DATE: 20040121
DOCKET: C39457

COURT OF APPEAL FOR ONTARIO

BORINS, MACPHERSON and CRONK JJ.A.

IN THE MATTER OF THE BANKRUPTCY OF THE ROYAL CREST LIFECARE GROUP INC.

CANADIAN UNION OF PUBLIC EMPLOYEES, LOCALS 1712, 3009, 2225-05, 2225-06 AND 2225-12, AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCALS 204 AND 532	)	***Sean Dewart*** **and** ***Michael Kainer*** **for the appellants**
Appellants	)	
- and -	)	
ERNST & YOUNG INC., IN ITS CAPACITY AS TRUSTEE IN BANKRUPTCY FOR THE ROYAL CREST LIFECARE GROUP INC.	)	***John A. MacDonald*** **for the respondent Ernst & Young**
Respondent	)	***Harold P. Rolph*** **for Independent Counsel for the Trustee**
- and -	)	
CONFEDERATION LIFE INSURANCE COMPANY, IN LIQUIDATION	)	***L. Joseph Latham*** **and** ***Joseph K. Morrison*** **for the respondent Confederation Life**
Respondent	)	

- and -	)	
	)	
THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA	)	***Kyla E. M. Mahar*** **for the respondent National Life**
	)	
Respondent	)	
	)	
- and -	)	
	)	
ATTORNEY GENERAL OF ONTARIO	)	***Robin K. Basu*** **for the intervenor**
	)	
Intervenor	)	
	)	
	)	**Heard: September 17, 2003**

On appeal from the order of Justice James M. Farley of the Superior Court of Justice dated January 16, 2003, reported at (2003) 40 C.B.R. (4th) 146.

MACPHERSON J.A.:

A. INTRODUCTION

[1] On January 10, 2003, a large group of related companies collectively known as The Royal Crest Lifecare Group Inc. ("Royal Crest"), which operated five nursing homes, six retirement homes and six mixed care (nursing and retirement) homes in southern Ontario, was petitioned into bankruptcy by several banks after it defaulted under its loan agreements with the banks. Ernst & Young Inc. ("Ernst & Young") was appointed as trustee of the estate of the bankrupt.

[2] On the same day, and before the same judge, Farley J., who made the bankruptcy order, the trustee and the unions representing many of the employees of the bankrupt company brought duelling motions.

[3] The trustee sought an order that it not be bound by the collective agreements between Royal Crest and the unions and that it not be deemed to be a successor employer under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A. (the "*LRA*"), and other labour and employment laws.

[4] The unions resisted the trustee's motion. In addition, based on their view that the question of 'successor employer' came within the exclusive jurisdiction of the Ontario

Labour Relations Board (the "OLRB"), the unions made a cross-motion before the bankruptcy judge. In their cross-motion, the unions sought leave, pursuant to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"), to pursue an application before the OLRB seeking the designation of the trustee as a successor employer.

[5] The bankruptcy judge dismissed the trustee's motion. The trustee does not appeal.

[6] The bankruptcy judge also dismissed the unions' cross-motion, but "without prejudice to such a motion being brought back on again with appropriate factual underpinning". The unions appeal.

B. THE FACTS

(1) The parties and the events

[7] Royal Crest operated 17 long-term care facilities in Southern Ontario. These homes provided approximately 2300 beds for patients and residents. Royal Crest employed about 2200 full-time and part-time employees. Canadian Union of Public Employees Locals 1712, 3009, 2225-05, 2225-06 and 2225-12 and Service Employees International Union Locals 204 and 532 (the "unions") represent approximately 1400 of these employees.

[8] Unfortunately, by late 2002 Royal Crest was in serious financial difficulty. It owed its creditors, mostly banks, in excess of $128 million and was in default under its loan agreements.

[9] On October 21, 2002, Royal Crest was granted protection under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*") by order of Crane J. On November 13, 2002, the proceedings under the *CCAA* were terminated and Ernst & Young was appointed as interim receiver pursuant to s. 46 of the *BIA*. The interim receiver immediately engaged the former employees under terms and conditions of employment similar, but not identical, to those provided in the various collective agreements. One of the terms of employment to which the employees had to agree was that they accepted that Ernst & Young was not a successor employer.

[10] On January 10, 2003, Royal Crest was petitioned into bankruptcy. Ernst & Young was appointed as trustee.

(2) The litigation

(a) Before the bankruptcy judge

[11] On January 10, 2003, the trustee and the unions brought their duelling or mirror motions on the question of whether the trustee should be deemed to be a successor employer within the meaning of s. 69 of the *LRA*.

[12] The bankruptcy judge dismissed the trustee's motion. He reviewed considerable case law, much of it conflicting. It seems clear from his reasons that he doubted two of the propositions advanced by the trustee: (1) a trustee in bankruptcy cannot be a successor employer; and (2) collective agreements terminate with bankruptcy. All that the bankruptcy judge was prepared to order, consistent with *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, was:

> This Court orders that the employment of all employees engaged by the Interim Receiver is terminated by virtue of the bankruptcy. The Trustee is hereby authorized to engage any or all of such former employees of the Bankrupt or any other persons.

The trustee does not appeal this component of the bankruptcy judge's order.

[13] The bankruptcy judge also dismissed the unions' cross-motion. Again, the bankruptcy judge conducted a full review of the relevant legislation and case law. He concluded:

> There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E & Y Inc. in its capacity as IR) 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* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.

