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.

(Claims Proceeding to be heard November 15, 2011)

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PART I – OVERVIEW

1. Five retired employees of the Applicants' Montreal newspaper, *The Gazette*, have made a claim in this proceeding for damages they allege that they suffered as a result of a lock-out that began in 1996 and ended in 2002. Postmedia Network Inc. ("Postmedia"), which acquired *The Gazette* along with a number of the Applicants' other newspaper assets under the Plan of Arrangement, is responding to the claim on behalf of the Applicants. Postmedia does not dispute that each of the retired employees, all of whom were typographers at *The Gazette,* has a claim, but submits that the nature, scope and extent of their damages and the duration of the period during which damages were incurred were fully determined by the January 21, 2009 award of Arbitrator André Sylvestre (the "2009 Award"), who has been seized of the dispute between the typographers and *The Gazette* since its inception. All that remains to be done in this proceeding is the arithmetical exercise of calculating the damages and applying any available set-off.

2. The retired typographers, however, have taken the position that Arbitrator Sylvestre's award is not binding on them as it is the subject of a "motion in annulment" in Québec, which is being pursued by the six other typographers remaining at *The Gazette*, whose employment was assumed by Postmedia and whose claims are no longer stayed by the CCAA proceeding. The retired typographers are represented in these proceedings by their union, the Communications, Energy and Paperworkers' Union of Canada, Local 145 (the "Union").

3. The Honourable Justice Pepall, who supervised the CCAA proceeding, has directed that 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."

4. The motion in annulment is not meritorious. The only basis on which the 2009 Award could be set aside (annulled) under Québec's *Code of Civil Procedure* is that "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." The dispute between *The Gazette* and its typographers has been the subject of protracted litigation, in the course of which the Québec Court of Appeal has, in three separate decisions, clearly identified the matters to be decided by the Arbitrator. The Arbitrator determined those matters based on the evidence and submissions presented to him. There are consequently no grounds for setting aside the Arbitrator's award.

5. The CCAA objectives of fairness and expeditiousness that motivated Justice Pepall's decision demand that this, the last remaining claim in the CCAA proceeding, be finally

determined in a summary fashion by way of the Claims Procedure, so that the matter can be brought to a close and the retired typographers' claims resolved after 15 years of litigation.

PART II – FACTS

The CCAA Proceeding

6. The Applicants and certain related entities were granted protection from their creditors by Initial Order under the CCAA on January 8, 2010. A Claims Procedure Order was granted in April 2010 and Amended Claims Procedure Order in May 2010. Also in May 2010, the Court approved an Asset Purchase Agreement ("APA") by which the purchaser bought certain assets of the Applicants including *The Gazette*, and assumed certain liabilities of the Applicants. The APA was subsequently assigned by the purchaser to Postmedia.

> Reasons for Decision of Pepall J. dated January 5, 2011 ("January Decision"), paras. 2-3, Compendium of Postmedia Network Inc. ("Compendium"), Tab 1
>
> Reasons for Decision of Pepall J. dated July 28, 2011 ("July Decision"), para. 6, Compendium, Tab 3

7. In June 2010, the Plan was sanctioned, and in July 2010 the Applicants' assets were transferred to Postmedia.

> July Decision, para. 4, Compendium, Tab 3

8. In July 2010, the Union filed a proof of claim on behalf of the five retired typographers and four of the typographers whose employment was assumed by Postmedia. The two other typographers whose employment was assumed by Postmedia are representing themselves.

> July Decision, para. 7, Compendium, Tab 3
>
> January Decision, para. 1, Compendium, Tab 1

9. By judgment dated January 5, 2011, Justice Pepall determined that, under the terms of the APA, Postmedia was liable for the claims of the six typographers whose employment had been transferred to Postmedia under the APA, and those typographers need not participate in the claims process. The claims of the remaining five typographers, whose employment was not assumed by Postmedia, were to be disposed of in accordance with the Amended Claims Procedure Order.

January Decision, para. 69, Compendium, Tab 1

10. In accordance with the Plan, the Monitor reserved 55,490 shares in the Disputed Claims Reserve for the claims of the retired typographers. This reflects the amount of the claims of $500,000 per retired typographer submitted in the July 2010 proof of claim. These are the only shares remaining in the Disputed Claims Reserve, all other distributions having been effected.

July Decision, para. 16, Compendium, Tab 3

The Dispute between The Gazette and the Typographers

(i) Background

11. In the early 1980s, approximately 200 typographers worked in the composing room at *The Gazette*. However, with the expansion of computer technology, their function was becoming obsolete and their positions at *The Gazette* were becoming redundant.

January Decision, paras. 1, 7, Compendium, Tab 1

12. The Union and *The Gazette* were parties to collective agreements that expired every three years. In 1982, the Union negotiated an agreement with *The Gazette* and each of the 200 typographers (the "1982 Agreement"), which was to come into effect only at such times as the

collective agreement should "end, disappear, become without value or, for any other reason become null and void or inapplicable." Under the 1982 Agreement, in return for the right to proceed with technological changes, *The Gazette* guaranteed to protect the typographers from losing regular full time employment in the composing room as a consequence. The 1982 Agreement guaranteed employment at full pay at no less than the prevailing union rate as agreed to in the collective agreements negotiated from time to time by the parties. It was to remain in effect until the employment of all of the typographers who signed it had ceased, ultimately until 2017. It is binding on purchasers, successors or assigns of the company.

