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June 19, 2008

DELIVERED

Canada Industrial Relations Board
Suite 304, 400 St. Mary Avenue
Winnipeg MB R3C 4K5

Attention: John Taggart
Senior Labour Relations Officer

Dear Sirs:

Re: Canwest Media Inc., Global Saskatoon (CFSK), a division of Canwest Media Inc., Global Winnipeg (CKND), a division of Canwest Media Inc., CH Hamilton (CHCH), a division of Canwest Media Inc., Global Ontario (CIII), a division of Canwest Media Inc. and Global Maritimes (CIGH), a division of Canwest Media Inc. (the "Employer") (Complainant) and Communications, Energy & Paperworkers Union of Canada (the "Union") (Respondent)
Unfair Labour Practice Complaint pursuant to Section 97(1) of the *Canada Labour Code* (the "Code") alleging violations of section 50(a)
Our Matter No. 0057857 KDL

We are counsel for the Complainant and have been authorized on its behalf to file the following complaint.

NATURE OF THE COMPLAINT

1. The Employer hereby applies pursuant to section 97(1)(a) of the Code and complains that the Union has violated section 50(a) and has committed an unfair labour practice by refusing to bargain collectively in good faith and refusing to make every reasonable or any effort to enter into a collective agreement with the Employer with respect to its Eastern Canada Bargaining Unit.

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THE PARTIES

The Complainant:

Canwest Media Inc., Global Saskatoon (CFSK), a division of Canwest Media Inc., Global Winnipeg (CKND), a division of Canwest Media Inc., CH Hamilton (CHCH), a division of Canwest Media Inc., Global Ontario (CIII), a division of Canwest Media Inc. and Global Maritimes (CIGH), a division of Canwest Media Inc.

31st Floor Canwest Place

201 Portage Avenue

Winnipeg, MB R3B 3L7

Att: Robert Pruden, Vice President, Labour Relations

Counsel for the Complainant:

Thompson Dorfman Sweatman LLP

Barristers & Solicitors

2200 - 201 Portage Avenue

Winnipeg MB R3B 3L3

Att: Keith D. LaBossiere

The Respondent:

Communications, Energy & Paperworkers' Union

Suite 540 - 1199 West Pender Street

Vancouver BC V6E 4G1

Att: Robert Lumgair, National Representative

Counsel for the Respondent:

Rogers Robert

1210 - 1140 West Pender Street

Vancouver BC V6E 4G1

Att: Dan Rogers

SUBMISSIONS OF FACT

1. On April 26, 2001, an Application was filed pursuant to sections 18 and 35 of the Code by the Union seeking a declaration that the Employer operates as a single employer.
2. Following the submission of various replies and responses, a number of hearing days were convened by the Board throughout 2002 and 2003. The last day of hearing was on May 23, 2003.
3. On March 4, 2005, the Board issued its written Reasons for Decision with respect to the Union's single employer application.
4. In June and July of 2005, both the Union and Employer filed applications for reconsideration of the Board's written Reasons for Decision.
5. On March 17, 2006, the Board issued its written Reconsideration Decision and in that decision the Board upheld the Original Panel's decision to issue a single employer declaration. However, for a variety of reasons, the Board found that the Original Panel denied the parties any meaningful opportunity, as required by section 18.1(2) of the Code, to come to an agreement with respect to the bargaining unit determination questions. The Board found that the manner in which section 18.1(2) of the Code was applied constituted an error of law. In all of the circumstances, the Board decided to afford the parties an opportunity, pursuant to section 18.1(2) of the Code, to negotiate the bargaining unit configuration.

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6. Further to the Reconsideration Decision, the parties did meet as contemplated by section 18.1(2) of the Code, but were unable to reach an agreement and notified the Board of same.

7. The Board considered the parties' evidence and submissions as to the appropriate number of bargaining units during hearings held on January 22, 23, 24, 25 and 26, 2007, on February 20, 21 and 22, 2007 and on May 1 and 2, 2007.

