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

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./ PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Applicants

BOOK OF AUTHORITIES OF POSTMEDIA NETWORK INC.

(Claims Hearing November 15, 2011)

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TAB A

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

NO. 500-09-007384-985
(500-05-039701-980)

December 15, 1999

PRESENT: THE HONOURABLE ROUSSEAU-HOULE
CHAMBERLAND
FORGET JJ.A.

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

APPELLANT - (impleaded party)

and

RITA BLONDIN,
ERIBERTO DI FAOLO,
UMED GOHIL,
HORACE SOLLOWAY,
PIERRE REBETEZ,
MICHAEL THOMSON,
JOSEPH BRAZEAU,
ROBERT DAVIES,
JEAN-PIERRE MARTIN,
LESLIE STOCKWELL,
MARC TREMBLAY,

APPELLANTS - (impleaded parties)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

MTRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY - (respondent)

VALIDATING CODE = BBZQ2BRERO

500
00-025427-997

THE COURT: - *Ruling on* the appeal by appellants from a judgment of the Superior Court, District of Montréal, handed down on October 30, 1998 by the Honourable Justice Danielle Grenier, who allowed the respondent's motion for judicial review, declared that the arbitrator had exceeded his jurisdiction in allowing the grievance of June 4, 1996 and quashed the arbitral award that had allowed the grievance;

Having examined the file, heard the evidence and deliberated;

For the reasons expressed in the written opinion of Rousseau-Houle J.A., with which Chamberland and Forget JJ.A. concur;

ALLOWS the appeal in part;

ORDERS the respondent to submit to the process of exchanging best final offers within 30 days following this decision;

QUASHES the two orders by the arbitrator on the payment and reimbursement of the salaries and benefits lost because of the lock-out;

RETURNS the file to the arbitrator, who will determine, if necessary, the damages that could be granted the 11 appellants following the employer's failure to respect article XI of the 1987 agreement;

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

NO. 500-09-007415-987
(500-05-039701-980)

December 15, 1999

PRESENT: THE HONOURABLE ROUSSEAU-HOULE
CHAMBERLAND
FORGET JJ.A.

RITA BLONDIN,
ERIBERTO DI PAOLO,
UMED GOHIL,
HORACE SOLLOWAY,
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COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

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THE WHOLE with costs in both courts.

(s) Thérèse Rousseau-Houle J.A.

(s) Jacques Chamberland J.A.

(s) André Forget J.A.

Mtre. Robert Côté (Trudeau, Provençal et associés)
Attorney for the appellants

Mtre. Pierre Grenier (Melançon, Marceau et associés)
Attorney for the appellant

Mtre. Ronald McRobie (Martineau, Walker)
Attorney for the respondent

Date of hearing: November 9, 1999

VALIDATING CODE = BBZQ2BRERO

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(s) Thérèse Rousseau-Houle J.A.

(s) Jacques Chamberland J.A.

(s) André Forget J.A.

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Attorney for the appellant

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Attorney for the appellants

Mtre. Ronald McRobie (Martineau, Walker)
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THE COURT: - Ruling on the appeal by appellants from a judgment of the Superior Court, District of Montréal, handed down on October 30, 1998 by the Honourable Justice Danielle Grenier, who allowed the respondent's motion for judicial review, declared that the arbitrator had exceeded his jurisdiction in allowing the grievance of June 4, 1996 and quashed the arbitral award that had allowed the grievance;

Having examined the file, heard the evidence and deliberated;

For the reasons expressed in the written opinion of Rousseau-Houle J.A., with which Chamberland and Forget JJ.A. concur;

ALLOWS the appeal in part;

ORDERS the respondent to submit to the process of exchanging best final offers within 30 days following this decision;

QUASHES the two orders by the arbitrator on the payment and reimbursement of the salaries and benefits lost because of the lock-out;

RETURNS the file to the arbitrator, who will determine, if necessary, the damages that could be granted the 11 appellants following the employer's failure to respect article XI of the 1987 agreement;

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(s) Thérèse Rousseau-Houle J.A.

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Attorney for the appellants

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Attorney for the respondent

Date of hearing: November 9, 1999

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

NO. 500-09-007384-985
(500-05-039701-980)

PRESENT: THE HONOURABLE ROUSSEAU-HOULE
CHAMBERLAND
FORGET JJ.A.

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

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No. 500-09-007415-987
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COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145, CEP

APPELLANT - (impleaded party)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

MTRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY

OPINION OF ROUSSEAU-HOULE J.A.

The Gazette declared a lock-out on June 3, 1996. It is still on-going today.

Do the Communications, Energy and Paperworkers Union of Canada, Local 145, (the union) and the 11 typographers still employed by The Gazette on June 3, 1996 have the right to demand that the employer accept the compulsory adjudication procedure for the renewal of the collective agreement provided for in the 1987 tripartite agreement? Are the 11 employee appellants entitled to the salaries and other benefits they have lost since the lock-out?

The union and the 11 typographers won their case before the adjudicator. The decision was quashed by the judge of the Superior Court.

The facts

Until 1982, the union and the employer were bound by collective agreements that gave the union exclusive jurisdiction over the work done by the employees. In 1982, in return for the right to introduce major technological changes that were necessary in order to remain competitive, the employer negotiated a tripartite agreement with the union and the 200 typographers in the composing room guaranteeing job security and a salary for the typographers until the age of 65.

The main points of this agreement are as follows:

- **The agreement shall only come into effect once the agreement on job security provided for in the collective agreement or in subsequent collective agreements terminates, is cancelled, lapses or becomes inapplicable (art. I).**

- **The agreement shall remain in effect until all the employees who signed it have ceased their employment, ultimately until 2017, and no party shall raise the subjects of the present agreement during future negotiations for the renewal of a collective agreement (art. II).**

- **In return for the right to go ahead with technological changes, the employer agrees to guarantee and guarantees to protect the employees named in Appendix I against the lost of regular full-time employment in the composing room. The full-**

time employment guaranteed shall be employment with full salary, at least at the rate provided for in any collective agreement negotiated by the parties from time to time (art. III).

- The agreement shall only cease to apply to an employee by reason of death, voluntary resignation, end of employment at the age of 65 or dismissal (art. IV).

- The agreement shall bind any buyer, successor or assignee of the employer (art. V).

- An employee transferred to another department shall remain subject to the agreement (art. VI).

- In case of a dispute over the interpretation, application or violation of this agreement, the grievance procedure provided for in the collective agreement in effect at the time the grievance is filed shall apply (art. VII).

- Should the union cease to exist or cease to act as the certified bargaining agent, an employee named in Appendix I shall have recourse to the grievance procedure provided for in the *Labour Code*.

When this agreement was signed, the parties provided as follows for its incorporation into the collective agreement as Appendix C:

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

In 1987, the employer, the union and the 132 employees still working for The Gazette in the composing room reiterated the main points of the 1982 agreement, adding a salary indexing formula to compensate for the union's giving up the union protection clauses. Articles X and XI were also added:

[Translation]

X. AMENDMENTS

The parties acknowledge that all the provisions of the present agreement constitute terms and conditions that are essential to the validity of the agreement.

Consequently, if a provision of this agreement, in whole or in part, were to be declared void, inoperative or inapplicable by any competent tribunal or by law, the Company and the Union agree to meet immediately in order to conclude an amended agreement that would be binding on all parties. It is agreed in principle that the essential elements of the agreement will be maintained by means of amending formulas, equivalent provisions or any other agreement concluded by the parties in their negotiations.

If, within ninety (90) days following such a decision by a tribunal or by law as referred to above the parties are unable to reach such an amended agreement, the parties agree that the provisions of the present agreement and the collective agreement shall remain in effect until one or the other of the parties exercises its right to strike or to a lock-out as provided for in section 107 of the Québec *Labour Code* or until an award is rendered by an arbitrator as provided for in the following section of this agreement.

XI. RENEWAL OF COLLECTIVE AGREEMENTS AND DISPUTE SETTLEMENT

Within ninety (90) days preceding the expiration of the collective agreement, the Employer and the Union can begin negotiations for a new collective agreement. The terms and conditions of the agreement shall remain in effect until an agreement is reached, an award is rendered by an arbitrator or one of the parties exercises its right to strike or to a lock-out.

In the two weeks preceding the acquisition of the right to strike or to a lock-out, including the acquisition of such a right by the application of article X of the present agreement, one or the other of the parties can require that "best final offers" be exchanged, in which case both parties must present their offers simultaneously, in writing, within the next forty-eight (48) hours or within another period of time the parties agree to. The "best final offers" shall contain only those clauses or parts of clauses on which the parties have not yet agreed. If they still fail to agree, before the right to strike or to a lock-out is acquired, one or both parties can submit the disagreement to an arbitrator chosen in the manner provided for by the grievance procedure in the collective agreement. If such a request is submitted, the arbitrator, after giving both parties the opportunity to make their representations on the merits of their respective proposals, shall select one set of best final offers in its entirety and reject the other in its entirety. The arbitrator's decision shall be final and binding on both parties and shall become an integral part of the collective agreement.

Article X provided for a compulsory amendment formula should the agreement be declared void, inoperative or inapplicable by a tribunal or by law. At the time, the *Labour Code* had not been amended to allow a collective agreement to last longer than three years. The text of this article and the new article XI on the renewal of the collective agreements and dispute settlement is also found in article 2(b) of the collective agreement:

> [Translation]
> **Article 2(b) Within the ninety (90) days preceding the expiration of the present Collective Agreement, the Employer and the Union can begin negotiations for a new collective agreement that will come into effect on May 1, 1996.**
>
> **In the two (2) weeks preceding the acquisition of the right to strike or to a lock-out, including the acquisition of such a right by the application of article X of the agreement found in Appendix C of the present collective agreement, the parties can agree to exchange "best final offers" and shall do so, if applicable, simultaneously, in writing, within the next forty-eight (48) hours or within another period of time the parties agree to. The "best final offers" shall contain only those clauses or parts of clauses on which the parties have not yet agreed. If they still fail to agree, before the right to strike or to a lock-out is acquired, the parties can submit the disagreement to an arbitrator chosen in the manner provided for by the grievance procedure in the collective agreement. If such a request is submitted, the arbitrator, after giving both parties the opportunity to make their representations on the merits of their respective proposals, shall select one set of best final offers in its entirety and reject the other in its entirety. The arbitrator's decision shall be final and binding on both parties and shall become an integral part of the collective agreement.**
>
> **The terms and conditions of the present Collective Agreement shall remain in effect until one of the parties exercises its right to strike or to a lock-out as described in the paragraph above.**

These articles were designed to ensure the continuity of the commitments made by the employer and to provide a compulsory arbitration mechanism for renewing the collective agreement.

As they had done in 1982, each of the employees signed this agreement, which was incorporated into the collective agreement as Appendix C, in the same terms as in 1982, the 1982 agreement becoming Appendix B. The 1982 and 1987 agreements

reproduced in the collective agreements provide essentially for: (1) an employment and a salary guarantee, (2) an agreement not to renegotiate the guaranteed protection and (3) a compulsory process for renewing the collective agreement.

From 1987 to 1992, the composing room staff decreased constantly through attrition and the transfer of employees into other services. In 1992 and 1993, employer representatives informed each employee individually of the need to reorganize the composing room and told the union that the employer planned to renegotiate article 2(b) of the collective agreement, which made arbitration obligatory.

Since the employer and the union were unable to agree on the terms of a new collective agreement when the old one expired, on April 30, 1993, they resorted to the best final offers mechanism provided for in article 2(b) of the collective agreement and article XI of the 1987 agreement appended to it.

Arbitrator Leboeuf, to whom the best final offers were submitted for arbitration, had to examine them and accept one set in its entirety and reject the other, also in its entirety.

Meanwhile, the employer decreed a lock-out on May 17, 1993. The arbitrator first had to deal with a grievance between the same parties, in which the union claimed that the employer could not exercise its right to a lock-out as long as the collective agreement had not been renegotiated or decided by arbitral award. On November 18, 1993, arbitrator Leboeuf dismissed this grievance. He concluded that [translation] "the fact that the parties had agreed that either one could impose on the other the exceptional arbitration process provided for in article 2(b) meant no more than that and certainly did not include a renunciation, explicit or otherwise, of the right to strike or a lock-out. This right continues to exist, even within the process in question".

On August 18, 1994, arbitrator Leboeuf rendered his award and retained the employer's best final offers because he believed that they were in the best interests of The Gazette, which was experiencing financial difficulties and was paralyzed by the attitude of the union, which refused to authorize employee transfers to other departments. These best final offers included an important change to article 2(b) of the collective agreement and article XI of the 1987 tripartite agreement. The process of exchanging best final offers, which had been compulsory, became optional. A change was also made to the 1982 agreement, reproduced in Appendix B. The employer could now transfer its employees into other departments or positions as the firm required, without obtaining authorization from the union beforehand.

These two changes gave rise to appendices B-1 and C-1, which were inserted, in keeping with the arbitral award, into the 1993-1996 collective agreement. Appendix C-1 is the one that makes the process of exchanging best offers optional. The introductory text states that:

> [Translation]
>
> **The parties agree to amend as specified below the terms and conditions of Appendix C, which is an agreement originally concluded between the parties on March 5, 1987.**
>
> **The present agreement, as well as the present amendment, shall be deemed to be the only legal text, replacing any agreement(s) previously concluded on these points.**

Appendix C-1 is thus at the heart of the dispute, since, when the collective agreement expired, on April 30, 1996, the employer refused to exchange best final offers.

The new appendices B-1 and C-1 were not signed by the employees who were parties to the agreements of 1982 and 1987, but only by the union and the employer. The particular circumstances of the signing are worth describing. When the employer ended the lock-out, on August 24, 1994, there were only 62 employees left in the composing

room. At that date, the employer sent each one of them a letter informing them that their presence at work would not be required until further notice. On September 14, the employer made an end-of-employment offer including severance pay. This offer was conditional on acceptance by at least 45 typographers and on the union's agreeing to refrain from any recourse or claim against The Gazette. Around October 1, 51 typographers had accepted the offer and on October 3, the union and the employer signed the following agreement:

> [Translation]
>
> **By these presents, the Union waives all claims of any kind whatsoever against the Company originating in or resulting from the lock-out of its members by the Company on May 17, 1993, including future claims or existing claims that have not yet been presented.**

On October 14, the union and the employer signed the collective agreement including the former 1982 and 1987 agreements reproduced in appendices B and C and the new appendices B-1 and C-1.

The 11 typographers who refused the employer's offer were not called back to work. The employer did not offer them a position but began paying them a salary again on August 24, 1994. On February 8, 1995, the union filed a grievance demanding that they be called back to work. On April 25, 1996, arbitrator Foisy ordered the employer to re-open the composing room and recall the 11 typographers no later than April 30.

On April 30, 1996, the union and each of the 11 employees invited the employer to submit its best offers with a view to renewing the collective agreement that expired that day. On May 3, 1996, the employer refused the invitation, stating that the process was now optional.

On May 9, the union and the employer agreed to postpone until May 29, 1996 the implementation of arbitrator Foisy's award and to postpone until June 3 the date on which they acquired the right to strike or to a lock-out. A few proposals concerning working conditions were exchanged but declared unacceptable by the two parties. On June 3, 1996, the employer declared a lock-out. The 11 typographers who had not been given their jobs back since May 17, 1993 lost them all over again.

On October 4, 1996, the employer suggested that talks be resumed in the presence of a conciliator but there was no follow-up. The lock-out was therefore still in effect in the fall of 1999.

Two grievances were filed on behalf of the union and each of the 11 employees, the first on May 8, 1996, when the 1993-1996 collective agreement was still in effect. It contested the employer's refusal to submit its best final offers in response to those the union made on April 30, 1996. The arbitrator was asked to declare that article 2(b) and appendices B-1 and C-1 of the collective agreement reached after Mtre. Leboeuf's arbitral award were void and without effect against the union and the complainants, and that only appendices B and C were applicable. Arbitrator Sylvestre dismissed this grievance because he could not, as arbitrator, review or invalidate the award made on August 18, 1994 by arbitrator Leboeuf, which stood in lieu of a collective agreement. Arbitrator Leboeuf had accepted the employer's best final offers, which took from the typographers the rights conferred on them in the agreements signed in 1982 and 1987. No motion for a review of the award had been filed with the Superior Court, which alone had the jurisdiction to cancel it.

The second grievance was filed on June 4, 1996, the day after the lock-out. It read as follows:

[Translation]

Local 145 of the Communications, Energy and Paperworkers Union of Canada (CEP Local 145) and each of the 11 signatories mentioned below are contesting the decision of The Gazette (a division of Southam Inc.) to:

- refuse or omit to consent to the process of exchanging "best final offers", as required by a notice from the union and the 11 complainants on April 30, 1996;

- decree a lock-out as of June 3, 1996 with, as a result, an interruption of earnings for the 11 complainants and the suspension of other benefits provided for under the collective labour agreement and the tripartite agreements of November 12, 1982 and March 5, 1987;

- refuse to maintain the conditions in force before the lock-out was declared, that is, the paid presence at work of the complainants, despite the provisions of article 27 of the collective agreement and despite the guarantee to maintain the standard of living provided for in the tripartite agreement concluded on or around March 5, 1987.

The present grievance is filed under the collective labour agreement and each of the tripartite agreements signed on or about November 12, 1982 and March 5, 1987.

We ask the arbitrator to declare and order the following:

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

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

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

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

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

and, in the interim:

6- To order the employer to maintain, until the final decision is rendered, the conditions that existed prior to the lock-out;

7- To make any other order necessary to safeguard the parties' rights.

Arbitrator Sylvestre allowed this grievance on February 5, 1998.

The arbitral award

The arbitrator accepted the proposals made by the union and the 11 employees according to which the two agreements signed in 1982 and 1987 had survived the expiration of the collective agreement in 1996 and the declaration of a lock-out. The essential elements of his decision are found at pages 110 and 113 of the award:

> It is clear that when they signed the 1982 and 1987 agreements and appended them to the collective agreements concluded at the time, the parties intended them to continue until 2017. The employer and the union could not have expressed more clearly their intention to open the door to the typographers as signatories and interested parties when they declared, in November 1982, in the introduction, that the agreement was between "The Gazette", the "Syndicat québécois de l'imprimerie et des communications, local 145" and "the employers' employees, totalling 200, whose names are listed in an appendix to this document". They stipulated, in article II, that the agreement would remain in force until all the employees mentioned had left their jobs, and that none of the parties could raise the subjects of the agreement during future negotiations to renew a collective agreement. One of the subjects of the agreement, the guarantee given by the employer that the employees identified would be protected against the loss of their regular full-time jobs in the composing room despite the introduction of new technology, appeared in article III. In addition, it was agreed at the time that the agreement would come into force only once the agreement appended to the collective agreements and concluded between the employer and the union had terminated, been removed, been cancelled, or had lapsed. Lastly, each of the 200 typographers signed the agreement, attesting to the fact that they had read and understood the text "and especially that my job will terminate at the date given below (... and that ...) I agree to be bound by the terms and conditions of this agreement as a party to the presents, the whole in witness whereof I have signed below". At the same date, the union and the employer agreed to reproduce the agreement as an integral part of the collective agreement they were signing "without that fact affecting its civil effects outside the collective agreement". They declared that it was "their intention that the said agreement remain in full force, subject to the terms and conditions therein, notwithstanding the expiration of the collective agreement". Given such clear texts, it would be to deny the evidence to conclude that

the agreement involved only the two parties mentioned in the *Labour Code*, the employer *and the union.*

Five years later, in 1987, the same three parties signed another agreement of the same sort. They reaffirmed the guarantee of job security until the age of 65 for the 132 typographers still on the job and added an escalator clause as well as a clause creating a mechanism for renewing the collective agreements and settling disputes. *On this last point, they would exchange best final offers and, should they fail to agree,* submit the matter to an arbitrator of their choice who, after examination, would select one of the two best final offers and reject the other. The decision would be final and binding and would become an integral part of the collective agreement. The parties also appended this agreement to the collective agreement with the same introductory remark that the fact that the agreement was appended to the collective agreement would not affect "its civil effects outside the collective agreement".

...

The situation in this case is very unusual, but the parties wanted it that way to ensure the continued existence until 2017 of the commitments made by the employer in 1982 and 1987. They have to guard against all the situations that can threaten job security, including the termination of a collective agreement. In the case before us, the collective agreement expired on April 30, 1996 and its effects ended the following June 6 when a lock-out was declared. In the judgment of the undersigned, the tripartite agreements then came into effect. According to article I, each of the 1982 and 1987 agreements was to come "into force only once the job security agreement provided for in the collective agreement between the employer and the above-mentioned union, or subsequent collective agreements, ended ...". The arbitrator again points out that, unlike the case in *La Compagnie Paquet Ltée, McGavin Toastmaster Ltd., Hémond* or *CAIMAW*, where the employer had reached specific agreements with individuals, these two agreements were signed by three parties, including the 11 complainants. Mtre. Beaulieu referred to the incongruous nature of the results if the position of the union and the 11 complainants was to win the day. Between whom, he asked, would the best final offers be exchanged, and to what end? To have a collective agreement signed by each of the 11 complainants as well as the union and the employer? He qualified the situation as nonsensical. The undersigned must admit that the effect of these proceedings is unusual but points out that it is what the parties wanted. The union and the employer created acquired rights for the typographers, including job security until the age of 65 and a regular salary adjusted to the cost of living. Nothing in law prohibits such a solution. In the final analysis, the parties acted as they did in this case to protect acquired rights. Lastly, the arbitrator accepts this conclusion and, as Mr. McKay pointed out in his letter of April 17, 1992, quoting a financial columnist in *The Gazette*, [English in the original] *"Trust is the bedrock on which good labour relations or any other kind of human relations are built... Once a deal is made, you stick to it. Otherwise, your word is worth nothing"*.

For all these reasons, the arbitrator allowed the grievance and ordered the employer to submit to the process of exchanging best final offers. He declared that the employer had to respect the tripartite agreements signed in 1982 and 1987, which were still in force, and ordered the employer to pay each of the complainants the salary and other benefits deriving from the agreements, including any salary or benefit lost as a result of the lock-out.

The appellants acknowledged that the last conclusion ordering that the conditions prevailing prior to the award be maintained until the final award was handed down was rendered inadvertently since it had been proposed in case the arbitrator was asked to make an interim order before his final award, which did not happen. This conclusion must therefore be ignored.

The Superior Court decision

The judge of the Superior Court concluded that the arbitrator had made an error in qualifying the tripartite agreements as "civil contracts" that existed independently of the collective agreement. She pointed out that the Supreme Court had affirmed on several occasions that the collective nature of labour relations overrides, for all practical purposes, the individual rights of the employees governed by a collective agreement. The collective agreement deals with the same working conditions as the agreement. The latter cannot, then, be interpreted as a suppletive legal writing.

The arbitrator exceeded his jurisdiction in concluding that independent civil agreements existed that would produce effects after the 1993-1996 collective agreement expired and would reinstate the optional final offers mechanism abolished by that collective agreement. Article XI of the 1987 agreement stated in addition that the agreement would no longer be in force once one of the parties had exercised its right to

strike or to a lock-out. It could not, then, come into force or produce effects after the lock-out.

According to the judge, the individual agreements were signed by the typographers in case the union was decertified. As long as the union remained the employees' representative, the agreements appended to the collective agreement were subject to the collective bargaining process. She was of the opinion that, even if one of the provisions of the agreements stated the opposite, the union and the employer could raise the subjects contemplated by the agreements. Moreover, the 1982 agreement was the subject of negotiations in 1987 and neither the union nor the employees objected.

The introductory clause in the collective agreements stating that the agreement was part of the collective agreement "without that fact affecting its civil effects outside the collective agreement and that it remained in force despite the expiration of the collective agreement" served only to protect the employees against any future decertification of the union and to avoid having to renegotiate the agreements every time the collective agreement was renewed. These agreements remained in force but only produced civil effects if the union ceased to exist or ceased to be the certified bargaining agent.

The judge added that the parties had expressly provided for the possibility of a strike or a lock-out in articles X and XI of the 1987 agreement, and in article 2(b) of the collective agreement as of 1987. They therefore wanted to set up the same system for renewing the agreement as was used in renewing the collective agreement. Moreover, the lock-out was an essential mechanism of the system governing labour relations. Only an express provision could have limited the employer's right to declare a lock-out.

The arbitrator therefore committed an error of jurisdiction when he concluded that autonomous agreements existed that would survive the collective agreement and the lock-out. On June 4, when the grievance was filed, there was no longer any collective agreement to give an arbitrator jurisdiction. Moreover, the judge was of the opinion that the arbitrator's conclusions were patently unreasonable.

Grounds for appeal

Essentially, it is a matter of determining the nature and scope of the tripartite agreements of 1982 and 1987 in order to decide whether they could still produce effects after the lock-out of June 3, 1996. *Underlying this question is the issue of whether the arbitrator had the original jurisdiction to dispose of the grievance of June 4, 1996.*

Analysis

1. Arbitrator's original jurisdiction

The arbitrator had to decide whether, despite the lock-out, the 1982 and 1987 tripartite agreements could produce their effects independently of article 2(b) and Appendix C-1 of the last collective agreement, to which, moreover, the tripartite agreements had been appended.

Before both the adjudicator and the Superior Court, the union and the 11 employees consistently argued, as their main ground, that the declaration of a lock-out by the employer on June 3, 1996 did not suspend the application of appendices B and C, which reproduced the texts of the 1982 and 1987 tripartite agreements. The latter remained in full force when the collective labour agreement expired, and the grievance filed by the union and the 11 employees could be allowed on that basis.

Subsidiarily, the union and the 11 employees argued before the arbitrator that, even if he could not rely on texts that resembled a labour agreement to allow the grievance, he could interpret and apply the tripartite agreements as civil agreements independent of any collective labour agreement. Whatever the source of the right invoked, the conclusions the arbitrator reached should be the same.

