Court File No. CV-10-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

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

RESPONDING FACTUM
OF THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

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RESPONDING FACTUM

OF THE COMMUNICATIONSENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

(Motion Returnable May 16, 2011)

PART I - BACKGROUND

1. This factum is filed on behalf of the Communications, Energy and Paperworkers Union of Canada, Local 145 (the "CEP") in response to the motion brought by Postmedia Networks Inc. ("Postmedia") wherein it seeks the following:

(a) An Order declaring that the calculation of the claims of JP Martin, Marc Tremblay, Leslie Stockwell, Robert Davies and Horrace Holloway (collectively, the "Retired Typographers") against the Applicants has been previously determined in a labour arbitration award dated January 21, 2009 (the "Arbitral Award"), and that the Retired Typographers are bound by that Arbitral Award which establishes and limits their claim entitlement to the payment of salary and benefits for the period between May 1999 and January 21, 2000, subject to the alleged overpayment of salary and

benefits that were paid to the Retired Typographers by The Gazette for the period between February 5, 1998 and October 30, 1998;

(b) An Order declaring that as a result of (a) the only issues to be determined by the Claims Officer under the Amended Claims Procedure Order dated May 17, 2010 (the "Amended Claims Procedure Order") with respect to the Retired Typographers' claims are:

(i) The quantification of the Retired Typographers' salary and benefits for the period between May 1999 and January 2000;

(ii) The quantification of any alleged set off; and

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

(c) In the alternative to (a) and (b), an Order referring all questions of liability and quantum in respect of the Retired Typographers' claims to the Quebec Superior Court and the applicable arbitration proceedings to be determined in conjunction with the ongoing litigation of the other six (6) Typographers (the "Assumed Typographers").

2. The CEP, as the representative of the Retired Typographers, opposes the relief sought in the within motion for the following reasons:

(a) Postmedia lacks the requisite legal interest in the claims filed by the Retired Typographers and therefore lacks the requisite standing to bring the within motion;

(b) The instant motion is premature;

(c) The instant motion constitutes an improper collateral attack on the application filed by the Typographers to annul the Arbitral Award dated April 16, 2009; and

(d) The liability and quantum issues underlying the claims filed by the Retired Typographers have not been finally decided and the common law doctrine of *res judicata* does not apply.

PART II – THE FACTS

3. The Applicants were granted protection from their creditors under the *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended (the "*CCAA*"), pursuant to the Initial Order of this Honourable Court dated January 8, 2010 (the "Initial Order"). The protections contained in the Initial Order were also extended to Canwest Limited Partnership/Canwest Societe en Commandite (the "Limited Partnership", and together with the Applicant, the "LP Entities or the "Applicants").

Affidavit of Don McKay sworn December 10, 2010 ("First McKay Affidavit"), para. 3, Supplemental Motion Record of Postmedia Network Inc. ("Supplemental Motion Record") at Tab F, p. 168

4. On May 17, 2010, this Honourable Court approved an Amended Claims Procedure Order and an Asset Purchase Agreement, as amended, dated May 10, 2010 whereby the Ad Hoc Committee (the "ACH") acquired substantially all of the financial and operating assets of the LP Entities and the shares of the National Post Inc. on an ongoing concern basis for an effective purchase price of $1.1 billion (the "Amended ACH APA").

First McKay Affidavit, para. 4, Supplemental Motion Record at Tab F, p. 168

5. On July 14, 2010, the CEP filed a claim in accordance with the Amended Claims Procedure Order on behalf of nine (9) Typographers employed or formerly employed by the Montreal Gazette (the "Employer") in respect of the following:

(a) Salary and other benefits lost under the applicable collective agreement as a result of the Employer's refusal to submit to compulsory arbitration for the renewal of a collective agreement in or around 1996 contrary to the 1982 and 1987 Tripartite Agreements. The CEP filed a grievance dated

June 4, 1996 in respect of the aforementioned losses (the "1996 Grievance"); and

(b) Salary and other benefits lost by the Typographers as a result of the Employer bargaining an illegal term to an impasse in the collective bargaining negotiations that took place in or around 2000-2001. The CEP filed a grievance dated July 14, 2000 in respect of the aforementioned losses (the "2000 Grievance").