8. On November 6, 2007, the Board issued a "bottom line" decision outlining its determination with respect to the appropriate bargaining unit structure in CIRB Letter Decision No. 1695 (attached as Appendix "1"). The Board indicated that:

"Following a review of all of the evidence and extensive submissions of the parties, the majority of the Board has determined that it would appropriate to create three separate regional bargaining units, which would combine the following thirteen current bargaining units:

British Columbia: CHAN Vancouver (BCTV), CHEK Victoria and CHBC Kelowna;

Alberta: CICT Calgary, CITV Edmonton, CISA Lethbridge; and

East of Alberta: CFSK Saskatoon, CKND Winnipeg, CIII Toronto/Ottawa, CHCH Hamilton, CIHF St. John, New Brunswick and CIHF Dartmouth (News), CIHF Halifax (the 'Eastern Canada Bargaining Unit')."

9. On December 21, 2007, the Union filed an application pursuant to section 54 of the Code for an order granting leave to serve notice to commence collective bargaining in relation to alleged technological changes and its effect on employees in

Halifax, Nova Scotia (the "Union's Section 54 Application" which is attached as Appendix "2").

10. On January 14, 2008, the Employer served formal notice to the Union of the Employer's desire to enter into collective bargaining under the new structure imposed by the CIRB with respect to the Eastern Canada Bargaining Unit (the Employer's letter of January 14, 2008 is attached as Appendix "3").

11. On January 18, 2008, the Employer replied to the Union's Section 54 Application (the Employer's Response Submission is attached as Appendix "4"). In part, the Employer urged the Board to dismiss the Union's Section 54 Application as the Union did have the ability to negotiate with respect to the alleged technological change given the fact that a formal Notice to Bargain was served on the Union on January 14, 2008. The Notice to Bargain was with respect to the newly created Eastern Canada Bargaining Unit and included all of the employees the Union sought to negotiate on behalf of in its Section 54 Application.

12. Not having received a response to its letter of January 14, 2008, the Employer wrote once again to the Union on February 7, 2008 and reiterated its desire to commence collective bargaining as soon as possible (the Employer's letter of February 7, 2008 is attached as Appendix "5"). The Employer clearly outlined its view to the Union that:

"Collective bargaining for an eastern bargaining unit would enable the parties to address a variety of issues that are currently outstanding including wage increases and benefit improvements. In its section 54 application to the CIRB re technological change, CEP notes that there is a need to address the issues created by layoffs such as severance and

yet to date, CEP has not responded to our request for negotiations which would include among other things, an ability to address those very same issues in a timely manner.”

13. On February 21, 2008, the Union responded to the Employer’s Notice to Bargain and indicated to the Employer that it was not prepared to begin collective bargaining as in its view to do so would be “both inappropriate and counterproductive”. (Union’s letter of February 21, 2008 attached as Appendix “6”).

14. On February 29, 2008, the Employer responded to the Union’s position that it was not prepared to commence collective bargaining and expressed its concern with the Union’s belief that such negotiations would be “inappropriate and counterproductive”. In particular, the Employer outlined that:

“If the Union were to participate in bargaining, it would enable the parties to address a number of issues that the Union has identified as being very important to its members. The Union’s approach has been to try to address these issues through the Labour Board and the grievance procedure. We believe all of these issues should be addressed through collective bargaining.” (Employer’s letter of February 29, 2008 attached as Appendix “7”)

15. Furthermore, the Employer advised the Union that:

“We served notice to bargain for the Eastern Bargaining Unit to enable the parties to address a variety of issues that the Union has identified as urgent issues; benefit improvements, wage increases and severance issues for those employees impacted by the digital news implementation and to address those issues on a priority basis.” (Appendix “7”)

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16. On March 4, 2008, the Union again outlined its position that it was not prepared to enter into collective bargaining with the Employer and that it would "continue to vigorously pursue" its reconsideration application and "when that process has been completed" it would look forward to collective bargaining (Union's letter of March 4, 2008 attached as Appendix "8").

17. On April 25, 2008, the Board issued its Reasons for Decision for its bargaining unit determination (attached as Appendix "9"). In its written Reasons for Decision, the Board gave the parties ninety days from the date of those Reasons to reach a final agreement on the remaining issues, including collective agreements.

18. On May 14, 2008, the Union wrote to the Employer and again outlined its position that it was in the process of filing an application for reconsideration and it remained of the view that until its application had been dealt with "collective bargaining would be premature and counterproductive" (Union's letter of May 14, 2008 attached as Appendix "10").