The employer never recognized the arbitrator's jurisdiction other than as an adjudicator within the meaning of the *Labour Code*, named in accordance with the 1993-1996 collective agreement. It formally restated the bases of the arbitrator's jurisdiction at the hearing before him and opposed the presence of the 11 employees as parties that could intervene personally in arbitration proceedings before an arbitrator.

The grievance, as stated, was submitted under the collective labour agreement and the tripartite agreements made in 1982 and 1987. These agreements contained the following grievance procedure:

> [Translation]
>
> **IX - GRIEVANCE PROCEDURE**
>
> **In case of a disagreement over the interpretation, application and/or alleged violation of this agreement, the matter will be deemed a grievance and settled in the manner provided for in the grievance and arbitration procedures of the collective agreement between the Company and the Union in force at the time the grievance is filed. The parties acknowledge that the arbitrator's award will be final and binding.**
>
> **Should the Union cease to exist or no longer be the certified bargaining agent, an employee named in Appendix II may have recourse to the grievance procedure provided for in the Québec *Labour Code*.**
> **(emphasis added)**

Access to the grievance procedure to settle any disagreement resulting from the provisions of the agreements seems, from the text, to require that a collective agreement

be in force. Consequently, the employer argues that the arbitrator had necessarily to base his decision on a collective agreement that was still in force and producing its effects. However, on June 4, the collective labour relations of the parties were in what is described as a legislative vacuum and the union could no longer contest the situation through a grievance because there was no longer any grievance procedure.

The arbitrator therefore overstepped his powers when he sat as an adjudicator, and the intervention of the Superior Court was justified.

In her decision, the judge of the Superior Court mentions that the arbitrator "could only hear of and dispose of grievances" and that he had never been named a consensual arbitrator and that "since the agreements did not include any arbitration clause, it must be concluded that the arbitrator took on a dispute that he described as civil, for which he did not have jurisdiction".

However, she failed to consider the following facts:

(1) The grievance of June 4, 1996 stated that:

> [Translation]
>
> **The present grievance is filed under the collective labour agreement and each of the tripartite agreements concluded on or about November 12, 1982 and March 5, 1987.**

(2) The 1982 and 1987 tripartite agreements stipulated in the clause on grievance procedures that:

> [Translation]
> **In case of a disagreement over the interpretation, application and/or alleged violation of this agreement, the matter will be deemed a grievance and settled in the manner provided for in the grievance and arbitration procedures of the collective agreement,** (emphasis added)

(3) Arbitrator Sylvestre was named by mutual consent to settle the parties' grievances.

The specific grievance procedure contained in each of the tripartite agreements of 1982 and 1987 constitutes, in my opinion, a perfect arbitration clause obliging the parties to carry out the agreements under the system of general law. The grievance procedure provided for in the collective agreement and to which the arbitration clause refers only serves as a procedural framework for applying the arbitration clause.

An examination of all the provisions of the agreements clearly shows that the parties wanted the procedure provided for in the collective labour agreement to be used to force the execution of the commitments mutually contracted by the three parties under the agreements. Although the clause on this procedure refers to "the collective agreement in force at the time of the grievance", the clause as a whole implies that the last collective agreement in force is being referred to since it is only once the collective agreement has expired that the agreements come into force in keeping with the parties' wishes. In fact, clause II of the 1987 agreement expressly stipulates that:

> *[Translation]*
> **II - APPLICATION - This agreement applies to all the employees of the Composing Room (and those transferred to the Shipping Department) as at March 5, 1987 who signed the agreement and who had signed the previous agreement (Job security - Technological changes) and whose names appear in Appendix II attached to these presents. These employees are covered by the present agreement only if they remain members in good standing of the Union. The agreement will apply to transferred employees only when such employees work in the Composing Room.**
>
> **The present agreement will come into force only once the collective labour agreement between the above-mentioned Employer and Union or a subsequent collective agreement terminates, is removed, is cancelled, or lapses or becomes inapplicable for any other reason.**

The employer was wrong, relying on the second paragraph of clause IX on grievance procedures, to conclude that a consensual arbitrator could only be named once the union had ceased to exist or was no longer the certified bargaining agent.

Arbitrator Sylvestre seems to have taken on this very role of consensual arbitrator since, in essence, the award notes that the 1982 and 1987 agreements went into effect as autonomous civil agreements with the lock-out of June 3, 1996.

We must ask ourselves, however, whether the arbitrator exceeded his jurisdiction in concluding (1) that autonomous civil agreements could exist alongside the collective system provided for in the *Labour Code*, (2) that these agreements survived the award by arbitrator Leboeuf and (3) that they continued to produce effects despite the lock-out.

The employer invoked these grounds in a motion for judicial review and the appellants did not oppose this method of procedure. However, the Superior Court's power of review, provided for in article 846 C.C.P., is not available against the award of a purely consensual arbitrator, as our Court decided in *Tuyaux Atlas, une division de Atlas Turner inc. v. Savard*[1] and as now expressed in article 947 C.C.P.

This article states that an application for cancellation is the only recourse possible against an award made under an arbitration clause. Cancellation is obtained by motion to the court or by opposition to a motion for homologation. The court to which the application is made cannot enquire into the merits of the dispute (articles 946.2 and 947.2

1 [1985] C.A. 556; See *Régie intermunicipale de l'eau Tracy v. Construction Méridien inc.* [1996] R.J.Q. 1236 (S.C.); see Denis Ferland, "Chroniques, Le recours en évocation est-il recevable pour contrôler la légalité d'une sentence d'un arbitre consensuel?" (1968) 46 R. du B. 278-281; L. Marquis, "La compétence arbitrale: une place au soleil ou à l'ombre du pouvoir judiciaire", (1990) 21 R.D.U.S. 305, 327.

C.C.P.). It can only cancel or set aside the award if it is established under article 946.4 C.C.P. that:

> **(1) one of the parties was not qualified to enter into the arbitration agreement;**
>
> **(2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec;**
>
> **(3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;**
>
> **(4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or**
>
> **(5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.**
>
> ***However, in the case of subparagraph 4 of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.***

This point was not argued by the parties. However, since the grounds raised in the motion for judicial review do not differ essentially from those that could have been invoked under article 946.4 to apply for cancellation of the arbitration award, they should be studied.

In *Navigation Sonamar Inc.* v. *Steamships Ltd.*,[2] Gonthier J., then of the Superior Court, mentioned that the restrictive provisions of the *Code of Civil Procedure* in the chapter on arbitration awards are similar to the criteria set by the Supreme Court in *Blanchard* v. *Control Data Canada Ltd.*[3] for substantiating a decision by an administrative tribunal protected by a privative clause on judicial review. Referring to the

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2 [1987] R.J.Q. 1347 (S.C.).
3 [1984] 2 S.C.R. 476.

decision he handed down in *J. H. Dupuis Ltd.* v. *Résidence Jean de la Lande inc.*,[4] he reaffirmed that it should be possible to invoke only those errors involving nullity, that is, errors on points of fact or law affecting jurisdiction, or errors on points of public order, including rules of natural justice.[5]

The employer's allegations with respect to the errors made by the arbitrator must be examined within these parameters.

2. Did the arbitrator err in interpreting the nature, the scope or the effects of the tripartite agreements of 1982 and 1987?

The grievance was filed in order to determine whether the clauses on full-time employment with full salary, as well as the compulsory collective agreement renewal process used to ensure that the guarantees of job security given in prior agreements and collective agreements were maintained, acquired all their effect when the collective agreement expired on June 3, 1996, without there being any need to take into account the arbitral award Mtre. Leboeuf made in 1994, which ended the compulsory collective agreement renewal process.

This renewal process was part of the 1987 tripartite agreement that was added to the 1982 agreement guaranteeing job security. The employer promised to guarantee each typographer a full-time position with full salary until the last typographer had reached the age of 65, in return for the right to introduce technological changes. In 1987, the parties and the employees concerned added two important chapters to the first agreement: salary indexation and the procedure for renewing the collective agreement. The parties and the employees signed clause XI, which stated that if they could not agree on the renewal of

4 J.E. 81-500 (S.C.).

5 *See also Exploitation minière A-Pri-Or inc.* v. *Ressources Étang d'Or* [1988] R.D.J. 102 (S.C.); *Beaudry* v. *151444 Canada inc.*, J.E. 90-1257 (S.C.); *Leisure Products Ltd* v. *Funwear Fashions Inc.*, J.E. 88-1394 (S.C.); *Di Stefano* v. *Lenscrafters Inc.* [1994] R.J.Q. 1618 (S.C.).

the collective agreement, they must request an exchange of best final offers and, if no agreement could be reached, submit the matter to an arbitrator whose decision would be final and binding. In this way, they wanted to confirm the right to strike and to a lock-out while imposing a limit on the duration of those measures in the form of obligatory recourse to arbitration.

To ensure the permanence of the guarantees given the employees, the parties agreed not to raise the objects of the agreements during future negotiations but to keep them in force until the last employees concerned had reached the age of 65. These agreements, in keeping with the wishes of the parties, were integrated into the collective agreements, including that of 1993-1996, along with the introductory clause stating that the civil effects of the agreements would be preserved but would only come into effect outside the collective agreements.

The state of the law on the duration of collective agreements and the working conditions that they could cover is clearly established. Our Court, in *Parent* v. *The Gazette*[6] and *Journal de Montréal, division du groupe Québécor inc.* v. *Hamelin*,[7] recognized the validity of tripartite agreements incorporated into collective agreements, whose duration extends beyond the duration of the collective agreement itself. The *Labour Code* was actually amended in 1994[8] to allow collective agreements to run for more than three years.

The survival of certain obligations and working conditions established by collective agreement was also recognized. The Supreme Court, in *Caimaw* v. *Paccar of Canada Ltd.*,[9] recalled that the obligation to bargain collectively in good faith could not

6 [1991] R.L. 625 (C.A.).
7 [1996] R.D.J. 519 (C.A.).
8 S.Q. 1994, c. 6.
9 [1989] 2 S.C.R. 983.

be limited to cases where the collective agreement was still in force. The expiry of the collective agreement does not affect this obligation and, as long as this obligation remained, then the tripartite relationship of union, employer and employee brought about by the *Labour Code* displaced common law concepts.[10]

In *Bradburn* v. *Wentworth Arms Hotel*,[11] the Supreme Court upheld the validity of a clause that stated that the working conditions would continue to apply until a new collective agreement was signed. The contested clause in that case was not sufficient, however, to overrule the right to strike and to a lock-out recognized by Ontario's labour laws.

Québec's *Labour Code* also makes it possible to maintain certain working conditions after a collective agreement has expired and even during a strike or lock-out. In *Consolidated Bathurst* v. *Syndicat national des pâtes et papiers de Port-Alfred*,[12] the union asked that certain employees who belonged to the bargaining unit on strike be returned to work and paid accordingly. Lebel J. recognized the validity of a clause in the collective agreement that maintained the working conditions and salary of security guards during a legal strike. Not only did the arbitrators have the jurisdiction to decide this point during the post-collective agreement period, but, in addition, the agreement was lawful.

The 1987 agreement, which, essentially, reiterates that of 1982, contains a number of clauses that provide for the survival of the working conditions when a collective agreement expires. To clause II, quoted above, was added:

---

10 *Ibid.* La Forest J., at 1007-1008.
11 [1979] 1 S.C.R. 846.
12 [1987] R.J.Q. 520 (C.A.).

[Translation]

...

III. - *DURATION OF AGREEMENT* This agreement will remain in force until all the employees contemplated by it have stopped working, as provided for in Article VI below. Subject to articles V and X below, no party will raise the objects of this present agreement during future negotiations to renew a collective agreement.

IV. - *JOB SECURITY* All the terms and conditions of "Job security and manpower surplus" (article 25 and letters of understanding re: Notice of surplus manpower and Surplus manpower) of the 1987-1990 collective agreement are maintained unless a mutual agreement is reached between the Company and the representatives of its employees.

...

VI. - *LOSS OF PROTECTION* This Agreement shall cease to apply to an employee only in one of the following cases:

1. death of the employee;
2. voluntary resignation of a regular full-time employee;
3. date stipulated in Appendix II for each employee, regardless of the status of such employee in the Company after that date;
4. final dismissal by the company. Dismissal shall only be the result of a serious offence and, if a grievance is filed, the dismissal must be upheld in arbitration. This interpretation of the term final dismissal shall be changed only by mutual agreement to amend the collective agreement.

VII. - RIGHT TO FOLLOW This Agreement will remain in force despite any change in owner of The Gazette (even if the corporate name were to change). Therefore, this Agreement shall bind any purchaser, successor or assignee of the Company.

...

Moreover, the reproduction of these clauses in the collective agreements was preceded by an introductory text stating that the agreements were part of the collective agreement without that fact affecting their civil effects outside the agreement and that it was the intention of the parties that they remain in full force, subject to the terms and conditions therein, notwithstanding the expiry of the collective agreement.

These various provisions create vested rights collectively that must survive the expiration of the collective agreement. The arbitrator rightly pointed out, in my view, that the present situation is different from those examined in *La Compagnie Paquet Ltée* v. *Syndicat catholique des employés de magasins de Québec Inc.*,[13] *McGavin Toastmaster Ltd* v. *Ainscough*,[14] *Hémond* v. *Coopérative fédérée du Québec*,[15] *Caimaw* v. *Paccar of Canada Ltd.*,[16] and *Maribro Inc.* v. *L'union des employés(ées) de service, local 298*,[17] where the employer reached agreements with individuals. These decisions dealt with the rejection of common law or private civil law only insofar as it related to individual employment contracts.[18]

In the case at bar, the two agreements were signed by three parties, the employer, the union and the 11 complainants. As the arbitrator pointed out, the effect of these proceedings is unusual but is nonetheless the wish of the parties. The union and the employer created vested rights for the typographers, including the right to job security until the age of 65, a salary adjusted to the cost of living and a compulsory arbitration mechanism. Nothing in the law precludes such a solution.

It does not seem to me that the principle of the union's monopoly of representation is at issue in this case, since the three parties–employees, union and employer–all signed the two agreements. Moreover, these same agreements state that the employees are covered only insofar as they remain union members. In *Bradburn*, cited above, Estey J. recognized the primacy of collective agreements over individual working conditions. He added, however, that where not barred by statute the parties of course can, by unambiguous language, bring about results which others might consider to be

13 [1959] S.C.R. 206.
14 [1976] 1 S.C.R. 718.
15 [1989] 2 S.C.R. 962.
16 *Supra* note 9.
17 [1992] R.J.Q. 572 (C.A.).
18 See La Forest J. in *Caimaw* v. *Paccar of Canada Ltd.*, *supra* note 9, at 1006.

improvident.[19] In *Dayco*, the Supreme Court confirmed the decision of the arbitrator who declared he had jurisdiction since the advantages granted under the former collective agreement constituted vested rights the exercise of which could be requested after the end of the collective agreement. La Forest J. wrote:

> **In the end, I agree with the arbitrator's finding to the extent that retirement benefits *can (depending on the wording of the collective agreement)* vest in a collective sense for the benefit of retired workers, and any reduction in those benefits would be grievable at the instance of the union. Whether this vesting also creates a personal *right actionable by individual retirees* is a question that need not be decided in this appeal.[20]**

Therefore, it is incorrect to affirm categorically, as does the employer, that only the collective agreement can govern the working conditions of unionized employees, especially if the parties expressly saw to it that these working conditions would come into effect as independent civil agreements, should the collective agreement be cancelled, lapse or become inapplicable.

The question that arises now is whether the arbitrator erred in deciding that the working conditions contained in the 1982 and 1987 agreements would continue in force despite arbitrator Leboeuf's award and the lock-out.

The arbitrator decided that, despite the express provisions of arbitrator Leboeuf's award, which gave rise to the 1993-1996 collective agreement, the compulsory collective agreement renewal process and the right to a salary adjusted to the cost of living remained in force after the lock-out of June 3, 1996. Arbitrator Leboeuf, as we have seen, suppressed the obligatory mechanism provided for renewing collective agreements and reformulated as a result article 2(b) of the collective agreement and clause XI of the 1987 agreement to replace the compulsory mechanism with an optional one and the usual

19 *Supra* note 7, at 858.
20 [1993] 2 S.C.R. 230.

procedure for renewing any collective agreement. The employees did not sign appendices B-1 and C-1, which reproduced the amendments arbitrator Leboeuf brought to the 1982 and 1987 agreements.

The judge of the Superior Court concluded that the arbitrator had committed a patently unreasonable error by ignoring appendices B-1 and C-1, which substantially changed the 1982 and 1987 agreements. The award by arbitrator Leboeuf did not leave any room for interpretation with respect to the removal or repeal of clauses that were incompatible with appendices B and C. The introductory texts of appendices B-1 and C-1 clearly stated that:

> [Translation]
> **This agreement, as well as the present amendment, will be considered the only legal text replacing any preceding agreement(s) concluded on these points.**

She accepted the employer's argument that it was obvious that a renewal procedure set out in a collective agreement must necessarily survive the collective agreement's expiration and constitute a source of vested rights. It was not up to the arbitrator to change the award by arbitrator Leboeuf and reinstate the former renewal mechanism of best final offers he had removed. In doing so, the arbitrator exceeded his jurisdiction and rendered a patently unreasonable award.

The appellants claim that arbitrator Sylvestre's award did not contain any errors. The texts submitted to him show that the 1982 and 1987 agreements contained in appendices B and C reproduced in the 1993-1996 collective agreement had a clearly stated duration: they were to apply until 2017, whereas appendices B-1 and C-1 resulting from Leboeuf's arbitral award were valid only for the duration of the collective agreement. Arbitrator Sylvestre made a distinction between the 1993-1996 collective agreement, which remained in effect until the exercise of the right to strike or to a lock-

out, and the 1987 tripartite agreement which came into effect when the collective agreement became inapplicable, for instance during a lock-out.

The three parties to the agreements expressly stated that the working conditions set out in the agreements and reproduced in the collective agreements were to remain in force until all the employees contemplated by the agreements had stopped work, as long as they were still union members in good standing. The parties agreed not to raise any of the objects of the agreements during future negotiations. The 1982 and 1987 agreements were reproduced in full in the 1993-1996 collective agreement, with their introductory text specifying that the conditions in them remained in full force notwithstanding the expiration of the collective agreement.

These agreements are not individual work contracts. They are tripartite contracts that exist only through the will of the signatories even if their incorporation into the collective agreement may have extended their effects to an employee who had not signed them.[21] These agreements deal with vested rights, collectively speaking, and cannot be changed by the union and the employer without the consent of the employees. Otherwise, the duration of the agreements desired by all the parties would be repudiated and the employees would then have signed a fool's agreement.

In my view, the arbitrator did not commit an error in concluding that, as arbitrator, he had to respect the award by Leboeuf for the duration of the collective agreement, which is why he dismissed the grievance of May 8, 1996, but that when the collective agreement expired, he could acknowledge the full effect of the working conditions contained in the tripartite agreements. When they signed those agreements,

21 See *The Gazette* v. *Parent*, *supra* note 2.

which they appended to the collective agreements, the parties intended to make job security, the guaranteed salary, the agreement not to renegotiate and the renewal process for the collective agreement last until 2017. It was to ensure these guarantees and protective measures that they created the specific mechanism found in the agreements which were to survive all the collective agreements negotiated every three years, and that they provided for a consensual arbitration process to settle any disagreement on the interpretation, application or violation of these agreements.

In interpreting the texts submitted to him, the arbitrator was justified in concluding that the obligatory process for renewing the collective agreement provided for in article XI of the 1987 agreement had not been terminated by arbitrator Leboeuf's award, and that the employer failed to meet its obligations when it did not respond to the union's request, on April 30, 1996, that it submit its best final offers.

However, article XI of the 1987 agreement recognizes the employer's right to declare a lock-out. The appellants did not contest this fact before the arbitrator. They requested that this right be accompanied by the obligatory procedure for renewing the collective agreement provided for in article XI and that during the lock-out, the employer continue to pay the salaries and other fringe benefits, arguing that the COLA clause guaranteed them a certain standard of living, even during a lock-out.

In granting this last part of the appellant's request and ordering the employer (1) to continue paying each of the complainants the salary and other benefits resulting from the 1982 and 1987 tripartite agreements and (2) to reimburse any salary or other benefit lost because of the lock-out, with interest, the arbitrator made an error that justified judicial intervention.

By taking it for granted that article XI does not present an obstacle to continued access to employment and a regular salary adjusted to the cost of living during a lock-out, the arbitrator gave the provisions of the agreement a meaning they could not reasonably have.

Whatever the scope of the clauses on job security, a guaranteed salary adjusted to the cost of living, the duration of the agreements and their non-renegotiation, they do not change the content of article XI of the 1987 agreement, which permits the exercise of the right to strike and to a lock-out. The usual effect of a lock-out is to suspend the employer's obligation to pay the employees' salaries and to permit their access to work. Article XI in no way deprives the employer of this right, which is enshrined in labour relations.

However, this last article does set a limit on the exercise of the right to a lock-out, as it provides for a compulsory process for renewing the collective agreement through the arbitration of the best final offers. It necessarily ensures that any labour conflict will eventually end with the imposition by a third party of a new collective agreement. It may be that the lock-out was unduly prolonged by the employer's refusal to exchange best final offers as the union asked it to do within the time period provided for on April 30, 1996, and that the employees are accordingly entitled to damages. That will be for the arbitrator to decide.

Reflect page 2

THEREFORE, I would ALLOW the appeal in part, ORDER the employer to submit to the process of exchanging best final offers within the 30 days following this decision, QUASH the two orders on payment and reimbursement of the salaries and benefits lost because of the lock-out and RETURN the file to the arbitrator, who will determine whether any damages should be awarded the 11 employees as a result of the employer's failure to respect article XI of the 1987 agreement.

The whole WITH COSTS in both courts.

(s) Thérèse Rousseau-Houle J.A.

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TAB B

** Unofficial Translation **

Case Name:

Gazette (The), a division of Southam Inc. v. Blondin

THE GAZETTE, a Division of Southam Inc., APPELANT/Mis en cause
v.
RITA BLONDIN, ERIBERTO DI PAOLO, UMED GOHIL, HORACE HOLLOWAY, PIERRE REBETEZ, MICHAEL THOMSON, JOSEPH BRAZEAU, ROBERT DAVIES, JEAN-PIERRE MARTIN, LESLIE STOCKWELL and MARC-ANDRÉ TREMBLAY, RESPONDENTS/Plaintiffs
and
Mtre ANDRÉ SYLVESTRE, MIS EN CAUSE/Respondent
and
THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 145, MIS EN CAUSE/Mis en cause

[2003] Q.J. No. 9433

[2003] J.Q. no 9433

[2003] R.J.Q. 2090

J.E. 2003-1589

[2003] R.J.D.T. 1108

127 A.C.W.S. (3d) 459

REJB 2003-45981

2003 CanLII 33868

No.: 500-09-011439-015 (500-05-061257-000)

Quebec Court of Appeal
District of Montreal

**The Honourable Louise Mailhot J.A., François Pelletier J.A.
and Yves-Marie Morissette J.A.**

Heard: December 10, 2002.
Judgment: August 6, 2003.

(52 paras.)

Civil procedure -- Alternative dispute resolution -- Consensual arbitration -- Arbitration award -- Annulment -- The Gazette appealed from a judgment of the Superior Court that annulled in part an arbitral award -- The arbitrator decided on an interim award in the interests of procedural convenience, and this award had no bearing on his competence or the arbitrability of the dispute before him, but concerned the merits of this dispute -- Article 943.1 of the Code of Civil Procedure was inapplicable here -- The Superior Court was therefore not authorized to use this provision to review, as it did, the award -- Appeal allowed.

The Gazette appealed from a judgment of the Superior Court that annulled in part an arbitral award characterized as interim, and referred the case back to the arbitrator so that he could assume full jurisdiction over the dispute that had been brought before him. The Gazette was the employer of the 11 respondents. The origin of the dispute lay in two sets of tripartite agreements reached in 1982 and 1987 between the Gazette, each respondent individually, and the mis en cause, a union authorized to represent the respondents against the Gazette. The 1982 and 1987 agreements provided for an arbitration procedure for resolving any disagreements that might arise over the meaning of the agreements for as long as they remain in force between the parties. April 30, 1993 saw the expiry of a collective agreement pertaining to the respondents' bargaining unit of which the agreements of 1982 and 1987 form an integral part. Several disagreements between the parties ensued, which led to arbitration proceedings. Arbitrator Sylvestre made an interim award concerning damages to compensate lost wages and other benefits specified in the collective agreement. The respondents attacked this award. The Superior Court reviewed the arbitral award rendered by arbitrator Sylvestre, inasmuch as he declared himself without jurisdiction to award any damages other than the salary and other benefits specified in the collective agreement or the agreements of 1982 and 1987, and referred the file back to the him so that he could assume full jurisdiction with regard to the damages that the respondents might claim in the matter before him. The Gazette argued that the respondents had not applied for the annulment of the award and that the decision of the Superior Court constituted an annulment. The Gazette added that the arbitrator did not err in law by ruling that the respondents' claims for damages were to be limited to the wages and benefits lost during the lockout and that the respondents had in any case acquiesced to the arbitrator's conclusions regarding acceptable damages.

HELD : Appeal allowed. The arbitrator decided on an interim award in the interests of procedural convenience, and this award had no bearing on his competence or the arbitrability of the dispute before him, but concerned the merits of this dispute. Article 943.1 of the Code of Civil Procedure

was inapplicable here. The Superior Court was therefore not authorized to use this provision to review, as it did, the award.

Statutes, Regulations and Rules Cited:

Code of Civil Procedure, art. 33, art. 846, art. 940, art. 940.3, art. 941.3, art. 942.7, art. 943.1, art. 943.2, art. 944.10, art. 944, art. 945.8, art. 946.1, art. 946.2, art. 946.4, art. 946.4(4), art. 947, art. 947.1, art. 947.2

Labour Code, R.S.Q. c. C-27, s. 1(e), s. 1(f)

Counsel:

Mtre Ronald McRobie and Mtre Dominique Monet (FASKEN, MARTINEAU, DUMOULIN), counsel for the Appellant.