First McKay Affidavit, para. 5, Supplemental Motion Record at Tab F, p. 168

Affidavit of Don McKay sworn May 2, 2011 ("Second McKay Affidavit"), para. 5

Motion Record of the Communications, Energy and Paperworkers Union of Canada ("CEP Motion Record"), paras. 3-4, p. 2

6. The CEP and the Employer agreed to leave the 2000 Grievance in abeyance pending the disposition of the 1996 Grievance. Arbitrator Sylvestre remains seized with respect to all issues arising out of the 2000 Grievance. The 2000 Grievance has yet to be finally determined.

7. The 1996 Grievance has been the subject of extensive litigation between the parties. The history and events giving rise to the 1996 Grievance are described in detail in the Affidavit of Don McKay sworn December 2, 2010 and include the following:

(a) Until 1982, the Union and the Employer were bound to collective agreements that gave the Union exclusive jurisdiction over the work done by the typographers;

(b) In or around November 1982, the Union negotiated an agreement with the Employer and approximately 200 typographers employed by the Employer that provided for, *inter alia*, an undertaking by the Employer to guarantee to protect the typographers from loss of regular full time employment until the age of 65 due to technological changes in the workplace (the "1982 Agreement"). Specifically, the job protection benefits agreed to contemplated a guarantee of full employment for the

typographers paid at rate not less than the wage rate in the collective agreements negotiated by the parties from time to time. In return for the job protection benefit, the Employer was granted the right to implement any necessary technological changes to the manner in which the typographers work was to be carried out (art. III). The 1982 Agreement was to remain in effect until all the employees who signed it have ceased their employment (art. IV);

(c) In addition, the 1982 Agreement provided that no party would attempt to renegotiate the rights and obligations set out therein and that any dispute over the interpretation, application or breach of the 1982 Agreement would be resolved by resort to the grievance procedure as set out in the applicable collective agreement (art. VII). Finally, the 1982 Agreement bound any buyer, successor or assignee of the Employer (art. V);

(d) When the 1982 Agreement was signed, the parties provided as follows for its incorporation into the collective agreement as Appendix C:

> The parties agree to reproduce below the evidence of an agreement concluded between them on November 12, 1982. This agreement forms part of the present collective agreement without that fact affecting its civil effects outside the collective agreement. Therefore, the parties declare that it is their intention that the said agreement remain in full force subject to the terms and conditions contained there in, notwithstanding the expiration of the collective agreement. [Translation]

(e) In or around 1987, the Union, the Employer and the typographers agreed to amend the 1982 Agreement by incorporating two new important entitlements for the typographers (the "1987 Agreement", collectively with the 1982 Agreement, the "Tripartite Agreements"). The parties agreed to incorporate a salary indexing formula as well as an agreement that in the event the collective agreement was not renewed, the parties were obligated to submit to compulsory "final offer" arbitration for the renewal

of the collective agreement (art. X & XI). These articles were intended to ensure continuity of the commitments made by the Employer and to provide a compulsory arbitration mechanism for renewing the collective agreement;

(f) Consistent with the 1982 Agreement, each of the affected employees signed the agreement, which was then incorporated into the collective agreement as Appendix C, in the same terms as in 1982, the 1982 Agreement becoming Appendix B;

(g) In or around 1993, the Employer took issue with the Article 2(b) of the collective agreement during collective bargaining negotiations. In particular, the Employer attempted to renegotiate the compulsory "final offer" arbitration provisions required by Article 2(b). To that end, the Employer declared a lockout which continued until August 24, 1994 ceasing as a result of arbitral award imposing a renewal collective agreement. At that time, the Employer presented a voluntary retirement package to the (62) sixty-two remaining typographers. Of the 62 typographers, (11) eleven refused the Employer's voluntary retirement package;

