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

FACTUM ON BEHALF OF POSTMEDIA NETWORK INC.

(Motion to be heard May 16, 2011)

PART I – OVERVIEW

1. Postmedia Network Inc. ("Postmedia") on its own behalf and on behalf of the Applicants asks this Honourable Court to define the mandate of the claims officer with respect to the claims filed in these proceedings by five typographers at the Applicants' Montreal newspaper, *The Gazette,* who retired prior to the acquisition by Postmedia of the Applicants' assets (the "Retired Typographers"). Postmedia 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 the arithmetical exercise of calculating the damages and applying any available set-off. Alternatively, if there is a need for further proceedings to quantify the claims of the Retired Typographers, Postmedia submits that those proceedings should be referred to the Québec courts and arbitration proceedings to be heard along with the claims of the other six typographers whose employment has been assumed by Postmedia (the "Assumed Employees"), four of whom

are represented by the same union, while the other two, Ms Blondin and Mr. DiPaolo, are currently representing themselves. The claims of the Assumed Employees are not at issue in this motion.

2. The typographers and their union, the Communications, Energy and Paperworkers Union of Canada (the "Union"), were at the beginning of this CCAA proceeding engaged in litigation with *The Gazette* pertaining to a lock-out that began in 1996 and ended in 2002. They asserted by way of a disagreement submitted to arbitration in June 1996 (the "1996 disagreement") that *The Gazette's* refusal to exchange last final best offers ("LFBOs") prior to the lock-out was a breach of job security agreements entered into between the typographers, the Union, and *The Gazette* in 1982 and 1987 (the "Tripartite Agreements"), and claimed compensation for losses suffered as a result of the lock-out.

3. The litigation spans 14 years of arbitration and court hearings in Québec. The Québec Court of Appeal has issued three decisions providing guidance on the nature of the dispute, the arbitrator's jurisdiction, and the precise scope of his mandate.

4. Arbitrator Sylvestre, who has been seized of the disagreement since the outset, has determined over the course of four awards, each of which has been challenged in judicial proceedings, that the typographers' damages are limited to wages and benefits lost during the period of approximately nine months from May 1999, when the lock-out would have ended had LFBOs been exchanged as required, to January 21, 2000, when they finally were exchanged. Arbitrator Sylvestre is also seized, by order of the Québec Superior Court, of a counterclaim by *The Gazette* for restitution of wages and benefits paid to the typographers for a period of

approximately nine months at an earlier stage of the lock-out in compliance with an order that was subsequently quashed. He has not yet ruled on the counterclaim.

5. Arbitrator Sylvestre's ruling as to the nature and scope of the typographers' damages was affirmed by the Québec Court of Appeal, but the typographers and the Union have an application pending in the Québec Superior Court of Justice to set aside Arbitrator Sylvestre's ruling on the duration of the damage period. The application was stayed by the Initial Order and the Retired Typographers have taken no steps to lift the stay in order to proceed with the application.

6. In this CCAA proceeding, the typographers filed proofs of claim with respect to the 1996 disagreement. This Honourable Court determined that the claims of the Retired Typographers were to be disposed of in accordance with the Amended Claims Procedure Order dated May 17, 2010 (the "Amended Claims Procedure Order"), while the similar claims of the Assumed Employees were not subject to the Amended Claims Procedure Order and therefore could be pursued against Postmedia through the proceedings under way in Québec.

7. It is the position of Postmedia that the nature and scope of the damages and the duration of the period for which they are due have been finally determined by Arbitrator Sylvestre and cannot be relitigated in this proceeding. The only matters to be determined by the claims officer are the exact amount of those damages and the amount, if any, owing by the Retired Typographers to *The Gazette* by way of set-off or counterclaim.

8. The Retired Typographers now assert that their proofs of claim in these proceedings include damages allegedly owing in respect of another disagreement, submitted by the Union in July 2000 (the "2000 disagreement"), after LFBOs had been exchanged and while LFBO

arbitration of a new collective agreement was under way. For reasons discussed below, Postmedia submits that this second disagreement is an abuse of process and is barred by the claims bar date. In any event, the Union's suggestion that further proceedings may be required to resolve this second disagreement supports the alternative relief sought by Postmedia, namely that any further proceedings be heard by Arbitrator Sylvestre, who is already seized of the 2000 disagreement as well as the 1996 disagreement.

9. Postmedia asks this Court to issue declarations restricting the scope of the claims officer's mandate to a quantification of the net claim arising out of the 1996 disagreement (if any) following the application of any appropriate set off reflecting *The Gazette's* claim for restitution of wages and benefits overpaid.

10. In the alternative, Postmedia requests that the stay of proceedings be lifted to allow the Retired Typographers to pursue the 1996 disagreement and 2000 disagreement through arbitration and that any judicial proceedings regarding the arbitrator's mandate be referred to the Québec Superior Court pursuant to s. 17 of the CCAA, for the limited purpose of quantifying the Retired Typographers' claims against the Applicants so that they can be satisfied through a distribution of shares under the Plan. If further proceedings are required to establish the facts, it is in the interests of justice that the Retired Typographer's claims be heard together with the claims of the Assumed Employees in Québec. It is necessary that both sets of claims be heard together to avoid the risk of inconsistent results in Québec and in this proceeding that could bind Postmedia as a privy to the Applicants. Moreover it is in the interests of efficiency, fairness and judicial economy that the proceedings all be heard before the Québec arbitrator and courts, as they have invested over a decade in learning and understanding the facts and the unusual legal

context; all witnesses are in Québec; counsel are in Québec; most of the prior proceedings are reported in French only; and Québec law applies to all issues.

PART II – FACTS

11. The dispute between the typographers and *The Gazette* commenced in June 1996 following the breakdown of negotiations for a new collective agreement and continued for approximately 14 years until the litigation proceedings were stayed by the CCAA Proceedings in 2010. Over this lengthy period, 46 decisions have been rendered by various levels of Québec courts and tribunals and most of the issues between the typographers and *The Gazette* have been resolved.

