COURT FILE NO.: 06-CL-6820
DATE: 2007-07-31

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:	
TEXTRON FINANCIAL CANADA LIMITED Applicant	E. Patrick Shea, for the Applicant Textron Financial Canada Limited
- and -	
BETA LIMITEE/BETA BRANDS LIMITED Respondent	
- and -	
BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 242	Michael Klug - solicitor for the moving party, the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 242
- and -	
MINTZ & PARTNERS LIMITED	Jeffrey J. Simpson - solicitor for Mintz & Partners Limited
- and -	
BREMNER INC.	Ellen Swan – solicitor for Bremner Inc.
	HEARD: March 29, 2007

LEITCH R.S.J.:

[1] The Bakery, Confectionery, Tobacco Workers and Grain Millers International Union, Local 242G ("Local 242") applies pursuant to section 215 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 215 (the "*BIA*") and the January 3, 2007 Order of this Court for an order granting leave to commence or continue certain labour and/or employment law proceedings, described in more detail below, against Beta Brands Limited, Mintz & Partners Limited and other parties.

[2] Textron Financial Canada Limited ("Textron") and Mintz & Parties Limited (the "Receiver") oppose the granting of leave as against the Receiver. There is no opposition to proceedings continuing against Beta Brands Limited ("Beta Brands").

[3] Local 242 represents approximately 250 employees or former employees of Beta Brands. A collective agreement was in place effective from May 8, 2006 to May 7, 2009. The circumstances of the members of Local 242 are sympathetic and compelling. They have not been paid termination pay, severance pay or vacation pay since December 29, 2006. There is no issue that these payments are obligations of Beta Brands and presumably were not made because it was insolvent. I recognize that the value of this pay is significant, especially for employees with a long record of service with Beta Brands.

[4] Local 242 takes the position on this application that the Receiver is also liable for these payments. In addition, Local 242 asserts that the Receiver is bound by the collective agreement and is responsible for violations of that agreement.

[5] This application requires an assessment of the evidence presented to determine whether Local 242 should be granted leave to make the "related employer" and "successor employer" arguments and to address the alleged labour relations violations in another forum. This court does not have the authority to determine these issues that are within the exclusive jurisdiction of the Ontario Labour Relations Board (the "OLRB") and/or a labour arbitrator. The OLRB and/or a labour arbitrator have exclusive jurisdiction over the subject matter of applications made and the applications proposed to be made to the OLRB, as well as the grievances.

[6] Additionally, Local 242 seeks to vary the receivership order as described in more detail below.

A. BACKGROUND FACTS

[7] Textron is described in the materials filed on this motion as Beta Brands' primary secured creditor.

[8] The Receiver was appointed interim receiver and receiver of all assets, undertaking and property of Beta Brands on January 3, 2007 (the "receivership order"). The receivership order institutes a stay of proceedings against the Receiver and Beta Brands and limits the Receiver's liability. The terms of the receivership order are set out in more detail below. This order has not been appealed or varied and remains in full force and effect.

[9] Pursuant to the application of Textron, the sale of substantially all of the assets of Beta Brands' bakery division and certain finished goods inventory to Bremner Inc. was approved by Lax J. on January 5, 2007. On that same day, the employment of all members of Local 242 was terminated by written notice on the letterhead of Beta Brands.

The relevant terms of the receivership order and the *BIA*

[10] Paragraphs 7, 8 and 9 of the receivership order institute a stay of proceedings and limit the Receiver's liability. These paragraphs require leave of this court for proceedings against Beta Brands and the Receiver by providing as follows:

NO PROCEEDINGS AGAINST THE RECEIVER

7. THIS COURT ORDERS that no proceeding or enforcement process in any court or tribunal (each, a "Proceeding"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTOR OR THE PROPERTY

8. THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. THIS COURT ORDERS that all rights and remedies against the Debtor, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that nothing in this paragraph shall (i) empower the Receiver or the Debtor to carry on any business which the Debtor is not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtor from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

LIMITATION ON THE RECEIVER'S LIABILITY

16. THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or willful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

[11] Paragraph 13 of the receivership order relates to the employees of Beta Brands and provides that their employment status with Beta Brands would remain until they were terminated by the Receiver on behalf of Beta Brands as follows:

EMPLOYEES

13. THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction.

[12] The receivership order originally proposed by Textron was different from the Model Receivership Order form developed by the Commercial User's Committee. The Model Receivership Order was premised on the appointed receiver operating the debtor's business.