Mtre Martin Brunet (MONTY, COULOMBE), counsel for the Respondent.

Mtre Pierre Grenier (MELANÇON, MARCEAU), counsel for the Mis en cause.

JUDGMENT

1 THE COURT; - On the appeal from a judgment rendered on September 4, 2001 by the Superior Court, District of Montreal (the Honourable Nicole Duval Hesler), which granted in part and with costs the respondents' application for an annulment of the arbitration award;

2 Having examined the file, heard the parties, and on the whole deliberated;

3 For the reasons of Morissette J.A., with which Louise Mailhot and François Pelletier JJ.A. agree;

4 Allows the appeal with costs;

5 Reverses the judgment, quashing in part the arbitral award of arbitrator André Sylvestre of October 11, 2000, dismisses with costs the respondents' application for annulment dated November 10, 2000 and remits the case to the arbitrator so that he may continue the hearing of the disagreement and dispose of it solely on its merits.

LOUISE MAILHOT J.A.
FRANÇOIS PELLETIER J.A.
YVES-MARIE MORISSETTE J.A.

DECISION OF MORISSETTE J.A.

6 The appellant appeals from a judgment of the Superior Court that annulled in part an arbitral award characterized as interim, and referred the case back to the arbitrator so that he may "assume full jurisdiction" over the dispute that had been brought before him.

7 For the following reasons, I would allow the appeal, restore the award annulled by the Superior Court, and refer the case back to the arbitrator so that, after hearing the parties, he may render a decision on the merits.

The main facts

8 This case has a long history. The appellant, the daily newspaper The Gazette, is the respondents' employer. The respondents, 11 in number, work in the appellant's composing room.

A. Contractual framework

9 The direct, albeit distant, origin of the dispute lies in two sets of tripartite agreements reached in 1982 and 1987 between the appellant, each respondent individually, and the mis en cause, a union authorized to represent the respondents against the appellant.

10 These agreements are subordinate to collective agreements between the appellant and the union because, although they have remained in force ever since they were signed, they are fully applicable only between the expiry of one collective agreement and its replacement by a new one. In fact, their general purpose is to enable the appellant to bring about certain important technological changes in the newspaper's composition methods while preserving, to the degree negotiated by the union and agreed upon by each employee, the acquired rights of the members of the bargaining unit to which the respondents belong. The respondents are typographers, practitioners of a trade whose disappearance was already being predicted in the early 1980s and that has certainly declined appreciably since then. In 1982, the appellant had about 200 typographers in its employ. Only 11 remain today.

11 This Court has ruled on the nature, scope, and validity of the agreements of 1982 and 1987 on two occasions: first in *Parent v. The Gazette*,[1] then in *Communications, Energy and Paperworkers Union of Canada Local 145 v. The Gazette.*[2] The latter decision, which I will refer to here as *Gazette (No. 1)*, is the one that is most relevant for our purposes, however, since it brings together the same parties at an earlier stage of the same dispute, and provides a number of valuable guidelines for the resolution of this appeal.

12 In describing the effect of the 1982 and 1987 agreements, our colleague Rousseau-Houle J.A. observed on behalf of the court in *Gazette No. 1*: [TRANSLATION] "[these agreements] essentially ensure: 1) a guarantee of employment and wages, 2) an agreement of non-renegotiation of guaranteed protections, and 3) a mandatory process for renewing the collective agreement".[3]

13 Under the terms of the agreements in question, all signatory employees retain their employment with the appellant in conditions similar to those negotiated in 1982 but with wage indexing until their death, resignation, dismissal confirmed by an arbitral award, or departure upon reaching the age of retirement. At the time of the signing of the agreements in 1982 and 1987, the last departures due to retirement were foreseen in 2017. Therefore, these agreements originally had a potential duration of 35 and 30 years, respectively.

14 In addition to the provisions relating to the acquired rights of the signatory employees, the 1982 and 1987 agreements provide for an arbitration procedure for resolving any disagreements that might arise over the meaning of the agreements for as long as they remain in force between the parties. Article IX of the 1987 agreement substantially repeats Article VII of the 1982 agreement and states as follows:

> IX. GRIEVANCE PROCEDURE - In the event of a disagreement with respect to the interpretation, application, and/or alleged violation of this agreement, the matter shall be deemed to be a grievance and shall be submitted and disposed of in accordance with the grievance and arbitration procedures in the collective agreement between the Company and the Union, which is in effect at the time that the grievance is initiated. The parties agree that the decision of the arbitrator shall be final and binding. In the case where the Union is no longer the accredited bargaining agent, an employee who is named in Appendix "ii" may have recourse to the procedure for the resolution of grievances provided by the Quebec Labour Code.

Gazette No. 1 deals with the legal characterization of this arbitration procedure. It establishes that the procedure is indeed consensual, being based on [TRANSLATION] "a perfect arbitration clause obliging the parties to carry out the agreements in accordance with the ordinary rules of law. The grievance procedure in the collective agreement to which the arbitration clause refers is used only as a procedural framework for applying the latter."[4] It results from this analysis that "disagreements" subject to arbitration under the terms of Article IX of the 1987 agreement are neither "grievances" within the meaning of para. 1(*f*) of the *Labour Code*, R.S.Q. c. C-27, since they do not relate to the "interpretation or application of a collective agreement", nor "disputes" within the meaning of para. 1(*e*) of the same *Code*, since it is not a question of a "disagreement respecting the negotiation or renewal of a collective agreement or its revision by the parties under a clause expressly permitting the same". These "disagreements" are actually "disputes" within the meaning of 944 *C.C.P.*

15 Also, Article XI of the 1987 agreement sets forth the terms for renewing collective agreements, as follows:

> XI. RENEWAL OF COLLECTIVE AGREEMENTS AND SETTLEMENT OF DISPUTES - Within ninety (90) days before the termination of the collective agreement, the Employer and the Union may initiate negotiations for a new

> contract. The terms and conditions of the agreement shall remain in effect until an agreement is reached, a decision is rendered by an arbitrator, or until one or the other of the parties exercises its right to strike or lock-out.
>
> Within the two weeks preceding acquiring the right to strike or lock-out, including the acquisition of such right through the application of Article X of the present agreement, either of the parties may request the exchange of "Last final best offers", and both parties shall do so simultaneously and in writing within the following forty-eight (48) hours or another time period if mutually agreed by the parties. The "Last final best offers" shall contain only those clauses or portions of clauses upon which the parties have not already agreed. Should there still not be agreement before the right to strike or lock-out is acquired, either of the parties may submit the disagreement to an arbitrator selected in accordance with the grievance procedure in the collective agreement. In such an event, the arbitrator, after having given both parties the opportunity to make presentations on the merits of their proposals, must retain in its entirety either one or the other of the "Last final best offers" and reject, in its entirety, the other. The arbitrator's decision shall be final and binding on both parties and it shall become an integral part of the collective agreement.

The latter provision, as will be seen, acquires decisive importance in the current dispute between the appellant and the respondents.

A. History of the disagreement

16 In order to better understand the origins of the disagreement submitted to arbitration, a short chronology of the relationship between the parties follows. Several of these facts have already been presented in *Gazette No. 1*.

17 April 30, 1993 saw the expiry of a collective agreement pertaining to the respondents' bargaining unit of which the agreements of 1982 and 1987 form an integral part. The negotiations that followed gave rise to a disagreement within the meaning of the *Labour Code* as well as a lockout, which was declared on May 17, 1993. On August 18, 1994, arbitrator Leboeuf resolved this disagreement by issuing an arbitral award (hereinafter, the Leboeuf award) that took the place of a collective agreement until April 30, 1996. Although the validity of this award was not contested in court, *Gazette No. 1*[5] established that the award contravenes the agreements of 1982 and 1987, especially since it makes the mandatory final offer arbitration procedure in Article XI of the 1987 agreement optional, and because it permits the appellant to transfer its personnel in order to close down its composition room should the need arise.

18 Between August 18 and October 1, 1994, fifty-one of the sixty-two typographers still employed accepted the job security buy-back offers from the appellant.

19 On April 25, 1996, arbitrator Foisy rendered a decision[6] on a disagreement characterized as a "grievance" resulting from the appellant closing down the composition room. The arbitrator concluded that this closure contravened Article III of the 1982 agreement and ordered the appellant to reopen the composition room and reinstate the eleven plaintiffs, the same eleven respondents as in this appeal. (Arbitrator Foisy noted, however, that "the eleven respondents suffered no monetary losses, as they have been compensated under the terms of the collective agreement [since it came into force].")

20 Five days later, on April 30, 1996, the collective agreement resulting from the Leboeuf award terminated. The same day, the Union invited the appellant to proceed to final offer arbitration. The appellant refused because, in its opinion, the final offer arbitration in Article XI of the 1987 agreement had ceased be mandatory since the Leboeuf award. As we know, this claim was rejected in *Gazette No. 1.*

21 Faced with this refusal, the union and the eleven employees formulated a first disagreement dated May 8, 1996, contesting the appellant's refusal to make final offers to them and requesting that certain parts of the Leboeuf award be declared unenforceable against them. On June 3, the appellant issued a lockout notice and ceased remuneration to the eleven respondents. Together with the eleven respondents, the union formulated a second disagreement, dated June 4, in which it attacked the legality of the lockout decreed by the appellant. This disagreement and the amendments that were made to it subsequently were the subject of two awards by arbitrator Sylvestre.

22 On February 5, 1998, arbitrator Sylvestre made a determination concerning the disagreements of May 8 and June 4, 1996 (hereinafter, Sylvestre award no.1). He dismissed the first disagreement insofar as it was introduced [TRANSLATION] "under the terms of the grievance adjudication procedure set forth in the [Leboeuf award] and seeks remedies that run contrary to the provisions of this imposed collective agreement".[7] He sustained the second disagreement and, among other conclusions, declared the 1982 and 1987 agreements to be still in force and unchanged, ordered the appellant to submit final offers to arbitration, and ordered it to refund to the respondents all salary and benefits lost as a result of the lockout.

23 On October 30, 1998, the Superior Court, seized with a motion for judicial review, quashed the part of Sylvestre award no.1 sustaining the disagreement of June 4, 1996.[8]

24 This judgment was appealed and reversed on December 15, 1999 in *Gazette No. 1.*[9] As noted above, this Court, *per* Rousseau-Houle J.A., in substance ruled that (1) arbitrator Sylvestre was seized with the disagreements of May 8 and June 3, 1996 in his capacity as consensual arbitrator (from which it should be understood that his award is given on "disputes" under art. 944 *C.C.P.*), (2) art. 946.4 *C.C.P.* exhaustively lists the reasons for refusal of homologation or annulment of such an award, (3) the agreements of 1982 and 1987 could not be modified without the consent of the signatory employees and the appellant was obliged to submit its final offer to arbitration, as the arbitrator correctly decided, but that (4) the arbitrator erred in justifying a judicial intervention by

deciding that, pursuant to the 1982 and 1987 agreements, the appellant was obliged to pay salary and social benefits during the lockout. For these reasons, the Court allowed the appeal, ordered the appellant to submit to the final offer arbitration procedure, and referred the file back to the arbitrator to rule on the disagreement in accordance with the law.

25 Two paragraphs of *Gazette No. 1* pertaining to Article XI of the 1987 agreement, above, proved to be critical in the later progress of the case:

> [TRANSLATION]
>
> Whatever the scope of the clauses relating to job security, guaranteed earnings adjusted to the cost of living, and the duration of agreements and their non-renegotiation, these clauses do not change the content of Article XI of the 1987 agreement that permits for the exercise of the right to strike and lock-out. The usual effect of a lockout is to suspend the employer's obligation to pay the wages of its employees and to allow them access to the workplace. Article XI in no way has the effect of depriving the employer of this right, which is guaranteed in area of labour relations.
>
> However, this article sets a limit on the exercise of the right of lockout by prescribing a mandatory process for renewing the collective agreement through best, final offer arbitration. It certainly ensures that any labour conflict may end with a third party imposing a new collective agreement. It is possible that the lockout was prolonged unduly as a result of the employer's refusal to submit his last final best offers as requested by the union within the time specified on April 30, 1996, and that, consequently, the employees are entitled to damages. This will be up to the arbitrator to decide.

26 Between February 25, 2000, the date of a pre-hearing conference convened by arbitrator Sylvestre in response to *Gazette No. 1* and October 28, 2000, the date on which the arbitrator was to inform the parties of his interim decision (Sylvestre award no. 2), the appellant, the respondents, and the union mis en cause continued their contestation of the disagreement of June 4, 1996. At the end of the pre-hearing conference of February 25, 2000, the parties agreed, in fact, that certain points of law relating to acceptable heads of damage would be subject to an interim decision by the arbitrator, after which the arbitration proceedings would attempt to get to the bottom of other issues, including the quantum of damages. In its initial phase, debate focused primarily on the heads of damage that the respondents could claim. On February 25, March 15, and June 9, the respondents, through their respective lawyers, modified their claim by specifying the heads of damage on which they based their claim. In order to arrive at a clearer understanding of Sylvestre award no. 2, I have chosen to quote these various claims.

27 The disagreement of June 4, 1996, which marked the starting point of the dispute before arbitrator Sylvestre, identified the redress sought by the respondents in the following terms:

> [TRANSLATION]
>
> 1- order the employer to subject itself to the last best offer process and to send its "last final best offers" to the union and the 11 respondents without delay:
>
> 2- declare the tripartite agreements concluded on or about November 12, 1982 and March 5, 1987 to be fully in force and oblige the employer to respect them;
>
> 3- order the employer to continue to pay each respondent the salary and other benefits arising out of the collective labour agreement and the tripartite agreements of November 1982 and March 1987;
>
> 4- order the refund of any lost wages and any benefits lost as a result of the lockout, the whole with interest;
>
> 5- make any other order aimed at safeguarding the rights of the parties. ...

At the pre-hearing conference on February 25, 2000, counsel for the respondents reconsidered the damages claimed by his clients and announced that in addition to lost salary and social benefits, other damages of a pecuniary, moral, and exemplary nature would be claimed. It was agreed that the respondents would send a written report to this effect on March 15, which was done. The list of damages now read as follows:

> 5. The employees claim:
>
> a) the equivalent of the salaries lost between May 3, 1996 and January 21, 2000
> b) other employment-related benefits (such as the pension plan, collective insurance plan, etc.) from May 3, 1996 to January 21, 2000.
>
> 6. The employees also claim compensation for monetary damage including:

a) tax damage, loss of interest, and loss of capitalization resulting from cashing in RRSPs;
b) tax damage, loss of interest, and loss of capitalization resulting from non-contribution to RRSPs;
c) interest and other charges resulting from personal loans or mortgage refinancing;
d) amounts spent on fees and claims that would have been covered by the employer's group insurance and were assumed by the employees;

7. Moreover, the employees request compensation for moral damage such as inconvenience, stress, anxiety, and impact on family life.
8. Certain employees also seek compensation for damage related to their physical and psychological health.
9. Finally, the arbitrator is asked to award exemplary damages based on the violation of constitutional and quasi-constitutional guarantees of the employees' right to health, safety, dignity, and fair and reasonable working conditions.

On June 9, 2000, new counsel for the respondents filed an undated document during the hearing, which on that day was chaired by arbitrator Sylvestre. This document, labeled S-54 at the time of the arbitration and R-8 in the trial before the Superior Court, contains a new list of heads of damages:

1. Loss of wages and benefits for the period commencing June 4th, 1996 to the effective date of resumption of work.
2. Lost benefits for the same period.
3. Restitution of the pension plan contributions and earnings for the same period.
4. Compensation for loss of RRSP contributions and earnings for the same period.
5. Compensation for losses incurred for cashing in RRSP's prematurely for the same period.
6. Compensation for cost of loans and mortgages.
7. Compensation for damages due to stress and anxiety and inconvenience as well as loss of enjoyment of life, impact on family and damages to health for the same period.
8. Moral damages and damages for abuse of rights.
9. Exemplary and punitive damages for the same period.
10. Compensation for all fiscal prejudice.
11. Compensation for job search costs and business losses for the same period.
12. Legal fees and costs.
13. Interest and the additional indemnity provided for under s. 100.12 of the *Labour Code*.
14. Reserve of jurisdiction for arbitrator Me André Sylvestre.

As can be seen, several heads of damage were added to the claim between the initial filing of the disagreement and the arbitrator's interim decision.

28 In parallel with these arbitration proceedings, the appellant filed proceedings in Superior Court against the respondents to recover a thing not due for overpayment of salaries and benefits paid between February 5, 1998 - the date on which Sylvestre award no. 1 concluded that the appellant could not order a lockout against the respondents - and October 30, 1998, the date on which the Superior Court quashed Sylvestre award no 1. In response to this action, the respondents filed a declinatory exception, which was allowed on August 14, 2001,[10] since the Court considered that the matter was the responsibility of arbitrator Sylvestre and that he would, if necessary, be able to arrange legal compensation for any sums paid in excess by the appellant.

29 Finally, around the time of the February 25, 2000 pre-hearing conference, namely, on March 6, 2000, the parties brought the "dispute"[11] still opposing them before arbitrator Ménard seeking an award decided on the basis of the final offers exchanged on January 21. A motion brought by the respondents for an injunction aimed at putting an end to the lockout declared by the appellant as of January 21, 2000, the date of submission of the final offers, was subsequently rejected by the Superior Court.[12] Arbitrator Ménard rendered his award on June 5, 2001 and defined the content of the collective agreement between the appellant and the respondents for the next five years. A motion for homologation of this award, presented by the union mis en cause and disputed by the appellant and the respondents for reasons that are not relevant here, was allowed by the Superior Court on May 2, 2002.[13]

30 Sylvestre award no. 2, which was quashed by the judgment under appeal before us, was rendered on September 28, 2000.[14] The detailed reasons on which the arbitrator based his award were submitted on October 11.

31 On September 4, 2001, the Superior Court annulled this award under arts. 943.1 and 947 *C.C.P.*[15]

The award challenged in Superior Court

32 Sylvestre award no. 2, it should be recalled, is an "interim" award.

33 On September 28, 2000 the arbitrator contacted the parties by mail to inform them of his decision, summarizing as follows the conclusions that the Superior Court would subsequently annul in part:

> [TRANSLATION]
>
> 2 - the damages to which the 11 plaintiffs [the respondents] are entitled shall be limited to the salaries and other benefits as set forth in the collective agreement,

> if it can be shown, in the words of the Court of Appeal [TRANSLATION] "that the lockout was unduly prolonged as a result of the employer's refusal to submit its last final best offers as requested by the union before the specified deadline of April 30, 1996";
>
> 3 - in addition, as stipulated [by counsel for the respondents], the period of the claim shall end on January 21, 2000, the date on which the employer shall submit its last final best offers;
>
> 4 - each respondent shall, within a reasonable time, produce a document detailing the sums claimed in terms of wages and benefits lost during the period from June 6, 1996 to January 21, 2000 and of employment earnings received during the same period in order to offset the losses.

In the reasons for this award, filed a few days later, it can be seen that the arbitrator bases himself on two essential considerations.

34 First, the arbitrator interprets *Gazette No. 1*, from which he draws the following lesson: [TRANSLATION] "From the judgment as a whole, it must be understood that the damages referred to in the disposition cover only the salary and benefits specified in the agreement. The undersigned would breach the *ultra petita* rule if he were to grant the other damages claimed by the 11 respondents that are identified in the documents submitted by [counsel for the respondents]".

35 Second, the arbitrator ruled that the respondents, via their counsel, admitted that the damages in question - *i.e.*, lost wages and other benefits specified in the collective agreement - could not extend beyond January 21, 2000. Indeed, this was the date that the appellant, in compliance with *Gazette No. 1*, submitted its final offers and ceased thereupon to be in contravention of Article XI of the 1987 agreement. The position of counsel for the respondents, the arbitrator remarked, "was completely logical" and is tantamount to an admission that is binding upon his mandators.

The judgment of the Superior Court

36 The respondents attacked Sylvestre award no. 2 by means of a [TRANSLATION] "motion under art. 943.1 *C.C.P.* in annulment of an award under arts. 947 *C.C.P.* and following." The record shows that a judgment on this motion was rendered from the bench on September 4, 2001. The Court granted the motion in part and, without giving fuller reasons, pronounced the following judgment:

> [TRANSLATION]

> Annuls in part the arbitral award rendered by arbitrator André Sylvestre on October 11, 2000 inasmuch as he declares himself without jurisdiction to award any damages other than the salary and other benefits specified in the collective agreement or the agreements of 1982 and 1987;
>
> Refers the file back to the arbitrator-respondent so that he may assume full jurisdiction with regard to the damages that the applicants may claim in the matter before him, until January 21, 2000, except for the interest on any sums that may be granted which shall accrue, as applicable, both before and after this date.

Grounds for the appeal

The appellant's main argument is that the recourse exercised by the respondents necessarily takes the form of an application for annulment in accordance with art. 947 *C.C.P.* and that, therefore, Sylvestre award no. 2 can be annulled only in accordance with art. 946.4(4) *C.C.P.* However, according to the appellant, the respondents' application does not satisfy the requirements of this provision.

37 Subsidiarily, the appellant first of all maintains that the arbitrator did not err in law by ruling that the respondents' claims for damages were to be limited to the wages and benefits lost during the lockout. Second, it maintains that due to the behaviour of their former counsel subsequent to the decision of September 28, 2000, the respondents had in any case acquiesced to the arbitrator's conclusions regarding acceptable damages.

38 The respondents join issue on each of these points. They claim that in his decision of September 28, 2000 (the reasons for which, it should be recalled, were submitted only on 11 October), the arbitrator made a ruling on his own competence, thus providing an opening for the application of art. 943.1 *C.C.P.* By limiting as he did the respondents' claims, the arbitrator incorrectly ruled on his own competence, justifying an intervention by the Superior Court. Moreover, the respondents did not agree to the conclusions of the arbitrator.

39 Let us note finally that the respondents are requesting confirmation of the trial judgment, against which they have not lodged an appeal. As with Sylvestre award no. 2, this judgment sets the end of the period for claims for damages due to the respondents at January 21, 2000.

Analysis

40 Notwithstanding the use of the words "grievance procedure" in Article IX of the 1987 agreement, both sides acknowledge, since *Gazette No. 1*, that this is a consensual arbitration procedure.

41 The provisions of the *Code of Civil Procedure* most immediately relevant to this appeal are:

> 940.3. A judge or the court cannot intervene in any question governed by this Title except in the cases provided for therein.
>
> ...
>
> 943.1. If the arbitrators declare themselves competent during the arbitration proceedings, a party may, within 30 days of being notified thereof, apply to the court for a decision on that matter.

42 As long as the court has not ruled, the arbitrators may continue the arbitration proceedings and render their award.

> ...
>
> 944.10. The arbitrators shall settle the dispute according to the rules of law which they consider appropriate and, where applicable, determine the amount of the damages.
>
> They cannot act as amiables compositeurs except with the prior concurrence of the parties.
>
> They shall in all cases decide according to the stipulations of the contract and take account of applicable usage.
>
> ...
>
> 946.2. The court examining a motion for homologation cannot enquire into the merits of the dispute.
>
> ...
>
> 946.4. The court cannot refuse homologation except on proof that:

(1) one of the parties was not qualified to enter into the arbitration agreement;
(2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec;
(3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
(4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or
(5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.

In the case of subparagraph (4) of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.

...

947. The only possible recourse against an arbitration award is an application for its annulment.

947.1. Annulment is obtained by motion to the court or by opposition to a motion for homologation.

947.2. Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award.

43 Article 940.3 sets the tone of Book VII of the *Code of Civil Procedure*. In the case of proceedings under arts. 33 and 846 *C.C.P.*, the review of the legality of decisions by the court of general jurisdiction is the rule, but the legislator may restrict this power of intervention of the court of general jurisdiction, a power that it usually exercises by means of a privative clause. In the case of consensual arbitration tribunals, the reverse is now the rule. As set out in art. 940.3 *C.C.P.*, the judge may only intervene when so permitted by law. Article 946.2 *C.C.P.* specifies that a judge seized with a request for homologation or annulment of an award cannot enquire into the merits of the dispute, and it is impossible for the parties to an arbitration agreement to contract out of this rule. Nor may they derogate from para. 4 of art. 946.4 *C.C.P.*, except for reasons of annulment (or refusal of homologation) likely to apply in this instance. Once again pursuant to art. 940, other provisions of Title I of Book VII are also of public order and relate to the decisions that the judge

may be required to make in appointing an arbitrator (941.3), making a determination about the recusation or revocation of his mandate (942.7), recognizing his competence (943.2), or safeguarding the rights of the parties awaiting an arbitration award (945.8). By establishing that these legal decisions are final and without appeal, the Code reinforces the autonomy of the arbitration procedure and its conduct. By limiting the grounds for annulling or refusing the homologation of an award, the Code reinforces the autonomy of the arbitration process and its outcome. The adoption of these provisions [TRANSLATION] "marked a turning point in the conventional arbitration system in Quebec", as Thibault J.A. accurately stated for the Court in *Laurentienne-vie (La), compagnie d'assurances inc. v. Empire (L'), compagnie d'assurance-vie*.[16] However, in the context of a review of arbitral competence, a thorough reconsideration of the points of law an arbitrator may have to rule on - a consideration bordering on a judicial review of the appeal itself - creates a risk of stepping back from this turning point.