January Decision, paras. 8-10, 12-13, Compendium, Tab 1

1982 Tripartite Agreement between The Gazette, Le Syndicat Québécois de L'Imprimerie et des Communications, Section Locale 145 and the employees listed in the appendix, dated April 15, 1983 ("1982 Agreement"), Article I, Compendium, Tab 6

13. The 1982 Agreement was incorporated into the 1981-1984 collective agreement and all subsequent collective agreements. Any disputes as to the interpretation, application or breach of the 1982 Agreement were to be resolved through the grievance procedure set out in the collective agreement in effect at the time the grievance was initiated.

January Decision, para. 11, Compendium, Tab 1

1982 Agreement, Article VII, Compendium, Tab 6

14. In 1987, *The Gazette,* the Union and the then remaining 132 typographers entered into a further agreement (the "1987 Agreement" and, with the 1982 Agreement, the "Tri-partite Agreements") which contained language similar to the 1982 Agreement but also amended and added to it. In particular, the 1987 Agreement included a mechanism for the exchange of "last final best offers" or "LFBOs" on request by either party within the two weeks preceding the

acquisition of the right to strike or lock-out on the termination of a collective agreement. The LFBOs were to contain only those clauses or portions of clauses on which the parties had not already agreed; if no agreement was reached before the right to strike or lock-out was acquired, either party could submit the disagreement to an arbitrator selected in accordance with the grievance procedure in the collective agreement. The arbitrator was to retain one or other of the LFBOs in its entirety. The arbitrator's decision would be final and binding and become an integral part of the collective agreement.

January Decision, paras. 16-17, Compendium, Tab 1

1987 Tripartite Agreement between The Gazette, Le Syndicat Québécois de L'Imprimerie et des Communications, Section Locale 145 and the employees listed in the appendix, dated April 9, 1987 ("1987 Agreement"), Article XI, Compendium, Tab 7

15. Essentially, the LFBO mechanism limited the right to lock-out by providing a compulsory procedure for renewal of the collective agreement by arbitration. It ensured that any labour dispute would eventually end when a third party imposed a new collective agreement.

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.) ("1999 QCA Decision"), p. 31, Book of Authorities of Postmedia Network Inc. ("Book of Authorities"), Tab A

16. The 1987 Agreement was incorporated into the 1987-1990 collective agreement and all subsequent collective agreement and is binding on purchasers, successors and assigns of the company.

January Decision, para. 18, Compendium, Tab 1

17. In 1994, an LFBO arbitrator, Raymond Leboeuf, accepted in its entirety *The Gazette's* offer for the renewal of the collective agreement that had expired on April 30, 1993; as a result

of Arbitrator Leboeuf's decision, which was not contested, the LFBO process henceforth required the consent of both parties, and could not be initiated unilaterally.

1999 QCA Decision, p. 8, Book of Authorities, Tab A

(ii) The 1998 Arbitration Award and the 1999 Court of Appeal Decision

18. When the collective agreement resulting from Arbitrator Leboeuf's award expired on April 30, 1996, the Union invited *The Gazette* to proceed with LFBO arbitration. *The Gazette* refused because, in its view, the LFBO provision in the 1987 Agreement had ceased to be mandatory as a result of the Leboeuf award. On June 3, 1996, *The Gazette* issued a lock-out notice and stopped paying the typographers, whose number had by then dwindled to eleven. The typographers and the Union asserted by way of a dispute submitted to arbitration before Arbitrator Sylvestre that *The Gazette's* refusal to exchange last final best offers was a breach of the 1987 Agreement, and claimed they were entitled to continue to receive their salaries and benefits during the lock-out, pursuant to the Tri-partite Agreements.

January Decision, para. 27, Compendium, Tab 1

Gazette (The), a division of Southam Inc. v. Blondin, [2003] Q.J. No. 9433 (C.A.) ("2003 QCA Decision"), para. 20, Book of Authorities, Tab B

1999 QCA Decision, pp. 11-12, Book of Authorities, Tab A

19. Arbitrator Sylvestre determined that there had been a breach of the 1987 Agreement, whose LFBO mechanism survived independently even though it had been eliminated from the collective agreement imposed by LFBO arbitration in 1994, and ordered *The Gazette* to submit to the exchange process and compensate the typographers for wages and benefits lost since the lock-out began. The matter eventually made its way to the Court of Appeal, which quashed the

Arbitrator's award on the issue of liability to pay wages and benefits during a lock-out, but maintained the obligation to participate in the LFBO process.

1999 QCA Decision, pp. 14, 31, Book of Authorities, Tab A

20. The Court of Appeal decided that the Tri-partite Agreements came into effect as independent civil agreements anytime the collective agreement was cancelled, lapsed or became inapplicable. Thus, the Arbitrator's jurisdiction stemmed from the 1987 Agreement and the notice of dispute the Union had submitted for arbitration on June 4, 1996. The Court of Appeal concluded that *The Gazette* had breached the 1987 Agreement by refusing to exchange LFBOs. However, as *The Gazette* had a legal right to lock out its employees, the typographers were, possibly, entitled to damages only insofar as the employer's refusal to participate in the process had "unduly prolonged" the lock-out. The Court of Appeal was of the view that the Arbitrator should decide that question, and referred the matter back to Arbitrator Sylvestre.

