

Date of Release: March 14, 1994

NO. A933801

VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:)

)

LARRY BELL, ROBERT CHASE and)

PETER DOLEZAL)

)

APPELLANTS)

(DEFENDANTS))

)

AND:)

)

DIRECTOR OF EMPLOYMENT)

STANDARDS)

)

RESPONDENT)

(PLAINTIFF))

K.L. Johnston

For the Respondent (Plaintiff)

D.I. Knowles and

C.W. Caverly

For the Bank of Montreal

R.P.W. Slomen

For the Appellants (Defendants)

G.K. Randall, Q.C.

For United Mine Workers of America

F.G. Potts

For Greenhills Workers Association

R.K. McDonald

For Office and Technical Employees Union

Heard at Vancouver:

February 28, 1994

Bank of Montreal (the "Bank") applies to be joined as an intervenor in this appeal by former directors of the now bankrupt Westar Mining Ltd. ("Westar") from certificates of the respondent (the "Director") issued September 7, 1993 which obligated the appellants to pay sums in excess of \$6 million under the *Employment Standards Act*, R.S.B.C. 1979, c. 10 (the "Act").

The Bank's application, originally filed on January 7, 1994, is a response by the Bank to an application filed by the Director on December 22, 1993 for an order dismissing this appeal by consent (the issues herein having been settled as between the appellants and the Director) and approving payment

out of a \$4 million trust fund and interest accrued thereon, which has been held by the Director since late August of 1993. The consent of the appellants to that disposition of their appeal is evidenced by a letter from their solicitor dated December 17, 1993 which agrees to the filing of a consent order dismissing their appeal as abandoned.

While the details of the settlement reached have not been fully disclosed, the Director has revealed that no portion of the trust fund will be returned either to Westar (through its Trustee in Bankruptcy) or to its former directors (the appellants). That fund was established as a prelude to proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "C.C.A.A.") involving Westar, and was intended to indemnify Westar's directors (including the appellants) for any liability they might incur under, *inter alia*, the Act in respect of the payment of wages.

The trust fund has generated considerable litigation since it was first established in early May of 1992 and sanctioned by this court under the C.C.A.A. on May 14, 1992 (with some modification at the behest of the Bank on June 10, 1992). On September 3, 1993, in the C.C.A.A. proceedings involving Westar (No. A921964, Vancouver Registry), in response to an application by Greenhills Workers Association for preference against the fund for its members who worked during the C.C.A.A. stay period prior to Westar's bankruptcy on August 31, 1992, I stated:

Whatever the equities of the situation, I have decided that the applicants are not entitled to an order for preference against the Fund; that the issue of the liability of the former directors must be determined under the procedures set out in the *Employment Standards Act*.

Within days thereafter, the Director issued Certificates under the Act to the Trustee in Bankruptcy of Westar (the impact of which was lessened by the limits on preferred claims for wages under bankruptcy legislation) and to the appellants, whose resignation as the last remaining directors of Westar on August 24, 1992, triggered the collapse of the C.C.A.A. proceedings and Westar's bankruptcy one week later.

The opposition to that application for preference against the trust fund by Greenhills Workers Association was led by the appellants with the support of the Bank.

The arguments addressed ... on behalf of the former directors of Westar and for the Bank of Montreal (which permitted the establishment of the Fund out of monies subject to its charge on current assets) have convinced me that it is the directors who are protected. Only incidentally, to the extent that liability on the part of those directors under S. 19 of the *Employment Standards Act* is established, will the employees benefit.

Liability of the directors is a condition precedent to entitlement against the Fund.

The Notice of Appeal was filed well within the time limited for an appeal (by way of *trial de novo*) from a certificate of the Director. One of the grounds of appeal, as outlined for me on the hearing of the Greenhills Workers Association application for preference, was that the former directors of Westar (the appellants) are not liable for vacation pay which became payable to Westar employees on their termination after the appellants had resigned. The certificates issued by the Director in respect of the appellants include a "significant component" of such vacation pay.

POSITION OF THE BANK

The settlement between the Director and the appellants means that

unless the Bank is allowed to intervene in this appeal, that question will not be determined in these proceedings. The Bank claims an interest in any surplus of the trust fund beyond the amount required to pay the proper liability of the appellants under the Act (by virtue of the security which it held from Westar). It submits that abandonment of this appeal will effectively defeat any interest it may have, whether or not the certificates against the appellants are correct.

The only decided cases referred to are not directly on point. One establishes the right of a director to appeal from a certificate issued under the Act to his company, based on the director's potential personal liability under S. 19 thereof. (See, **Kelly, Douglas v. Director of Employment Standards** (1991), 36 C.C.E.L. 296 (B.C.S.C.) at p. 307). The other, a recent decision of mine, extends the right of appeal under the Act to an employee seeking to challenge the amount of a certificate in the employee's favour. (See, **Mehta v. Director of Employment Standards** (1993), 84 B.C.L.R. (2d) 125).

However, the **Kelly, Douglas** case was decided on the basis that the director there had a "real and substantial interest" in the appeal. **Mehta** turned on the view that it would be "unfair to deny a right of appeal to one of the two parties to the adjudicative process before the Director, unless the Act expressly so provided".

The Bank submits that it has a real and substantial interest in this appeal because of its alleged right to any surplus in the trust fund, and that it would be unfair to deny it the right to contest the correctness of the certificates in issue on this appeal now that the appellants have chosen not to do so. The trust fund was created by Westar (with the Bank's money, the Bank says) and not by the appellants. The Bank argues that it should not be open to the appellants to agree to a distribution of the trust fund if their liability does not, in fact, extend to the full amount of the fund.