The unions appeal the bankruptcy judge's decision relating to their cross-motion.

(b) The appeal

[14] The appeal is unusual in an important respect. Most appeals involve the same parties, issues and arguments that were before the trial, application or motion judge. To

some extent, that is true of this appeal. Some of the matters that were before the bankruptcy judge, and which he resolved, are raised again on appeal.

[15] However, significant attention was devoted on the appeal (in facta and in oral argument) to an issue that was invisible, or almost invisible, in the hearing before the bankruptcy judge. The issue is the relationship, in constitutional law terms, between the federal *BIA* and the Ontario *LRA*.

[16] The appellants raised the purported constitutional issue in their factum by framing the first issue of the appeal as:

> (a) Did the learned bankruptcy judge err in effectively finding a conflict between the provisions of the *Bankruptcy and Insolvency Act* and the *Labour Relations Act, 1995*, where none in fact exists?

[17] Rather than ignore the fact that the appellants' argument appeared to be put no higher than the assertion that the bankruptcy judge had made an *implicit* determination of a constitutional issue *raised by no one*, the respondent trustee decided to mount a full-scale attack on the applicability of the successor employer provisions of the *LRA* in a bankruptcy context. The trustee served a Notice of Constitutional Question upon the Attorney General of Canada and the Attorney General of Ontario, pursuant to s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[18] The Attorney General of Ontario intervened in the appeal. He noted that no Notice of Constitutional Question was served in the proceedings before the bankruptcy judge and, consequently, he had no opportunity to participate in those proceedings.

[19] During the appeal hearing, the panel permitted the appellants and the trustee to make their constitutional arguments. However, at the conclusion of these submissions, the panel indicated that it did not need to hear further submissions on this issue, including submissions from the Attorney General who had filed an extensive factum on the purported constitutional issue. The panel essentially agreed with the Attorney General's submissions that: (1) the constitutional issue was not raised before, or addressed or determined by, the bankruptcy judge; and (2) the appeal could, and should, be determined without the necessity of dealing with the constitutional issue.

C. ISSUE

[20] The sole issue on the appeal is whether the bankruptcy judge erred in the exercise of his discretion by refusing to permit the unions to proceed, on January 10, 2003, to the OLRB to have the question of the status of the trustee as successor employer resolved.

D. ANALYSIS

(1) The standard of review

[21] A bankruptcy is a disaster. A company has failed; in many cases it will not survive. Creditors, who provided goods and services in good faith, may lose substantial sums of money. Employees of the bankrupt company instantly lose their jobs.

[22] The bankruptcy judge is thrown into the middle of the disaster. The judge will need to make important decisions that will affect the future of the company, creditors and employees. The qualities of a good bankruptcy judge are therefore expertise, sensitivity and speed.

[23] Appellate courts have long recognized the unique difficulties faced by judges in bankruptcy and *CCAA* proceedings. The result is that appellate courts accord considerable deference to judges' decisions in these contexts: see, for example, *Re Algoma Steel Inc.*, [2001] O.J. No. 1943 (C.A.); *Banque National de Paris (Canada) v. Opiola*, [2001] 6 W.W.R. 95 (Alta. C.A.); and *Ford Credit Canada Ltd. v. Fred Walls & Sons Holdings Ltd.*, [2003] B.C.J. No. 454 (C.A.).

(2) The test under s. 215 of the *BIA*

[24] The *LRA* gives the OLRB exclusive jurisdiction to decide successor employer applications: see ss. 69(12), 114 and 116. However, in bankruptcy proceedings, a party seeking to challenge a decision by a trustee must seek leave from a judge. Section 215 of the *BIA* provides:

> **215.** Except by leave of the court, no action lies against … a trustee with respect to any report made under, or any action taken pursuant to, this Act.

The appellants acknowledge that they require the leave of the court in order to pursue their application to the OLRB.

[25] The case law establishes that the threshold for granting leave under s. 215 of the *BIA* is a low one. In *Society of Composers, Authors and Music Publishers of Canada v. Armitage* (2000), 50 O.R. (3d) 688 at 690 (C.A.) ("*SOCAN*"), Charron J.A. stated:

> [T]he evidence required to support an order under s. 215 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action. However, the evidence does not have to be sufficient to enable the motions judge to make a final

> assessment of the merits of the proposed claim. The sufficiency of the evidence must be measured in the context of the purpose of s. 215 which is to prevent the trustee from having to respond to actions which are frivolous or vexatious or which do not disclose a cause of action….

See also: *Mancini (Bankrupt) et al. v. Falconi et al.* (1993), 61 O.A.C. 332 and *Vanderwoude et al. v. Scott and Pichelli Ltd. et al.* (2001), 143 O.A.C. 195.

(3) Discussion

[26] The appellants contend that the bankruptcy judge made three errors in his reasons relating to their cross-motion: (1) he applied the wrong test for a *BIA* s. 215 application; (2) he determined a matter – whether the trustee was a successor employer – within the exclusive jurisdiction of the OLRB; and (3) he incorrectly found that the various collective agreements were in "suspended animation".

