



SUPERIOR COURT OF JUSTICE

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TOTAL PAGES (INCLUDING COVER PAGE): 8

RE: **G.E. Canada Equipment Financing G.P. and
Northern Sawmills Inc.
Court File No.: 10-CV-9042CL**

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CITATION: G.E. Canada Equipment Financing G.P. v. Northern Sawmills Inc., 2011
ONSC 4511
COURT FILE NO.: Court File No. 10-CV-9042CL
DATE: July 25, 2011

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

G.E. Canada Equipment Financing G.P.

Applicant

- and -

Northern Sawmills Inc.

Respondent

COUNSEL:

- John MacDonald and Sven Poya for PricewaterhouseCoopers Inc., Receiver of Northern Sawmills Inc.
- Jesse Kugler for the Communications, Energy and Paperworker Union of Canada
- Lawrence Swartz for Morneau Shepell, Pension Plan Administrator

HEARING DATE: July 21, 2011

PERELL, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] The preamble of the *Wage Earner Protection Act*, S.C. 2005, C.47, s. 1 (“WEPPA”) states that it is an Act “to establish a program for making payments to individuals in respect of wages owed to them by employers who are bankrupt or subject to a receivership.”

[2] PricewaterhouseCoopers Inc. is the court-appointed Receiver of Northern Sawmills Inc., a corporation in bankruptcy. It applies to the court for directions about the “end” date of the employment of the unionized former employees of Northern Sawmills. The date that their employment ended is critical to determining whether some or all of 232 former employees of the bankrupt will obtain benefits under WEPPA, which provides that Service Canada will pay eligible unionized employees “eligible wages” owed to them by their former employer up to a maximum of \$3,000 each.

[3] Based on its interpretation of the factual and legal background, it is the Receiver's opinion that 54 former employees are entitled to WEPPA benefits. In contrast, it is the opinion of the former employees' union, the Communication, Energy and Paperworkers Union of Canada ("CEP") that all the employees have WEPPA entitlements.

[4] For the Reasons that follow, I agree with CEP's position.

B. FACTUAL BACKGROUND AND LEGAL ANALYSIS

[5] In my opinion, for the Reasons that follow, all of the former unionized employees of Northern Sawmills, none of whom have received severance or termination pay, are entitled to benefits under WEPPA.

[6] The Receiver and the Union agree that the deemed termination provisions of Ontario's *Employment Standards Act, 2000*, S.O. 2000, c. 41 are not helpful for resolving the question before the court, which concerns the meaning and operation of different legislation. I agree, and, therefore, I will say nothing more about the *Employment Standards Act*.

[7] The explanation for my conclusion may be best achieved by describing the history of Northern Sawmills from around 2004 to July 2011 (when Rene Lindquist, the National Representative of CEP who worked closely with the former unionized employees of Northern Sawmills, swore his affidavit) and by interspersing the factual background with the legal analysis.

[8] Northern Sawmills was an Ontario corporation that was located in Thunder Bay, Ontario. It manufactured lumber products. With two union locals and two identical collective agreements, CEP was the statutory bargaining agent for the following bargaining unit:

All employees engaged in the plan and yard of the Company with the exception of the office staff, superintendents, persons above the rank of sub-foreman, any party who has the right to hire or lay off or discharge men and engineers and hoisting men belonging to the Operating Engineers' Union.

[9] On October 31, 2004, CEP ratified a collective bargaining agreement with Northern Sawmills. The collective bargaining agreement included a letter of understanding about recall rights; that is, the rights of an employee who had been laid off to return to work without termination of employment or loss of seniority.

[10] The Letter of Understanding stated:

Letter of Understanding Between Northern Sawmills Inc. and Communication, Energy and Paperworkers Union, Local 38X [38.02]

Re. RECALL RIGHTS

1. Regular full-time employees as of the date of ratification will have general recall rights until August 31, 2008. An agreed upon list of such employees will be prepared.

