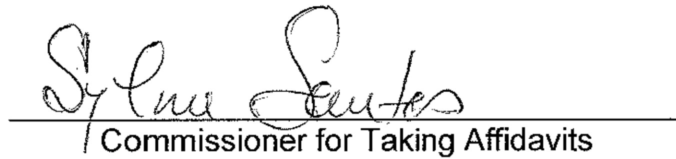
TAB 15

This is Exhibit « D » to the

Affidavit of ERIBERTO DI PAOLO

Sworn before me this 2nd day of December 2010



Commissioner for Taking Affidavits

This is Exhibit « D » to the

Affidavit of RITA BLONDIN

Sworn before me this 2nd day of December 2010

Sylvie Santos

Commissioner for Taking Affidavits

COUR D'APPEL

PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

No: 500-09-000712-877
(500-05-009220-862)

Le 25 avril 1991

CORAM: LES HONORABLES McCARTHY
ROTHMAN
PROULX, JJ.C.A.

THE GAZETTE, (une division de Southam Inc.),

APPELANTE - intimée

c.

ERNEST PARENT,

et

HARRY FREITAG,

INTIMÉS - requérants

et

LE SYNDICAT QUÉBÉCOIS DE L'IMPRIMERIE ET DES COMMUNICATIONS, Local 145,

INTIMÉ - intimé

LA COUR, statuant sur l'appel d'un jugement déclaratoire de la Cour supérieure, district de Montréal, prononcé le 8 mai 1987 par l'Honorable juge Ginette Piché;

Après étude du dossier, audition et délibéré;

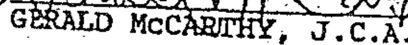
POUR LES MOTIFS exprimés dans l'opinion de Monsieur le juge Rothman, dont copie est déposée avec le présent arrêt, et auxquels souscrivent Messieurs les juges McCarthy et Proulx:

ACCUEILLE l'appel;

INFIRME le jugement a quo et, prononçant le jugement qui aurait dû être prononcé en première instance:

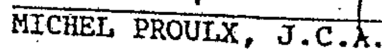
DÉCLARE que l'Entente signée par le Syndicat et The Gazette lie tous les employés mentionnés à l'Entente qu'ils l'aient signée ou non;

Le tout avec dépens contre les intimés Ernest Parent et Harry Freitag dans les deux Cours.



GERALD McCARTHY, J.C.A.

MELVIN L. ROTHMAN, J.C.A.



MICHEL PROULX, J.C.A.

500-09-000712-877

Me Marc Benoît
(McCarthy, Tétrault)
Avocat de l'appelante

Me Pierre Cloutier
(Alarie, Legault)
Avocat des intimés

Me Pierre Laplante
(Laurin, Laplante)
Avocat de l'intimé

Date d'audition: 19 mars 1991

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

COURT OF APPEAL

Nos: 500-09-000712-877
500-05-009220-862

THE GAZETTE, (une division de Southam Inc.)

APPELLANT - respondent

c.

ERNEST PARENT
and
HARRY FREITAG

RESPONDENTS - petitioner

and

LE SYNDICAT QUÉBÉCOIS DE L'IMPRIMERIE ET DES COMMUNICATIONS, Local 145

RESPONDENT - respondent

CORAM:

McCARTHY,
ROTHMAN,
PROULX, JJ.A.

OPINION OF ROTHMAN, J.A.

This is an appeal from a declaratory judgment of the Superior Court declaring, in substance, that Appendix "C" to a collective agreement between appellant, The Gazette, and the

respondent Union was not applicable to respondents Parent and Freitag and could not deprive them of their rights, under Sec. 84.1 of the Labour Standards Act (R.S.Q. ch. N-1) and under Secs 10, 16 and 17 of the Quebec Charter of Human Rights and Freedoms (R.S.Q. ch. C-12) to continue working for The Gazette after the age of 65.

The critical question in the present appeal is whether or not Appendix "C" of the Collective Agreement, in providing for the cessation of employment at age 65 of some 200 typographers who were members of the Union, constituted discrimination on grounds of age in violation of the rights of respondents Parent and Freitag under the Labour Standards Act and the Quebec Charter of Human Rights and Freedoms.