However, Beta Brands had ceased to carry on business prior to the Receiver's appointment and the Receiver took the position it had no plans to operate the Beta Brands' business. Thus, Textron sought a modified order. Local 242 objected. In order to compromise, the following paragraphs were added to the receivership order:

> 31. THIS COURT ORDERS that nothing in this Order or the granting of powers or authorities to the Receiver herein shall be relied upon by the Debtor's employees on any application to obtain relief against the Receiver from any court or tribunal of competent jurisdiction.
>
> 32. THIS COURT ORDERS that nothing herein shall be construed as affecting any legal proceedings before any court or tribunal dealing with Local 242G's members' and/or Local 242G's rights under labour and/or employment law, subject to the obtaining of leave in advance from this Court.

[13] These added paragraphs are the subject of Local 242's motion to vary the receivership order.

[14] Section 215 of the *BIA* requires leave of this court to pursue an action as "against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act." Thus, section 215 of the *BIA* does not require leave as against other parties. Textron and the Receiver agree with that position.

B. DETAILS OF THE RELIEF SOUGHT BY LOCAL 242

[15] Local 242 seeks leave of the court to lift the stay in respect of four proceedings. Two of the proceedings – a successor/related employer application filed with the OLRB on January 2, 2007 and a proposed application under the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A (the "*LRA*") – name Beta Brands and other entities but not the Receiver.

[16] The successor/related employer application filed on January 2, 2007, now held in abeyance, alleges that Beta Brands, Beta Brands U.S.A. Ltd., Sun Capital Partners Inc. and/or Sun Beta LLC are a "single employer" pursuant to section 1(4) of the *LRA*. In addition, Local 242 alleges that there was a "sale of business" in March 2004 from Beta Brands to Sun Beta LLC and/or Sun Capital Partners Inc., pursuant to section 69 of the *LRA*.[1]

[17] The proposed application under the *LRA* is pursuant to section 96 of that *Act* and alleges bargaining for the collective agreement was in bad faith, contrary to section 17 of the *LRA*. Local 242 alleges that Beta Brands, Beta U.S.A. Limited, Sun Capital Partners Inc. and/or Sun Beta L.L.C., as employers, violated the duty to bargain in good faith by failing to disclose to Local 242 decisions to close or massively restructure the business (See *Westinghouse Canada*

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[1] For clarity I note that counsel for Local 242 advised that the affidavit upon which the January 3, 2007 order was issued by Lax J. stated that Sun Beta LLC. was the sole shareholder of Beta Brands. Subsequently, counsel for Local 242 was advised that Beta Brands (Barbados) Holding SRL is the sole shareholder of Beta Brands).

Limited, [1980] O.L.R.B. Rep. April 577 at para. 39). It is Local 242's position that these decisions had been made before collective bargaining concluded in May 2006.

[18] Another proceeding names Beta Brands, the Receiver and others. It is a grievance filed on January 19, 2007, now held in abeyance, alleging violations of the collective agreement and the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the "*ESA*"). The grievance application alleges that Beta Brands, Sun Beta LLC, the Receiver, Beta Brands (U.S.A.) Ltd., Sun Capital Partners Inc., Bremner Inc. and/or Cangro Foods Inc. violated the collective agreement and the *ESA*. Local 242 alleges that its members have been denied their legislative and/or contractual rights to severance pay, termination pay, vacation pay, benefits on lay-off and advance notice of lay-off. They further allege that the employees were the subject of an illegal lockout.

[19] Local 242 alleges that the manner in which the various named companies have structured their affairs has effectively denied its members of their entitlement to basic minimum employment standards.

[20] Local 242 also submits that the Receiver was the active employer of Local 242 members beginning on January 3, 2007, following the receivership order. Local 242 suggests that its members were entitled to severance pay and, pursuant to section 67(3) of the *ESA*, had the right to elect either to be paid the severance pay or to retain employee status and the right to be recalled. Since the employees did not waive their recall rights and since the Receiver exercised total control over the premises and what has remained of the business since January 3, 2007, Local 242 suggests that union members are still employees of the Receiver.

[21] Further, Local 242 alleges that, after the court-approved sale, the Receiver and/or Bremner Inc. hired employees to perform work in the plant. If it is determined that either party is bound by the collective agreement pursuant to "related employer" provisions (section 1(4) *LRA* and section 4 *ESA*) and/or "successor employer" provisions (section 69 *LRA* and section 9 *ESA*), Local 242 suggests that work performed by these employees would fall within the collective agreement.

[22] The fourth proceeding names the Receiver, Bremner Inc. and/or Cangro Foods Inc. and is pursuant to sections 1(4) and 69 of the *LRA* and sections 4 and 9 of the *ESA*.

[23] Local 242 also seeks to delete paragraph 31 of the January 3, 2007 order of Lax J. to remove restrictions that it asserts might prevent the OLRB and/or the labour arbitrator from considering all relevant aspects of the matters over which it has exclusive jurisdiction.

C. THE APPLICATION FOR LEAVE AS AGAINST THE DEBTOR BETA BRANDS

[24] Pursuant to paragraph 8 of the receivership order, Local 242 seeks leave to commence or continue proceedings where Beta Brands is a necessary party.