19. On May 30, 2008, the Employer attempted one last time to urge the Union to begin collective bargaining and expressed its disappointment with the Union's refusal and unwillingness to negotiate until the reconsideration application had been dealt with (Employer's letter of May 30, 2008 attached as Appendix "11"). In particular, the Employer noted:

"Many of our employees have not received wage increases since the fall of 2005 and the Union's position will only further delay any wage increases."

20. The Employer reiterated its desire to commence negotiations immediately for the Eastern Bargaining Unit.

21. On June 17, 2008, the Union replied to the Employer's letter of May 30, 2008 and once again advised it was prepared to deal with issues of scope and inclusions/exclusions with the bargaining units, but did not accept the Employer's third request to meet and commence to bargain collectively in good faith with respect to the Eastern Canada Bargaining Unit (Union's letter of June 17, 2008 attached as Appendix "21").

SUBMISSIONS OF LAW

22. The Board in its Letter Decision (Appendix "1") and written Reasons for Decision (Appendix "9") has determined that three new regional broad-based bargaining units are appropriate for collective bargaining and have directed the parties to begin the process of negotiating collective agreements for those three units.

23. The Employer has on three occasions (January 14, February 7 and May 30, 2008, attached as Appendices "3", "5" and "11") served formal Notices to Bargain a new collective agreement for the Eastern Canada Bargaining Unit on the Union.

24. The Employer has repeatedly reiterated its desire to commence negotiations immediately with respect to wages, benefits and other terms and conditions of employment for the new Eastern Canada Bargaining Unit. Furthermore, had the Union not refused to meet and bargain with the Employer over the past five months, it could have bargained any and all of the issues it has raised in its Section 54 Application (Appendix "2").

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25. All previous local collective agreements which were in effect prior to the bargaining unit consolidation have expired.

26. As outlined above, the Union has simply refused to even meet with the Employer to begin collective bargaining.

27. In addition to bargaining new working conditions for the new Eastern Canada Bargaining Unit, such bargaining would have allowed the parties to address all of the issues identified in the Union's Section 54 Application (Appendix "2"), including the Union's concerns with respect to the Employer's alleged "recently announced technological change and its affects on employees in Halifax, Nova Scotia."

28. We note that in the Union's Section 54 Application, it suggests that the need for a Section 54 Order is "particularly pressing" and yet as noted above, not only has the Union refused to bargain since it received the Employer's first Notice to Bargain on January 14, 2008, it has refused to bargain for the five months that have elapsed since that time, despite repeated requests.

29. The Union has suggested that it is prepared to meet with the Employer to discuss matters of scope and inclusions/exclusions. The Employer is prepared to meet, discuss and negotiate these issues with the Union in the context of collective bargaining for the new Eastern Canada Bargaining Unit. Regretfully, the Union refuses to do so.

30. The Union has repeatedly stated that it simply refuses to meet with the Employer for the purposes of collective bargaining for the new Eastern Canada Bargaining Unit until the application for reconsideration that has been filed has been determined by the Board.

31. As an aside, the Employer fails to understand why the Union would be prepared to meet with the Employer to negotiate issues of scope and inclusions/exclusions while the reconsideration process is underway, yet refuses to discuss and negotiate issues such as wages, benefits and severance, at the same time.

32. Furthermore, the Employer is of the view that issues such as wages, benefits and severance for employees facing layoff would seem to be of more immediate concern to the Union's existing members rather than engaging in a lengthy process to determine whether any new members will be added to the unit.

33. Lastly, although the Union is now proposing, five months after the first notice to bargain for the Eastern Canada Bargaining Unit was served, that all of the local individual collective agreements be simply rolled over while the parties discuss issues of scope and inclusions/exclusions, it is important to note that such a proposal is not in any way an attempt to bargain collectively in good faith or any kind of reasonable effort to enter into a collective agreement with respect to the new Eastern Canada Bargaining Unit.

34. In fact, it is yet another tactic being used by the Union to simply refuse to bargain collectively at all or make any effort to enter into a collective agreement with respect to the new Eastern Canada Bargaining Unit.

SECTION 50 OF THE CODE

35. Section 50 of the Code provides that once notice to bargain is given, parties are under an obligation to meet within twenty days and commence to bargain collectively in good faith and make every reasonable effort to enter into a collective agreement.