Affidavit of E. Flood sworn April 14, 2011 ["Flood Affidavit"], para. 13,
Motion Record of Postmedia Network Inc. ["Motion Record"], Tab 2, p. 10

Tripartite Agreements

12. As at 1982, *The Gazette* employed approximately two hundred typographers in what was known as the 'composing room'. Historically, typographers performed the function of composing the type for the printing of the newspaper. By the early 1980's, however, these typography functions, a labour-intensive task, were becoming obsolete as they were replaced by computerized technology.

Flood Affidavit, para. 6, Motion Record, Tab 2, pp. 8-9

13. In 1982, *The Gazette*, the Union, and each of the 200 typographers employed in the composing room at the time entered into agreements (the "1982 Tripartite Agreements") that guaranteed that the typographers would not lose their employment due to technological changes

until they reached the age of 65. In 1987, *The Gazette*, the Union and the then remaining 132 typographers entered into further tripartite agreements (the "1987 Tripartite Agreements").

Flood Affidavit, paras. 7-8, Motion Record, Tab 2, p. 9

14. The Tripartite Agreements, which are governed by Québec law, provide that they come into effect only when a collective agreement between *The Gazette* and the Union is not in force.

Flood Affidavit, para. 9, Motion Record, Tab 2, p. 9

1982 Tripartite Agreement, Flood Affidavit, Exhibit "A", Motion Record, Tab 2A, p. 18

1987 Tripartite Agreement, Flood Affidavit, Exhibit "B", Motion Record, Tab 2B, p. 22

15. By August, 1994, only 11 typographers were still employed by *The Gazette*. As at the date of closing of the Asset Purchase Agreement (the "Closing Date") in 2010, five of those 11 typographers, JP Martin, Marc Tremblay, Leslie Stockwell, Robert Davies and Horrace Holloway had retired, while six of them, Umed Gohil, Pierre Rebetez, René Brazeau, Michael Thomson, Rita Blondin and Eriberto DiPaolo, remained.

Flood Affidavit, paras. 10-11, Motion Record, Tab 2, pp. 9-10

Litigation History

16. The dispute arose from *The Gazette*'s refusal to exchange LFBOs after the Union's April 30, 1996 demand under the 1987 Tripartite Agreements.

Flood Affidavit, para. 14, Motion Record, Tab 2, p. 10

17. *The Gazette* declared a lock-out on June 3, 1996. The typographers and the Union filed a notice of dispute on June 4, 1996 (the 1996 disagreement) challenging the right of *The Gazette* to

declare a lock-out and requested orders requiring *The Gazette* to exchange LFBOs with the Union pursuant to the 1987 Tripartite Agreements and pay the typographers their regular salary and benefits for the duration of the lock-out.

Flood Affidavit, para. 15, Motion Record, Tab 2, pp. 10-11

18. The 1996 disagreement was submitted to arbitration before André Sylvestre, who held six days of hearings between December 5, 1996 and July 9, 1997. On February 5, 1998, Arbitrator Sylvestre ordered, *inter alia*, that *The Gazette* exchange LFBOs with the typographers and pay the typographers their salary and benefits for the duration of the lock-out. *The Gazette* complied with the order to pay salary and benefits, while challenging the award.

Flood Affidavit, paras. 16-17, Motion Record, Tab 2, p. 11

19. Ultimately, the Québec Court of Appeal upheld the arbitrator's order that *The Gazette* submit an LFBO as required by the 1987 Tripartite Agreements, but overruled the award of salary and benefits, on the grounds that the Tripartite Agreements did not detract from *The Gazette's* right to declare a lock-out. The Court of Appeal found, however, that *The Gazette* could be liable to compensate the typographers, by way of damages, for any period of time during which the lock-out was unduly prolonged as a result of *The Gazette's* failure to submit its LFBO, and remanded the matter to the arbitrator to assess those damages, if any.

Flood Affidavit, para. 18, Motion Record, Tab 2, pp. 11-12

Communications, Energy and Paperworkers Union of Canada, Local 145 v. The Gazette, a division of Southam Inc. (15 December 1999), Montréal 500-09-007384-985 (C.A.) ["CA 1999"] at 31, Motion Record, Tab 2C, p. 65

20. *The Gazette,* the Union and the typographers exchanged LFBOs on January 21, 2000.

Flood Affidavit, para. 19, Motion Record, Tab 2, p. 12

21. In September 2000, Arbitrator Sylvestre issued a ruling (with reasons released October 11, 2000) that the typographers' damages were limited to compensation for lost salary and benefits and specifically denying the pecuniary, moral and exemplary heads of damage claimed by the typographers. He also ruled that the typographers were held to their counsel's admission that the period for which damages could be claimed ended on January 21, 2000, when *The Gazette* submitted its LFBO. In a 2003 decision, the Court of Appeal confirmed Arbitrator Sylvestre's ruling, and referred the matter back to him for determination on the merits.

Flood Affidavit, para. 20, Motion Record, Tab 2, p. 12

Arbitration Award of Me. André Sylvestre dated October 11, 2000 ["2000 Award"] at pp. 13, 14, 28, 30-31, Motion Record, Tab 2D, pp. 81, 82, 96, 98-99

Gazette (The), a division of Southam Inc. v. Blondin, [2003] Q.J. No. 9433 (C.A.) ["CA 2003"] at paras. 27, 33 and 52, Motion Record, Tab 2E, pp. 108-111, 117-118

22. In February 2001, *The Gazette* launched a civil action against the typographers to recover the salary and benefits paid pursuant to Arbitrator Sylvestre's February 1998 order during the nine month period until the order was quashed on October 30, 1998. The Québec Superior Court declined jurisdiction over *The Gazette's* action and ordered that the issues be referred to Arbitrator Sylvestre to be dealt with in conjunction with the 1996 disagreement.

