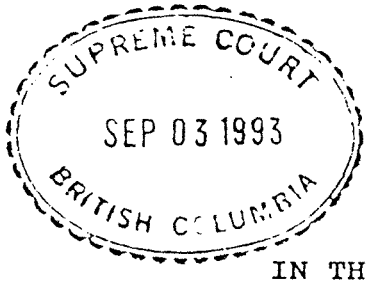

NO. A921964
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36

and

IN THE MATTER OF WESTAR MINING LTD.

) REASONS FOR JUDGMENT
)
) OF THE HONOURABLE
)
) MR. JUSTICE B.D. MACDONALD
)
) (IN CHAMBERS)

Frank G. Potts & Angela E. Thiele	Counsel for Greenhills Workers' Association
Jack M. Giles, Q.C., L. Warren & R.P. Slomen	Counsel for former directors of Westar
Gwen K. Randall, Q.C.	Counsel for United Mine Workers, Local 7292
Douglas I. Knowles	Counsel for Bank of Montreal
Alexander J. MacDonell	Counsel for Office and Technical Employees, Local 378
A.D. Louie	Counsel for the Attorney General of Canada
Larry Koo	Counsel for the Province of British Columbia
Keith L. Johnston	Counsel for the Director of Employment Standards
P.J. Furlong	Counsel for M.C. Resources
R.A. Millar	Counsel for C.P. Rail
G.J. Gehlen	Counsel for various suppliers

Digby Leigh & Laura Donaldson	Counsel for the Trustee in Bankruptcy of Westar Mining Ltd.
Dates and place of hearing:	August 30 & 31, 1993 Vancouver, B.C.

Greenhills Workers' Association (G.W.A.) applies for:

(a) an order that its members who worked for Westar Mining Ltd. (Westar) during the period of the s. 11 stay of proceedings herein (May 14, 1993 to August 26, 1993) be granted preference for their unpaid wages and holiday pay accruing during that period, against a trust fund (the Fund) now in the hands of the Director of Employment Standards (the Director); and

(b) in the alternative, an order that such claims be paid by the Monitor appointed herein from the proceeds of the judicial charge created by this court on June 10, 1992 (the Suppliers' Charge) which are surplus to the principal amounts now secured thereunder and claimed by the suppliers of goods and services to Westar during the period of the s. 11 stay.

The original motion, filed on June 21, 1993, was in somewhat different terms, but was modified by counsel for G.W.A. at the commencement of this hearing. A parallel motion was filed on June

22, 1993 on behalf of 300 non-union employees of Westar who also worked during the period of the stay. Those applicants were not represented at this hearing. They elected to rely on the arguments to be presented on behalf of G.W.A. While G.W.A.'s initial brief tracked the relief sought in the original motion, I have no alternative, short of dismissing the parallel motion, except to treat it as modified in the same manner. I propose to adopt the latter course.

THE BACKGROUND

The initial *ex parte* stay of proceedings in respect of Westar under s. 11 of the C.C.A.A. was granted on May 14, 1992. During the next several weeks, I heard numerous applications to vary or modify my initial order. On June 10, 1992, the initial order was modified in many respects, only two of which are significant here.

1. The initial authority to Westar to maintain $4 million in trust "to satisfy the liabilities of the directors and officers of the Petitioner in respect of the payment of wages under the *Employment Standards Act*, S.B.C. 1980, c. 10 as defined under the said *Act*..." was modified by the addition of these words:

> ...provided that nothing in the foregoing shall entitle the Petitioner or the trustee...to apply the trust fund or any portion thereof to obligations which were payable prior to May 14, 1992, without further Order of this Court;

As will be seen, that change led to a misapprehension on my part which resulted in a priority order made on August 26, 1992 in favour of G.W.A. against the Fund. That priority order was set aside by the Supreme Court of Canada on June 8, 1993 on the ground that "there was no jurisdiction...to make the Order, absent notice to and hearing from the affected parties".

2. The Suppliers' Charge, not to exceed $17 million, was created to secure all amounts due to suppliers of goods and services to Westar after May 14, 1992. That security was declared to be a first charge, subject only to tax liens, on Westar's 80% interest in the Greenhills mine. "Current assets", as defined in an existing charge in favour of Bank of Montreal, were excluded.