36. Section 50 of the Code provides:

"50. Where notice to bargain collectively has been given under this Part,

(a) the bargaining agent and the employer, without delay, but in any case within twenty days after the notice was given unless the parties otherwise agree, shall

(i) meet and commence, or cause authorized representatives on their behalf to meet and commence, to bargain collectively in good faith, and

(ii) make every reasonable effort to enter into a collective agreement..."

SECTION 97 OF THE CODE

37. The section 50 duty to bargain requires that parties bargain in good faith and make every reasonable effort to reach an agreement. A failure to do so allows the aggrieved party the ability to make a complaint of an unfair labour practice under section 97 of the Code.

38. Section 97(a) of the Code provides as follows:

"97. (1) Subject to subsections (2) to (5), any person or organization may make a complaint in writing to the Board that

(a) an employer, a person acting on behalf of an employer, a trade union, a person acting on behalf of a trade union or an employee has contravened or failed to comply with subsection 24(4) or 34(6) or section ... 50 ..."

GOOD FAITH BARGAINING

39. The leading authority on section 50 of the Code is contained in the Supreme Court of Canada's decision in *Royal Oak Mines Inc. v. Canada (Labour Relations Board)*, 1996 CanLII 220 (SCC) (attached as Appendix "12"). In that decision, the Supreme Court reviewed the Board's finding that the employer violated their duty to bargain in good faith. While the factual circumstances differ from the case at hand, the Supreme Court reviewed the applicable section of the Code. In regard to section 50(a), the Supreme Court found that:

"Section 50(a) of the *Canada Labour Code* has two facets. Not only must the parties bargain in good faith, but they must also make every reasonable effort to enter into a collective agreement. Both components are equally important, and a party will be found in breach of the section if it does not comply with both of them. There may well be exceptions, but as a general rule, the duty to enter into bargaining in good faith must be measured on a subjective standard, while the making of a reasonable effort to bargain should be measured by an objective standard which can be ascertained by a board looking to comparable standards and practices within the particular industry."

40. The *Royal Oak* decision was analysed by the CIRB in *Nav Canada (Re)*, [1999] CIRB No. 13 at paragraph 148 (attached as Appendix "13"), where the Board applied the reasoning found therein:

"The observations of Mr. Justice Cory [in *Royal Oak*] respecting the intent and application of section 50(a) are relevant in the present circumstances...it may be seen that the suggestion that there is no subjective bad faith does not

provide an excuse for the conduct of the respondent in the present circumstances, if the respondent has objectively fallen short of making every reasonable effort to enter into a collective agreement. While the parties must not be guilty of bad faith, they equally cannot escape their obligations by carrying them out in a manner that fails to meet objective reasonable standards.”

41. As a result of the foregoing, it is clear that there are two ways in which to contravene section 50(a): either through a failure to bargain in good faith or a failure to make a reasonable effort to bargain. In the situation at hand, the Union is outright refusing to bargain a new collective agreement for the Eastern Canada Bargaining Unit at all. As a result, it is the Employer’s respectful view that this brings the Union squarely under the provisions of section 50(a) of the Code. First, the Union has refused and, as a result, failed to meet with the Employer within twenty days as required by section 50(a)(1). Secondly, its overt refusal to meet and even consider a collective agreement for the new Eastern Canada Bargaining Unit is clearly a failure to make “reasonable efforts” to enter into a collective bargaining agreement as required under section 50(a)(ii).

42. Unlike many of the cases before the Board which require detailed and sometimes difficult reviews and consideration of whether a party has bargained in bad faith on the “subjective standard” outlined in *Royal Oaks* (Appendix “12”) and *Nav Canada (Re)* (Appendix “13”), the case before the present Board is very simple and straight forward. The Union is required to meet for the purposes of collective bargaining and they have simply refused to meet. In the circumstances, there can be no question that the Union has committed an unfair labour practice.