Flood Affidavit, para. 21, Motion Record, Tab 2, p. 12

The Gazette, division de Southam inc. c. Blondin, [2001] J.Q. No. 4083 at paras. 32, 35, 38 (C.S.) Motion Record, Tab 2F, pp. 125-126

CA 2003 at para. 28, Motion Record, Tab 2E, p. 110

23. In accordance with the instructions given in the Court of Appeal's 1999 decision, Arbitrator Sylvestre had to decide whether the lock-out had been unduly prolonged by *The*

Gazette's breach of the 1987 Tripartite Agreement so as to justify an award of damages. The arbitrator interpreted this as a request that he determine whether there had been an "abuse of rights" by *The Gazette* which unduly prolonged the lock-out. He found that *The Gazette* had not committed an abuse of rights and therefore ruled that the typographers could be awarded no damages. The Court of Appeal intervened once again, finding in 2008 that the arbitrator had answered the wrong question. The issue was not to determine whether *The Gazette* had committed a separate wrong in the form of an abuse of rights, but simply to determine, as a factual matter, when the lock-out would have ended had the exchange of LFBOs taken place following the April 30, 1996 request.

Flood Affidavit, para. 22, Motion Record, Tab 2, p. 13

S.C.E.P., Local 145 c. Sylvestre, 2008 CarswellQue 1939 (C.A.) ["CA 2008"] at paras. 28-31, 34, 37, Motion Record, Tab 2G, pp. 135-136

Arbitration Award of Me. André Sylvestre dated January 21, 2009 ["2009 Award"] at paras 23-24 (citing *S.C.E.P., Local 145 c. Sylvestre,* 2008 CarswellQue 1939 (C.A.)) Motion Record, Tab 2H, pp.151-152

24. Arbitrator Sylvestre subsequently heard the matter again and found on the facts before him that had *The Gazette* delivered its LFBO when required, the lock-out would have lasted until May 1999. Consequently, he determined that damages ran for the nine-month period from May 1999 to January 2000. He found that no amount should be subtracted for failure to mitigate. However, he did not make any award as he found that *The Gazette's* claim for restitution remained to be determined and might be set off against the typographers' damages.

2009 Award at paras. 56-58, Motion Record, Tab 2H, pp.163-164

25. The typographers and their counsel at the time had agreed in October 2000 that the sums claimed for salaries and social benefits lost during the entire 43-month period from June 4, 1996

to January 21, 2000 totalled $163,611.51 per typographer. Arbitrator Sylvestre in his 2009 award found that the typographers were held to that maximum amount, the debate as to whether other heads of damage were available having been closed by the Québec Court of Appeal's 2003 decision. Accordingly, the calculation of The Gazette's liability for nine months damages and of any set-off for the period during which The Gazette paid wages and benefits that the Québec Court of Appeal, in its 1999 decision, found The Gazette was not obligated to pay, is an arithmetical exercise which does not require material findings of fact and could appropriately be conducted by a claims officer in these proceedings.

2009 Award at paras. 47-49, Motion Record, Tab 2H, pp. 161-162

Current Status of 1996 Disagreement

26. In issuing the 2009 Award and finding that *The Gazette*'s liabilities to the typographers consisted of the loss of salary and benefits for the nine-month period between May 1999 and January 21, 2000, Arbitrator Sylvestre finally determined the issue of *The Gazette*'s liability to the typographers under the legal test established by the Québec Court of Appeal (before considering the entitlement of *The Gazette* to set off salary and benefit overpayments made during the lock-out). Having resolved the issue of *The Gazette*'s liabilities to the typographers, Arbitrator Sylvestre remains seized of the issue of *The Gazette*'s counterclaim for the reimbursement of the salary and benefits paid to the typographers for the period from February 5, 1998 to October 30, 1998 and the quantification of any net amount that might remain owing to the typographers or to *The Gazette* after the set-off is applied.

Flood Affidavit, paras. 24, 26, Motion Record, Tab 2, pp. 13-14

27. In April 2009, the Union brought a proceeding before the Québec Superior Court to set aside the 2009 Award. This proceeding takes the form of a motion for annulment (also referred to as an application for cancellation) and is similar to a motion to set aside an arbitration award pursuant to section 46 of Ontario's Arbitration Act, 1992. A hearing was scheduled before the Québec Superior Court for June 7, 8 and 9, 2010, but was stayed by the CCAA proceedings.

Flood Affidavit, para. 25, Motion Record, Tab 2, pp. 13-14

28. The Québec Court of Appeal having found that Arbitrator Sylvestre is acting as a consensual arbitrator, any award he makes can be quashed only on narrow jurisdictional grounds. As the Court of Appeal explained in its 1999 decision:

> Arbitrator Sylvestre seems to have taken on this very role of consensual arbitrator since, in essence, the award notes that the 1982 and 1987 agreements went into effect as autonomous civil agreements with the lock-out of June 3, 1996.
>
> ...
>
> 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 Québec;
>
> (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.
>
> However, in the case of subparagraph 4 of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.
>
> ...
>
> ... the restrictive provisions of the *Code of Civil Procedure* in the chapter on arbitration awards are similar to the criteria... for substantiating a decision by an administrative tribunal protected by a privative clause on judicial review. ... it should be possible to invoke only those errors involving nullity, that is, errors on points of fact or law affecting jurisdiction, or errors on points of public order, including rules of natural justice. [Citations omitted.]
>
> CA 1999 at 20-22, Motion Record, Tab 2C, pp. 54-56

Alleged New Claim

29. The Retired Typographers in their Motion Record delivered May 3, 2011 seek to add to their claim damages arising out of the 2000 disagreement. This disagreement asserts that the lock-out was prolonged after the delivery of *The Gazette's* LFBO in January 21, 2000 because the LFBO contained terms that sought to amend the Tripartite Agreement and such terms were improperly included in the LFBO.