* * *

Background Facts

Appellant, The Gazette, publishes a daily newspaper in Montreal. Respondents Parent and Freitag were employed by The Gazette as typographers from 1964 and 1970 respectively. The respondent Union was an association certified under the Labour Code to represent the typographers employed by The Gazette, including

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respondents Parent and Freitag.

On November 12, 1982, The Gazette and the Union signed a Collective Agreement for a term of 3 years commencing July 1, 1981 and terminating June 30, 1984.

Annexed to and forming part of the Collective Agreement, as Appendix "C", was an Entente signed by The Gazette and Union as well as by all of the 200 typographers except 4. Among the 4 who did not sign the Entente were respondents Parent and Freitag. The Entente was stated to cover all 200 typographer employees employed in the composing room.

Although the term of the Collective Agreement itself was 3 years, the Entente was to remain in force until the cessation of employment of all of the employees covered in the Entente - well into the 21st century.

In the Entente, The Gazette undertook to guarantee security of employment to the 200 typography employees in such manner that they would not lose their regular full time employment by reason of technological change and that their employment would only cease on the happening of one or another of the following:

1) Death.

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2) Voluntary resignation.

3) Cessation of employment on the dates stipulated in Annex I, which dates corresponded to the 65th birthdays of the employees.

4) Dismissal by the employer for serious cause:

III. - SECURITE D'EMPLOI. - En contrepartie du droit de progresser avec les changements technologiques, la Compagnie s'engage à garantir et garantit de protéger les employés nommés à l'Annexe i des présentes contre la perte de leur emploi régulier à plein temps dans la salle de composition en raison de changements technologiques. L'emploi à plein temps visé par cette garantie sera un emploi à plein salaire, au moins au taux prévu dans toute convention collective négociée par les parties de temps à autre.

Un changement technologique est défini comme étant un changement causé par l'implantation d'équipement ou de nouveaux procédés et représentant soit un remplacement ou évolution du travail présentement accompli ou relevant de la compétence du Syndicat dans les services.

IV. - PERTE DE PROTECTION. - Cette Entente ne cessera de s'appliquer à un salarié que pour l'une ou l'autre des causes suivantes:

1. Le décès d'un salarié.
2. La démission volontaire d'un salarié régulier à plein temps.
3. Cessation d'emploi à la date stipulée à l'Annexe i des présentes pour chaque employé.
4. Le congédiement définitif par la Compagnie. Le congédiement définitif

> ne peut avoir lieu que pour une offense grave et, s'il y a grief, losque le congédiement est maintenu en arbitrage. Cette interprétation du terme congédiement définitif ne peut varier que par une entente mutuelle à des modifications à la convention collective.

It is not disputed that the Entente was concluded in the context of very rapid and serious technological changes in the printing of newspapers caused by the development of sophisticated computers which threatened to eliminate the work that had traditionally been done by typographers. This is how the Commissioner, Suzanne Moro, described this context:

> L'historique des changements technologiques peut être résumé comme suit:
>
> - Les premiers changements technologiques à survenir dans la salle de composition se sont produits au début des années soixante, avec l'introduction de l'ordinateur. La vitesse de l'opérateur fut ainsi doublée, passant d'environ six lignes à la minute à douze lignes.
>
> - La deuxième génération d'ordinateurs fait augmenter la production à quatre-vingt dix lignes minutes. L'ajout d'équipement (software) de plus en plus sophistiqué permet de produire de façon de plus en plus rapide.
>
> - Aujourd'hui il existe aux Etats-Unis un journal entièrement produit par ordinateur. C'est ce qu'on appelle le "full page pagination" qui est produit sans l'aide de compositeurs (Zero base composing room). M. Hills déclare qu'en modifiant le système en place il serait possible de produire le journal

> de cette façon. Des fonds ont été prévus en 1986-1987 pour un tel système. Il sera mis en place au fur et à mesure de la réduction du personnel.
>
> M. RICHARDSON déclare que le développement de cette nouvelle technologie fera disparaître entièrement le métier de typographe. En 1981 il y avait environ 210 employés travaillant dans la salle de composition: aujourd'hui il en reste environ 148. M. HILLS précise qu'aujourd'hui il n'a besoin que d'environ 100 personnes pour faire le travail de composition.
>
> M. DON McKAY, typographe chez l'employeur jusqu'en 1981 et maintenant permanent syndical, déclare que tous les typographes des quotidiens de l'Amérique du Nord font face au problème des changements technologiques. Le métier est en voie de disparition, ces changements ne pouvant être évités.

