in relation to health and safety, became law.

To find out how this new legislation could affect your organization or to arrange a presentation to your management team or clients, please contact any member of our firm.

EMPLOYEE FOR LIFE...

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be \$520,000.

The employer appealed from the damages award.

THE APPEAL

By a 2-1 majority, the Court of Appeal overturned the Trial Judge's damages award on the following basis:

- while fixed term employment contracts are legal "the courts require unequivocal and explicit language to establish such a [fixed term] contract";
- lifetime employment requires even clearer articulation given the profound financial responsibility of such a guarantee;
- Ms Foreman's employment contract did not contain a clear indication that she was to be given a job for life; and

- the objective of Ms Foreman's employment agreement was to protect her from arbitrary removal in favour of the new owner's family and friends - not to create employment for life.

The Court of Appeal awarded Ms Foreman pay in lieu of 12 months' notice (\$30,800), which in turn disentitled her to damages arising out of the new lottery ticket scheme which had become legal two years after her termination.

One Judge wrote a dissenting opinion (in part). He held that the Trial Judge had not committed a palpable error in finding that the contract was intended to be for life. As such in his view Ms Foreman was entitled to lost income for 33 years (to age 65). However, on the issue of the lost prof-

its from the new lottery ticket scheme, the dissenting Judge held that the Trial Judge's award of \$520,000 was a reversible error because the parties could not have contemplated this lottery scheme at the time the employment contract was signed.

This case offers dramatic insight into what can happen when employment agreements are ambiguous.

If you would like to discuss how this employment law decision might affect your organization, or would like assistance in drafting clear and effective employment agreements please contact any member of our legal team.



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