> Affidavit of D. McKay sworn May 2, 2011 ["McKay 2011 Affidavit"], para. 4, Motion Record of the Communications, Energy and Paperworkers Union of Canada ["Retired Typographers' Motion Record"], Tab 1, p. 2

30. The Amended Claims Procedure Order in these proceedings set June 3, 2010 as the claims bar date for employee claims and provided that any claim not submitted by the claims bar date or such later date as the Monitor and the Applicants might agree in writing was forever extinguished.

Amended Claims Procedure Order, para. 2(kk) and para. 25, Supplemental Motion Record of Postmedia Network Inc. ["Supplemental Motion Record"] Tab G, pp. 193, 200

31. The Union, on behalf of the Retired Typographers (and certain Assumed Employees) submitted a proof of claim on July 14, 2010, a date to which the Monitor and the Applicants agreed. The proof of claim itself provides no details of the claim but simply sets out an amount of $500,000 per typographer. However, the affidavit of Don McKay sworn December 2, 2010 and Exhibit "C" thereto, which consists of the proof of claim submitted and the cover letter attached to it, demonstrate that the claim pertained solely to the 1996 disagreement. The cover letter states:

> 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. [Emphasis added.]

Letter from S. Ataogul to P. Luthra dated July 14, 2010, Affidavit of Don McKay sworn December 2, 2010 ["McKay 2010 Affidavit"], Exhibit "C", Supplemental Motion Record, Tab F, p. 179

The enclosed decision to which the cover letter refers is the 2009 Award.

32. Mr. McKay in his sworn affidavit identified the typographers' claims as follows: "On July 14, 2010, the Union filed a claim in accordance with the Amended Claims Procedure Order on behalf of 9 typographers employed or formerly employed by the Montreal Gazette (the "**Employer**") with respect to salary and other benefits lost under the applicable collective agreement *as a result of the Employer's refusal to submit to compulsory arbitration for the renewal of a collective agreement and consequent improper lock-out in or around June 3, 1996 (the "**Claim**")."* [Emphasis added.]

McKay 2010 Affidavit, para. 5, Supplemental Motion Record, Tab F, pp. 169-170

33. The affidavit goes on to provide a seven-page long history of the claim and the events surrounding its inception and development, which does not contain a single mention of or allusion to the 2000 disagreement or the alleged delay in reaching a collective agreement as a result of *The Gazette's* submission of an inadmissible and illegal final best offer. Rather, the affidavit traces the progress of the June 4, 1996 disagreement from the Arbitrator's initial award of February 5, 1998 through the numerous proceedings before the Arbitrator, in the Superior Court, and in the Court of Appeal, up to the Arbitrator's most recent decision of January 21, 2009 and subsequent challenge to it.

> McKay 2010 Affidavit, paras. 9 to 34, Supplemental Motion Record, Tab F, pp. 170-176

34. The first express mention of the 2000 disagreement in the CCAA claims process is found in a document provided to the Monitor on April 5 of this year in the context of "without prejudice" negotiations of the Retired Typographers' claims and disclosed to Postmedia as Exhibit "G" to the Union's Motion Record dated May 3, 2011. Exhibit "G" splits the Retired Typographers' claims into two components: the first relates to the 1996 disagreement and consists of damages for the full period of June 1996 to January 2000, plus interest (notwithstanding the Court of Appeal's decision that *The Gazette* was not liable for wages or benefits during the lock-out and Arbitrator Sylvestre's finding that the lock-out would have lasted until May 1999 even if LFBOs had been exchanged promptly); the second relates to the 2000 disagreement and consists of damages of over 16 months' salary from January 2000 to June 2001, plus interest. The total amount claimed on behalf of each typographer, $561,072, exceeds the amount submitted in the proofs of claim, which was $500,000 each.

E-mail from F. Myers to J. Kugler and P. Grenier dated May 6, 2011, Supplemental Motion Record, Tab A, p.1

Proof of Claim, McKay 2010 Affidavit, Exhibit "C", Supplemental Motion Record, Tab F, p. 185

Previous Ruling of this Honourable Court

35. This Court ruled on January 5, 2011 that the Retired Typographers' claims may be submitted and disposed of in accordance with the Amended Claims Procedure Order. That Order provides that, subject to the discretion of the Court, a claims officer shall determine the validity and amount of disputed claims. Postmedia requests that this Honourable Court exercise its discretion to issue the declarations requested as to the claims officer's mandate or, in the alternative, to lift the stay for the limited purpose of allowing the Retired Typographers' claims to be quantified.

Amended Claims Procedure Order, para. 12, Supplemental Motion Record, Tab G, p. 197

PART III – LAW

The 1996 Disagreement Should be Referred to the Claims Officer on the Basis of Declarations Limiting its Scope

The Nature and Scope of the Typographers' Damages and the Duration of the Damages Period are Res Judicata

36. The nature and scope of the Retired Typographers' damages and the duration of the damages period have already been conclusively determined in final and binding arbitration to which the parties consented and the principle of issue estoppel dictates that the claims officer has no jurisdiction to entertain evidence rebutting that determination.

37. Issue estoppel is a species of res judicata which arises where, as here:

(a) the same question has been decided;

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

(c) 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.

> *Angle v. M.N.R.*, [1975] 2 S.C.R. 248 at 254, Book of Authorities of Postmedia Network Inc. ["Book of Authorities"] Tab A
>
> *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 25 [*Danyluk*], Book of Authorities, Tab B
>
> *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at para. 23 [*Toronto v. C.U.P.E.*], Book of Authorities, Tab C

38. The principles of *res judicata* apply in insolvency proceedings with respect to the establishment of a proof of claim. Where an issue has already been determined in prior proceedings between the insolvent party and a creditor, it cannot be relitigated in the insolvency proceeding at the instance of that creditor or its privies.