On April 11, 1985, which was after their respective 65th birthdays, Parent and Freitag were notified by The Gazette that their employment would end on June 8, 1985.

The Proceedings

On June 10 and June 17, 1985, respectively, Parent and Freitag filed complaints against The Gazette, under Sec. 122.1 of the Labour Standards Act, alleging that they had been illegally retired on grounds of having reached or passed age 65.

The complaints were heard in first instance before Suzanne Moro, a labour commissioner appointed under the Labour Code (Sec. 123 Labour Standards Act). The Commissioner dismissed the complaints. In her view, the purpose of the Entente was not to establish an age for compulsory retirement but rather to provide security of employment for as long as possible and to reduce the composing room work-force on a fair and orderly basis to meet technological conditions:

> En fonction de ce qui précède je ne puis conclure que la convention établit un âge à compter duquel le plaignant serait mis à la retraite. Il apparaît clairement que l'entente intervenue entre le syndicat et l'employeur en est une relative à la sécurité d'emploi. Cette sécurité est notamment très avantageuse pour les plus jeunes employés qui se voient garantir un emploi à plein temps et à plein salaire pour une très longue période (pouvant aller jusqu'à l'an 2018 dans certains cas). Cette sécurité d'emploi se termine au moment où les employés atteignent l'âge de 65 ans, à la date stipulée à l'anneze i, date à partir de laquelle l'employeur cesse d'être lié par l'entente et peut ainsi mettre fin à l'emploi. Replacés dans le contexte ci-haut relaté les mots "Date de fin d'emploi" signifient de toute évidence "Date de fin de la sécurité d'empoi.

The Commissioner in her decision went on the explain:

> L'employeur déclare avoir mis fin à l'emploi des plaignants en raison des changements technologiques survenus à la chambre de composition, changements qui résultent en une diminution du nombre d'employés requis pour exécuter les tâches. Il ressort du témoignage

non contredit de M. Hills, directeur adjoint de la production, qu'alors qu'il y a environ 148 employés qui travaillent actuellement à la chambre de composition, seulement 100 employés sont requis pour exécuter les tâches. Il ressort également de la preuve qu'environ 210 employés travaillaient à la chambre de composition en 1981, comparativement à 148 en novembre 1985. De plus, la déclaration non contredite de M. Robert Williams, directeur de la production est à l'effet que le nombre d'heures régulières de travail requises pour produire le quotidien ont été réduites d'environ 13 000 heures depuis février 1985. D'autre part, le surtemps toujours effectué par les employés de la salle de composition s'explique par le non respect de l'heure de tombée fixée à 17 heures; si plusieurs annonces et copies ne sont pas entrées à ce moment les employés ne peuvent évidemment y travailler. Ce travail entré en retard doit être effectué en temps supplémentaire après les heures régulières de travail.

Les progrès technologiques entrepris chez l'employeur ont déjà affecté de façon sensible le travail de la salle de composition. Pour continuer d'aller de l'avant l'employeur doit réduire sa main d'oeuvre. Or il est lié envers les employés de la composition par une entente leur garantissant une sécurité d'emploi jusqu'à l'âge de 65 ans. Il ne peut donc réduire sa main d'oeuvre que parmi les employés qui ne bénéficient plus de cette sécurité d'emploi. Les plaignants faisaient partie du personnel ne bénéficiant plus de cette sécurité d'emploi ce qui explique le choix que fit l'employeur.

La preuve administrée me convainct que la progression de l'instauration des changements technologiques est la véritable cause de congédiement et qu'il ne s'agit pas là d'un prétexte.

