



SUPERIOR COURT OF JUSTICE
COUR SUPÉRIEURE DE JUSTICE

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Date: January 5, 2011

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FROM: Eartha Reid, Judicial Assistant to The Honourable Madam Justice Pcpall

TOTAL PAGES (INCLUDING COVER PAGE): 25

MESSAGE:

Please see the attached Reasons for Decision in Canwest Global Publishing Inc., 2010 ONSC 6818.

Thank you.

ER

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CITATION: Canwest Global Publishing Inc., 2010 ONSC6818
COURT FILE NO.: CV-10-8533-00CL
DATE: 20110105

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

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

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

PEPALL J.

REASONS FOR DECISION

Relief Requested

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

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

Facts

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

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

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

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

¹ R.S.C., c. C-36 as amended.

(a) History

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

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

(i) 1982 Agreement

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

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

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

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

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

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

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

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

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

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

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

enforced, subject to the terms and conditions contained therein, notwithstanding the expiry of the present labour agreement.”³

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

(ii) 1987 Agreement

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

“Within 90 days before the termination of the collective agreement, the Employer and the Union may initiate negotiations for a new contract. The terms and conditions of the agreement shall remain in effect until an agreement is reached, a decision is rendered by an arbitrator, or until one or the other of the parties exercises its right to strike or lock-out.

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

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

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

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

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

(iii) 1991 Decision of Québec Court of Appeal

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

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

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

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

[23] He went on to write:

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

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

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

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

⁵ *Ibid* p. 516

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

(iv) 1999 Québec Court of Appeal Decision

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

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

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

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

⁶ R.S.Q. ch. N-1.

⁷ R.S.Q. ch. C-12.

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

(v) 2003 Québec Court of Appeal decision

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

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

⁸ Page 25.

⁹ Page 26.

¹⁰ [1993] 2 S.C.R. 230.

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

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

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

(vi) 2008 Quebec Court of Appeal Decision

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

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

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

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

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

(b) The APA

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

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

(i) The Purchase and Sale

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

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

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

(ii) Definitions

(a) Assumed Liabilities

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

(b) Liabilities

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

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

(c) Assumed Contracts

¹¹ Person includes a corporation.

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

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

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

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

(d) Transferred Employees

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

(e) Employees

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

(f) Union Employees

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

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

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

- (a) to Employees who are part of a bargaining unit ("Union Employees") in respect of which a collective agreement is in force, or has expired and the terms and conditions of which remain in effect by operation of law, the terms and conditions provided for in such collective agreement, or expired collective agreement if such terms and conditions remain in effect by operation of law, subject to any amendments or alterations to the terms thereof to which the bargaining agent under such collective agreement or expired collective agreement consents; and
- (b) to all other Employees ("Non-Union Employees") on substantially similar terms and conditions as their then existing employment immediately prior to the Acquisition Date, excluding any equity or equity-like compensation, supplementary retirement or supplementary pension arrangements or plans.

s 5.4(1) The provisions of this Article 5 insofar as they relate to unionized Employees shall be subject and subordinate to the provisions of the relevant collective agreements (including expired collective agreements that continue by operation of law) and Purchaser shall be bound as a successor employer to such collective agreements to the extent required by Applicable Law¹³.

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

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

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

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

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

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

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

s 1.1(63) (i) Certain Employee-Related Liabilities:

(i) all Liabilities of any kind, howsoever arising, in respect of any Employees or former employees other than the Transferred Employees (other than in connection with: the LP Pension Plans, as required by any collective agreement or the Purchaser Assumed Benefit Plans)

...

(k) Litigation:

All Liabilities in respect of any litigation proceedings, lawsuits, court proceedings or proceedings before any Governmental Authority against any of the LP Entities and their predecessors in respect of any matters, events or facts occurring prior to the Acquisition Time, other than the Insured Litigation Deductibles and the obligation to defend and/or settle all claims in connection therewith pursuant to Section 9.15.

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

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

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

(c) *The Québec Labour Code*

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

The alienation or operation by another in whole or in part of an undertaking shall not invalidate any certification granted under this Code, any collective agreement or any proceeding for the securing or for the making or carrying out of a collective agreement.

The new employer, notwithstanding the division, amalgamation or changed legal structure of the undertaking, shall be bound by the certification or collective agreement as if he were named therein and shall be ipso facto a party to any proceeding relating thereto, in the place and stead of the former employer.

(d) *Claims Procedure*

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

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

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

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

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

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

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

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

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

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

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

Issue

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

Positions of the Parties

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

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

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

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

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

Discussion

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

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

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

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

(a) Transferred Employees

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

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

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

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

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

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

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

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

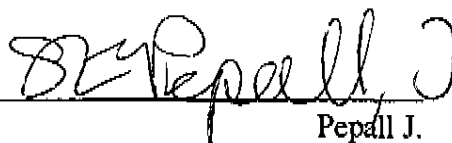
(b) Remaining Typographers

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

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

Conclusion

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


Pepall J.

Released: January 5, 2011

CITATION: Canwest Global Publishing Inc., 2010 ONSC 6818
COURT FILE NO.: CV-10-8533-00CL
DATE: 20110105

ONTARIO

**SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

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

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

REASONS FOR DECISION

Pepall J.

Released: January 5, 2011