Federal Court  Cour fédérale

Date: 20101005

Docket: T-418-10

Citation: 2010 FC 988

Ottawa, Ontario, October 5, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

COMMUNICATIONS, ENERGY & PAPERWORKERS' UNION OF CANADA

Applicant

and

GLOBAL TELEVISION,
a DIVISION OF
CANWEST TELEVISION
LIMITED PARTNERSHIP

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to section 18.1 of the *Federal Courts Act*, R.S.C., 1985, c. F-7 for judicial review of the decision of a delegate of the Minister of Labour (Minister), dated February 19, 2010 (Decision), which granted the Respondent's request for appointment of a conciliation officer pursuant to section 72 of the *Canada Labour Code*, R.S.C. 1985, c. L-2, (Code).

BACKGROUND

[2] The Applicant, the Communications, Energy & Paperworkers' Union of Canada (Union or Applicant) is the certified bargaining agent for certain unionized employees of the Respondent employer, Global Television (Global or Respondent).

[3] These parties have been before the Canadian Industrial Relations Board (CIRB) on numerous occasions. During proceedings before the CIRB, the CIRB established three regional bargaining units for the Respondent: British Columbia; Alberta; and Eastern Canada. The parties have a number of proceedings before the CIRB that are ongoing.

[4] On January 14, 2008, Global served notice to the Union of its desire to enter into collective bargaining with respect to the Eastern Canada Bargaining Unit. It re-served on January 11, 2010. The Union contends that the notice to bargain was premature and improper and, for this reason, refused to bargain collectively with Global.

[5] In June 2008, Global filed a complaint with the CIRB alleging that the Union had refused to bargain. The Union filed a cross-complaint in which it alleged that no legal duty to bargain existed in this instance. Both of these complaints are outstanding before the CIRB.

[6] In October 2009, Global filed for protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (CCAA). As a result of this filing, the Ontario Superior Court issued an

order (Stay Order) staying proceedings against or in respect of Global until November 5, 2009. The period of stay was subsequently extended until March 31, 2010, and then June 15, 2010 (Stay Extension Order.) At the time of the hearing the stay had been extended to September 8, 2010.

[7] On February 4, 2010, Global wrote to the Minister seeking the appointment of a conciliation officer, pursuant to section 72 of the Code. The Union wrote to the Minister, opposing the appointment of a conciliation officer. The conciliation officer was appointed on February 19, 2010.

DECISION UNDER REVIEW

[8] The Minister granted Global's request to appoint a conciliation officer to address the dispute between Global and the Union after having reportedly received "a notice of six disputes pursuant to Section 71 of the *Canada Labour Code*."

[9] The Minister noted that, pursuant to paragraph 73(2)(*b*) of the Code, the conciliation officer's mandate is subject to extension by the Minister up to 60 days from the date of the appointment, and by mutual consent of the parties thereafter.

ISSUES

[10] The issues on this application can be summarized as follows:

1. Whether the Decision to appoint a conciliation officer is prohibited by the Stat Extension Order made by the Ontario Superior Court of Justice;
2. In the alternative, whether the Decision is invalid because it was made in relation to "multiple disputes" that did not exist;
3. In the further alternative, whether the Decision to appoint a conciliation officer was improper because it was:
    a. an unreasonable exercise of the Minister's discretion; or
    b. conditional on the existence of a duty to bargain and the service of a proper notice to bargain neither of which existed.

STATUTORY PROVISIONS

[11] The following provisions of the Code are applicable in these proceedings:

48. Where the Board has certified a bargaining agent for a bargaining unit and no collective agreement binding on the employees in the bargaining unit is in force, the bargaining agent may, by notice, require the employer of those employees, or the employer may, by notice, require the bargaining agent to commence collective bargaining for the purpose of entering into a collective agreement.	**48.** Une fois accrédité pour une unité de négociation et en l'absence de convention collective applicable aux employés de cette unité, l'agent négociateur de celle-ci — ou l'employeur — peut transmettre à l'autre partie un avis de négociation collective en vue de la conclusion d'une convention collective.
49. (1) Either party to a collective agreement may,	**49.** (1) Toute partie à une convention collective peut, au

within the period of four months immediately preceding the date of expiration of the term of the collective agreement, or within the longer period that may be provided for in the collective agreement, by notice, require the other party to the collective agreement to commence collective bargaining for the purpose of renewing or revising the collective agreement or entering into a new collective agreement.

cours des quatre mois précédant sa date d'expiration, ou au cours de la période plus longue fixée par la convention, transmettre à l'autre partie un avis de négociation collective en vue du renouvellement ou de la révision de la convention ou de la conclusion d'une nouvelle convention.

(2) Where a collective agreement provides that any provision of the collective agreement may be revised during the term of the collective agreement, a party entitled to do so by the collective agreement may, by notice, require the other party to commence collective bargaining for the purpose of revising the provision.

(2) Si la convention collective prévoit la possibilité de révision d'une de ses dispositions avant l'échéance, toute partie qui y est habilitée à ce faire peut transmettre à l'autre partie un avis de négociation collective en vue de la révision en cause.

50. Where notice to bargain collectively has been given under this Part,

50. Une fois l'avis de négociation collective donné aux termes de la présente partie, les règles suivantes s'appliquent :

(*a*) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

a) sans retard et, en tout état de cause, dans les vingt jours qui suivent ou dans le délai éventuellement convenu par les parties, l'agent négociateur et l'employeur doivent :

(i) meet and commence, or

(i) se rencontrer et entamer des

cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement; and

(*b*) the employer shall not alter the rates of pay or any other term or condition of employment or any right or privilege of the employees in the bargaining unit, or any right or privilege of the bargaining agent, until the requirements of paragraphs 89(1)(*a*) to (*d*) have been met, unless the bargaining agent consents to the alteration of such a term or condition, or such a right or privilege.

…

71. (1) Where a notice to commence collective bargaining has been given under this Part, either party may inform the Minister, by sending a notice of dispute, of their failure to enter into, renew or revise a collective agreement where

(*a*) collective bargaining has not commenced within the time fixed by this Part; or

(*b*) the parties have bargained collectively for the purpose of entering into or revising a collective agreement but have

négociations collectives de bonne foi ou charger leurs représentants autorisés de le faire en leur nom;

(ii) faire tout effort raisonnable pour conclure une convention collective;

b) tant que les conditions des alinéas 89(1)*a*) à *d*) n’ont pas été remplies, l’employeur ne peut modifier ni les taux des salaires ni les autres conditions d’emploi, ni les droits ou avantages des employés de l’unité de négociation ou de l’agent négociateur, sans le consentement de ce dernier.