January Decision, paras. 27-28, Compendium, Tab 1

1999 QCA Decision, pp. 22-23, 31, Book of Authorities, Tab A

Local 145 of the Communications, Energy and Paperworkers Union of Canada (CEP) v. Gazette (The), a division of Southam Inc., 2008 QCCA 522 ("2008 QCA Decision"), para. 10, Book of Authorities, Tab C

(iii) The 2000 Arbitration Award and the 2003 Court of Appeal Decision

21. In a September 2000 interim award, Arbitrator Sylvestre decided that the heads of damages which could be claimed by the typographers were limited to lost salary and benefits during the lock-out and that the damage calculation period was limited to June 4, 1996 to January 21, 2000, when *The Gazette* submitted its LFBO. The Québec Superior Court partly set aside the award, but the Court of Appeal overruled and reinstated the award in its entirety. As a

result, the maximum period of possible loss and limitation of potential damages to salary and benefits that would have been earned during that period have been determined with finality. The Court of Appeal also confirmed that the disputes submitted to arbitration under the 1987 Agreement were neither grievances nor disputes under the *Labour Code,* but disputes within the meaning of the provisions of the *Code of Civil Procedure* governing private (consensual) arbitration proceedings. The Court of Appeal once again referred the matter back to Arbitrator Sylvestre to continue the hearing on the disagreement in order to dispose of it on its merits.

January Decision, para. 30, Compendium, Tab 1

2003 QCA Decision, paras. 14, 52, Book of Authorities, Tab B

(iv) **The 2005 Arbitration Award and the 2008 Court of Appeal Decision**

22. Following the Court of Appeal's 2003 decision, Arbitrator Sylvestre once again took up the question put to him by the Court of Appeal in 1999, i.e. whether the lockout had been "unduly prolonged" so as to justify an award of damages. He issued an award in 2005, in which he interpreted the question as requiring him to determine whether there had been an abuse of rights by *The Gazette*. In 2008, the Court of Appeal determined that Arbitrator Sylvestre had asked himself the wrong question. The issue that needed to be addressed was whether the lock-out would have ended earlier than January 21, 2000 had the exchange of final best offers taken place following the April 30, 1996 request.

January Decision, para. 32, Compendium, Tab 1

2009 Award, paras. 21-23, Compendium, Tab 8

2008 QCA Decision, para. 34, Book of Authorities, Tab C

23. As the Québec Court of Appeal stated in its 2008 Decision:

> [TRANSLATION]...*The Gazette* was required to exchange its last final best offers with the union no later than May 2, 1996. *The Gazette* did not do so and it is that fault that our Court pointed to as having possibly caused damage. That being so, what the arbitrator had to do was determine whether the contractual breach had had that effect in reality and, if so, determine the appropriate amount of compensation.
>
> 2008 QCA Decision, para. 24, Book of Authorities, Tab C

24. The Court of Appeal provided further guidance by breaking the issue down into three questions which it remitted to Arbitrator Sylvestre for determination on the basis of the evidence before him: when the collective agreement would have been finalized, or, in other words, when the lock-out would have ended if the exchange of offers had taken place normally; the quantum of the wages and benefits the typographers would have been entitled to as of the end of the lock-out; and whether those wages and benefits would have been lower than the minimum guaranteed in the 1987 Agreement.

2008 QCA Decision, paras. 30, 32, Book of Authorities, Tab C

25. The Court of Appeal expressly found that the typographers' position that the lock-out had been unduly prolonged during the entire period from June 3, 1996 to January 21, 2001, went too far. The Court found that it was "not at all certain" that the whole lock-out period unduly caused loss of wages and benefits otherwise guaranteed to the typographers, and that it was the evidence to be adduced before the Arbitrator on the three questions posed above that would resolve the issue.

2008 QCA Decision, paras. 36, 37, Book of Authorities, Tab C

(v) The 2009 Award

26. Arbitrator Sylvestre precisely followed the Court of Appeal's instructions. After reviewing the evidence put forward by the parties, he found that had the exchange of offers taken

place normally, the lock-out would have lasted until May 1999. Consequently, he determined that the typographers' damages consisted of salaries and benefits for the nine-month period from May 1999 to January 2000. He found that no amount should be subtracted for failure to mitigate.

2009 Award at paras. 56-58, Compendium, Tab 8

Outstanding Issues

27. *The Gazette* paid the typographers' salaries and benefits from February 5, 1998 to October 30, 1998 while seeking judicial review of Arbitrator Sylvestre's first award. As noted above, the Court of Appeal allowed, in part, the Gazette's application and held that *The Gazette* was not required to pay the typographers during a lockout. In February 2001, *The Gazette* commenced a civil action against the typographers to recover the amounts that it overpaid (which amounted to approximately nine months' salary and benefits). The Québec Superior Court referred *The Gazette's* claim to Arbitrator Sylvestre for adjudication as part of the arbitration of the typographers' claims. In the 2009 Award, Arbitrator Sylvestre did not rule on *The Gazette's* claim. Rather, in light of his holding that the typographers' damages equated to nine months salary and benefits which was approximately equal to the amount claimed to have been over-paid during the lockout by *The Gazette*, he adjourned the hearings and gave the parties an opportunity to settle their issues. However, no settlement has occurred. Consequently, *The Gazette's* claim remains outstanding and the net damages owing to the typographers (if any) have not been calculated.

July Decision, para. 8, Compendium, Tab 3

2003 QCA Decision, para. 28, Book of Authorities, Tab B

28. Postmedia acquired *The Gazette's* claim under the CCAA Plan. The Claims Procedure Order allows for setoff against payments or other distributions to be made pursuant to the Plan.

July Decision, paras. 12, 25, Compendium, Tab 3

29. The typographers and their counsel (who is not their current counsel) 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 the 2009 Award found that the typographers were bound to that maximum amount given that the debate as to whether other heads of damage were available to them had been determined against the typographers by the Québec Court of Appeal's 2003 decision.

2009 Award, paras. 47-49, Compendium, Tab 8

30. Accordingly, the calculation of the nine months damages for which *The Gazette* is liable, and of any set-off for the period during which *The Gazette* paid wages and benefits that it was not obligated to pay, is a purely arithmetical exercise.