44 Very recently, in the appeal *Desputeaux v. Editions Chouette (1987) Inc.*,[17] the Supreme Court of Canada, *per* Lebel, J., made the following comments on a related matter, that of public order mentioned in art. 946.5 *C.C.P.*:

> Despite the specificity of these provisions of the *Code of Civil Procedure* and the clarity of the legislative intention apparent in them, there have been conflicting lines of authority in the Quebec case law regarding the limits of judicial intervention in cases involving applications for homologation or annulment of arbitration awards governed by the *Code of Civil Procedure*. Some judgments have taken a broad view of that power, or sometimes tended to confuse it with the power of judicial review provided for in arts. 33 and 846 *C.C.P.* (On this point, see the commentary by F. Bachand, "Arbitrage commercial: Assujettissement d'un tribunal arbitral conventionnel au pouvoir de surveillance et de contrôle de la Cour supérieure et contrôle judiciaire d'ordonnances de procédure rendues par les arbitres" (2001), 35 R.J.T. 465.) The judgment in issue here illustrates this tendency when it adopts a standard of review based on simple review of any error of law made in considering a matter of public order. That approach extends judicial intervention at the point of homologation or an application for annulment of the arbitration award well beyond the cases intended by the legislature. It ignores the fact that the legislature has voluntarily placed limits on such review, to preserve the autonomy of the arbitration system. Public order will of course always be relevant, but solely in terms of the determination of the overall outcome of the arbitration proceeding, as we have seen.

These points being made, we may now consider the claims of the parties regarding the impugned award here.

45 Is Sylvestre award No. 2 a case covered by art. 943.1 *C.C.P.*? The article in question contemplates situations in which arbitrators "declare themselves competent during the arbitration

procedure" and provides that a party may then require the court to decide "on this matter" in turn, as long as the arbitration procedure is not interrupted. In this instance, as of February 25, 2000, the arbitrator simply resumed, in light of *Gazette No. 1*, his consideration of the dispute of June 4, 1996. That judgment had set aside his two orders concerning wages and benefits lost during the lockout and the file had been referred back to him "so that he might determine, if necessary, the damages to be awarded to the 11 employees as a result of the employer's non-observance of Article XI of the Agreement of 1987."[18] It seems to me that this is exactly what the arbitrator wanted to determine, that he decided on an interim award in the interests of procedural convenience, and that this award has no bearing on his competence or the arbitrability of the dispute before him, but concerns the merits of this dispute. Unless one proposes that any decision by an arbitrator is at least implicitly related to his competence, which in my view is not justifiable in light of 943.1 *C.C.P.* and its context, one must conclude that art. 943.1 *C.C.P.* was inapplicable here. The Superior Court was therefore not authorized to use this provision to review, as it did, Sylvestre award No. 2

46 But could the Superior Court intervene on the grounds that, under para. 4 of art. 946.4, Sylvestre award No. 2, "deal[t] with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or that it contain[ed] decisions on matters beyond the scope of the agreement"?

47 This argument may only be made within the context of an application for annulment under arts. 947, 947.1 and 947.2 *C.C.P.*, or in defense of a motion for homologation under art. 946.1 *C.C.P.* The respondents proceeded here with an application for annulment.

48 The first difficulty that arises concerns the status of an award characterized as "interim". It is not certain that Sylvestre award No. 2, as such, could have been subject to a motion for homologation. Could it, under these conditions, have been subject to an application for annulment? Or was it merely a procedural order, a preliminary step toward a possible final award on the merits that could itself have been subject, at the proper time, to a motion for homologation or an application for annulment?[19] There is no doubt in my mind that by limiting as he did the admissible heads of damage and by setting aside, for example, the moral, exemplary, or punitive damages to which the respondents might be entitled, the arbitrator in the present case resolved a substantive issue between the appellant and the respondents. In so doing, he ruled in part on the dispute that was before him. His decision therefore constituted a suitable award for annulment under art. 947 *C.C.P.* In stating this, I am aware that other legal policy considerations might need to be taken into account in the event of an "interim" award by an international commercial arbitration tribunal; this is noted in the recent judgment in *National Compagnie Air France v. Mbaye*.[20] But these considerations do not apply in a case such as this, characterized as it is it by a dynamic of working relationships, governed entirely by domestic law and already highly judicialized.

49 Paragraph 4 of art 946.4 *C.C.P.* refers to the "arbitration agreement", which here must mean Article IX of the 1987 agreement reproduced above. This contractual clause stipulates that "[i]n the event of a disagreement with respect to the interpretation, application, and/or alleged violation of

this agreement, the matter shall be deemed to be a grievance... ." The respondents' claim, insofar as it relates to the damage suffered as a result of the employer's delay in submitting its final offers to arbitration, doubtless relates to the "interpretation", "application" or the "alleged violation" of the agreements of 1982 and 1987, and in particular of Article XI of the 1987 agreement. One cannot therefore seriously propose that it concerns a "dispute not contemplated by or not falling within the terms of the arbitration agreement".

50 We must also ask, however, still pursuant to art. 946.4(4) *C.C.P.*, whether Sylvestre award No. 2 contains "decisions on matters beyond the scope of the [arbitration] agreement". Pondering over the meaning to be given to this phrase, our colleague Thibault J.A. wrote in the appeal *Laurentienne-vie (La), compagnie d'assurances inc. v. Empire (L'), compagnie d'assurance-vie*:[21]

> [TRANSLATION]
>
> It seems to me that in order to decide whether an arbitral award goes beyond the scope of the arbitration agreement, we need to disregard the interpretation that led to the result and concentrate on the result itself. This interpretation of the grounds for annulment set forth in art. 946.4(4) *C.C.P.*, in addition to being consistent with art. 946.2 *C.C.P.*, which prohibits the court seized with an application for the annulment of an arbitral award to enquire into the merits of the dispute, is consistent with the approach adopted by author Sabine Thuilleaux.

A quotation from author Sabine Thuilleaux follows, which LeBel J. took up in turn in *Desputeaux v. Éditions Chouette (1987) Inc.*:[22] [TRANSLATION] "the appreciation of this grievance depends on a connection with the question to be disposed of by the arbitrators with the dispute submitted to them."[23]

51 If we focus on the result, *i.e.*, the precise conclusions of the arbitrator in Sylvestre award No. 2, it is impossible to conclude that the question disposed of here by the arbitrator has no connection with the dispute that was submitted to him. Quite the contrary; this is exactly what is at the heart of the dispute between the parties. Perhaps a detailed consideration of the reasons on which the arbitrator based himself would bring out the fact that another arbitrator might have dealt differently with one or several of the questions submitted to arbitrator Sylvestre. That is not the question, however. I recall that the court seized of an application for annulment under art. 947 may not enquire into the merits of the dispute. Perhaps the question would appear in a different light if the arbitrator had failed to comply with the order contained in *Gazette No. 1*, but nothing of the sort occurred here.

52 FOR THESE REASONS, I would therefore ALLOW the appeal with costs, SET ASIDE the judgment annulling in part the award of arbitrator André Sylvestre on October 11, 2000, DISMISS the respondents' motion with costs, and REFER the case back to the arbitrator so that he may continue the hearing on the disagreement between the appellant and the respondents in order to

dispose of it solely on its merits.

YVES-MARIE MORISSETTE J.A.

cp/e/qlisl/qlana

1 [1991] R.L. 625, 91 J.E. 91-850.

2 [2000] R.J.Q. 24, leave to appeal to S.C.C. refused, 5 October 2000 (without written reasons), S.C.C. Bulletin, 2000 at 1613.

3 *Ibid.* at 29.

4 *Ibid.* at 34.

5 *Ibid.* at 38-39.

6 *Communications, Energy and Paper Workers Union of Canada, Local 145 v. Gazette (The), a division of Southam Inc.*, [1996] T.A. 562.

7 *Gazette (The), a division of Southam Inc. v. Communications, Energy and Paper Workers Union of Canada, Local 145*, D.T.E. 98T-270 at 109.

8 *Gazette (The), a division of Southam Inc. v. Sylvestre*, [1998] R.J.Q. 3201.

9 See *supra* note 2.

10 *Gazette (The), a division of Southam Inc. v. Blondin*, B.E. 2001BE-803.

11 In this instance, it is indeed a dispute within the meaning of para. 1(*e*) of the *Labour Code* and Article XI of the 1987 agreement relating to the "Last final best offers" that warrant a collective agreement between the parties.

12 *Blondin v. Gazette (The), a division of Southam Inc.*, J.E. 2001-1328.

13 *Communications, Energy and Paper Workers Union of Canada, Local 145 v. Ménard*, J.E. 2002-935; this judgment was not appealed.

14 *Communications, Energy and Paper Workers Union of Canada, Local 145 v. The Gazette, a division of Southam Inc.*, D.T.E. 2001T-137.

15 This judgment was rendered orally and was never published.

16 [2000] R.J.Q. 1708, [23].

17 2003 SCC 17 at para. 68.

18 See *supra* note 2 at 40.

19 See the article to which LeBel, J. refers in the passage from the judgment *Desputeaux v. Editions Chouette (1987) Inc.* quoted above: Frederic Bachand, "Arbitrage commercial: Assujettissement d'un tribunal arbitral conventionnel au pouvoir de surveillance et de contrôle de la Cour supérieure et contrôle judiciaire d'ordonnances de procédure rendues par les arbitres" (2001), 35 R.J.T. 465. The author clarifies, at 481 and following, the distinction between a procedural order and an arbitral award.

20 J.E. 2003-746 (A.C.) at paras. 70-75.

21 See *supra* note 16 at para. 44.

22 See *supra* note 17 at para. 35.

23 *L'arbitrage commercial au Québec : Droit interne - Droit international privé* (Cowansville: Yvon Blais, 1991) at 115.

TAB C

COURT OF APPEAL

CANADA
PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

Traduction non-officielle

No. 500-09-016637-068
(500-17-026195-050)

DATE: March 17, 2008

CORAM: THE HONOURABLE MARC BEAUREGARD J.A.
ANDRÉ FORGET J.A.
FRANÇOIS PELLETIER J.A.

LOCAL 145 OF THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA (CEP)

and
RITA BLONDIN
ROBERT DAVIES
UMED GOHIL
JEAN-PIERRE MARTIN
LESLIE STOCKWELL
MARC-ANDRÉ TREMBLAY
JOSEPH BRAZEAU
HORACE HOLLOWAY
PIERRE REBETEZ
MICHAEL THOMSON
ERIBERTO DI PAOLO
APPELLANTS - Petitioners

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.
RESPONDENT – Impleaded paty

and
ANDRÉ SYLVESTRE, in his capacity as arbitrator
IMPLEADED PARTY - Respondent

JUDGMENT

[1] **THE COURT**; - Ruling on the appeal from a judgment rendered on March 31, 2006 by the Superior Court, District of Montréal (the Honourable Claude Larouche J.), dismissing the appellants' motion for annulment of arbitrator André Sylvestre's arbitration award of March 18, 2005 with costs;

[2] After examining the record, hearing the parties and taking the case under advisement;

[3] For the reasons of Pelletier J.A., with which Beauregard and Forget JJ.A. concur:

[4] **GRANTS** the appeal with costs against the respondent, The Gazette, A Division of Southam Inc., except for the costs relative to the books of authorities;

[5] **QUASHES** the Superior Court judgment; and, proceeding to render the judgment that should have been rendered:

> **GRANTS** the petitioners' motion for annulment of arbitrator André Sylvestre's arbitration award of March 18, 2005 with costs against the impleaded party, The Gazette, A Division of Southam Inc.;
>
> **ORDERS** that the case be remanded to arbitrator Sylvestre so that he may comply with the Court of Appeal judgments of December 15, 1999 and August 6, 2003.

MARC BEAUREGARD J.A.

ANDRÉ FORGET J.A.

FRANÇOIS PELLETIER J.A.

Mtre. Pierre Grenier
Melançon, Marceau, Grenier et Sciortino
For the appellants, except Rita Blondin and Eriberto Di Paolo

Rita Blondin
Eriberto Di Paolo
Self-represented

Mtres. Ronald J. McRobie and Dominique Monet
Fasken Martineau DuMoulin
For the respondent

Date of hearing: December 10, 2007

REASONS OF PELLETIER J.A.

[6] Natural persons Rita Blondin *et al.* were typographers employed by the respondent, *The Gazette*. They were also members of the appellant union.

[7] By their appeal, they, along with their union, seek to have quashed the Superior Court judgment dismissing their motion for annulment of an award granted by the impleaded party, Sylvestre, on March 18, 2005. That award determined that there was no reason to order *The Gazette* to compensate the typographers for wages and benefits lost during all or part of the period from June 3, 1996 to January 21, 2000. In the arbitrator's opinion, that conclusion was justified because *The Gazette* did not unduly prolong the lock-out in effect during that period.

[8] This is the third time the parties have appeared before our Court. I will therefore refrain from revisiting in detail the facts of the case, as they already account for dozens of pages of arbitration awards, judgments and decisions of courts of original general jurisdiction.[1] Below is the substance of the case.

[9] In relation to this dispute, which has been ongoing since 1996, the role of the impleaded party, Sylvestre, is that of an arbitrator of disputes within the meaning of the *Code of Civil Procedure*. This situation, which, it must be admitted, is rather unusual, stems from a tripartite civil agreement involving the typographers, the union and the employer that was entered into in 1982 and amended in 1987. Beyond existing and future collective agreements, the agreement sought to provide special coverage to the typographers, whose job security was irremediably threatened by the necessary introduction of technological changes into the newspaper's newsroom. Essentially, *The Gazette* offered each of the typographers wage guarantees and job security until age 65. It is worth pointing out that the 1987 addition incorporated a rather unpalatable element into this already unusual formula. For a proper understanding of what is to follow, I have reproduced below one of the two new provisions agreed in 1987:

> **XI. RENEWAL OF COLLECTIVE AGREEMENTS AND SETTLEMENT OF DISPUTES**
>
> Within ninety (90) days before the termination of the collective agreement, the Employer and the Union may initiate negotiations for a new contract. The terms and conditions of the agreement shall remain in effect until an agreement is

1 *Syndicat canadien des communications, de l'énergie et du papier, section locale 145* v. *Gazette (The), une division de Southam inc.*, EYB 1999-15534 (C.A.); *The Gazette* v. *Blondin*, EYB 2003-45981 (C.A.).

> reached, a decision is rendered by an arbitrator, or until one or the other of the parties exercises its right to strike or lock-out.
>
> Within the two weeks preceding acquiring the right to strike or lock-out, including the acquisition of such right through the operation of Article X of the present agreement, either of the parties may request the exchange of "Last final best offers", and both parties shall do so simultaneously and in writing within the following forty-eight (48) hours or another time period if mutually agreed by the parties. The "Last final best offers" shall contain only those clauses or portions of clauses upon which the parties have not already agreed. Should there still not be agreement before the right to strike or lock-out is acquired, either of the parties may submit the disagreement to an arbitrator selected in accordance with the grievance procedure in the collective agreement. In such an event, the arbitrator, after having given both parties the opportunity to make presentations on the merits of their proposals, must retain in its entirety either one or the other of the "Last final best offers" and reject, in its entirety, the other. The arbitrator's decision shall be final and binding on both parties and it shall become an integral part of the collective agreement.
>
> [Emphasis added.]

[10] Thus, the arbitrator's original jurisdiction stemmed from the 1987 version of the tripartite agreement and from a notice of dispute sent to *The Gazette* by the union and the 11 typographers on June 4, 1996.

[11] The scope and legal consequences of the documents in question were defined by our Court in 1999, hence it may generally be affirmed that the judgment rendered at that time circumscribed the arbitrator's jurisdiction—the jurisdiction under which the arbitrator granted the award of which the annulment is sought by the union and the typographers today.

[12] In 1999, after annulling in part the first arbitration award granted by arbitrator Sylvestre, the Court remanded the case to him for a ruling on an outstanding question:

> [TRANSLATION]
> QUASHES the arbitrator's two orders relative to the payment and reimbursement of the wages and benefits lost because of the lock-out;
>
> REMANDS the case to the arbitrator for him to determine, if applicable, the damages that may be awarded to the 11 appellants as a result of the employer's non-compliance with Article XI of the 1987 agreement;

[13] The Court also ordered *The Gazette* to fulfil the obligation created under Article XI, reproduced above, by exchanging last final best offers within 30 days after the filing of the judgment:

> [TRANSLATION]
> ORDERS the respondent to submit to the exchange of last final best offers within 30 days of this judgment;

[14] Thus, the conclusions of our 1999 judgment set the stage for the holding of two parallel, independent debates.

[15] First, acting on the conclusion ordering it to submit to the process stated in the tripartite agreement, *The Gazette* exchanged its last final best offers with the union on January 21, 2000.

[16] Barely a month later, the parties were again at an impasse, and seized Mtre. Jean-Guy Ménard of the dispute.

[17] On analysis, the dispute was comprised not only of a component governed by the *Labour Code*, but also of a civil component insofar as the arbitrator was seized of a matter relative to the operation of the tripartite agreement as part of a proceeding to which the 11 typographers were henceforward parties in their own right, independent of the union.

[18] On June 5, 2001, Mtre. Ménard granted an arbitration award imposing a collective agreement effective that very day. The collective agreement did not provide for any retroactive measures, but did set the work conditions for the following five years. This time, each individual typographer and *The Gazette* asked the Superior Court to declare its annulment. They failed when, in May 2002, Jean Frappier J. dismissed each of the motions. No one appealed from the dismissal judgments.

[19] Second, in application of the order to remand the case to the arbitrator, which also appears in the conclusions of the 1999 judgment, arbitrator Sylvestre resumed the hearings on the dispute to determine [TRANSLATION], "if applicable", the amount of wages and benefits lost by the topographers between June 3, 1996 and January 21, 2000 [TRANSLATION] "as a result of *The Gazette*'s non-compliance with Article XI of the 1987 agreement".

[20] Mtre. Sylvestre chose to rule first on two preliminary questions: one concerning the relevant heads of damage in the case; the other, the likely start and the duration of the damage period.

[21] In his arbitration award granted in October 2000, Mtre. Sylvestre established that the damage in question related solely to the wages and benefits said to have been lost during the period between June 3, 1996 and January 21, 2000 exclusively.

[22] Once again, the typographers applied to the Superior Court, attacking the arbitration award by means of a motion for annulment. The judge ruled in their favour, but his judgment did not survive the appeal *The Gazette* brought against it. Thus, in 2003, our Court concluded, *per* Morissette J.A., that, while the arbitration award did not resolve everything, it nevertheless decided substantive issues at the heart of the dispute of which he was seized. Below are the conclusions of the judgment:

> [TRANSLATION]
> [5] Quashes the judgment, annulling in part the arbitration award of arbitrator André Sylvestre of October 11, 2000, dismisses with costs the respondents' motion for annulment served on November 10, 2000 and remands the case to the arbitrator so that he may continue the hearing of the disagreement between the appellant and the respondents in order to dispose of it entirely on its merits.

[23] That was the backdrop for Mtre. Sylvestre's resumption of the hearings that had been interrupted by the proceeding instituted against his interlocutory decision. However, it should be borne in mind that, at the time of the resumption, the situation had evolved. The collective agreement imposed by Mtre. Ménard was in effect at the time and, as mentioned earlier, it did not provide for retroactive measures or for compensation to eliminate or lessen the damage caused by what was perhaps an undue prolongation of the lock-out declared by *The Gazette* in June 1996.

[24] That clarification having been made, it is important to recall that our Court's 1999 judgment very clearly identified the contractual fault committed by *The Gazette* in violation of the provisions of Article XI of the 1987 version of the tripartite agreement. Under a notice sent on April 30, 1996, the very date on which the collective agreement imposed by arbitrator Leboeuf in 1993 expired, *The Gazette* was required to exchange its last final best offers with the union no later than May 2, 1996. *The Gazette* did not do so and it is that fault that our Court pointed to as having possibly caused damage. That being so, what the arbitrator had to do was determine whether the contractual breach had had that effect in reality and, if so, determine the appropriate amount of compensation.

[25] Unfortunately, and by his own admission, the arbitrator lost the thread of the reasoning that, in December 1999, had led the Court to remand the case to him for a ruling on the matter. In all likelihood, Mtre. Sylvestre was disconcerted by the fact that, at that time, the Court had set aside his order to pay the wages and benefits under the 1987 version of the tripartite agreement. Below is how he expressed his incomprehension:[2]

> [TRANSLATION]
> [97] In his arbitration award of February 5, 1998, the arbitrator ruled that the employer should be required to compensate the complainants as of the declaration of the lock-out, because the letters of understanding took effect at that time, and obliged the employer to pay the complainants their wages and benefits. However, the Court of Appeal said it disagreed with that ruling, and found that the arbitrator had erred in deciding that the work conditions stated in the 1982 and 1987 agreements stood despite the lock-out. The appellate court wrote the following at pages 40 and 41:
>
> > [TRANSLATION]
> > However, Article XI of the 1987 agreement recognizes the employer's right to lock-out. In fact, the appellants did not contest it before the arbitrator. They

2 SOQUIJ AZ-50307135.

> asked that the right be combined with the compulsory collective agreement renewal procedure, provided for in Article XI, and that, during the exercise of the right to lock-out, the employer continue to pay the wages and other benefits, alleging that the cost of living adjustment clause guaranteed them a certain standard of living even during a lock-out.
>
> In accepting the latter part of the appellants' application and, consequently, ordering the employer: (1) to continue paying each of the complainants the wages and other benefits stemming from the 1982 and 1987 tripartite agreements and (2) to reimburse any wages and other benefits lost due to the lock-out, the whole with interest, the arbitrator committed an error justifying judicial intervention.
>
> In taking it for granted that Article XI is not an obstacle to maintaining access to the workplace and payment of regular wages adjusted to the cost of living during the lock-out, the arbitrator conferred on the provisions of the agreement a meaning that they cannot rationally support.
>
> Whatever the scope of the clauses relating to job security, guaranteed wages adjusted to the cost of living, and the duration of the agreements and their non-renegotiation, they do not change the content of Article XI of the 1987 agreement, which permits the exercise of the right to strike or lock-out. The usual effect of a lock-out is to suspend the employer's obligations to pay the employees' wages and allow the employees access to the workplace. Article XI in no way has the effect of depriving the employer of this entrenched labour relations right.
>
> However, the article limits the exercise of the right to lock-out, by providing for a compulsory procedure for collective agreement renewal through last final best offer arbitration. It necessarily ensures that any labour dispute will eventually end when a third party imposes a new collective agreement. The lock-out may have been unduly prolonged by the employer's refusal to exchange its last final best offers, as requested by the union, within the time specified on April 30, 1996, and the employees may be entitled to damages as a result. It will be up to the arbitrator to decide.

[98] The Court thus set aside the union proposal that, for the duration of the lock-out, the employer be required to continue to pay all remuneration to the 11 typographers. The Court called the arbitrator's conclusion granting the motion an error justifying judicial intervention, stated that the content of Article XI of the agreement permitted the exercise of the right to lock-out and pointed out its effects, namely, the suspension of the obligation to pay the employees' wages and the ban on the employees' access to their workplaces.

[99] The problem encountered by the arbitrator in this case stems from the directive he was given by the Court of Appeal, which, after writing that it [TRANSLATION] "is possible that the lock-out was unduly prolonged", remanded the case to the arbitrator [TRANSLATION] "for him to determine, if applicable, the damages that may be awarded to the 11 employees as a result of the employer's non-compliance with Article XI of the 1987 agreement". In the preceding paragraph, Rousseau-Houle J. had written that Article XI limited the exercise of the right to lock-out, by providing for the compulsory procedure for collective agreement renewal through last final best offer arbitration, and that the

> labour dispute would eventually end when a third party imposed a new collective agreement.
>
> [100] What is meant by the reference to the possibility that the employer may have unduly prolonged the lock-out by refusing to exchange its last final best offers? The arbitrator must admit to being totally bewildered. It can be inferred from the judgment that the undue delay in terminating the lock-out could not begin on June 3, 1996, the day the lock-out was imposed. Indeed, the Court of Appeal emphasized that the arbitrator, in reaching such a conclusion, contradicted the wording of Article XI, which [TRANSLATION] "in no way has the effect of depriving the employer of this entrenched labour relations right". However, the lock-out lasted an extremely long time, since it went on for almost four years. But does that mean it must be concluded that it was unduly prolonged by the employer? The use of the adverb *indûment* ("unduly") does not shed any light on this comment by the Court of Appeal. The *Grand dictionnaire encyclopédique Larousse* defines the adjective *indu* ("undue") as follows: [TRANSLATION] "Serge Côté, honorary notary, commissioner, says that which is against the rule, against usage, against reason. . .". That definition is not any more helpful in understanding this Court's directive, as the arbitrator does not know what a rule, usage or reason would be in a matter such as the duration of a work stoppage, strike or lock-out.

[26] Faced with what he considered an enigma, the arbitrator began looking for a separate fault that the employer might have committed during the lock-out period:[3]

> [TRANSLATION]
> [103] In other words, based on what the arbitrator understands from its directives, the Court of Appeal conferred on him the power to award damages if he found that the employer had engaged in the abusive exercise of its right to lock-out. However, apart from the extremely long duration of the lock-out, the arbitrator was unable to find evidence of a specific time after June 3, 1996 when the employer should have terminated the lock-out. In standing firm until January 21, 2000, by its refusal to exchange its last final best offers, it did not demonstrate clemency toward its 11 typographers. But, as confirmed by Messrs. Di Paolo and Thomson, the typographers were so confident of being right that they had no intention of making any concessions.

[27] Not having found one, he concluded as follows:[4]

> [104] Given the picture as a whole, the arbitrator cannot find, on the basis of the evidence, that the employer unduly prolonged the lock-out. Therefore, he cannot order it to pay the damages claimed by the 11 complainants for the period from June 3, 1996 to January 21, 2000.

[28] With respect, I believe that there was a misunderstanding and that the arbitrator's confusion led him to distort the dispute of which he was seized.

---

3 SOQUIJ AZ-50307135.
4 *Ibid.*

[29] In finding that a lock-out could not be unduly continued, the arbitrator did not answer the question asked by the Court in its 1999 judgment. In so doing, he did not exercise the jurisdiction ascribed to him.

[30] It is important to remember that, at the time our Court rendered its judgment, in mid-December 1999, there were four main unknowns in the matter:

(a) If the exchange of offers had taken place normally, after the sending of the April 30, 1996 notice, when would the collective agreement have been finalized or, in other words, when would the lock-out have ended?

(b) Should the evidence to come disclose that the lock-out would have ended before December 15, 1999 (date of the judgment), to what wages and benefits would the 11 typographers have been entitled as of the end of the lock-out?