REFUSAL TO BARGAIN

43. Upon a review of decisions of the CIRB and its precursor, the Canadian Labour Relations Board (collectively, the "Board"), it is clear that a refusal to commence bargaining within twenty days of receiving notice, will constitute an unfair practice under the Code. An early decision so holding, is *National Association of Broadcast Employees and Technicians and CKLW Radio Broadcasting Limited, Windsor, Ontario, (1977) 23 di 5i* (attached as Appendix "14"). In *CKLW*, the Board considered whether the employer had contravened Section 50(a), then known as Section 148(a). After conducting a lengthy review of the facts, the Board stated:

"Finally, we have the employer's refusal to meet once the ministerial consent was given and the complaint was filed. In McCord's words, the complaints "preclude any resumption of bargaining until those charges have been heard and disposed of". The union asserts that this refusal to meet was a violation of the good faith duty. Does the request for ministerial consent or the making of a complaint relieve the other party of its obligations? We think not. The duty to bargain in good faith and make every reasonable effort is a continuous duty from when notice to bargain is given until a final resolution of an agreement. It survives the intervention of a work stoppage, although the character of the duty may change. It also survives a complaint of failure to bargain in good faith. Of course, the existence of the complaint may make it very difficult for the parties to meet face to face on their own." [Emphasis added]

44. Though, on the particular facts of the case, the Board found that there was no violation of the duty to bargain, the statements are indicative of the extent of the duty to bargain. In decisions subsequent to *CKLW*, the Board has consistently held that if a

party fails to bargain, they are in contravention of the Code. For example, in *J. Phillips and Nabet*, [1979] 34 di 603 (attached as Appendix "15"), the Board held that:

"The employer did contravene section 148(a). Colin Jamieson, President and General Manager of the employer admitted this. He received notice to bargain dated September 8, 1977, and returned it unopened. He was verbally requested to bargain several times thereafter. By letter dated June 2, 1978, he received notice to bargain again...

...
...We find and declare that the employer has failed to comply with section 148 of the Code."

45. Furthermore, in *Maritime Employers' Association and I.L.A.* (1986), 68 di 48 (attached as Appendix "16"), the Board held that:

"The actions taken by Local 1739, in concert with other unions belonging to the Council of trade unions, plus the statements made by its counsel, taken together with its conduct during mediation, do not constitute hard but legal bargaining; rather they are an outright refusal to bargain and are therefore indicative of bad faith." [Emphasis added]

46. In all of the circumstances, the Employer respectfully submits that the Union's refusal to bargain is a clear violation of the Code.

RECONSIDERATION PROCEEDINGS DO NOT OPERATE AS A STAY

47. As noted above, it is clear that the Union's outright refusal to bargain is premised on its view that it is able to await the outcome of the reconsideration proceedings. Notwithstanding the allusion to "exceptions" in the *Royal Oak* decision

(Appendix "12") and contrary to the Union's view, the duty to bargain in good faith is not "frozen" or "stayed" by judicial or Board proceedings.

48. For example, in *Allan Martin and Grain Services Union (C.L.C.)* (1979), 37 di 50 (attached as Appendix "17"), the employer gave notice to the union that they were seeking judicial review of the Board's decision to grant the union certification. As a result, the union delayed in bringing the employer to the bargaining table, even though they had served notice to bargain. After a lengthy period of inactivity, the employees brought an application for revocation of the union's certification. The union attempted to rely on the judicial review proceeding, as a reason for their inactivity:

"The major reason, if not excuse, for the union's inactivity throughout 1978 was the judicial review proceedings before the Federal Court of Appeal. We wish to state that we do not consider this to be a valid reason. Judicial review proceedings do not stay or interrupt the operation of Board orders. The disadvantage of judicial review in labour relations is the delay it frequently causes. A party seeking judicial review may honestly think it has a wrong to be righted or it may merely be seeking a delay, a reason which we do not assess to have been the case here. Delay in labour relations, perhaps more so than in most areas, works to seriously undermine the purposes of the legislation.

...

The import of all of this is that although judicial review may cause delays, it is well recognized that judicial review proceedings to not interrupt or have a legal effect on orders of the Board and consequential obligations under the Code."
[Emphasis added]

49. In the result of that case, the Board was not required to make a determination on whether the actions of the union contravened section 148(a) (now

section 50(a)). However, based on the principles outlined in that case, it is clear that delay because of additional proceedings involving the parties violates the Code. It is no surprise then that in subsequent decisions, the Board relied on *Allan Martin* for these principles. In *Canadian Air Line Employees' Association and Austin Airways Limited/White River Air Services Limited*, (1981) 41 di 151 (attached as Appendix "18"), the employer refused to bargain, pending the results of a judicial review of a certification order. The Board found this to be bargaining in bad faith:

"So that there is no misunderstanding by the parties, we wish to clearly indicate that the application for judicial review and the other proceedings before this Board did not lessen or suspend the employer's obligation to meet and engage in collective bargaining...