The Supervising Judge's Directions

31. Postmedia requested an order declaring that the retired typographers were bound by the 2009 Award and, as a result, the only issues to be determined by the Claims Officer were the quantification of the typographers' salary and benefits for the period determined by the 2009 Award, the quantification of the applicable set-off, and the net amount, if any, due. In the alternative, Postmedia requested that all questions be referred to the Québec Superior Court and the arbitration proceedings already underway for the purposes of quantifying the retired typographers' claim. The Union, on behalf of the retired typographers, opposed.

July Decision, paras. 1, 19, Compendium, Tab 3

32. Justice Pepall noted that the "practical issue" before her was to ensure a process that reduced the risk of inconsistent results but was fair and expeditious for the five retired typographers remaining in the CCAA process. She noted that she must also be mindful of the objectives that underlie a CCAA proceeding. She decided that, in the interest of judicial economy, it made sense to provide direction on the mandate of the Claims Officer.

July Decision, paras. 22, 24, Compendium, Tab 3

33. Pepall J. observed that a motion in annulment is similar to a motion to set aside an arbitration award pursuant to section 46 of the *Arbitration Act, 1992.* She found that the proceeding "is not an appeal on the merits of Arbitrator Sylvestre's Decision". In doing so, she relied on a passage from the Québec Court of Appeal's 2003 decision in which the Court wrote that on a request for annulment of an award, a judge "cannot enquire into the merits of a 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."

July Decision, paras. 9, 31-32, Compendium, Tab 3

2003 QCA Decision, para. 43, Book of Authorities, Tab B

34. Justice Pepall determined that, by reason of the Québec Court of Appeal's 2003 decision affirming Arbitrator Sylvestre's September 2000 award, the Union and the retired typographers are clearly estopped from re-litigating the following issues:

(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.

July Decision, para. 33, Compendium, Tab 3

35. However, she found that the determination in the 2009 Award that the damages period extended from May 1999 to January 21, 2000 was not final and binding on the parties so as to create an estoppel, as the motion in annulment remained outstanding and accordingly all available reviews had not been exhausted or abandoned. Nevertheless, she decided that "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.*" [Emphasis added.] If the motion was not meritorious, the Claims Officer was to simply quantify the retired typographers' salary and benefits for the period between May, 1999 and January 21, 2000, and consider any appropriate claim for set-off. If it was meritorious, the Claims Officer would be at liberty to authorize the retired typographers to bring a motion before Pepall J. seeking to lift the stay or for other relief.

July Decision, para. 34, Compendium, Tab 3

36. Counsel for Postmedia argued that the resolution of this claim should not occur separately from the resolution of the remaining Québec motion in annulment brought by the other typographers whose employment has been assumed by Postmedia. A decision in an Ontario claims process risked creating some form of estoppel in Québec although it is the Québec Court that is the proper forum in which to determine whether the decision of Arbitrator Sylvestre ought to be annulled. Justice Pepall recognized that there was some possibility that

different results might ensue for the typographers who were pursuing their claim in Québec than for the retired typographers. However, she determined that her decision to bind the typographers to the Arbitrator's decision unless the Claims Officer finds that the annulment proceeding is "meritorious based on the evidence" was in keeping with the objectives of the CCAA.

July Decision, para. 34, Compendium, Tab 3

PART III – LAW AND ARGUMENT

A claim is not meritorious unless it has sufficient legal worth that its prospects of success are reasonable

37. The only issue to be determined at this hearing is whether the motion in annulment is "meritorious on the evidence". Postmedia submits that the requirement that the motion be "meritorious" imposes a relatively high test of merit which the Union has the onus of meeting.

38. A general definition of "meritorious" in the legal context is found in *Black's Law Dictionary*: "meriting a legal victory; having legal worth <meritorious claim>".

B. A. Garner, Ed., Black's Law Dictionary, 8th Ed. (St. Paul, Minn.: Thompson West, 2004) at p. 1010, Book of Authorities, Tab D

39. In Canadian law, the term "meritorious" has been considered in the context of interim costs awards, which may be granted in the Court's discretion, either as a result of its inherent jurisdiction (typically in matrimonial or family cases) or by statute (such as in corporate oppression cases). As explained by LeBel J. writing for a majority of the Supreme Court of Canada, such an award of costs "forestalls the danger that a *meritorious* legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed."

[Emphasis added.] Expanding on this requirement, LeBel J. stated that: "The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit." The case must be "strong enough to get over the preliminary threshold of being worthy of pursuit."

> *British Columbia (Minister of Forests) v. Okanagan Indian Band,* 2003 SCC 71 at paras. 31, 36, 37, Book of Authorities, Tab E

40. Another context in which Ontario courts are called upon to consider whether a case is meritorious is on a motion to transfer an appeal from the Divisional Court to the Court of Appeal. The first branch of the test adopted by the Divisional Court is that the appellant seeking to have the matter transferred have a "meritorious" appeal. (The second and third branches are that the respondent not suffer undue prejudice as a result of further delay while the appeal is waiting to be heard, and that the appellant have moved expeditiously once the jurisdiction is known to be disputed.) The first branch has been interpreted to require that the appellant have "an arguable case that could reasonably, but not necessarily be successful."

> *Hammond v. State Farm Mutual Automobile Insurance Company,* 2011 ONSC 3192 at para. 12 (Div. Ct.) ("*Hammond v. State Farm*"), Book of Authorities, Tab F

41. The *Black's Law Dictionary* definition and judicial commentary indicate that to be "meritorious" a claim must have a degree of legal worth, of strength, which gives it a reasonable prospect of success. The onus lies on the claimant to show that the claim is "worthy of pursuit", not, as in the case of a pleadings motion, on the respondent to show that it is plain and obvious that the claim cannot succeed.