The Commissioner's decision dismissing the complaints was appealed to the Labour Court. Madame la juge Lise Langlois

maintained the appeal, set aside the decision of the Commissioner and ordered that Parent and Freitag be reinstated in their employment with full salary and all of their other rights and privileges retroactive to the date of the termination of their employment. The Labour Court was of the opinion that the evidence before the Commissioner did not justify the conclusion that the termination of employment was the result of technological change:

> Il ressort des témoignages que la salle de Composition est depuis 25 ans l'objet de changements technologiques progressifs dont certains se sont concrétisés et dont d'autres ne sont qu'envisagés (v.g. le "zéro base composing room") dans une avenir plus ou moins lointain.
>
> La preuve qui a été faite devant la commissaire ne démontre pas la concrétisation d'un changement technologique réel, actuel et effectif au moment des congédiements de MM. Freitag et Parent, le 8 juin 1985.
>
> La preuve établit au contraire la volonté de l'intimée de mettre à la retraite ou de congédier les appelants parce qu'ils ont dépassé l'âge de la retraite, tel que déterminée dans l'Entente "C"...

On July 28, 1986, The Gazette reinstated Parent and Freitag in their employment with full salary and all other rights, retroactive to June 8, 1985 until September 1985, the date of a new Collective Agreement. The new Collective Agreement again incorporated the provisions of Entente "C" which had formed part of the previous Collective Agreement. The Gazette took the

position that all of the employees covered by the Collective Agreement were bound by the Entente whether or not they had signed it.

Following this notice by The Gazette, on October 15, 1986, Parent and Freitag presented a motion for declaratory judgment to the Superior Court asking that the Entente be declared illegal insofar as they are concerned.

On May 8, 1987, the Superior Court rendered judgment granting the motion, in part, and declaring that the Entente was not binding on Parent and Freitag. The Superior Court acknowledged that the purpose of the Entente was to enable The Gazette to meet changing technological needs and to provide protection for the loss of employment by the composing room typographers. The judge was of the opinion, however, that the Entente was in the nature of a "civil" contract rather than a collective agreement so that, since Parent and Freitag, had refused to sign it, they were not bound by it. She was further of the view that they could not, in a collective agreement, be deprived of their rights to continue working beyond age 65:

> On a ici inséré l'Annexe "C" à la convention collective, et elle fait juridiquement partie intégrante de cette dernière. Il s'agit d'une entente civile qu'on a fait signer par tous les typographes sauf par quatre, dont les requérants, qui ont refusé de la signer. Cette

> entente est valide entre ceux qui l'ont signée comme contrat civil ordinaire mais elle ne peut lier ceux qui ne l'ont pas signée et le fait de l'incorporer comme "Annexe" dans la convention collective ne peut lier ceux qui l'ont pas signée. On ne peut, en effet, retirer à un citoyen un droit intrinsèque - le droit de continuer à travailler après 65 ans, par une convention collective.

It is from this judgment that the present appeal has been taken by The Gazette.

It should be added, finally, that the Union fully supports the position of The Gazette as to the purpose of the Entente and the reasons for which it was negotiated, particularly the threat to the jobs of typographers by rapidly advancing technology and the need to protect the jobs of the employees concerned. At the hearing before us, no one seriously put in doubt The Gazette's gloomy forecast that the typographers' trade within daily newspapers was a metier headed for extinction.

* * *

The Law

Age Discrimination

In Quebec, an employee cannot be compelled under a

retirement plan or a collective agreement to retire at a predetermined age.

Sec. 84.1 of the Labour Standards Act provides:

> 84.1. An employee is entitled to continue to work notwithstanding the fact that he has reached or passed the age or number of years of service at which he should retire pursuant to a general law or special Act applicable to him, pursuant to the retirement plan to which he contributes, pursuant to the collective agreement, the arbitration award in lieu thereof or the decree governing him, or pursuant to the common practice of his employer.
>
> However, and subject to section 122.1, such right does not prevent an employer or his agent from dismissing, suspending or transferring such an employee for good and sufficient cause.

Sec. 122.1 of the Act prohibits employers from dismissing, suspending or retiring employees on grounds of age specified in a collective agreement or a retirement plan.

> 122.1. No employer or his agent may dismiss, suspend or retire an employee on the ground that he has reached or passed the age or the number of years of service at which he should retire pursuant to a general law or special Act applicable to him, pursuant to the retirement plan to which he contributes, pursuant to the collective agreement, the arbitration award in lieu thereof or the decree governing him, or pursuant to the common practise of his employer.