[25] In *General Motors Corp. v. Tiercon Industries Inc.*, [2005] O.J. No. 3750 at para. 18 (Super. Ct.), Hoy J. stated:

> Where relief from a stay is sought in an insolvency context, whether from an order issued pursuant to the *Courts of Justice Act* or the *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3, the Court should consider a balancing of the interests of all affected parties: *Toronto Dominion Bank v. Ty (Canada) Inc.*, [2003] O.J. No. 1552, (2003) 42 C.B.R. (4th) 142 (Ont. S.C.J.) at paragraph 22.

[26] The Receiver and Textron do not oppose the lifting of the stay as against the debtor, Beta Brands. There is evidence that suggests that the successor employer and related employer applications, involving parties other than the Receiver, are not frivolous or vexatious and should be considered by the OLRB and/or a labour arbitrator. Beta Brands is a necessary party to these proceedings.

[27] Leave is granted to Local 242 as against Beta Brands to lift the stay of proceedings associated with the application filed with the OLRB on January 2, 2007.

[28] Likewise, leave is granted to Local 242 as against Beta Brands to lift the stay of proceedings associated with the grievance dated January 19, 2007 and leave is granted as against Beta Brands to commence proceedings for an alleged violation of the duty to bargain in good faith by failing to disclose to Local 242 its decision to close or to undergo massive restructuring.

D. THE POSITIONS OF LOCAL 242, THE RECEIVER AND TEXTRON

[29] In its application seeking leave against the Receiver, counsel for Local 242 argues that remnants of the Beta Brands' business were transferred to the Receiver by the January 3, 2007 order of Lax J., and thus the economic activity of Beta Brands did not terminate on December 29, 2006, the last day of work.

[30] It is the position of Local 242 that these claims are not frivolous or vexatious. Rather, they represent a good faith effort by the Union to redress the wholesale denial to its members of their contractual and legislative rights. Local 242 argues that in opposing this leave application the Receiver is seeking immunity from labour laws.

[31] Counsel for the Receiver agreed with and adopted the submissions of counsel for Textron and therefore I will refer to them hereinafter collectively as the Receiver in describing their positions. It is the Receiver's position that it did not carry on Beta Brands' business and it has not hired or terminated any employees of Beta Brands on its own behalf.

[32] The Receiver notes that pursuant to section 14.06(1.2) of the *BIA*, the Receiver is isolated from pre-appointment severance and termination pay liabilities:

> 14.06(1.2) Notwithstanding anything in any federal or provincial law, where a trustee carries on in that position the business of the debtor or continues the employment of the debtor's employees, the trustee is not by reason of that fact personally liable in respect of any claim against the debtor or related to a requirement imposed on the debtor to pay an amount where the claim arose before or upon the trustee's appointment.

[33] Further, paragraph 16 of the receivership order limits the Receiver's personal liability to liability arising from its gross negligence or wilful misconduct.

[34] The Receiver asserts that Local 242 has not established a *prima facie* case against it and, thus, the motion for leave should be dismissed. The Receiver's position is that the proposed actions are frivolous, vexatious or an abuse of process because there is no possibility that Local 242 will succeed in achieving its ultimate objective of recovering severance, termination and vacation pay from the Receiver in another forum.

E. THE TEST TO BE APPLIED ON THIS APPLICATION FOR LEAVE AGAINST THE RECEIVER

[35] In *GMAC Commercial Credit Corp. – Canada v. T.C.T. Logistics Inc.*, [2006] 2 S.C.R. 123 ("*T.C.T. Logistics*"), the Supreme Court of Canada endorsed the approach in *Mancini (Trustee of) v. Falconi*, [1993] O.J. No. 146 (C.A.) as the appropriate test under s.215 of the *BIA* for granting leave to unions to bring actions against receivers before labour relations boards and summarized the accepted principles from that case as follows:

> 1. Leave to sue a trustee or receiver should not be granted if the action is frivolous or vexatious. Manifestly unmeritorious claims should not be permitted to proceed.
>
> 2. An action should not be allowed to proceed if the evidence filed in support of the motion, including the intended action as pleaded in draft form, does not disclose a cause of action against the trustee or receiver. The evidence typically will be presented by way of affidavit and must supply facts to support the claim sought to be asserted.
>
> 3. The court is not required to make a final assessment of the merits of the claim before granting leave. [Citations omitted; para. 7.]

[36] The threshold for granting leave to commence an action against the Receiver under section 215 "is not a high one, and is designed to protect the receiver or trustee against only frivolous or vexatious actions, or actions which have no basis in fact." (*T.C.T. Logistics* at para. 55). In determining whether to grant leave, the Court should not make an assessment based on the merits. Rather, leave should be granted if the evidence arguably supports the cause of action being asserted (*T.C.T. Logistics* at para. 57). The court's gate-keeping function is to protect receivers from frivolous and vexatious actions or claims that disclose no cause of action.