[27] I do not agree that the bankruptcy judge applied the wrong test. The cross-motion was directly related to s. 215 of the *BIA* and the relevant case law was argued before the bankruptcy judge. It is true that the test under s. 215 of the *BIA* establishes a low threshold for granting leave. However, *SOCAN* makes it clear that there must be an evidentiary basis for the proposed cause of action.

[28] The bankruptcy judge clearly turned his mind to this component of the test. In dismissing the cross-motion, he invited the unions to bring a further motion "with appropriate factual underpinning".

[29] It is important to place the appellants' cross-motion in its proper context. Prior to January 10, 2003, there was no live successor employer issue because Ernst & Young, acting as interim receiver, engaged current employees only if they contractually agreed that Ernst & Young was not a successor employer. On January 10, 2003, this picture changed in a major way. When receiving orders were made and Ernst & Young was appointed as trustee of the estate of Royal Crest, the status of the trustee as a potential successor employer emerged as a live issue because the existing employment relation was automatically terminated: see *Re Rizzo & Rizzo Shoes Ltd.*, *supra*. Both the trustee and the unions decided, virtually instantaneously, to resort to their preferred institutions, the court and the OLRB respectively, to resolve the issue.

[30] It is clear that the bankruptcy judge regarded both motions as premature. In my view, this conclusion was amply supported by the chronology of events and the record before the bankruptcy judge.

[31] The trustee has many responsibilities – to the estate it is managing, to creditors and to the court. Where, as here, a trustee in bankruptcy seeks to hire former employees of the bankrupt company, the trustee also has a responsibility to those employees. The trustee's decision to bring a motion on the first day of its trusteeship seeking a declaration that it not be deemed a successor employer "for any purpose whatsoever" was, in the bankruptcy judge's view, premature. Accordingly, he dismissed the motion. The trustee does not appeal this component of his decision.

[32] Equally, the appellants' cross-motion, understandable perhaps because of the trustee's motion, was also, arguably, misconceived. The first day of a bankruptcy is hardly 'business as usual' for anyone, including the employees. The relationship between the trustee and the employees of the bankrupt company cannot be resolved instantly. Care, sensitivity, negotiation and at least some time will be necessary before an appropriate relationship can be set in place. The bankruptcy judge regarded the union's cross-motion as premature as well. Accordingly, he dismissed it, but without foreclosing the possibility that such a motion could succeed once the parties, at a minimum, had explored the establishment of an appropriate employment relationship. Again, I see no basis for interfering with the bankruptcy judge's exercise of discretion in this regard.

[33] I also do not accept the appellants' submission that the bankruptcy judge decided the successor employer issue. He explicitly did not do this. He dismissed the trustee's motion seeking an order that the trustee not be deemed a successor employer and authorized the trustee to engage former employees of the bankrupt company. He also dismissed the unions' cross-motion, but coupled that dismissal with an invitation to bring another motion later with an "appropriate factual underpinning". In my view, these careful combined dispositions establish clearly that the bankruptcy judge did not decide the successor employer issue on its merits. Rather, he regarded resolution of that issue on January 10, 2003 as being premature. Accordingly, in the exercise of his discretion, he left it open.

[34] Finally, I do not agree with the appellants' challenge to the bankruptcy judge's description of the various collective agreements as "not terminated but rather…put into suspended animation".

[35] On January 10, 2003, the first day of the bankruptcy, it strikes me that this description was entirely apt. On that date, it was simply too early to attach formal, and final, legal labels to the relationship between the trustee and the employees. Importantly, the bankruptcy judge explicitly recognized the existence and importance of the collective agreements. Immediately after his description of the collective agreements as contracts put into "suspended animation", he effectively gave some advice to the trustee regarding the importance of the employment relationship established by those agreements:

> 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.

[36] For these reasons, I conclude that the bankruptcy judge did not err, in the exercise of his discretion, by deciding that the appellants' cross-motion seeking leave to make an application on the successor employer issue to the OLRB was premature and, therefore, should be dismissed.

E. DISPOSITION

[37] I would dismiss the appeal with costs fixed at $20,000 inclusive of disbursements and G.S.T.

"J. C. MacPherson J.A."
"I agree E. A. Cronk J.A."

BORINS J.A. (Dissenting):

[38] I have had the advantage of reading the reasons for judgment of my colleague, MacPherson J.A. With respect, I am unable to agree with his conclusion that this appeal should be dismissed.

[39] In my view, this appeal is about the exercise of judicial discretion in the context of an application by two trade unions (the "appellants") pursuant to s. 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") for leave to bring an application before the Ontario Labour Relations Board (the "OLRB") under s. 69(12) of the *Labour Relations Act*, *1995*, S.O. 1995, c.1, Sch. A (the "*LRA*") for a declaration that Ernst & Young, Inc. ("EYI"), the trustee in bankruptcy of The Royal Crest Lifecare Group ("Royal Crest"), is a successor employer. Thus, the issue in this appeal is whether there is any basis on which this court can interfere with the discretion exercised by Farley J. in dismissing the appellants' application under s. 215 of the *BIA*. For the reasons that follow, I have concluded that the bankruptcy judge erred in the exercise of his discretion.