The Quebec Charter of Human Rights and Freedom prohibits discrimination on grounds of age:

> Sec. 10: Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social conditio, a handicap or the use of any means to palliate a handicap.
>
> Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.
>
> Sec. 13: No one may in a juridical act stipulate a clause involving discrimination.
>
> Such a clause is deemed without effect."
>
> Sec. 16: "No one may practice discrimination in respect of the hiring, apprenticeship, duration of the probationary period, vocational training, promotion, transfer, displacement, laying-off, suspension, dismissal or conditions of employment of a person or in the establishment of categories or classes of employment."

Was the Entente a "Civil Contract"?

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.

Why then were the individual employees invited to sign the Entente if the Union was there to represent them?

Counsel for The Gazette and for the Union explained that this was done to meet an unusual problem relating to the duration of the guarantee of security of employment they had agreed upon. The Gazette and the Union had negotiated a guarantee coupled with a program of planned lay-offs extending well into the twenty-first century. The Collective Agreement, however, could not have a term exceeding 3 years (Sec. 65, Labour Code). The plan would therefore have to be incorporated into several successive Collective Agreements. In order to achieve some semblance of an understanding extending beyond the 3 year term of the Collective Agreement, in the event that the plan was repudiated after the Collective Agreement expired, The Gazette and the Union asked the individual employees to sign the Entente as well.

In my view, the Entente formed part of the Collective

Agreement and any of the Employees who did not sign were nonetheless 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. (Sec. 67, Labour Code; Syndicat catholique des employés de magasins de Québec Inc. v. La Cie Paquet Ltée [1959] S.C.R. 206; C.P.R. v. Zambie [1962] S.C.R. 609; McGavin Toastmaster Ltd v. Ainscough [1976] 1 S.C.R. 718; General Motors of Canada Ltd v. Brunet [1977] 2 S.C.R. 537; Canadian Merchant Service Guild v. Gagnon [1984] 1 S.C.R. 509)

There remains the critical question of whether the Entente was valid in the light of the provisions of the Labour Standards Act and the Quebec Charter prohibiting discrimination on grounds of age. To decide the validity of the Entente, one must carefully examine its nature.

The Nature of the Entente

The Gazette and the Union contend that the purpose of the Entente was not to establish age 65 as a mandatory retirement

age for these employees nor to provide for their dismissal or lay-off on the basis of age. Age was simply a release mechanism used in the implementation of the guarantee of job security. Its purpose, they contend, was to provide the employees of the composing room with a guarantee of security of employment in the face of rapidly advancing changes in technology, a guarantee which they would not otherwise have had, and to set out a fair and orderly program of lay-offs to meet this technological change. Without the Entente, The Gazette might simply have proceeded to install technologically advanced equipment, laying off or terminating workers who were no longer needed.

The Gazette and the Union argue that the Entente permitted The Gazette to proceed with the new technology while at the same time protecting the jobs of each of the composing room employees until each attained a specific age, in this case the age of 65.

The Gazette and the Union submit that the plan was both logical and fair. Since the typographer's function was becoming obsolete, the object was to prolong employment as long as possible for as many of the employees as possible. Because these jobs were to disappear on a progressive basis, the decision was made by the Employer and the Union to protect workers until they reached an age at which pensions and other social benefits were

available to them. The guarantee would remain in force for each employee until he or she reached that age, when the guarantee would cease.

I have no doubt whatever that the Entente was negotiated by The Gazette and the Union in good faith to assure a significant measure of security of employment for the composing room employees in the face of imminent technological change which threatened their jobs. The Commissioner came to that conclusion as did the Superior Court and I see no reason to question it.

The critical question, however, is not whether The Gazette and the Union were in good faith in negotiating the Entente but whether the Entente they concluded contravened the requirements of the Labour Standards Act and the Quebec Charter.

In my respectful opinion, it did not.

It is true that the Labour Standards Act and the Quebec Charter contain provisions, that are a matter of public order, prohibiting dismissal, suspension or retirement of an employee on grounds of age and discrimination on grounds of age. But these provisions were intended to prohibit discriminatory employment practises based on age. Not all age distinctions are necessarily discriminatory. Nor was the Entente an instrument for dismissal,

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suspension or retirement.

Both The Gazette and the Union recognized during their negotiations that the work-force in the composing room had to be reduced on a progressive basis to make way for essential new technology. The question obviously then became how one would select those who would have to leave and those who could remain. If there was to be a guarantee of security of employment over an extended period of time in exchange for a progressive reduction of the work-force, then some formula had to be established to select those who were to leave.