While some 25 disputed claims against the Suppliers' Charge remain to be resolved, and the question of whether or not claims paid thereunder are entitled to receive interest remains outstanding, there now appears to be a surplus available which G.W.A. looks to as an alternative to an order for preference against the Fund.

THE FUND

While I do not accept the argument that the issue is *res judicata* as a result of the decision in the Supreme Court of Canada, the short answer to both applications insofar as the Fund is concerned is that this court is *functus* in that regard. On October 30, 1992, I directed that my order of June 10, 1992, when entered, would contain the wording set out above in respect of the Fund, and that:

> ...at such time as the Order...made June 10, 1992...is entered, it shall include no provision which alters or modifies the meaning of the said paragraph...

The order of October 30, 1992 was entered two days later, on December 1, 1992. It was sought by G.W.A. to provide a solid foundation for argument on the appeal from the August 26, 1992 preference order, which was also settled on October 30, 1992.

Thus, by the time the Supreme Court of Canada set aside the August 26, 1992 order for preference against the Fund, the wording of the June 10, 1992 order in respect of the Fund was "cast in stone". The only "flexibility" which remains in this court is to interpret the words of that order.

I confess to having regarded the Fund, in company with the order authorizing it (as modified on June 10, 1992), as security for those employees of Westar who continued to work during the period of the stay. The arguments addressed to me on this hearing on behalf of the former directors of Westar and for Bank of Montreal (which permitted the establishment of the Fund out of monies subject to its charge on current assets) have convinced me that it is the directors who are protected. Only incidentally, to the extent that liability on the part of those directors under s. 19 of the *Employment Standards Act* is established, will the employees benefit.

Liability of the directors is a condition precedent to entitlement against the Fund. The wording of the June 10, 1992 order can lead to no other conclusion.

Insofar as the right of the applicants to preference against the Fund is concerned, the words:

> ...nothing...shall entitle...the Trustee...to apply...any portion...to obligations...payable prior to May 14, 1992...
>
> (my emphasis)

has nothing to do, except by coincidence, with obligations accruing after May 14, 1992.

Had I properly understood the effect of the June 10, 1992 order in respect of the Fund at that time, provisions would likely have been made to better secure those who continued to work during the stay, at least to the extent that the Fund did not do so.

The present concern of the applicants is that, even assuming liability of the directors for almost all unpaid wages and holiday pay owing by Westar (an issue which will undoubtedly be litigated to the fullest), they will achieve only partial recovery because the total claims against the Fund are almost double its amount.

Whatever the equities of the situation, I have decided that the applicants are not entitled to an order for preference against the Fund; that the issue of the liability of the former directors must be determined under the procedures set out in the *Employment Standards Act*; and that there is no need for me to determine at this time the question of whether the Director is bound by either or both of the Trust Deed and the order of June 10, 1992 in respect of the Fund.

I expressly reject the argument advanced on behalf of G.W.A. that the former directors, Westar and Bank of Montreal, misled G.W.A. members by their words or conduct into believing that the Fund would "...protect post-May 14 wages and holiday pay" or that there was any obligation on those parties to "... make it clear

that the directors' liability was a condition precedent". G.W.A. did not participate in these C.C.A.A. proceedings until August 25, 1992. If it misunderstood the effect of the June 10, 1992 order (as I did), that was no fault of those parties.

The G.W.A. submission that its members "... acted on their [Westar's] assurances to their detriment" by continuing to work after May 14, 1992 is entirely unsupported by any cogent evidence. Indeed, G.W.A. members were regarded as fortunate, in comparison to the locked-out U.M.W. and laid-off O.T.E.U. members. Whether or not the directors assumed, at the time the Fund was established, that their liability for unpaid wages and holiday pay was coextensive with Westar's, is immaterial. What governs is the wording of the June 10 order.

THE SUPPLIERS' CHARGES

I have already stated that a proper understanding on my part of the meaning and effect of the June 10, 1992 order insofar as the Fund is concerned would most likely have resulted in some further protection to Westar's employees who worked during the period of the C.C.A.A. stay. There is no question that the suppliers' Charge was not intended to, and does not now, extend to the applicants. Several arguments are advanced as to why, at this late date, the

inclusion of the applicants under the protection of the Suppliers' Charge is not appropriate.

The Trustee in Bankruptcy submits that any such extension will impact on the preferred creditors of Westar's bankrupt estate. At present, any surplus from the Suppliers' Charge will vest in the estate. It is no longer necessary, the Trustee argues, to exercise the broad discretion available under the C.C.A.A. to "keep Westar going" until a plan of reorganization can be filed. Bankruptcy has now intervened and the rights of Westar's creditors crystallized at that point.

