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.

(Appeal Returnable on January 19, 2012)

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FACTUM ON BEHALF OF POSTMEDIA NETWORK INC.

PART I – OVERVIEW

1. Postmedia Network Inc. ("Postmedia") files this factum in response to the appeal by the Communications, Energy and Paperworkers Union of Canada Local 145 (the "Union"), on behalf of five typographers formerly employed at the Applicants' Montreal newspaper, *The Gazette* (the "Retired Typographers"), from the decision of Claims Officer Osborne dated November 24, 2011.

2. Claims Officer Osborne found that the Union's outstanding motion in annulment in the Quebec Superior Court, described below, is not meritorious. The finding of the Claims Officer was made pursuant to directions provided by this Honourable Court by Order dated July 28, 2011. Postmedia submits that this appeal ought to be dismissed with costs here and below.

3. The Retired Typographers 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 responded to the claim on behalf of the Applicants, asserting that the nature, scope and extent of the damages incurred by the Retired Typographers were fully determined by the January 21, 2009 award of Arbitrator André Sylvestre (the "2009 Award"). Arbitrator Sylvestre has been seized of the dispute between the typographers and *The Gazette* since its inception. In the 2009 Award, he determined that the typographers' damages were equivalent to nine months salary and benefits.

4. The Union, on behalf of the six typographers remaining at *The Gazette* whose employment was assumed by Postmedia and whose claims are no longer stayed by the CCAA proceeding, is pursuing a motion in Québec to set aside the 2009 Award (the motion in annulment). The Retired Typographers maintain that, as long as the motion in annulment remains outstanding, the 2009 Award is not binding upon them.

5. By Order dated July 28, 2011, this Honourable Court referred the Retired Typographers' claim to Claims Officer Osborne with the direction that he "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."

6. After holding a hearing to consider the facts and arguments submitted by the parties in respect of the annulment proceeding, by decision dated November 24, 2011, Claims Officer Osborne determined that it was "plain and obvious" that the motion in annulment was not meritorious.

7. The Claims Officer reached his decision after a detailed review of the historic facts in connection with dispute among the typographers and *The Gazette*, the related proceedings and the pleadings put before him at the November 15, 2011 claims hearing, answering the question directed to him by this Honourable Court. In doing so, he took into account all proper factors, did not take into account any improper factors, and made no error in principle or in law.

8. Accordingly, Postmedia respectfully requests that the appeal be dismissed with costs.

PART II – FACTS

The CCAA Proceeding

9. 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, Appeal Record of the Union ("Appeal Record"), Tab 3
>
> Reasons for Decision of Pepall J. dated July 28, 2011 ("July 28 Directions"), para. 6, Appeal Record, Tab 5

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

> July 28 Directions, para. 4, Appeal Record, Tab 5

11. 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 28 Directions, para. 7, Appeal Record, Tab 5

January Decision, para. 1, Appeal Record, Tab 3

12. 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, Appeal Record, Tab 3

13. 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 28 Directions, para. 16, Appeal Record, Tab 5

The Dispute between The Gazette and the Typographers

Events Leading to the 2009 Award

14. 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, Appeal Record, Tab 3

15. The Union and *The Gazette* were parties to collective agreements that expired every three years. In 1982, the Union and *The Gazette* negotiated a job security agreement (the "1982 Agreement") to which they and each of the 200 typographers were parties. In return for the right to proceed with technological changes, *The Gazette* guaranteed the typographers 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. The 1982 Agreement was to remain in effect until the employment of all of the typographers who signed it had ceased, and is binding on purchasers, successors or assigns of the company.

January Decision, paras. 8-10, 12-13, Appeal Record, Tab 3

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, Appeal Record, Tab 8

16. 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. 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 the 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, Appeal Record, Tab 3

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, Appeal Record, Tab 9

17. 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 the Union (the "Union Book of Authorities"), Tab 3

18. When the collective agreement expired in April, 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 a 1994 arbitral award which eliminated the LFBO process from the collective agreement. In June, 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, Appeal Record, Tab 3

Gazette (The), a division of Southam Inc. v. Blondin, [2003] Q.J. No. 9433 (C.A.) ("2003 QCA Decision"), para. 20, Union Book of Authorities, Tab 5

1999 QCA Decision, pp. 11-12, Union Book of Authorities, Tab 3

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.

