Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

Applicants

APPEAL RECORD

OF THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145
(Appeal Returnable January 19, 2012)

January 16, 2012

CaleyWray
Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto, Ontario M5H 2M5

Jesse Kugler (LSUC #55269V)
Tel: 416-775-4677
Fax: 416-366-3293
kuglerj@caleywray.com

Lawyers for the Communications, Energy and Paperworkers Union of Canada

TO: SERVICE LIST

INDEX

INDEX

TAB 1

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APPLICANTS

NOTICE OF MOTION

The Communications, Energy and Paperworkers Union of Canada Local 145 (the "**CEP**") will make a motion which will be heard at the courthouse at 363 University Avenue five (5) days after service of the CEP's Notice of Motion or such other date that this matter may be heard by the Court.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An Order abridging the time for, and validating the service of, the Notice of Motion and the materials filed in support of the motion;

2. An Order quashing the decision of the Claims Officer dated November 24, 2011;

3. An Order declaring that the claim of the retired typographers is meritorious;

4. Costs of this motion; and

5. Such further and other relief as the CEP may seek and this Honourable Court considers just.

THE GROUNDS FOR THE MOTION ARE:

1. On January 8, 2010 Canwest Publishing/Publications Canwest Inc., Canwest Books Inc. and Canwest (Canada) Inc. (collectively, the "**Canwest Publishing Entities**") were granted protection from their creditors under the *Companies' Creditors Arrangement Act* ("***CCAA***").

2. Pursuant to Orders of the Court dated April 12, 2010 and May 17, 2010, a claims procedure was established (the "**Claims Procedure Order**").

3. In on around 2009, provincial labour Arbitrator Sylvestre issued an award in which Arbitrator Sylvstre found, *inter alia*, that the Retired Topographers' compensable losses were limited to salaries and benefits from May 1999 to January 2000, a nine month period.

4. On April 16, 2009 the Union moved in the Quebec Superior Court to set aside Mr. Sylvestre's award. This proceeding is referred to as a "Motion in Annulment."

5. Pursuant to the Claims Procedure Order, the Retired Typographers filed a Claim in respect of their losses.

6. On July 28, 2011, the *CCAA* Supervising Judge, Madame Justice Pepall, issued a decision in respect of Postmedia's motion. Pepall J. found, *inter alia*, that the finding as to the damages period (i.e., Retired Topographers' compensable losses) was not barred by issue estoppel because of the CEP's Motion in Annulment. Peppal J.'s July 28, 2011 decision provided directions to the Claims Officer including leaving the decision as to whether the Motion in Annulment proceeding is meritorious to the Claims Officer.

7. On November 28, 2011, Claims Officer Coulter A. Osborne rendered his decision wherein he found that the Motion in Annulment.

8. The Claims Officer erred by finding that, *inter alia*, "it is plain and obvious that the CEP's Motion in Annulment is not meritorious."

9. The CEP's Motion in Annulment is meritorious.

10. The appeal will not unduly hinder the progress of the proceeding.

11. Sections 11 of the *CCAA*.

12. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be read in support of this motion:

1. The decision of Claims Officer Coulter A. Osborne, dated November 24, 2011;

2. Relevant excerpts from the record before Claims Officer Osborne;

3. Such further and other material as counsel may advise and this Honourable Court permit.

November 28, 2011

CaleyWray
Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto, Ontario M5H 2M5

Jesse Kugler (55269V)
Email: kuglerj@caleywray.com
Tel : 416-775-4677
Fax: 416-366-3293

In the matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

Court File No. CV-10-8533-00CL

SUPERIOR COURT OF JUSTICE

NOTICE OF MOTION

CaleyWray
Labour/Employment Lawyers
1600 - 65 Queen Street West
Toronto, Ontario M5H 2M5

Jesse Kugler (55269V)
Email: kuglerj@caleywray.com
Tel: (416) 775-4677
Fax: (416) 366-3293

TAB 2

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

APPLICANT

INTERIM AWARD

(A) Introduction

[1] In a narrow context, this motion requires me to determine what the word "meritorious" means. More broadly stated, the issue before me is whether a proceeding in Quebec is "meritorious". What immediately follows is the background against which the above question should be considered.

(B) Background

[2] Although not the chronological beginning, for my purposes 1987 is a convenient starting point.

[3] In 1987 the Gazette, the Union and 132 Typographers entered into a Tri-partite Agreement. Its text was similar to the 1982 Agreement but it also included a mechanism for the exchange of "last final best offers" (LFBO's) on request by either party within two weeks of the time when the right to strike or lock-out accrued upon the termination of the collective agreement.

[4] If no agreement was reached in this contractually established gap period, i.e. before the right to strike or lock-out crystallized, either party could submit the disagreement to an arbitrator in accordance with the grievance procedure set out in the collective agreement. Under the applicable procedure the arbitrator was to select one or the other submitted LFBO's in its

entirety. The deal was that the arbitrator's decision would be final and binding and would become part of the collective agreement.

[5] The LFBO focused procedure limited the right to lock-out since it provided a specific procedure for renewal of the collective agreement, albeit by arbitration.

[6] In 1994, an arbitrator (not Mr. Sylvestre) accepted the Gazette's LFBO with the result that there was a new collective agreement. This collective agreement expired on April 30, 1996 and the Union asked the Gazette to proceed with the established LFBO arbitration. The Gazette refused to go along with the LFBO process for reasons that I see no need to review. All that need be said is that the Gazette issued a lock-out notice and stopped paying the Typographers on June 3, 1996[1]. The response of the Typographers and the Union was to submit the dispute to arbitration before Mr. Sylvestre. They contended that pursuant to the Tri-partite agreement the Typographers were entitled to receive full salaries and benefits during the lock-out period.

[7] Mr. Sylvestre concluded that the Gazette had breached the 1987 Agreement. His conclusion flowed from his finding that the LFBO process to which I referred above had an independent contractual force. He thus ordered the Gazette to pay wages and benefits in the lock-out period.

[8] The Quebec Court of Appeal agreed that the Gazette had breached the 1987 Agreement by refusing to participate in the LFBO process. However, the court went on to find that damages should be quantified by reference to the extent to which the Gazette's breach had "prolonged" the lock-out. It referred that question to Arbitrator Sylvestre.

[9] In a September 2000 award Arbitrator Sylvestre ruled that the Typographers' damages were limited to their lost salaries and benefits during the lock-out and that the operative period for the quantification of damages was June 4, 1996 to January 21, 2000.

[10] Consistent with the history of the parties' dealings, the matter did not end there. The Quebec Superior Court set aside Arbitrator Sylvestre's award in part. However, following another trip to

[1] By June 1996 the number of Typographers had shrunk to 11.

the Quebec Court of Appeal in 2003, that court reinstated the award in its entirety and referred the matter back to Arbitrator Sylvestre for an on the merits determination.

[11] Arbitrator Sylvestre issued a further award in 2005. In it he opined that what he had to determine was whether the Gazette's conduct constituted an abuse of rights.

[12] In 2008 Arbitrator Sylvestre's 2005 award was before the Quebec Court of Appeal which held that Arbitrator Sylvestre had asked and answered the wrong question. The court identified the question that had to be asked and answered was whether the lock-out would have ended earlier than January 21, 2000 had the required exchange of LFBO's taken place after the Union's April 30, 1996 request. The court observed that, "[T]he Gazette was required to exchange its last final best offer with the Union no later than May 2, 1996". It went on to conclude that the arbitrator had to determine what damages were caused by the Gazette's failure.

[13] It was against the background of the Court of Appeal's 2008 reasons that in 2009 Arbitrator Sylvestre issued a further award in which
He found that had the exchange of offers unfolded as it should have the lock-out would have ended in May 1999. Accordingly, he concluded that the Retired Topographers' compensable losses consisted of salaries and benefits from May 1999 to January 2000, a nine month period.

[14] On January 8, 2010 the CanWest companies were granted CCAA protection. On April 12, 2010 and May 17, 2010 the Superior Court of Ontario (Commercial List) granted a Claims Procedure Order and an Amended Claims Procedure Order.

[15] In December 2010, certain Montreal Gazette Typographers sought directions on the appropriate characterization of the Typographers' claims within the CCAA proceedings.

[16] Within the CCAA proceedings Postmedia then sought an order declaring that the Typographers were bound by Arbitrator Sylvestre's 2009 award with the result that the issues to

be determined by the CCAA Claims Officer were limited to the quantification of the Typographers' salaries and benefits in the period determined by Mr. Sylvestre in his 2009 award, the quantification of the applicable set off[2] and, of course, the net amount owing, essentially an arithmetic undertaking.

[17] On April 16, 2009 the Union moved in the Quebec Superior Court to set aside Mr. Sylvestre's award. This proceeding is referred to as a "Motion in Annulment".

[18] Postmedia's motion was heard by Pepall J., the CCAA Supervising Judge. In reasons released July 28, 2011, Pepall J. determined that the Union and the Retired Typographers were estopped from re-litigating the heads or categories of damages and the January 21, 2000 end point for purposes of the quantification of damages. However, she also found that the finding as to the damages period could not be brought within the ambit of issue estoppel because of the Union's Motion in Annulment, a proceeding which was staged once the CCAA Initial Order was issued.

[19] In her reasons Pepall J. recognized there was a possibility that the existence of the motion for annulment proceeding presented a problem with the finality component of issue estoppel militating against an across the board issue estoppel ruling. She explicitly rejected referring the matter to the Quebec Superior Court and Arbitrator Sylvestre. Instead, she provided direction to the Claims Officer for which, I should add, I am grateful. Those directions included leaving the decision whether the Motion in Annulment proceeding is meritorious to the Claims Officer.

