

**Ontario Labour  
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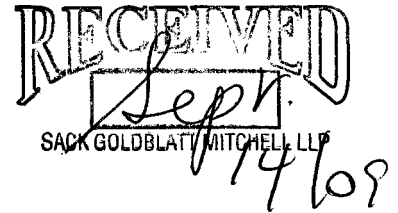
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Our File Number/Numero de dossier 2983-06-R

September 11, 2009



TO THE PARTIES LISTED ON APPENDIX "A"

Dear Sir/Madam:

**Communications, Energy and Paperworkers Union of Canada  
Local 87-M Southern Ontario Newsmedia Guild v. Sun Media  
Corporation; Sun Media (Toronto) Corporation; The London  
Free Press, A Division of Sun Media Corporation; and Sun  
Media Corporation c.o.b. as The Ottawa Sun**

I enclose herewith a copy of the Board's Decision dated September 11, 2009 in the above matter.

Sincerely,

A handwritten signature in black ink that reads "Tim R. Parker". The signature is written in a cursive, flowing style.

Tim R. Parker  
Registrar

TRP/wt  
Enclosure



APPENDIX "A"

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Attention: Mr. Richard Charney

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Attention: Chris Harrison  
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Attention: Chris Grogan  
President



## ONTARIO LABOUR RELATIONS BOARD

**2983-06-R** Communications, Energy and Paperworkers Union of Canada Local 87-M Southern Ontario Newsmedia Guild, Applicant v. **Sun Media Corporation**; Sun Media (Toronto) Corporation; The London Free Press, A Division of Sun Media Corporation; and Sun Media Corporation c.o.b. as The Ottawa Sun, Responding Parties.

**BEFORE:** Brian McLean, Vice-Chair

**APPEARANCES:** Howard Goldblatt and Howard Law for the applicant; Richard Charney and Michael Torrance for the responding parties; Chris Krygiel for Sun Media Corporation; Chris Harrison for Sun Media (Toronto) Corporation; Nancy Tyndall for The London Free Press, A Division of Sun Media Corporation; Mike Therrien for Sun Media Corporation c.o.b. as The Ottawa Sun.

**DECISION OF THE BOARD;** September 11, 2009

1. This is an application under section 69 and/or 1(4) of the *Labour Relations Act, 1995* (the "Act").
2. By decision dated June 26, 2007 the Board (differently constituted) dismissed the application under section 69 of the Act. It also dismissed one of the remedies requested by the applicant under section 1(4), that being the consolidation of various bargaining units of the responding parties. However, the applicant continued on with the remainder of the section 1(4) application.
3. A three person panel of the Board commenced hearing this matter. Sadly, before the hearing concluded, Board Member Rene Montague died. With the consent of the parties and at the direction of the Chair of the Board, I continued the hearing sitting alone.
4. This is an application which occurred after Sun Media Corporation ("Sun Media"), which is the parent company of newspapers which are organized by the applicant, allegedly moved work out of the newspapers to itself. Sun Media is not organized. The applicant seeks to have Sun Media declared to be a single employer with the newspapers and also seeks, as a remedy under s. 1(4) of the Act, to have the Board order that the work in question be returned to the newspapers.

### **The Facts**

5. Sun Media publishes a number of newspapers across Canada. In addition to the newspapers which are responding parties in this application it also publishes the Calgary Sun, the Edmonton Sun, the Winnipeg Sun, Le Journal de Montreal and Le Journal de Quebec. Sun Media also publishes commuter dailies such as "24 Hours" and several local newspapers like the Simcoe Reformer (where the applicant also has bargaining rights) and papers operated by Osprey Media. Sun Media owns Sun Media (Toronto) Corporation which in turn publishes the Toronto Sun. Sun Media is itself a subsidiary of Quebecor Media Inc.

6. The employees of the three responding party newspapers are partially unionized. The applicant represents employees of the Sun Media (Toronto) Corporation, which publishes the Toronto Sun, in the following “all editorial employees” bargaining unit:

all employees in its Editorial Department in the City of Toronto save and except for Editor-in-Chief, Managing Editor, Executive Assistant to the Editor-in-Chief, Assistant Managing Editors – News Editor, City Editor, Associate City Editors (2), Sports Editor, Executive Assistant to the Sports Editor, Entertainment Editor, Associate Entertainment Editor, Executive Assistant to the Entertainment Editor, Editor Op-ED, Senior Associate Editor Op-Ed, Lifestyle Editor, Money Editor, Photo Editor, Research Director, Art Director, and additional positions exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Labour Relations Act.

