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Montreal City Hall is seen above. A strike by city lawyers was averted by a last minute settlement. ALADIN66 / ISTOCKPHOTO.COM

Montreal lawyers settle at 11th hour

LUIS MILLAN

A strike by municipal lawyers for the City of Montreal was averted at the last minute after a tentative labour agreement that will give them wage parity with Quebec public sector lawyers was reached May 2, following three days of negotiations before a conciliator.

"The determination of municipal lawyers to go on strike and the city's willingness to reach an agreement led to the tentative deal," said Kateri Lefebvre, assistant director of the Syndicat des employées et employés professionnel(le)s et de bureau — Quebec (SEPB-Quebec). "People are relieved and happy that a deal was finally reached."

Montreal's municipal lawyers, were without a contract since 2011. A strike would have likely crippled the municipal justice system, delaying thousands of cases and affecting the inner workings of City Hall, where municipal lawyers provide guidance to elected and administration officials.

The seven-year tentative deal, approved by 85 per cent of the 132 lawyers and notaries employed by the City of Montreal, provides for salary increase of an average two per cent until 2015, and 2.5 per cent until 2017. Under the agreement, salaries will climb this year to $50,000 for junior lawyers and $115,000 for lawyers with 14 years of experience, and increase to $53,582 and $123,238 respectively by 2017. The deal also includes overtime provisions and see 14 temporary full-time jobs held by lawyers converted into permanent ones.

"We reached a good deal, in exchange for some concessions, at a time when the City of Montreal is facing budgetary restraints," said Jean-Nicholas Loiselle, a municipal lawyer and head of Section 571 of SEPB-Quebec. "The deal recognizes our three principal demands, including wage parity with Quebec government lawyers, recognition for the overtime work that we do, and the creation of 14 jobs."

In exchange, municipal lawyers will lose a week of vacation. They will also pay out-of-pocket insurance costs after they retire and will have to contribute a greater portion of their pay into their defined-benefit pension plans at a time when Montreal is faced with a soaring municipal pension deficit. Approximately 10.5 per cent of the city's 2013 budget, or $510.3 million of the $4.9 billion budget, will fund the retirement system, including $256.3 million to cover the plan's actuarial deficit for a single year.

Municipal lawyers agreed to provide for nearly equal pension cost-sharing. Their contributions will rise from the current 26 per cent to 45 per cent, with the city of Montreal covering the remaining 55 per cent. Existing pension deficit shortfalls and retirement age were not addressed by the tentative deal. Montreal municipal lawyers can still retire after 30 years of service. "We agreed to increase our pension fund contributions because we wanted to strengthen our defined pension plans," said Loiselle.

Montreal's municipal lawyers, though pleased that 14 temporary postings were transformed into permanent jobs, were hoping to convince the city to hire more lawyers to help relieve the growing workload. According to the latest figures provided by the City of Montreal, the city saved approximately $2.2 million since 2011 by slashing its legal outsourcing budget while hiring two new lawyers. "The extra workload has led our people to work an average of 40 to 45 hours a week, instead of 35," said Loiselle. "The savings incurred by the city could have provided for more hirings."

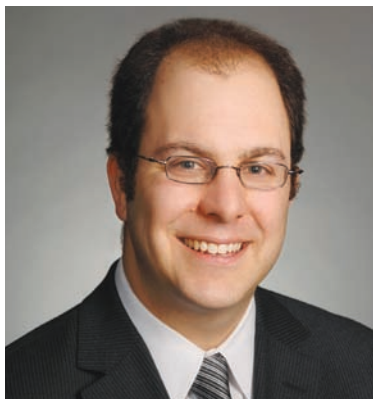
U.S. high court set to rule in TV streaming showdown

DONALEE MOULTON

In a case that has implications for tech companies in Canada, the U.S. Supreme Court is set to rule in a showdown between a technology upstart offering what it calls cloud DVR on one hand, and one of the world's largest television networks in opposition claiming copyright infringement.