I

[40] At the outset, I find it helpful to repeat what I said about the standard of appellate review of the exercise of judicial discretion in *Wong v. Lee* (2002), 58 O.R. (3d) 398 at 408-409:

> The standard of appellate review of judicial discretion has been considered by the Supreme Court of Canada in a number of cases. In *Reza v. Canada*, [1994] 2 S.C.R. 394 at pp. 404-05, 116 D.L.R. (4th) 61 at p. 68, the Supreme Court held that:
>
> > ...the test for appellate review of the exercise of judicial discretion is whether the judge at first instance has given sufficient weight to all relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77, *per* LaForest J. See also *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.,* [1987] 1 S.C.R. 110, at pp. 154-55.
>
> In *Friends of Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77, LaForest J. stated that in *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561, 96 D.L.R. (3d) 14, the Supreme Court had essentially adopted

the following standard of review articulated by Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston,* [1942] A.C. 130 at p. 138 (H.L.):

> The law as to the reversal by a court of appeal of an order made by the judge below in the exercise of his discretion is well-established, and any difficulty that arises is due only to the application of well-settled principles in an individual case. The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified.

II

[41] It is also helpful to reproduce the legislation that is relevant to this appeal.

Bankruptcy and Insolvency Act

s. 72(1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

s. 215 Except by leave of the court, no action lies 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, this Act.

Labour Relations Act, 1995

s. 69(1) In this section,

"business" includes a part or parts thereof; ("enterprise")

"sells" includes leases, transfers and any other manner of disposition, and "sold" and "sale" have corresponding meanings. ("vend", "vendu", "vente")

(2) Where an employer who is bound by or is a party to a collective agreement with a trade union or council of trade unions sells his, her or its business, the person to whom the business has been sold is, until the Board otherwise declares, bound by the collective agreement as if the person had been a party thereto and, where an employer sells his, her or its business while an application for certification or termination of bargaining rights to which the employer is a party is before the Board, the person to whom the business has been sold is, until the Board otherwise declares, the employer for the purposes of the application as if the person were named as the employer in the application.

s. 69(12) Where, on any application under this section or in any other proceeding before the Board, a question arises as to whether a business has been sold by one employer to another, the Board shall determine the question and its decision is final and conclusive for the purposes of this Act.

s. 114(1) The Board has exclusive jurisdiction to exercise the powers conferred upon it by or under this Act and to determine all questions of fact or law that arise in any matter before it, and the action or decision of the Board thereon is final and conclusive for all purposes, but nevertheless the Board may at any time, if it considers it advisable to do so, reconsider any decision, order, direction, declaration or ruling made by it and vary or revoke any such decision, order, direction, declaration or ruling.

III

[42] Although MacPherson J.A. has reviewed the facts which formed the basis for both the appellants' s. 215 application and the trustee in bankruptcy's application for

declarations that it is not a successor employer under s. 69(12) of the *LRA* and other labour and employment laws, his review does not make reference to a number of facts that, in my view, are relevant to this appeal. Therefore, I propose to outline these additional facts.

[43] When EYI was appointed as interim receiver of the estate of Royal Crest on November 12, 2002, it immediately engaged the former Royal Crest employees on a temporary basis under terms and conditions of employment similar but not identical to those provided by the collective agreements. EYI was authorized to do so by a term of the order that appointed it as interim receiver. Excluded terms were access to a grievance procedure, full recognition of seniority, payment of union dues and contributions to the company pension plan. The former Royal Crest employees are members of the appellant unions which, prior to the bankruptcy, had entered into collective agreements with the Royal Crest companies. At the time of the interim receivership, there were, and remain, several outstanding labour relations issues, such as: outstanding grievances involving employee discipline; outstanding pay equity adjustments; the negotiation of a first time collective agreement; and default in contributions to the pension plan.

[44] On November 13, 2002, EYI delivered a letter to each employee containing an offer of employment and discussing, *inter alia*, the terms of employment. In addition, the letter contained the following information:

> Our appointment as Interim-Receiver is on a temporary basis and for the limited purpose of continuing the operation of the homes and protecting the assets. It is our intent to stabilize the operations of the home by assuming control of the homes and protecting the interests of the stakeholders, including the residents whose health, safety and well being is of central concern. To assist in achieving this objective, we have retained the services of Extendicare (Canada) Inc. to manage and supervise the operations of the homes.
>
> Pursuant to the terms of the Order, your employment by the Companies has been terminated. We would like to engage your services on a temporary basis to assist with the continued operation of the homes, which will assist the Interim-Receiver in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns. The purpose of this letter is to set out the terms under which we are prepared to do so.
>
> . . .

> In making this offer, the Interim-Receiver is acting solely in its capacity as Interim-Receiver and without personal or corporate liability. By accepting this offer you acknowledge that the Interim-Receiver is not a successor employer within the meaning or contemplation of the Ontario *Employment Standards Act, 2000*, the Ontario *Labour Relations Act* or other similar federal or provincial legislation.

[45] On January 10, 2003, EYI was appointed as trustee in bankruptcy of the estate of Royal Crest under the *BIA*. On January 17, 2003, pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"), EYI was appointed as receiver over the assets, property and undertaking of Royal Crest for the purpose of realizing thereon. Although clause 11 of this order expressly precluded the engagement of any or all of Royal Crest's former employees, on January 17, 2003, the trustee delivered a letter to the former employees that contained an offer of employment.