7. The applicant represents employees of the London Free Press, a Division of Sun Media Corporation in an Editorial Department bargaining unit as follows:

all employees of the Employer employed in its Editorial Department, save and except Editor-in-Chief, Editor, Managing Editor, Assistant Managing Editor, news Editor, Business Editor, City Editor, Sports Editor, Today Editor, Art Director, Saturday Editor, Librarian and Office Manager, employees exercising managerial functions or employed in a confidential capacity in matters relating to labour relations within the meaning of section 1(3)(b) of the Labour Relations Act, and high school students on a co-operative training program.

The Employer also recognizes the Union as the exclusive bargaining agent for employees of FYI London and London This Week save and except advertising employees.

8. The applicant also represents employees in an “all editorial employees” bargaining unit at the Ottawa Sun. At the time of the hearing of these applications those parties had not yet concluded their first collective agreement.

9. Most of the major Sun papers operate under the Sun “formula”. That is they have a right of centre political philosophy, “Sunshine girls/boys”, and a focus on crime news and sports.

10. The events which gave rise to these applications took place in a rapidly changing business climate for print newspapers. The newspaper industry has always been very competitive. However, new technology, particularly the internet, has presented additional and relatively sudden new challenges. Readership of the major printed newspapers, including the Sun chain, has declined steadily, with little prospect of returning to previous levels. (I note that these issues are faced by newspapers all across North America. For example, following the hearing of this matter the Rocky Mountain News in Denver and the Seattle Post-Intelligencer announced that they were going to publish only on-line and the Los Angeles Times laid-off 300 of its employees.)

11. Over time Sun Media has dealt with these challenges in a variety of ways, including staff cuts and the creation of an on-line presence (canoe.ca). This application concerns one of the strategies adopted by Sun Media: the creation of what it calls "Centres of Excellence". Centres of Excellence were basically a way to create common content for potential use across the Sun chain. The Centres of Excellence were established on the basis of the sections of the newspapers: there was a sports Centre of Excellence, a business Centre of Excellence, etc.

12. As a result of the increased use of across the chain content in the Centres of Excellence, Sun Media took employees from its daily papers to create such content. These employees are employed by Sun Media and are treated as not falling under any of the newspaper collective agreements.

13. The only witness in this case was Glenn Garnett, Sun Media Executive Editor in Chief for Sun Media English Urban newspapers. As such, Mr. Garnett is in charge of content for newspapers in Ottawa, Toronto, London, Winnipeg, Calgary and Edmonton. Mr. Garnett was an honest and forthright witness. Mr. Garnett testified that one of the central and at times challenging tasks for a newspaper is to fill its pages each day with content that is of interest to readers. In practice this content comes from a variety of sources. These include the wire services, like Canadian Press (of which Sun Media is the largest member), Associated Press, Getty, and Reuters which provide news stories, sports stories and political comment from Canada and around the world.

14. Sun Media also has a Parliamentary Bureau which acts like an internal wire service for National Political stories. The Parliamentary Bureau consists of a columnist and three reporters based in the National Press Building in Ottawa. They are excluded from the Ottawa Sun bargaining unit. The content created by the Parliamentary Bureau can be and is used by any newspaper in the chain. The staff at the Parliamentary Bureau report to the editor-in-chief of the Toronto Sun.

15. In 1999 and 2000 the President of Sun Media asked Mr. Garrett to head up a task force of senior editors to look into ways to better pool (that is share) content as a response to the decline in readership and to create efficiencies. Senior management believed that Sun Media could do a better job of identifying its best writers and publish them across the chain. In addition, it seemed to make sense to better co-ordinate the creation and production of content across the chain, so, for example, the Toronto Sun, the Calgary Sun and the Edmonton Sun, would not all send staff to cover an event like the Super Bowl.