(h) Despite the renewal of the collective agreement, the Employer refused to reinstate the typographers (the Employer was paying the typographers regular wages). The Union filed a grievance demanding that the typographers be reinstated forthwith. Ultimately the matter proceeded to grievance arbitration and an award dated April 25, 1996 was rendered wherein the Employer was ordered to reinstate the employment of the typographers by no later than April 30, 1996;

(i) On April 30, 1996, pursuant to the collective agreement which incorporated the 1982 Agreement and 1987 Agreement, the Union asked the Employer to exchange "final offers" and to engage in compulsory

arbitration with a view to renewing the collective agreement which expired that day. The Employer refused to do so;

(j) On May 8, 1996, the Union filed a grievance demanding that the Employer submit to "final offer" compulsory arbitration;

(k) On June 3, 1996, the Employer declared a lockout. Thereafter, on June 4, 1996, the Union filed a further grievance which read, in part, as follows:

> Local 145 of the Communications, Energy and Paperworkers Union of Canada (CEP Local 145) and each of the 11 signatories mentioned below are contesting the decision of The Gazette (a Division of Southam Inc.) to:
>
> - refuse or omit to consent to the process of exchanging "best final offers," as required by notice from the union and the 11 complainants on April 30, 1996;
>
> - decree a lock-out as of June 3, 1996 with, as a result, an interruption of earnings for the 11 complainants and the suspension of other benefits provided for under the collective labour agreement and the tripartite agreements of November 12, 1982 and March 5, 1987;
>
> - refuse to maintain the conditions in force before the lock-out was declared, that is, the paid presence at work of the complainants, despite the provisions of article 27 of the collective agreement and despite the guarantee to maintain the standard of living provided for in the tripartite agreement concluded on or around March 5, 1987.
>
> The present grievance is filed on the collective labour agreement and each of the tripartite agreements signed on or about November 12, 1982 and March 5, 1987.

We ask the arbitrator to declare and order the following:

1. To order the employer to submit to the process of exchanging best and final offers and to send its "latest final offer" to the union and the 11 complainants without delay;

2. To declare the tripartite agreements reached on or about November 12, 1982 and March 5, 1987 in full force, and to oblige the employer to respect them;

3. To order the employer to continue to pay each complainant the salary and other benefits resulting from the collective labour agreement and the tripartite agreements of November 12, 1982 and March 1987;

4. To order the reimbursement of any salary or other benefits lost following or as a result of the lock-out, with interest;

5. To make any other order necessary to preserve the parties' rights.

(l) Both grievances were referred to arbitration and heard by the same grievance arbitrator. On February 5, 1998, the arbitrator allowed the grievances and ordered that the Employer submit to the process of exchanging best "final offers". The arbitrator further declared that the Employer had to respect the tripartite agreements signed in 1982 and 1987, which were still in force, and ordered the Employer to pay the 11 Typographer complainants the salary and other benefits deriving from the agreements, including any salary or benefits lost as a result of the lockout;

(m) An Application to annul the arbitrator's decision was filed. The Application was ultimately allowed. The Union thereafter filed an Appeal with the Court of Appeal of Quebec;

(n) The Court of Appeal of Quebec rendered its decision on December 15, 1999. In that decision, the Court overturned the decision of the lower Court and upheld, in part, the decision of the arbitrator. More specifically, the Court held as follows:

> Therefore, I would allow the appeal in part, order the employer to submit to the process of exchanging best final offers within thirty days following this decision, quash the two orders on payment and reimbursement of the salaries and benefits lost because of the lock-out and return the file to the arbitrator, who will determine whether any damages should be awarded to the 11 employees as a result of the Employer's failure to respect article XI of the 1987 agreement.