…

71. (1) Une fois donné l’avis de négociation collective, l’une des parties peut faire savoir au ministre, en lui faisant parvenir un avis de différend, qu’elles n’ont pas réussi à conclure, renouveler ou réviser une convention collective dans l’un ou l’autre des cas suivants :

a) les négociations collectives n’ont pas commencé dans le délai fixé par la présente partie;

b) les parties ont négocié collectivement mais n’ont pu parvenir à un accord.

been unable to reach agreement.

(2) The party who sends a notice of dispute under subsection (1) must immediately send a copy of it to the other party.

(2) La partie qui envoie l'avis de différend en fait parvenir sans délai une copie à l'autre partie.

72. (1) The Minister shall, not later than fifteen days after receiving a notice in writing under section 71,

72. (1) Dans les quinze jours suivant la réception de l'avis qui lui a été donné aux termes de l'article 71, le ministre prend l'une ou l'autre des mesures suivantes :

(*a*) appoint a conciliation officer;

a) nomination d'un conciliateur;

(*b*) appoint a conciliation commissioner;

b) nomination d'un commissaire-conciliateur;

(*c*) establish a conciliation board in accordance with section 82; or

c) constitution d'une commission de conciliation en application de l'article 82;

(*d*) notify the parties, in writing, of the Minister's intention not to appoint a conciliation officer or conciliation commissioner or establish a conciliation board.

d) notification aux parties, par écrit, de son intention de ne procéder à aucune des mesures visées aux alinéas *a*), *b*) et *c*).

(2) Where the Minister has not received a notice under section 71 but considers it advisable to take any action set out in paragraph (1)(*a*), (*b*) or (*c*) for the purpose of assisting the parties in entering into or revising a collective agreement, the Minister may take such action.

(2) Même sans avoir reçu l'avis prévu à l'article 71, le ministre peut prendre toute mesure visée aux alinéas (1)*a*), *b*) ou *c*) s'il l'estime opportun pour aider les parties à conclure ou à réviser une convention collective.

(3) The Minister may only

(3) Le ministre ne peut

take one action referred to in this section with respect to any particular dispute involving a bargaining unit.	prendre qu'une des mesures que prévoit le présent article à l'égard d'un différend visant une unité de négociation collective.

[12] The following provisions of the CCAA are also applicable in these proceedings:

Stays, etc. — initial application	**Suspension : demande initiale**
11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,	**11.02** (1) Dans le cas d'une demande initiale visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période maximale de trente jours qu'il estime nécessaire :
(*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*;	*a*) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime de la *Loi sur la faillite et l'insolvabilité* ou de la *Loi sur les liquidations et les restructurations*;
(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and	*b*) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;
(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.	*c*) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.
Stays, etc. — other than initial application	**Suspension : demandes autres qu'initiales**

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(2) Dans le cas d'une demande, autre qu'une demande initiale, visant une compagnie débitrice, le tribunal peut, par ordonnance, aux conditions qu'il peut imposer et pour la période qu'il estime nécessaire :

(*a*) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(*a*);

a) suspendre, jusqu'à nouvel ordre, toute procédure qui est ou pourrait être intentée contre la compagnie sous le régime des lois mentionnées à l'alinéa (1)*a*);

(*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

b) surseoir, jusqu'à nouvel ordre, à la continuation de toute action, poursuite ou autre procédure contre la compagnie;

(*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

c) interdire, jusqu'à nouvel ordre, l'introduction de toute action, poursuite ou autre procédure contre la compagnie.

Burden of proof on application

Preuve

(3) The court shall not make the order unless

(3) Le tribunal ne rend l'ordonnance que si :

(*a*) the applicant satisfies the court that circumstances exist that make the order appropriate; and

a) le demandeur le convainc que la mesure est opportune;

(*b*) in the case of an order under subsection (2), the applicant also satisfies the court that the

b) dans le cas de l'ordonnance visée au paragraphe (2), le demandeur le convainc en outre

applicant has acted, and is acting, in good faith and with due diligence.	qu'il a agi et continue d'agir de bonne foi et avec la diligence voulue.
Restriction	**Restriction**
(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.	(4) L'ordonnance qui prévoit l'une des mesures visées aux paragraphes (1) ou (2) ne peut être rendue qu'en vertu du présent article.

STANDARD OF REVIEW

[13] There is considerable disagreement between the parties regarding the standard of review that is applicable to the issues raised in this application. Global is of the view that all of the issues raised should be reviewed using the reasonableness standard. The Applicant, on the other hand, feels that, at least with regard to the jurisdictional issue, the standard should be correctness.

[14] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[15] In my view, the issue of whether the Stay Order prohibited the appointment of a conciliation officer is not a true jurisdictional issue. The Applicant concedes that there is nothing in the CCAA

that prevents the appointment of a conciliator, and there is no issue concerning the Minister's power to appoint a conciliator under the Code. This looks to me like a simple question of whether the terms of the Order forbid the appointment of a conciliation officer. In other words, it is a matter of construction interpreting the Order and, as such, it attracts a standard of reasonableness**.**

[16] In *Kissoon v. Canada (Minister of Human Development Resources)*, 2004 FC 24, 245 F.T.R. 152, aff'd at 329 N.R. 232 (F.C.A.), Justice Snider stated, at paragraphs 4 and 5 that the appropriate standard for a review of the exercise of discretion by a minister is patent unreasonableness:

> 4 The decision of the Minister under section 66(4) of the CPP is discretionary. Although the Minister "shall" take remedial action that it considers appropriate, this duty arises only once the Minister is satisfied that erroneous advice has been given or that an administrative error has occurred. The requirement to take remedial action is conditional and, therefore, does not fetter the Minister's discretion to first satisfy herself that an error has been made (*Maple Lodge Farms Ltd. v. Canada*, [1982] 2 S.C.R. 2). Given the discretionary nature of the Minister's decision, the standard of review is patent unreasonableness (*Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 at 24). This means that the Minister's decision should only be set aside if it is "made arbitrarily or in bad faith, it cannot be supported on the evidence, or the Minister failed to consider the appropriate factors" (*Maple Lodge Farms*, supra).
>
> 5. A finding of erroneous advice or administrative error is one of fact, which also signals to a court that deference should be accorded to the Minister. Evidence should not be reweighed nor findings tampered with merely because this Court would have come to a different conclusion. (*Suresh*, supra at 24-25).