42. This interpretation of the term "meritorious" is consistent with Justice Pepall's description of the issue facing her, namely to arrive at a result that "reduced the risk of

inconsistent results" but was "fair and expeditious". The proposed test strikes the balance that Justice Pepall sought.

43. It is worth noting that the Divisional Court, in seeking to determine the meaning to be given to the term "meritorious" in the *Hammond v. State Farm* case cited above, observed that the criterion was presumably designed to avoid wasting judicial resources at the Court of Appeal on cases that have little chance of success even though, but for the filing error, that "gatekeeper" function would not otherwise exist. In other words, it is designed to be fair to the appellant while ensuring the expeditious use of judicial resources, an objective similar to that stated by Justice Pepall.

Hammond v. State Farm, supra, at para. 9, Book of Authorities, Tab F

44. For the reasons set out below, Postmedia submits that the motion to annul is not meritorious. It is not of sufficient legal worth or strength to have a reasonable prospect of success.

45. In the alternative, Postmedia submits that even if it is wrong as to the meaning of "meritorious", it is in any event plain and obvious that the motion in annulment cannot succeed.

The motion in annulment is not meritorious

The Arbitrator's Award is not subject to judicial review

46. The Court of Appeal having found that Arbitrator Sylvestre is acting as a consensual arbitrator, his award can be quashed only on narrow jurisdictional grounds. The *Code of Civil Procedure* provides that:

940.3 A judge or the court cannot intervene in any question governed by this Title ["Arbitration Proceedings"] except in the cases provided for therein.
...

946.2 The court examining a motion for homologation [enforcement] cannot enquire into the merits of the dispute.
...

946.4 The court cannot refuse homologation except on proof that

(4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains a decision on matters beyond the scope of the agreement.
...

947. The only possible recourse against an arbitration award is an application for its annulment.
...

947.2 Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award.

Code of Civil Procedure, R.S.Q., c. C-25, Compendium, Tab 9

47. Whereas review of the legality of tribunal decisions by the court of general jurisdiction is the rule (except to the extent it has been legislatively restricted by a privative clause), the reverse is the rule in Québec in the case of consensual arbitrators such as Arbitrator Sylvestre. The power to annul an arbitration award is restricted to the specific circumstances enumerated in the *Code of Civil Procedure*. It is not to be confused with the power of judicial review, which allows the court to intervene on errors of law.

2003 QCA Decision at paras. 43-44, Book of Authorities, Tab B citing the Supreme Court of Canada's decision in *Desputeaux v. Éditions Chouette (1987) Inc.*, 2003 SCC 17 ("*Desputeaux*") at para. 68, Book of Authorities, Tab G

48. As the Supreme Court of Canada pointed out in the *Desputeaux* case cited by the Québec Court of Appeal in its 2003 Decision in this matter, some judgments have tended to confuse the power of annulment with the power of judicial review. Indeed, this criticism may be levelled at

those passages of the Québec Court of Appeal's 1999 decision in which the Court found that, "the arbitrator gave the provisions of the agreement a meaning they could not reasonably have." Be that as it may, the law has now been clarified by the Supreme Court of Canada and the Court of Appeal's subsequent 2003 decision, and there can be no doubt that Arbitrator Sylvestre's award is not reviewable for error of law or indeed any error on the merits of the issues before him.

Desputeaux, supra, at paras. 54, 68, Book of Authorities, Tab G

1999 QCA Decision at pp. 30-31, Book of Authorities, Tab A

2003 QCA Decision at paras. 43-44, Book of Authorities, Tab B

49. The Supreme Court of Canada discussion in *Desputeaux* of the limits on the review of the validity of arbitration decisions is set out in full below (with citations omitted):

The Court of Appeal stated at para. 49:

> [TRANSLATION] Where an arbitrator, in performing his or her mandate, is required to apply the rules of public order, he or she must apply them correctly, that is, in the same manner as do the courts.

That statement runs counter to the fundamental principle of the autonomy of arbitration. What it necessarily leads to is review of the merits of the dispute by the court. In addition, it perpetuates a concept of arbitration that makes it a form of justice that is inferior to the justice offered by the courts.

The legislature has affirmed the autonomy of arbitration by stating, in art. 946.2 *C.C.P.*, that '[t]he court examining a motion for homologation cannot enquire into the merits of the dispute". (That provision is applicable to annulment of an arbitration award by the reference to it in art. 947.2 *C.C.P.*) In addition, the reasons for which a court may refuse to homologate or annul an arbitration award are exhaustively set out in arts. 946.4 and 946.5 *C.C.P.*

Despite the specificity of these provisions of the *Code of Civil Procedure* and the clarity of the legislative intention apparent in them, there have been conflicting lines of authority in the Quebec case law regarding the limits of judicial intervention in cases involving applications for homologation or annulment of

arbitration awards governed by the *Code of Civil Procedure.* Some judgments have taken a broad view of that power, or sometimes tended to confuse it with the power of judicial review provided for in arts. 33 and 846 *C.C.P.* ... The judgment in issue here illustrates this tendency when it adopts a standard of review based on simple review of any error of law made in considering a matter of public order. That approach extends judicial intervention at the point of homologation or an application for annulment of the arbitration award well beyond the cases intended by the legislature. It ignores the fact that the legislature has voluntarily placed limits on such review, to preserve the autonomy of the arbitration system. Public order will of course always be relevant, but solely in terms of the determination of the overall outcome of the arbitration proceeding, as we have seen.