16. The Task Force was formed at about the same time as the chain was laying off staff.

17. The Task Force did its work over a period of approximately one year. Mr. Garnett and the editors-in-chief of the various papers identified the chain's main writers for entertainment, sports, political commentary, and lifestyle. The outcome was that the centralized writers would create content for use across the chain including canoe.ca. So, for example, there would be one entertainment columnist who might be from Winnipeg and would focus on national (rather than local) entertainment stories rather than have each of the papers have their own columnist writing about national entertainment stories. These entertainment columnists and reporters would report to a National Entertainment Editor who was in charge of the Entertainment Centre of Excellence.

18. In 2006 Mr. Garnett identified National Editors in News, Entertainment, Sports, Comment, and Business to head a "Centre of Excellence" in each of these areas. The National

Editors were responsible for working with the local papers to develop strategies on the coverage of events and stories and to put together a package of content useful for the papers and on-line. The National Editor generally also remained as an editor at their local paper. Mike Therrien (Editor-in-Chief of the Ottawa Sun) was National Editor for News. Paul Benton (Editor-in-Chief of the London Free Press) was made National Comment Editor. John Kyle (Toronto Sun Entertainment Department) was made National Entertainment Editor. P.J. Hurston (Business Editor of the London Free Press) was National Business Editor and Chris Nelson (Editor-in-Chief of the Calgary Sun) was made the National Sports Editor.

19. The National News Editor is also responsible for the Ottawa Parliamentary Bureau of Sun Media and oversees a team of feature writers to create national feature stories. The feature writers are employees of Sun Media, as opposed to any of the newspapers. There are also Sun Media graphics employees who do the lay out for National stories who work for Sun Media and formerly worked for the London Free Press. There are eleven national employees who could be or formerly were in one of the Newspaper bargaining units. It is these eleven employees, (which include the four employees at the Ottawa Bureau who the union now concedes ought not to be subject of this application) that are the immediate focus of the union's application.

20. The subject employees based in London are led by an employee, a graphic editor, who was in the London Free Press bargaining unit. There are also four graphic artists and one copy editor located there. The employees based in London work at Sun Media Central Graphics but not in the same building as the London Free Press. They are dedicated to building shared graphics to go into the urban dailies to go with national chain wide stories. The work they do is no more directed to the London Free Press than it is to any of the other Sun dailies. They do not work with London Free Press bargaining unit employees. They report to Mike Therrien the National News Editor in Ottawa.

21. Four of the subject employees are based in Toronto, located in the same building (third floor as opposed to second floor for Toronto Sun reporters)) as the Toronto Sun bargaining unit employees although Sun Media is in the process of finding alternate space. They are not integrated with the Toronto Sun employees, do not work with Toronto Sun reporters and do not report to the editor-in-chief of the Toronto Sun. In Toronto there are three reporters and one editorial co-ordinator who were transferred to Sun Media.

22. Once a week the National Editors and other Senior Editors meet via conference call. They discuss the major stories for the upcoming week and decide which employees can best be deployed to write about them. The employees selected might be Sun Media employees or they might be employees of one of the newspapers.

23. Occasionally, bargaining unit employees in Toronto, Ottawa and London are assigned to carry out work that is intended to be distributed chain wide. For example, a Toronto Sun Columnist was asked to write a series on the tenth anniversary of Princess Diana's death because the Editors felt she was the best person to do it. That series was distributed chain wide.

24. There has always been content sharing at Sun Media. However, what Sun Media argues is different about the Centres of Excellence and the corporate employees is that their *focus* is national stories which allows local editors to be focused on local stories. The national editor can focus on stories with a cross-country appeal. The national editor has a select group of corporate employees to assign to these stories. The Centres of Excellence allowed the Sun to pool resources better and, at the same, cover stories with the best people.

25. In addition, the existence of corporate employees clarify the chain of command, budgetary and resource issues. Removing the corporate employees from local responsibility (rather than, simply not assigning them local stories) eliminates conflict with local responsibilities. They do not have two bosses, and when they are assigned a national story for use across the chain there are no issues about whether the budget of Sun Media or the newspaper bears the cost.

### **Decision**

26. In summary, Sun Media responded to economic challenges and decided to create efficiencies generally by establishing a mechanism for creating content for use across the Sun chain. There is no doubt it could have done this by simply using stories/material created for and by one newspaper across the chain. In fact this did happen and still happens. However, creating chain wide content at the individual newspaper level can lead to certain issues. First, there may be duplicate coverage of stories by two or more papers in the chain, leading to inefficiencies. Second, there are budgetary issues, so that it becomes problematic from a budget perspective to have, in effect, one newspaper in the chain spend the money to create content for other papers.