[37] The test for leave from a court-ordered stay is similar to the test for leave under section 215 of the *BIA*. See *Third Generation Realty Ltd. v. Twigg Holdings Ltd.*, 1992 CarswellOnt 473 (Gen. Div.), in which Farley J. stated, "[l]eave to commence proceedings against a Receiver appointed by the court is to be granted, unless it is clear there is no foundation for the claim or the action is frivolous or vexatious."

[38] In this case, the receivership order instituted a stay of proceedings against the Receiver and limited the Receiver's liability. Application of the above principles establishes that leave under s. 215 should not be granted unless Local 242 submits evidence clearly disclosing that there is merit to the proposed proceedings. This evidence must establish a factual basis for the proposed claim and that the proposed claim discloses a cause of action.

F. WHAT WILL LOCAL 242 HAVE TO ESTABLISH TO ULTIMATELY SUCCEED IN THE PROCEEDINGS IT SEEKS TO CONTINUE OR COMMENCE AGAINST THE RECEIVER?

[39] Section 1(4) of the *LRA* permits the OLRB to declare that two or more legal entities are "related employers." The purpose of section 1(4) is to protect bargaining rights from being deliberately or inadvertently eroded by the commercial operations of related employers.

[40] Pursuant to section 1(4) of the *LRA*, the OLRB may declare one or more legal entities to be "one employer for the purposes of this Act" if the entities carry on "associated or related activities or businesses…under common control or direction." Factors considered in assessing "common control" include:

- Common ownership or financial control
- Common management
- Interrelationship of operations
- Representation to the public as a single integrated enterprise; and
- Centralized control of labour relations

(See: *Walters Lithography Company Limited*, [1971] O.L.R.B. Rep. July 406 and *S.E.I.U., Local 268 v. Canadian Red Cross Society (Ontario Zone)*, 2001 CarswellOnt. 3507 (O.L.R.B. at para. 38))

[41] To establish a *prima facie* case pursuant to section 1(4) of the *LRA*, Local 242 will be required to establish the following:

1. involved related or associated activities; and the Receiver and Beta Brands each carried on a business;
2. the businesses carried on by Beta Brands and the Receiver;
3. the Receiver and Beta Brands were under common control or direction.

[42] Turning next to the remedy sought under the *ESA*, pursuant to section 4, an employer is considered to be a "related employer" where the direct or indirect "intent" or "effect" of more than one legal person carrying on related activities or businesses is to "defeat" employees' entitlements under the *ESA*. Common control is not required. It is a mandatory provision and not discretionary.

[43] To establish a *prima facie* case against the Receiver under section 4 of the *ESA*, Local 242 must establish evidence that:

(a) Associated or related activities or business were carried out by Beta Brands and the Receiver; and

(b) The intent or effect of the Receiver and Beta Brands carrying on associated or related activities or businesses was to directly or indirectly defeat the true intent and purpose of the *ESA*.

(See: *Verdun v. PlateSpin Canada Inc.*, 2005 Can LII 1637 at para. 76 (O.L.R.B.); *Novaquest Finishing Inc.*, 2006 Can LII 1439 (O.L.R.B.))

[44] Two or more entities are "related" or "associated" if "they are of the same character, serve the same general market, employ the same mode and means of production, utilize similar employee skills and are carried on for the benefit of related principals." "Functional interdependence" is the key issue. See: Cybernet Communications Inc., 2004 Can LII 11659 at para. 18(O.L.R.B.); Re K. Behnke Investments Ltd., [1993] O.E.S.A.D. No. 118.

[45] To establish that the Receiver and Beta Brands carried on associated or related business activities under section 4 of the *ESA*, the Union needs to establish at least some of the following:

- Common ownership
- Common management or control
- Interrelationship or integration of operations
- Existence of a common trade name or logo
- Movement of employees between the entities
- Non-arm's length transactions between the entities
- Use of common premises
- Transfers of assets between the entities
- A common market or customers served by the entities; and
- Representation to the public as a single integrated enterprise.

(See: *Verdun v. PlateSpin Canada Inc.*, supra, at para. 77; *Novaquest Finishing Inc.*, 2005 CanLII 40283 (O.L.R.B.); *Queensway Roadhouse Limited*, 2004 CanLII 3163 (O.L.R.B.), paras. 30 – 32; *Cybernet Communications Inc.*, 2004 CanLII 11659 (O.L.R.B.), para 17; and *Re K. Behnke Investments Ltd.*, [1993] O.E.S.A.D. No. 118 (Muir), Local 242G's Book of Authorities Tab 14)

[46] With respect to the issue of whether the Receiver is a "successor employer," Local 242 relies on section 69 of the *LRA* and section 9 of the *ESA*.