...

We find that the employer refused to meet with the trade union and thereby contravened section 148(a) of the Code."

50. A similar situation was canvassed by the Board in *Communication Workers of Canada, CLC, and Northern Telecom Canada Limited*, [1981] 42 di 178 (attached as Appendix "19"), where, after receiving notice to bargain, the employer told the union that it would be premature to negotiate as the union certification was under appeal. When the decision was rendered, the union again served notice to bargain. However, the employer appealed the decision to the Supreme Court and again refused to meet. The union complained to the Board. The Board found:

"We have a complaint in 1977 and a ministerial consent.... Also, because section 148(a) imposes a continuous obligation, we may consider on a complaint accompanied by consent the events subsequent to the filing of the complaint

and granting of consent... The second consent in 1979 was therefore strictly unnecessary but its issuance and addition to the original complaint together with further allegations of fact amend the original complaint to include more current events at the time. The judicial review proceedings do not suspend the duty to bargain...

On the first complaint then we can easily conclude the employer failed to meet and bargain as required by section 148(a) throughout 1977 to 1979.”

51. In addition to the Board’s clear direction that judicial proceedings do not act as a “stay” or an excuse to fail to bargain after receiving a notice to bargain, the Board has also expressly rejected an explicit request for a stay pending an application for reconsideration. In *Brinks Canada Ltd (Re)*, [2002] CIRB No. 204 (attached as Appendix “20”), the Board found that the employer had committed an unfair labour practice under Section 50(a). The employer filed both an application for reconsideration and an application for an interim order under Section 19.1 for a stay of the original decision, pending the decision of the reconsideration panel. The Board found:

“6 Firstly, on a preliminary review of the present matter, the reconsideration panel is not of the view that an interim order granting a stay of the decision of the original panel is appropriate, in all the circumstances.

...

10 ...the granting of a stay of a decision of the Board pending the outcome of reconsideration applications and applications for judicial review would be contrary to the policy inherent in section 22(c) of the Code, that Board decisions are final, and also contrary to the principle of timely resolution of industrial disputes, which is one of the basic tenets underlying labour legislation in Canada.”

CONCLUSION

52. In all of the circumstances, and as outlined above, it is clear that:
- (a) the Code requires the Union to bargain in good faith;
 - (b) a failure to do so is an unfair labour practice;
 - (c) an outright refusal to bargain, once notice has been given with respect to a particular bargaining unit, constitutes a contravention of the Code;
 - (d) additional judicial proceedings or other proceedings before the Board do not have an affect on any obligation imposed under the Code; and
 - (e) as a result, a pending application for reconsideration does not negate a duty to bargain in good faith.

53. In the case at hand, the Employer respectfully submits that the Union's refusal to meet and commence collective bargaining with respect to the new Eastern Canada Bargaining Unit (or even recognize that it exists) while there is an outstanding application for reconsideration amounts to an unfair labour practice and such a practice should be so declared.

REMEDIES SOUGHT

54. The Employer requests the following Orders of the Board:

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- (a) a Declaration that the Union has violated section 50(a) of the Code in the manner alleged in this complaint;
- (b) an Order of the Board compelling the Union to cease and desist in its unfair labour practice and its violation of the said provisions of the Code;
- (c) an Order of the Board directing the Union to immediately meet and commence or cause authorized representatives on its behalf to meet and commence with the Employer to bargain collectively in good faith and make every reasonable effort to enter into a collective agreement with respect to the Eastern Canada Bargaining Unit; and
- (d) such further and other relief to which this Board may deem just in all of the circumstances.

SERVICE OF RESPONDENT

55. We have sent the Complaint by e-mail and courier to counsel for the Respondent.

All of which is respectfully submitted.

Yours truly,

THOMPSON DORFMAN SWEATMAN LLP

Per:

Keith D. LaBossiere

KDL/nb
Enc.
#799092-v2