> *Re EnerNorth Industries Inc.*, [2009] O.J. No. 2815 at paras. 54-58 (C.A.), Book of Authorities, Tab D

39. The question can be "any right, question of fact distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery." Any question thus distinctly put in issue and determined must, as between the parties, "be taken to be conclusively established so long as the judgment remains."

> *Dableh v. Ontario Hydro* (1994), 58 C.P.R. (3d) 237 at 241 (Ont. Gen. Div.) [*Dableh*], citing *McIntosh v. Parent* (1924), 15 [sic: 55] O.L.R. 552 at 555 (C.A.), Book of Authorities, Tab E

40. In this case, Arbitrator Sylvestre determined by his ruling of September 28, 2000 (reasons for which were issued on October 11, 2000) that the scope of the typographers' damages was restricted to the wages and benefits set out in the collective agreement and that the period of the claim would not extend beyond January 21, 2000, the date on which the employer submitted its LFBOs. Notwithstanding that the Arbitrator himself characterized this ruling as an "interim" award, the Québec Court of Appeal determined that the award resolved a substantive issue and was accordingly "final" enough so as to be vulnerable to annulment under the *Code of Civil Procedure*. However, the Court of Appeal set aside the Superior Court's order annulling the award and referred the case back to the arbitrator so that he might continue the hearing and dispose of the disagreement on the merits. There can be no doubt that Arbitrator Sylvestre's decision in this respect is now final, and indeed its finality was confirmed by the Québec Court of Appeal in its 2008 decision.

CA 2003 at paras. 33-34, 48, 52, Motion Record, Tab 2E, pp. 110-111, 116, 117-118

CA 2008 at paras. 20-22, 31, Motion Record, Tab 2G, pp. 132, 135

41. The Québec Court of Appeal in its 2008 decision then put three distinct questions of fact to Arbitrator Sylvestre as to the period for which damages should be awarded and whether any amount should be subtracted for failure to mitigate, and Arbitrator Sylvestre answered those questions in his 2009 Award.

CA 2008 at para. 30, Motion Record, Tab 2G, p. 135

2009 Award at paras. 23-24 (citing CA 2008), 56-59, Motion Record, Tab 2H, pp. 151-152, 163-164

42. The nature and scope of the Retired Typographers' damages were thus conclusively established by Arbitrator Sylvestre's award of September 28, 2000 and their duration by his award of January 21, 2009.

43. The principles of *res judicata* apply to arbitration decisions as they do to judicial decisions. An award in an arbitration proceeding creates an issue estoppel. The parties chose the tribunal and are bound by its determination on any issue fundamental to the award.

> *Scotia Realty Ltd. v. Olympia & York SP Corp.*, [1992] O.J. No. 811 at para. 20 (Ont. Gen. Div.), Book of Authorities, Tab F
>
> KR Handley, *Spencer Bower and Handley Res Judicata,* 4th Ed. (London: LexisNexis, 2009) at para. 8.27, Book of Authorities, Tab G

44. An arbitral award, like a judgment, remains final and binding unless and until it is overruled. While reviewability is an important aspect of finality, it is improper to attempt to impeach a judgment by relitigation in a different forum while an attempt to set it aside is under way. The 2009 Award is binding unless and until it is quashed. Any concerns regarding inconsistent results that might be raised by the outstanding application to set it aside must be resolved by staying judgment in the claims process pending the outcome of that application, not by allowing the issue to be relitigated in the claims process. However, Postmedia submits that in this case, as the Retired Typographers have never sought to lift the stay in order to proceed with their application before the Québec Superior Court to challenge Arbitrator Sylvestre's 2009 Award, they must be taken to have accepted his decision and no stay is necessary.

Toronto v. C.U.P.E. at para. 46, Book of Authorities, Tab C

Danyluk at para. 19, Book of Authorities, Tab B

Dableh at 241, 243-244, Book of Authorities, Tab E

Four Embarcadero Centre Venture v. Mr. Greenjeans Corp. (1988), 64 O.R. (2d) 746 at p. 18 of QL print-out (Ont. H.C.J.), Book of Authorities, Tab H

It Would be an Abuse of Process to Relitigate the Issues Determined by Arbitrator Sylvestre

45. The key concern underlying the doctrine of abuse of process is preserving the integrity of the adjudicative process. This includes preventing the relitigation of claims which the court has already determined and avoiding inconsistent results.

Sanofi-Aventis Canada Inc. v. Novopharm Ltd., [2007] F.C.J. no. 548 at para. 35 (C.A.) [*Sanofi-Aventis*], citing *Toronto v. C.U.P.E.*, Book of Authorities, Tab I

46. The Federal Court of Appeal, considering the principle of issue estoppel in the context of summary proceedings under the regulations governing patented medicines, noted that permitting inconsistent results would threaten the credibility of the adjudicative process without there being any reason to believe that a second proceeding would lead to a more accurate result than the first, particularly when the second proceeding is of a summary nature—such as the summary proceedings before the Federal Court of Appeal or the claims hearing at issue here.

Sanofi-Aventis at para. 36, Book of Authorities, Tab I

47. In the context of a claims hearing, as in the context of the regulations with which the Federal Court of Appeal was concerned, encouraging the efficient use of scarce judicial resources is of particular concern; attempts to further strain the resources of the parties and the courts through repetitious litigation without any compelling justification should be met with a finding of abuse of process.