1999 QCA Decision, pp. 14, 31, Union Book of Authorities, Tab 3

20. The Court of Appeal decided 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 and cease paying wages and benefits during the lock-out, the typographers were at most 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, para. 28, Appeal Record, Tab 3

1999 QCA Decision, pp. 22-23, 31, Union Book of Authorities, Tab 3

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, Union Book of Authorities, Tab 6

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. 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 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, Appeal Record, Tab 3

2003 QCA Decision, paras. 14, 52, Union Book of Authorities, Tab 5

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, Appeal Record, Tab 3

2009 Award, paras. 21-23, Appeal Record, Tab 10

2008 QCA Decision, para. 34, Union Book of Authorities, Tab 6

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, Union Book of Authorities, Tab 6

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, Union Book of Authorities, Tab 6

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, Union Book of Authorities, Tab 6

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, Appeal Record, Tab 10

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 28 Directions, para. 8, Appeal Record, Tab 5

2003 QCA Decision, para. 28, Union Book of Authorities, Tab 5

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 28 Directions, paras. 12, 25, Appeal Record, Tab 5

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, Appeal Record, Tab 10

30. Accordingly, all that remains to be done is the calculation of the nine months damages for which *The Gazette* is liable, and of the set-off for the period during which *The Gazette* paid wages and benefits that it was not obligated to pay.

The Supervising Judge's Directions

31. Postmedia, relying on the principle of issue estoppel, 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 28 Directions, paras. 1, 19, Appeal Record, Tab 5

32. This Honourable Court noted that the "practical issue" 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, in accordance with the objectives that underlie a CCAA proceeding.

July 28 Directions, para. 22, Appeal Record, Tab 5

33. In the interests of judicial economy, the Court decided that it made sense to provide direction on the mandate of the Claims Officer. In doing so, the Court noted that the objective of issue estoppel is to balance fairness to the parties with the protection of the decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided. The Court found that the motion in annulment was in the nature of a review which prevented the Arbitrator's 2009 Award from being final so as to create an issue estoppel. However, the Court also noted the very narrow confines of that review, which could not go to the merits of the Arbitrator's decision.

July 28 Directions, paras. 24, 28, 31, Appeal Record, Tab 5

34. The Court 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.* The proceeding "is not an appeal on the merits of Arbitrator Sylvestre's Decision". As the Québec Court of Appeal stated in its 2003 decision in the dispute between *The Gazette* and the typographers, a judge hearing a request for annulment of an award, "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 28 Directions, paras. 9, 31-32, Appeal Record, Tab 5

2003 QCA Decision, para. 43, Union Book of Authorities, Tab 5

35. The Court 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 were 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 28 Directions, para. 33, Appeal Record, Tab 5

36. However, the Court 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, the Court 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.]

July 28 Directions, para. 34, Appeal Record, Tab 5

37. The Court 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, but decided that binding the typographers to the Arbitrator's decision unless the Claims Officer found that the annulment proceeding was "meritorious based on the evidence" was in keeping with the objectives of the CCAA.

July 28 Directions, para. 34, Appeal Record, Tab 5

Claims Officer's Decision

38. Pursuant to the directions provided by this Honourable Court, the Claims Officer considered the issue of whether the Union's motion in annulment was "meritorious" at the November 15, 2011 claims hearing.

Interim Award of Coulter A. Osborne, Claims Officer, dated November 24, 2011 ("Interim Award"), para. 1, Appeal Record, Tab 2

39. The Claims Officer first assessed the nature of a motion in annulment, agreeing with Pepall J.'s analysis that a motion in annulment is akin to "a review of the arbitral process, but not a process through which the entire proceeding (or, in my view, any discrete part of it) is re-litigated on a correctness basis."

Interim Award, para. 21, Appeal Record, Tab 2

40. The Claims Officer then considered the meaning of the term "meritorious" in the context of Justice Pepall's July 28 Directions and determined that he needed to decide "whether on the evidence it is plain and obvious that the Motion in Annulment will or will not succeed."