(C) Analysis

[20] In her reasons Pepall J. set out her views as to the nature or substance of the Motion in Annulment process and its effect depending on whether the motion is, or is not, meritorious (see para (34)) and as noted she left that issue to the Claims Officer. The inquiry makes it necessary to consider three broad issues. They are first, what is the true nature of the Motion in Annulment

[2] The set off issue arose because the Gazette paid the Typographer's salaries and benefits for the period February 5, 1998 to October 30, 2998. The Quebec Superior Court referred the Gazette's civil claim for reimbursement to Arbitrator Sylvestre. In his 2009 award Mr. Sylvestre did not rule on the Gazette's set off claim.

process; second, what is the meaning of "meritorious" in the context of Pepall J.'s reasons; and third, is the Motion for Annulment meritorious.

(i) The Motion in Annulment

[21] The parties seem to agree, or at least are close to agreeing, on the nature of the Motion in Annulment. In any event, Pepall J., I think accurately, summarized the essence of the Motion. She described it as a review of the arbitral process, but not a process through which the entire proceeding (or, in my view, any discrete part of it) is re-litigated on a correctness basis.

[22] Whether or not I am bound by Pepall J.'s analysis of the Motion in Annulment is really a non-issue since I agree completely with it.

[23] In my opinion the Motion in Annulment is analogous to the process contemplated by s. 46 of the Ontario Arbitration Act s.o. 1991, ch 17, Errors of fact or law on the Arbitrator's part are not properly part of the Motion in Annulment process.

(ii) The Meaning of Meritorious

[24] As I have observed this part of the inquiry is not free standing. What Pepall J. meant by meritorious must be considered in the context of her reasons, which seem to me to trigger the somewhat circular question, does the Motion in Annulment have merit? This obviously drives one to consider to some articulable standard whether, on the evidence before me, what the motion's prospects of success are. Counsel made comprehensive and helpful submissions on that issue.

[25] As to the standard of assessment, it seems to me that I should consider whether on the evidence it is plain and obvious that the Motion in Annulment will or will not succeed.

[26] For purposes of analysis I accept that the moving party has the onus of establishing that the Motion in Annulment will not succeed. I would add that onus in the circumstances of this matter

in which no new evidence was called plays no determinative role in the process. That is to say where the onus lies plays no role in the outcome.

[27] "Meritorious" is not a word that is restricted to the operating vocabulary of lawyers or judges. It has, and should be given its plain, ordinary meaning. In a legal context it has to do with the end legal worth or value of some process or position. Counsel provided useful examples of circumstances in which the merit of something is a relevant factor. I see no need to review those examples here.

[28] It seems to me that taken as part of Pepall J.'s reasons the submission that I ought to link the meritoriousness of the Motion in Annulment with a "*prima facie*" case is without merit. In my view, had Pepall J. intended that standard to frame the inquiry, she would have said so.

(iii) Is the Motion in Annulment Meritorious

[29] In his submissions, Mr. Grenier valiantly tried to squeeze and convert the alleged failings of the arbitrator into the restricted scope of the Motion in Annulment process. In the end, however, I am satisfied that all of the errors upon which Mr. Grenier relies are errors of fact or law, assuming for purposes of analysis that they are errors in the first place.

[30] To conclude, the Motion in Annulment is not a process intended for review of the merits of an arbitrator's award. It is not a forum through which errors of fact or law are part of the review process. On the material before me, I am satisfied that it is plain and obvious that the Motion in Annulment is not meritorious.

Dated at Toronto this 24th day of November, 2011

_____

Coulter A. Osborne, Claims Officer

TAB 3

11

CITATION: Canwest Global Publishing Inc., 2011 ONSC 6818
COURT FILE NO.: CV-10-8533-00CL
DATE: 20110105

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

COUNSEL: *Nina V. Fernandez* and *Christian Pare*, counsel for the Moving Parties Eriberto Di Paolo and Rita Blondin
Douglas J. Wray and *Jesse B. Kugler*, counsel for the Moving Party Communications, Energy and Paperworkers' Union of Canada, Local 145 ("CEP")
Fred Myers and *Logan Willis*, counsel for the Respondent Postmedia Networks Inc.
Maria Konyukhova, counsel for the Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Relief Requested

[1] The Moving Party, the Communications, Energy and Paperworkers' Union of Canada, Local 145, ("CEP" or the "Union") is the certified bargaining agent for typographers who worked at The Gazette, an English language newspaper in Montreal which is now owned by the Respondent, Postmedia Networks Inc. Once there were 200 typographers; now there are eleven, two of whom, Eriberto Di Paolo and Rita Blondin, are also Moving Parties. Of the remaining nine, six are retired or resigned. The CEP and Mr. Di Paolo and Ms. Blondin (the "Moving Parties") request an order asserting that their claims are liabilities to be assumed by the Respondent Purchaser, Postmedia Networks Inc., pursuant to an Asset Purchase Agreement dated May 10, 2010, entered into with Canwest Publishing Inc., Canwest Limited

Partnership, and certain related entities (the "LP Entities"), and that they are excluded from the claims process in the *CCAA* proceedings. The motion is resisted by the Respondent Purchaser. The Monitor, FTI Consulting Canada Inc., takes no position.

Facts

[2] The LP Entities were granted protection from their creditors by the court pursuant to the *Companies' Creditors Arrangement Act*[1] on January 8, 2010.

[3] On May 17, 2010, an order was granted approving an amended claims procedure and an Asset Purchase Agreement ("APA") dated May 10, 2010, in which the purchaser bought certain assets and assumed certain liabilities of the LP Entities. The APA was subsequently assigned by the purchaser to Postmedia Networks Inc. (the "Respondent Purchaser"). On June 18, 2010, a vesting order was granted.

[4] The issue before me relates to the scope of the liabilities assumed by the Respondent Purchaser pursuant to the provisions of the APA and whether the claims of the Moving Parties are included. I have also been asked to consider whether the claims are excluded from the *CCAA* claims process.

[5] The terminology used in this motion is somewhat confusing as the APA refers to Assumed Liabilities and Excluded Liabilities and the *CCAA* Amended Claims Procedure Order refers to Excluded Claims. Excluded Liabilities and Excluded Claims are distinct and different concepts, the former referring to liabilities not assumed by the Purchaser in the APA and the latter referring to claims that are not part of the *CCAA* claims process for the LP Entities.

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[1] R.S.C., c. C-36 as amended.

(a) History

[6] The provenance of this dispute lies in an extraordinarily troubled relationship involving typographers employed by The Gazette, an English language newspaper in Montreal. This is indeed a sorry saga. Forty six decisions have been rendered by various levels of tribunals and courts and the Union and The Gazette have attended before the Quebec Court of Appeal on at least four occasions.

[7] Approximately 200 typographers worked in the composing room of The Gazette. Historically, they performed the function of composing the type for the printing of the newspaper. With the expansion of computerized technology, this function was becoming obsolete and by the early 1980s, the typographers' positions at The Gazette were becoming redundant.

(i) 1982 Agreement

[8] The Union, CEP, and The Gazette (also referred to as the company) were party to collective agreements that governed the typographers. Consistent with the applicable law at the time, these collective agreements expired every three years.[2] In 1982, the Union negotiated an agreement with The Gazette and the 200 typographers (the "1982 Agreement"). It was signed on April 15, 1983 but dated November 12, 1982. The 1982 Agreement was stated to cover the 200 typographers and was to come into effect "only at the time when the collective agreement between the employer and the Union as mentioned below, similarly in the case of future collective agreements, shall end, disappear, become without value or, for any other reason become null and void or inapplicable."

[9] In return for the right to proceed with technological changes, The Gazette guaranteed to protect the typographers from the loss of regular full-time employment in the composing room due to technological changes. The full-time employment covered by the guarantee was

---

[2] The Labour Code was amended in 1994 to allow collective agreements to run for more than three years.

to be at full pay and at not less than the prevailing union rate of pay as agreed to in the collective agreements negotiated from time to time by the parties. A job transfer was to be agreed upon by The Gazette, the Union and the employee and if required by the applicable collective agreement, any other union involved.

[10] The term of the 1982 Agreement was described as follows:

> "This agreement shall remain in effect until the employment of all the persons named in the attached Appendix 1 has ceased. Neither party shall raise any matter dealt with in this Agreement in future negotiations for any new collective agreement."

[11] In the event of a dispute as to the interpretation, application or breach of the agreement, the grievance procedure to be followed was that laid out in the collective agreement between the company and the union which was in effect at the time that the grievance was initiated.

[12] The 1982 Agreement was to cease to apply to an employee for one of the following reasons: death, voluntary resignation, termination of employment on reaching age 65 or final permanent discharge which could only occur for a major offence. In essence, the agreement was to remain in effect until each of the typographers had ceased his or her employment and ultimately until 2017.

[13] The 1982 Agreement also was to be binding on purchasers, successors or assigns of the company.

[14] The 1982 Agreement was incorporated into the 1981-1984 collective agreement and all subsequent collective agreements. The collective agreements stated:

> "The parties agreed to duplicate hereunder the text of an agreement entered into between them the 12th day of November, 1982. This agreement forms an integral part of the present labour agreement without affecting its civil status beyond the collective agreement. Therefore, the parties declare that it is their intent that said agreement remains fully

> enforced, subject to the terms and conditions contained therein, notwithstanding the expiry of the present labour agreement."[3]

[15] Where this paragraph uses the term labour agreement, the French version of this provision uses the term collective agreement.