(o) An Application for Leave to Appeal to the Supreme Court of Canada was denied;

(p) The issue of damages was remitted to the arbitrator in accordance with the directive of the Court of Appeal of Quebec. By way of interim decision dated September 28, 2000, the arbitrator held as follows with respect to the nature of the damages payable as a result of the Employer's improper lock-out:

> The damages to which the 11 complainants have a right are limited to salary and other benefits lost and provided in the collective agreement, if it is to use the terms of the Court of Appeal, the lockout was unduly prolonged because of the refusal of the employer to exchange final best offers as requested by the union within the deadline of April 30, 1996.

(q) The Arbitrator's interim decision regarding the nature of the damages payable was challenged and ultimately upheld by Court of Appeal of Quebec;

(r) Thereafter, the arbitrator rendered his decision on the quantum of damages payable, holding that no damages could be awarded to the typographers as no specific events had caused the lockout to be unduly prolonged;

(s) The Union challenged this decision by bringing an application for annulment pursuant to Article 947 of the Quebec *Code of Civil Procedure*. The Court of Appeal of Quebec issued a decision dated March 17, 2008 wherein it quashed the decision of the arbitrator and ordered that the Arbitrator re-hear and determine the issue of damages payable to the typographers. The Court of Appeal found that the Arbitrator erred in concluding that the lock-out could not have been unduly prolonged and therefore fettered his jurisdiction in contravention of the previous directives of the Court and Article 946.4(4) of the *Code of Civil Procedure*;

(t) At the direction of the Court of Appeal of Quebec, the Arbitrator re-heard the issue of damages and issued a decision dated January 21, 2009 wherein he held that "in the circumstances, the salary and benefits which The Gazette owes to the complainant are for the period of the May 1999 to January 2000."

First McKay Affidavit, paras. 10-30, Supplemental Motion Record at Tab F, p. 170-175

Second McKay Affidavit, paras. 5-26, CEP Motion Record at Tab 1, p. 2-5

8. The CEP subsequently challenged the Arbitral Award dated January 21, 2009 by instituting proceedings pursuant to Article 947 of the Quebec *Code of Civil Procedure*. Specifically, the CEP alleged that the Arbitrator once again failed to act within his jurisdiction. The Arbitrator was directed by the Court of Appeal to determine the compensation owed to the Typographers had the Employer properly engaged in the requirement to exchange "last best final offers" in May 1996. In other words, the Arbitrator was directed by the Court of Appeal to determine when the lockout would have ended and a collective agreement been concluded had the Employer engaged in the process correctly. The Arbitrator erred when he determined that the relevant period

for determining compensation was subsequent to the Arbitrator's decision on the merits in February 1998. The Arbitrator's failure to follow the direction of the Court of Appeal constitutes an error in law and provides good cause to have his decision dated April 19, 2009 vacated.

Second McKay Affidavit, para. 27, CEP Motion Record at Tab 1, p. 5

Second McKay Affidavit, para. 27, CEP Motion Record at Tab F, p. 34

9. The CEP's application to annul the Arbitral Award was further based on the Arbitrator's refusal to grant compensation for lost pension benefits. The Arbitrator's refusal in this regard was contrary to his previous decision, upheld by the Court of Appeal, in which the nature of the compensation owed to the Typographers was confirmed to include salary *and benefits*.

Second McKay Affidavit, para. 27, CEP Motion Record at Tab F, p. 34

10. The CEP's application to annul confirmed that the Arbitrator remained seized of the 2000 Grievance. Finally, the application to annul requested that the Court quash the Arbitral Award, direct the Arbitrator to apply the proper considerations to determine the compensation owed to the Typographers and to remit the matter back to another Arbitrator to determine the outstanding issues in the 1996 Grievance and the 2000 Grievance.

Second McKay Affidavit, para. 27, CEP Motion Record at Tab F, p. 34

11. The CEP's application to annul the Arbitral Award therefore raises serious questions as to the validity of the award itself.