[46] The relevant portions of this letter read as follows:

> As noted previously, the Interim Receiver was appointed on a temporary basis until the appointment of the Trustee, and therefore the role of the Interim Receiver has come to an end effective January 17, 2003. The Trustee will continue to operate the homes in the same manner as the Interim Receiver, and the Trustee has retained the services of Extendicare (Canada) Inc. to manage and supervise the operations of the homes.
>
> Your employment with the Interim Receiver has ceased effective January 17, 2003 and the Trustee will immediately re-engage your services on a temporary basis to assist with the continued operation of the homes, on the same terms and conditions as outlined in the Offer of Employment. Your services are required to assist the Trustee in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns. The purpose of this letter is to set out the terms under which we are prepared to do so.
>
> You will be paid the same regular wages or salary that you have been receiving from the Interim Receiver. The Trustee will continue to provide all benefits provided by the Interim Receiver to you. The Trustee, in the same manner as the

> Interim Receiver, is unable to continue to provide benefits provided by the Companies to you prior to the appointment of the Interim Receiver (including, but not limited to, life insurance, disability or pension benefits or RRSP contributions). The Trustee will be making the usual payroll deductions to the appropriate government authority on your behalf.
>
> In making this offer, the Trustee is acting solely in its capacity as Trustee and without personal or corporate liability. By continuing to work in the homes after January 17, 2003 you will be deemed to have accepted this offer, have read and understand fully the terms of this letter and agreed to be bound by its terms. You have also acknowledged that the Trustee is not a successor employer within the meaning or contemplation of the Ontario *ESA*, the Ontario *Labour Relations Act* or similar federal or provincial legislation.

[47] From the foregoing, it is clear that from the outset EYI, in its various capacities, recognized that it was prudent to operate the nursing homes as a going concern for two related reasons: (1) to accommodate the 2300 patients and residents of the homes; and (2) to maximize the potential dividend to be paid to Royal Crest's creditors by selling the nursing homes as a going concern. Moreover, it recognized that the most efficient way to continue to operate the homes was to engage the former employees of Royal Crest. Indeed, this appeared to be of such importance to EYI that in its second letter to the employees it wrote: "Your services are required to assist the Trustee in fulfilling its mandate to determine the best way to ensure the future of the homes as going concerns".

[48] When the appellants' motion was before the court, it was clear that the operation of the homes was continuing in the same manner as it had before Royal Crest was granted protection under the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C.36 (the "CCAA") on October 21, 2002, and throughout the two month period of the interim receivership. It appeared that this operation would continue in the same manner until the trustee in bankruptcy was able to sell the nursing home business as a going concern. Thus, when the appellants' s. 215 motion was before the court, approximately 2200 employees were continuing the operation of the nursing homes for approximately 2300 patients and residents, and would continue to do so subsequent to EYI's appointment as trustee in bankruptcy and receiver until EYI was able to obtain a purchaser willing to acquire the nursing homes as a going concern.

[49] From the letters it wrote to the former employees of Royal Crest, it is clear that EYI did not wish to be declared a successor employer under s. 69(12) pf the *LRA*. It is

evident from EYI's application for an order declaring that the trustee in bankruptcy is not a successor employer under the *LRA*, the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, the *Employment Standards Act, 2000*, S.O. 2000, c. 41, the *Workplace Safety and Insurance Act*, S.O. 1997, c. 16, Sch. A, the *Pay Equity Act*, R.S.O. 1990, c. P.7, the *Human Rights Code*, R.S.O. 1990, c. H.19, the *Pension Benefits Act*, R.S.O. 1990, c. P.8 and the *Pension Benefits Standards Act, 1985*, R.S.C. 1985, c. 32 (2nd Supp.) or any other legislation or common law governing labour relations, that EYI recognized that in the administration of an estate under the *BIA*, a trustee in bankruptcy is required to do so in conformity with provincial legislation governing employees and employee rights.

IV

[50] The test that applies in considering an application under s. 215 of the *BIA* for leave to bring proceedings against a trustee has received considerable judicial attention. As MacPherson J.A. points out, the case law establishes that the threshold for granting leave is a low one. However, in applying the test it is necessary to consider that s. 215 is part of the machinery of the *BIA* which is designed to ensure that the purposes of the Act can be carried out properly without the undue intervention of other proceedings. As such, the purpose of s. 215 is to protect the trustee against frivolous and vexatious proceedings, or proceedings that have no factual basis.

[51] This court considered s. 186 of the former *Bankruptcy Act,* the predecessor of s. 215, in *Mancini (Bankrupt) et al. v. Falconi et al.* (1993), 61 O.A.C. 332. After reviewing a number of authorities, in para. 7 Osborne J.A. set out the factors to be considered on a s. 215 application:

> The following principles can be taken from the decided cases:
>
> 1. Leave to sue a trustee should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
>
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted: see *Peat Marwick Ltd. v. Thorne Riddell, supra.*

> 3. The court is not required to make a final assessment of the merits of the claim before granting leave: see *Re Lufro Ltée; Leblond v. Tremblay* (1985), 54 C.B.R. (N.S.) 199 (Que. C.A.).

[52] In para. 12 Osborne J.A. stated that the court is required to consider the evidence filed in support of the application in the context of the proposed proceeding when adjudicating a s. 215 leave application. He continued: "The issue is not whether the evidence on the [s. 215] motion discloses the existence of a cause of action against the trustee, but rather whether the evidence provides the required support for *the* cause of action sought to be asserted [against the trustee]" [emphasis in original].