(c) Would the wages and benefits have been lower than the minimum guaranteed in the 1987 version of the tripartite agreement?

(d) In addition, would the future exchange of last final best offers in execution of the conclusion [TRANSLATION] "[o]rders the respondent to submit to the exchange of last final best offers within 30 days of this judgment" lead to the elimination or reduction of the possible loss to be identified by the answer to the above three questions?

[31] Those are the questions the arbitrator had to answer in executing the 1999 judgment, which remanded the case to him. Taking into account his own interlocutory decision of October 2000, which became final as a result of our 2003 judgment, the arbitrator's task was to consider possible compensation for a period that might extend, not to December 15, 1999, but on to January 21, 2000, exclusively, by conducting the analysis I have just described.

[32] Since the rendering of the December 1999 judgment, the outcome of the exchange of last final best offers in early 2000 showed that the possible damage suffered by the typographers had not in any way been diminished by the new collective agreement. Thus, further to the dismissal judgments rendered by Frappier J., which crystallized this situation, we know the answer to the question I identified as "d" above.

[33] To date, however, the other three questions are as yet unanswered, since the arbitrator did not make any ruling in regard to them.

[34] In deciding that *The Gazette* had done nothing to unduly prolong the lock-out, arbitrator Sylvestre ruled on something other than what had been intended in the judgment. I therefore believe that his award falls under the fourth subparagraph of article 946 of the *Code of Civil Procedure*, which applies in matters of application for annulment, because of the legislator's reference in article 947.2 C.C.P.

[35] Thus, in the end, I am of the opinion that the Superior Court should have granted the motion for annulment.

[36] That said, the conclusions sought by the appellants go too far. They ask that arbitrator Sylvestre be ordered to consider, without nuance, the entire period from June 3, 1996 to January 21, 2001 as the period during which the lock-out was unduly prolonged, and that he award compensation accordingly. However, the 1999 judgment had already determined that the tripartite agreement recognized the employer's right to legally declare a lock-out, which entailed the right to stop paying the typographers their wages and benefits:[5]

> [TRANSLATION]
>
> Whatever the scope of the clauses relating to job security, guaranteed wages adjusted to the cost of living, and the duration of the agreements and their non-renegotiation, they do not change the content of Article XI of the 1987 agreement, which permits the exercise of the right to strike or lock-out. The usual effect of a lock-out is to suspend the employer's obligation to pay the employees' wages and allow the employees access to the workplace. Article XI in no way has the effect of depriving the employer of this entrenched labour relations right.

[37] It is far from certain that the process initiated on April 30, 1996, which was to result in an arbitration award terminating the lock-out, would have played out before June 3 of that year, the date on which the lock-out was declared, even had *The Gazette* not committed the fault identified by our Court. In other words, it is not at all certain that the whole lock-out period unduly caused the loss of the wages and benefits otherwise guaranteed to the typographers under the tripartite agreement. On this aspect, it is the evidence to be adduced before the arbitrator relative to the three questions I identified above by the letters "a", "b"[6], and "c" that will enable the solution to the problem to be found.

[38] I therefore propose to grant the appeal with the costs of the two courts against *The Gazette*, quash the judgment of the Superior Court, grant the respondents' motion for annulment, and order that the case be remanded to arbitrator Sylvestre so that he may comply with the judgments rendered by our Court on December 15, 1999 and August 6, 2003.

FRANÇOIS PELLETIER J.A.

---

5 *Syndicat canadien des communications, de l'énergie et du papier, section locale 145* v. *Gazette (The), une division de Southam inc*, EYB 1999-15534 at para. 82 (C.A.).

6 However, the end date of the period is January 2, 2000, as already determined by Mtre. Sylvestre's interlocutory decision. See paragraph 31 in that regard.

TAB D

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nopolies, Restraints of Trade, and Unfair Trade Practices § 169, at 226 (1996).

de facto merger (di **fak**-toh). A transaction that has the economic effect of a statutory merger but that is cast in the form of an acquisition or sale of assets or voting stock. • Although such a transaction does not meet the statutory requirements for a merger, a court will generally treat it as a statutory merger for purposes of the appraisal remedy. [Cases: Corporations ⇐445.1. C.J.S. *Corporations* § 657.]

downstream merger. A merger of a parent corporation into its subsidiary.

forward triangular merger. See *triangular merger.*

freeze-out merger. See *cash merger.*

horizontal merger. A merger between two or more businesses that are on the same market level because they manufacture similar products in the same geographic region; a merger of direct competitors. — Also termed *horizontal integration.*

product-extension merger. A merger in which the products of the acquired company are complementary to those of the acquiring company and may be produced with similar facilities, marketed through the same channels, and advertised by the same media.

reverse triangular merger. A merger in which the acquiring corporation's subsidiary is absorbed into the target corporation, which becomes a new subsidiary of the acquiring corporation. — Also termed *reverse subsidiary merger.*

short-form merger. A statutory merger that is less expensive and time-consuming than an ordinary statutory merger, usu. permitted when a subsidiary merges into a parent that already owns most of the subsidiary's shares. • Such a merger is generally accomplished when the parent adopts a merger resolution, mails a copy of the plan to the subsidiary's record shareholders, and files the executed articles of merger with the secretary of state, who issues a certificate of merger.

statutory merger. A merger provided by and conducted according to statutory requirements.

stock merger. A merger involving one company's purchase of another company's capital stock.

triangular merger. A merger in which the target corporation is absorbed into the acquiring corporation's subsidiary, with the target's shareholders receiving stock in the parent corporation. — Also termed *subsidiary merger; forward triangular merger.*

upstream merger. A merger of a subsidiary corporation into its parent.

vertical merger. A merger between businesses occupying different levels of operation for the same product, such as between a manufacturer and a retailer; a merger of buyer and seller.

9. The merger of rights and duties in the same person, resulting in the extinction of obligations; esp. the blending of the rights of a creditor and debtor, resulting in the extinguishment of the creditor's right to collect the debt. • As originally developed in Roman law, a merger resulted from the marriage of a debtor and creditor, or when a debtor became the creditor's heir. — Also termed *confusion; confusion of debts; confusion of rights.* Cf. CONFUSION OF TITLES. **10.** The absorption of a contract into a court order, so that an agreement between the parties (often a marital agreement incident to a divorce or separation) loses its separate identity as an enforceable contract when it is incorporated into a court order.

merger clause. See INTEGRATION CLAUSE.

merger doctrine. 1. *Copyright.* The principle that since an idea cannot be copyrighted, neither can an expression that must inevitably be used in order to express the idea. • When the idea and expression are very difficult to separate, they are said to merge. For example, courts have refused copyright protection for business-ledger forms (*Baker v. Selden*, 101 U.S. 99 (1879)), and for contest rules that were copied almost verbatim (*Morrissey v. Procter & Gamble*, 379 F.2d 675 (1st Cir. 1967)). — Also termed *Baker v. Selden doctrine.* [Cases: Copyrights and Intellectual Property ⇐4.5. C.J.S. *Copyrights and Intellectual Property* § 10.] **2.** *Hist. Family law.* The common-law principle that, upon marriage, the husband and wife combined to form one legal entity. — Often shortened to *merger.* See SPOUSAL-UNITY DOCTRINE; LEGAL-UNITIES DOCTRINE.

merger of offenses. See MERGER (5).

meritorious (mer-ə-tor-ee-əs), *adj.* **1.** (Of an act, etc.) meriting esteem or reward <meritorious trial performance>. **2.** (Of a case, etc.) meriting a legal victory; having legal worth <meritorious claim>.

meritorious consideration. See *good consideration* under CONSIDERATION (1).

meritorious defense. See DEFENSE (1).

merit regulation. Under state blue-sky laws, the practice of requiring securities offerings not only to be accompanied by a full and adequate disclosure but also to be substantively fair, just, and equitable.

merits. 1. The elements or grounds of a claim or defense; the substantive considerations to be taken into account in deciding a case, as opposed to extraneous or technical points, esp. of procedure <trial on the merits>. **2.** EQUITY (3) <on questions of euthanasia, the Supreme Court has begun to concern itself with the merits as well as the law>.

merit system. The practice of hiring and promoting employees, esp. government employees, based on their competence rather than political favoritism. Cf. SPOILS SYSTEM. [Cases: Officers and Public Employees ⇐11. C.J.S. *Officers and Public Employees* §§ 63–65, 71–74.]

Merit Systems Protection Board. The independent federal agency that oversees personnel practices of the federal government and hears and decides appeals from adverse personnel actions taken against federal employees. • It has five regional offices and five field offices. Its functions were transferred from the former Civil Service Commission under Reorganization Plan No. 2 of 1978. — Abbr. MSPB. See CIVIL SERVICE COMMISSION. [Cases: Officers and Public Employees ⇐72.20. C.J.S. *Officers and Public Employees* §§ 143, 195.]

TAB E

British Columbia (Minister of Forests) *v.* Okanagan Indian Band, [2003] 3 S.C.R. 371, 2003 SCC 71

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests *Appellant*

v.

Chief Dan Wilson, in his personal capacity and as representative of the Okanagan Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A57614 *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation *Interveners*

and between

Her Majesty The Queen in Right of the Province of British Columbia, as represented by the Minister of Forests *Appellant*

v.

Chief Ronnie Jules, in his personal capacity and as representative of the Adams Lake Indian Band, Chief Stuart Lee, in his personal capacity and as representative of the Spallumcheen Indian Band, Chief Arthur Manuel, in his personal capacity and as representative of the Neskonlith

Indian Band, and David Anthony Nordquist, in his personal capacity and as representative of the Adams Lake Indian Band, the Spallumcheen Indian Band and the Neskonlith Indian Band, and all other persons engaged in the cutting, damaging or destroying of Crown Timber at Timber Sale Licence A38029, Block 2 *Respondents*

and

Attorney General of Canada, Attorney General of Ontario, Attorney General of Quebec, Attorney General of New Brunswick, Attorney General of British Columbia, Attorney General of Alberta, the Songhees Indian Band, the T'Sou-ke First Nation, the Nanoose First Nation and the Beecher Bay Indian Band (collectively the "Te'mexw Nations"), and Chief Roger William, on his own behalf and on behalf of all other members of the Xeni Gwet'in First Nations government and on behalf of all other members of the Tsilhqot'in Nation *Interveners*

Indexed as: British Columbia (Minister of Forests) *v.* Okanagan Indian Band

Neutral citation: 2003 SCC 71.

File Nos.: 28988, 28981.

2003: June 9; 2003: December 12.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for british columbia

Costs — Interim costs — Principles governing exercise of court's discretionary power to grant interim costs — Minister of Forests serving Indian Bands

with stop-work orders for logging on Crown land without authorization — Bands claiming aboriginal title to lands — Minister applying to have proceedings remitted to trial list — Bands arguing that matter of aboriginal title should not go to trial as they lack financial resources to fund action or in alternative, requesting order that Crown pay interim costs to fund action in advance and in any event of cause — Whether Court of Appeal's decision to grant interim costs should be upheld — Whether Court of Appeal had sufficient grounds to review exercise of chambers judge's discretion — Rules of Court, B.C. Reg. 221/90, ss. 52(11)(d), 57(9).

In 1999, members of the four respondent Bands began logging on Crown land in B.C. without authorization under the *Forest Practices Code of British Columbia Act*. The Minister of Forests served the Bands with stop-work orders under the Code, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging the Code as conflicting with their constitutionally protected aboriginal rights. The Minister then applied to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The Bands argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order and to make orders as to costs, should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. The B.C. Supreme Court held that the case should be remitted to the trial list and declined to order the Minister to pay the Bands' costs in advance of the trial. The Court of Appeal allowed the Bands' appeal. The decision to remit the matter of the Bands' aboriginal rights or title to trial was upheld. The court concluded,

however, that although the Bands did not have a constitutional right to legal fees funded by the provincial Crown the court did have a discretionary power to order interim costs. It ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that it imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation.

Held (Iacobucci, Major and Bastarache JJ. dissenting): The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ.: The Court of Appeal's decision to grant interim costs to the Bands should be upheld. The discretionary power to award interim costs in appropriate cases has been recognized in Canada. Concerns about access to justice and the desirability of mitigating severe inequality between litigants feature prominently in the rare cases where such costs are awarded. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. Several conditions must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case; the claimant must establish a *prima facie* case of sufficient merit to warrant pursuit; and there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate.

In public interest litigation special considerations also come into play. Public law cases, as a class, can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the special circumstances that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as special by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate. The criteria that must be present to justify an award of interim costs in this kind of case are as follows: the party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial; the claim to be adjudicated is *prima facie* meritorious; and the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

Each of these criteria is met in this case. The Bands are impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward; the issues sought to be raised at trial are of profound importance to the people of B.C., both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme. The conditions attached to the costs order by the Court of Appeal ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown, and also that there will be no temptation

for the Bands to drag out the process unnecessarily and to throw away costs paid by the Crown.

The Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court. Discretionary decisions are not completely insulated from review. An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues and erred when he concluded that his discretion did not extend so far as to empower him to make the order requested. Second, his finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

Per Iacobucci, Major and Bastarache JJ. (dissenting): The chambers judge interpreted the applicable principles correctly and there is no basis for reversing his discretion. Traditionally, costs are awarded after the ultimate trial or appellate decision and almost always to the successful party. However, the common law on interim costs has been more confined and interim costs have been awarded in two circumstances: in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. Courts may also award interim costs in child custody cases. The reason for such restrictive use is apparent since awarding costs in advance

could be seen as prejudging the merits and the objectivity of the court making such an order will almost automatically be questioned. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. The new criteria endorsed by the majority broaden the scope of interim costs to an undesirable extent and are not supported in the case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion. A case must be exceptional in order to attract interim costs; however, the majority accept that most public interest cases would satisfy this criterion and leave to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. Even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. Further, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal. The *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs: the party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case; there is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate; and it is presumed that the party seeking interim costs will win some award from the other party. The chambers judge committed no error of law nor a palpable error in his assessment of the facts. Deference should be given to his decision not to exercise his discretion to grant interim costs.

Cases Cited

By LeBel J.

Referred to: *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23; *Ryan v. McGregor* (1925), 58 O.L.R. 213; *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464; *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201; *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295; *Canadian Newspapers Co. v. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292; *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486, rev'd (1989), 67 O.R. (2d) 536, aff'd [1991] 2 S.C.R. 211; *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, aff'g (1992), 10 O.R. (3d) 321, aff'g [1989] O.J. No. 205 (QL); *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642; *Organ v. Barnett* (1992), 11 O.R. (3d) 210; *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527; *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306; *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL); *Amcan Industries Corp. v. Toronto-Dominion Bank*, [1998] O.J. No. 3014 (QL); *Turner v. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76; *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273, rev'd [1999] 3 S.C.R. 46; *Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68; *Benson v. Benson* (1994), 120 Sask. R. 17; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12; *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

By Major J. (dissenting)

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010; *R. v. Van der Peet*, [1996] 2 S.C.R. 507; *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527; *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954; *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL); *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

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Business Corporations Act, R.S.O. 1990, c. B.16, ss. 248, 249.

Canadian Charter of Rights and Freedoms, s. 15.

Company Act, R.S.B.C. 1996, c. 62, s. 201.

Constitution Act, 1982, s. 35.

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131(1).

Forest Practices Code of British Columbia Act, R.S.B.C. 1996, c. 159, ss. 96, 123.

Queen's Bench Rules, Man. Reg. 553/88, r. 49.10.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, rr. 49.10, 57.01(1)(d), (2).

Rules of Court, B.C. Reg. 221/90, rr. 1(12), 37(23) to 37(26), 52(11)(d), 57(9).

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APPEAL from a judgment of the British Columbia Court of Appeal (2001), 95 B.C.L.R. (3d) 273, 208 D.L.R. (4th) 301, 161 B.C.A.C. 13, 263 W.A.C. 13, 92 C.R.R. (2d) 319 (*sub nom. British Columbia (Ministry of Forests) v. Jules*), [2002] 1 C.N.L.R. 57, [2001] B.C.J. No. 2279 (QL), 2001 BCCA 647, allowing in part an appeal from a decision of the British Columbia Supreme Court, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135. Appeal dismissed, Iacobucci, Major and Bastarache JJ. dissenting.

Patrick G. Foy, Q.C., and *Robert J. C. Deane*, for the appellant.

Louise Mandell, Q.C., *Michael Jackson, Q.C.*, *Clarine Ostrove* and *Reidar Mogerman*, for the respondents.

Cheryl J. Tobias and *Brian McLaughlin*, for the intervener the Attorney General of Canada.

Lori R. Sterling and *Mark Crow*, for the intervener the Attorney General of Ontario.

René Morin, *Gilles Laporte* and *Brigitte Bussières*, for the intervener the Attorney General of Quebec.

Written submissions only by *Gabriel Bourgeois,Q .C.*, for the intervener the Attorney General of New Brunswick.

Written submissions only by *George H. Copley, Q.C.*, for the intervener the Attorney General of British Columbia.

Written submissions only by *Margaret Unsworth*, for the intervener the Attorney General of Alberta.

Robert J. M. Janes and *Dominique Nouvet*, for the interveners the Songhees Indian Band et al.

Joseph J. Arvay, Q.C., and *David M. Robbins*, for the intervener Chief Roger William.

The judgment of McLachlin C.J. and Gonthier, Binnie, Arbour, LeBel and Deschamps JJ. was delivered by

LEBEL J. —

I. Introduction

1 These two appeals concern the inherent jurisdiction of the courts to grant costs to a litigant, in rare and exceptional circumstances, prior to the final disposition of a case and in any event of the cause (I will refer to a cost award of this nature as "interim costs"). Such a jurisdiction exists in British Columbia. This discretionary power is subject to stringent conditions and to the observance of appropriate procedural controls. In this case, for the reasons which follow, I would uphold the granting of interim costs to the respondents by the British Columbia Court of Appeal,

and I would hold that the Court of Appeal had sufficient grounds to review the exercise of discretion by the trial court.

II. Background

2 In the fall of 1999, members of the four respondent Indian bands (the "Bands") began logging on Crown land in British Columbia without authorization under the *Forest Practices Code of British Columbia Act*,R .S.B.C. 1996, c. 159 (the "Code"). The Bands' respective tribal councils had purportedly authorized the harvesting of the timber, which was to be used to construct housing on the Bands' reserves. The appellant Minister of Forests served the Bands with stop-work orders under the Code, and commenced proceedings to enforce the orders. The Bands claimed that they had aboriginal title to the lands in question and were entitled to log them. They filed a notice of constitutional question challenging ss. 96 and 123 of the Code as conflicting with their constitutionally protected aboriginal rights.

3 The Minister then applied under Rule 52(11)(d) of the *Rules of Court* of the Supreme Court of British Columbia, B.C. Reg. 221/90, to have the proceedings remitted to the trial list instead of being dealt with in a summary manner. The respondents argued that the matter should not go to trial, because they lacked the financial resources to fund a protracted and expensive trial — which, given the evidentiary challenges of proving a claim of aboriginal title, this would almost undoubtedly be. In the alternative, they argued that the court, in the exercise of its powers to attach conditions to a discretionary order under Rule 52(11)(d) and to make orders as to costs pursuant to Rule 57(9), should order a trial only if it also ordered the Crown to pay their legal fees and disbursements in advance and in any event of the cause. In support of this position, they raised constitutional arguments on three grounds: a general right of access to justice that is implicit in the *Canadian Charter of Rights and Freedoms* and flows from the primacy of the rule of law; the protection

of aboriginal rights, as affirmed by s. 35 of the *Constitution Act, 1982*; and equality rights under s. 15 of the *Charter*.

4 The respondents filed affidavit and documentary evidence in support of their claims of aboriginal title and rights. They also submitted evidence demonstrating that it was impossible for them to fund the litigation themselves. The evidence indicated that the Bands were all in extremely difficult financial situations. The chiefs deposed that their communities face grave social problems, including high unemployment rates, lack of housing, inadequate infrastructure, and lack of access to education. Many members of the respondent Bands who live off-reserve would like to return to their communities, but are unable to do so because there are not enough jobs and homes even for those who live on the reserves now. The Bands have been forced to run deficits to finance their day-to-day operations. The chiefs of the Spallumcheen and Neskonlith Bands deposed that they are close to having outside management of their finances imposed by the Department of Indian and Northern Affairs because their working capital deficits are so high.

5 The Bands' counsel estimated that the cost of a full trial would be $814,010. The Bands say that they had no way to raise this much money; and that even if they did, there are many more pressing needs which would have to take priority over funding litigation. One of the most urgent needs is new housing — the very purpose for which, they say, they want to harvest timber from the land to which they claim title.

III. Relevant Legislative Provisions

6 Supreme Court of British Columbia *Rules of Court*, B.C. Reg. 221/90

> 1(12) When making an order under these rules the court may impose terms and conditions and give directions as it thinks just.
>
> 52(11) On an application the court may
>
> (d) order a trial of the proceeding, either generally or on an issue, and order pleadings to be filed, and may give directions for the conduct of the trial and of pre-trial proceedings, and for the disposition of the application.
>
> 57(9) . . . costs of and incidental to a proceeding shall follow the event unless the court otherwise orders.

IV. Judicial History

A. *British Columbia Supreme Court*, [2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135

7 Sigurdson J. held that the case could not be decided on the basis of documentary and affidavit evidence alone, and should therefore be remitted to the trial list. The evidence submitted by the Bands of their historical connection to the land was not sufficient in itself to dispose of the issue. Proving the Bands' aboriginal rights claims, which were contested by the Crown, would require historical, anthropological and archaeological evidence to be given by live witnesses and subjected to the detailed and rigorous testing of the trial process. The just resolution of the dispute required a trial and pleadings.

8 Sigurdson J. went on to consider whether he should impose a condition that the Minister pay the Bands' legal fees and disbursements. He began with the question of whether the court retained a general jurisdiction to award interim costs in a

proceeding. He noted that costs usually follow the event and are awarded at the conclusion of the proceedings. Referring to a line of Ontario cases where a narrow jurisdiction to award interim costs has been recognized, Sigurdson J. held that such a discretion also existed in British Columbia in exceptional circumstances. He noted that he was unaware of any cases where substantial amounts had been awarded prior to trial where a liability or right was seriously in issue.

9 Turning to the Bands' argument that constitutional norms applied to the exercise of his discretion over costs, Sigurdson J. held that those norms did not require an order of interim costs to be made in the Bands' favour. He acknowledged that the Bands would need to retain experienced counsel and experts, and that a trial would be complex and expensive. He also recognized that the Bands' poverty would make it difficult for them to put their case forward. In his view, however, these obstacles resulted from the nature of the case and from the Bands' financial circumstances, not from any interference with their constitutional rights. The Bands' s. 35 argument failed, he held, because there were no specific circumstances giving rise to a fiduciary obligation on the part of the Crown to negotiate with the Bands or to fund the litigation of their land claim.

10 Sigurdson J. declined to order the Minister to pay the Bands' costs in advance of the trial. He found that his jurisdiction to make such an order was very narrow and was limited by the principle that he could not prejudge the outcome of the case. In this case, liability was still in issue, and Sigurdson J. held that ordering the payment of costs in advance would involve prejudging the case on the merits. For this reason, he was of the view that he was precluded from making such an order. Sigurdson J. added a recommendation that the federal and provincial Crown consider

providing funding to ensure that the cases, which had elements of test cases, would be properly resolved at trial. He also suggested that the litigation might be able to proceed if the Bands could work out a contingent fee arrangement with counsel.

B.*B ritish Columbia Court of Appeal* (2001), 95 B.C.L.R. (3d) 273, 2001 BCCA 647

11 Newbury J.A., writing for a unanimous panel, allowed the Bands' appeal of Sigurdson J.'s decision.

12 At the outset, Newbury J.A. noted that the Bands' claims, if they went to trial, would be the first to try aboriginal claims to title and other rights in respect of logging in British Columbia. She also summarized some of the affidavit evidence setting out the dire financial circumstances of the Bands.

13 Newbury J.A. upheld the chambers judge's decision to remit the matter of the Bands' aboriginal rights or title to trial. She agreed with him that the just determination of these issues required a trial. This holding was not raised on appeal to this Court.

14 On the question of funding the litigation, Newbury J.A. distinguished between a constitutional right to full funding of legal fees and disbursements, on the one hand, and on the other, the court's discretion to make orders as to "costs" as that term is used in the rules of court and in general legal parlance — meaning a payment to offset legal expenses, usually in an amount set by statutory guidelines, rather than payment of the actual amount owed by the client to his or her solicitor.

15 As far as a constitutional right to funding of the Bands' legal expenditures was concerned, Newbury J.A. substantially agreed with the reasons of the chambers judge. She held that the principle of access to justice did not extend so far as to oblige the government to fund litigants who could not afford to pay for legal representation in a civil suit. She also agreed with Sigurdson J. that s. 35 of the *Constitution Act, 1982* did not place an affirmative obligation on the government to provide funding for legal fees of an aboriginal band attempting to prove asserted aboriginal rights. Nothing in the specific circumstances of this case gave rise to a fiduciary expectation on the Bands' part that their legal fees would be funded. (She did not address the Bands' s. 15 arguments, which were not raised on appeal.) Newbury J.A. concluded that the Bands did not have a constitutional right to legal fees funded by the provincial Crown.

16 Newbury J.A. came to a different conclusion, however, on the matter of the court's discretion to order interim costs in favour of the Bands. She agreed with Sigurdson J. that this discretion existed, and that it was narrow in scope and restricted to narrow and exceptional circumstances. In her view, however, the circumstances of this case were indeed exceptional. Newbury J.A. held that the chambers judge had placed too much emphasis on concerns about prejudging the outcome, which in her view were diminished in light of the special circumstances of the case and the public interest in a proper resolution of the issues. She held that constitutional principles and the unique nature of the relationship between the Crown and aboriginal peoples were background factors that should inform the exercise of the court's discretion to order costs. Newbury J.A. held that the chambers judge had erred in failing to recognize that the case involved exceptional and unique circumstances which outweighed concerns about prejudging the outcome of the case.