This was cited favourably by Justice Mandamin in *Manning v. Canada (Human resource Development)*, 2009 FC 523, [2009] F.C.J. No. 646.

[17] In *Eli Lilly and Co. v. Apotex Inc.*, 2007 FC 929, [2007] F.C.J. No. 1223, Justice Harrington considered the standard of review to be applied when a prothonotary was interpreting her own orders. Justice Harrington stated:

> 7. The three orders under appeal are discretionary in nature. No matter what her [Prothonotary Aronovitch's] decisions might have been, they were not vital to the outcome of the cases. Therefore, her discretion should not be disturbed, and I should not exercise discretion *de novo*, unless the orders are clearly wrong in the sense that the exercise of discretion was based upon a wrong principle or upon a misapprehension of the facts (*Merck & Co. v. Apotex Inc.*, [2004] 2 F.C.R. 459, 30 C.P.R. (4th) 40 (F.C.A.)). Eli Lilly submits that the Prothonotary misconstrued her earlier orders and thereby rendered her decisions based upon a wrong principle.
>
> […]
>
> 15. Whether two orders are to be read together, or if one supersedes the other is a matter of construction. As stated by the Manitoba Court of Appeal in *Allen v. Manitoba* (*Judicial Council)*, [1993] 3 W.W.R. 749, 83 Man. R. (2d) 136, "...a court order should ordinarily be construed in the context of the application for it." There is nothing in the record to indicate that the Prothonotary got it wrong.
>
> 16. Although I am basing myself on a standard of correctness, that is to say that I can show her no deference on a question of law, it may well be that the interpretation of scheduling orders should not be disturbed unless unreasonable. In *Voice Construction Ltd. v. Construction & General Workers' Union Local 92*, [2004] 1 S.C.R. 609, the Supreme Court held that the standard of judicial review in assessing an arbitrator's interpretation of a collective agreement was reasonableness simpliciter. Although an appeal to this Court from an order of a Prothonotary is of a different legal order, the fact remains that it is the case manager who knows what is going on in a case, and why. If lengthy reasons had to be given for each and every order, the process would grind to a halt.
>
> […]
>
> 21. I am not prepared to say she erred in law in interpreting her two orders. Indeed, I do not think a strict literal textual approach can be taken in an analysis of scheduling orders. The June 2005 order

> was her 56th order or direction, her March 2006 order her 72nd, and her order under appeal her 103rd, to be found on the 245th page of the Summary of Recorded Entries.
>
> 22. I think the question to be asked is whether her interpretation was reasonable and in the interest of justice. I do not think that this is such a strict matter of law that the Prothonotary's order must be reviewed on a standard of correctness. See *Voice Construction*, above.

[18] Whether the Decision and appointment are invalid because they were made based on erroneous findings of fact is reviewable, in my view, on a standard of reasonableness. See *Dunsmuir*, above, at paragraph 53. The Decision may be overturned if it is found to be based on an erroneous finding of fact made in a perverse or capricious manner.

[19] Similarly, reasonableness is, in my view, the appropriate standard with which to review whether the Decision and appointment are invalid due to the lack of a duty to bargain and the provision of proper notice, the existence of which are issues of fact. See *Dunsmuir*, above.

[20] The judicial review of the Minister's exercise of discretion deserves deference. See *Dunsmuir*, above, at paragraph 53. As such, reasonableness is the appropriate standard.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process and [also] with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir* at paragraph 47. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it

falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

ARGUMENTS

The Applicant

Decision and appointment contrary to the Order

[22] The Union submits that the initial Order made by the Ontario Superior Court of Justice included a stay of proceedings, which stayed "all rights and remedies of any … governmental body or agency, or any other entities … " The period of stay was extended to March 31, 2010 by the Stay Extension Order. Consequently, the February 19th Decision and appointment of the conciliation officer occurred during the stay period and were contrary to the Order and the Stay Extension Order. Similar circumstances existed in *Guelph Products Collins & Aikman*, [2009] O.L.R.D. No. 850, [2009] OLRB Rep. March/April 243 (*Guelph*), in which the Ontario Labour Relations Board determined that the order prohibited the appointment of a conciliation officer.

[23] The Union submits that the language of the order in *Guelph* is substantially the same as the Order in the present case. The Minister's Decision and subsequent appointment of the conciliation officer pursuant to section 72 of the Code constitute the exercise of a "right" or "remedy." Furthermore, it is a right or remedy that pertains to the employer. The initial Order and the Stay Extension Order prohibit the appointment of a conciliation officer during the stay period. Clearly,

the language of the Order and the similarity with *Guelph*, above, demonstrate that the Minister erred in making her Decision and subsequent appointment.

[24] The Union submits that, if there is any room for interpretation within the language of the Order, the Court ought to take a broad and liberal approach to interpretation. According to *Guelph*, above, at paragraph 18, a "broad interpretation is consistent with the way in which courts have interpreted their own *CCAA* Orders." Moreover, the cautious approach taken in *Guelph* is appropriate because of the public policy purpose served by the CCAA. It is also worth noting that the CIRB itself has determined that its proceedings can be stayed by a CCAA order. See, for example, *Re Air Canada*, [2003] CIRB No. 225, [2003] C.I.R.B.D. No. 17.

[25] The Union further submits that the Minister's Decision and subsequent appointment of the conciliation officer were stayed by virtue of the initial Order, which cannot be "cured" by subsequent consent of the employer. Rather, the appointment of the conciliation officer on February 19, 2010 is either valid or invalid as of that date. Furthermore, the Minister's conduct cannot be cured by the conciliator's decision to proceed with conciliation after receiving consent of the parties.

[26] The Minister's Decision was made without jurisdiction. When it was made, the Minister had no jurisdiction to appoint a conciliator because of the stay provisions in the initial Order. Consequently, the Decision is void *ab initio*. It cannot be cured since it is a legal nullity. As such, the conciliation officer could not re-start a process that was a legal nullity from the outset. Not even the consent of the parties can resuscitate a process that was never lawfully started.