[53] Osborne J.A. commented further on what factors the evidence must establish and the sufficiency of the evidence in paras. 16 - 17:

> In my opinion, the motions court judge was correct in reaching the conclusion he did on this issue. *On a continuum of evidence ranging from no evidence to evidence which is conclusive, the evidence required to support an order under s. 186 must be sufficient to establish that there is a factual basis for the proposed claim and that the proposed claim discloses a cause of action.*
>
> The sufficiency of the evidence must be measured in the context of the purpose of s. 186 which, as stated earlier, is to prevent the trustee from having to respond to actions which are frivolous or vexatious or from claims which do not disclose a cause of action. As I have previously noted, the evidence on a motion under s. 186 does not have to be sufficient to enable the motions court judge to make a final assessment of the merits of the claim sought to be made, but it must be sufficient to address the issues that I have identified, having in mind the objectives of s. 186 [emphasis added].

V

[54] The bankruptcy judge's reasons for rejecting the appellants' s. 215 application are reported as *Royal Crest Lifecare Group Inc. (Re)*, [2003] O.J. No. 756. Early in his reasons, in para. 6, the bankruptcy judge identified "the contentious issue or battlefield [to be] whether the trustee in bankruptcy can become a successor employer [pursuant to s. 69 of the *LRA*] if the trustee hires employees to do the work previously engaged in by

employees pre-bankruptcy". After reviewing the positions of the parties, the bankruptcy judge considered the trustee's submission that collective agreements terminate upon an employer's bankruptcy. He appears to have accepted the reasoning of the Nova Scotia Court of Appeal in *Saan Stores Ltd. v. Nova Scotia (Labour Relations Board)* (1999), 172 D.L.R. (4th) 134 that although bankruptcy terminates the employment relationship between a bankrupt employer and its employees, a collective agreement is "not rendered inoperative" by reason of an employer's bankruptcy.

[55] In paras. 24 - 26 the bankruptcy judge discussed the statutory mandate of a trustee in bankruptcy. In my opinion, as this discussion is relevant to his ultimate decision to dismiss the appellants' application, it is helpful to reproduce it in its entirety:

> 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 to partially satisfy their claims, the circumstance of operating the business (if the assets are the business and undertaking) *is merely ancillary and incidental to that function of realizing upon the assets*. Coupled with the rather "new-found" objective and thrust of the BIA since the 1992 amendments with the significant social and economic policy with particular positive impact for employees and the communities in which these employees live to have businesses, if possible and practicable, sold as a going concern (such being the usual way in which to maximize value as well), *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 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 realizor of the assets or is it acting qua employer in essence.* Where the business cannot be conveniently mothballed (e.g. a steel mill where the blast furnaces must be kept active or otherwise the furnaces would "solidify" or, as here, where the residents cannot be easily transferred both physically and as well with concern for their emotional disruption), it seems that the trustee may be "forced" to operate the business during the period of marketing through sale. The maintenance of going concern goodwill will also be an important factor in determining whether it is reasonable to continue some or all of the operations, even if it were not a

physical problem to shut down operations. *If the trustee did not operate the business where that was physically necessary or to maximize value of realization, then the trustee would be acting contrary to the principles of the BIA and in so acting would be derelict in its duties and obligations under that federal insolvency statute.*

It seems to me that where a trustee is operating the business as incidental to the trustee disposing of it and realizing on the assets and there is no question or issue raised that it is pursuing a marketing and ultimately sale/disposition program *in a reasonable and bona fide way with due dispatch, then the question of employment of personnel is only incidental to its function of realizing on the assets (and protecting stakeholder interests in going concern preservation).*

I certainly agree with the observations of Spence J. in *588871* at p. 33:

> PMTI also contended that this motion involves an important policy question. If, in circumstances such as those in the present case, a trustee in bankruptcy who is given authority to carry on the business is to be exposed to the risk of being considered a successor employer and the attendant liabilities of the status, *no trustee would ever undertake to carry on that business and that could thwart the proper operation of the BIA*. I think this concern may properly be taken into account.

I do not regard this as an "in terrorem" argument as so characterized by CUPE's counsel. Spence J. went on to state at p. 33:

> With respect to the request for leave, I think a delicate balancing of the relevant considerations is required. The [OLRB] clearly has jurisdiction under the OLRA to make a determination that there has been a sale of a business and that PMTI is a successor employer. The considerations which have been raised here concerning the apparent

> inconsistencies between a positive determination to that effect and bankruptcy principles and the order of December 14, 1994 could presumably be considered in those proceedings to the extent germane and in any other proceedings that may be taken in this matter. *The courts should ordinarily defer to the [OLRB] on a matter clearly within its statutory jurisdiction. On the other hand, if a decision were taken by the [OLRB] against the trustee, it would involve the inconsistencies mentioned above. It would be incompatible with the termination of the collective agreement as a result of the bankruptcy and the limited role of a trustee in bankruptcy in carrying on a business. It seems to me that such matters are properly to be addressed by this court on this application for leave under the BIA and not to be deferred for decision to a tribunal which is not charged with responsibility in respect of the bankruptcy law.* The stay of proceedings imposed by s. 215 of the BIA is one part of the machinery of the Act which functions to ensure that the purposes of the Act can be carried out properly without the undue intervention of other proceedings. The stay imposed under s. 215 has a proper effect in this case, for the reasons mentioned above. Accordingly, the request for leave nunc pro tunc should not be granted [emphasis added].