27. To address these issues the Sun established processes to create chain wide content, including graphics, outside of the existing newspaper structure. It took employees out of the newspapers and put them in the employ of Sun Media. This is problematic for the union. Union employees were placed in non-union positions and engaged in similar (or the same) kind of work. Some of the employees would have been laid off, but were retained by Sun Media and other more senior employees were laid off.

28. I apply the law to the foregoing facts.

29. Section 1(4) of the Act states:

1(4) Where, in the opinion of the Board, associated or related activities or businesses are carried on, whether or not simultaneously, by or through more than one corporation, individual, firm, syndicate or association or any combination thereof, under common control or direction, the Board may, upon the application of any person, trade union or council of trade unions concerned, treat the corporations, individuals, firms, syndicates or associations or any combination thereof as constituting one employer for the purposes of this Act and grant such relief, by way of declaration or otherwise, as it may deem appropriate.

30. Section 1(4) is designed to deal with situations where more than one legal entity operates related businesses or activities under common control and direction where it may not make industrial relations sense to allow the legal form to dictate and possibly fragment the collective bargaining structure. There are three conditions which must be met before the section can be applied:

- (a) there must be more than one corporation, firm or individual etc. involved;
- (b) the entities must be engaged in associated or related business activities; and

(c) these entities must be under common control or direction.

31. There are two parts to the Board's analysis of a s. 1(4) application. First, the Board must determine whether the conditions to a s. 1(4) declaration have been met. That is, there must have been two or more entities, who are engaged in associated or related businesses under common control or direction. The second part of the analysis is an assessment of whether the Board should exercise its discretion to make a declaration. There have been many cases which discuss the circumstances under which the Board will exercise its discretion to make a declaration. Most of these cases can be reduced to this statement: a declaration will be made when there is a labour relations reason for doing so.

32. In this case the employer argues both that the conditions to a s. 1(4) application have not been met and that the Board ought not to exercise its discretion to make a single employer declaration in any event. Sun Media does not dispute that there are two or more corporations, firms or business entities. Therefore, I first consider whether the last two of the three conditions under s. 1(4) have been met.

33. In my view the various newspapers and Sun Media are clearly associated or related businesses. They are all (at least in part) in the newspaper business. They share content and the "Sun Formula". Except for the London Free Press, they operate under the same "Sun" banner.

34. Sun Media disputes that the corporation or entities are under common control or direction. Sun Media argues that the fact that Sun Media owns the other responding parties is not enough to make out the common control or direction criteria. In its submission there must also be evidence of managerial control over the employees or labour relations of the employees of the subordinate entity. In this case, it argues, labour relations is controlled on a newspaper by newspaper basis. It relies on *Ontario Legal Aid Plan*, [1991] OLRB Rep. November 1327, where the Ontario Court of Appeal states:

I agree with this observation. I appreciate that s. 1(4) is intended to ensure that the Board can take into account labour relations reality without regard to legal form, and that, in a proper case, it is fully entitled to pierce the corporate or other legal veil to give recognition, for labour relations purposes, to what is in essence an employer-employee relationship. Where employers are closely related, it is often difficult to define the employment relationship. But the look behind the corporate or legal veil must reveal that there are sufficient indicia of the *managerial* control normally exercised by an employer over its employees to constitute a *de facto* employment relationship.

35. Sun Media also relies on *Toronto (City)* 2006 OLRD No. 3505 where the Board, in finding that the City of Toronto and the Toronto Community Housing Corporation ("TCHC") were not under common control and direction stated:

92. While the City could tomorrow either amend the Shareholder Direction or perhaps apply it differently so as to exercise day-to-day managerial control over the TCHC, that has not in any way occurred over the course now of some five years since the TCHC was brought into existence. Just as in *Legal Aid*, where the Law Society of Upper Canada exercised in a general sense, the power of life and death over legal aid clinics, this form and type of overall general control is not sufficient to permit the Board to find that there is common control and direction for purposes of section 1(4) of the Act. In

the present case, as in *Legal Aid*, the entity with overarching control plays no role in the day-to-day management of the enterprise. There is no way in which it can be said that the City acts as employer of employees of TCHC. The City has had no involvement with labour relations or employment matters. Just as the Law Society was not in the business of providing legal aid services, neither is the City (any longer) in the business of providing public housing services.