Both the Attorney General of Canada and the provincial Crown (together they are substantially all of the preferred creditors to whom the trustee refers) adopt the argument that the intervention of Westar's bankruptcy demands a more traditional approach than the court takes in the intense atmosphere of C.C.A.A. proceedings, where survival of the business as a going concern is the essential goal. They say that the rights of the respective parties should now be resolved as a priority question as at the date of the bankruptcy.

G.W.A. responds that it is not too late to include its members in the Suppliers' Charge, at least to the extent of any surplus available thereunder. It submits that the bankruptcy legislation

expressly reserves rights under the C.C.A.A., and that until the court deals finally with the scope of the security which it created thereunder, the bankrupt estate has no interest therein.

Despite my concern for the applicants, expressed at the time I made the preference order of August 26, 1992, and my desire to see that they are preferred for wages and holiday pay accrued between May 14 and August 26, 1992, I have come to the reluctant conclusion that there is nothing which I can do at this point to ensure that result.

I do direct, as the U.M.W. and the O.T.E.U. urge (with the agreement of the Director), that whatever rights Westar employees have against the Fund in the hands of the director do not in any way limit or reduce their respective preferred claims (limited to $2,000.00 per employee) in the bankrupt estate. Since liability of the directors is a precondition to payment out of the Fund in the Director's hands, I cannot regard it as security from Westar which the employees are obliged to exhaust before receiving payment on their preferred claims. Rather, their claims against the Fund will be reduced by their respective recovery through the Trustee.

My decision not to extend the Suppliers' Charge to cover the applicants at this late date is based on the following considerations:

(a) The intervening bankruptcy of Westar is a factor which must be taken into account at this point. There is no longer a need to take steps to ensure Westar's survival.

(b) Extension of the Suppliers' Charge, now that a surplus is certain, is tantamount to directing that the applicants recover any shortfall after their preferred claims in bankruptcy and their claims against the Fund from the provincial and federal Crowns.

(c) Imposing a new set of priorities on those created by the bankruptcy legislation and those arising under the *Employment Standards Act* is likely to further confuse an already complicated situation.

(d) The inclusion of the applicants under the Suppliers' Charge to the extent of any surplus would raise the spectre of their right to be represented in proceedings to resolve the 25 or more disputed claims against the Suppliers' Charge and on the issue of the entitlement to interest on claims thereunder.

Whatever I might have done on June 10, 1992 with a proper understanding of the effect of the order I made in respect of the Fund on that day, and despite what I tried (unsuccessfully) to do

on August 26, 1992 to remedy that omission, it is now too late, as the provincial Crown argues, to "turn back the clock". The rights of the parties crystallized on August 31, 1992, the date of Westar's bankruptcy. Unfortunately for the applicants, the preference which I endeavoured to bestow on them on August 26, 1992 did not stand up to scrutiny.

As the U.M.W. and the O.T.E.U. argue, all employees should now be treated equally, even though in their eyes the applicants will still receive a *de facto* preference because of the 6 month time limit for preferred wage claims in the bankruptcy legislation, coupled with the lockout and layoffs involving their members on May 1, 1992. Admittedly, G.W.A. puts an entirely different slant on the effect of its members continuing to work and "increasing their claims" during the C.C.A.A. stay.

JUDGMENT

The applications of Greenhills Workers' Association (and of 300 non-union employees of Westar) for orders:

(a) in respect of the $4 million fund in the hands of the Director of Employment Standards; and

(b) for an extension of the Suppliers' Charge to cover their claims for wages and holiday pay accrued between May 14 and August 26, 1992 (to the extent of any surplus remaining after existing claims thereunder)

are dismissed.

There is a direction to the Trustee in Bankruptcy of the estate of Westar that the preferred claims of employees will not be reduced by their contingent claims against the Fund.

In the event that it may be necessary to enable the Director to process payments from the Fund to all employees of Westar once the issue of the liability of the directors has been resolved, the "further order" contemplated by my order of June 10, 1992 in respect of the Fund is now made, thus permitting payment on account of obligations payable prior to May 14, 1992.

There is liberty to apply in respect of the costs of these applications.

D.E. Macdonald J.

September 3, 1993
Vancouver, B.C.