12. The CEP's application was stayed upon the issuance of the Initial Order dated January 8, 2010 in connection with the Applicant's proceedings.

Second McKay Affidavit, para. 28, CEP Motion Record at Tab 1, p. 5

PART III — ISSUES

13. The issues to be resolved in the instant motion are as follows:

(i) Does Postmedia have an interest in the claims filed by the Retired Typographers and therefore have standing to bring the present motion?

(ii) If the answer to (i) is yes, is the instant motion premature?

(iii) If the answer to (ii) is no, does the instant motion constitute an improper collateral attack on the CEP's application to annul the Arbitral Award?

(iv) If the answer to (iii) is no, does the common law doctrine of *res judicata* prevent the CEP from litigating the issue of compensation before a Claims Adjudicator appointed pursuant to the Amended Claims Procedure Order?

(v) In the alternative, should the claims of the Retired Typographers be referred to the Courts in Quebec for determination?

PART IV - ARGUMENT

Postmedia Lacks a Legal Interest and Standing

14. The CEP respectfully submits that Postmedia lacks a legal interest in the claims filed by the Retired Typographers and therefore has no standing to bring the present motion.

15. The parties attended before this Honourable Court on a motion returnable on December 10, 2010. At that motion, the CEP argued that the claims filed by all Typographers were liabilities that were assumed by Postmedia and therefore excluded from the Amended Claims Procedure Order.

Decision dated January 5, 2011, Motion Record of Postmedia Network Inc. ("Postmedia Motion Record"), Tab I, p. 166-191

16. Postmedia attended that motion and argued strenuously that the claims of all Typographers were caught by the Amended Claims Procedure Order and liability with respect to same fell with the Applicants rather than Postmedia.

17. In its decision dated January 5, 2011, this Honourable Court held as follows:

> "The claims of the Transferred Employee 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."

Decision dated January 5, 2011 at para. 69, Postmedia Motion Record, Tab I, p. 189

18. In accordance with the above decision, the CEP advanced the claims of the Retired Typographers against the Applicants in accordance with the Amended Claims Procedure Order. The claims of the Assumed Typographers will proceed before the Court and Arbitrators in Quebec against Postmedia.

19. Postmedia has no legal interest with respect to the claims filed by the Retired Typographers. In *Noel v. Society d'energie de la Baie James*, [2001] 2 S.C.R. 207, the Supreme Court of Canada held that the right to bring a judicial proceeding depends on the existence of a substantive right. In the present matter, the fact is that Postmedia has no substantive rights at stake with respect to the determination of the validity and quantum of the Retired Typographers claims. This interest is insufficient to grant Postmedia standing with respect to the matters raised in the instant motion.

***Noel v. Society d'energie de la Baie James*, [2001] 2 S.C.R. 207 at para. 38**

20. Postmedia's interest lies exclusively with the claims of the Assumed Typographers. Nevertheless, Postmedia is asserting that it has a legal interest in the claims of the Retired Typographers because of the potential impact that an adjudication of such claims may have on its liabilities vis-à-vis the Assumed Typographers. Postmedia's position in this regard is unfounded and improper. There is no reason to conclude that the negotiation and/or adjudication of the validity and quantum of the Retired Typographers' claims would have any impact on the outstanding litigation advanced by the Assumed Typographers. If there is a negotiated settlement between the Monitor and the CEP, such a settlement would have no impact on the ongoing

litigation being pursued by the Assumed Typographers. If the matter is adjudicated before a Claims Officer, any decision rendered would not be determinative of the litigation of the Assumed Typographers. Moreover, if the interest advanced by Postmedia is sufficient to grant it standing to bring the within motion, the motion itself would therefore constitute an abuse of process and a collateral attack on the rights of the Assumed Typographers to lawfully challenge the propriety of the Arbitral Award pursuant to the *Code of Civil Procedure*.