(ii) 1987 Agreement

[16] In 1987, The Gazette, CEP and the then remaining 132 typographers entered into a further agreement (the "1987 Agreement"). This agreement contained language similar to that of the 1982 Agreement and included a cost of living formula. It also included a final best offer mechanism which said:

> "Within 90 days before the termination of the collective agreement, the Employer and the Union may initiate negotiations for a new contract. The terms and conditions of the agreement shall remain in effect until an agreement is reached, a decision is rendered by an arbitrator, or until one or the other of the parties exercises its right to strike or lock-out.
>
> Within the two weeks preceding acquiring the right to strike or lock-out, including the acquisition of such rights through the operation of Article X of the present agreement, either of the parties may request the exchange of "Last final best offers," and both parties shall do so simultaneously and in writing within the following forty-eight (48) hours or another time period if mutually agreed by the parties. The "Last final best offers" shall contain only those clauses or portions of clauses upon which the parties have not already agreed. Should there still not be agreement before the right to strike or lock-out is acquired, either of the parties may submit the disagreement to an arbitrator selected in accordance with the grievance procedure in the collective agreement. In such an event, the arbitrator, after having given both parties the opportunity to make presentations on the merits of their proposals, must retain in its entirety either one or the other of the "Last final best offers" and reject, in its entirety, the other. The arbitrator's decision shall be final and binding on both parties and it shall become an integral part of the collective agreement."

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[3] This same language was used with respect to the 1987 Agreement except that the November 12, 1982 date was changed to March 5, 1987.

[17] As such, if there was no agreement prior to the acquisition of a right to strike or lock-out, either of the parties could require that best final offers be exchanged and submitted to the arbitrator selected in accordance with the grievance procedure contained in the collective agreement. The arbitrator would choose one of the last final best offers which then would be binding on the parties and become part of the collective agreement.

[18] The 1987 Agreement was incorporated into the 1987-1990 collective agreement and all subsequent collective agreements. The incorporation language was similar to that used for the 1982 Agreement. The 1987 Agreement was also to be binding on purchasers, successors and assigns of the company.

[19] Typically, each collective agreement would expire after three years. There would then be a hiatus during which time a new collective agreement would be negotiated. It would then be signed and back dated to commence on the first day following the termination of the last collective agreement. So, for example, on November 12, 1982, the parties signed a collective agreement that covered the period July 1, 1981 to June 30, 1984 and then on September 16, 1985 they signed a collective agreement that covered the period July 1, 1984 to April 30, 1987. The last collective agreement covers the period 2010 to 2017. It too is to be binding on purchasers, successors and assigns of the company.

(iii) 1991 Decision of Québec Court of Appeal

[20] Disputes arose regularly amongst the typographers, the Union and The Gazette. On numerous occasions, the Québec Court of Appeal has been obliged to rule on these disputes and on the impact and purport of both the 1982 and 1987 Agreements.

[21] In an appeal brought by two typographers in 1991, the critical question before the Québec Court of Appeal was whether the terms of the 1982 Agreement which was attached and described as Entente C to the collective agreement constituted discrimination on the grounds of age because it required retirement by the age of 65. The two typographers had not signed the 1982 Agreement. After their 65 birthdays, they were told that their employment would end on June 8, 1985. The typographers filed complaints on June 10 and 17, 1985. The

collective agreement had expired on June 30, 1984 and a new collective agreement was not reached until September, 1985. The Superior Court judge concluded that the 1982 Agreement was in the nature of a civil contract and as the two typographers had not signed it, they were not bound by its terms.

[22] Rothman, J.A. had to determine whether the 1982 Agreement which was only signed by some typographers extended to cover all typographers as would have been the case if the 1982 Agreement were a collective agreement. He observed that the September, 1985 collective agreement again incorporated "the provisions of Entente "C" [the 1982 Agreement] which had formed part of the previous collective agreement."

[23] He went on to write:

> "In my respectful opinion, the Entente was not merely a "civil contract" as the Superior Court suggests. It was negotiated and signed by The Gazette and the Union that had been certified to represent the composing room employees and it was specifically stated to form part of the Collective Agreement to which it was annexed. If the Entente was valid, it would have been legally binding on all of the employees whether or not they signed it."[4]

[24] He stated that the collective agreement could not have a term exceeding three years. He went on to state:

> "In my view, the Entente formed part of the Collective Agreement and any of the Employees who did not sign would nonetheless be bound by it. The Entente was negotiated on behalf of all of the composing room employees by a Union that was certified to represent them. It covered conditions of employment and it was expressly stated to form part of the Collective Agreement. If it was valid, I can see no reason why it would not have been legally binding on all of the composing room employees, whether or not they signed it."[5]

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[4] Page 515 of Motion Record of Di Paulo and Blondin.

[5] *Ibid* p. 516

[25] Having concluded that the 1982 Agreement covered all typographers regardless of whether they were signatories to it, he then went on to consider whether the Entente was valid in light of the provisions of the *Labour Standards Act*[6] and the *Québec Charter of Human Rights and Freedoms*[7] prohibiting discrimination on the grounds of age. He concluded that it did not contravene either statute.

(iv) 1999 Québec Court of Appeal Decision

[26] The parties attended before the Quebec Court of Appeal in 1999, 2003 and 2008. I do not intend to summarize each decision but will extract certain key components.

[27] On June 3, 1996, the applicable collective agreement being at an end, The Gazette had issued a lockout notice and stopped paying the 11 typographers. The Union and the 11 typographers challenged The Gazette's failure to participate in the final best offer procedure outlined in the 1987 Agreement and submitted that the 11 were entitled to salaries and benefits lost since the lockout.

[28] In 1999, the Court of Appeal had to determine the nature and scope of the 1982 and 1987 Agreements to decide "whether they could still produce effects after the lockout of June 3, 1996." The Court concluded firstly that The Gazette had breached the 1987 Agreement by refusing to exchange final best offers. Secondly, the Court determined that the 11 typographers were entitled to damages if the lock-out was unduly prolonged due to the employer's refusal to participate in the process. The Court of Appeal was of the view that the arbitrator should decide that question.

[29] In reaching the Court's decision, Rousseau-Houle J.A. wrote that the 1987 Agreement was incorporated into the collective agreement as was the 1982 Agreement. The parties intended that the 1982 and 1987 Agreements remain in full force notwithstanding the expiry

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[6] R.S.Q. ch. N-1.

[7] R.S.Q. ch. C-12.

of the collective agreements.[8] The 1982 and 1987 Agreements provided: (1) an employment and a salary guarantee, (2) an agreement not to renegotiate the guaranteed protection and, (3) a compulsory process for renewing the collective agreement. The 1982 and 1987 Agreements created vested rights collectively and they had to survive the expiry of the collective agreement. "The union and the employer created vested rights for the typographers including the right to job security until the age of 65, a salary adjusted to the cost of living and a compulsory arbitration mechanism. Nothing in the law precludes such a solution."[9] Rousseau-Houle J.A. referred to the Supreme Court of Canada's decision in *Dayco Canada Ltd. v. TCA Canada*[10] dealing with vested rights the exercise of which could be requested after the end of a collective agreement. She observed that the Agreements came into effect as independent civil agreements if the collective agreement was cancelled, lapsed or became inapplicable.

(v) 2003 Québec Court of Appeal decision

[30] This time the issue before the Court was whether an interim ruling of the arbitrator was correct. The arbitrator had ordered that the damages of the typographers were limited to compensation for lost salary and benefits during the lockout and that the period was limited to June 4, 1996 to January 21, 2000, when The Gazette submitted its final best offer. This interim ruling was upheld by the Court of Appeal. In writing for the court, Yves-Marie Morissette J.A. observed that:

> a) the 1982 and 1987 Agreements were applicable only between the expiry of one collective agreement and its replacement by a new one; and
>
> b) the 1999 Court of Appeal decision dealt with the legal characterization of the arbitration procedure. "It establishes

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[8] Page 25.

[9] Page 26.

[10] [1993] 2 S.C.R. 230.

> that the procedure is indeed consensual, and based on [TRANSLATION] "a perfect arbitration clause obliging the parties to carry out the agreements in accordance with the ordinary rules of law. The grievance procedure that is provided for in the collective agreement and to which the arbitration clause refers is used only as a procedural framework for applying the latter." As a result of this analysis, the [TRANSLATION] "disagreements" submitted to arbitration pursuant to the terms of Article IX of the 1987 agreement are neither "grievances" within the meaning of paragraph 1(f) of the *Labour Code*, R.S.Q. c. C-27, since they do not deal with "the interpretation or application of a collective agreement", nor "disputes" within the meaning of para. 1(e) of the *Code*, since they are not [TRANSLATION] "disagreement[s] respecting the negotiation or renewal of a collective agreement or its revision by the parties under a clause expressly permitting the same". Those "disagreements" actually constitute "disputes" within the meaning of article 944 *C.C.P.*"

C.C.P. refers to the *Code of Civil Procedure* that governs civil actions in Quebec.

[31] While appealing one of the arbitral decisions, The Gazette had paid salaries and benefits between February 5, 1998 and October 30, 1998. In February, 2001, The Gazette commenced a civil action against the typographers to recover these amounts. This action is still outstanding. It was acquired by the Respondent Purchaser as part of the APA.

(vi) 2008 Quebec Court of Appeal Decision

[32] In deciding whether the lockout had been unduly prolonged so as to justify an award of damages, the arbitrator interpreted the issue to be considered as requiring him to determine whether there had been an abuse of rights by The Gazette which unduly prolonged the lockout. In 2008, the Court of Appeal determined that the arbitrator had addressed the wrong issue. The only issue that needed to be addressed was whether the lockout would have ended earlier than January 21, 2000 had the exchange of final best offers taken place following the April 30, 1996 request. The Court of Appeal remitted the matter to the arbitrator to answer that question.

[33] Since then, the arbitrator has determined that had the final best offer procedure been adhered to, the lockout would have lasted until May, 1999. Therefore the typographers were

entitled to damages covering the nine month period from May, 1999 to January, 2000. He did not order this amount to be paid, however, because The Gazette's request for reimbursement was still outstanding and had to be addressed. He therefore gave the parties an opportunity to settle the issue but retained jurisdiction. The Union and the typographers then challenged the arbitrator's January 21, 2009 decision.

[34] As mentioned, on January 8, 2010, an initial CCAA order was granted and proceedings against the LP Entities were stayed including those involving The Gazette and the typographers. Subsequently, the Respondent Purchaser acquired the assets of the LP Entities on a going concern basis for approximately $1.1 billion. I approved both the APA and the claims procedure to be used with respect to the CCAA plan.