Interim Award, paras. 24-25, Appeal Record, Tab 2

41. After a detailed review of the historic facts in connection with the dispute among the typographers and *The Gazette*, the related proceedings and the pleadings put before him at the November 15, 2011 claims hearing, the Claims Officer found that it was plain and obvious that the motion in annulment was not meritorious as it relied on alleged errors of fact or law which were not reviewable by the annulment process.

Interim Award, paras. 23, 29, Appeal Record, Tab 2

42. The Union now seeks to appeal the Claims Officer's award.

PART III – LAW AND ARGUMENT

Standard of Review

43. This appeal is brought pursuant to paragraph 32 of the Amended Claims Procedure Order dated May 17, 2010. The Order provides that the appeal is "to be an appeal based on the record before the Claims Officer and not a hearing *de novo*". The Appellant's factum on this appeal is almost identical to the factum that it delivered to the Claims Officer. It re-argues the issues that were before the Claims Officer on their merits, without submitting that the Claims Officer made any reviewable error. Rather the Appellant asks this Court to review the matter *de novo* and come to a different conclusion than that reached by the Claims Officer. That is not a proper basis for an appeal in this matter.

Amended Claims Procedure Order dated May 17, 2010, para. 32, Appeal Record, Tab 7

44. In referring the matter to the Claims Officer, this Honourable Court stated that the Claims Officer should be limited by the determination of the nine month period of damages, subject to consideration of whether the motion in annulment was meritorious based on the evidence presented. The Court did not define the meaning of "meritorious". Accordingly, while providing some guidelines in the July 28 Directions, this Court essentially asked the Claims Officer to make a discretionary decision, a judgment call as to the merits of the motion in annulment, rather than finding facts and applying a rule which would dictate a particular result depending on the findings made.

July 28 Directions, para. 34, Appeal Record, Tab 5

D.J.M. Brown, *Civil Appeals,* Looseleaf Ed. (Toronto: Canvasback Publishing, 2011), paras. 15: 21 11 and 15:21 12 at pp. 15-21 to 15-22, Book of Authorities of Postmedia Network Inc. ("Postmedia Book of Authorities"), Tab 1

45. Broad curial deference should be accorded to the exercise of discretion by a decision maker exercising a judicial function. The Ontario Court of Appeal has on several occasions observed that a Registrar's discretionary decision will not be overruled unless the Registrar "erred in principle or in law or failed to take into account a proper factor or took into account an improper factor, which led to a wrong conclusion". A Claims Officer's discretionary decision is subject to the same standard of review.

Murphy v. Sally Creek Environs Corp. (Trustee of), [2010] O.J. No. 1773 (C.A.) at paras. 67, 70, Postmedia Book of Authorities, Tab 2

Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould Inc. (Interim Receiver of) (2006), 79 O.R. (3d) 241 at para. 48 (C.A.), leave to appeal dismissed, [2008] S.C.C.A. No. 220, Postmedia Book of Authorities, Tab 3

General Motors Corp. v. Tiercon Industries Inc., 2009 CanLII 72341 at para. 12(e) (ON SC), aff'd, 2010 ONCA 666, Postmedia Book of Authorities, Tab 4

46. The Claims Officer in this case was not asked to make any determination of fact. There is no dispute that a motion in annulment has been brought before the Quebec Superior Court and that it has not yet been heard. There is no dispute as to the content of the written submissions made by both sides in the Quebec Superior Court, and placed before the Claims Officer, or as to the content of the hearing before the Arbitrator, the transcript of all relevant portions of which was also before the Claims Officer. Neither was there any real dispute as to the proper legal standard applicable in Québec law on a motion in annulment (foreign law also being a matter of fact). The parties essentially agreed on the nature of a motion in annulment, and in any event this Honourable Court had provided guidance on that point, which the Claims Officer wholeheartedly accepted. All that remained was for the Claims Officer to exercise judicial discretion in assessing the merits of the motion in annulment based on the evidence before him.