2. If such employees have not been recalled to a permanent vacancy before August 31, 2008, their seniority will be lost and their employment terminated

[11] In the summer of 2007, Northern Sawmills began to wind down its operations. Layoffs began, and the layoffs continued until the fall of 2008, when Northern Sawmills permanently ceased operations.

[12] Under the collective bargaining agreement, as it existed in the fall of 2008, employees would have 24 months of recall rights after which their employment would be deemed to have been terminated if they had not been recalled. Based on this state of affairs, the Receiver's analysis is that employees laid off before July 4, 2008 have no WEPPA entitlements. There were 54 employees laid off after July 4, 2008, who, in the opinion of the Receiver, would have WEPPA entitlements.

[13] Mr. Lindquist deposes, however, that neither Northern Sawmills nor its unionized employees wished the cessation of operations to be the end of the company or for the lapsing of recall rights. During the fall of 2008 and thereafter, there were regular discussions about restarting operations. These discussions produced an oral agreement between the union and the employer that the recall rights would be extended until the signing of a new collective agreement. The purpose of the oral agreement was to provide Northern Sawmills with financial breathing space by avoiding it having to pay severance and termination pay and this indulgence, in turn, could allow employees the opportunity to have employment.

[14] The Receiver submits, however, that the oral agreement extending recall rights was ineffective because it was not reduced to writing in accordance with the formalities of the Ontario *Labour Relations Act, 1995*, S.O., 1995, c.1, Sch. A, s. 1(1), which requires a collective agreement between the employer and a trade union to be in writing. For reasons that will become apparent, it is not necessary to decide whether the Receiver's position that the oral agreement was ineffective, is correct.

[15] Following the oral agreement to extend recall rights, Northern Sawmills continued to be inoperative, but the employees did not receive severance or termination pay, and apparently most employees continued to hope that a start-up would eventually happen.

[16] The evidentiary record for this motion reveals that had severance and termination pay been paid: 6 employees would have received between \$3,000 to \$9,999; 13 employees would have received between \$10,000 and \$19,999; 137 employees would have received between \$20,000 and \$29,999; and 48 employees would have received between \$30,000 and \$38,000. They, in fact, received nothing.

[17] Hope lasted until the beginning of 2010, when the Union decided that it was unlikely that Northern Sawmills would restart its operations. The Union now turned its mind to collecting severance and termination pay on behalf of its members. It filed a grievance.

[18] On or about July 6, 2010, Northern Sawmills and CEP entered into a Memorandum of Settlement. For present purposes, the following provisions of the Memorandum of Settlement are pertinent:

1. The parties agree that the Employees are employees whose employment has terminated and who have no recall rights either because:

(a) they are employees whose recall rights expired and whose employment terminated on the date they lost their recall rights; or

(b) they are employees who forfeited their right to recall and elected to terminate their employment and claim termination and severance pay, whose employment terminated on the date of their election.

3. [Northern Sawmills] acknowledges its obligation to pay the Employees the amounts set out in Schedule A (less statutory withholdings and remittances and any repayment to Human Resources and Social Development Canada regarding any employment insurance payments they may have received) in full and final satisfaction of their termination pay and severance pay claims regardless of when notice of termination was or is deemed to have been given.

4. In the event that any Employee listed in Schedule A is subsequently rehired by [Northern Sawmills] that Employee shall commence employment as a new employee.

5. The Union agrees to settle Grievance #07970 (08-03) on the terms set out herein ...

[19] In my opinion, the Memorandum of Settlement is part of the collective agreement between CEP and Northern. It is in an agreement in writing, and it is signed by both the union and the employer. It informed a consent grievance award.

[20] Further, it is my opinion that, in its effect, the Memorandum of Settlement acknowledges and confirms the oral agreement between CEP and Northern Sawmills that the employees had recall rights that were being extended so that Northern Sawmills' obligation to pay severance and termination payments would be deferred. I interpret the words "employees whose recall rights expired and whose employment terminated on the date they lost their recall rights" in the Memorandum of Settlement to mean "employees whose recall rights expired on July 6, 2010."