21. In *AbitibiBowater Inc.*, [2009] QCCS 5482 (CanLII), the Quebec Superior Court dismissed a motion brought by the Province of Newfoundland and Labrador ("Province") wherein it sought an Order granting it access to the Applicants' data room. In dismissing the motion, the Court held that the Province did not have a legal interest in accessing the data room and that the Province's request to access the data room was motivated by reasons unrelated to the objectives underlying the *CCAA* – to facilitate compromises and arrangements between an insolvent debtor company and its creditors. The Court found that the Province's interest in bringing the motion was motivated by its desire to understand the financial health of the Applicants and to gain an advantage in future business negotiations. Importantly, the Court held that the "CCAA process should not be used to further a collateral objective that, in the end, is not connected with the ultimate goal of the Act."

***AbitibiBowater Inc.*, [2009] QCCS 5482 (CanLII) at para. 84**

22. In the present matter, Postmedia does not have a legal interest in the claims filed on behalf of the Retired Typographers. Rather, as in *AbitibiBowater* matter, Postmedia is attempting to manipulate the *CCAA* for purposes unrelated to the objectives of the Act, that being to gain an advantage with respect to its liabilities to Assumed Typographers. This is improper and ought not be permitted.

23. Had any of the Monitor, the Applicants' or an affected creditor elected to bring the within motion, they would likely have the requisite legal interest and standing to bring the motion. However, none of the foregoing interested parties elected to do so.

Rather, Postmedia, for collateral purposes, has done so. For all of the foregoing reasons, the CEP submits that Postmedia lacks the legal interest and standing to bring the within motion.

The Motion Constitutes an Impermissible Attack

24. In the alternative, and related to the CEP's position Postmedia's interest/standing above, the instant motion constitutes an impermissible attack on the application to annul the Arbitral Award dated April 19, 2009 and the arbitration proceedings that will flow therefrom.

25. The instant motion is being brought by Postmedia to gain an advantage with respect to the determination of its liabilities to the Assumed Typographers. As noted above, the use of the *CCAA* to advance purposes unrelated and collateral to the objectives of the Act is improper and ought not to be permitted by this Honourable Court.

26. Orders granted under the *CCAA* should not be issued for purposes that do not promote the objectives of the Act. In *Century Services Inc. v. Canada*, [2010] 3 S.C.R. 379, the Supreme Court of Canada provided the following guidance with respect to the jurisdiction of a supervising judge in a *CCAA* proceeding to issue orders:

> The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith and due diligence are baseline consideration that a court should always bear in mind when exercising *CCAA* authority. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA – avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means its employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all

> stakeholders are treated as advantageously and fairly as the circumstances permit.

***Century Services Inc. v. Canada*, [2010] 3 S.C.R. 379 at para. 70**

27. In the CEP's submission, given the collateral nature of the present motion, it cannot be said that the Order requested by Postmedia meets the standard of appropriateness as articulated by the Supreme Court of Canada in *Century Services*. In the present circumstances, where the restructuring efforts of the Applicants are completed and the only outstanding issue relates to the claims of the Retired Typographers, it cannot be said that the Order sought by Postmedia in the present matter is in furtherance of the successful restructuring of the Applicants and the object of the *CCAA*.

The Motion is Premature

28. The CEP submits that the instant motion is premature and should therefore be dismissed.

29. The Claims of the Retired Typographers were filed in accordance with the Amended Claims Procedure Order.

30. In accordance with paragraph 12 of the Amended Claims Procedure Order, a Claims Officer is charged with determining the validity and amount of the disputed claims. Paragraph 14 of the Amended Claims Procedure Order provides that the decision to refer a claim to a Claims Officer lies *exclusively* with the LP Entities:

> **THIS COURT ORDERS** that, notwithstanding anything to the contrary herein, an LP Entity may in its sole discretion refer an LP Creditor's Claim for resolution to a Claims Officer or the Court for voting and/or distribution purposes, where in the LP Entity's view such a referral is preferable or necessary for the resolution of the valuation of the Claim.