[47] Pursuant to section 69 of the *LRA*, in the event of a sale of a business, the collective agreement continues to be binding on the successor or purchaser, who "stands in the shoes" of the predecessor vendor. Thus, where an employer, who is bound by a collective agreement, sells a business, the purchaser is a successor employer. From a policy perspective, this ensures that work performed by unionized workers is not transferred to a new owner/operator who will employ non-unionized workers.

[48] The terms "sells" and "business" are defined very broadly. Unlike section 1(4) *LRA*, section 69 is not discretionary; an employer automatically becomes bound following any disposition "until the Board otherwise declares."

[49] For leave under section 215 of the *BIA* to be granted, Local 242 must establish evidence that it is possible that the OLRB will determine that there has been a "sale", as defined by the relevant legislation, of Beta Brands' business to the Receiver. At a minimum, Local 242 must present evidence that the Receiver has carried on Beta Brands' business; there must be evidence that there was a transfer of work from Beta Brands to a business operated by the Receiver.

[50] Section 9 of the *ESA* applies where a purchaser "employs an employee of the seller." Pursuant to section 9 of the *ESA*, a purchaser of a business or part of a business who hires any of the transferor's employees will "inherit" or "assume" the employees length of period of service with the transferor.

[51] To establish a *prima facie* case for liability under section 9 of the *ESA*, Local 242 needs to establish:

(a) a transfer of Beta Brands' business or part of Beta Brands' business to the Receiver; and

(b) that the Receiver hired one or more of Beta Brands' employees within the 13-week period after January 3, 2007.

ESA, ss. 9(1) and (2)

G. THE EVIDENCE PRESENTED ON THIS APPLICATION

[52] Mr. Norris, an employee of Beta Brands, swore the affidavit filed in support of Local 242's motion. The essence of his affidavit is that the economic activity of Beta Brands did not terminate on the date the members of Local 242 stopped work and part of their work was transferred to the Receiver.

[53] In his affidavit, Mr. Norris states that the members of Local 242 were temporarily laid off, in accordance with the collective agreement, on December 29, 2006 for a previously scheduled two week temporary shutdown.

[54] At paragraph 38 of his affidavit, Mr. Norris refers to the court-approved sale of a significant portion of the Beta Brands business to Bremner. At paragraph 53 of his affidavit, Mr. Norris states that for a period of two to three weeks following the approval of the sale to Bremner, "there were individuals working in the plant who were moving the product purchased by Bremner on to trucks. I know this from personal observation and have been advised of it by different employees who observed some of this work being done and do believe it. It was work of the sort that Local 242 members performed under the collective agreement." Thus, he alleges that the collective agreement was breached. He asserts employees on layoff should have been recalled to perform this work and were not.

[55] At paragraph 51 of his affidavit, Mr. Norris states, "the business of Beta Brands was transferred to the complete control of Mintz."

[56] Local 242 suggests that the affidavit of Mr. Norris provides the evidentiary foundation that work continued after January 3, 2007. It is the position of Local 242 that the hiring of non-union members to perform union work constitutes an unfair labour practice.

[57] Thus, it is Local 242's position that further proceedings in another forum are required to determine whether the Receiver and/or Bremner contracted out union work.

[58] On the other hand, the Receiver relies on the fourth report delivered in response to this motion in which it is stated that "at the time the Receiver was appointed, Beta Brands had ceased

to carry on business." Other than the inventory sold to Bremner, there was very little remaining finished goods or raw material inventory when the Receiver took possession. In particular, the Receiver states in paragraph 10 that "the sole role of the Receiver has been to protect, preserve and realize on Beta Brands' assets and property" in accordance with the terms of the orders in place.

[59] The Receiver states in paragraph 14 that it terminated the Beta Brands' employees on behalf of Beta Brands and in strict compliance with the receivership order and that "the Receiver has not hired (or terminated) any of Beta Brands' unionized employees."

[60] Further, in paragraph 30 of the report, it is stated that "the Receiver did not employ anyone to deal with and remove the purchased assets from the premises" in reference to the sale to Bremner and further, in paragraph 32, that "Bremner employed its own people and hired its own agents to carry out the disassembly and removal of the purchased assets. The Receiver did not employ or hire any parties to effect the disassembly or removal."

H. ANALYSIS AND CONCLUSIONS

(i) Leave Against the Receiver

[61] I will deal first with the related/successor employer issues. Those issues are relevant to the proposed OLRB application and to the grievance filed January 19, 2007 because success on the grievance depends on a finding that the Receiver is bound by the collective agreement as a related or successor employer.

[62] If granted leave, Local 242 will argue that some or all of the Receiver, Bremner and Cangro are a "single employer" with Beta Brands and/or that there has been a "sale of business," in whole or part, to one or more of them, from Beta Brands and/or its other related employers or successors.

