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CCAA: IS THE TERMINATION OF EMPLOYMENT CONTRACTS SUBJECT TO SECTION 32 CCAA?

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CONTEXT

On August 30, 2011, Hart Stores Inc./Magasins Hart inc. (hereinafter "Hart"), filed for protection under the *Companies' Creditors Arrangement Act* (hereinafter the "CCAA"). As part of the restructuring, Hart closed down 32 out of 92 points of sale and laid off 640 out of 1,600 employees. Included in the lay off are five executives, who are the subject of this bulletin.

The executives were all laid off by means of a simple notice of termination. On February 20, 2012, the five executives filed a motion contesting the termination of their employment contracts. Their application was based primarily on section 32 CCAA, which permits a debtor to resiliate certain agreements. This resiliation can be contested, and the court will then issue a ruling. Section 32(4) of the CCAA states as follows:

Disclaimer or resiliation of agreements

32. (...)

Factors to be considered

- (4) In deciding whether to make the order, the court is to consider, among other things,
- whether the monitor approved the proposed disclaimer or resiliation;
 - whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
 - whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

In this case, the monitor and the debtor contested the executives' application, arguing that their employment contracts were subject to the general rules of contract law and, therefore, could be terminated without giving any cause or notice. More specifically, the monitor and debtor submitted that section 32 CCAA only applies to agreements for services which could not otherwise be terminated unilaterally. They also argued that the initial order issued in the case expressly authorized Hart to lay off its personnel, according to its needs and the circumstances.

Before considering the issue raised in this case, Justice Mongeon referred to articles 2085 *et seq.* C.C.Q. and, more specifically, article 2091 C.C.Q., which reads as follows:

2091. Either party to a contract with an indeterminate term may terminate it by giving notice of termination to the other party.

The notice of termination shall be given in reasonable time, taking into account, in particular, the nature of the employment, the special circumstances in which it is carried on and the duration of the period of work.

QUESTION IN DISPUTE

Justice Mongeon worded the contentious issue in the following terms:

[Translation] Do the terms of section 32 CCAA apply on the termination of an employment contract where the contract can be terminated upon simple notice pursuant to article 2091 C.C.Q.?

ANALYSIS

At the outset, Justice Mongeon indicated that section 32 CCAA is "[translation] an exceptional and exorbitant provision of contract law" which must, therefore, be interpreted narrowly. Thus, this section only exists to allow a debtor having filed for protection under the CCAA to resiliate *service agreements* which it is otherwise unable to terminate.

Requiring the debtor to follow the procedure under section 32 CCAA for the termination of an open-ended employment contract would seem unreasonable given the unwieldiness of this mechanism. Indeed, this provision requires the approval of the monitor or the court, followed by an elaborate process for contesting the application before the court, with the termination taking effect only 30 days after this process is complete. In the specific context of Hart's restructuring, to conduct the layoffs of nearly 600 employees using the procedure required by section 32 CCAA would have been completely unmanageable.

According to Justice Mongeon, this seems even more inconceivable when one considers that the ordinary rules of the general law permit the resiliation of a contract upon simple notice, without having to give any reasons or good and sufficient cause, subject to damages.

Moreover, Justice Mongeon noted that the great majority of initial orders rendered in Quebec under the CCAA authorize debtors to terminate employment contracts without establishing any specific procedure for doing so. At the same time, for the resiliation of service agreements, such initial orders generally contain directives similar to those set out in section 32 CCAA.

Justice Mongeon acknowledged that section 32(9) CCAA expressly refers to specific agreements which are not subject to the terms of section 32 CCAA, and does not mention individual employment contracts. However, he was of the opinion that this in no way changes the fact that Quebec civil law allows the termination of certain agreements without the need for any intervention by the courts, and that such agreements in no way require the mechanism provided for in section 32 CCAA.

The expression "any agreement" contained in section 32 CCAA only extends to agreements which cannot be resiliated otherwise than through the mechanism contained in this section. Indeed, the legislator did not use the expression "all agreements", which would have meant that no agreement could escape the

procedure under section 32 CCAA. This provision simply reflects the will of the legislator to offer debtors an exceptional means outside the general law for terminating obligations of which they would otherwise be unable to divest themselves. To interpret this provision in the manner submitted by the applicants would significantly encumber, if not paralyze, the process for laying off employees of debtors already struggling with financial difficulties.

CONCLUSION

Thus, contrary to what one might otherwise understand after a first reading of section 32 CCAA, this provision does not apply to "all agreements". Indeed, even outside the exceptions specifically referred to therein, this section does not apply to individual open-ended employment contracts. The judge properly understood the scope of section 32 CCAA and the legislator's intention to offer debtors in financial difficulty an effective means for resiliating agreements in order to promote their restructuring. The purpose of section 32 CCAA is certainly not to encumber the process for reducing the debtor's workforce, which is frequently a difficult, but essential, component of corporate restructuring.

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