

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

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 CEP². 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

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 re-litigated. 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.

- (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 Doctrine 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.

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:

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.

⁹ At para 43.

¹⁰ [2003] 3 S.C.R. 77 at p. 107.

(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

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