[27] The Minister should have recognized that pursuant to paragraph 16 of the initial Order, she was prevented from appointing a conciliation officer under section 72 of the Code. Because she did not recognize that such an appointment was stayed by the Order, the Decision and appointment are invalid.

Decision and appointment made in relation to "disputes" that did not exist

[28] In the alternative, the Union submits that the Decision and appointment were invalid because they were made in relation to disputes that did not exist.

[29] Global had applied to the Minister for the appointment of a conciliation officer in respect of the Eastern Canada Bargaining Unit. This is the bargaining unit that Global contends it has served with notice to bargain.

[30] At the time of Global's application for appointment of a conciliation officer, six bargaining units had been collapsed to create a single Eastern Canada Bargaining Unit. Regardless, the Minister appointed a conciliator to address the "six disputes." The reference to six bargaining units was inaccurate.

[31] Due to this inaccuracy, the Minister's consideration of whether to appoint a conciliator was flawed because she had in mind six alleged disputes as opposed to the one actual dispute. There cannot be six disputes when only one bargaining unit exists. As a result, the appointment was

improper. While there was a dispute in existence, it was different from the disputes for which the conciliation officer was appointed. Consequently, the appointment was contrary to the Code.

Unreasonable exercise of discretion

[32] The conciliation process started by an appointment under sections 71 and 72 of the Code must be completed prior to the Union being lawfully permitted to strike or the employer being in a lawful position to lockout. The Union submits that, due to the existence of the Stay Order and its subsequent extensions, the appointment made by the Minister may result in a situation where Global may lockout its employees but the Union cannot strike.

[33] A situation where one party to the collective bargaining relationship may initiate a labour dispute while the other is prohibited by a court order from so doing is contrary to the fundamental scheme of the Code. According to the Union, "[t]he *Code* contemplates that the spectre of the initiation of a labour dispute by either party is the motivation that forces the parties to engage in meaningful collective bargaining, or conciliation, toward the goal of a constructive settlement of their dispute." Jurisprudence supports this argument. See, for example, *Re CFRN-TV (A Division of BBS Inc.)*, [1999] CIRB No. 7, [1999] C.I.R.B.D. No. 7, at paragraph 71.

[34] The Union submits that where one party alone has the power to initiate a labour dispute, there is no incentive for that party to engage in meaningful collective bargaining or conciliation. This is especially so where the party is the employer, who may unilaterally alter the terms and

conditions of employment of members of the bargaining unit if it satisfies the relevant provisions of the Code. The Court should prohibit the Minister from exercising her discretion to appoint a conciliation officer because it could lead to this untenable situation.

No duty or proper notice to bargain

[35] The Union argues that not just any notice to bargain triggers the duty to bargain in good faith pursuant to section 50(a) of the Code. Rather, the only proper notice to bargain is a notice authorized under the Code. While notice to bargain could be given under sections 48, 49 and 18.1(4)(*f*) of the Code, none of these provisions are applicable to the facts in this case.

[36] Moreover, under section 71 of the Code, a party may send a notice of dispute to the Minister requesting the appointment of a conciliator only where "notice … has been given under this Part" (emphasis added). The Union submits that this is a jurisdictional prerequisite to the exercise of the Minister's discretion and that it was not met in this instance. As such, the appointment of the conciliation officer pursuant to section 72 of the Code was improper

[37] The Union has no legal obligation at this point to bargain in relation to the Eastern Bargaining Unit. In the words of the Union, "[i]n the absence of a legal obligation to bargain, there can be no valid notice to bargain, no valid application pursuant to Section 71, and thus no valid Appointment pursuant to Section 72."

[38] The conciliation process is a prerequisite to any lawful lockout or strike. The unlawful and invalid appointment of the conciliator has unlawfully moved the parties closer to a labour dispute. The Union submits that the Court must now intervene to ensure that all of the statutory prerequisites are met before such a dispute begins.

Remedy

[39] The Decision and appointment were improper and an unreasonable exercise of the Minister's discretion under these circumstances. The Decision to appoint a conciliator has affected the rights of the Union and moved Global closer to a position where it can claim to lawfully lockout the employees. As a result, the Court should issue a writ of *certiorari* quashing both the Decision and the appointment. The Union also seeks a declaration that the Decision and appointment are invalid, as well as costs of this application.

The Respondent

The Stay

[40] Global submits that when a company seeks protection under the CCAA and a stay order is issued, that company is shielded from actions commenced before and after the order is issued. However, neither the CCAA nor a stay order nor the stay extension order prohibits the protected company from taking action itself. Consequently, in the instant case, neither the Stay Order nor the Stay Extension Order prohibit Global from taking action.

[41] A similar situation occurred in *Re Canwest Global Communications Corp.*, [2009] O.J. No. 5379 in which the court examined sections 11.02(1) and (2) of the CCAA and determined that the legislation prevented only those actions that were against the company seeking protection. As stated by the Respondent, "[w]ith respect to that part of the order dealing with '*proceedings taken or that might be taken in respect of the company*', that part relates only to proceedings under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, neither of which applies in the present case." The result is that the CCAA and the Stay Order and Stay Extension Order will stay, restrain or prohibit action against Global but do not prevent Global from taking action itself.

[42] While the Union relies on *Guelph*, above, and *Re Air Canada*, above, those cases are distinguishable from the case at hand. In those cases, it was the Union that was seeking to appoint a conciliation officer. Neither of these cases considered whether the appointment of a conciliation officer should be stayed where that right or remedy inheres in the protected company, as is the case at hand.

[43] Global contends that it would be absurd to interpret the Stay Order and the Stay Extension Order (or, indeed, any stay under the CCAA) as prohibiting actions taken by the protected company, since such actions may be necessary or beneficial to the company as reorganizes or restructures under the protection of the CCAA. Moreover, such an interpretation would be contrary to the language used by Parliament in drafting section 11 of the CCAA, which considers staying and prohibiting actions against protected companies.

[44] Therefore, Global submits that the Stay Order and the Stay Extension Order do not render the Minister's Decision and appointment void. Regardless, however, there has been agreement between the parties to lift the stay as it pertains to the conciliation process.