Once the Bank is a party to this appeal, it can ascertain whether the proposed distribution by the Director is directed only to "proper liabilities" of the appellants under the Act. The Bank strongly objects to the suggestion that the settlement has created such a liability. It maintains that such an agreement cannot alter the liability of the directors under the Act to the prejudice of another "interested party".

POSITION OF THE DIRECTOR

Since there will be no residue in the trust fund after the distribution which the Director proposes to make following settlement with the appellants (total claims for wages and holiday pay exceed the balance of the fund, including accrued interest, even after preferred dividends from the bankrupt estate of Westar have been credited), the Director submits that there is nothing to which the Bank's security can attach.

In the alternative, the Director argues that once the direct parties to this appeal have settled, there is no proceeding left in which the Bank can intervene. The Act prohibits an appeal after 45 days from the issue of a certificate thereunder. It is now too late for the Bank to do so. While the appellants utilized the appeal procedure, and the Bank might have assumed conduct of this appeal on some terms in order to protect its alleged interest, that opportunity was lost when the parties concluded a settlement.

The Director emphasizes the overall scheme of the Act and the importance of the summary protection it provides to employees. Surely, the Director submits, a creditor of an employer does not have standing to appeal from a certificate on the mere prospect that a reduction in the amount thereof might result in making monies available to creditors generally. Under the Act, the Director's lien for wages even has priority over security interests. How

could a creditor of even that class have a sufficient "interest" to support an appeal?

The Bank can never be called upon to make good any shortfall (like the director in **Kelly, Douglas** who was allowed to appeal) nor is it an employee for whose benefit the certificate was issued (as was the situation in **Mehta**). A mere "interest in any surplus" the Director submits, is not sufficient to give the Bank standing to intervene, particularly at this stage of the proceedings.

The Director is supported in his position by the appellants and by the three unions represented on this hearing. It is the members of those unions who will benefit from the proposed distribution of the trust fund which the Bank seeks to block (at least in part) until the issue of whether the appellants are liable for vacation pay which became payable after their resignation is resolved.

DISCUSSION

Despite the risk of opening up the appeal process under S. 14 of the Act even more than has resulted from the decisions of this court in **Kelly, Douglas** and **Mehta**, I confess to considerable sympathy with the arguments advanced by the Bank. It seems to me that a secured creditor, faced with the Director's priority under S. 15, under a certificate which is based on some error, must have standing to cause that certificate to be reviewed on appeal under the Act.

The Director's argument that there is no proceeding left in which the Bank can intervene is destroyed by his own application for an order approving his proposed distribution and dismissing this appeal as abandoned.

For the Director to submit that there is no residue in the trust fund to which the Bank's security can attack, is to beg the question of whether or not the Bank is entitled to attack the certificates in question so as to create just such a residue.

Admittedly, the Bank is not exposed to liability as a consequence of the certificates issued here (and thus not in a position analagous to that of a director in **Kelly, Douglas**), but a distinction between the Bank and the employee in **Mehta** (assuming the Bank's charge does attach to any residue) is much harder to discern.

The one troubling aspect of the Bank's application, relying as it does on the court's inherent jurisdiction, is the Bank's delay in bringing this application. Not only had the 45 day appeal period expired when this application was filed exactly four months after the certificates in question were issued, the parties to the appeal had reached a compromise which would have allowed the Director, at long last, to distribute the trust fund to claimants.

The fund was established in early May of 1992, and the wage and holiday pay claims against it all crystallized by August 31st of that year. Eighteen months have now elapsed without any benefit to the employees whom the fund was (indirectly at least) intended to protect.

On the other hand, until the settlement was reached between the direct parties to this appeal, the Bank had every reason to expect that the issue which it wishes to raise as intervenor would be actively litigated by the appellants. The Bank supported arguments of the appellants that their liability under S. 19 of the Act must be determined as a condition precedent to the entitlement of employees against the fund on the application which resulted in my judgment of September 3, 1993 (referred to earlier).

That legitimate expectation on the part of the Bank is a justification for its delay. Until it learned of the settlement, and the fact

that no residue would be left against which its security might attach, the Bank cannot be criticized for its failure to intervene. Indeed, the court would not likely have allowed it to do so while the appellants were actively litigating the very issue with which the Bank was concerned. Once it learned to the contrary, the Bank moved promptly.

While I accept, in general terms, the Director's argument based on the scheme of the Act and the summary protection which it provides to employees, and would not entertain an application of this nature from an ordinary creditor of the employer, there are special and unusual circumstances here which dictate granting the Bank the relief which it seeks.

One further observation is appropriate. I have assumed for the above discussion that the Bank is a secured creditor against the trust fund, subject only to the terms of the trust on which it is held by the Director. That fact is not conceded, has not been established, and is by no means clear. Once that fund, with the consent of the Bank, came under the direction of the court (at least to some extent), and later reached the hands of the Director, any rights of the Bank to those monies under its security may have ended. Should that prove to be the case, the Director may have a prior right under the Act to attach any surplus or residue under its certificate issued to Westar even if the appellants are not, as the Bank seeks to argue, liable for the full amount. Those issues remain very much alive.

JUDGMENT

1. The application of the Bank to intervene in this appeal is allowed.
2. The application of the Director to dismiss this appeal as abandoned is adjourned generally.
3. There will be leave to renew the application for approval of a distribution by the Director, based upon the Bank's position that a partial distribution is likely appropriate.
4. To the extent that the members of any of the three unions represented on this hearing have a continuing interest in the issue which the Bank will raise, those unions will also be granted status in this appeal.
5. The costs of this application will be in the cause.

"B.D. MACDONALD J."

Vancouver, B.C.

March 14, 1994