# THE STELCO RESTRUCTURING PARADOX

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A labour dispute is defined as a disagreement between management and workers with respect to working conditions.[1] Often times, labour disputes involve job cuts, wage decreases and pension concessions. These types of issues are commonly covered in collective agreements between unions and managements. The threat of disadvantageous changes to, or interpretations of, collective agreements is usually at the forefront of disputes. However, in particular cases, it is not always as clear cut as management versus union. In some instances, labour law may be overshadowed by corporate law. Nowhere is this more evident than with the Stelco restructuring that occurred between January 29th, 2004 and March 31st, 2006. This particular situation not only involved union members and management, but also creditors, shareholders and the Canadian judicial system, rather than Labour Boards. The primary piece of legislation at the root of this dispute was the *Companies' Creditors Arrangement Act* (CCAA). Throughout the Stelco reorganization dispute, labour law was often trumped by corporate law, in what came to be an extremely controversial process. The union failed in its attempt to get Stelco out of CCAA protection, failed to block an extension of coverage by the CCAA, failed to successfully remove certain directors from Stelco's board and failed in its motion against the stocking horse bid by the Deutsche Bank. Ultimately, however, the union made no concessions whatsoever and became perhaps the only victorious party in this dispute, despite its exhaustive list of legal defeats in court.

Stelco, along with several subsidiaries, filed for protection under the CCAA on January 29th, 2004.[2] In short, the CCAA provides a stay of proceedings for all actions against the company, whether by unionized employees or other creditors, when total claims against the debtor company exceed five million dollars.[3] It provides a protective reprieve to the corporation for the purpose of reorganization. According to Justice James Farley of the Ontario Superior Court of Justice, the fundamental purpose of the CCAA is to "rehabilitate insolvent corporations for the benefit of all stakeholders," but is to be preventative rather than proactive.[4] Union leaders would be quick to point out that Justice Farley may not have followed his own precepts. This is especially true when

considering that the CCAA, which is a vague piece of legislation, leaves most matters open to judicial interpretation.[5] Once a company is granted protection under the CCAA, many changes take immediate effect. With respect to Stelco's CCAA proceedings, the collective agreement became suspended until the company was released from its protection. The union representing Stelco employees, the United Steelworkers of America (USWA), claimed that while the company was under bankruptcy protection, it could "cancel union contracts, order layoffs without appropriate severance, and take other actions that would not normally be permitted by labour law." [6] Moreover, while under the CCAA, Stelco effectively stopped all workplace grievances from proceeding to arbitration.[7] In effect, the CCAA puts everything aside in order to allow a company to effectively reorganize. The USWA argued in court that this freeze of labour operations is both unfair and unjust.

Although the USWA brought forth several legal motions throughout the restructuring process, its efforts to stop Stelco from obtaining protection under the CCAA in the first instance was perhaps the most important. In a motion heard on March 5th, 2004, before Justice Farley, the USWA argued to "rescind the initial order and dismiss the application of Stelco for access to the protection and process of the CCAA."[8] The union claimed that Stelco could not be classified as a debtor company because it was at no point insolvent. Furthermore, the USWA argued that sworn affidavits from management were misleading in analyzing whether or not the steelmaker was in fact insolvent. In its motion, the union alleged that the company's $1.3 billion pension shortfall was exaggerated only to gain concessions from employees.[9] Moreover, the union's position was that CCAA protection should not be granted when taking into account the fact that the company had $804 million more in assets than debts.[10] Ultimately however, Justice Farley sided with the company saying that even though Stelco was not bankrupt, the "CCAA should not be the last gasp of a dying company; it should be implemented prior to the death throe."[11] This seems somewhat contradictory to his earlier statement that the legislation should be preventative rather than proactive. Moreover, his Honour stated that Stelco had passed the test of insolvency using any and all measures, specifically that of being unable to meet its obligations as they become due; a definition as found in the *Bankruptcy Act* as revised to the *Bankruptcy and Insolvency Act* of 1992.[12] In the final statements of his endorsement, Justice Farley found that "the CCAA test strongly supports the conclusion of insolvency…and the union's motion is therefore dismissed."[13] Interestingly, in this landmark decision, a judge actually granted protection to a company that was not yet bankrupt, a first in Canadian law. The USWA appealed Justice Farley's decision, but on May 5th, 2004, the Ontario Court of Appeal refused to hear the union's attempt to overturn this matter.[14] Undeterred, the union sought leave to appeal the decision to the Supreme Court of Canada, but leave was denied on December 10th, 2004.[15] In its motion against granting

CCAA protection, the union failed to win a single argument, a trend that would become increasingly common for the USWA.