Aereo, which allows subscribers to view live and saved streams of television shows via the Internet, has put forward two legal defences and one "brilliant" societal argument against the action brought by the American Broadcasting Corporation (ABC), said Susan Abramovitch, an entertainment lawyer with Gowling Lafleur Henderson in Toronto.

Aereo, based on Long Island, N.Y., contends that if it loses before the Supreme Court the ramifications will be major for both the IT industry and Americans who rely on modern technology in their jobs and lives. In its 100-page brief, Aereo asserts that ABC's argument it has infringed copyright by providing subscribers virtual access to small antennas that enable them to download network TV shows "imperils the cloud computing industry."



> "I expect the Supreme Court will be careful to write a narrow decision confined primarily to its facts."
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> **Andrew Bernstein**
> Torys LLP

"Their position depends on aggregation of all the individual transmissions and individual performances of a program by consumers using Aereo's system. That 'aggregation' would turn all cloud storage providers into infringers," the company stated in its brief.

"It's the most convincing argument," said Abramovitch. "Every-

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one knows we're going the way of the cloud."

The contention has resonated with the high court's justices, who have expressed concern over the threat a decision against Aereo would pose to other organizations in the cloud-computing industry, noted Andrew Bernstein, a partner with Torys LLP in Toronto. In particular, Justice Sonia Sotomayor has pointed to the implications for Dropbox, a widely used cloud storage system.

If the justices ultimately find in favour of ABC, it is anticipated they will do so carefully. "I expect the Supreme Court will be careful to write a narrow decision confined primarily to its facts," said Bernstein.

One legal argument before the court is whether Aereo's service constitutes a public performance and, therefore, infringes on ABC's copyright. While a hotly debated defence in the U.S., it is unlikely to have significant implications in this country. "We already have the Supreme Court of Canada ruling on this," noted Abramovitch. "Loopholes don't rule."

Canada's judicial determination can be found in two decisions: *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada* [2012] S.C.J. No. 35, and *ESA v. SOCAN* [2012] S.C.J. No. 34. The court held that on-demand point-to-point transmissions of musical works at a user's request over the Internet are a communication to the public. Downloads, on the other hand, do not constitute a public communication. "However, on-demand streaming over the Internet, whether received by individuals at the same or at different times and locations, does constitute communication to the public," said Bernstein.

> Is what Aereo is doing any different from me programming my DVR on a cloud? In Canada, we have yet to carve out this right.
>
> **Susan Abramovitch**
> Gowling Lafleur Henderson

Canada's new copyright act, which received royal assent in 2012, contemplates the arrival of services like that provided by Aereo, said George Burger, a lawyer and advisor to VMedia Inc., a cable TV and Internet service provider in Toronto. "Conceptually, everybody acknowledges it's intended to provide cloud DVR."

At issue are the retransmission fees cable companies and others pay broadcasters, worth more than $3.3 billion a year in the United States (all figures U.S.). Aereo does not currently pay these fees, contending it is not retransmitting, and therefore it can sell its services to customers for as little as $8 a month.

The second legal argument being put forward in the groundbreaking case is whether subscribers are actually renting equipment from Aereo, which says a mini-antenna is assigned to each subscriber. "It's not clear the law here would toss out that argument," said Abramovitch.

"Is what Aereo is doing any different from me programming my DVR on a cloud?" she said. "In Canada, we have yet to carve out this right."

At present, cable subscribers in Canada must buy a basic package of channels. Aereo does not require this. Its subscribers select only the channels they want. If Aereo is successful before the U.S. Supreme Court, the win would be felt by cable companies in this country, said Burger.

"If the ability of consumers in the U.S. is to get channels they want very inexpensively that will impact the market and demand here," he said.

Lower courts have found in favour of Aereo, and they have also ruled against the technology company, so the pendulum doesn't appear to be leaning and the U.S. Supreme Court will the settle the question in a decision expected by next month.