[63] Local 242 alleges that there was a sale of definable parts of the pre-existing Beta Brands business to Cangro in March 2006 and to Bremner pursuant to the January 5, 2007 court order. Local 242 also alleges that Cangro shares common control over related activities with Sun Capital, Sun Beta, Beta Brands (Barbados), Beta Brands, the Receiver and/or Bremner.

[64] Pursuant to section 1(4) of the *LRA* and section 4 of the *ESA*, Local 242 argues that the Receiver is a "related employer." As noted, this requires evidence that the Receiver carried on "associated or related activities or business...under common control or direction." Local 242 suggested that "common control" is established because those in control of the Receiver are also those in control of Beta Brands. Local 242 also suggests that section 4 of the *ESA* may apply where two legal persons acting at "arms length" carry on "related activities." Local 242 referred to the Norris affidavit for evidence that the Receiver was moving product and submitted that this was similar work to the work being performed prior to receivership.

[65] Local 242 suggests that a "sale" declaration does not depend on the continued employment of the employees of the predecessor or on the continued operation of the business as

a "going concern." Therefore, Local 242 suggests that a business closure does not prevent a successor employer declaration.

[66] With respect to the successor employer issue, Local 242 suggests that the assumption of control over an operation by the Receiver is a key factor in assessing whether a receiver is a successor employer. See *Deloitte & Touche*, [1993] O.L.R.D. No. 458 at para. 34 [*Deloitte & Touche*]. It is the position of Local 242 that the Receiver has exercised total control over the premises and the remaining business since January 3, 2007 – that is, the entire Beta Brands business was transferred to the Receiver.

[67] Local 242 relies on the findings in *H & S Reliance Ltd.*, [1998] O.L.R.D. No. 4087 at paras. 28-29 ("*H & S Reliance*"), where the OLRB found the Receiver to be a successor employer because the Receiver employed some of the predecessor's employees for two weeks before liquidating the business in the same jobs as they had prior to the receivership.

[68] It is the position of Local 242 that the Receiver was obligated to employ union members in accordance with the collective agreement, and that the Receiver should not be immunized from being declared a successor employer by failing to do so. Section 9 of the ESA is advanced in support of this position. Local 242 acknowledges that this section only applies where the purchaser "employs an employee of the seller." However, it is their view that the section also applies in this case because the Receiver and/or Bremner were obligated to employ some of Local 242 members who retained recall rights under the collective agreement and employment status after "permanent lay-off."

[69] Counsel for Local 242 could not cite any cases where a Receiver was found to be a successor employer in a situation where the receiver did not employ individuals but should have. However, counsel for Local 242 suggested that this issue should be decided in another forum.

[70] The Receiver submits that there is no evidence of the businesses of the Receiver and Beta Brands being associated or related. The Receiver asserts that Local 242 has not established the existence of "common control or direction" between the Receiver and Beta Brands. Beta Brands was a manufacturer of candy and other products. The Receiver, as an officer of the court, is independent from Beta Brands and performs a receiver function.

[71] Further, it is the Receiver's position that Local 242 has failed to establish that the relationship between the Receiver and Beta Brands has resulted in Beta Brands' failure to comply with its obligations under the *ESA*. The Receiver notes that the relationship between Beta Brands and the Receiver did not even begin until Beta Brands was no longer in business.

[72] With respect to the successor employer issue, it is the position of the Receiver that, in this case, the Receiver did not carry on a business and did not employ individuals. Rather, pursuant to the receivership order, the Receiver merely took possession of assets and is realizing on those assets. This does not constitute a "sale of business" under section 69 of the *LRA*. From a policy perspective, it makes little sense to preserve the collective bargaining relationship where the Receiver has only taken possession of assets.

[73] The Receiver acknowledged that there was an Agreement of Purchase and Sale prior to its court-appointment. Although Local 242 opposed the transaction, the court approved the sale of these assets to Bremner. The union did not appeal this decision. Thereafter, the Receiver complied with the court order, including the requirement that the Receiver provide access to Bremner for removal of the purchased goods. The employees last attended on the premises on December 29, 2006. The Receiver received assets only. It is the Receiver's position that this is insufficient to constitute the transfer of a business. Further, the Receiver provided access to Bremner to remove the purchased assets, in accordance with the court-approved Access Agreement. The Receiver did not employ anyone to remove the items sold to Bremner nor was it obliged to do so.

[74] The Receiver also points to the receivership order which states that employees of Beta Brands shall remain employees of that entity. The Receiver terminated Beta Brands' employees on behalf of Beta Brands; such termination was not effected by the Receiver directly because these were not employees of the Receiver.

[75] After considering the evidence, I conclude that the claims asserted by Local 242 fail to meet the requirements under s. 215 of the BIA and therefore leave as against the Receiver should not be granted. In coming to this conclusion, I have not made a final assessment of the merits of Local 242's claim, as this determination falls within the jurisdiction of the OLRB. The focus of this application, as noted by Abella J. at paragraph 59 of *T.C.T. Logistics, supra,* is "whether the evidence provides the required support for the cause of action sought to be asserted." In essence, the court's role at this stage is to ensure that, unless the claim is without merit, the gate to a litigated determination remains open.