The USWA's second legal battle was heard on September 24th, 2004 and was focused on stopping the extension of Stelco's protection under the CCAA.[16] In this particular motion, the union disputed the fact that the company was ever insolvent, in any event, and therefore should not get an extension because protection should not have been granted in the first place. Furthermore, the USWA proffered that they would rather deal with Stelco pursuant to the conditions of the *Labour Relations Act* (LRA), rather than the CCAA.[17] It was because of this that the union claimed that labour law was being usurped by insolvency law. This motion was again heard by Justice Farley, and again the decision was rendered in favour of the company saying that it was "reasonable to extend the CCAA stay."[18] The result of this action was not surprising when taking into account the fact that the arguments brought forth by the union were similar to those brought in the first motion. It was somewhat surprising that Stelco was successful in seeking an extension when examining the circumstances under which the ruling by Justice Farley was made. According to company financial statements, the company reported profits exceeding $42 million in the second quarter of 2004 (August).[19] Notwithstanding this rather remarkable result, the order to extend CCAA protection was granted, which was quite a significant blow to the union's efforts. Although the USWA once again came out the loser, it would continue to pursue its legal remedies regarding other matters under the Stelco restructuring process.

In November 2004, the union tested the Ontario judicial system yet again. In this instance, the USWA contested a stalking horse bid made by the Deutsche Bank. A stalking horse bid occurs when a company agrees to make a public offer, which then becomes the floor bid for others to better. Should higher offers materialize, Stelco would be obligated to pay a fee to the Deutsche Bank. It is noteworthy that the union was not against a stalking horse proposal in principle, but rather the particulars of the one offered by the Deutsche Bank. The USWA's main concern was that $400 million of the total $900 million offer would stand in priority to the unsecured deficiency in the pension plan.[20] The union noted throughout its motion that pensioners were without a doubt the most vulnerable party within the entire reorganization process.[21] Moreover, the union was also in disagreement regarding the market out clause in the proposal, which would allow the bank to cancel the entire arrangement without any penalty whatsoever. No doubt the union was concerned with the leniency under which the stalking bid proposal was being presented. Justice Farley stated that the $900 million would provide Stelco with "much needed stability… and I therefore approve the Deutsche Bank stalking horse bid."[22] Consequently, the union was defeated in yet another legal battle. Following the ruling, lawyers representing the USWA said that the stalking horse bid was "simply a swap of debt… and puts workers

at further financial risk."[23] Although the union lost again, it would continue to pursue its legal rights.

February 2005 was an interesting month in the Stelco restructuring saga. At this time that the union representing the employees fought the appointment of two directors to Stelco's board, Michael Woollcombe and Roland Keiper, pursuant to s. 111 (1) of the *Canada Business Corporations Act*.[24] The two men were initially named board members on February 18th, 2005, after shareholders voted to approve them.[25] Almost instantly, the USWA brought forth a motion, once again in front of Justice Farley, to have these board members removed. Among the union's main arguments was that employees feared that the Woollcombe and Keiper would maximize shareholder value at the expense of the employees.[26] In addition, the union stated that these particular board members would be a "threat because the appointments provide direct access to sensitive information…to which other stakeholders, including employees, are not privy."[27] In general, the USWA claimed that the two directors would not act in the best interests of all of the stakeholders of the company. In what would be a short lived victory for the union, Justice Farley granted the union's requests to have Woollcombe and Keiper removed by "borrowing the concept of reasonable apprehension of bias."[28] In his reasons, Justice Farley stated, "in exercising my inherent jurisdiction [and that given to me by the CCAA], I have rescinded the appointments of Keiper and Woollcombe."[29]

Woollcombe and Keiper challenged Justice Farley's decision on March 18th, 2005 at the Ontario Court of Appeal. The directors argued that the "reasonable apprehension of bias test…had no application to the removal of directors," and that there should be no "interfering with the exercise by the Board of its business judgment."[30] Furthermore, the appellants claimed that the CCAA does not in fact, have the capacity to remove elected nor appointed directors.[31] In their endorsement, Justices Goudge, Feldman and Blair stated that the court is not entitled to interfere with the appointment of directors.[32] The final statement of the judgment read, "I would grant leave to appeal, allow the appeal and set aside the order of Justice Farley."[33] Thereafter, the union sought a stay of the Court of Appeal decision, but failed. This pattern of losses by the union would continue at yet a higher level of court within the Canadian legal system, as the USWA sought leave to appeal this decision to the Supreme Court of Canada, but was yet again denied.