For cloud computing companies on both sides of the border, it is a nerve-wracking wait. "Once the Supreme Court rules it could shut everything down or open everything up," said Abramovitch.

Changes coming

Whatever the U.S. Supreme Court decides in the battle between Aereo and ABC, cable companies in Canada need to prepare for significant change in light of developments within the Canada Radio-television and Telecommunications Commission, said George Burger, a lawyer and advisor to VMedia.

"The CRTC is far more consumer-focused than has ever been the case," he noted. "Traditionally, it has been concerned with incumbents and the cultural community. Consumers were a distant third."

The CRTC is currently conducting a review of the future of the television system in this country, and if bundling is eliminated cable companies will have to change how they do business.

"You'd better hold on to your seatbelt," said Burger. "It's going to be a bumpy ride for the industry."

Trio: SCC will hear three other human smuggling cases

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tion was not solely aimed at protecting against human smuggling and that Parliament did not intend to exempt humanitarians or family members from human smuggling prosecutions.

"I conclude the legislative objective of s. 117 is aligned with its scope," Justice Kathryn Neilson wrote for the court. "Both are broadly based, and the conduct caught by the provision is rationally connected to its purpose. Section 117 is therefore not unconstitutionally overbroad."

The judge explained that in enacting the provision, Parliament intended to create a broad offence with no exceptions, directed to Canada's concerns about controlling its borders and deterring and penalizing those who assist others in entering illegally. Although Parliament "recognized there may be difficult and sensitive cases in which prosecution under s. 117 would be unpalatable, it found these defied comprehensive definition and elected to enact centralized charge approval by the Attorney General [of Canada] as a means to ensure all circumstances, including motive, would be assessed before charges were laid under s. 117," Justice Neilson wrote.

Her judgment was endorsed by Justices Elizabeth Bennett and Christopher Hinkson (who was appointed chief justice of the B.C. Supreme Court last November, one month after hearing the appeal).

Counsel for the intervener B.C. Civil Liberties Association, Monique Pongracic-Speier of Vancouver's Ethos Law Group, said the appeal court's approach to analyzing constitutional overbreadth has implications beyond human smuggling.

"If the court's reasoning around the purpose of the legislation stands, then I think we really have to ask, 'Can legislation ever be held to be overbroad?' " she said.

"The net will be expanded, and so the concern there is the dilution of the protection of s. 7 of the *Charter*."

Pongracic-Speier called the case "one to watch."

"It raises some very interesting and tough questions about the ongoing balancing of values within a democratic society, and what the government has to establish in terms of 'purpose' in order for a law that catches a broad range of conduct to be held unconstitutional for overbreadth or constitutional."

Last month the Supreme Court agreed to hear a trio of other human smuggling cases.

In *B306 v. Minister of Public Safety and Emergency Preparedness,* the appellant, who arrived in Canada in 2010 along with 491 other Sri Lankan nationals on the MV Sun Sea argues the Immigration Division of the Immigration and Refugee Board incorrectly determined that B306 was inadmissible to Canada under s. 37(1)(b) of the IRPA because he had engaged, in the context of a transnational crime, in people smuggling. The board found that B306 had aided and abetted the coming into Canada of the foreign nationals aboard the freighter because, in its view, B306's watchkeeping duties and his work as a cook aboard the ship, in exchange for food, meaningfully supported the smuggling operation. The Board rejected B306's claims that he acted out of necessity and under duress, and ordered him deported. The top court is asked to address the standard of review and the scope of s. 37(1)(b).

Similar issues are raised in *J.P., et al. v. Minister of Public Safety and Emergency Preparedness,* and *Jesus Rodriguez Hernandez v. Minister of Public Safety and Emergency Preparedness.* The latter case involves a Cuban national who was denied refugee status in Canada because the IRB found there were reasonable grounds to believe he engaged in organized crime, under s s. 37(1)(b), by helping to organize the smuggling of Cubans into the United States, albeit not for financial gain.