17 Newbury J.A. held that, although the court had no discretion to order full funding of the Bands' case by the Crown, the chambers judge did have a discretionary power to order interim costs. She held that such an order should be made with conditions designed to provide concrete assistance to the Bands without exposing the Minister to unreasonable or excessive costs. She ordered the Crown to pay such legal costs of the Bands as ordered by the chambers judge from time to time, subject to detailed terms that she imposed so as to encourage the parties to minimize unnecessary steps in the dispute and to resolve as many issues as possible by negotiation. These terms, as found in the Court of Appeal Order dated November 5, 2001, are best stated in full:

> AND THIS COURT FURTHER ORDERS that the Crown, in any event of the cause, pay such legal costs of the Bands, as that term is used and as the Chambers judge orders from time to time in accordance with the following:
>
> (a) Costs, as is referenced in paragraph [10] of the *Reasons for Judgment*;
>
> (b) Unless the Chambers judge concludes that special costs are warranted in this case, costs are to be calculated on the appropriate scale in light of the complexity and difficulty of the litigation;
>
> (c) Counsel are to consider whether costs could be saved by trying one of the four cases rather than all four at the same time. If counsel are unable to agree on that issue, they should seek directions from the Chambers judge. Counsel are also to use all other reasonable measures to minimize costs, and the Chambers judge may impose restrictions for this purpose;
>
> (d) The Province and the Bands are to attempt to agree on a procedure whereby the Bands upon incurring taxable costs and disbursements from time to time up to the end of the trial, will so advise the respondent, and provide such other 'backup' material as the Chambers judge may order. Such costs would be paid by the respondent within a given time-frame, unless the Province objects, in which case it shall refer the matter to the Chambers judge, who may order the taxation of the bill in the ordinary way;

(e) If counsel are unable to agree on such procedures, the matter shall be taken back to the Chambers judge, who shall make directions in accordance with the spirit of these *Reasons*.

V. Issues

18 This case raises two issues: first, the nature of the court's jurisdiction in British Columbia to grant costs on an interim basis and the principles that govern its exercise; and second, appellate review of the trial court's discretion as to costs. The issue of a constitutional right to funding does not arise, as it was not relied on by the respondents in this appeal.

VI. Analysis

A. *The Court's Discretionary Power to Grant Interim Costs*

(1) Traditional Costs Principles — Indemnifying the Successful Party

19 The jurisdiction of courts to order costs of a proceeding is a venerable one. The English common law courts did not have inherent jurisdiction over costs, but beginning in the late 13th century they were given the power by statute to order costs in favour of a successful party. Courts of equity had an entirely discretionary jurisdiction to order costs according to the dictates of conscience (see M. M. Orkin, *The Law of Costs* (2nd ed. (loose-leaf)), at p. 1-1). In the modern Canadian legal system, this equitable and discretionary power survives, and is recognized by the various provincial statutes and rules of civil procedure which make costs a matter for the court's discretion.

20 In the usual case, costs are awarded to the prevailing party after judgment has been given. The standard characteristics of costs awards were summarized by the Divisional Court of the Ontario High Court of Justice in *Re Regional Municipality of Hamilton-Wentworth and Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23, at p. 32, as follows:

> (1) They are an award to be made in favour of a successful or deserving litigant, payable by the loser.
>
> (2) Of necessity, the award must await the conclusion of the proceeding, as success or entitlement cannot be determined before that time.
>
> (3) They are payable by way of indemnity for allowable expenses and services incurred relevant to the case or proceeding.
>
> (4) They are *not* payable for the purpose of assuring participation in the proceedings. [Emphasis in original.]

21 The characteristics listed by the court reflect the traditional purpose of an award of costs: to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed). Costs awards were described in *Ryan v. McGregor* (1925), 58 O.L.R. 213 (App. Div.), at p. 216, as being "in the nature of damages awarded to the successful litigant against the unsuccessful, and by way of compensation for the expense to which he has been put by the suit improperly brought".

(2) Costs as an Instrument of Policy

22 These background principles continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them. The power to order costs is discretionary, but it is a discretion that must be exercised judicially, and accordingly the ordinary rules of costs should be followed unless the circumstances justify a different approach. For some time, however, courts have recognized that indemnity to the successful party is not the sole purpose, and in some cases not even the primary purpose, of a costs award. Orkin, *supra*, at p. 2-24.2, has remarked that:

> The principle of indemnification, while paramount, is not the only consideration when the court is called on to make an order of costs; indeed, the principle has been called "outdated" since other functions may be served by a costs order, for example to encourage settlement, to prevent frivolous or vexations [*sic*] litigation and to discourage unnecessary steps.

23 The indemnification principle was referred to as "outdated" in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Gen. Div.), at p. 475. In this case the successful party was a law firm, one of whose partners had acted on its behalf. Traditionally, courts applying the principle of indemnification would allow an unrepresented litigant to tax disbursements only and not counsel fees, because the litigant could not be indemnified for counsel fees it had not paid. Macdonald J. held that the principle of indemnity remained a paramount consideration in costs matters generally, but was "outdated" in its application to a case of this nature. The court should also use costs awards so as to encourage settlement, to deter frivolous actions and defences, and to discourage unnecessary steps in the litigation. These purposes could be served by ordering costs in favour of a litigant who might not be entitled to them on the view that costs should be awarded purely for indemnification of the successful party.

24 Similarly, in *Skidmore v. Blackmore* (1995), 2 B.C.L.R. (3d) 201, the British Columbia Court of Appeal stated at para. 28 that "the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated". The court held that self-represented lay litigants should be allowed to tax legal fees, overruling its earlier decision in *Kendall v. Hunt (No. 2)* (1979), 16 B.C.L.R. 295. This change in the common law was described by the court as an incremental one "when viewed in the larger context of the trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant" (para. 44).

25 As the *Fellowes* and *Skidmore* cases illustrate, modern costs rules accomplish various purposes in addition to the traditional objective of indemnification. An order as to costs may be designed to penalize a party who has refused a reasonable settlement offer; this policy has been codified in the rules of court of many provinces (see, e.g., Supreme Court of British Columbia *Rules of Court*, Rule 37(23) to 37(26); Ontario *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 49.10; Manitoba *Queen's Bench Rules*, Man. Reg. 553/88, Rule 49.10). Costs can also be used to sanction behaviour that increases the duration and expense of litigation, or is otherwise unreasonable or vexatious. In short, it has become a routine matter for courts to employ the power to order costs as a tool in the furtherance of the efficient and orderly administration of justice.

26 Indeed, the traditional approach to costs can also be viewed as being animated by the broad concern to ensure that the justice system works fairly and efficiently. Because costs awards transfer some of the winner's litigation expenses to

the loser rather than leaving each party's expenses where they fall (as is done in jurisdictions without costs rules), they act as a disincentive to those who might be tempted to harass others with meritless claims. And because they offset to some extent the outlays incurred by the winner, they make the legal system more accessible to litigants who seek to vindicate a legally sound position. These effects of the traditional rules can be connected to the court's concern with overseeing its own process and ensuring that litigation is conducted in an efficient and just manner. In this sense it is a natural evolution in the law to recognize the related policy objectives that are served by the modern approach to costs.

(3) Public Interest Litigation and Access to Justice

27 Another consideration relevant to the application of costs rules is access to justice. This factor has increased in importance as litigation over matters of public interest has become more common, especially since the advent of the *Charter*. In special cases where individual litigants of limited means seek to enforce their constitutional rights, courts often exercise their discretion on costs so as to avoid the harshness that might result from adherence to the traditional principles. This helps to ensure that ordinary citizens have access to the justice system when they seek to resolve matters of consequence to the community as a whole.

28 Courts have referred to the importance of this objective on numerous occasions. In *Canadian Newspapers Co. v. Attorney-General of Canada* (1986), 32 D.L.R. (4th) 292 (Ont. H.C.J.), Osler J. opined that "it is desirable that *bona fide* challenge is not to be discouraged by the necessity for the applicant to bear the entire burden" (pp. 305-6), while at the same time cautioning that "the Crown should not be

treated as an unlimited source of funds with the result that marginal applications would be encouraged" (p. 306). In *Re Lavigne and Ontario Public Service Employees Union (No. 2)* (1987), 60 O.R. (2d) 486 (H.C.J.), White J. held that "it is desirable that Charter litigation not be beyond the reach of the citizen of ordinary means" (p. 526). He awarded costs to the successful *Charter* applicant in spite of the fact that his representation had been paid for by a third-party organization (so that he would not, on the traditional approach, have been entitled to any indemnity). This case was overturned on the merits on appeal (*Lavigne v. O.P.S.E.U.* (1989), 67 O.R. (2d) 536 (C.A.), aff'd [1991] 2 S.C.R. 211), but neither the Ontario Court of Appeal nor this Court expressed any disapproval of White J.'s remarks on costs. Referring to both *Canadian Newspapers* and *Lavigne* in *Rogers v. Sudbury (Administrator of Ontario Works)* (2001), 57 O.R. (3d) 467 (S.C.J.), Epstein J. concluded at para. 19 that "costs can be used as an instrument of policy and . . . making *Charter* litigation accessible to ordinary citizens is recognized as a legitimate and important policy objective".

29 In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, the applicants, who were Jehovah's Witnesses, unsuccessfully argued that their *Charter* rights had been violated when a blood transfusion was administered to their baby daughter over their objections. Instead of granting costs in the cause, the District Court judge directed the intervening Attorney General to pay the applicants' costs. Whealy Dist. Ct. J. cited Osler J.'s statement in *Canadian Newspapers*, *supra*, that *bona fide* challenges should not be deterred, and observed that the case before him was an unusual one involving a matter of province-wide importance (see [1989] O.J. No. 205 (QL) (Dist. Ct.)). His costs order, although unconventional, was upheld on appeal by the Ontario Court of Appeal, and subsequently by this Court. At the Court of Appeal, Tarnopolsky J.A. noted that this case, in which "the parents rose up against

state power because of their religious beliefs", was one of national, even international significance ((1992), 10 O.R. (3d) 321, at pp. 354-55). La Forest J. stated at para. 122 of this Court's judgment that the costs award against the Attorney General was "highly unusual" and something that should be permitted "only in very rare cases", but that the case "raised special and peculiar problems". He allowed Whealy Dist. Ct. J.'s order to stand.

30 The *B. (R.)* case illustrates that in highly exceptional cases involving matters of public importance the individual litigant who loses on the merits may not only be relieved of the harsh consequence of paying the other side's costs, but may actually have its own costs ordered to be paid by a successful intervenor or party. It should be noted that Whealy Dist. Ct. J. applied Rule 57.01(2), a provision of Ontario's *Rules of Civil Procedure* that expressly authorized the court to award costs against a successful litigant and specified that the importance of the issues was a factor to be considered (see Rule 57.01(1)(d)). Although these principles are not spelled out in the Supreme Court of British Columbia *Rules of Court*, in my view they are generally relevant in guiding the exercise of a court's discretion as to costs. They form part of the background against which a British Columbia court exercises its inherent equitable jurisdiction, confirmed by Rule 57(9), to depart from the usual rule that costs follow the event.

(4) Interim Costs

31 Concerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded. An award of costs of this nature forestalls the danger that a

meritorious legal argument will be prevented from going forward merely because a party lacks the financial resources to proceed. That costs orders can be used in this way in a narrow class of exceptional cases was recognized early on by the English courts. In *Jones v. Coxeter* (1742), 2 Atk. 400, 26 E.R. 642 (Ch.), the Lord Chancellor found that "the poverty of the person will not allow her to carry on the cause, unless the court will direct the defendant to pay something to the plaintiff in the mean time". Invoking the "intirely discretionary" equitable jurisdiction to order costs, he ordered costs to be paid to the plaintiff "to empower her to go on with the cause" (p. 642).

32 The discretionary power to award interim costs in appropriate cases has also been recognized in Canada. An extensive discussion of this power is found in *Organ v. Barnett* (1992), 11 O.R. (3d) 210 (Gen. Div.). Macdonald J. reviewed the authorities, including *Jones*, *supra*, and concluded that "the court *does* have a general jurisdiction to award interim costs in a proceeding" (p. 215 (emphasis in original)). She also found that that jurisdiction was "limited to very exceptional cases and ought to be narrowly applied, especially when the court is being asked to essentially pre-determine an issue" (p. 215).

33 As Macdonald J. recognized in *Organ*, *supra*, at p. 215, the power to order interim costs is perhaps most typically exercised in, but is not limited to, matrimonial or family cases. In *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A.), Russell J.A. observed that the wife in divorce proceedings could traditionally obtain "anticipatory costs" to enable her to present her position (para. 18). This was because husbands usually controlled all the matrimonial property. Since the wife had "no means to pay lawyers, her side of the litigation would not be advanced, and this position was patently unfair" (para. 20). Interim costs will still be granted in family

cases where one party is at a severe financial disadvantage that may prevent his or her case from being put forward. See, e.g., *Woloschuk v. Von Amerongen*, [1999] A.J. No. 463 (QL), 1999 ABQB 306, where the Alberta Court of Queen's Bench ordered a lump sum payment of $10,000 to the mother in a custody action by way of interim costs, finding that the father's financial position was "significantly better than that of the [mother] in terms of funding this protracted lawsuit" (para. 16); and *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL) (S.C.J.), also a custody case, where the court held that the father was unlikely to succeed at trial and that the mother lacked the resources to pay her legal fees and disbursements, and ordered the father to pay $15,000 as interim costs. Orkin, *supra*, at p. 2-23, observes that in the modern context "the *raison d'tre* [*sic*] of such awards is to assist the financially needy party pending the trial; they are made where the spouse is without resources and would otherwise be unable to obtain relief in court" (citations omitted).

34 Interim costs are also potentially available in certain trust, bankruptcy and corporate cases, where they are awarded for essentially the same reason — to avoid unfairness by enabling impecunious litigants to pursue meritorious claims with which they would not otherwise be able to proceed. *Organ* was a corporate case involving, among other causes of action, an action under the oppression remedy set out in s. 248 of the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16. The statute also provided in s. 249(4) that interim costs could be awarded in an oppression case. Macdonald J. held that, in addition to this express statutory power, the court also had an inherent jurisdiction to award interim costs. In the particular circumstances of this case, however, she held that the order should not be granted, because by their own admission the plaintiffs were not impecunious and would be able to proceed to trial without it. In *Amcan Industries Corp. v. Toronto-Dominion Bank*, [1998] O.J.

No. 3014 (QL) (Gen. Div.), a bankruptcy case, Macdonald J. acknowledged "the inherent unfairness that arises in choking a plaintiff's action if access to funds is not permitted" (para. 39); in this case, again, interim costs were not awarded because impecuniosity was not established. In *Turner v. Telecommunication Workers Pension Plan* (2001), 197 D.L.R. (4th) 533, 2001 BCCA 76, an action for breach of fiduciary duty in respect of a pension fund, the British Columbia Court of Appeal recognized that the court had the power to award interim costs, but held that the interests of justice did not require it to do so on the facts of the case. Newbury J.A. noted that the financial position or impecuniosity of a party is not in itself reason enough to depart from the usual rules as to costs (para. 18).

35 Based on the foregoing overview of the case law, the following general observations can be made. The power to order interim costs is inherent in the nature of the equitable jurisdiction as to costs, in the exercise of which the court may determine at its discretion when and by whom costs are to be paid. This broad discretion may be expressly referred to in a statute, as in s. 131(1) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides that costs "are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid". Indeed, the power to order interim costs may be specifically stipulated, as in the Ontario *Business Corporations Act* or similar legislation in other jurisdictions. Even absent explicit statutory authorization, however, the power to award interim costs is implicit in courts' jurisdiction over costs as it is set out in statutes such as the Supreme Court of British Columbia *Rules of Court*, which provides that the court may make orders varying from the usual rule that costs follow the event.

36 There are several conditions that the case law identifies as relevant to the exercise of this power, all of which must be present for an interim costs order to be granted. The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case. The claimant must establish a *prima facie* case of sufficient merit to warrant pursuit. And there must be special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate. These requirements might be modified if the legislature were to set out the conditions on which interim costs are to be granted, or where courts develop criteria applicable to a particular situation where interim costs are authorized by statute (as is the case in relation to s. 249(4) of the Ontario *Business Corporations Act*; see *Organ*, *supra*, at p. 213). But in the usual case, where the court exercises its equitable jurisdiction to make such costs orders as it concludes are in the interests of justice, the three criteria of impecuniosity, a meritorious case and special circumstances must be established on the evidence before the court.

37 Although a litigant who requests interim costs must establish a case that is strong enough to get over the preliminary threshold of being worthy of pursuit, the order will not be refused merely because key issues remain live and contested between the parties. If the court does decide to award interim costs in such circumstances, it will in a sense be predetermining triable issues, since it will have to decide that one side will receive its costs before it is known who will win on the merits (and since the winner is usually entitled to costs). As a result, concerns may arise about fettering the discretion of the trial judge who will eventually be called upon to adjudicate the merits of the case. This in itself should not, however, preclude the granting of interim costs if the relevant criteria are met. As Macdonald J. noted in *Organ*, *supra*, the court's

discretion must be exercised with particular caution where it is being asked to predetermine an issue in this sense, but it does not follow that the court would be going beyond the limits of its discretion if it were to grant the order. I therefore disagree with the conclusion of the New Brunswick Court of Queen's Bench in *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1995), 131 D.L.R. (4th) 273, that costs cannot be ordered at the commencement of a proceeding in the absence of express statutory authority to award costs regardless of the outcome of the proceeding (p. 283) (this case was eventually overturned by this Court in [1999] 3 S.C.R. 46, but the interim costs issue was a secondary one that was not dealt with on appeal). As I stated above, the power to order costs contrary to the cause is always implicit in the court's discretionary jurisdiction as to costs, as is the power to order interim costs.

(5) Interim Costs in Public Interest Litigation

38 The present appeal raises the question of how the principles governing interim costs operate in combination with the special considerations that come into play in cases of public importance. In cases of this nature, as I have indicated above, the more usual purposes of costs awards are often superseded by other policy objectives, notably that of ensuring that ordinary citizens will have access to the courts to determine their constitutional rights and other issues of broad social significance. Furthermore, it is often inherent in the nature of cases of this kind that the issues to be determined are of significance not only to the parties but to the broader community, and as a result the public interest is served by a proper resolution of those issues. In both these respects, public law cases as a class can be distinguished from ordinary civil disputes. They may be viewed as a subcategory where the "special circumstances"

that must be present to justify an award of interim costs are related to the public importance of the questions at issue in the case. It is for the trial court to determine in each instance whether a particular case, which might be classified as "special" by its very nature as a public interest case, is special enough to rise to the level where the unusual measure of ordering costs would be appropriate.

39 One factor to be borne in mind by the court in making this determination is that in a public law case costs will not always be awarded to the successful party if, for example, that party is the government and the opposing party is an individual *Charter* claimant of limited means. Indeed, as the *B. (R.)* case demonstrates, it is possible (although still unusual) for costs to be awarded in favour of the unsuccessful party if the court considers that this is necessary to ensure that ordinary citizens will not be deterred from bringing important constitutional arguments before the courts. Concerns about prejudging the issues are therefore attenuated in this context since costs, even if awarded at the end of the proceedings, will not necessarily reflect the outcome on the merits. Another factor to be considered is the extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court.

40 With these considerations in mind, I would identify the criteria that must be present to justify an award of interim costs in this kind of case as follows:

1. The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial — in short, the litigation would be unable to proceed if the order were not made.

2. The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

3. The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

41 These are necessary conditions that must be met for an award of interim costs to be available in cases of this type. The fact that they are met in a particular case is not necessarily sufficient to establish that such an award should be made; that determination is in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively. Such orders should be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them. In the context of public interest litigation judges must be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application. Within these parameters, it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order.

B. *Appellate Review of Discretionary Decisions*

42 The discretion of a trial court to decide whether or not to award costs has been described as unfettered and untrammelled, subject only to any applicable rules of court and to the need to act judicially on the facts of the case (*Earl v. Wilhelm* (2000), 199 Sask. R. 21, 2000 SKCA 68, at para. 7, citing *Benson v. Benson* (1994), 120 Sask. R. 17 (C.A.)). Sigurdson J.'s decision in the present case was based on his judicial experience, his view of what justice required, and his assessment of the evidence; it is not to be interfered with lightly.

43 As I observed in *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12, however, discretionary decisions are not completely insulated from review (para. 118). An appellate court may and should intervene where it finds that the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts. As this Court held in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, at p. 814-15, the criteria for the exercise of a judicial discretion are legal criteria, and their definition as well as a failure to apply them or a misapplication of them raise questions of law which are subject to appellate review.

44 Two errors in particular vitiate the chambers judge's decision and call for appellate intervention. First, he overemphasized the importance of avoiding any order that involved prejudging the issues. In a case of this kind, as I have indicated, this consideration is of less weight than in the ordinary case; in fact, the allocation of the costs burden may, in certain cases, be determined independently of the outcome on the merits. Sigurdson J. erred when he concluded that his discretion did not extend so far

as to empower him to make the order requested. Secondly, Sigurdson J.'s finding that a contingent fee arrangement might be a viable alternative for funding the litigation does not appear to be supported by any evidence, and I agree with Newbury J.A. that the prospect of the Bands' hiring counsel on a contingency basis seems unrealistic in the particular circumstances of this case.

C.*A pplication to the Facts of this Case*

45 It is unnecessary to send this case back to the chambers judge to apply the criteria set out here, because it is apparent from his reasons that, had he done so, he would have ordered interim costs in favour of the respondents. Sigurdson J. found as a fact that the Bands were in extremely difficult financial circumstances and could not afford to pay for legal representation. The only alternative which he suggested might be available for funding the litigation was a contingent fee arrangement, which, as I have stated, was not feasible. He found the Bands' claims of aboriginal title and rights to be *prima facie* plausible and supported by extensive documentary evidence; although the claim was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit. Finally, Sigurdson J. found the case to be one of great public importance, raising novel and significant issues resolution of which through the trial process was very much in the interests of justice. He even went so far as to urge the executive branches of the federal and provincial governments to provide funding so that the respondents' claims could be addressed.

46 Applying the criteria I have set out to the evidence in this case as assessed by the chambers judge, it is my view that each of them is met. The respondents are

impecunious and cannot proceed to trial without an order for interim costs. The case is of sufficient merit that it should go forward. The issues sought to be raised at trial are of profound importance to the people of British Columbia, both aboriginal and non-aboriginal, and their determination would be a major step towards settling the many unresolved problems in the Crown-aboriginal relationship in that province. In short, the circumstances of this case are indeed special, even extreme.

47 The conditions attached to the costs order by Newbury J.A. ensure that the parties will be encouraged to resolve the matter through negotiation, which remains the ultimate route to achieving reconciliation between aboriginal societies and the Crown (see *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, at para. 186), and also that there will be no temptation for the Bands to drag out the process unnecessarily and to throw away costs paid by the appellant. I would uphold her disposition of the case.

VII. Disposition

48 The appeal is dismissed with costs to the respondents.

The reasons of Iacobucci, Major and Bastarache JJ. were delivered by

49 MAJOR J. (dissenting) — At issue in this appeal is how trial courts should be guided in their award of interim costs. When are these advance costs appropriate? How much deference should appellate courts give to the trial judge's discretion in the matter?

50 Four Indian bands are suing the Crown in right of British Columbia, to establish aboriginal title over land they wish to log. Because this litigation will be expensive, they seek interim costs — that is, advance costs awarded whether or not they are successful at trial. By any standard, this is an extraordinary remedy.

51 The chambers judge could not find a supporting precedent and in the exercise of his discretion he chose not to grant interim costs. The British Columbia Court of Appeal, and now my colleague LeBel J., reversed the chambers judge on what appears to be a new rule for interim costs. With respect for the contrary view, I conclude that Sigurdson J. interpreted the applicable principles correctly and can find no basis for reversing his discretion. I would therefore allow the appeal.

52 The appeal raises difficult questions. In particular, how may impoverished parties sue to establish what is submitted to be constitutionally supported rights? Constitutional issues, however, were not pursued in this appeal. The respondents rely solely on the common law rules on costs.

53 Traditionally, costs — usually party and party costs — are awarded after the ultimate trial or appellate decision and almost always to the successful party. Party and party costs in all Canadian jurisdictions are only partial indemnification of the litigants' legal costs. In certain cases, interim costs may be awarded to a spouse suing for the division of property as a consequence of separation or divorce. The *ratio* of the matrimonial cases is clear: a spouse usually owns or is entitled to part of the matrimonial property; some success on the merits is practically assured. Thus, the traditional purpose of costs — indemnification of the prevailing party — is preserved.

54 But to award interim costs when liability remains undecided would be a dramatic extension of the precedent. Furthermore, to do so in a case with serious constitutional considerations where the Crown is the defending party would be an unusual extension of highly exceptional private law precedent into an area fraught with other implications.

55 The common law is said to evolve to adapt prevailing principles to modern circumstances. But the common law of costs should develop through the discretion of trial judges. This equitable trial-level discretion, developed over centuries, is essential to the primary traditional use of the discretionary costs power by courts: to manage litigation and case loads. It may be that there are public law questions where access to justice can be provided through the discretionary award of interim costs. Even so, such cases must lie closer to the heart of the interim costs case law. Such developments should be initiated by trial courts properly exercising their discretionary power, not the appellate reversal of that discretion.

I. Background

56 My colleague has fairly characterized the facts of this litigation. However, some highlighting of those facts may be useful.

57 In 1999, the four respondent Indian bands (the "Bands") began logging Crown land. Funds from that activity were to be used for housing and other desperately needed social services. The British Columbia Minister of Forests served the Bands with stop-work orders and commenced proceedings to prevent further logging. The Bands challenged the orders and claimed aboriginal title to the lands.