[35] As mentioned, six of the 11 typographers have now retired or resigned although one retired after the closing of the APA. The remaining five, including Mr. Di Paulo and Ms. Blondin, are still employed at The Gazette by the Respondent Purchaser as "Transferred Employees" under the APA.

(b) The APA

[36] The APA delineates the assets purchased, the liabilities that are assumed and those that are excluded. The purchase price included the amount of the Assumed Liabilities as defined in the APA.

[37] The focus of this review of the APA is to ascertain whether the Respondent Purchaser assumed the liabilities that relate to the typographers. The relevant provisions of the APA with emphasis added by me are as follows:

(i) The Purchase and Sale

> s 2.1 On the Acquisition Date effective as at the Acquisition Time, pursuant to the Sanction and Vesting Orders, the LP Entities shall sell and Purchaser shall purchase the Acquired Assets, free and clear of all Encumbrances (other than Permitted Encumbrances) and Purchaser shall

assume the Assumed Liabilities, in each case, on the terms of and subject to the conditions of this Agreement, the *CCAA* Plan and the Sanction and Vesting Orders.

[38] Therefore, generally speaking, if the claims of the Moving Parties constitute Assumed Liabilities, the Respondent Purchaser is responsible for them. To assist in finding the answer to this question, one must examine the definitions found in the APA.

(ii) Definitions

(a) Assumed Liabilities

s1.1(19) "Assumed Liabilities" means (i) Accounts Payable, Deferred Revenue Obligations, Accrued Liabilities and Insured Litigation Deductibles, (ii) the other Liabilities of the LP Entities relating to the Business accrued due on, or accruing due subsequent to the Acquisition Date under the Assumed Contracts, Licences and the Permitted Encumbrances, (iii) the Liabilities of the LP Entities relating to the Transferred Employees, and (iv) other Liabilities to be assumed by Purchaser as specifically provided for under this Agreement.

(b) Liabilities

s 1.1(86) "Liabilities" of a Person means all Indebtedness, obligations and other liabilities of that Person whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due.[11]

s 1.1(3) "Accrued Liabilities" means liabilities relating to the Business incurred by the LP Entities as of the Acquisition Time but on or after the Filing Date in the Ordinary Course of Business and in accordance with the terms of the Initial Order and this Agreement, including liabilities in respect of pre and post-filing accruals for vacation pay for Transferred Employees, customer rebates and allowance for product returns.

(c) Assumed Contracts

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[11] Person includes a corporation.

s 1.1(18) "Assumed Contracts" means all Contracts, Personal Property Leases and Real Property Leases, other than the Excluded Contracts and Leases.

s 1.1(40) "Contracts" means all contracts and agreements relating to the Business to which any of the LP Entities is a party at the Acquisition Time...

Acquisition Time is defined as being three days after the sanction and vesting orders became final.

Excluded Contracts and Leases are described in Schedule 3.1(3). It includes certain lease agreements, financing agreements and material contracts. The Schedule does not include any collective agreements nor does it include the 1982 or 1987 Agreements.

(d) Transferred Employees

s 1.1(147) "Transferred Employees" means (i) Union Employees and (ii) non-Union Employees who accept offers of employment by Purchaser or who begin active employment with Purchaser as of the Acquisition Date or their next scheduled work day.

(e) Employees

s 1.1(52) "Employees" means any and all (i) employees who are actively at work (including full-time, part-time or temporary employees) of the LP Entities, including Misaligned CMI Employees; and (ii) employees of the LP Entities who are on approved leaves of absence (including maternity leave, parental leave, short-term disability leave, workers' compensation and other statutory leaves).

(f) Union Employees

s 1.1 (149) "Union Employees" has the meaning given to it in section 5.1(2)(a).

[39] Employee matters are addressed in Article 5 of the APA. Under this Article, the Purchaser was to offer employment to all Employees subject to certain terms. The definition of Union Employees is found in this article. It and other relevant subsections state:

s 5.1(2) Subject to section 5.1(3) and section 5.1(4)[12], Purchaser shall offer employment, effective as of the Acquisition Date and conditioned on the completion of the Acquisition, to all Employees immediately prior to the Acquisition Date on the following terms and conditions:

(a) to Employees who are part of a bargaining unit ("Union Employees") in respect of which a collective agreement is in force, or has expired and the terms and conditions of which remain in effect by operation of law, the terms and conditions provided for in such collective agreement, or expired collective agreement if such terms and conditions remain in effect by operation of law, subject to any amendments or alterations to the terms thereof to which the bargaining agent under such collective agreement or expired collective agreement consents; and

(b) to all other Employees ("Non-Union Employees") on substantially similar terms and conditions as their then existing employment immediately prior to the Acquisition Date, excluding any equity or equity-like compensation, supplementary retirement or supplementary pension arrangements or plans.

s 5.4(1) The provisions of this Article 5 insofar as they relate to unionized Employees shall be subject and subordinate to the provisions of the relevant collective agreements (including expired collective agreements that continue by operation of law) and Purchaser shall be bound as a successor employer to such collective agreements to the extent required by Applicable Law[13].

s 5.1(9) No Employee or Person other than the LP Entities and Purchaser shall be entitled to any rights or privileges under this Section 5.1 or under any other provisions of this Agreement. Without limiting the foregoing, no provision of this Agreement shall: (i) create any third party beneficiary or other rights in any bargaining agent representing Employees or in any other Employee or former employee of an LP Entity

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[12] These sections are not relevant to the facts before me.

[13] The definition of Applicable Law is all encompassing. It means, in respect of any Person, property, transaction, event or other matter, any law, statute, regulation, code, ordinance, principle of common law or equity, municipal by-law, treaty or Order, domestic or foreign, applicable to that Person, property, transaction, event or other matter and all applicable requirements, requests, official directives, rules, consents, approvals, authorizations, guidelines, and policies, in each case, having the force of law, of any Governmental Authority having or purporting to have authority over that Person, property, transaction, event or other matter and regarded by such Governmental Authority as requiring compliance.

> (or on any beneficiary or dependant of any Employee or former employee of an LP Entity); (ii) constitute or create an employment agreement or collective agreement; or (iii) constitute or be deemed to constitute an amendment to any of the Purchaser Established Benefit Plans, National Post Benefit Plans or LP Benefit Plans.

[40] Except as specifically provided for in the APA, the Purchaser did not assume liabilities.

> s 3.2 Except as specifically provided in this Agreement, Purchaser shall not assume and shall not be obliged to pay, perform or discharge any Liabilities of any LP Entity which arise or relate to the Business or otherwise. Without limiting the generality of the foregoing, Purchaser shall not assume and shall have no obligations in respect whatsoever of any of the Excluded Liabilities or any Claims relating thereto.

[41] "Excluded Liabilities" are defined in section 1.1(62) as meaning all liabilities of the LP Entities other than the Assumed Liabilities, and for certainty includes all of the Liabilities described in Schedule 1.1(62). Schedule 1.1(63) is in fact the schedule that lists the Excluded Liabilities. The following are Excluded Liabilities:

> s 1.1(63) (i) Certain Employee-Related Liabilities:
>
> (i) all Liabilities of any kind, howsoever arising, in respect of any Employees or former employees other than the Transferred Employees (other than in connection with: the LP Pension Plans, as required by any collective agreement or the Purchaser Assumed Benefit Plans)
>
> ...
>
> (k) Litigation:
>
> All Liabilities in respect of any litigation proceedings, lawsuits, court proceedings or proceedings before any Governmental Authority against any of the LP Entities and their predecessors in respect of any matters, events or facts occurring prior to the Acquisition Time, other than the Insured Litigation Deductibles and the obligation to defend and/or settle all claims in connection therewith pursuant to Section 9.15.

[42] Representations and Warranties are found in section 7.6(2) of the APA. It states:

> Except as disclosed in Schedule 7.6(2), neither any LP Entity nor National Post is a party to or bound by any collective agreement, labour contract, letter of understanding, memorandum of understanding, letter of intent, voluntary recognition agreement, or other legally binding commitment to any labour union, trade union, employee association or similar entity in respect of any Employees...

[43] Schedule 7.6(2) includes the most recent collective agreement between The Gazette and the CEP dealing with the typographers and which in turn includes the 1982 and 1987 Agreements.

(c) The *Québec Labour Code*

[44] Section 45 of the *Québec Labour Code* provides:

> The alienation or operation by another in whole or in part of an undertaking shall not invalidate any certification granted under this Code, any collective agreement or any proceeding for the securing or for the making or carrying out of a collective agreement.
>
> The new employer, notwithstanding the division, amalgamation or changed legal structure of the undertaking, shall be bound by the certification or collective agreement as if he were named therein and shall be ipso facto a party to any proceeding relating thereto, in the place and stead of the former employer.

(d) Claims Procedure

[45] As mentioned, the Amended Claims Procedure Order was granted on May 17, 2010. It delineated, amongst other things, how proofs of claim in the *CCAA* proceedings were to be filed by creditors and how certain claims were to be excluded from the procedure. An Employee Claim consisted of "any claim by an employee or former employee of the LP Entities arising out of the employment of such employee or former employee by the LP Entities that relates to a Prefiling Claim or a Restructuring Period Claim other than an Excluded Claim or any employee-related liabilities that are being assumed by the Purchaser pursuant to the Purchase Agreement." Excluded Claims included "all Grievances or claims that can only be advanced in the form of a Grievance pursuant to the terms of a collective bargaining agreement". Grievance was defined as meaning "all grievances filed by

bargaining agents (the "Unions") representing unionized employees of the LP Entities, or their members, under applicable collective bargaining agreements".