[76] In fulfilling this court's gate-keeping function pursuant to section 215 of the *BIA*, I conclude that there is no *prima facie* case upon which Local 242 would have any chance of success as against the Receiver. I reach this conclusion for the following reasons.

[77] Based upon submissions of counsel and the evidence provided, there is no *prima facie* case by which the Receiver could be considered a related employer to Beta Brands under either section 1(4) of the *LRA* or section 4 of the *ESA*. The appointment of the Receiver was designed strictly for the purpose of preserving, protecting and realizing on Beta Brands' assets. Beta Brands ceased to carry on business prior to the appointment of the Receiver and there is no evidence which suggests that the Receiver has been carrying on a business. I agree with the Receiver's position that because the business is no longer operating there is no erosion of the union's bargaining rights. Section 1(4) of the *LRA* is not intended to give a party to a collective agreement the right to a "deep pocket" recovery of an unsatisfied debt; the provision was not intended to extend bargaining rights. See *G.A.U. v. Total Marketing Inc.*, 1983 CarswellOnt 1014 at paras. 4-5 (O.L.R.B.).

[78] In addition, the Receiver is prohibited from being related or associated to Beta Brands by virtue of the Canadian Association of Insolvency and Restructuring Professionals' Rules of Professional Conduct, with which the Receiver is required to comply. In accordance with these Rules, the Receiver is to have no economic interest in Beta Brands or any companies affiliated

with Beta Brands. Rather, the Receiver acts as an agent of the court in administering and supervising the debtor's property.

[79] Likewise, there is no *prima facie* case by which the Receiver could be considered a successor employer to Beta Brands under either section 69 of the *LRA* or section 9 of the *ESA*. Bargaining rights attach to the business and follow the transfer of that business to the purchaser of that business. The transfer of possession of physical assets, on its own, does not constitute a transfer of a business. See *Syndicat national des employés de la commission scolaire régionale de l'Outaouais c. U.E.S., local 298*, 1988 CarswellQue 125 at para. 174 (S.C.C.). Rather, the Receiver must have acquired a functional economic vehicle. Such acquisition could not have occurred here since, at the time the Receiver was appointed, Beta Brands had ceased to carry on business.

[80] As noted in *Deloitte & Touche*, *supra* at para. 34, control over the business as a going concern and the employment relationship is an important factor. In this case, the Receiver did not operate Beta Brands as a going concern business. Although this fact is not determinative (see *Accomodex*, *supra* at para. 73), I find no evidence that the Beta Brands business, or part thereof, was transferred to the Receiver. As the Receiver has noted, its sole role has been to protect, preserve and realize on Beta Brands' assets and property. It has not taken or filled orders and has not operated Beta Brands as a business.

[81] In *Accomodex*, *supra* at paras. 66-67, the OLRB reviewed cases dealing with the sale of a "part" of a "business" as follows:

> In each of these cases, the Labour Relations Board found that the predecessor had transferred a coherent and severable "part" of its economic organization - managerial, or employee skills, plant, equipment, know-how, or goodwill - thereby allowing the successor to perform a definable part of the economic functions formerly performed by the predecessor. This "new" economic organization undertook activities which gave rise to employment, and the terms and conditions of employment, together with the union's right to bargain about them were preserved. The "part" of the predecessor's business which it no longer wished to continue, provided the business opportunity which the successor was able to pursue to its own advantage.
>
> In all of these cases, there was a transfer of a distinct part of the predecessor's configuration of assets or capacity to carry on business, and no material change in the character of the work performed by the employees within that asset framework. There was a continuation of the work performed, the essential attributes of the employment relationship, and the skills of the employees; and, but for section 64, the established bargaining and collective bargaining rights would have been lost. This was the mischief to which section 64 is directed, and the Board was satisfied on the evidence in each of these cases that it should be applied.

[82] Here, the Receiver terminated employees on behalf of Beta Brands and in accordance with a court order. Paragraph 13 of the receivership order provides as follows:

> THIS COURT ORDERS that all employees of the Debtor shall remain the employees of the Debtor until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related

> liabilities, including wages, severance pay, termination pay, vacation pay, and pension or benefit amounts, other than such amounts as the Receiver may specifically agree in writing to pay, or such amounts as may be determined in a Proceeding before a court or tribunal of competent jurisdiction.

[83] I acknowledge that a "successor employer" finding is not dependent on the Receiver employing the Local 242 members. See *Accomodex*, *supra* at para. 61. However, there is no evidence that the Receiver employed anyone to perform any work of former Beta Brands employees.