[56] In paras. 29 - 30, the bankruptcy judge then gave what I understand to be his reasons for dismissing the appellants' application:

> *There has been no allegation, let alone evidence, that the Trustee here (even if one were to consider E&Y Inc. in its capacity as IR) 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 realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities.*

> In the meantime it appears to me that the collective agreement is not terminated but rather is put into suspended animation, to be revived if, as, and when a purchaser with a personal economic interest in the operation of the business acquires the business [emphasis added].

[57] Read as a whole, as I read his reasons, the bankruptcy judge dismissed the appellants' application for leave to commence proceedings before the OLRB for a declaration that EYI is a successor employer under s. 69(12) of the *LRA* because he was of the view that if the application before the Board were to succeed, a declaration that the trustee in bankruptcy is a successor employer would interfere with the mandate of a trustee, saddle the trustee "with (heavy) personal liabilities", would discourage trustees from carrying on a business as a going concern and would be incompatible with the termination of a collective agreement consequent to the bankruptcy of an employer. As a result, the bankruptcy judge agreed with the opinion of Spence J. in *Re 588871 Ontario Ltd.* (1995), 33 C.B.R. (3d) 28 (Ont. Gen. Div.), that although the OLRB has exclusive jurisdiction over the determination of "whether a business has been sold by one employer to another", the court should not defer to the jurisdiction of the Board where a successor employer application is made in the context of a bankruptcy; instead, this determination should be made by a court "charged" with responsibilities in respect to bankruptcy law.

[58] As his ultimate reason for dismissing the application for leave, the bankruptcy judge stated that the trustee in bankruptcy had not "been dragging its feet" and there was no suggestion that it would do so. However, the dismissal of the application was without prejudice to it being reinstated "with appropriate factual underpinning... to demonstrate that the trustee has slipped over from functioning *qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities".

VI

[59] In analyzing the bankruptcy judge's reasons for dismissing the appellants' application under s. 215 of the *BIA* it is helpful to recall that the authorities are uniform that the test to be applied by the court sets a low threshold.

[60] With respect to the first element of the test established in *Mancini*, in my view, there can be no question that the proposed application to the OLRB is neither frivolous nor vexatious. At the time of the application, EYI was operating the same business that was operated by Royal Crest and had hired the same employees that had been employed by Royal Crest to perform the same function that they had performed previously. EYI had done so as interim receiver for two months prior to its appointment as trustee in bankruptcy and receiver. Moreover, neither EYI nor the bankruptcy judge suggested that the proposed application to the OLRB was frivolous or vexatious.

[61] Under the second element of the test, the proposed application to the OLRB must disclose "a cause of action" against the trustee in bankruptcy. This is to be decided on the basis of evidence that is sufficient to establish a factual basis for the proposed OLRB application. In the context of these proceedings, the "cause of action" against the trustee consists of the assertion that in the operation of the Royal Crest's business as a going concern, the trustee had become a successor employer within the meaning of s. 69(12) of the *LRA*. It would appear that the trustee's operation of Royal Crest's business as a going concern for the benefit of its creditors and the patients and residents mitigates in favour of a finding by the OLRB that the trustee is a successor employer. There is little doubt that the evidence of the history of EYI's operation of the business since its appointment as interim receiver on November 12, 2002, provided a factual basis for the appellants' application as contemplated by the second element of the *Mancini* test.

[62] In considering whether the proposed application to the OLRB discloses a cause of action against the trustee in bankruptcy it is important to recognize that s. 69(2) of the *LRA* provides that a union continues to be the bargaining agent for the employees of the person, or entity, to whom a business is sold *until the OLRB otherwise declares*. As pointed out by George W. Adams in his text, *Canadian Labour Law*, 2nd ed. looseleaf (Aurora:Canada Law Book Inc., 2003) at 8.10:

> ...collective bargaining rights flow through changes in ownership so long as there is a continuation of the same business. It is the business - and not the employer – to which collective bargaining rights have become attached...The successor provisions [of the *LRA*] have a two-fold purpose: to protect the trade union's right to bargain and to protect any subsisting collective agreement from termination upon sale.

[63] Moreover, as Mr. Adams points out at 8.190, labour boards have adopted a broad and liberal interpretation of successorship provisions, including what constitutes the sale of a business under s. 69(1) of the *LRA*, in accordance with the remedial nature of the legislation. After reviewing the case law, Mr. Adams concludes:

> For the most part, the Ontario and British Columbia courts accept and recognize that the substantial similarity of work performed subsequent to a transaction to that performed prior to a transaction normally creates a strong inference there has been a transfer of a business. The criteria relevant to such an interpretation are: (a) substantially the same jobs being performed at the same time and places; (b) in respect of substantially the same goods and services; and (c) for substantially the same customers or patrons.

[64] In determining whether the appellants' proposed application to the OLRB disclosed a "cause of action" against the trustee in bankruptcy, it was necessary that the bankruptcy judge consider not only the purpose of the successorship provision in s. 69 of the *LRA*, but the criteria relevant to the determination of whether the trustee could be found by the OLRB to be a successor employer. The bankruptcy judge failed to do so. Based on the above criteria, there is an abundance of evidence in the record to establish a factual basis for the proposed successorship application to the OLRB.