[46] Mr. Di Paulo and Ms. Blondin filed claims for $6,604,376.80 and $6,431,536.80 respectively. CEP also filed a claim on behalf of the remaining 9 typographers on a without prejudice basis so as to preserve their rights. Each claim amounted to $500,000.

(e) LP Entities' and Monitor's Correspondence on Claims Procedure

[47] On May 31, 2010, counsel for the LP Entities, Sven Poysa of Osler, Hoskin & Harcourt LLP, wrote to counsel for Mr. Di Paulo and Ms. Blondin stating:

> "The Claims Procedure Order excludes certain claims from the Claims Procedure, including claims arising from grievances filed by bargaining agents (the "Unions") representing unionized employees of the LP Entities, or their members, under applicable collective bargaining agreements. Holders of Excluded Claims (as defined in the Claims Procedure Order) are not included in the Claims Procedure and can proceed to advance such claims outside of the Claims Procedure in the ordinary course. The above Grievance Matter is properly characterized as an Excluded Claim. Accordingly, your claim will not be included in the Claims Procedure."

[48] Mr. Poysa went on to state that the APA had been approved by the court and the Purchaser would be assuming certain liabilities of the LP Entities on closing "which may include the Grievance Matter".

[49] On July 14, 2010, Quebec counsel acting on behalf of 9 typographers filed a proof of claim to preserve their clients' rights. In response, the Monitor's counsel wrote that pursuant to the APA, the Respondent Purchaser had agreed to purchase substantially all of the assets and assume substantially all of the liabilities of the LP Entities. Counsel wrote:

> "The Claims Procedure Order excludes certain claims from the Claims Procedure, including claims arising from grievances filed by bargaining agents (the "Unions") representing unionized employees of the LP Entities, or their members, under applicable collective bargaining agreements which are Assumed Liabilities under the APA. Holders of Excluded Claims (as defined in the Claims Procedure Order) are not included in the Claims Procedure and can proceed to advance such claims outside of the Claims Procedure in the

ordinary course which in the case of Assumed Liabilities is against the Purchaser.

In your letter of July 14, 2010, you stated that you were of the view that your clients' claim was an Excluded Claim. If your position remains that your clients' claim is an Excluded Claim, you must withdraw the claim from the Claims Procedure and pursue your claim against and through the Purchaser. Please note that if you withdraw your claim from the Claims Procedure and are ultimately unsuccessful in establishing that your claim is an Assumed Liability under the APA, you will not be able to share in the distributions to be made under the Plan to the LP Entities' creditors."

Issue

[50] I must determine whether the claims asserted against The Gazette by the Moving Parties have been assumed as liabilities by the Respondent Purchaser under the APA and whether they are Excluded Claims under the Amended Claims Procedure Order.

Positions of the Parties

[51] In brief, the positions of the parties are as follows. The Moving Party Union submits that the claim is an Excluded Claim according to the definitions contained in the Amended Claims Procedure Order and that this view is shared by both counsel to the LP Entities and counsel to the Monitor.

[52] In addition, the Union states that the claim is an Assumed Liability under the APA. The APA provides that the Liabilities of the LP Entities relating to the Transferred Employees and other Liabilities as specifically provided for under the APA are to be assumed by the Purchaser. Section 5.4 of the APA provides that the Purchaser shall be bound as a successor employer to such collective agreements to the extent required by Applicable Law. This means that the Purchaser assumes all collective agreement liabilities. This is confirmed by Schedule 1.1(63) of the APA which excludes all liabilities except those required by any collective agreement and also by the provisions of the Quebec Labour Code.

[53] The Union also submits that past judicial consideration and equity support the Union's interpretation and position. Lastly, and in the alternative, the 5 remaining typographers are clearly within the ambit of Assumed Liabilities under the APA.

[54] The position of Mr. Di Paulo and Ms. Blondin is similar to that of the Union. Additionally, they submit that the Purchaser is bound by the obligations of the LP Entities found in the 2010-2017 collective agreement which again includes the 1982 and 1987 Agreements both of which provide that they are binding on third party purchasers and also as a result of the application of the Quebec Labour Code.

[55] The Respondent Purchaser takes the position that the liability of The Gazette represents a pre-filing civil liability for damages for breach of contract and is not in the nature of a grievance. Secondly, the claims of the Moving Parties do not fall within the definition of Assumed Liabilities contained in the APA. Furthermore, as litigation, the claims are expressly excluded from the ambit of the APA. Such an interpretation is consistent with the overall interpretation of the APA read as a whole. Similarly, the claims for damages do not arise as successor employer obligations under the collective agreement. The Respondent Purchaser has never had any involvement with or connection to the claims of the typographers.

Discussion

[56] The claims of the Moving Parties that are in issue represent in part damages consisting of wages and benefits that would have been paid to the typographers had The Gazette participated in the final best offer procedure set forth in the 1987 Agreement. The damages flowed from a breach of the Agreement at a time when the old collective agreement had expired and a new collective agreement had not yet been negotiated. As noted by the Quebec Court of Appeal in 1999 and 2003, the dispute fell within the parameters of the Code of Civil Procedure that governs civil actions in the Province of Quebec.

[57] The arrangement negotiated by the Union and The Gazette was unusual. It was designed to provide protection to the typographers in exchange for which The Gazette was free to proceed with the technological changes it desired unencumbered by a resistant union

and typographers. Due to the applicable law then in force, a collective agreement could not exceed three years in duration. The 1982 and 1987 Agreements were negotiated to provide for seamless protection for the workers. They would cover any hiatus between collective agreements and were incorporated into every subsequent collective agreement. Based on the decisions of the Quebec Court of Appeal in 1999 and 2003, the claims of the Moving Parties are not technically grievances although their origins are tied to the collective agreements negotiated by the Union and The Gazette.

[58] I do note that the Quebec Court of Appeal treated the Agreements as hybrid creatures. In 1991, the Court stated that the Agreements encompassed all typographers including those who were not signatories. As J. A. Rothman stated, the Entente or the 1982 Agreement was not simply a "civil contract". In contrast, Yves-Marie Morissette J.A. described the disagreements relating to the 1982 and 1987 Agreements as being disputes within the meaning of the Code of Civil Procedure.

(a) Transferred Employees

[59] The APA contemplates that the Purchaser will continue to operate all of the businesses of the LP Entities in substantially the same manner as they had been operated and would offer employment to substantially all of the employees of the LP Entities. The existing collective agreements including that governing the typographers will continue.

[60] As part of the purchase transaction, the Purchaser agreed to assume certain liabilities and indeed the purchase price included the amount of the Assumed Liabilities. The Assumed Liabilities expressly included the liabilities of the LP Entities relating to the Transferred Employees. Liabilities are given a very broad definition in the APA. They encompass all obligations and other liabilities whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due.

[61] One must then consider who is included in the definition of Transferred Employees. Transferred Employees include Union Employees in respect of which a collective agreement is in force or has expired.

[62] This then leads one to the definition of Union Employees. Union Employees consist of active employees and employees on approved leaves of absence who are part of a bargaining unit in respect of which there is a collective agreement. This definition causes me to conclude that under the APA, as active employees, Mr. Di Paulo and Ms. Blondin are Transferred Employees and The Gazette's liability to them is assumed by the Respondent Purchaser as is the liability to the other four typographers who were not retired or who had not resigned as of the date of the closing of the APA.

[63] In my view, the description of Excluded Liabilities found in the APA does not detract from this conclusion. Firstly, the Assumed Liabilities are specifically enumerated. Secondly, Excluded Liabilities means all Liabilities of the LP Entities other than the Assumed Liabilities. Thirdly, the exclusions themselves expressly except liabilities of the Transferred Employees. Even if one were to accept that the language of the litigation exception is broad enough to encompass the Moving Parties' claims, it does not overcome these other explicit provisions.

[64] It seems to me clear therefore that the parties to the APA intended that the Assumed Liabilities would extend to cover liabilities relating to the Transferred Employees. This would cover the typographers still employed by the LP Entities and would cover "liabilities relating to them" as stated in section 1.1(19)(iii) of the APA. I would also add that the third party provision contained in the APA does not serve to relieve the Respondent Purchaser from these obligations.

[65] This conclusion is also consistent with the Amended Claims Procedure order. Under paragraph 21 of that order, the LP Entities are to deliver a LP Entities' claims package to each LP Creditor with an Employee Claim as soon as practicable. Employee Claim is defined as "any claim by an employee or former employee of the LP Entities arising out of the employment of such employee or former employee by the LP Entities that relates to a Prefiling Claim or a Restructuring Period Claim other than an Excluded Claim or any employee-related liabilities that are being assumed by the Purchaser pursuant to the Purchase Agreement." It is therefore clear that the claims process did not apply to employee related liabilities assumed by the Purchaser.

[66] In conclusion, The Gazette's liability to the Transferred Employees is assumed by the Respondent Purchaser. The Transferred Employees include Mr. Di Paulo, Ms. Blondin and the four other typographers who had not retired or resigned as of the closing of the APA. They need not participate in the *CCAA* claims procedure.

(b) Remaining Typographers

[67] The next issue to consider is whether The Gazette's liability to the remaining five typographers who retired or resigned before the closing of the APA is assumed by the Respondent Purchaser. Certainly they are not Transferred Employees within the definition of the APA. Similarly, they are not captured by Article 5 which addresses Employees who are actively at work or on a leave of absence. It is possible to argue that the definition of Assumed Liabilities extends to include the remaining typographers, however, in my view, this is straining the interpretation of the APA and does not accord with the intention of the contracting parties. Dealing firstly with section 1.1(19)(ii) of the APA, while the collective agreement which includes the 1982 and 1987 Agreements is an Assumed Contract within the meaning of the APA, any obligation to the remaining typographers accrued due well before the Acquisition Date. Similarly, the remaining typographers' claims are not within section 1.1(19) (iv) of the APA as the liability is not specifically provided for under the APA. Rather, the remaining typographers are specifically addressed in the provisions of the APA dealing with Excluded Liabilities. Schedule 1.1(63) expressly provides that all Liabilities of any kind in respect of former employees are excluded (other than pension plans). It seems to me therefore, that the claims advanced by the CEP on behalf of the remaining typographers do not represent liabilities that are assumed by the Respondent Purchaser pursuant to the provisions of the APA.