This latter approach has been adopted by a significant line of authority. It recognizes that the remedies that may be sought against arbitration awards are limited to the cases set out in arts. 946 *et seq. C.C.P.* and that judicial review may not be used to challenge an arbitration decision, or, most importantly, to review its merits. Review of the correctness of arbitration decisions jeopardizes the autonomy intended by the legislature, which cannot accommodate judicial review of a type that is equivalent in practice to a virtually full appeal on the law. Thibault J.A. identified this problem when she said:

> [TRANSLATION] In my view, the argument that an interpretation of the regulation that is different from, and in fact contrary to, the interpretation adopted by the ordinary courts means that the arbitration award exceeds the terms of the arbitration agreement stems from a profound misunderstanding of the system of consensual arbitration. The argument makes that separate system of justice subject to review of the correctness of its decisions, and thereby substantially reduces the latitude that the legislature and the parties intended to grant to the arbitration board.
>
> [All citations omitted.]
>
> *Desputeaux, supra,* at paras. 65-69, Book of Authorities, Tab G

50. It emerges from the Supreme Court of Canada's decision in *Desputeaux* that:

a. arbitration is to be viewed as a form of justice equal to and autonomous from that offered by the courts;

b. an arbitrator's decision is not reviewable for error of law; and

c. the correctness of the arbitrator's decision on the merits is not reviewable by the courts.

The Arbitrator decided the Matter referred to him by the Court of Appeal

51. The Union's motion in annulment, rather than addressing the *only* relevant issue, namely whether the 2009 Award "deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or ... contains decisions on matters beyond the scope of the agreement [as defined by the Court of Appeal in its decisions]", takes issue with the Arbitrator's approach to answering the questions put to him and the evidence on which he relied in doing so, thus inviting the Court to engage in precisely the sort of review of the merits of the decision that the Supreme Court of Canada has forbidden. While the Union contends that the 2009 Award does not comply with the Court of Appeal's 1999, 2003, and 2008 decisions, the analysis of those decisions set out below demonstrates that in fact Arbitrator Sylvestre precisely followed the guidance given by the Court of Appeal.

Motion in Annulment, para. 28, Compendium, Tab 11

(i) **The Court of Appeal's Instructions**

52. The Court of Appeal, in its 1999 decision, established that Maître Sylvestre was not acting as an arbitrator under the *Labour Code* but as a consensual arbitrator within the meaning of Chapter XVIII "Arbitration Agreements" of the *Civil Code* and Book VII "Arbitration" of the *Code of Civil Procedure.* The Court upheld the part of his award requiring *The Gazette* to submit to the LFBO exchange process, but overruled his award of full salary and benefits from the beginning of the lock-out, on the basis that nothing in the Tri-partite Agreements prevented *The Gazette* from exercising its right to lock-out and thus suspending its obligation to pay wages

and benefits. The question that remained was whether the arbitration of LFBOs, had it proceeded as requested by the Union, would have curtailed the duration of the lock-out. The Court of Appeal found that it was "possible" that the lock-out had been "unduly prolonged" as a result of *The Gazette's* refusal to exchange LFBOs and it was therefore "possible" that the typographers would be entitled to damages. The Court made it clear that the decision in this respect was the Arbitrator's to make.

1999 QCA Decision, p. 31, Book of Authorities, Tab A

53. The Court of Appeal, in its 2003 decision, confirmed the Arbitrator's decision that the plaintiffs could claim no damages other than wages and benefits and that the claim could not extend beyond January 21, 2000.

2003 QCA Decision, paras. 34-35, 52, Book of Authorities, Tab B

54. The Court of Appeal, by its 2008 decision, remanded the case to Arbitrator Sylvestre "so that he may comply with the judgments rendered by our Court on December 15, 1999 and August 6, 2003." The Court of Appeal did not redefine the issue on which the Arbitrator had to decide, i.e. whether the lock-out had been unduly prolonged as a result of the employer's failure to exchange LFBOs so as to cause damages to the typographers. Rather, the Court offered guidance as to how the issue was to be resolved. As the Court put it, "what the arbitrator had to do was determine whether the contractual breach had had that effect [of causing damages] in reality...." The Court then sought to provide further guidance by identifying the three questions on which "evidence [is] to be adduced before the arbitrator" in order to "enable the solution to be found"—the solution being the solution to the question put by the Court of Appeal in its 1999 Decision.

2008 QCA Decision, paras. 24, 37, 38, Book of Authorities, Tab C

55. The Court stated as follows the three "unknowns" the Arbitrator had to determine in order to decide the issue remitted to him by the Court of Appeal in 1999:

a. If the exchange of offers had taken place normally, after the sending of the April 30, 1996 notice, when would the collective agreement have been finalized or, in other words, when would the lock-out have ended?

b. Should the evidence to come disclose that the lock-out would have ended before December 15, 1999 (date of the judgement), to what wages and benefits would the 11 typographers have been entitled as of the end of the lock-out?

c. Would the wages and benefits have been lower than the minimum guaranteed in the 1987 version of the tripartite agreement?

2008 QCA Decision, para. 30, Book of Authorities, Tab C

56. The Court noted that as a result of the Arbitrator's 2000 decision and the Court of Appeal's 2003 judgment, the Arbitrator's task under section (b) was to consider possible compensation for a period that might extend not to December 15, 1999 but on to January 21, 2000.

2008 QCA Decision, para. 31, Book of Authorities, Tab C

(ii) Arbitrator Sylvestre followed the Court of Appeal's Instructions

57. The 2009 Award both recognizes and complies in all respects with the foregoing directives. The Award is limited to salary and benefits, the period of damages does not extend beyond January 21, 2000, and the Arbitrator answered questions (a), (b) and (c).