[65] As for the third element of the *Mancini* test, the bankruptcy judge must not make a final assessment of the proposed claim or application. Although the bankruptcy judge did not in fact do so in this case, in my view he came perilously close to doing so. He followed the decision of Spence J. in *Re 588871 Ontario Ltd.* that the question of successorship should be effectively decided on a motion to the bankruptcy court under s. 215 of the *BIA*, contrary to s. 114(1) of the *LRA* that provides that the OLRB has exclusive jurisdiction to exercise the powers conferred upon it by the *LRA*.

[66] In addition, I have difficulty in understanding what the bankruptcy judge meant in para. 24 by his characterization of the trustee's role as "acting *qua* realizor of the assets or *qua* employer in essence". In my view, if it is the opinion of the trustee in bankruptcy that the maximum dividend for creditors can be achieved by selling the bankrupt's business as a going concern it stands to reason that the trustee can do so only if it has the necessary employees to operate the business. The bankruptcy judge reasoned that the trustee's employment of personnel was "only incidental" to its function of realizing on the assets and "protecting stakeholder interests in going concern preservation". With respect, I do not agree with this reasoning. The operation of the business as a going concern and the re-hiring of Royal Crest's employees to accomplish this are neither incidental nor ancillary to the trustee's role to maximize and maintain the value of the assets for the benefit of the creditors. In my view, they are central to that role. Without the former Royal Crest employees, the trustee could not operate the nursing home business as a going concern. The employees have statutory rights which an employer must respect. The unions were attempting to protect and enforce their members' rights in seeking leave to apply to the OLRB to obtain a successorship ruling.

[67] The bankruptcy judge returned to this theme in para. 29, where he gave his ultimate reason for dismissing the appellants' s. 215 application. He was of the view that the length of time during which the trustee in bankruptcy had operated the business was pertinent to whether or not the trustee might be declared a successor employer under s. 69 of the *OLRA*. Thus, he permitted the appellants to make a further application should the trustee "[slip] over from functioning *qua* realizor of assets in a diligent fashion to the role of being predominantly an employer in its activities".

[68] Moreover, in my view the bankruptcy judge minimized the fact that this case involves the rights of employees and workers and that under the legislative scheme of the *LRA* the only recourse available to the unions in protecting the rights of their members was to bring the appropriate proceeding before the OLRB. In addition, the bankruptcy judge appears to have placed the trustee's role under the *BIA* ahead of the employees' statutory rights conferred by the statutes that I have listed in para. 12. In doing so, it seems that he overlooked the proposition that except in the case of "operational conflict", valid provincial law of general application continues to apply in a bankruptcy context: *Husky Oil Operations Ltd. v. M.N.R.*, [1995] 3 S.C.R. 453. This is also recognized in s. 72(1) of the *BIA* where Parliament has explicitly called for the application of provincial law in administering a bankrupt estate, except to the extent that it is inconsistent with the terms of the *BIA*.

[69] In making these observations I am mindful that the court did not require submissions from the parties on the constitutional issue raised by the respondent trustee and I do not intend, by my observations, to be taken as determining that issue. The purpose of my observations is to indicate that as the rights of employees and workers are central to the unions' s. 215 application, it is my view that early recourse to the OLRB was an appropriate factor for the bankruptcy judge to take into account in applying the *Mancini* test.

[70] In summary, the bankruptcy judge placed too much emphasis on the bankruptcy environment and gave insufficient weight to the essential character of the issues that the unions sought to advance before the OLRB on behalf of their members. While the important role performed by bankruptcy trustees is deserving of protection, the rights of labour unions to pursue legitimate issues on behalf of their members must also be respected. As, in my view, the bankruptcy judge did not give sufficient weight to these considerations and to the test to be applied on an application under s. 215 of the *BIA* as explained in *Mancini*, he erred in the exercise of his discretion.

[71] In my opinion, the unions' s. 215 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 EYI as trustee in bankruptcy. It was brought in response to EYI's application for a declaration that it be deemed not to be a successor employer. EYI was no stranger to the business operation of Royal Crest. For two months prior to its appointment as trustee, as interim receiver it had operated the nursing home business with Royal Crest's former employees. As trustee, it was intending to operate the business with the same 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.

[72] Indeed, nothing changed in the operation of the business on January 10, 2003 other than the status of EYI, which continued that operation as trustee in bankruptcy rather than as interim receiver. The trustee was of the opinion that the record supported its application, which acknowledged the existence of the collective agreements, for a declaration that it was not a successor employer. The unions relied on the same record. Moreover, had the bankruptcy judge granted the unions' application for leave to bring a s. 69(12) application before the OLRB, the record could only have improved in the time that it would have taken for the application to be heard by the OLRB.

VII

[73] For all of the foregoing reasons, it is my view that there was a wrongful exercise of discretion by the bankruptcy judge as a result of his failure to apply the test in *Mancini* and to give sufficient weight to the relevant considerations as argued before us by the appellants. Therefore, this is a proper case for this court to interfere with the bankruptcy judge's exercise of discretion.

[74] In the result, I would allow the appeal with costs, set aside the order of the bankruptcy judge and substitute an order granting leave to the appellants pursuant to s. 215 of the *BIA* to bring an application to the OLRB under s. 69(12) of the *LRA*.

RELEASED: January 21, 2004 ("SB")

"S. Borins J.A."