[84] The evidence suggests that Beta Brands operations ceased at the end of December 2006, prior to the appointment of the Receiver. The Receiver took possession and control of the assets pursuant to the receivership order and for the purpose of liquidation. The Receiver acted in accordance with a court approved "Access Agreement" that was part of the sale agreement with Bremner. The Receiver was required to provide access to the plant to Bremner to remove assets and did so. Bremner employed its own people to disassemble and remove the purchased assets. As the Receiver noted, Local 242 rejected an operations agreement that would have retained the services of union members to disassemble and remove assets. This rejected agreement contained a term whereby the union members could not allege that the Receiver was a successor employer.

[85] After considering these facts, I have concluded that I am not satisfied there is evidence of a "new" economic organization through which the Receiver continued any of the previous operations of Beta Brands and employed workers to carry out those operations. As noted in *Accomodex* at para. 60, "[u]nless there is a continuation of work and jobs, it would make little sense to preserve the collective bargaining relationship or collective agreement."

[86] I reject submissions of counsel for Local 242 that the Receiver was under an obligation to employ Local 242 members and that the Receiver should therefore be considered a successor employer on that basis. The evidence suggests that operations ceased prior to the Receiver's appointment. The Receiver did not employ Local 242 members because it did not commence or continue the business of Beta Brands. There can be no obligation to employ Local 242 members under these circumstances. Thus, there is no *prima facie* case whereby the Receiver could be found to be a successor employer by failing to employ Local 242 members.

[87] Therefore, Local 242's motion requesting leave to commence or continue proceedings against the Receiver as a successor employer or related employer under sections 1(4) and 69 of the *LRA* and sections 4 and 9 of the *ESA* is dismissed.

[88] Since I have denied leave to proceed against the Receiver as a successor employer or related employer, the Receiver cannot be bound to the collective agreement. As a result, Local 242 has no basis on which to proceed with its grievances against the Receiver. Therefore, leave to commence or continue grievance proceedings against the Receiver is dismissed.

(ii) Variation of Lax J.'s Order

[89] Paragraph 29 of the receivership order permits an application to the Superior Court of Justice to vary or amend that order. I agree with the Receiver that the jurisdiction to vary an

order must be exercised sparingly and that variance provisions are intended to apply in situations where parties impacted by an order are not provided with notice of the making of the order. A motion to vary is not a substitute for an appeal where the time for appeal has passed.

[90] Local 242 seeks to vary the receivership order by deleting paragraph 31 on the basis that paragraph 31 of the receivership order is inconsistent with paragraph 32 and that paragraph 31 is not consistent with *T.C.T. Logistics,* supra. Local 242 asserts that the variance would remove any restriction in that order that could be construed as preventing the OLRB, in connection with an application by employees, from considering the court's grant of control over the business to the Receiver.

[91] I am not satisfied that Local 242 has provided any valid reasons to vary the order of Lax J. I do not find the inconsistencies asserted by Local 242 exist. In my view the receivership order reflects the Receiver's intentions to be a custodian only. The paragraphs included in the order ensure that, subject to obtaining leave, Local 242 can seek to have the Receiver declared a related or successor employer based on the Receiver's actual actions. Paragraph 31 was drafted to prevent the union from arguing that the Receiver was a successor employer simply by virtue of the powers granted to the Receiver in the Appointment Order.

[92] Accordingly, the motion to vary paragraph 31 of the January 3, 2007 order of Lax J. is dismissed.

I. SUMMARY

[93] Local 242 does not require leave of this court to pursue the claims in proceedings described herein against parties other than Beta Brands and the Receiver.

[94] I grant leave to Local 242, as against the debtor, Beta Brands, to lift the stay of proceedings associated with: the application filed with the OLRB on January 2, 2007; the grievance dated January 19, 2007; and a proposed grievance relating to an alleged violation of the duty to bargain in good faith by failing to disclose to Local 242 of its decision to close or to undergo massive restructuring.

[95] I dismiss Local 242's motion requesting leave to commence or continue: grievance proceedings against the Receiver, and proceedings against the Receiver as a successor employer or related employer under sections 1(4) and 69 of the *LRA* and sections 4 and 9 of the *ESA*.

[96] Local 242's motion to vary paragraph 31 of the January 3, 2007 order of Lax J. is dismissed.

Regional Senior Justice Lynne C. Leitch

Released: July 31, 2007.

Court File No.: 06-CL-6820
Date: July 31, 2007.

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

TEXTRON FINANCIAL CANADA LIMITED

Applicant

- and -

BETA LIMITEE/BETA BRANDS LIMITED

Respondent

- and -

BAKERY, CONFECTIONERY, TOBACCO WORKERS AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL 242

- and -

MINTZ & PARTNERS LIMITED

- and -

BREMNER INC.

REASONS FOR JUDGMENT

LEITCH R.S.J.

Released: July 31, 2007.