The situation with Stelco's restructuring not only pitted the company against unionized employees, but also saw a clash between corporate and labour law. The string of court cases shows how corporate law superseded labour law, at least in this particular instance. In Justice Farley's ruling regarding the extension of Stelco's protection under the CCAA, he stated that he would not accept the USWA's claim that these issues should be dealt with using the principles of the LRA rather than those pursuant to the CCAA.[34] Justice Farley

himself agreed that, "labour law is being replaced with insolvency law."[35] This notion worried many unions and its employees because it allowed the judge to effectively render collective agreements unenforceable. Under a new Canadian law, which is similar to Chapter 11 of American bankruptcy law, companies such as Stelco have the right to reopen labour contracts, a right not previously available in Canada.[36] In other areas of labour law, Justice Farley's ruling crippled union rights even further. In August 2005, the Lake Erie local held a strike vote, in which the majority of employees voted in favour of a strike. However, according to one of Justice Farley's numerous rulings, although Section 21 of the LRA would place the union in a legal strike position, it could not be used because of the stay of proceedings provided by the CCAA.[37] Consequently, in this instance, the Ontario Ministry of Labour could only appoint a mediator, which significantly restricted the union's usual scope of power. As if matters could not deteriorate further for the USWA and its members, it was announced that the Ontario Human Rights Commission had no power while Stelco was protected under the CCAA. A letter sent from a representative of the Commission stated that, "we are unable to process any potential human rights complaints against Stelco because of bankruptcy protection."[38] Not only did this result in significant and obvious problems, but also the repercussions of this lack of protection from the Commission led to other difficulties for the union. Because the Commission was abstaining from any action with respect to Stelco and its employees, the union was also unable to obtain conciliation rights under the *Ontario Labour Relations Act* (OLRA) to settle disputes pertaining to expiring collective agreements.[39] Much like the union losses in court, labour law took a back seat to corporate law during the company's restructuring process, which certainly did not benefit the USWA and its members.

The conclusion of the Stelco restructuring process was perhaps completely unpredictable given the preceding events. The company came out of CCAA bankruptcy protection on March 31st, 2006. Stelco's final restructuring plan was quite interesting. Despite the company's impressive list of courtroom victories, it asked for no concessions from employees. In fact, the plan itself proposed "no cuts to current wages or benefits".[40] This was nothing short of amazing for many labour experts especially when compared to similar restructurings both within Canada and in the United States. In the United States, when steelmakers have come out of protection, companies have almost always renegotiated union contracts and asked for concessions from employees.[41] Similarly, in Canada, Algoma Steel went through two restructurings in 1991 and 2001. However, unlike the Stelco situation, Algoma's employees faced significant job losses and wage cuts.[42] The union's ultimate win can be attributed to its solidarity and perseverance. As evident through its numerous legal attempts, the union refused to go down without a fight. Throughout the 18-month process,

Stelco was not bankrupt. In actual fact, the company made over $150 million in profits and the union was fully aware of this.[43] The USWA and its members believed that Stelco sought protection under the CCAA only to extract from workers 20 percent of their wages and pensions.[44] Ultimately, the union and therefore, the employees were victorious, while the company, its shareholders and creditors came out on the short end. This sentiment was echoed by Richard Swan, the lawyer acting for the directors Woollcombe and Keiper, when he agreed that the unions did not win a single matter in court, but nevertheless lost nothing in the actual restructuring.[45]

In conclusion, the 18-month restructuring process was a long and arduous one for all stakeholders. Although the union and its members lost at virtually every turn, they were, in the end, perhaps the only victor in a sea of vanquished. "The union's success in practice far exceeded their success in court."[46] Although the proponents of CCAA legislation would argue that it has built-in protection for all stakeholders; this does not appear to be the case. In fact, the manifest function of the CCAA, as its name implies, is to protect the creditors' arrangements. Whether or not it is successful in this regard is questionable. Indeed, most business law is premised on the protection of the capital markets that make the system run. The employees' protection seems to be grounded in the prowess of its union's negotiation power. The union's protection is enshrined in its collective bargaining position.

In the case of Stelco, the checkered history of animosity between unions and management is a long one. The union may only be able to rely upon the potential threat that it provides to an unyielding and unremitting management. It may further be that this potential threat to wreak havoc is sufficient to cause a new management to yield to union demands. In the final analysis the employee is best protected through the solidarity of his/her union and the collective bargaining process. This too however, is a delicate balance for if the union extracts too much from management, it may threaten the very existence of the corporation. In March 2007, the prediction was that if Stelco did not find a large multi-national suitor, it was only a matter of time before it sought protection yet again. In fact, in August 2007, a mere five months later, Stelco announced that it had agreed to be taken over by the United States Steel Corporation (US Steel). The prediction was accurate and Stelco, as an entity in and of itself, remains no longer.

## NOTES

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