[21] In other words, interpreting the words of the Memorandum of Agreement in their factual nexus, I interpret this part of the collective agreement between CEP and Northern Sawmills to recognize that the employees - save those who had forfeited their right to recall and who had elected to terminate their employment and to claim termination and severance pay - as having recall rights up to July 6, 2010, which is the date that the Memorandum of Settlement was signed terminating those recall rights.

[22] July 6, 2010, was the date that the layoffs became a termination or ending of the employment of the unionized employees, except those who had already elected to terminate their employment by executing waivers. Of these 66 employees, I will have more to say below.

[23] In reaching this conclusion about the interpretation of the Memorandum of Settlement, I do not rely on the letter of April 11, 2011, recently written by Mr. Wolfe Gericke, who had been a representative of the employer, Northern Sawmills. His letter purports to confirm the oral agreement of the fall of 2008. I rely only on the

interpretation of the Memorandum of Settlement, which, in my opinion, forms part of the collective agreement between the union and the employer.

[24] This analysis makes July 6, 2010, the date on which the employees' employment ended for the purposes of WEPPA.

[25] Turning to WEPPA, for present purposes, the relevant provisions of WEPPA are the definition of "wages" and the definition of "eligible wages." Under WEPPA, employees whose employers are subject to a receivership are entitled to "eligible wages" up to a maximum of \$3,000.

[26] Under s. 2 (1) of WEPPA, wages is defined as follows:

Wages

Includes salaries, commissions, compensation for services rendered, vacation pay, severance pay, termination pay and any other amounts prescribed by regulation.

[27] Under s. 2 (1) of WEPPA, eligible wages is defined as follows:

Eligible Wages

(a) wages other than severance pay and termination pay that were earned during the six month period ending on the date of the bankruptcy or the first day on which there was a receiver to the former employer; and

(b) severance pay and termination pay that relate to the employment that ended during the period referred to in paragraph (a).

Thus, under WEPPA, a former employee is entitled to unpaid severance pay and termination pay for employment that ended within six months before the receivership.

[28] On January 4, 2011, two days before the six months referred to in the definition of eligible wages would expire, PricewaterhouseCoopers Inc. was appointed Receiver of Northern Sawmills Inc. Thus, except perhaps the 66 employees who had signed waiver forms ending their recall rights, in my opinion, all the unionized employees are entitled to WEPPA benefits.

[29] Turning to the employees who signed waiver forms, the July 6, 2010, Memorandum of Settlement recognizes that there were employees who had forfeited their right to recall and elected to terminate their employment and claim termination and severance pay, whose employment terminated on the date of their election.

[30] The standard form waiver, which is under the letterhead of the employer stated:

I, _____, confirm that I have elected to receive any termination pay and severance pay to which I may be entitled in accordance with the Employment Standards Act and/or the Collective Agreement. I understand that in making this election, I am waiving any recall rights to which I might be otherwise entitled and that my employment with Northern Sawmills will be terminated effective immediately.

[31] It is interesting to note that 23 waivers were signed in 2008, 26 waivers were signed in 2009, and 20 waivers were signed in 2010. This confirms that the employer,

the union, and the employees understood that recall rights had been extended beyond August 2008, else no purpose would be served by the employees waiving non-existent recall rights.

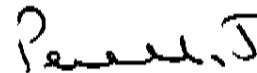
[32] The employees waiving their existing recall rights did so in consideration of receiving termination pay “in accordance with the *Employment Standards Act* and/or the Collective Agreement.”

[33] The 66 employees, however, like their fellow employees, never did receive any severance or termination pay. Thus, in my opinion, there was a total failure of consideration, and the waivers of recall rights are ineffective and are null and void. It follows that this group of employees should be treated in the same fashion as the others who did not sign waivers.

C. CONCLUSION

[34] An order should issue in accordance with these Reasons for Decision.

[35] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions of CEP within 15 days of the release of these Reasons for Decision followed by the Receiver’s submissions within a further 15 days.



Perell, J.

Released: July 25, 2011

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