> [56] In order to answer question (a), determining a date on which the collective agreement would have been finalized and the lock-out would have ended had the employer agreed to exchange final best offers, the arbitrator had to consider several different scenarios. The most logical stems from the claim by counsel for the employer that, on April 30, 1996, the union was not ready to exchange its final best offers. Indeed, in 2000 and 2008, the union offers could not be located and no reason for this was ever given by the union or the complainants. The arbitrator concludes from this that the latter preferred to opt for their disagreement to be heard by the grievance arbitrator to obtain adjudication of their rights. This first stage was eventually to be followed by a second, interest arbitration of final best offers. In these circumstances, the undersigned considers the scenario proposed by counsel for the employer to be the least flawed. Therefore, to answer the question, he has added the time he took to settle the disagreement, from June 1996 to February 1998, and the 15 months it took M[e] Leboeuf to render his award. Under this optimistic scenario, an arbitral award deciding the dispute would have been rendered in May 1999, followed a few days later by the signing of a renewed collective agreement and the end of the lock-out.
>
> [57] It follows that the answer to question (b) is that the complainants would have been entitled to the salaries and social benefits lost as of May 1999.
>
> [58] Lastly, question (c) raises the issue of mitigation of damages. The arbitrator does not think it appropriate to reduce the sums due to the complainants. Their small group's involvement in union business prevented them from engaging in other activities. Indeed, to survive on the union's strike pay, they would have had to participate in union business or risk losing this pay. Therefore, the salaries and social benefits owing to the complainants could not be less than the minimum guaranteed by the 1987 tripartite agreement.
>
> [59] In the circumstances, the salaries and benefits owed by The Gazette to the complainants cover the period from the month of May 1999 to January 2000. ...
>
> 2009 Award, paras. 56-59, Compendium, Tab 8

58. Neither the Union nor *The Gazette* called witnesses at the hearing before Arbitrator Sylvestre, which resumed on July 28, 2008. They confined themselves to producing documents.

> 2009 Award, para. 25, Compendium, Tab 8

59. The Union did not address the factual issues set out by the Court of Appeal at all. It did not submit any evidence or argument as to the length the lock-out would have lasted had LFBOs been exchanged, arguing instead that damages should be awarded for the entire period based on

an "abuse of rights" theory. This was precisely what the Court of Appeal had, in its 2008 judgment, determined was *not* the issue. Consequently, the Arbitrator did not accept the Union's argument.

Transcript of Hearing held on July 28, 2008 re: 2009 Award ("Transcript"), pp. 140-154, Compendium, Tab 10

2009 Award, paras. 45-46, 51, Compendium, Tab 8

2008 QCA Decision, paras. 26-28, 34, Book of Authorities, Tab C

60. *The Gazette's* counsel sought to address the factual issues raised by the Court of Appeal's question (a) by presenting various scenarios based on the evidence already adduced before Arbitrator Sylvestre. First, *The Gazette* argued that the lock-out had not been prolonged at all by its failure to submit to the exchange of LFBOs. The Union was not ready to submit its LFBO at that point either. It had made a strategic decision to have its rights under the 1987 Agreement arbitrated rather than forcing the LFBO arbitration by submitting its own LFBO and then facing arguments as to the arbitrator's jurisdiction to conduct the arbitration. In any event, all the issues that were ultimately decided in the context of the initial arbitration before Arbitrator Sylvestre and the many proceedings that followed had to be determined one way or another, given the inconsistency between the mandatory LFBO exchange provision in the 1987 Agreement and the consensual process for which the 1994 collective agreement provided. There would have been objections and applications to Court at every stage, so the process would have taken just as long.

Transcript, pp. 182-207, Compendium, Tab 10

2009 Award, paras. 36-40, Compendium, Tab 8

61. Second, *The Gazette* argued that, even setting aside the possibility of applications to Court and looking only at the time the arbitrators had taken to determine the issues, the process would have extended to July or August 1999. *The Gazette* arrived at this result by combining the time spent by Arbitrator Sylvestre in determining the initial issues (June 1996 to February 1998) and the time spend by Arbitrator Ménard in deciding on the LFBOs (January 2000 to June 2001).

Transcript, p. 208, Compendium, Tab 10

62. Finally, *The Gazette* proposed adding the time that Arbitrator Leboeuf had taken to determine the LFBOS (15 months, compared to Arbitrator Ménard's 18 months) to the time spent by Arbitrator Sylvestre in determining the initial issues, and calculated on that basis that the lock-out would have lasted until May 1999.

Transcript, p. 209, Compendium, Tab 10

63. It was this "most optimistic" scenario that the Arbitrator ultimately retained, after summarizing the various parties' submissions and reiterating question (a). Of the three scenarios proposed by the employer (the Union having proposed none), the Arbitrator thus chose the one that provided for the earliest signing of the collective agreement and hence for the longest period of damages to the typographers. He found that an arbitral award deciding the dispute would have been rendered in May 1999, followed a few days later by the signing of a renewed collective agreement and the end of the lock-out.

2009 Award, para. 56, Compendium, Tab 8

64. With respect to question (b), the Arbitrator rejected the Union's pension plan claim demanding compensation for the length of service lost during the lock-out, as the quantum of

salaries and benefits lost during the period from June 4, 1996 to January 21, 2000 had already been settled during the hearings that led to his 2000 award, and his decision as to the heads of damage available had been confirmed by the Court of Appeal in 2003. Furthermore, the length of service claim had been submitted in the Union's LFBO to Arbitrator Ménard (who conducted the LFBO arbitration ordered by the Court of Appeal in its 1999 decision) and he had rejected it, since he accepted *The Gazette's* LFBO. Arbitrator Sylvestre found that the complainants were entitled to salaries and benefits lost as of May 1999.