36. Sun Media says there is no evidence that it exercised this kind of managerial authority with respect to the newspapers.

37. I am satisfied, Sun Media and the various newspapers are under common control and direction. While there is largely local control of labour relations, it is also the case that Sun Media can play a significant role. For example, Sun Media may decide that a number of employees at each paper need to be laid off or hired. Sun Media through the Centres of Excellence also has a say in where employees are to work – for example in deciding that certain reporters will attend particular events. This kind of work direction, even though not necessarily on a day to day basis, is a hallmark of managerial control.

38. I turn to the issue of whether I should exercise my discretion to make a single employer declaration under s. 1(4). At one level, the circumstances before me can be viewed as a straightforward section 1(4) application. Sun Media is a non-union employer which controls a number of unionized newspapers. Sun Media had not previously employed employees to produce content, or if it has, it has done so in particular areas (like the Parliamentary Bureau). In a recent development, Sun Media has hired new non-union employees to do work which undisputedly could be performed by employees of its unionized business. This has had the effect of diminishing the union's bargaining rights and the employees' collective agreement rights. Junior employees have been retained by Sun Media while more senior employees have been laid off by the newspapers.

39. Nevertheless, the question of whether the Board should exercise its discretion to make a single employer declaration is a difficult one. As is unfortunately typical in this industry, the union's bargaining rights are restricted to a department in each individual newspaper. Newspaper content is frequently created by non bargaining unit individuals including the wire services. It is not at all clear that the work in question could not have been performed by employees whether union or not, who work at one of the out of province Sun newspapers. A single employer declaration may not solve the problem the union faces.

40. The union recognizes the problem for, in addition to the declaration, it asks the Board to return the work transferred out of the bargaining unit. The Board has never made such an Order in a related employer application, but it argues that the Board can do so as s. 1(4) permits the Board to "grant such relief, by way of declaration or otherwise, as it may deem appropriate".

41. The union is concerned that technology has allowed the employer to create "virtual" businesses. Technology permits employees to work on the newspaper, write stories, create pages, and create graphics, from anywhere in Ontario or the world. The union is concerned that in these circumstances the scope of its bargaining rights cease to have protective meaning. It urges the Board to adapt to the technology and create remedies which can address these new issues.

42. I am satisfied that Sun Media's actions, while carried out for legitimate business purposes, have potentially diminished the union's bargaining rights at least in Toronto and

London. In the case of the Toronto Sun, Sun Media has simply moved employees down one floor in the Sun's building, transferred them to Sun Media and from there they engaged in work which is similar, and in some cases identical, to the work they carried out for the Toronto Sun. It is not at all surprising that the union takes issue with that transfer.

43. It may be that the scope of the applicants' bargaining units means that the applicant has no remedy at arbitration irrespective of a related employer declaration. This is not unusual in labour relations in Ontario. For example, all who practice before the Board understand that if a union has bargaining rights restricted to a municipality and the employer moves the plant across the street, to a different municipality, the union's bargaining right may be effectively lost in the absence of anti-union animus. However, these are issues which, in the context of this case, are best determined by an arbitrator. The union has at least an arguable case. The existence of two corporations or businesses ought not to prevent the union from seeking the determination of a grievance when the answer is not clear.

44. A similar issue was before the Board in *United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local 7135 v. National Steel Car Limited*, 2009 CanLII 3548 (On L.R.B.). In that case the Board stated:

10. The union, therefore, has established all the elements for a single employer declaration. NSCL and UPCL are under common control and direction, and they are related or associated businesses or activities. In my view, the union has also made out an arguable case - not contradicted by anything the responding parties have had to say - that there is a reason to make the declaration under subsection 1(4). That is, without the declaration, the union has no basis upon which to assert the existence of a right under article 7.12(10) of the collective agreement that potentially protects the work of the bargaining unit in Hamilton. In saying that, I am not suggesting that the union will necessarily prevail with respect to any argument it may make concerning article 7.12(10) before Arbitrator Brown. It may be that NSCL's argument concerning the interpretation and application of article 7.12(10) will be preferred by the arbitrator. However, NSCL ought not to prevail on that issue merely because it has organized its business in a manner that incidentally thwarts the union's opportunity to advance the assertion of a right under the collective agreement. That would constitute an unwarranted frustration of the contractual rights of the bargaining unit members, precisely the type of mischief contemplated in the *Brant Erecting and Hoisting* decision.