Multiple disputes

[45] This alleged "defect" in the appointment does not render the appointment void, as suggested by the Union. It was simply an inadvertent slip on the part of the Minister with regard to the material before her. There is no doubt that the appointment pertained to the Eastern Canada Bargaining Unit and the collective bargaining negotiations that Global was attempting to perform with the Union.

[46] Furthermore, the parties have started the conciliation process, and the Minister's reference to "six disputes" does not change or impact the conciliation process. Global contends that any alleged defect in the notice to appoint should not render the entire process void.

Notice of Dispute

[47] The Minister is required to appoint a conciliation officer once a party has complied with section 71 of the Code. See *Guelph*, above. Global submits that the notice of dispute met the requirements of section 71 of the Code. As a result, the subsequent appointment of a conciliation

officer pursuant to section 72 was appropriate, since the parties had neither met nor started collective bargaining within the time limits required under section 50 of the Code.

[48] Notice to begin collective bargaining was provided to the Union on two occasions: first on January 14, 2008; and again on January 11, 2010. Collective bargaining failed to begin after each notice to bargain was served. Consequently, the notice of dispute provided by Global satisfied section 71(1)(*a*) of the Code.

[49] The notice to bargain was in the prescribed form and was served properly on the Union. Because notice to commence collective bargaining was given, and collective bargaining was not commenced within the timeframe stipulated by the Code, the appointment was appropriate. Indeed, the prerequisites to serving the notice of dispute were met in this instance. It was the Minister's prerogative to appoint a conciliator once she was satisfied that these prerequisites had been met.

[50] If the Minister was required to confirm that the notice to bargain was appropriate, Global submits that the Minister was satisfied that the notice to bargain had been properly served on the Union. The same arguments that the Union has placed before the Court were placed before the Minister: that the appropriate notice to bargain had not been served; that no bargaining should proceed until the Union knew the constituency for whom it was bargaining; and that the application should not proceed while Global was in CCAA proceedings.

[51] In response to the Union's arguments, Global argued that the notice to bargain was neither premature nor improper, that the Eastern Bargaining Unit was mostly set and that the pending matters before the Board did not act as a stay or freeze the collective bargaining relationship.

[52] Despite the arguments of the Union, the Minister made the appointment requested by Global. The Minister's Decision and the subsequent appointment were reasonable based on the facts and arguments before her.

Potential for a Lockout

[53] The Union has argued that the Minister's appointment was unreasonable because it could result in Global being able to lockout following the conciliation process but does not allow the Union to strike without violating the Stay Order and the Stay Extension Order. However, Global contends that the Stay Order and the Stay Extension Order are intended to benefit the company that is seeking to restructure. Global argues that, "[w]hile perhaps draconian, such measures are necessary for a company facing bankruptcy. Moreover, they are specifically contemplated by the CCAA." For instance, *Re Air Canada*, above, recognized that lay-offs that would normally be inconsistent with the relevant collective bargaining agreement may be necessary where a company is facing bankruptcy.

[54] The Union's argument that it is contrary to the fundamental scheme of the Code to permit a lockout but not a strike is flawed for several reasons. First, this argument ignores the reality that

employers are provided with additional protections when stays are granted under the CCAA. Second, the argument ignores the fact that a labour disruption occurs as the result of an impasse in collective bargaining and that the current absence of any progress in negotiations is due to the Union's refusal to bargain. According to Global, "[i]t is the Union avoiding negotiations, not Global." Indeed, Global says that it has provided numerous requests to begin collective bargaining and has sought the assistance of a conciliation officer. Finally, Global notes that the Union may apply to the Ontario Superior Court to lift the stay in accordance with the CCAA in order to allow the Union to exercise its rights pursuant to the Code.

Preconditions Met

[55] Global says that notice to commence collective bargaining was provided to the Union on two separate occasions: first, on January 14, 2008, and second, on January 11, 2010 and that collective bargaining failed to commence on both occasions. The notice to bargain was in prescribed form and was properly served on the Union. This means that the preconditions to serving the notice of dispute under section 71(1) of the Code were met in this case.

ANALYSIS

[56] The Union has advanced four grounds for reviewable error in this case.

Contrary to Stay Extension Order

[57] The Union concedes that there is nothing in the CCAA itself that prevents the Minister from appointing a conciliation officer on the facts of this case. The complaint is that the Minister's Decision is contrary to the Stay Order and the Stay Extension Order made under the CCAA.

[58] The Union's focus is upon paragraphs 15 and 16 of the Stay Order and, in particular, the words in paragraph 16 that suspend rights and remedies during the stay period "in respect of the CMI Entities, the Monitor and/or the CMI CRA … ."

[59] The Union further concedes that the Minister's Decision to appoint a conciliator is not made "against" Global, so that it can be caught by the prohibition in the Stay Order only if it can be characterized as being made "in respect of" Global.

[60] The Union agrees that these words are not specific to Global and that the Order made in this case is standard and fairly typical of stay orders made under CCAA. This includes the term "in respect of."

[61] The purpose and scope of this kind of stay order were extensively reviewed by Justice Pepall of the Ontario Superior Court of Justice in *Re Canwest Global*, above. I find the following portions of Justice Pepall's reasons helpful in this case:

> **27** The stay provisions in the CCAA are discretionary and are extraordinarily broad. Section 11.02 (1) and (2) states:

> 11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,
>
> (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.
>
> (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,
>
> (a) staying until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
>
> (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
>
> (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

28 The underlying purpose of the court's power to stay proceedings has frequently been described in the case law. It is the engine that drives the broad and flexible statutory scheme of the CCAA: *Re Stelco Inc* and the key element of the CCAA process: *Re Canadian Airlines Corp.* The power to grant the stay is to be

> interpreted broadly in order to permit the CCAA to accomplish its legislative purpose. As noted in *Re Lehndorff General Partner Ltd.*, the power to grant a stay extends to effect the position of a company's secured and unsecured creditors as well as other parties who could potentially jeopardize the success of the restructuring plan and the continuance of the company. As stated by Farley J. in that case,
>
> > "It has been held that the intention of the CCAA is to prevent any manoeuvres for positioning among the creditors during the period required to develop a plan and obtain approval of creditors. Such manoeuvres could give an aggressive creditor an advantage to the prejudice of others who are less aggressive and would undermine the company's financial position making it even less likely that the plan will succeed. ... The possibility that one or more creditors may be prejudiced should not affect the court's exercise of its authority to grant a stay of proceedings under the CCAA because this affect is offset by the benefit to all creditors and to the company of facilitating a reorganization. The court's primary concerns under the CCAA must be for the debtor and *all* of the creditors." (Citations omitted)

[62] I think it is clear from this review of section 11.02(1) of the CCAA and the references to the underlying purpose of the Act and the Stay, that the standard Stay Order is intended to prevent other entities from exercising rights and remedies against the company in question but does not prevent the company from taking action on its own behalf except “in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*.”