Sanofi-Aventis at para. 37, Book of Authorities, Tab I

This is Not an Appropriate Case for the Court to Exercise its Discretion Not to Apply the Principles of Issue Estoppel or Abuse of Process

48. The fundamental policy concerns underlying both the doctrines of *res judicata* and of abuse of process, namely that there be an end to litigation and that no one be twice vexed by the same cause, militate in favour of applying the doctrines in this case, as do concerns of judicial economy and consistency and the integrity of the administration of justice. There can be no unfairness in holding the Retired Typographers to the results of a 14-year-long arbitration which they initiated, in an award given by an arbitrator of their choosing, with the benefit of precise directions from the Court of Appeal as to the exact issues on which he was called to rule. If the matter is re-heard here, then there is a risk of inconsistent results in that Postmedia, as a privy to the Applicants, may find itself bound by decisions emanating from this proceeding that are inconsistent with results in Québec in respect of the Assumed Employees on the exact same facts and issues. It is in precisely such circumstances that the doctrines of *res judicata* and abuse of process find their purpose.

Toronto v. C.U.P.E. at paras. 38, 37, Book of Authorities, Tab C

The 2000 Disagreement is No Longer Alive and Should Not be Referred to the Claims Officer

49. The 2000 disagreement seeks damages arising from the alleged prolongation of the lock-out during the period from January 21, 2000 to June 5, 2001, in which LFBO arbitration of the competing LFBOs finally took place. The typographers claim that the LFBO arbitration was prolonged and the implementation of a new collective agreement delayed by *The Gazette*'s submission of an "inadmissible and illegal final offer on January 21, 2000". The disagreement

states that this alleged violation of the process for exchanging LFBOs "causes damages to the Union and the complainants in that it prevents agreement being reached between the parties on the renewal of the collective agreement, delays the complainants' return to work and unduly prolongs the process for renewing the collective agreement and the lock-out to which the complainants are currently subject. The Union and the complainant have a right to compensation for the damages suffered."

> Letter dated July 14, 2000 from Michel Handfield, SCEP, to Jean-Pierre Tremblay, *The Gazette*, Exhibit "C" to the McKay 2011 Affidavit, Retired Typographers' Motion Record, Tab 1C, p. 18

50. Aside from being barred under the Amended Claims Procedure Order for the reasons discussed below, the Retired Typographers' claim with respect to the 2000 disagreement is in any event an abuse of process for three reasons: (i) the Retired Typographers are estopped by their own conduct from complaining about the illegality of *The Gazette's* offer, the arbitrator who conducted the LFBO arbitration having specifically found that *both* parties submitted LFBOs containing inadmissible and illegal terms; (ii) the arbitrator conducting the LFBO arbitration severed the illegal portions of the offers in any event and imposed *The Gazette*'s offer as so amended, precisely so as to avoid endlessly prolonging the process of arriving at a new collective agreement; and (iii) even once a new collective agreement had been awarded on June 5, 2001, the typographers refused to accept it, continued to bargain with *The Gazette,* did not return to work until May 12, 2002, and were denied damages in subsequent arbitration concerning the period from June 5, 2001 to May 12, 2002, on the basis that they could not claim compensation for salary and benefits lost during a period when they were not willing to report to work in any event.

51. Arbitrator Ménard, who conducted the LFBO arbitration on the 1996 collective agreement, found that *both* sides had deliberately submitted LFBOs containing terms which were inadmissible and illegal because they sought to renegotiate terms of the 1982 and 1987 Tripartite Agreements in contravention of those agreements. The Québec Superior Court homologated Arbitrator Ménard's award and specifically endorsed this finding.

> Arbitration Award of Me. Jean-Guy Ménard dated June 5, 2001 ["Ménard Award"] at pp. 79-80, 83-85, Supplemental Motion Record, Tab B, pp. 80-81, 84-86
>
> *S.C.E.P., section locale 145 c. Ménard*, 2002 CarswellQue 1002 (C.S.) at paras. 134-135, 143, Supplemental Motion Record, Tab C, pp. 123-124
>
> 2009 Award at para. 14 (citing *S.C.E.P., section locale 145 c. Ménard*, 2002 CarswellQue 1002 (C.S.)), Motion Record, Tab 2H, pp. 146-147

52. Arbitrator Ménard ultimately resolved the parties' disagreement by accepting and enforcing *The Gazette*'s LFBO while striking its inadmissible terms. The deficiencies in *The Gazette*'s LFBO did not in fact prevent agreement being reached between the parties on the renewal of the collective agreement. Neither did they delay the complainants' return to work or unduly prolong the process for renewing the collective agreement and the lock-out. The Arbitrator stated [TRANSLATION]:

> From a more general perspective, the objective of the procedure, which includes a period during which the exchange of final best offers is to take place and a period for arbitration if there is a disagreement, is to ensure that the parties have a viable collective agreement as soon as possible after they realize that it will be impossible for them to reach agreement by negotiation. To set aside one party's offer entirely because of an irregularity in one portion of it and accept the other party's offer by default without regard for its content would clearly deviate from the mechanism that the parties, including the individual complainants, chose to establish. *Favouring the annulment of the parties' final best offers as soon as they are found to contain any illegality would give the parties a means of improperly extending the process to the point of making it, for all practical purposes, ineffective. Hence the advantageousness of considering that the arbitrator's obligation to retain or reject the parties' final best offers goes to the arbitrator's assessment of their value, not of their validity.* [Emphasis added.]

Ménard Award at p. 81, Supplemental Motion Record, Tab B, p. 82

53. Having thus found a way of resolving the parties' disagreement without unduly prolonging the arbitration process, Arbitrator Ménard gave his award. The Union applied for homologation of the award, which was granted. However, *The Gazette* and the individual typographers *both* challenged the award and continued bargaining until May 2002, when the lock-out finally ended. That is, the typographers did not go back to work even after Arbitrator Ménard had awarded a new collective agreement. The typographers subsequently attempted to claim damages for the period from January 21, 2000, when Arbitrator Ménard gave his award, to May 12, 2002, when negotiations settled. This claim was given short shrift, both by Arbitrator Gravel, who heard it, and by the Québec Superior Court, which heard the typographers' application to set aside Arbitrator Gravel's award. Arbitrator Gravel found that the typographers were estopped by their conduct from claiming damages when none of them was available to return to work on the basis of the collective agreement awarded by Arbitrator Ménard on June 5, 2001. He found that "it flies in the face of the principle of fairness ... to try to turn back the clock and claim the benefits of a collective agreement that they did not want to make effective at the moment it should have been." The Québec Superior Court found that the standard of review applicable to the award was one of patent unreasonableness, and upheld it on that basis, but went on to note that even on a standard of correctness, the decision would have been upheld.