[68] As for the provisions of the Amended Claims Procedure Order, it excluded claims that could only be advanced as a grievance or in the form of a grievance pursuant to the terms of a collective bargaining agreement. The claims asserted by the CEP on behalf of the remaining typographers do not fall within that description. Accordingly, they may be submitted and disposed of in accordance with the Amended Claims Procedure Order.

Conclusion

[69] In conclusion, the claims of the Transferred Employee typographers are Assumed Liabilities within the meaning of the APA and those typographers need not participate in the claims process. The claims of the remaining typographers are not and their claims may be submitted and disposed of in accordance with the Amended Claims Procedure Order. Accordingly, the motion brought by the Moving Parties Di Paulo and Blondin is granted. The motion brought by CEP is granted insofar as it relates to the other Transferred Employees and is otherwise dismissed. The Monitor is to establish a reserve for the claims of all of the Moving Parties until the requisite time for any appeals has expired.

Pepall J.

Released: January 5, 2011

CITATION: Canwest Global Publishing Inc., 2011 ONSC 6818
COURT FILE NO.: CV-10-8533-00CL
DATE: 20110105

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

REASONS FOR DECISION

Pepall J.

Released: January 5, 2011

TAB 4

Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 5TH
	)	
MADAM JUSTICE PEPALL	)	DAY OF JANUARY, 2011

B E T W E E N:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Applicants

O R D E R

THIS MOTION, made by Communications, Energy and Paperworkers' Union of Canada, Local 145 ("CEP") for an Order declaring that the claims described in the proof of claim submitted by CEP to FTI Consulting Canada Inc. (the "Monitor") on July 14, 2010 (the "Proof of Claim") are Assumed Liabilities assumed by Postmedia Network Inc. (the "Purchaser") pursuant to the Asset Purchase Agreement dated May 10, 2010 (the "APA") entered into with Canwest Publishing Inc., Canwest Limited Partnership, and certain related entities, was heard on December 10, 2010, at 330 University Avenue, Toronto, Ontario.

ON READING the Affidavit of Eriberto Di Paolo sworn December 2, 2010, the Affidavit of Rita Blondin sworn December 2, 2010, the Affidavit of Don McKay sworn December 2, 2010, and the Affidavit of Eileen Flood sworn December 5, 2010, and on hearing the submissions of the lawyers for Eriberto Di Paolo and Rita Blondin, CEP, the Purchaser and the Monitor:

ASSUMPTION OF CLAIMS

1. THIS COURT ORDERS AND DECLARES that the claims of Pierre Rebetez, René Brazeau, Michael Thomson and Uhmed Gohil, the typographers who were not retired or who had not resigned as of the date of the closing of the APA (collectively, the "Transferred Employees"), against The Gazette for lost salaries and benefits resulting from The Gazette's lack of participation in an exchange of last final best offers ("LFBOs") pursuant to the tripartite agreements entered into in 1987 by The Gazette, CEP and the Transferred Employees after the Transferred Employees and CEP demanded on April 30, 1996 an exchange of LFBOs (as described in the Proof of Claim) (the "Transferred Employees' Claims") are Assumed Liabilities within the meaning of the APA, provided that nothing in this Order shall be determinative of the quantum or validity of the Transferred Employees' Claims or affect the Purchaser's right to set-off any claims of the Purchaser against the Transferred Employees, including, without limitation, The Gazette's claims for salary and benefits paid to the Transferred Employees for the period running from February 5, 1998 to October 30, 1998.

2. THIS COURT ORDERS AND DECLARES that the claims of JP Martin, Marc Tremblay, Leslie Stockwell, Robert Davies and Horrace Holloway, the typographers who were retired or who had resigned as of the date of the closing of the APA (collectively the "Non-Transferred Employees"), against The Gazette for lost salaries and benefits resulting from The Gazette's lack of participation in an exchange of LFBOs pursuant to the tripartite agreements entered into in 1987 by The Gazette, CEP and the Non-Transferred Employees after the Non-Transferred Employees and CEP demanded on April 30, 1996 an exchange of LFBOs (as described in the Proof of Claim) (the "Non-Transferred Employees' Claims") are not Assumed Liabilities within the meaning of the APA.

3. THIS COURT ORDERS that the Non-Transferred Employees' Claims shall be disposed of in accordance with the Amended Claims Procedure Order granted by this Court on May 17, 2010.

37

RESERVE FOR CLAIMS

4. THIS COURT ORDERS that the Monitor is directed to establish a reserve in an amount sufficient to satisfy the full amount of the Transferred Employees' Claims and of the Non-Transferred Employees' Claims until the requisite time for any appeal has expired.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

APR 19 2011

PER/PAR:

POSTMEDIA NETWORK INC. Respondent	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**	Court File No: CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
- COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Fred Myers LSUC#: 26301A
Logan Willis LSUC#: 53894K

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for Postmedia Network Inc.

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TAB 5

TAB 5

CITATION: Canwest Publishing Inc., 2011 ONSC 4518
COURT FILE NO.: CV-10-8533-00CL
DATE: 20110728

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

Applicants

COUNSEL: *Fred Myers and Caroline Descours*, counsel for Postmedia Networks Inc.
Douglas J. Wray, Jesse B. Kugler and P. Grenier, counsel for the Communications, Energy and Paperworkers Union of Canada, Local 145
Maria Konyukhova, for the Monitor

REASONS FOR DECISION

PEPALL J.

Relief Requested

[1] Postmedia Network Inc. ("Postmedia") requests an order:

(a) declaring that the method for the calculation of the claims of J.P. Martin, Marc Tremblay, Leslie Stockwell, Robert Davies and Horrace Holloway (the "Retired Typographers") against the Applicants has previously been determined in a commercial arbitration award dated January 21, 2009 and that the Retired Typographers are bound by that award which establishes and limits their claim entitlement to the payment of salary and benefits for the period between May, 1999 and January 21, 2000 subject to the overpayment of salary and benefits that were paid to the Retired Typographers by The Gazette for the period between February 5, 1998 and October 30, 1998;

(b) declaring that as a result, the only issues to be determined by the Claims Officer under the Amended Claims Procedure Order dated May 17, 2010 are the

quantification of the Retired Typographers' salary and benefits for the period between May, 1999 and January 21, 2000; the quantification of the applicable set off of The Gazette's overpayment; and the net amounts, if any, remaining due to the Retired Typographers or due from them; or

(c) in the alternative, in the event that the award is held not to be determinative of the valuation of the claims, an order pursuant to, *inter alia*, s. 11 and s. 17 of the *Companies' Creditors Arrangement Act* ("*CCAA*") referring all questions of liability and quantum in respect of the Retired Typographers' claims to the Quebec Superior Court and the arbitration proceedings already underway in Quebec to be heard in conjunction with the ongoing litigation by six other Typographers ("the Assumed Typographers") whose claims against The Gazette were assumed by Postmedia pursuant to court order dated January 5, 2011; provided, however, that the referred proceeding shall not result in a judgment or enforceable claim against Postmedia but shall only form the quantification of the Retired Typographers' claims as filed in these proceedings.

Factual Background

[2] My reasons for decision of January 5, 2011 provided details of the history of the dispute between the Typographers and The Montreal Gazette which I do not propose to recite for the purposes of this motion although through necessity, some facts will be repeated.

(a) Court Orders

[3] The Applicants, Canwest Publishing Inc., Canwest Limited Partnership, and certain related entities (the "LP Entities") filed for CCAA protection and on January 8, 2010, I granted an Initial Order.

[4] On June 18, 2010, I granted an order sanctioning the Plan proposed by the LP Entities. All of the operating assets of the LP Entities were transferred to the Purchaser, Postmedia, on July 13, 2010.

[5] On July 6, 2010, I granted an Administrative Reserve and Transition Order which, amongst other things, established an administrative reserve and expanded certain powers of the Monitor following the implementation of the Plan.

[6] On April 12, 2010 and May 17, 2010, I granted a Claims Procedure Order and an Amended Claims Procedure Order respectively. Amongst other things, the Orders called for

claims and established the claims procedure for the identification and quantification of claims against the LP Entities.

(b) CEP Proof of Claim and the Decision

[7] On July 14, 2010, the Communications, Energy and Paperworkers Union of Canada ("CEP") filed a proof of claim on behalf of nine of the LP Entities' Typographers. CEP claimed $500,000 in respect of each of the Typographers and did not provide any additional details in connection with their claims. In the cover letter dated July 14, 2010 enclosing the proof of claim, CEP's counsel stated:

> "Our clients are employees of The Gazette and are owed money for unpaid salary. Please note that an arbitrator is seized of the claim. His latest decision in this regard is enclosed with the present letter. Please note however that this decision is being contested in front of the Superior Court of Quebec."

The letter enclosed the decision of Arbitrator Andre Sylvestre dated January 21, 2009 (the "Decision").

[8] The Decision addressed a June 4, 1996 grievance filed by CEP on behalf of the Typographers relating to The Gazette's refusal to exchange last, final and best offers following a breakdown of negotiations for a new collective agreement. Arbitrator Sylvestre had to determine whether the lockout of the Typographers was unduly prolonged as a result of The Gazette's refusal to submit its last final best offers as requested by the union before a certain deadline. He determined The Gazette's liability to the Typographers under the legal test established by the Quebec Court of Appeal in its earlier decisions. While Arbitrator Sylvestre found and ruled that the Typographers were entitled to damages for the nine month period from May, 1999 to January, 2000, he did not order this amount to be paid. The reason he gave was that while various court proceedings were being pursued, The Gazette had overpaid salaries and benefits between February 5 and October 30, 1998 and in February 2001, it had commenced a civil action to be reimbursed for these amounts. Its claim had been referred to Arbitrator Sylvestre for adjudication. As The Gazette's claim for reimbursement was outstanding, Arbitrator Sylvestre wished to give the parties an opportunity to settle their issues. As such, in his Decision,

Arbitrator Sylvestre did not order the Gazette to pay the nine months of damages he had determined were due to the Typographers.