[63] Because the appointment of a conciliator by the Minister at the request of Global does not involved proceedings “against” Global, and is not a proceeding “in respect of the company under

the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act," I do not think it is prohibited by the terms of the Stay Order or the Stay Extension Order made in this case.

[64] I also do not think that the Minister's Decision involves the exercise of a "right" or "remedy" of a "governmental body or agency, or any other [entity]," either against, or in respect of, Global. The appointment of a conciliator under section 72(1)(*a*) of the Code is triggered by a "notice of dispute" under section 71(1) by either the company or the union. In my view, the Minister's mandatory obligations under section 72(1) do not involve the exercise of a right or remedy by the Minister. It is the company or the union that is given a right or a remedy to seek a conciliation officer under sections 71 and 72 of the Code. As section 72 makes clear in its terms, following receipt of notice under section 71, the Minister must either appoint or establish under (a), (b) and (c), or notify the parties under section 72(1)(*d*) not to appoint or establish. In other words, the Minister is given a discretion as to whether or not she or he appoints a conciliation officer under section 72(1)(*d*), or acts under sections 72(1)(*b*) or (*c*), or gives notice to the parties of an intention not to act under sections 72(1)(*a*), (*b*), or (*c*). Typically, and as occurred in this case, the Minister considers submissions and arguments from both sides before making a decision under section 72. In my view, then, in making a decision under section 72 of the Code the Minister does not exercise a right or a remedy of a governmental body or agency or an entity. The rights and remedies under sections 71 and 72 inhere in the company or the union involved.

[65] Hence, I do not think that the basic purposes of CCAA, as manifested in the Stay Order made in this case, or the terms of the Stay Order itself support the Union's interpretation of how the

Stay Order prohibits Global from giving notice of dispute under section 71 or prohibits the Minister from appointing a conciliation officer under section 72.

[66] The Union has cited *Guelph* and *Re Air Canada*, above, to support its position on this issue. In my view, however, neither case assists the Union. Both cases involve union applications that are obviously "against" the companies involved. In the present case, we are dealing with a company invoking sections 71 and 72 of CCAA. Neither *Guelph* or *Re Air Canada*, which are decisions of the Ontario Labour Relations Board and the Canada Industrial Relations Board respectively, deals with the issue raised by the facts in this case, which involves proceedings undertaken by the company and not the union. Neither case considers whether actions or proceedings undertaken by a company that has secured CCAA protection is the exercise of a right or a remedy undertaken "in respect of" the company.

Six Disputes

[67] The Union says that the Minister's Decision is based upon an erroneous finding of fact that was made in a perverse and capricious manner or without regard for the material before it, and thus contains a reviewable error that requires relief pursuant to 18.1(4)(*d*) of the *Federal Courts Act*.

[68] The erroneous finding of fact, according to the Union, is that, in deciding to appoint a conciliation officer under section 72(1)(*a*) of the Code, the Minister based her Decision upon the existence of the six separate disputes referenced in Mr. Baron's letter of February 19, 2010 and that

the Minister was not aware that the conciliator would be dealing with the dispute between Global and the Union involving the new Eastern Canada Bargaining Unit.

[69] In my view, there is no convincing evidence before me of any such error. The letter of February 19, 2010 is simply notification of the Minister's Decision. It is awkwardly worded. It references six separate disputes but then says that the conciliation officer has been appointed "to deal with the above-cited dispute." The history of this matter reveals that there were six separate bargaining units that were brought together under the Eastern Canada Bargaining Unit. Initially then, there were six separate collective agreements that had to be dealt with and which, in fact, still have to be dealt with because the Eastern Canada Bargaining Unit has yet to conclude a collective agreement with Global. This means that the six separate collective agreements are still in place until a new collective agreement between Global and the Union is concluded. In one sense, then, the dispute is about how to replace the six separate agreements with a new single collective agreement. In its submissions to the Minister of February 11, 2010, the Union itself informed the Minister of what was before the CIRB and argued that the "issues required to be addressed by the Board must be determined. This is especially true with respect to the Eastern Bargaining Unit, where six collective agreements may be combined into one." In other words, the Union itself connects the anticipated Eastern Bargaining Unit collective agreement with the six separate agreements that "may be combined into one."

[70] The fact that this process is referenced as six separate disputes in the letter of February 19, 2010 does not mean that the Minister was erroneously unaware that the original parties to those agreements had become the Eastern Canada Bargaining Unit at the time of the Decision.

[71] It is highly unlikely that the Minister was unaware of the actual situation, given the company's notice of dispute and the submissions made by the parties prior to the appointment of the conciliation officer.

[72] Conciliators are appointed to deal with disputes, and this dispute has a history that originally involved six separate entities that have since been brought under the Eastern Canada Bargaining Unit.

[73] The Union and Global have acted throughout on the assumption that the dispute will now be dealt with by the Eastern Canada Bargaining Unit and Global. So they have not been misled about why Global gave notice of dispute, or what the conciliator will address one of the things the conciliator will be dealing with is the dispute about how six separate collective agreements should be addressed in a single agreement that will apply to the entities that now make up the Eastern Canada Bargaining Unit.

[74] In my view, an awkward approach to referencing in the letter of February 19, 2010 cannot be regarded as evidence that the Minister did not know that she was appointing a conciliator to deal with the continuation of the dispute between Global and the Eastern Canada Bargaining Unit. The

letter certainly could have been formatted better but I do not think it likely, given the actual notice of the dispute and the submissions of the parties, that the Minister was under a misapprehension regarding what the dispute was and the form it had taken at the time of the Decision.