58 At the British Columbia Supreme Court, Sigurdson J. ruled that the question of aboriginal title was sufficiently complex that a trial was necessary. The Bands stated that they could not afford to litigate and even if they could, they would have preferred to use such funds to provide social services. The Bands claimed that they had been unable to find any governmental or *pro bono* sources of aid. They therefore petitioned for interim costs — costs in advance of trial. The Bands' motions were originally grounded in the constitutional question of title. They now seek interim costs on the basis of the trial court's inherent and statutory cost power.

59 The chambers judge conducted a thorough examination of the case law on interim costs and, in the exercise of his discretion, concluded:

> I find that the respondents' argument that its trial costs be paid in advance must fail. The issue of liability is very much in dispute and the trial costs are substantial. To order the payment of trial costs would require prejudging the case on the merits which, of course, I cannot do. Although I have a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area. I recognize that these respondents are in a difficult position. However, counsel may be prepared to represent them on a contingency basis and, if successful, the respondents will undoubtedly receive significant indemnity for their costs. I recommend, however, that the Federal and Provincial Crown consider providing some funding so that these disputes, which have some elements of test cases, if they cannot be settled, can be properly resolved at trial.
>
> ([2000] B.C.J. No. 1536 (QL), 2000 BCSC 1135, at para. 129)

II. Analysis

A. *The Law of Costs*

60 The standard rule on party and party costs is that they are generally awarded to the successful litigant at the end of litigation. These costs are a contribution to the successful party's actual expense. Full indemnification by way of solicitor-client costs is infrequently ordered in Canada. Such costs require unusual and egregious conduct by the losing party. On rare occasions the court may award solicitor-client costs where equity is met by doing so.

61 My colleague points to what he describes as a modern trend in the law on costs — its use as an instrument to encourage litigation in the public interest. With respect, I think this proposition mistakes public funding to pursue *Charter* claims as an exercise in awarding costs. It is a separate function. Although the trial judge retains a discretion on the question of costs in such cases, they have always been awarded at the conclusion of the litigation.

B. *The Law of Interim Costs*

62 As a matter of public policy as reflected in federal and provincial rules of court, costs are usually awarded at the conclusion of trial as a contribution to the successful party's legal expenses. However, the common law on interim costs — costs in advance of trial — has been more confined and almost exclusively restricted to family law litigation to allow the impecunious spouse and children access to the court. The reason for such restrictive use is apparent since awarding costs in advance could be seen as prejudging the merits. While there is limited jurisdiction to award interim costs, it is logical that the party who must pay them and informed members of society might, in the absence of compelling reasons, have a reasonable apprehension of bias

in favour of the recipient. The objectivity of the court making such an order will almost automatically be questioned.

63 The award of costs before trial is a more potent incentive to litigation than the possibility of costs after the trial. The awarding of interim costs in the circumstances of this appeal appears as a form of judicially imposed legal aid. Interim costs are useful in family law, but should not be expanded to engage the court in essentially funding litigation for impecunious parties and ensuring their access to court. As laudable as that objective may be, the remedy lies with the legislature and law societies, not the judiciary.

64 LeBel J. concludes from his review of the case law on interim costs that they may be granted when (i) the party seeking the costs would be unable to pursue the litigation otherwise; (ii) there is a *prima facie* case of sufficient merit; and (iii) there are present "special circumstances sufficient to satisfy the court that the case is within the narrow class of cases where this extraordinary exercise of its powers is appropriate" (para. 36). He finds that such special circumstances may exist if the case is in the public interest and is a test case. With respect, I come to a different result.

65 I agree that the case must be exceptional in order to attract interim costs. Of necessity, the proposition that extraordinary circumstances practically always exist where the public interest is invoked is too broad to meet the exceptional requirement. LeBel J. accepts that most public interest cases would satisfy this criterion (para. 38). This is why he leaves to the discretion of the trial judge the decision as to whether the case is "special enough" to warrant an order. The difficulty for the trial judge is that this does not provide any ascertainable standard or direction. To say simply that the

issues transcend the individual interests in the case and have not yet been resolved (para. 40) does not assist the trial judge in deciding what is "special enough". An examination of past *Charter* cases will demonstrate that dilemma.

66 Test cases are referred to by LeBel J. and involve situations where important precedents are sought. In my view, the proposition that "it [would be] contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40), without more, is not sufficient. A trial judge can draw no direction from this proposal.

67 But even if such special circumstances were to be considered, there is nothing to distinguish the present aboriginal land claims from any other. On the contrary, the litigation here is likely to involve the application of principles enunciated by this Court in cases such as *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, and *R. v. Van der Peet*, [1996] 2 S.C.R. 507. There is no evidence to establish that these land claims should be considered exceptional. Nor is there anything to establish how the new criteria would apply in a different way between one impecunious aboriginal party and another.

68 It is worth noting that the honour of the Crown is not at stake in this appeal and that there is no reason to distinguish the aboriginal claimants from any other impecunious persons claiming rights under the Constitution with regard to the availability of costs. The new definition of extraordinary circumstances must therefore apply generally and its impact measured accordingly. There is no doubt that the conclusions of LeBel J. will result in an increase of interim costs applications while offering little in the way of guidance to trial judges.

69 The interim costs case law suggests narrow guidelines. Interim costs have been awarded in two circumstances: (i) in marital cases where some liability is presumed and the indemnificatory purpose of the costs power is fulfilled; and (ii) in corporate and trust cases where the court grants advanced costs to be paid by the corporation or trust for whose benefit the action is brought. In those cases it is still necessary that the party seeking advanced costs show that they would otherwise be unable to proceed with litigation.

70 The matrimonial cases involving the division of assets upon divorce comprise the oldest line of interim costs jurisprudence. At common law, a wife could be awarded interim costs to help her maintain her divorce action. This rule has been generally recognized in statute and Canadian case law. See *McDonald v. McDonald* (1998), 163 D.L.R. (4th) 527 (Alta. C.A.). See also *Randle v. Randle* (1999), 254 A.R. 323, 1999 ABQB 954, where interim costs were granted in an action concerning the division of property between common law spouses.

71 There are three legal characteristics that explain why the post-marital contest serves as the exception to the standard rule that costs "follow the event". These three characteristics are guidelines for the exercise of discretion in the award of interim costs.

72 First, at common law, husbands usually had control and legal ownership of the marital purse and property, ensuring in most cases that wives did not have the financial resources to pursue litigation. See *McDonald*, *supra*, at para. 20. Therefore, the first required element of an interim cost award is that the party seeking the award

is impoverished, and would not be able to pursue the litigation without such an award. It is acknowledged in this appeal that each of the bands are without funds.

73 Second, the marital relationship is perhaps unique in the mutual support owed between spouses. Thus, generalizing beyond the marital context, there must be a special relationship between the parties such that the cost award would be particularly appropriate. Where, as in this appeal, no right under s. 35 of the *Constitution Act, 1982* is implicated and the matter involves the provincial Crown rather than the federal Crown, this special relationship cannot automatically be presumed.

74 But third, and dispositive to this appeal, in the marital cases there is a presumption that the property that is the subject of the dispute is to be shared in some way. See *Randle*, *supra*, at para. 22. Generally, it is the distribution of assets and extent of support that are at issue in a divorce action, not whether such a division and such support are owed. In a sense, some liability is assumed; all that is to be litigated is the extent of the liability. LeBel J. blunts the bite of this element, reducing it to the modest requirement that "[t]he claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" (para. 40). The traditional roots of the costs power require more than *prima facie* merit. The costs power originally provided indemnification — the prevailing party won costs. In a divorce action, however, it was assumed that the spouse, usually the wife, would be awarded something; the question was how much.

75 The matrimonial cases can therefore be seen as exceptional not because they dispensed with the rule that the prevailing party won costs (and the related principle that judges not predetermine the merits of the case), but because they dispensed with the need to wait for the end of trial to decide which party prevailed, for some liability was presumed.

76 In this appeal, Sigurdson J.'s reluctance to "prejudg[e] the case on the merits" was appropriate. Unlike the divorce cases, one may not presume that the Bands will establish even partial aboriginal title in the cases under appeal.

77 In summary, in my opinion the *ratio* of the common law dictates the following three guidelines for the discretionary, extraordinary award of interim costs:

1. The party seeking the interim costs cannot afford to fund the litigation, and has no other realistic manner of proceeding with the case.

2. There is a special relationship between the parties such that an award of interim costs or support would be particularly appropriate.

3. It is presumed that the party seeking interim costs will win some award from the other party.

78 In my view, a court should be particularly careful in the exercise of its inherent powers on costs in cases involving the resolution of controversial public questions. Not only was such precedent not required at common law, but by incorporating such an amorphous concept without clearly defining what constitutes

"special circumstances", the distinction between the traditional purpose of awarding costs and concerns over access to justice has been blurred.

79 As noted earlier, certain corporate and trust actions form another line of interim costs cases with a different *ratio*. In those cases, a litigant sues on behalf of a corporation or trust, and seeks interim costs. Such cases are an exception to the general rule on costs because the court makes the costs order on behalf of the corporation or trust. For example, where a shareholder sues directors on behalf of the corporation, it is presumed that the corporation, which in many ways is owned by the shareholders, although under the control of the directors, consents to the paying of the interim costs. It is important to note that in the corporate context, interim costs are specifically addressed by legislation. See British Columbia *Company Act*, R.S.B.C. 1996, c. 62, s. 201; Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 249.

80 Courts may also award interim costs in child custody cases. See *Roberts v. Aasen*, [1999] O.J. No. 1969 (QL) (S.C.J.). Child custody litigation focuses on the best interests of the child for whose welfare both parents are responsible. The purpose of the interim costs award is not merely to aid one side or the other in funding their litigation but, commensurate with the parents' duty, to help the court find the result most beneficial to the child.

81 The value in considering the derivative and related child custody cases is simply to concede that there are circumstances beyond the matrimonial cases in which interim costs may be appropriate. The cases on appeal do not fit these exceptions.

C.T he Trial Judge's Discretion

82 I agree with LeBel J. that a trial judge's discretionary decision on interim costs is owed great deference, and should be disturbed only if "the trial judge has misdirected himself as to the applicable law or made a palpable error in his assessment of the facts" (para. 43). I also agree that a misapplication of the criteria relevant to an exercise of discretion constitutes an error of law.

83 LeBel J. concludes that because Sigurdson J. failed to apply the newly enunciated criteria of impecuniosity, *prima facie* merit, and public importance, an error of law was (understandably) committed. LeBel J. saw no need to return the case to the chambers judge, and held that Sigurdson J. would have exercised his discretion to grant the award had he had the benefit of what is described as new criteria.

84 If this Court enlarges the scope for interim costs it should be seen as a new rule and not an adaptation of existing law. On the basis of the law on costs at the time of this application the chambers judge properly exercised his discretion.

85 Sigurdson J. was correct in his assessment that liability remains an open question in this appeal and that ordering interim costs would inappropriately require prejudging the case. Accordingly, he was justified in concluding that "[a]lthough [he had] a limited discretion in appropriate circumstances to award interim costs this case falls far outside that area" (para. 129).

III. Conclusion

86 The common law is to advance by increments while generally staying true to the purposes behind its rules. The new criteria endorsed by my colleague broaden the scope of interim costs to an undesirable extent and are not supported in the case law. In my view, the common law rules on interim costs should not be advanced through an appellate court ignoring and overturning the trial judge's correctly guided discretion. This is more appropriately a question for the legislature. See *Watkins v. Olafson*, [1989] 2 S.C.R. 750; *R. v. Salituro*, [1991] 3 S.C.R. 654; and *Winnipeg Child and Family Services (Northwest Area) v. G. (D.F.)*, [1997] 3 S.C.R. 925.

87 Since Sigurdson J. committed no error of law and did not commit a "palpable error" in his assessment of the facts, I would defer to his decision not to exercise his discretion to make the extraordinary grant of interim costs.

88 I would allow the appeal, with each side to bear its own costs.

Appeal dismissed with costs, IACOBUCCI, MAJOR *and* BASTARACHE JJ. *dissenting.*

Solicitors for the appellant: Borden Ladner Gervais, Vancouver.

Solicitors for the respondents: Mandell Pinder, Vancouver.

Solicitor for the intervener the Attorney General of Canada: Department of Justice of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Department of Justice, Sainte-Foy.

Solicitor for the intervener the Attorney General of New Brunswick: Attorney General of New Brunswick, Fredericton.

Solicitor for the intervener the Attorney General of British Columbia: Ministry of Attorney General, Victoria.

Solicitor for the intervener the Attorney General of Alberta: Alberta Justice, Edmonton.

Solicitors for the interveners the Songhees Indian Band et al.: Cook, Roberts, Victoria.

Solicitors for the intervener Chief Roger William: Woodward & Company, Victoria.

TAB F

2011 CarswellOnt 3892, 2011 ONSC 3192

Hammond v. State Farm Mutual Automobile Insurance Co.

Kiera Hammond, Appellant and State Farm Mutual Automobile Insurance Company, Respondent

Ontario Superior Court of Justice (Divisional Court)

Reid J.

Heard: May 16, 2011
Judgment: May 30, 2011
Docket: DC-10-231

Counsel: Jane Paproski, for Appellant

Joseph Sullivan, for Respondent

Subject: Civil Practice and Procedure; Insurance

Judges and courts --- Jurisdiction — Transfer between courts for jurisdictional reasons — Monetary jurisdiction

Appellant passenger was injured in motor vehicle accident — Passenger brought action against other vehicle's insurer — Action was dismissed on summary judgment motion — Passenger appealed judgment to Divisional Court — Respondent insurer's counsel advised passenger's counsel that matter was in wrong court — Five months later, passenger's counsel learned of jurisdictional error — Passenger brought motion to transfer appeal to Ontario Court of Appeal — Motion dismissed — Divisional Court did not have jurisdiction to hear appeal — Passenger did not satisfy all three criteria necessary to transfer file to Court of Appeal — There was no evidence of undue prejudice to insurer if jurisdictional change was granted — Passenger moved expeditiously once counsel learned of jurisdictional error — Inadvertent gap of five months between e-mail and response was not so great as to override court's discretion to transfer file — Passenger did not have meritorious appeal — Passenger had arguable case that could reasonably be successful as to statutory interpretation under Insurance Act — Limitation period had expired at least ten months prior to commencement of passenger's action — Passenger did not discover potential claim when Ontario Court of Appeal released decision on similar statutory interpretation question.

Civil practice and procedure --- Practice on appeal — Powers and duties of appellate court — Miscellaneous

Transfer between courts for jurisdictional reasons.

Insurance --- Automobile insurance — Underinsured motorist endorsement — Persons covered

Practice on appeal — Transfer between courts for jurisdictional reasons.

Cases considered by *Reid J.*:

Dunnington v. 656956 Ontario Ltd. (1991), 89 D.L.R. (4th) 607, 54 O.A.C. 345, 9 O.R. (3d) 124, 6 C.P.C. (3d) 298, 1991 CarswellOnt 464 (Ont. Div. Ct.) — followed

McArdle v. Bugler (2007), 2007 ONCA 659, 2007 CarswellOnt 6001, 87 O.R. (3d) 433, 52 C.C.L.I. (4th) 176, 229 O.A.C. 26, 55 M.V.R. (5th) 28, [2007] I.L.R. I-4643 (Ont. C.A.) — distinguished

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 19(1.2)(c) [en. 2006, c. 21, Sched. A, s. 3] — considered

s. 110 — considered

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

s. 224 — considered

s. 226 — considered

s. 265 — considered

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 1.04 — considered

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, O. Reg. 403/96

Generally — referred to

MOTION by appellant passenger to transfer appeal to Ontario Court of Appeal.

***Reid J.*:**

1 The Appellant seeks an Order, pursuant to section 110 of the *Courts of Justice Act*, transferring this appeal to the Ontario Court of Appeal. The motion comes before me sitting as a single judge of the Divisional Court. For the reasons set out below, the motion is dismissed.

2 The facts are not in dispute.

3 The action was dismissed by Arrell J. by judgment dated July 27, 2010 following a motion for summary judgment.

4 A Notice of Appeal was served on August 12, 2010 but mistakenly filed in the Divisional Court rather than in the Ontario Court of Appeal.

5 The parties acknowledge that the Divisional Court derives its jurisdiction from statute and agree that it has no jurisdiction to hear this appeal since the subject matter of the action falls outside the monetary limits of section 19

(1.2)(c) of the *Courts of Justice Act*.

6 Counsel for the Respondent advised counsel for the Appellant by e-mail on September 28, 2010 that he considered the matter to be in the wrong court. For reasons that were not explained, but which presumably relate to inadvertence, the e-mail did not come to the attention of the appropriate person in the office of Appellant's counsel in a timely way with the result that it was not until February 2011 that the jurisdictional error was acknowledged by the Appellant. Thereafter, counsel for the Appellant moved expeditiously to deal with the issue.

7 If the Notice of Appeal had been filed in the Court of Appeal, that court would be dealing with the appeal on its merits in due course, since appeal is as of right.

8 Counsel agreed that I should direct myself to the criteria set out by Rosenberg J. (as he then was) in *Dunnington v. 656956 Ontario Ltd.* (1991), 9 O.R. (3d) 124 (Ont. Div. Ct.). That decision, which has been followed by subsequent Divisional Court panels, states that in exercising discretion under section 110 of the Courts of Justice Act to transfer a file to the Court of Appeal in a case where the Divisional Court does not have jurisdiction to hear the matter, there are three criteria to be considered, namely:

(a) Does the Appellant have a meritorious appeal?

(b) Will the respondent suffer undue prejudice as a result of further delay while the appeal is waiting to be heard by the Court of Appeal?

(c) Has the Appellant moved expeditiously once it was known that the jurisdiction was being disputed.

9 The first criterion of the three presumably is designed to avoid wasting judicial resources at the Court of Appeal on cases that have little chance of success even though, but for the filing error, that "gatekeeper" function would not otherwise exist. The second criterion deals with fairness to the Respondent, and the third relates to the court's responsibility to manage its process.

10 There is no evidence of any undue prejudice to the Respondent that might occur while the appeal is pending if the jurisdictional change is granted. Counsel for the Appellant indicates that she is prepared to proceed without delay to perfect the appeal. The time anticipated to bring the matter to a hearing at the Court of Appeal is not significantly different from the time that could be anticipated for scheduling a hearing before a panel of the Divisional Court. This case is unlike *Dunnington* and the cases that follow it where the matters had already been dealt with at a hearing in Divisional Court so that the transfer to the Court of Appeal was adding a further period of delay.

11 As noted above, counsel for the Appellant moved expeditiously once the jurisdictional dispute became known to her. The inadvertent gap of about five months between receipt of the e-mail from Respondent's counsel and the Appellant's response, while significant, was not so great as to override the general mandate described in Rule 1.04 of the Rules of Civil Procedure which requires a liberal construction of the Rules to secure the "just, most expeditious and least expensive determination of every civil proceeding on its merits."

12 Before deciding the issue of whether or not the Appellant has a meritorious appeal, I must determine what that test means. It is not the function of this court to predict the ultimate outcome of an appeal on the merits. That would usurp the role of the Court of Appeal and could not have been what the court in *Dunnington* intended. Therefore to be "**meritorious**" must **mean** that the Appellant has an arguable case that could reasonably, but not necessarily be successful. I have reviewed the matter in that fashion, and considered the Appellant's case in light of the two key conclusions of Arrell J. in dismissing the action.

13 According to the Appellant, the appeal raises a novel point of law which should be dealt with by the Court of Appeal, the result of which could be significant not just for the Appellant but for the personal injury bar in Ontario.

14 The substance of the Appellant's claim attempts to relate the Ontario Court of Appeal decision in *McArdle v. Bugler*, 2007 ONCA 659 (Ont. C.A.) (CANLII) to this case. *McArdle* dealt with a plaintiff's entitlement to statutory

uninsured motorist coverage. That case reviewed the extended definition of "insured" in section 224 of the Insurance Act which applied to "every person who is entitled to statutory accident benefits under the contract, whether or not described as an insured person." Since the plaintiff in that case was entitled to accident benefits, she was found to be an "insured" under s. 224 which informed the narrower definition of "person insured under the contract" in s. 265, and was therefore entitled to payment through the uninsured motorist coverage.

15 In the case at bar, the Appellant contends that a similar reasoning should apply to her situation. The Appellant was a passenger in a vehicle involved in a collision. The other vehicle was insured (but underinsured), and payments to the maximum policy limits were made to the Appellant and two other injured parties, pro-rata in 2004.

16 The Appellant has continued to receive Statutory Accident Benefits through the insured's policy. She claims that she should be entitled to receive the underinsured benefits available under the optional Family Protection Coverage (OPCF 44) as well. The Appellant claims that she is an "eligible claimant" under OPCF 44, which means she must be either an "insured person" or another person who is entitled to maintain an action because of an injury to an insured person. An "insured person" under OPCF 44 is defined as a named insured under the policy. The Appellant does not meet these criteria but claims that since she is an "insured" under s. 224 (by virtue of *McArdle*), and since s. 226 requires that the *Insurance Act* provisions take precedence when there is a conflict with an insurance contract, she is entitled to coverage. Arrell J. determined on the summary judgement motion that there was a distinction between optional and statutory coverage and that the Appellant was not an "insured person" such that she would fall within the OPCF 44 definition.

17 Arrell J. found an additional rationale for dismissing the action in that the applicable limitation period had expired no less than ten, and possibly twenty-two months prior to the commencement of the claim. Counsel for the Appellant argued before me that the potential claim was only "discovered" once the *McArdle* decision was released in 2007 and that as a result the limitation period in effect was extended. I was not presented with any case law that would justify such a conclusion. Assuming that the *McArdle* decision applies by analogy, in effect the Appellant is saying that she has been alerted to a potential statutory interpretation that might change pre-existing assumptions. If that was the case, it seems to me that a great many statute-barred cases could be resuscitated by subsequent statutory interpretations, with the result that the certainty offered as a matter of public policy by the *Limitations Act 2002* would be subverted.

18 A previous claim issued by the Appellant in 2002 on the same basis as this claim was dismissed on a motion for summary judgment in 2003, without opposition from the Appellant on the basis that there was no sustainable cause of action.

19 Applying *Dunnington*, while I consider the argument about statutory interpretation under the Insurance Act to be of at least arguable merit, I am not able to determine that the appeal is meritorious in view of the limitations period issue which appears conclusive in favour of the Respondent. As a result, this motion for transfer to the Court of Appeal is dismissed.

20 If the parties are not able to resolve the question of costs of the motion, I may be spoken to on that issue.

Motion dismissed.

END OF DOCUMENT

TAB G

Desputeaux *v.* Éditions Chouette (1987) inc., [2003] 1 S.C.R. 178, 2003 SCC 17

Les Éditions Chouette (1987) inc. and Christine L'Heureux *Appellants*

v.

Hélène Desputeaux *Respondent*

and

Régis Rémillard *Mis en cause*

and

Quebec National and International Commercial Arbitration Centre, Union des écrivaines et écrivains québécois, Conseil des métiers d'art du Québec and Regroupement des artistes en arts visuels du Québec *Interveners*

Indexed as: Desputeaux *v.* Éditions Chouette (1987) inc.

Neutral citation: 2003 SCC 17.

File No.: 28660.

2002: November 6; 2003: March 21.

Present: Gonthier, Iacobucci, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for quebec

Arbitration — Interpretation of contract between artist and promoter — Copyright — Whether Copyright Act prevents arbitrator from ruling on question of copyright — Copyright Act, R.S.C. 1985, c. C-42, s. 37.

Arbitration — Interpretation of contract between artist and promoter — Copyright — Public order — Whether question relating to ownership of copyright falls outside arbitral jurisdiction because it must be treated in same manner as question of public order relating to status of persons and rights of personality — Whether Court of Appeal erred in stating that erga omnes nature of decisions concerning copyright ownership is bar to arbitration proceeding — Civil Code of Québec, S.Q. 1991, c. 64, art. 2639 — Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, R.S.Q., c. S-32.01, s. 37.

Arbitration — Arbitration award — Validity — Extent of arbitrator's mandate — Interpretation of contract between artist and promoter — Whether arbitrator exceeded mandate by ruling on question of copyright ownership — Whether award should be annulled because arbitrator did not comply with requirements respecting form and substance of contracts between artists and promoters — Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, R.S.Q., c. S-32.01, ss. 31, 34.

Arbitration — Arbitration award — Consideration of matter of public order — Limits on review of validity of arbitration awards — Code of Civil Procedure, R.S.Q., c. C-25, arts. 946.4, 946.5.

Arbitration — Procedure — Natural justice — Methods of proof — Interpretation of contract between artist and promoter — Whether arbitration proceeding conducted in violation of rules of natural justice.

D, L and C formed a partnership for the purpose of creating children's books. L was the manager and majority shareholder in C. D drew and L wrote the text for the first books in the Caillou series. Between 1989 and 1995, D and C entered into a number of contracts relating to the publication of illustrations of the Caillou character. D signed as author and L signed as publisher. In 1993, the parties signed a contract licensing the use of the Caillou character. D and L represented themselves in it as co-authors and assigned certain reproduction rights to C, excluding rights granted in the publishing contracts, for the entire world, with no stipulation of a term. The parties waived any claims based on their moral right in respect of Caillou. They also authorized C to grant sub-licences to third parties without their approval. A rider signed in 1994 provided that in the event that D produced illustrations to be used in one of the projects in which Caillou was to be used, she was to be paid a lump sum corresponding to the work required. In 1996, faced with difficulties in respect of the interpretation and application of the licence contract, C brought a motion to secure recognition of its reproduction rights. D brought a motion for declinatory exception seeking to have the parties referred to an arbitrator as provided in s. 37 of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*. The Superior Court, finding that the existence of the contract was not in issue, and that there were no allegations in respect of its validity, referred the case to arbitration. The arbitrator decided that his mandate included interpreting all the contracts and the rider. In the arbitrator's view, Caillou was a work of joint authorship by D and L. With respect to the licence and the rider, the arbitrator concluded that C held the reproduction rights

and that it alone was authorized to use Caillou in any form and on any medium, provided that a court agreed that the contracts were valid. The Superior Court dismissed D's motion for annulment of the arbitration award. The Court of Appeal reversed that judgment.