[9] A settlement did not occur and on April 16, 2009, CEP brought a proceeding before the Quebec Superior Court to set aside the Decision. The proceeding is referred to as a motion in annulment and, based on the evidence before me, is similar to a motion to set aside an arbitration award pursuant to section 46 of Ontario's Arbitration Act, 1992. The proceeding is not an appeal on the merits of Arbitrator Sylvestre's Decision. In the 2003 Quebec Court of Appeal decision, the Court wrote that on a request for annulment of an award, a judge "cannot enquire into the merits of the dispute, and it is impossible for the parties to an arbitration agreement to contract out of this rule...By establishing that these legal decisions are final and without appeal, the Code reinforces the autonomy of the arbitration procedure and its conduct. By limiting the grounds for annulling or refusing the homologation of an award, the Code reinforces the autonomy of the arbitration process and its outcome." [1]

[10] The motion in annulment was stayed as a result of the operation of the CCAA Initial Order. No one ever moved to lift the stay so as to pursue the motion in annulment nor did The Gazette pursue its claim.

(c) Court Directions Order

[11] In December, 2010, the Typographers sought this Court's instructions and directions with respect to the proper characterization of the Typographers' claims. On January 5, 2011, I released Reasons for Decision on whether claims of Typographers who worked at The Gazette were excluded from the claims process in the *CCAA* proceedings. I determined that liabilities relating to active employees or transferred employees (the "Assumed Typographers") had been assumed by the Purchaser, Postmedia, and were excluded from the claims process and that liabilities relating to the five Typographers who were retired or who had resigned (the "Retired Typographers") were not. Those claims were encompassed by the claims procedure in the

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[1] At para 43.

CCAA proceedings. This meant that the Assumed Typographers would continue with whatever proceedings they felt were appropriate in the Province of Quebec and that the CEP would pursue the Retired Typographers' proof of claim that was filed in July, 2010, in the CCAA proceedings. Leave to appeal that decision was not sought by anyone.

[12] As part of the LP Entities' Plan transaction, The Gazette's claim was acquired by Postmedia. Additionally, the Plan contained releases of the Applicants. Accordingly, if the Retired Typographers were to seek to proceed with the motion in annulment in Quebec, an argument could be advanced that they were precluded from doing so as a result of the releases. As noted by counsel for Postmedia, the Assumed Typographers are not bound by the Plan or the releases.

[13] The claims of the Retired Typographers have not yet been referred to a Claims Officer or to the Court for resolution as provided for in paragraph 14 of the Amended Claims Procedure Order.

(d) Settlement Discussions

[14] Subsequent to the release of the January 5, 2011 Reasons for Decision, counsel for Postmedia and CEP engaged in settlement discussions with respect to all Typographers represented by CEP[2]. Any settlement involving the claims of the Retired Typographers was subject to approval by the Monitor. The settlement efforts were unsuccessful. Subsequently, the Monitor and CEP commenced settlement discussions with respect to the claims of the Retired Typographers. As of the date of the motion, the claims of the Retired Typographers had not been settled but counsel for the Monitor advised the Court that settlement negotiations were ongoing.

[15] On April 5, 2011, during the course of settlement discussions between the Monitor and CEP, CEP's counsel delivered a breakdown of the quantum of the Retired Typographers' claims. The description referred to two grievances: the 1996 grievance and another grievance submitted on July 14, 2000. The reference to the 2000 grievance delivered to the Monitor on April 5, 2000

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[2] Some of the Assumed Typographers are not represented by CEP.

was the first time CEP had expressly mentioned the 2000 grievance in the context of the proof of claim of $500,000 per Typographer. CEP is claiming $417,864 for each of the Retired Typographers in respect of the 1996 grievance and $143,208 for each of the Retired Typographers in respect of the 2000 grievance for a total claim of $561,072 per Retired Typographer. This is in excess of the $500,000 amount claimed for each Typographer by CEP in its original proof of claim filed in July, 2010.

[16] In accordance with the Plan, the Monitor reserved 55,490 shares in the Disputed Claims Reserve for the claims of the Retired Typographers. This reflected the amount of the claims of $500,000 per Retired Typographer as submitted in the proof of claim of July, 2010. These are the only shares now remaining in the Disputed Claims Reserve, all other distributions having been effected.

[17] The Monitor takes the position that any claims relating to the 2000 grievance are claims that are barred by the provisions of the Amended Claims Procedure Order. The Monitor states that if Postmedia is unsuccessful in its request for relief and the Monitor and CEP are unsuccessful in reaching a settlement of the Retired Typographers' claims, the Monitor will refer the claims of the Retired Typographers to a Claims Officer or the Court and at that time will be advancing a claims bar defence with respect to the Retired Typographers' claims relating to the 2000 grievance.

Positions of Parties

[18] Although the Retired Typographers' claims have not yet been referred to a Claims Officer, Postmedia requests that I define the mandate of the Claims Officer. It submits that the scope and extent of the Retired Typographers' damages has been determined in proceedings that are binding upon them and all that remains is an arithmetical exercise of calculating the damages and applying any available setoff. It argues that the nature and scope of the damages and the duration of the period for which they are due have been finally determined by the Quebec arbitrator and courts and cannot be relitigated. The only matters to be determined by the Claims Officer are the exact amount of those damages and the amount owed by setoff or counterclaim.

Alternatively, Postmedia submits that the proceedings should be referred to the Quebec courts and heard with the claims of the Assumed Typographers.

[19] CEP is the representative of all of the Retired Typographers. It opposes the relief on the grounds that: Postmedia lacks standing; the motion is premature and constitutes an improper collateral attack on the Typographers' April 2009 motion for annulment of the arbitral award; and the liability and quantum issues underlying the claims filed have not been finally decided and *res judicata* is inapplicable.

[20] The Monitor takes no position.

[21] During argument of this motion, I enquired as to whether those appearing were interested in a judicial settlement conference to help in resolving their dispute. Based on the response, I did arrange for a judge to assist in this regard. Many days after the motion was argued, I was advised that not all of the stakeholders wished to participate at this stage of the proceedings. If they should change their view, the Monitor's counsel should contact me and I will renew the settlement initiative.

Discussion

[22] The practical issue before me is to ensure a process that reduces the risk of inconsistent results but which is fair and expeditious for those remaining in the *CCAA* process. I must also be mindful of the objectives that underlie a CCAA proceeding.

[23] The Ontario proceeding could be stayed pending the outcome of the Assumed Typographers' claims and the claim of The Gazette. This would avoid inconsistent results but would compel the Retired Typographers to wait for resolution of their *CCAA* claims and any distribution. The CCAA claims procedure is summary in nature – in stark contrast to the proceedings in which the Typographers and The Gazette had been involved. While clearly inconsistent results would be avoided by staying the Ontario claim pending resolution of the dispute between the Assumed Typographers and Postmedia in Quebec, in my view it would be unfair to thrust the remaining Retired Typographers into that maelstrom. They are retired or have resigned from their employment with The Gazette, are entitled to have their claims addressed

summarily, and to rely on my directions order which authorized them to proceed with their proof of claim. For the same reasons, I am not prepared to refer the matter to the Quebec Superior Court and Arbitrator Sylvestre. The dispute between Postmedia and the Assumed Typographers, some of whom are not represented by CEP, may well be protracted which would be consistent with the history of the dealings between The Gazette and the Typographers. I have no confidence that the claims of the Retired Typographers would be dealt with expeditiously if addressed in conjunction with those of the Assumed Typographers.

[24] I accept CEP's submission that this motion is premature as the claims of the Retired Typographers have not yet been submitted to a Claims Officer or to the Court for determination. In addition, clearly the Monitor's report contemplates the possibility of further settlement discussions between the Monitor and the Retired Typographers. That said, in the interests of judicial economy, it makes sense to provide some direction on the mandate of the Claims Officer if appointed. As such, I will consider the issues of standing and issue estoppel. Lastly, I will address the appropriate procedure for CEP's claim relating to the July 14, 2000 grievance.

(a) Standing

[25] Postmedia owns the set off claim of The Gazette and section 36 of the Claims Procedure Order allows for setoff against payments or other distributions to be made pursuant to the Plan. Postmedia's shares are the value being distributed to creditors under the Plan. Lastly, pursuant to the provisions of the Plan, the treatment of the Retired Typographers' claims are final and binding for all purposes and enure to the benefit of Postmedia. In these circumstances, Postmedia does have standing to bring this motion.

(b) Issue Estoppel

[26] The Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*[3] established the three preconditions to the operation of issue estoppel:

(i) the same question has been decided;

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[3] [2001] 2 S.C.R. 460 at p. 477.

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(ii) the judicial decision which is said to create the estoppel was final; and

(iii) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[27] Even if the three preconditions are met, a court must still decide whether, as a matter of discretion, issue estoppel ought to be applied.

[28] With reference to administrative decisions, Binnie J. in *Danyluk* wrote that the objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.[4]

[29] The issue engaged by this case is the second precondition which relates to finality. In *The Doctine of Res Judicata in Canada*[5], the author, Donald J. Lange, writes that there is an unresolved conflict in the law relating to the effect of the appeal process on the finality of a decision for the purpose of issue estoppel. He reviews numerous decisions that hold that a pending appeal does not preclude the application of issue estoppel and others that do. He also refers to Supreme Court of Canada *obiter dicta* and particularly *Toronto (City) v. CUPE, Local 79*[6], in which Arbour J. wrote:

> "A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned."