[75] The Union says that the letter shows that the conciliator was appointed to deal with a dispute that no longer exists. In my view, this is not a necessary, or even likely, reading of the Minister's intentions in making the Decision.

[76] Since the Decision was made, the Union gave its consent on or around April 6, 2010 (and knew what it was consenting to) and the parties have been involved in the conciliation process. I can see nothing on the record that would justify quashing the Decision because of what appears to be some inadvertent slip or awkward wording in the letter of February 19, 2010. That letter, in any event, looks to me like notification that a decision has been made to appoint a conciliator rather than an explanation or reasons for the Decision or a recitation of the facts upon which it was based.

Unreasonable Exercise of Discretion

[77] The Union says that the Decision amounts to an unreasonable exercise of the Minister's discretion because, given the existence of the Stay Order, the Stay Extension Order and the subsequent extensions, the appointment of a conciliator could "potentially result in a situation where the Employer is permitted to lock out but the CEP [Union] cannot engage in a strike against it" and that such a situation is "contrary to the fundamental scheme of the *Code*."

[78] The Union is asking the Court to speculate and to assess the reasonableness of the Decision against something that could happen. First, it is not even clear on the evidence before me that the Decision could tip the bargaining balance in favour of Global. Any such conclusion would depend upon a number of factors that may never materialize.

[79] Second, the conciliator was appointed on February 19, 2010. At that time, the first extension of January 21, 2010 was in place, which extended the Stay Order to March 31, 2010. There is no evidence that the Minister had before her notification of subsequent extensions that would run until June 15, 2010 or further.

[80] In addition, the Union has provided no authority to suggest that remedies granted to an employer under CCAA are not available, or should not be granted, in situations where collective bargaining powers may be affected. In paragraph 17 of the *Re Air Canada* case, above, as Global points out, it was recognized that lay-offs inconsistent with the relevant collective bargaining agreement may be necessary when a company is facing bankruptcy.

[81] In the present case, Global applied for the appointment of a conciliator because, in the opinion of Global, the Union refused to bargain. It hardly behooves the Union to argue that the Minister's Decision is unreasonable because it could affect the Union's future powers to bargain effectively if indeed the Union did refuse to bargain in a situation where, in accordance with the Code, the Union was obliged to bargain. In my view, then, this cannot be an independent ground for rendering the Decision unreasonable. It all depends upon whether notice to bargain was given in a

situation where the Code says that bargaining must occur. This brings us to the Union's final ground.

Preconditions Not Met

[82] The Union says that the Decision is in error because the Union had no legal obligation to bargain in this case and, therefore, the prerequisites for the appointment of a conciliation officer did not exist.

[83] Essentially, the argument is that notice to bargain can take place only in accordance with sections 48, 49, or 18.1(4)(*f*) of the Code. The duty to bargain under section 50 of the Code arises only where notice to bargain is given "under this Part." Global has not given notice "under this Part." Section 72 is triggered by section 71 which requires "a notice to commence collective bargaining" to have been given "under this Part."

[84] In determining whether the Minister's Decision is unreasonable on this basis, I think I have to examine the evidence and submissions that were placed before the Minister.

[85] In its submissions of February 11, 2010, the Union argued, in relevant part, that the appropriate notice to bargain had not been served by Global because a party "should not be able to serve notice under section 71 of the Code until the Board has determined the issues required to be determined under section 18.1 [of the Code]." Hence, Global's application for a conciliator was

premature because "the process required by section 18.1 has not been completed." According to the Union:

> It is only after the Board's process is complete that it will be possible for the parties to engage in full, meaningful collective bargaining with respect to the renewal or revision of the collective agreements then applicable to the three bargaining units. That is the process mandated by the Code under section 18.1. The Employer's request to the Minister in these circumstances, is premature. [emphasis in original]

[86] In its letter to the Minister of February 15, 2010, Global replied that its application for a conciliator was not premature because the section 18.1 process "does not preclude collective bargaining":

> The Union also suggests (without any authority for doing so) that somehow a notice under section 71 can not (*sic*) be served until the CIRB has determined all issue outstanding pursuant to a section 18.1 review. Section 71 of the Code is very clear. Where a notice to commence collective bargaining has been given, either party may inform the Minister, by sending a notice of dispute, of their failure to enter into, renew or revise a collective agreement. The only conditions are that collective bargaining has not commenced within the time frame fixed under the Code and the parties have failed to reach an agreement. A notice to bargain has been served and the Union has steadfastly refused to commence collective bargaining. As a result, the pre-conditions to serving a Notice of Dispute have been met and the Minister ought to appoint a conciliator as requested.

[87] Clearly, then, Global's position was that, in order to make a request under section 71 by sending a notice of dispute, it merely had to serve a notice to commence collective bargaining in the prescribed form upon the Union. However, it is clear from the wording of section 71 that the notice to commence collective bargaining has to be "given under this Part." It is not the form of the notice that is at issue in this application; it is whether it was "given under this Part."

[88] Global did not argue before the Minister that it had given notice under section 48 or section 49 of the Code, nor did Global explain to the Minister how the notice to bargain that it had served on the Union had been "given under this Part." Global ignored these words under section 71 and simply asserted that, in order to satisfy the preconditions for giving notice to bargain under section 71 of the Code, all it had to do was serve notice to commence collective bargaining on the Union.

[89] It seems to me that the words "under this Part" must have some meaning; otherwise, a union or a company could simply serve a notice to commence collective bargaining at any time and thus trigger section 72(1) and its possible consequences.

[90] Global has not indicated to the Court how it served notice "under this Part." It has attempted to avoid the issue by saying that the Minister must have considered that some relevant section (perhaps section 48, for example) was applicable and that there is no evidence before me that would allow me to say that the Minister's Decision is unreasonable in this respect. However, that was not the argument put to the Minister by Global. I think I must assume that, in acting under section 72(1)(*a*) to appoint a conciliator, the Minister accepted Global's position that the only prerequisite was service of a notice to bargain collectively in prescribed form.

[91] In any event, I cannot see how sections 48 or 49 can possibly have been applicable to these facts, and it is common ground that the CIRB has yet to authorize that notice can be given under section 18.1(4)(*f*) of the Code.

[92] Pursuant to the Code, a party can give notice to bargain under three provisions only: section 18.1(4)(*f*), section 48 and section 49.