11. As the Board noted in *KNK Limited*, [1991] OLRB Rep. Feb. 209 and more recently in *Humphrey Plumbing & Electrical Service Ltd.*, [2006] OLRB Rep. July/Aug. 519, where a trade union has made out the elements for a common employer declaration and established the existence of the mischief for which such a declaration was designed to prevent, the Board will normally issue the declaration in the absence of significant prejudice or a compelling policy reason not to do so.

45. In *KNK Limited*, [1991] OLRB Rep. Feb. 209 stated:

57. In our view, where a trade union has established the legal requirements for a section 1(4) declaration, as well as the "mischief" which such declaration was designed to prevent, a declaration should ordinarily be made unless there is either particular prejudice or compelling policy reasons for

not doing so. Those policy reasons should be rooted in labour relations rather than commercial law considerations, and the alleged prejudice should involve something more than having to apply a collective agreement which the related employer has disregarded in the past. If that were the test, the purpose of section 1(4) would be undermined, and the related employer could plead, in reply, the very "mischief" upon which the union relies and for which section 1(4) is a remedy.

46. In the case before me, there is no suggestion of any hardship to any of the responding parties if the declaration is made. A declaration will merely reflect the reality of the situation: Sun Media has substantial power over the labour relations issues which affect the employees of the various newspapers. Moreover, the kind of "mischief" which s. 1(4) is designed to address is present in this case even if there is a serious issue about whether some or all of that mischief can be solved by the s. 1(4) declaration. At a minimum, a single employer declaration brings Sun Media to the bargaining table so that these important issues can be discussed.

47. In my view a s. 1(4) application ought not to be a contest over the proper interpretation to be given to a collective agreement unless the interpretation is clear. Where the conditions as set out in s. 1(4) for a declaration are present and where there is arguable labour relations mischief as a result of the existence of separate corporations or business entities then a declaration should issue.

48. I therefore find it appropriate to exercise my discretion to make a declaration under s. 1(4).

49. In his submissions, counsel for the applicant asserted that any s. 1(4) declaration would be ineffective without the Board, at the same time, making an order requiring the return of the work to the bargaining units from which it came. However, I conclude that I ought not to Order the employer to return work from the Centres of Excellence to the bargaining units as requested by the union. In my view, Orders made under s. 1(4) ought to relate directly to the purposes of the section. That is to say, they ought to relate to the protection and preservation of the union's bargaining rights however those rights are defined and protected in the collective agreement. Once those rights are protected it is up to an arbitrator to determine if a Collective Agreement has been breached and, if so, what remedy should follow.

50. I acknowledge that the union is in a difficult situation. However, it was open to the union to organize newspapers in a way which was more protective of its rights. (I note that the union organized the Ottawa Sun after these issues became apparent). It was also open to the union to negotiate work protections into the collective agreement. Perhaps it was unable to do so, but the Board ought not to insert itself into the collective bargaining relationship by effectively imposing a no contracting out provision, which is what the union seeks in this case. The union's request effectively asks the Board to sit as a rights or interest arbitrator.

51. The transfer of work or employees out of the bargaining unit is not something that s. 1(4) is directly concerned with. Moreover, s. 1(4) ought not to be used to prevent an employer's legitimate commercial activities. Section 1(4) has never been used to stop an employer from creating another corporate entity through which to conduct its business. Section 1(4) exists to ensure that the union's bargaining rights, as expressed in the collective agreement, attach to the new corporate vehicle. To grant the remedy requested by the union would mean that the employer could not achieve the legitimate budgetary and work management goals it seeks to achieve by running central content creation. It does not matter that the employer could do the

work through its newspapers and that the employer's budget concerns could be addressed by means other than running national content creation through Sun Media. In the absence of anti-union animus these kind of restrictions should not be imposed by the Board, but rather need to be obtained by the union in bargaining.

52. For all of the foregoing reasons, I declare the responding parties Sun Media, London Free Press, Ottawa Sun and Toronto Sun to be a single employer for the purposes of the Act.

\_\_\_\_\_  
"Brian McLean"  
for the Board