Arbitration Award of Me. Marc Gravel dated November 24, 2003 ["Gravel Award"] at p. 30, Supplemental Motion Record, Tab D, p. 156

2009 Award at para. 16 (citing Gravel Award), Motion Record, Tab 2H, pp. 147-148.

Section locale 145 du S.C.E.P. c. Gravel, 2005 CarswellQue 667 (C.S.) at paras. 65-66, 70, Supplemental Motion Record, Tab E., pp. 165-166

54. The Union cannot claim that the inclusion of improper terms in *The Gazette's* LFBO unlawfully prolonged the lock-out when (a) the Union did the exact same thing in its LFBO; and (b) Arbitrator Gravel held that even once a collective agreement was awarded that did not contain improper terms, the typographers challenged that agreement and were not ready, willing and able to go back to work. The Retired Typographers cannot be heard to say that they would have gone back earlier if *The Gazette's* offer had not included certain terms, when they refused to go back even after those terms were removed.

Any Claim Relating to the July 14, 2000 Disagreement is Barred by the Amended Claims Procedure Order in Any Event

55. This is not a situation in which the Court should exercise its discretion to allow late filing of the Retired Typographers' claim pertaining to the 2000 disagreement. The Union delayed in asserting this component of the claim for almost nine months after filing proofs of claim on behalf of the typographers. Neither the Union nor any of the Retired Typographers has provided any evidence that they inadvertently neglected to include any mention of this alleged claim in their earlier filings. In the meantime, the Plan has been approved, distributions have been made, and the claim as it currently stands is the last one remaining unresolved. A hard-fought motion was argued in December 2010 as to the proper forum for the hearing of the typographers' claims, in which the history of the dispute between *The Gazette* and its typographers was described at length by the typographers' affiant without any mention being made of the 2000 disagreement.

56. It is clear that the late revival of the 2000 disagreement is made to gain a purely tactical advantage by attempting to weaken the argument of issue estoppel. A claimant cannot lie in the weeds and wait for the appropriate moment to pounce, hoping to gain advantage to the prejudice

of the other stakeholders, at a point when an already long insolvency proceeding is finally nearing its end.

> *Re Blue Range Resource Corp.*, 2000 CarswellAlta 1145 (C.A.) at para. 18, Book of Authorities, Tab J
>
> *Re West Bay SonShip Yachts Ltd,* 2007 CarswellBC 2518 at paras. 34-36 (S.C.); aff'd, 2009 CarswellBC 139 (C.A.), Book of Authorities, Tab K

In the Alternative, Any Damages Flowing from the 1996 and 2000 Disagreements Should be Quantified by the Arbitrator with the Oversight of the Québec Courts

The Stay Should be Lifted for Purposes of Quantification by the Arbitrator Without Allowing Execution

57. If this Honourable Court does not wish to exercise its discretion to issue the declarations requested, Postmedia submits that the proper course is for the stay imposed by the Initial Order herein to be lifted so as to require the Retired Typographers to pursue the 1996 disagreement and the 2000 disagreement until finally resolved by arbitration in Québec, with the express direction that the Retired Typographers' claims, once quantified, are to be considered as claims under the Amended Claims Procedure Order enforceable only against the shares of Postmedia held by the Monitor to satisfy those claims, and to have no further or other effect.

> *Trusts & Guarantee Co. v. Brenner,* 1932 CarswellOnt 28 at paras. 20-23 (C.A.); affirmed on this point, 1933 CarswellOnt 66 at para. 13 (S.C.C.), Book of Authorities, Tab L

58. The Tripartite Agreements are governed by Québec law. The Québec Court of Appeal has determined that Arbitrator Sylvestre is seized of the 1996 disagreement as a consensual arbitrator under the *Code of Civil Procedure.* The 1996 disagreement has been the subject of rulings by Arbitrator Sylvestre in February 1998, September 2000, March 2005 and January

2009. The Québec Court of Appeal has provided guidance in December 1999 (affirming in part the February 1998 award, and remitting the matter to the Arbitrator to assess damages), August 2003 (affirming and finalizing the September 2000 award as to the scope of damages and remitting the matter to the arbitrator for further determination on the merits), and March 2008 (confirming the finality of the September 2000 award, overruling the March 2005 award that no damages were owing to the typographers as the lock-out had not been unduly prolonged by any separate fault (abuse of rights) of the employer, and remitting the matter to the arbitrator to assess damages based on a factual determination as to how long the lock-out would have lasted had the LFBOs been exchanged in 1996 in accordance with the requirements of the 1987 Tripartite Agreements and whether there was any reason to subtract an amount from those damages for failure to mitigate).

CA 1999, Motion Record, Tab 2C
CA 2003, Motion Record, Tab 2E
CA 2008, Motion Record, Tab 2G
2009 Award, Motion Record, Tab 2H

59. Arbitrator Sylvestre is also seized of the 2000 disagreement. The 2000 disagreement is governed by Québec law and if a factual assessment is required despite the arguments above, then the facts must be assessed in the context of the surrounding proceedings regarding both the 1996 disagreement and the subsequent disagreement that was the subject of Arbitrator Gravel's 2003 award. As submitted above, Postmedia's position is that the 2000 disagreement can have no effect in the face of Arbitrator Ménard's award severing the illegal terms of *The Gazette's* LFBO and setting a new collective agreement, and of Arbitrator Gravel's award finding that even once this new collective agreement was awarded on June 5, 2001, the typographers remained unwilling to return to work.