The measures adopted by the Union and the Gazette to accomplish these purposes were far from discriminatory or arbitrary.

What the Gazette and the Union agreed upon in the Entente was a formula of attrition. They guaranteed full time regular employment to each employee until he or she reached the age of 65. At age 65 the guarantee would cease for that employee. The guarantee would continue for the other employees until each of them, respectively, reached 65. On the 65th birthday of the youngest employee, the guarantee would terminate.

The Entente was therefore designed to give all of the

employees an extended period of protection from the impact of technological change that they would not otherwise have had. The protection they received under the Entente was considerable and it was relatively long term. That the term was longer for those who were farther from age 65 does not, in my view, amount to discrimination. All were obtaining a firm guarantee of job security to age 65 which they did not have without the Entente.

The fact that the guarantee was to terminate, with respect to each employee, on his 65th birthday simply gave each employee the assurance that their jobs would be protected until age 65 whatever the technological advances and that their jobs would likely disappear when they left.

In short, I believe The Gazette and the Union recognized a bleak future for composing room employees. They negotiated what seems to me a very fair and advantageous agreement protecting the jobs of the employees from the consequences of technological change for a very substantial period and requiring, in return, that the employees leave as they reached age 65.

That the favourable impact of the guarantee of employment may have been shorter in duration for Parent and Freitag than for younger employees is of no consequence in this case. The fact that a provision of collective agreement may have a less favourable

impact on some employees than others does not necessarily amount to discrimination. Employees often have different interests and different needs and concerns. If these have been addressed honestly, fairly, and in good faith, as I believe they have here, then there is no discrimination even if the impact is more favourable on some employees than others.

Finally, I would note that the Supreme Court of Canada has recently upheld, under Sec. 1 of the Canadian Charter of Rights and Freedoms, a number of retirement plans requiring employees to retire at age 65, while recognizing that, generally, mandatory retirement plans based on age constitute discrimination on grounds of age (McKinney v. Board of Governors of the University of Guelph et al., S.C.C. December 6, 1990; The Vancouver General Hospital v. Stoffman et al., S.C.C. December 6, 1990; University of British Columbia v. Connell, December 6, 1990; Douglas College v. Douglas-Kwantlen Faculty Association, December 6, 1990)

These decisions, which were decided under the Canadian Charter of Rights, are not directly applicable in this case in the sense that the Canadian Charter is not applicable to the Entente, given the absence of both government involvement and statutory impeachment here. The observations of the Supreme Court as to the discriminatory nature of mandatory retirement plans requiring employees to retire at age 65 would, of course, be highly relevant

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if we were dealing with a mandatory retirement plan. But we are not.

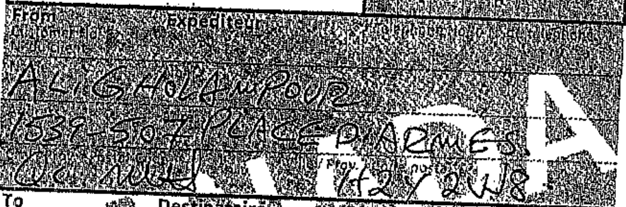
Unless the Entente is to be considered a mandatory retirement plan which, in my view it should not, then I see nothing in these recent decisions which justifies the conclusion that the Entente was discriminatory.

Conclusion

In the result, I conclude that the Entente was valid and binding upon all of the employees covered by it, whether or not they signed it, including Parent and Freitag.

I would therefore maintain the appeal, set aside the judgment appealed from and declare that the Entente signed by the Gazette and the Union was valid and binding upon all of the composing room employees mentioned in the Entente, whether or not they signed it, including Parent and Freitag, the whole with costs against Parent and Freitag in both Courts.

J.A.



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ONTARIO SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
No: CV-09-8396-00CL

IN THE MATTER OF COMPANIES' CREDITOR ARRANGEMENTS ACT R.S.C. 1985 c C-36, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP.

FILING OF A CLAIM

ORIGINAL

Ali Gholampour avocat inc.

507 Place d'Armes, 15th floor
Montreal Quebec H2Y 2W8

Tel: 514 395-0522
Fax: 514 395 -0524

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