[30] In 2008, in *R. v. Mahalingan*[7], Charron J. for the minority wrote:

> Determining whether a decision is final for the purpose of issue estoppel has raised some controversy in the case law, even in the context of civil litigation. For example, the law does not appear settled concerning the effect of the appeal process on the question of finality.

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[4] Ibid, at p. 475.
[5] LexisNexis Canada Inc. 2010 (3d) at p.98.
[6] [2003] 3 S.C.R. 77 at p. 107.
[7] [2008] S.C.J. No. 64 at para. 134.

[31] The question before me is whether the motion in annulment is in the nature of a review that has not yet been exhausted or abandoned. In its 1999 decision, the Quebec Court of Appeal described the article of the *Quebec Civil Code of Procedure* ("CCP") on which the Retired Typographers' challenge is based.

> This article [947 C.C.P.] states that an application for cancellation is the only recourse possible against an award made under an arbitration clause. Cancellation is obtained by motion to the court or by opposition to a motion for homologation. The court to which the application is made cannot enquire into the merits of the dispute (articles 946.2 and 947.2 C.C.P.). It can only cancel or set aside the award if it is established under article 946.4 C.C.P. that:
>
> (1) one of the parties was not qualified to enter into the arbitration agreement;
>
> (2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Quebec;
>
> (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> (4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or
>
> (5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.[8]

[32] In the Quebec Court of Appeal's 2003 decision, the Court referred to the motion to annul provision in the Quebec Code of Civil Procedure and noted that article 947 stated that the only possible recourse against an arbitration award was an application for its annulment. By virtue of article 947.2 and 946.2, a court could not enquire into the merits of a dispute. The Court of Appeal stated:

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[8] At page 21.

> "By establishing that these legal decisions are final and without appeal the Code reinforces the autonomy of the arbitration procedure and its conduct. By limiting the grounds for annulling or refusing the homologation of an award, the Code reinforces the autonomy of the arbitration process and its outcome."[9]

[33] As a result of Arbitrator Sylvestre's September 28, 2000 decision and the Quebec Court of Appeal's August 6, 2003 decision, clearly CEP and the Retired Typographers are estopped from relitigating the following:

(i) the description of the heads of damages. They are limited to salaries and benefits set forth in the applicable collective agreement; and

(ii) the endpoint for the calculation of damages which is January 21, 2000.

[34] In my view, the motion in annulment is in the nature of a review as contemplated by Arbour J. in *Toronto (City) v. CUPE, Local 79*[10]. That said, this does not mean that the Retired Typographers are at liberty to relitigate the entire proceedings. Rather, the Claims Officer should be limited by the determination of the nine month period of damages previously established by Arbitrator Sylvestre but subject to consideration of whether the motion in annulment is meritorious based on the evidence presented. If it is meritorious, the Claims Officer would be at liberty to authorize the Retired Typographers to bring a motion before me seeking to lift the stay or to make any other order he felt was appropriate. If the motion in annulment is not meritorious, the Claims Officer would simply quantify the Retired Typographers' salary and benefits for the period between May, 1999 and January 21, 2000. The claims officer should also consider any appropriate claim for setoff. This is consistent with the broad definition of "claim" and the description of the Claims Officer's powers found in the Amended Claims Procedure Order. While recognizing that there is some possibility that different results may ensue for the Assumed Typographers on the one hand and the Retired Typographers on the other, it seems to me that this determination is fair and is in keeping with both the objectives of the CCAA and the summary procedure provided for by my earlier orders.

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[9] At para 43.
[10] [2003] 3 S.C.R. 77 at p. 107.

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(a) Claim Relating to July, 2000 Grievance

[35] As for the claim relating to the July, 2000 grievance, as submitted by the Monitor, if the CEP claim is submitted to a Claims Officer, the Monitor proposes to take the position that CEP's claim in that regard is barred by the provisions of the Amended Claims Procedure Order. In my view, that is an appropriate procedure.

Conclusion

[36] In conclusion, I have not granted the full relief requested by Postmedia but have provided directions to guide the parties in the resolution of the Retired Typographers' claims. If any other issues need to be addressed, I may be spoken to at a 9:30 am appointment.

Pepall J.

Released: July 28, 2011

CITATION: Canwest Publishing Inc., 2011 ONSC 4518
COURT FILE NO.: CV-10-8533-00CL
DATE: 20110728

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

Applicants

REASONS FOR DECISION

Pepall J.

Released: July 28, 2011

TAB 6

TAB 6

Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	THURSDAY, THE 28TH
	)	
MADAM JUSTICE PEPALL	)	DAY OF JULY, 2011

B E T W E E N:

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Applicants

O R D E R

THIS MOTION, made by Postmedia Network Inc. ("Postmedia") for an Order:

a) declaring that the method for the calculation of the claims of JP Martin, Marc Tremblay, Leslie Stockwell, Robert Davies and Horrace Holloway (collectively, the "Retired Typographers") against the Applicants has previously been determined in a commercial arbitration award dated January 21, 2009 (the "Arbitral Award"), and that the Retired Typographers are bound by that Arbitral Award which establishes and limits their claim entitlement to the payment of salary and benefits for the period between May, 1999 and January 21, 2000 subject to the overpayment of salary and benefits that were paid to the Retired Typographers by *The Gazette* for the period between February 5, 1998 and October 30, 1998;

b) declaring that as a result of (a) the only issues to be determined by the Claims Officer under the Amended Claims Procedure Order dated May 17, 2010 (the "Amended Claims Procedure Order") with respect to the Retired Typographers' claims are:

(i) the quantification of the Retired Typographers' salary and benefits for the period between May 1999 and January 21, 2000;

(ii) the quantification of the applicable setoff of *The Gazette*'s overpayment of salary and benefits for the period between February 5, 1998 to October 30, 1998; and

(iii) the net amounts, if any, remaining due to the Retired Typographers or due from the Retired Typographers; or

c) in the alternative to (a) and (b), in the event that the Arbitral Award is held not to be determinative of the valuation of the claims of the Retired Typographers in these proceedings, an Order pursuant to, *inter alia*, sections 11 and 17 of the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (the "CCAA"), referring all questions of liability and quantum in respect of the Retired Typographers' claims to the Québec Superior Court and the arbitration proceedings already underway in Québec to be heard in conjunction with the ongoing litigation by six other typographers (the "Assumed Typographers") whose claims against *The Gazette* were assumed by Postmedia pursuant to an Order of this Court made on January 5, 2011; provided, however, that the referred proceedings shall not result in a judgment or enforceable claim against Postmedia but shall only form the quantification of the Retired Typographers' claims as filed in these proceedings;

was heard on May 16, 2011, at 393 University Avenue, Toronto, judgment having been reserved to this day.

ON READING the Affidavit of Eileen Flood sworn April 14, 2011; the Affidavit of Don McKay sworn May 2, 2011; the Supplemental Motion Record of Postmedia containing: a copy of the e-mail correspondence dated May 6, 2011 from Fred Myers to Jesse Kugler and Pierre Grenier re: "*Agreement re: Evidence*", a copy of the decision of Arbitrator Jean-Guy Ménard dated June 5, 2001, a copy of the May 2, 2002 Québec Superior Court decision, *S.C.E.P., section locale 145 c. Ménard*, a copy of the decision of Arbitrator Marc Gravel

dated November 24, 2003, a copy of the February 15, 2005 Québec Superior Court decision, *Section locale 145 du S.C.E.P. c. Gravel*, a copy of the Affidavit of Don Mackay sworn December 2, 2010 and attached Exhibit "C", and a copy of the Amended Claims Procedure Order; the Applicants' Amended Consolidated Plan of Compromise dated May 20, 2010; and the Seventeenth Report of FTI Consulting Canada Inc. in its capacity as the Court-appointed Monitor of the Applicants (the "Monitor") dated May 12, 2011, and on hearing the submissions of the lawyers for Postmedia, Communications, Energy and Paperworkers' Union of Canada, Local 145 ("CEP") and the Monitor:

ISSUES TO BE DETERMINED BY THE CLAIMS OFFICER

1. THIS COURT ORDERS that any Claims Officer appointed pursuant to the Amended Claims Procedure Order is limited by the determination of the nine month period of damages previously established by Arbitrator Sylvestre but subject to consideration of whether the proceeding brought by CEP on April 16, 2009 before the Québec Superior Court to set aside the Arbitral Award (the "Motion in Annulment") is meritorious based on evidence to be presented to the Claims Officer. If the Claims Officer finds that the Motion in Annulment is meritorious, the Claims Officer is at liberty to authorize the Retired Typographers to bring a motion before Justice Pepall seeking: to lift the stay or to make any other order the Claims Officer felt was appropriate. If the Claims Officer finds that the Motion in Annulment is not meritorious, the Claims Officer shall simply quantify the Retired Typographers' salary and benefits for the period between May, 1999 and January 21, 2000 and also consider any appropriate claim for setoff.

CLAIM RELATING TO THE JULY, 2000 GRIEVANCE

2. THIS COURT ORDERS that any Claims Officer appointed pursuant to the Amended Claims Procedure Order may determine whether CEP's claim relating to its July 14, 2000 grievance claiming $143,208 for each of the Retired Typographers (the "July 2000 Grievance") is barred by the provisions of the Amended Claims Procedure Order.

OTHER ISSUES

3. THIS COURT ORDERS that if any other issues need to be addressed, they may be addressed at a 9:30 am appointment before Justice Pepall.

S. E. Pepall, J.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

SEP 07 2011

PER/PAR:

POSTMEDIA NETWORK INC.	**IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED**	Court File No: CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
- COMMERCIAL LIST

Proceeding commenced at Toronto

ORDER

Goodmans LLP
Barristers & Solicitors
Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Fred Myers LSUC#: 26301A
Caroline Descours LSUC#: 58251A

Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for Postmedia Network Inc.

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