2009 Award, paras. 17-20, 47-48, 57, Compendium, Tab 8

2003 QCA Decision, paras. 33, 52, Book of Authorities, Tab B

65. In answer to question (c), the Arbitrator decided that it was not appropriate to reduce the sums due to the complainants for alleged lack of mitigation and consequently the salaries and benefits owing to the complainants could not be less than the minimum guaranteed by the 1987 Agreement.

2009 Award, para. 58, Compendium, Tab 8

(iii) The Motion in Annulment is an unallowable attempt to re-litigate the issues determined by the Arbitrator

66. The Union chose to rest its entire case before the Arbitrator on its abuse of rights theory rather than addressing the questions put by the Court of Appeal. It now seeks to argue new and different theories on the merits under the heading "The length of the arbitration process" at paragraphs 61 to 70 of its Motion in Annulment. The Union is, however, several years too late. The Arbitrator was directed to decide the matter on "*the evidence adduced before [him]* relative to the three questions" (emphasis added). That is what he did, for better or for worse. The

Union simply does not like the result of the arbitration and is asking the Québec Superior Court to substitute its decision for the Arbitrator's.

67. The Union's new argument that the arbitration process would have taken at most seven months clearly goes to the merits of the dispute and would require the court to engage in precisely the sort of analysis of the correctness and reasonableness of Arbitrator Sylvestre's decision that it is barred from conducting. Furthermore, it ignores Arbitrator Sylvestre's findings of fact that the LFBO arbitration process before Arbitrator Leboeuf took 15 months, not seven, and that, in any event, the Union was not ready to exchange LFBOs when it issued its request that the employer submit to the exchange process. Effectively, the Union seeks a *de novo* determination of the typographers' claim such as would not even be appropriate in a full-fledged appeal, or for that matter on a judicial review, and is clearly improper on a motion in annulment.

Motion in Annulment, para. 68, Compendium, Tab 11

2009 Award, para. 56, Compendium, Tab 8

68. Ironically, the Union, which now quibbles over the Arbitrator's approach to determining the issues before him, had this to say through its counsel at the hearing before him in July 2008:

> It will certainly be argued that the Court of Appeal did not agree to refer the case back to you with directions to pay damages necessarily for the entire period, since the Court of Appeal described the request for that order as lacking nuance.
>
> The fact the Court of Appeal did not specifically order you to do that does not mean that you do not have jurisdiction to do it. *Your jurisdiction must be exercised in accordance with the applicable legal concepts, having regard to the particular context of the case, which context was put in evidence before you and about which the Court of Appeal was not fully informed.* The court therefore left you the necessary latitude to dispose of this question. [Emphasis added.]

Transcript, pp. 148-149, Compendium, Tab 10

69. Arbitrator Sylvestre exercised his jurisdiction in accordance with the applicable legal concepts and having regard to the particular context of this exceedingly complex case. Having heard the parties for a total of 15 days between 1996 and 2008 and reviewed numerous exhibits, he relied on his extensive knowledge of the evidence in finding that the preliminary issues concerning the interaction of the 1987 Agreement and the collective agreement would have had to be resolved in any event, and assessed the delay in reaching a collective agreement resulting from the employer's refusal to exchange LFBOs accordingly.

2009 Award, paras. 50-56, Compendium, Tab 8

70. It is noteworthy that question (a), as put to the Arbitrator by the Court of Appeal, was to determine what would have happened "if the exchange of offers had taken place normally"—not, as the Union puts it in its motion in annulment, if "the process had been engaged *without contestation*". Moreover, questions (a), (b) and (c) were subsidiary to the main task the Court of Appeal had assigned the Arbitrator, namely to determine whether, "in reality", *The Gazette's* refusal to submit to the LFBO exchange process had caused damage by "unduly prolonging" the lock-out. There can be no doubt that the Arbitrator dealt with that issue in accordance with the guidance provided him by the Court of Appeal.

2008 QCA Decision, para. 24, Book of Authorities, Tab C

Motion in Annulment, para. 62, Compendium, Tab 11

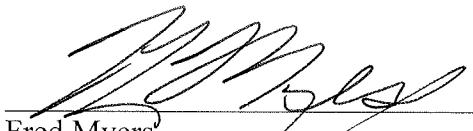
71. The Supreme Court of Canada has made it clear that under Québec law arbitral decisions are not subject to review on the merits, and the Québec Court of Appeal applied that directive in its 2003 decision in the very proceedings in issue here. The sole question to be decided at this point is whether or not Arbitrator Sylvestre dealt with a dispute that was not before him or

rendered a decision on matters beyond the scope of those referred to him. That might have been the case had he awarded damages other than wages or benefits, or decided that damages ran from a date earlier than June 3, 1996 or to a date later than January 21, 2000, but he did not do so. He clearly dealt with the dispute within the parameters set by the Court of Appeal and thus definitively disposed of the matter. Having dealt with the matters the Court of Appeal identified through its 1999, 2003 and 2008 decisions as the issues in dispute, Arbitrator Sylvestre's 2009 Award is immune from judicial attack. The motion in annulment is manifestly without merit.

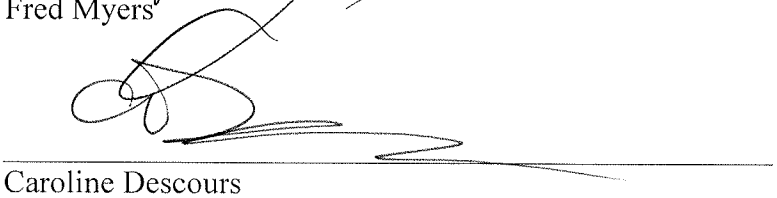
PART IV - ORDER REQUESTED

72. Postmedia respectfully requests an order declaring that the Motion in Annulment is not meritorious.

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
(Claims Hearing November 15, 2011)

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