Amended Claims Procedure Order, paras. 12 and 14

Supplementary Motion Record, Tab G, p. 197 and 198

31. In the present circumstances, neither the LP Entities nor the Monitor have exercised their discretion to refer the relevant claims to a Claims Officer for the purposes of resolving the validity and amount of the Retired Typographers claims. In fact, the CEP and the Monitor continue to engage in dialogue over the validity and valuation of said claims.

32. Paragraph 12 of the Amended Claims Procedure provides that a Claims Officer's jurisdiction to determine the validity and amount of disputed claims is subject to the discretion of this Honourable Court. However, the Court's discretion and jurisdiction in this regard is only engaged once a disputed claim has been referred to a Claims Officer pursuant to paragraph 14 and not before. This is for good reason. The Court's primary role in *CCAA* proceedings is to *supervise* the restructuring of insolvent companies and to facilitate compromises between debtors and their creditors. With respect to the negotiation and compromise of disputed claims, the Court's role is supervisory and not interventionist. The parties continue to engage in discussions to resolve the claims of the Retired Typographers and the Court's jurisdiction to intervene has not yet been engaged.

33. In the CEP's submission, unless and until the LP Entities or the Monitor determine, in their sole discretion, to refer the claims of the Retired Typographers to a Claims Officer for determination, Postmedia's attempt to prevent litigation of the claims before a Claims Officer is premature.

Res Judicata Does Not Apply

34. In the CEP's submission, the doctrine of *res judicata* does not apply in the present circumstances.

35. In *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46, the Supreme Court of Canada identified the three preconditions necessary in order to establish issue estoppel:

(i) That the same question has been decided;

(ii) That the judicial decision which is said to create Estoppel was final; and

(iii) That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estopped is raised or their privies.

***Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 25**

36. The Supreme Court of Canada held that even where the three preconditions to establish issue estoppel have been met, the Court retains residual discretion to relieve against the application of issue estoppel where the circumstances warrant such relief.

37. Applying the foregoing to the present matter, the three preconditions necessary to establish issue estoppel have not been met. Specifically, the Arbitral Award that Postmedia relies upon as creating the estoppel was not final in the sense contemplated by the Supreme Court of Canada. The CEP's application to annul the Arbitral Award filed with the Quebec Superior Court on April 19, 2009 renders the Arbitral Award not "final" in the sense required in order to estopp the claims of the Retired Typographers from being adjudicated.

38. In *EnerNorth Industries Inc.*, 96 O.R. (3d) 1, the Ontario Court of Appeal held that the doctrine of issue estoppel may, in certain circumstances, apply to the quantification of a proof of claim filed in connection with an insolvency proceeding. In that matter, the Court found that the creditors had a unqualified right to challenge a proof of claim based on a judgement debt pursuant to section 135(5) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3. In its decision, the Court made the following comments regarding right to attack a proof of claim that is based on a judgement debt:

> I agree that the trustee's power to allow or disallow a proof of claim, and the court's power to expunge or reduce it on an application under s. 135(5) of the BIA, is wide. However, to say that the attacking creditor or debtor has an "unqualified" right to challenge the proof of claim where the claim is <u>based upon a valid and enforceable judgement that is no longer subject to appeal</u> is going to far.
>
> [emphasis added]

***EnerNorth Industries Inc.*, 96 O.R. (3d) 1 at para. 49**

39. The inference to be drawn from the above passage is that a proof of claim can legitimately be challenged when it is based on a judgement debt that is subject to appeal. It stands to reason therefore that a creditor may legitimately file a proof of claim that in effect challenges a judgement debt where the judgement debt itself is subject to an appeal. This approach accords with the principles of natural justice. To hold otherwise would in effect deprive litigants the opportunity to be heard. Moreover, this approach addresses the Court's concern that reliance on a judgement debt not be used to carryout a miscarriage of justice.

