

## Difference in Canadian law compared with U.S.

Can't bust unions through bankruptcy

**NATIONAL POST**

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As Barack Obama, the U.S. President, eyes a “quick and surgical” bankruptcy solution for ailing automakers, don't expect the wound in Canada to be as clean or neat should car companies here seek creditor protection under the Companies' Creditors Arrangement Act (CCAA).

That's because of a difference in Canadian labour and insolvency law. In the United States, insolvencies can be used to end high-cost union contracts if certain procedures are followed. In Canada, however, such contracts survive insolvency and extend to successor employers who emerge from the ashes of a defunct company. A union collective bargaining agreement can also apply to an unsuspecting company that simply buys equipment, even if it's moved to a different location and possibly even if it's used for different purposes.

So, in the United States, you can impose a “cram down” and use the threat of bankruptcy to force unions to accept a deal. Here, that's a tactic that doesn't fly and the presence of a collective bargaining agreement (CBA) makes it more complex when restructuring a company.

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*“A CBA is always an issue because of the effect it has on costs of running the business and any restrictions there may be on running the business. Typically, parties have to address that in cutting their deal.” - Alison Narod*

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“What it does is it skews the negotiating process among the various stakeholders and more heavily favours the employees,” said Rick Orzy, an insolvency lawyer at Bennett Jones in Toronto. “It makes it harder to get a deal. The odds of a complete breakdown and liquidation get stronger.”

Ken Rosenberg, a lawyer at Paliare Roland in Toronto, who has represented unions in restructurings, said, “The position of unions -- and certainly no court has ever said otherwise -- is that union bargaining rights and the right to apply their contract to a successor employer [are] not affected by a bankruptcy or insolvency.”

“You can't bust unions by going through a bankruptcy,” he said.

While judges have broad powers under insolvency law in Canada, even they can't set aside union contracts to facilitate a restructuring.



Farris Partner, Alison Narod features in the April 11 edition of The National Post

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That's because in Canada, the federal and provincial governments have constitutional powers over certain areas. The federal government is responsible for bankruptcy law, but the provinces are responsible for property and civil rights, which include employment.

Provincial labour boards are responsible for ruling on labour-law issues, such as whether a union contract applies to a successor employer. An insolvency court judge overseeing a restructuring has no jurisdiction to determine that matter. A Labour Board must hear it.

Mr. Rosenberg said that "courts, whether in an insolvency context or otherwise, have no right to terminate, amend, abrogate or selectively apply collective agreements."

Boards, he said, "are very factual about these things. Sometimes unions lose and sometimes they win."

About three of every 10 workers in Canada belong to a union, according to 2007 federal government figures. As the economy slows and more companies seek insolvency protection, expect successor rights to play a bigger role in the success or failure of restructurings.

Kevin McElcheran, an insolvency lawyer at McCarthy Tétrault, said it already "comes up a lot."

"In a non-unionized workplace you have got a lot more ability to re-set the terms of employment." He said the only way to bring the union to the table is to "demonstrate a crisis in the business and that jobs could be eliminated." Even then, there's no guarantee the union will negotiate.

Mr. McElcheran cited the restructuring of the steelmaker Stelco, in which the "union wouldn't come to the table. That turned out to be a brilliant strategy." Steel prices rebounded and the company became viable again without the union making major concessions.

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*- Alison Narod*

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Mr. Orzy, however, said that without the steel-price rally there was "a really good chance it would have shut down." Stelco was later sold to U.S. Steel and now sits idle following a temporary closure. But its pension obligations, the original reason that Stelco filed for CCAA protection and which were never dealt with, are being met by the U.S. company.

He said the successor-rights issue affects the dynamic of negotiations in restructurings and has the greatest impact on the smaller union plants, those with 100 to 300 jobs. "Nobody will buy them," he said. "Everybody is going to have to take the same pain if it's going to work."

Those plants will be mothballed and the equipment shipped outside the reach of the union's CBA, such as overseas or to a lower-cost jurisdiction. (Labour laws apply only to the province they cover.)

Mr. Orzy, who often advises lenders in insolvencies, said the successor rights also affect valuations and financing. He tells lenders that if they lend to a company with a union and the company defaults and they have to collect on the loan by selling the company or its assets, the buyer is then subject to the CBA and the liabilities that go with it. "The price you are going to get as a result of the law is less."

Mr. Rosenberg, however, said unions are prepared to negotiate when jobs are on the line. “The position of organized labour is that they’re in the business of saving and maintaining jobs and creating new employment. They’re not in the business of closing factories. They are a willing participant in the restructuring of business and usually have the greatest stake in the survival of that business.”

Alison Narod, an employment lawyer at Farris, Vaughan, Wills & Murphy in Vancouver, said a CBA “is always an issue because of the effect it has on costs of running the business and any restrictions there may be on running the business. Typically, parties have to address that in cutting their deal.”

“Some unions are practical and will be more concerned about preserving jobs if they are convinced that the employer is in a tight financial spot,” she added.

Jean-Yves Fortin, a restructuring lawyer at the Montreal law firm BCF, said given the economic climate, “people compromise more out of necessity. These are very trying times and everybody has to compromise. There will be more of a will than there was before.”

#### *About Alison Narod*

*Alison Narod practises in the areas of labour and employment law, human rights, workers compensation and administrative law. Her experience includes appearing as counsel before the courts at all levels, as well as before collective agreement arbitrators, and labour relations and human rights tribunals. Additionally, she has adjudicated collective agreement arbitration disputes, employment standards complaints, workers compensation appeals and professional disciplinary complaints.*

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