Interim Award, paras. 21-23, Appeal Record, Tab 2

No Reversible Error

47. In assessing the standard of "merit" that he was to apply, the Claims Officer reviewed the examples provided by counsel of circumstances in which the merit of something is a relevant example and considered their comprehensive submissions. He ultimately determined that he should consider whether on the evidence "it is plain and obvious" that the motion in annulment will not succeed. Postmedia had urged upon the Claims Officer that the test turned on the balancing of the merits and not the "plain and obvious" standard that applies more commonly in the pleadings context. The Retired Typographers cannot readily complain that they were the beneficiaries of the application of the highest possible standard in their favour.

Interim Award, paras. 24-26, Appeal Record, Tab 2

48. Applying this high standard which put the onus on Postmedia to demonstrate that the motion was not meritorious, the Claims Officer nevertheless determined that the Union's criticisms of the 2009 Award, even if they were justified, would not fall within the narrow confines of the review of an arbitrator's award for which the *Code of Civil Procedure* provides.

Interim Award, para. 29, Appeal Record, Tab 2

49. Postmedia submits that the Claims Officer made no error in principle or in law in so finding. Following the directions provided by this Honourable Court, he took into account all proper factors and did not take into account any improper factor which would lead to a wrong conclusion. His analysis is borne out by the following review of the matters that he was asked to consider.

50. The question set out by the Quebec Court of Appeal, in its 2008 decision required Arbitrator Sylvestre to consider:

> 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 lockout have ended?

2008 QCA Decision, para. 30, Union Book of Authorities, Tab 6

51. Arbitrator Sylvestre's 2009 Award recognized and complied in all respect with the directives of the Court of Appeal. He answered the questions set out in the 2008 Court of Appeal decision including the following:

> [56] In order to answer question (a), determining a date on which the collective agreement would have been finalized

> and the lockout 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 a claim by counsel for the employer that, on April 30, 1996, the Union was not ready to exchange its final best offers. Indeed, in 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 disagreements 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 the 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 Me. 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 lockout.
>
> 2009 Award, para. 56, Appeal Record, Tab 10

52. Before the Arbitrator, the Union argued that it should have been entitled to damages for the entire period of the lockout based on a theory that the employer had committed an "abuse of rights". This was precisely the theory that was advanced by the Arbitrator in his prior decision which the Court of Appeal had determined in its 2008 judgment was not the question in issue. Consequently, the Arbitrator did not accept the Union's argument. In addition, in reply, the Union had noted that if pushed, it would argue that the lockout would have lasted seven months. The Arbitrator rejected that position. Before the Claims Officer, the Union repeated its arguments, as set out in its motion in annulment, that it should have been entitled to damages for the entire period of the lockout or, alternatively, that the lockout would have lasted at most seven months. Both of these arguments go to the merits of the dispute either as matters of fact finding

by the Arbitrator or as matters of mixed law and fact concerning the legal obligations upon the employer at the relevant time.

53. In assessing these arguments, the Claims Officer found as follows:

> [29] In his submissions, Mr. Grenier valiantly tried to squeeze and convert the alleged failings of the Arbitrator into the restricted scope of the motion in annulment process. In the end, however, I am satisfied that all of the errors upon which Mr. Grenier relies are errors of fact or law, assuming for the purpose of analysis that they are errors in the first place.
>
> [30] To conclude, the motion in annulment is not a process intended for review of the merits of an arbitrator's award. It is not a forum through which errors of fact or law are part of the review process. On the material before me, I am satisfied that it is plain an obvious that the motion in annulment is not meritorious.

Interim Award, paras. 29 and 30, Appeal Record, Tab 2

54. The Claims Officer reviewed in detail the historic facts, the proceedings and the pleadings put before him, and determined that the issues raised by the Union went to the merits of the findings of the Arbitrator, which are not reviewable in an annulment proceeding. Consequently, he found that the motion in annulment was not meritorious. He committed no reviewable error in doing so.

55. It is therefore submitted that this appeal be dismissed.

PART IV - RELIEF REQUESTED

56. Postmedia respectfully seeks an order dismissing this appeal with costs here and below.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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Fred Myers

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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

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