40. In *Danyluk*, the Court specifically addressed the issue of "finality" and indicated that where a claimant has recourse to challenge a decision and elects not to exercise such recourse, the decision should be considered final for the purposes of issue estoppel:

> Further, I agree with the Ontario Court of Appeal that the employee not having taken advantage of the internal review procedure, the decision of the ESA officer was final for the purposes of the Act and therefore capable in the normal course of events giving rise to an estoppel.

***Danyluk, Supra*. at para. 57**

41. Accordingly, where a claimant takes steps to challenge a decision by way of appeal, or in the within matter, application for annulment, the decision itself is not "final" for the purposes of giving rise to an estoppel. The mere fact that the Retired Typographers did not file a motion to lift the stay of proceedings to pursue the application to annul the Arbitral Award does not mean that the application itself has been abandoned. The Retired Typographers continually represented to all parties that the Arbitral Award was not final and binding as a result of the outstanding application to annul the decision. At no time did any party suggest that if a lift stay motion was not pursued the Typographers would be deemed to have abandoned their application to annul the Arbitral Award. The Retired Typographers acted in good faith and have

asserted their claim pursuant to the Amended Claims Procedure Order. The elements of estoppel cannot be made out.

42. In any event, even if the preconditions to the application of issue estoppel have been met (which is denied), the circumstances warrant that this Honourable Court exercise its discretion and relieve against its application. As identified in the application to annul the Arbitral Award, there are serious questions and concerns regarding the Arbitral Award itself. In the circumstances, a finding of issue estoppel would prevent a proper exploration of these issues and concerns. Moreover, a finding of issue estoppel in the circumstances would raise serious questions of natural justice insofar as such a finding would prohibit the Retired Typographers from having the opportunity to participate in and pursue their application to annul the Arbitral Award.

43. The foregoing has considered the impact, if any, of the doctrine of issue estoppel as it relates to the Arbitral Award. The Arbitral Award did address the questions that are engaged by the 2000 Grievance. As the claims filed by the Retired Typographers encompass both the 1996 Grievance and the 2000 Grievance, the first condition precedent to the application of issue estoppel cannot be established.

44. In the circumstance, it is submitted that issue estoppel has no application in the present circumstances. For the same reasons, the doctrine of abuse of process does not apply in the present circumstance.

Claims Should Be Decided in the *CCAA* Proceedings

45. In CEP's submission, there is no basis for having the claims of the Retired Typographers determined outside the *CCAA* proceedings.

46. The Retired Typographers filed their claims in accordance with the Amended Claims Procedure Order and they should be determined in accordance with that procedure.

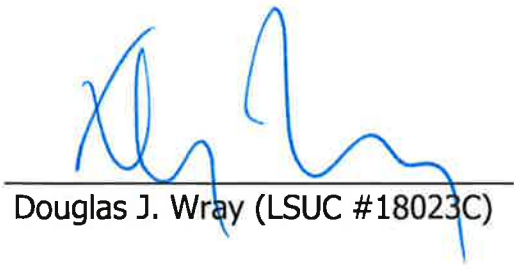
47. The Retired Typographers are entitled to a resolution of their claims in an expeditious manner. The *CCAA* process provides just that and there is no compelling

reason to deviate from the process contemplated by the Amended Claims Procedure Order.

PART V — ORDER REQUESTED

48. The Union respectfully requests that this Honourable Court dismiss the motion of Postmedia in its entirety.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



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SCHEDULE A

LIST OF AUTHORITIES

1	*Noel v. Societe d'energie de la Baie James*, [2001] 2 S.C.R. 270
2	*AbitibiBowater Inc. (Arrangement relatif a)*, 2009 QCCS 5482 (CanLII)
3	*Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379
4	*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460
5	*EnerNorth Industries Inc.*, 96 O.R. (3d) 1

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.

Court File No. CV-8533-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

RESPONDING FACTUM

(Motion Returnable on May 16, 2011)

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