E-mail from F. Myers to J. Kugler and P. Grenier dated May 6, 2011, Supplemental Motion Record, Tab A, p. 1

60. If the results of the Québec proceedings to date are not to be recognized as binding on the parties and hearings on the merits are to resume, then this is an appropriate case for the Court to exercise its discretion to lift the stay for the limited purposes indicated above. Given the extraordinary resources already devoted to this matter in the arbitration proceedings and judicial proceedings arising out of them, Arbitrator Sylvestre's comprehensive knowledge of the proceedings, and the fact that the issues are all governed by Québec law, it makes little sense for a claims officer in Ontario to undertake a redetermination of them. Furthermore, a decision in Ontario different from the decision arrived at by Arbitrator Sylvestre with respect to the damages arising out of the 1996 disagreement will lead to inconsistent results as between the Retired Typographers and the Assumed Employees in the event that Arbitrator Sylvestre's ruling is upheld or that the application challenging it is not pursued. As noted above, Postmedia stands to be bound by inconsistent rulings as a privy to the Applicants.

61. It is in the interests of justice that the stay be lifted in these circumstances so that the matter can be finally resolved in a manner that is fair and consistent for all parties, namely the Retired Typographers, the Assumed Employees, the Applicants and Postmedia.

Re Canwest Global Communications Corp, 2009 CarswellOnt 7882 at para. 33 (S.C.J.—Commercial List), Book of Authorities, Tab M

Any Matters Relating to the Arbitrator's Exercise of his Jurisdiction Should be Referred to the Québec Courts Pursuant to s. 17 of the CCAA

62. Section 17 of the CCAA provides that courts having jurisdiction under it shall act in aid of and be auxiliary to each other in all matters provided for by the Act. Courts have relied on the

corresponding section of the *Bankruptcy and Insolvency Act* to refer particular issues relating to proofs of claim for determination by the court of another province, especially where the law of that province was at stake, while retaining ultimate jurisdiction over the insolvency proceedings.

> *Re Fairweathers Ltd,* 1921 CarswellOnt 28 at para. 8 (S.C.—Bankruptcy) [*Re Fairweathers*], Book of Authorities, Tab N
>
> *Knai v. Steen Contractors Ltd. (Trustee of),* [2001] O.J. No. 269 at paras. 21-23, 26 (S.C.J.—Commercial List) [*Knai*], Book of Authorities, Tab O

63. The Retired Typographers were employees of a Montreal newspaper and their claims arise out of that employment. Those claims have been pursued through arbitration and judicial proceedings in Québec for 14 years. They depend on the interpretation of the Tripartite Agreements, which are governed by Québec law. Any application to set aside any existing or future arbitrator's award is to be made to a Québec court under the provisions of the Québec *Code of Civil Procedure*. These are precisely the sort of circumstances in which it would be appropriate for judicial proceedings to set aside the 2009 Award or any eventual award on the 2000 disagreement to be referred to the Québec Superior Court as auxiliary to this Honourable Court. Appeals from any decisions of the Québec Superior Court in this respect would lie to the Québec Court of Appeal. However, Postmedia submits that provision should be made for any motions for advice and direction regarding distribution to be heard by this Honourable Court once all proceedings for the quantification of the Retired Typographers' claims by way of arbitration or judicial proceedings in Québec are exhausted.

> *Knai* at paras. 24-25, Book of Authorities, Tab O
>
> *Genovese v. York Lambton Corp.* (1969), 67 W.W.R. 355 at para. 39 (Man. C.A.), Book of Authorities, Tab P
>
> *Re Fairweathers* at para. 10, Book of Authorities, Tab N

PART IV - ORDER REQUESTED

64. Postmedia respectfully requests 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 "2009 Award") and that the Retired Typographers are bound by the 2009 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 reduction for the overpayment of salary and benefits paid to the Retired Typographers by *The Gazette* for the period between February 5, 1998 and October 30, 1998;

b. Declaring that the claims of the Retired Typographers arising out of the July 14, 2000 disagreement submitted by the Communications, Energy and Paperworkers Union of Canada (the "Union") are barred, or, in the alternative, declaring that the claims have previously been determined, are an abuse of process or are valued at zero in light of the arbitration awards of Arbitrator Ménard dated June 5, 2001 and of Arbitrator Gravel dated November 24, 2003;

c. Declaring that as a result of (a) and (b), 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 set-off of *The Gazette's* overpayment of salary and benefits for the period between February 5, 1998 and October 30, 1998; and

iii. The net amounts, if any, remaining due to the Retired Typographers or due from the Retired Typographers;

d. In the alternative to (a), (b) and (c), pursuant to section 11 of the *Companies' Creditors Arrangement Act,* R.S.C., c. C-36 ("CCAA"), lifting the stay so as to allow the Retired Typographers to continue the arbitration proceedings in Québec with respect to the 1996 disagreement and the 2000 disagreement in conjunction with the six other typographers still employed at *The Gazette* (the "Assumed Employees") for the limited purpose of quantifying the Retired Typographers' claims under the Amended Claims Procedure Order enforceable only against the shares of Postmedia held by the Monitor to satisfy those claims, and with no further or other effect; and

e. In addition to (d) and in the alternative to (a), (b) and (c), pursuant to section 17 of the CCAA, requesting that the Québec Superior Court act in aid of and be auxiliary to this Court to hear any applications for annulment of the arbitration awards mentioned in (d), and that any appeals therefrom lie to the Québec Court of Appeal; and

f. Directing that any motion for advice or direction as to the distribution to the Retired Typographers of the shares held by the Monitor to satisfy their claims following their final quantification be brought to this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Fred Myers

Caroline Descours

Lawyers for Postmedia Network Inc.

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

FACTUM
(Motion to be heard May 16, 2011)

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