[93] The wording of section 48 seems to assume that the bargaining unit is defined. That is not the case here, where the scope of the Eastern Canada Bargaining Unit remains uncertain. The Union and Global are party to ongoing proceedings before the CIRB that will address the scope of the bargaining unit as well as other, more specific matters. These matters, in the Union's view, are "significant consequential issues," such as the "bargaining units' descriptions and the issue of which positions are included or excluded from those bargaining units." Global has said that the Eastern Canada Bargaining Unit was "set save for two isolated issues." Nevertheless, with those two issues outstanding, the unit is not "set."

[94] Section 49 does not apply for similar reasons.

[95] Section 18.1(4)(*f*) does not apply because, under that provision, the CIRB must authorize a party to give notice to bargain collectively, and the CIRB has given no such authorization.

[96] Global states that "the section 18.1 process does not preclude the possibility of collective bargaining." It elaborates: "Notice to bargain was in prescribed form and was properly served on the Union. This means that the pre-conditions to serving the notice of dispute under section 71(1) of the Code were met in this case."

[97] Although Global gave notice in the prescribed form and properly served such notice on the Union, this does not mean that the pre-conditions were met. Global has not demonstrated that it has given notice "under this Part." There is no authority that supports Global's assertion that it can give notice "under this Part" without relying on section 48, section 49 or section 18.1(4)(*f*).

[98] Consequently, if Global has not given notice "under this Part," then the section 50 duty to bargain is not triggered. In short, the Union has no duty to bargain.

[99] Section 71 also requires that notice to bargain be given "under this Part."

[100] Global states: "Section 71 of the Code is very clear. Where a notice to commence collective bargaining has been given, either party may inform the Minister … of their failure to enter into, renew or revise a collective agreement." I agree with Global; section 71 is very clear. The provision in its entirety says: "Where a notice to commence collective bargaining has been given under this Part, either party may inform the Minister … of their failure to enter into, renew or revise a collective agreement." In my view, Global is deliberately ignoring the underlined phrase.

[101] Finally, if notice is not "given under this Part," then section 72 is not triggered.

[102] It seems unlikely that Global should be able to give notice to bargain before the section 18.1 process is complete. Global cannot bargain effectively with a bargaining unit the very scope of which has yet to be determined. This seems to put the cart before the horse.

[103] The modern rule of statutory interpretation also supports the analysis.

[104] Elmer Driedger at page 87 of Construction of Statutes (2nd ed. 1983) states: "Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context and their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (my emphasis). This approach was adopted by the Supreme Court of Canada in *Re. Rizzo & Rizzo Shoes Ltd*., [1998] 1 S.C.R. 27, [1998] S.C.J. No. 2.

[105] The modern rule is described again in Driedger on the *Construction of Statutes* (3rd ed. 1994), by R. Sullivan, at page 288: "It is presumed that the legislature does not intend to contradict itself or to create inconsistent schemes. Therefore, other things being equal, interpretations that minimize the possibility of conflict or incoherence among different enactments are preferred." The Supreme Court adopted this approach in *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804, [1999] S.C.J. No. 69.

[106] Section 18.1(4)(*f*) allows the Board to authorize a party to a collective agreement to give notice to bargain. Read in its plain meaning, the provision suggests that that party cannot just unilaterally give such notice (contrary to Global's assertions); the party must seek authorization from the Board. Alternatively, the party could give notice under sections 48 or 49. These appear to be the only options. There is no free-floating option under Part I of the Code allowing a party to give notice to bargain as long as it is correct in its form and manner of service.

[107] The Supreme Court of Canada has said that the preamble of Part I of the *Canada Labour Code*, which sets out that Part's purpose, is an expression by Parliament of the value of collective bargaining and constructive dispute resolution in the context of industrial relations. See *Dynamex Canada Inc. v. Mamona*, 2003 FCA 248, [2003] F.C.J. No. 907 at paragraph 30. It is difficult to see how "effective industrial relations" and "constructive collective bargaining practices," which are referenced in the preamble to Part I of the Code, can be achieved when the necessary procedural steps are not followed.

[108] Bearing in mind the Supreme Court's statements—that "words of the Act are to be read in their entire context" and that the legislature does not intend to contradict itself—we may draw the following conclusions:

a. "under this Part" has some meaning and should not be ignored. If Global has not given notice under the three above-noted sections, then it has not given notice "under this Part";

b. that Parliament did not intend to do an "end run" around section 18.1. In other words, if the Board is reviewing the structure of the bargaining unit that is no longer appropriate for collective bargaining, pursuant to section 18.1, a party cannot then give a notice to bargain with that inappropriate unit. This cannot be construed as promoting "effective industrial relations" and "constructive collective bargaining practices" as the preamble of Part I requires.

[109] On this point, then, I think that I must conclude that the Decision was unreasonable because the Minister erred in concluding and accepting Global's argument that all of the prerequisites to satisfying section 71 had been met in this case. There was no evidence before the Minister that Global had given the Union a notice to commence collective bargaining "under this Part." The only evidence was that Global had served the Union with a notice to bargain collectively.

[110] Global argues that the Union has challenged the validity of the notices to bargain before CIRB and that, until CIRB makes a decision on this issue, I must presume the notices to be valid because there is no evidence before me that would allow me to say the notices were invalid.

[111] The issue before me, however, is not whether the notices were valid. I have to decide whether the Minister's Decision was reasonable. As regards compliance with the preconditions of section 71, I think I have to assume that the Minister concluded that notice to bargain collectively had been given "under this Part." As the submissions to the Minister by Global show, there was no evidence of this before the Minister because Global took the position that all it had to do was serve a notice on the Union to bargain collectively. That was the only evidence on point before the Minister:

> The only conditions are that collective bargaining has not commenced within the time frame fixed by the Code and the parties have failed to reach an agreement. A notice to bargain has been served and the Union has steadfastly refused to commence collective bargaining. As a result, the pre-conditions to serving a Notice of Dispute have been met … ."

[112] There was clearly no evidence or argument placed before the Minister that the notice to bargain collectively had been given “under this Part.”

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Minister's Decision to appoint a conciliation officer pursuant to section 72(1)(*a*) of the *Canada Labour Code* is invalid;
2. A writ of *certiorari* shall issue quashing the Decision;
3. The Applicant Union shall have its costs of this application.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

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