Held: The appeal should be allowed. The arbitrator acted in accordance with his terms of reference and made no error such as would permit annulment of the arbitration award.

The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. Subject to the applicable statutory provisions, that agreement comprises the arbitrator's terms of reference and delineates the task he or she is to perform. In this case, however, the arbitrator's terms of reference were not defined by a single document. His task was delineated, and its content determined, by a judgment of the Superior Court, and by an exchange of correspondence between the parties and the arbitrator. The Superior Court's first judgment limited the arbitrator's jurisdiction by removing any consideration of the problems relating to the validity of the agreements from him. That restriction necessarily included any issues of nullity based on compliance by the agreements with the mandatory formalities imposed by ss. 31 and 34 of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters*. The arbitrator therefore had to proceed on the basis that this problem was not before him. With respect to the question of copyright, and ownership of that copyright, in order to understand the scope of the arbitrator's mandate, a purely textual analysis of the communications between the parties is not sufficient. In addition to what is expressly set out in the arbitration agreement, the arbitrator's mandate includes everything that is

closely connected with that agreement. Here, from a liberal interpretation of the arbitration agreement, based on identification of its objectives, it can be concluded that the question of co-authorship was intrinsically related to the other questions raised by the arbitration agreement.

Section 37 of the *Copyright Act* does not prevent an arbitrator from ruling on the question of copyright. The provision has two objectives: to affirm the jurisdiction that the provincial courts, as a rule, have in respect of private law matters concerning copyright and to avoid fragmentation of trials concerning copyright that might result from the division of jurisdiction *ratione materiae* between the federal and provincial courts in this field. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. By assigning shared jurisdiction *ratione materiae* in respect of copyright to the Federal Court and provincial courts, s. 37 is sufficiently general to include arbitration procedures created by a provincial statute.

The arbitration award is not contrary to public order. In interpreting and applying the concept of public order in the realm of consensual arbitration in Quebec, it is necessary to have regard to the legislative policy that accepts this form of dispute resolution and even seeks to promote its expansion. Except in certain fundamental matters referred to in art. 2639 *C.C.Q.*, an arbitrator may dispose of questions relating to rules of public order, since they may be the subject matter of the arbitration agreement. Public order arises primarily when the validity of an arbitration award must be determined. Under art. 946.5 *C.C.P.*, the court must examine the award as a whole to determine the nature of the result. It must determine whether the decision itself, in its disposition of the case, violates statutory provisions or principles that are matters of

public order. An error in interpreting a mandatory statutory provision would not provide a basis for annulling the award as a violation of public order, unless the outcome of the arbitration was in conflict with the relevant fundamental principles of public order. Here, the Court of Appeal erred in holding that cases involving ownership of copyright may not be submitted to arbitration, because they must be treated in the same manner as questions of public order, relating to the status of persons and rights of personality. In the context of Canadian copyright legislation, although the work is a "manifestation of the personality of the author", this issue is very far removed from questions relating to the status and capacity of persons and to family matters, within the meaning of art. 2639 *C.C.Q.* The *Copyright Act* is primarily concerned with the economic management of copyright, and does not prohibit artists from entering into transactions involving their copyright, or even from earning revenue from the exercise of the moral rights that are part of it. In addition, s. 37 of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* recognizes the legitimacy of transactions involving copyright, and the validity of using arbitration to resolve disputes arising in respect of such transactions.

The Court of Appeal also erred in stating that the fact that a decision in respect of copyright may be set up against the entire world, and accordingly the nature of its effects on third parties, is a bar to the arbitration proceeding. The *Code of Civil Procedure* does not consider the effect of an arbitration award on third parties to be a ground on which it may be annulled or its homologation refused. The arbitrator ruled as to the ownership of the copyright in order to decide as to the rights and obligations of the parties to the contract. The arbitral decision is authority between the parties, but is not binding on third parties.

Finally, by adopting a standard of review based on simple review of any error of law made in considering a matter of public order, the Court of Appeal applied an approach that runs counter to the fundamental principle of the autonomy of arbitration and extends judicial intervention at the point of homologation or an application for annulment of the arbitration award well beyond the cases provided for in the *Code of Civil Procedure*. Public order will of course always be relevant, but solely in terms of the determination of the overall outcome of the arbitration proceeding.

D has not established a violation of the rules of natural justice during the arbitration proceeding.

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[1992] R.J.Q. 302; *Goulet v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 719, 2002 SCC 21; *Condominiums Mont St-Sauveur inc. v. Constructions Serge Sauvé ltée*, [1990] R.J.Q. 2783; *Procon (Great Britain) Ltd. v. Golden Eagle Co.*, [1976] C.A. 565; *Société Seagram France Distribution v. Société GE Massenez*, Cass. civ. 2e, May 3, 2001, *Rev. arb.* 2001.4.805; *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34; *Entreprises H.L.P. inc. v. Logisco inc.*, J.E. 93-1707; *Moscow Institute of Biotechnology v. Associés de recherche médicale canadienne (A.R.M.C.)*, J.E. 94-1591.

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APPEAL from a judgment of the Quebec Court of Appeal, [2001] R.J.Q. 945, 16 C.P.R. (4th) 77, [2001] Q.J. No.1510 (QL), reversing a decision of the Superior Court. Appeal allowed.

Stefan Martin and *Sébastien Grammond*, for the appellants.

Normand Tamaro, for the respondent.

Pierre Bienvenu and *Frédéric Bachand*, for the intervener the Quebec National and International Commercial Arbitration Centre.

Daniel Payette, for the interveners the Union des écrivaines et écrivains québécois and the Conseil des métiers d'art du Québec.

Louis Linteau, for the intervener the Regroupement des artistes en arts visuels du Québec.

English version of the judgment of the Court delivered by

LEBEL J. —

I. Introduction

1 The friendly face of Caillou, with his round cheeks and expression of wide-eyed surprise, has delighted countless young children and won over their parents and grandparents. Today, this charming little character, a creation that sprang from the imagination and from the art of form and colour, is moving out of the world where he welcomes his new baby sister, or gets ready for kindergarten. Unintentionally, no doubt, he is now making a contribution to the development of commercial arbitration law in the field of intellectual property. What has happened is that the people who consider themselves to be his mothers are engaged in battle for him. The respondent claims exclusive maternity. The appellants believe it was a joint effort. The manner in which

their dispute is to be resolved has itself become the subject of a major disagreement, and that is what is now before this Court.

2 A decision of the Quebec Court of Appeal annulled the arbitration award made by the *mis en cause* Rémillard, who had found in part for the appellants on the question of the intellectual property in the Caillou character. The respondent Desputeaux is seeking to have that judgment affirmed. In her submission, the arbitrator did not remain within the bounds of his terms of reference. She contends, as well, that he disposed of an issue that is not a proper subject of arbitration: copyright ownership. She further submits that the arbitration proceeding was conducted in violation of the fundamental principles of natural justice and procedural fairness. Her final argument is that the arbitrator's decision violated the rules of public order. The appellants dispute those contentions and argue that the Court of Appeal's judgment should be set aside and the arbitration award restored, in accordance with the disposition made by the Superior Court. For the reasons that follow, I am of the opinion that the appeal must be allowed. The arbitrator acted in accordance with the terms of reference he was given. The allegation that the rules of natural justice were violated has not been substantiated. The arbitrator had the authority to dispose of the issues before him. As well, there was no violation of the rules of public order that would justify the superior courts in annulling the award.

II. Origin of the Case

3 In 1988, the respondent and the appellants Christine L'Heureux and Les Éditions Chouette (1987) inc. ("Chouette") formed a partnership for the purpose of creating children's books. The appellant L'Heureux was the manager and majority

shareholder in Chouette. The first books in the Caillou series were published in 1989. While the respondent drew the little fictional character, L'Heureux wrote the text for the first eight books. Between May 5, 1989, and August 21, 1995, the respondent and the appellant Chouette entered into a number of contracts relating to the publication of illustrations of the Caillou character in the forms of books and derivative products. All those contracts were for a period of ten years and were signed by the respondent, as author, and the appellant L'Heureux, as publisher. The parties were using standard forms drafted as provided in an agreement between the Association des éditeurs and the Union des écrivaines et écrivains québécois. The parties inserted only the particulars that related specifically to them, such as the title of the work, the territory covered, the term of the agreement and the percentage of royalties payable to the author.

4 On September 1, 1993, the parties signed a contract licensing the use of the fictitious Caillou character. The respondent and the appellant L'Heureux represented themselves in it as co-authors of a work consisting of a fictitious character known by the name Caillou. They assigned the following rights ("reproduction rights") to the appellant Chouette, excluding rights granted in the publishing contracts, for the entire world, with no stipulation of a term:

> [TRANSLATION]
>
> (a) The right to reproduce CAILLOU in any form and on any medium or merchandise;
>
> (b) the right to adapt CAILLOU for the purposes of the creation and production of audio and/or audiovisual works, performance in public and/or communication to the public of any resulting work;
>
> (c) the right to apply, as owner, for registration of the name CAILLOU in any language whatsoever, or of the graphic representation of CAILLOU, as a trademark;

(d) the right to apply, as owner, for registration of any visual configurations or characteristics of CAILLOU as an industrial design.

5 The parties waived any claims based on their moral right in respect of Caillou. Their agreements also authorized Chouette to grant sub-licences to third parties, without the approval of the other parties to the contracts. On December 15, 1994, the parties added a rider to the agreement of September 1, 1993, which neither replaced nor cancelled the previous publishing contracts, but amended the contract of September 1, 1993, as it related to the royalties payable in respect of the licence for the use of the fictitious Caillou character. In the event that Desputeaux produced illustrations to be used in one of the projects in which the character was to be used, she was to be paid a lump sum corresponding to the work required. Neither the rider nor the licence contract specified the term of the agreement between the parties.

6 In October 1996, difficulties arose in respect of the interpretation and application of the licence contract, and Chouette brought a motion for a declaratory judgment. The applicant's purpose in bringing the motion was to secure recognition of its entitlement to exploit the reproduction rights. The respondent then brought a motion for declinatory exception seeking to have the parties referred to an arbitrator. On February 28, 1997, Bisaillon J. of the Superior Court allowed the declinatory exception and referred the case to arbitration: [1997] Q.J. No. 716 (QL). He found, based on the relief sought by the parties in the two motions, that the existence of the contract was not in issue, and that there were no allegations in respect of the validity of the contract.

7 After hearing the case, the arbitrator appointed by the parties, Régis Rémillard, a notary, concluded that Chouette held the reproduction rights sought and that

it alone had the right to use the Caillou character. The Superior Court dismissed a motion for annulment of the award. The appeal from that judgment was unanimously allowed by the Court of Appeal, which annulled the award, and it is that decision which has been appealed to this Court.

III. Relevant Statutory Provisions

8 *Copyright Act*, R.S.C. 1985, c. C-42

2. . . .

"work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;

13. . . .

(3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.

14.1 (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.

(2) Moral rights may not be assigned but may be waived in whole or in part.

(3) An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.

(4) Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by

the owner or licensee to use the work, unless there is an indication to the contrary in the waiver.

37. The Federal Court has concurrent jurisdiction with provincial courts to hear and determine all proceedings, other than the prosecution of offences under section 42 and 43, for the enforcement of a provision of this Act or of the civil remedies provided by this Act.

Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, R.S.Q., c. S-32.01

31. The contract must be evidenced in a writing, drawn up in duplicate, clearly setting forth

(1) the nature of the contract;

(2) the work or works which form the object of the contract;

(3) any transfer of right and any grant of licence consented to by the artist, the purposes, the term or mode of determination thereof, and the territorial application of such transfer of right and grant of licence, and every transfer of title or right of use affecting the work;

(4) the transferability or nontransferability to third persons of any licence granted to a promoter;

(5) the consideration in money due to the artist and the intervals and other terms and conditions of payment;

(6) the frequency with which the promoter shall report to the artist on the transactions made in respect of every work that is subject to the contract and for which monetary consideration remains owing after the contract is signed.

34. Every agreement between a promoter and an artist which reserves, for the promoter, an exclusive right over any future work of the artist or which recognizes the promoter's right to determine the circulation of such work shall, in addition to meeting the requirements set out in section 31,

(1) contemplate a work identified at least as to its nature;

(2) be terminable upon the application of the artist once a given period agreed upon by the parties has expired or after a determinate number of works agreed upon by the parties has been completed;

(3) specify that the exclusive right ceases to apply in respect of a reserved work where, after the expiration of a period for reflection, the promoter, though given formal notice to do so, does not circulate the work;

(4) stipulate the duration of the period for reflection agreed upon by the parties for the application of paragraph 3.

37. In the absence of an express renunciation, every dispute arising from the interpretation of the contract shall be submitted to an arbitrator at the request of one of the parties.

The parties shall designate an arbitrator and submit their dispute to him according to such terms and conditions as may be stipulated in the contract. The provisions of Book VII of the Code of Civil Procedure (chapter C-25), adapted as required, apply to such arbitration.

42. Subject to sections 35 and 37, no person may waive application of any provision of this chapter.

Civil Code of Québec, S.Q. 1991, c. 64 ("*C.C.Q.*")

2639. Disputes over the status and capacity of persons, family matters or other matters of public order may not be submitted to arbitration.

An arbitration agreement may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order.

2640. An arbitration agreement shall be evidenced in writing; it is deemed to be evidenced in writing if it is contained in an exchange of communications which attest to its existence or in an exchange of proceedings in which its existence is alleged by one party and is not contested by the other party.

2643. Subject to the peremptory provisions of law, the procedure of arbitration is governed by the contract or, failing that, by the Code of Civil Procedure.

2848. The authority of a final judgment (*res judicata*) is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same.

However, a judgment deciding a class action has the authority of a final judgment in respect of the parties and the members of the group who have not excluded themselves therefrom.

Code of Civil Procedure, R.S.Q., c. C-25 ("*C.C.P.*")

943. The arbitrators may decide the matter of their own competence.

943.1 If the arbitrators declare themselves competent during the arbitration proceedings, a party may within 30 days of being notified thereof apply to the court for a decision on that matter.

While such a case is pending, the arbitrators may pursue the arbitration proceedings and make their award.

944.1 Subject to this Title, the arbitrators shall proceed to the arbitration according to the procedure they determine. They have all the necessary powers for the exercise of their jurisdiction, including the power to appoint an expert.

944.10 The arbitrators shall settle the dispute according to the rules of law which they consider appropriate and, where applicable, determine the amount of the damages.

They cannot act as *amiable compositeurs* except with the prior concurrence of the parties.

They shall in all cases decide according to the stipulations of the contract and take account of applicable usage.

946.2. The court examining a motion for homologation cannot enquire into the merits of the dispute.

946.4. The court cannot refuse homologation except on proof that

(1) one of the parties was not qualified to enter into the arbitration agreement;

(2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec;

(3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;

(4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or

(5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.

In the case of subparagraph (4) of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.

946.5. The court cannot refuse homologation of its own motion unless it finds that the matter in dispute cannot be settled by arbitration in Québec or that the award is contrary to public order.

947. The only possible recourse against an arbitration award is an application for its annulment.

947.1. Annulment is obtained by motion to the court or by opposition to a motion for homologation.

947.2. Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award.

IV. Judicial History

A. *Arbitration Award (Régis Rémillard, Notary)* (July 22, 1997)

9 The arbitrator first decided that his mandate included interpreting the contract concerning the licence as well as the rider and the publishing contracts, to determine the method of commercial exploitation provided for by the licence. After examining the publishing contracts, he stated the opinion that the fact that the respondent had signed as "author" did not reflect reality. In his view, both Desputeaux and L'Heureux could, under the *Copyright Act*, R.S.C. 1985, c. C-42, claim the status of author in respect of Caillou, the appellant L'Heureux in respect of the literary portion of the original texts and the respondent in respect of the illustration and the physical aspect of the character. In the arbitrator's view, the involvement of the respondent and the appellant L'Heureux in the development of the Caillou character was indivisible. The work was therefore a work of joint authorship, within the meaning of s. 2 of the *Copyright Act*.

10 The licence contract for the fictitious Caillou character must therefore be considered in its context. It was signed after protracted negotiations between the parties, who were assisted by their lawyers. At that time, the respondent and the appellant L'Heureux each mutually recognized the other's status as co-author of the Caillou character, as confirmed by letters that were exchanged after the agreement was signed, which were submitted to the arbitrator. The arbitrator therefore quickly rejected the argument that the contract was a sham. In the agreement, the co-authors assigned the appellant Chouette all of the rights that were needed for the commercial exploitation of Caillou in the entire world. While the arbitrator did not refer to the public order provisions of the *Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters* ("*Act respecting the professional status of artists*"), he stated the opinion that because the parties had not stipulated a time limit, the contract was protected under s. 9 of the *Copyright Act*, for 50 years after the death of the last co-author. With respect to the rider of December 15, 1994, he said that the obligation to consult the respondent did not create a veto right. By his interpretation, neither the rider nor the licence contract imposed any obligation to account.

11 In conclusion, the arbitrator pointed out that the licence and the rider related solely to future works by the authors with the Caillou character as their subject. On this point, he stated that because Chouette held the reproduction rights, it was the only one authorized to use the Caillou character in any form and on any medium, provided that a court agreed that the contracts were valid. Mr. Rémillard refrained from stating an opinion on that subject. In my view, the judgment referring the matter to arbitration reserved that question to the Superior Court.

B. *Quebec Superior Court* (March 13, 1998)

12 Desputeaux then challenged the arbitration award, and asked the Superior Court to annul it. She argued, *inter alia*, that the arbitrator had ruled on a dispute that was not before him, the intellectual property in the Caillou character and the status of the parties as co-authors. She also criticized the arbitrator for failing to apply the mandatory provisions of the *Act respecting the professional status of artists*. In her submission, their application would have justified annulment of the agreements between the parties. The respondent also criticized Mr. Rémillard for ruling on the main issues without evidence and for conducting the arbitration without regard for the fundamental rules of natural justice.

13 In a brief judgment delivered from the bench, Guthrie J. of the Superior Court dismissed the application for annulment. In his opinion, none of the grounds of nullity argued was material or well-founded. However, the judgment was mainly restricted to a summary of the content of the annulment proceeding and reference to the most important statutory provisions applicable, including the articles of the *Code of Civil Procedure* of Quebec relating to judicial review of the validity of arbitration decisions. Desputeaux then appealed to the Quebec Court of Appeal.

C. *Quebec Court of Appeal (Gendreau, Rousseau-Houle and Pelletier JJ.A.)*, [2001] R.J.Q. 945

14 The Quebec Court of Appeal took a more favourable view of the application for annulment made by Desputeaux. It unanimously allowed the appeal and annulled the arbitration award. To begin with, in the opinion of Rousseau-Houle J.A., the award was

null under s. 37 of the *Copyright Act*. According to her interpretation, that provision requires that disputes as to ownership of copyright be heard by the Federal Court or the superior courts, and therefore does not authorize arbitration, even commercial arbitration, in that realm. In her opinion, the award exceeded the strict interpretation of the contract documents, in respect of which arbitration would have been possible: [TRANSLATION] "In deciding the legal status [of the respondent] and [of the appellant L'Heureux] in respect of the Caillou character, a work protected by the [*Copyright Act*], the arbitrator assumed a competence he did not have" (para. 32). Then, examining the case from the standpoint of the principles of the civil law, Rousseau-Houle J.A. added that disputes over the status and capacity of persons or other matters of public order may not be submitted to arbitration (art. 2639 *C.C.Q.* and art. 946.5 *C.C.P.*). She concluded, on this point, that the paternity of the respondent's copyright was a moral right that attached to her personality. Accordingly, art. 2639 *C.C.Q.* exempted it from the arbitrator's jurisdiction (at paras. 40 and 44):

> [TRANSLATION] The right precisely to credit for paternity of a work, like the right to respect for one's name, gives a purely "moral" connotation to the dignity and honour of the creator of the work. From these standpoints, the question of the paternity of copyright is not a matter for arbitration.
>
> . . .
>
> In ruling on the question of the monopoly granted by the [*Copyright Act*] to an author, the arbitrator made a decision that not only had an impact on the right to paternity of the work, but could be set up against persons other than those involved in the dispute submitted for arbitration.

15 In the opinion of Rousseau-Houle J.A., the award also had to be annulled because the arbitrator had not applied, or had misinterpreted, ss. 31 and 34 of the *Act respecting the professional status of artists*, which lays down requirements in respect of the form and substance of contracts between artists and promoters. For one thing, the

contracts did not state the extent of the exclusive rights granted, the frequency of the reports to be made or the term of the agreements. The violation of these rules of public order resulted in the nullity of the agreements and the award. The appellants were then granted leave to appeal to this Court. In addition, there are still other proceedings underway in the Superior Court in respect of various aspects of the legal relationship between the parties.

V. Analysis

A. *The Issues and the Positions of the Parties and Intervenors*

16 There are three categories of problems involved in this case, all of them connected to the central question of the validity of the arbitration award. First, we need to identify the nature and limits of the arbitrator's terms of reference. We will then have to identify the issue that was before the arbitrator, in order to determine whether and how those terms of reference were carried out. In considering that question, we will have to examine the grounds on which the respondent challenged the conduct of the arbitration proceeding, such as the violation of the principles of natural justice and the rules of civil proof. We shall then discuss the main issues in this appeal, which relate to the arbitrability of copyright problems and the nature and limits of judicial review of arbitration awards made under the *Code of Civil Procedure*. That part of the discussion will involve an examination of how rules of public order are applied by arbitrators and the limits on the powers of the courts to intervene in respect of decisions made in that regard.

17 The parties argued diametrically opposed positions, each of them supported by certain of the intervenors. I shall first summarize the arguments advanced by the appellants, with the broad support of one of the intervenors, the Quebec National and International Commercial Arbitration Centre ("the Centre"). I will then review the arguments made by the respondent and the other intervenors, the Union des écrivaines et écrivains québécois ("the Union") and the Regroupement des artistes en arts visuels du Québec ("RAAV"). Those intervenors took the same position as Desputeaux on certain points.

18 In the submission of the appellants, the arbitration award was valid. In their view, the legal approach taken by the Court of Appeal conflicted with the way that the civil and commercial arbitration function has been defined in most modern legal systems, and the decision-making autonomy that they recognize as inherent in that function. In particular, in the field of intellectual property itself, modern legal systems frequently use arbitration to resolve disputes (see M. Blessing, "Arbitrability of Intellectual Property Disputes" (1996),12 *Arb. Int'l* 191, at pp. 202-3; W. Grantham, "The Arbitrability of International Intellectual Property Disputes" (1996), 14 *Berkeley J. Int'l L.* 173, at pp. 199-219). On that point, the Centre pointed to the risks involved in the decision of the Court of Appeal and the need to protect the role of arbitration. In substance, Chouette and L'Heureux argued, first, that s. 37 of the *Copyright Act* did not prohibit arbitration of the ownership of copyright or the exercise of the associated moral rights. Nor do the provisions of the *Civil Code* and the *Code of Civil Procedure* prohibit an arbitrator from hearing those questions. In addition, an arbitrator may and must dispose of questions of public order that are referred to him or her, or are inherent in his or her terms of reference. Review of an arbitrator's decision is strictly limited to the grounds set out in the *Code of Civil Procedure*, which allows an award to be annulled for violation of public order only

where the outcome of the arbitration is contrary to public order. It is not sufficient that an error have been committed in interpreting and applying a rule of public order in order for a court to be able to set aside an arbitrator's decision. The appellants also submitted that the matter of the status of the co-authors was before the arbitrator, and that he had complied with the relevant rules in conducting the arbitration, the arbitrator being in control of the procedure under the law. Chouette and L'Heureux concluded by saying that Mr. Rémillard could not be criticized for not ruling on the validity of the contracts, having regard to the *Act respecting the professional status of artists*. That question was not before him. What the judgment rendered by Bisaillon J., who referred the dispute to arbitration, had done was to reserve consideration of the problem of the validity of the contracts between the parties to the Superior Court.

19 The respondent first challenged the arbitrator's definition of his terms of reference. She argued that he had broadened them improperly by wrongly finding that the ownership of the copyright and the status of L'Heureux and Desputeaux as co-authors were before him. She further argued that he had erred in narrowing that definition by failing to apply the mandatory rules in the *Act respecting the professional status of artists* and thereby failing to rule as to the validity of the contracts in issue. Desputeaux also criticized the conduct of the arbitration proceeding, alleging that the arbitrator had disposed of the copyright issue and of the moral rights resulting from the copyright without evidence. In her submission, s. 37 of the *Copyright Act* denied the arbitrator any jurisdiction in this respect. As well, the *Civil Code of Québec* also did not permit those matters to be submitted to arbitration because they are matters of public order. All that could be submitted to arbitration under the *Act respecting the professional status of artists* was questions relating purely to the interpretation and application of the contracts. Desputeaux's final submission was that the Superior Court could have reviewed the

arbitration award based on any error made in interpreting or applying a rule of public order. The respondent argued that the award was vitiated by errors of that nature, and that those errors justified annulling the award. She therefore sought to have the appeal dismissed. The Union and the RAAV supported her arguments in respect of the nature of copyright, the arbitrator's jurisdiction and the application of rules of public order.

B. *The Arbitrator's Terms of Reference*

20 We need only consider the parties' arguments to see that there is a preliminary problem in analysing this appeal. It would be difficult to assess the weight of the substantive law arguments made by either party, or the justification for intervention by the Superior Court, without first identifying the issues that were in fact before the arbitrator, either at the behest of the parties or pursuant to the earlier decisions of the courts. Simply by identifying those issues, we will be able to eliminate, or at least to narrow, certain questions of law or procedure. That would be the case if, for example, we were to conclude that the problem of ownership of the copyright was not before the arbitrator, by reason of the legislation that governed his decision. The award could then be annulled on that ground alone, under art. 946.4, para. 4 *C.C.P.*

21 The question of the scope of the arbitrator's mandate has influenced the course of the judicial proceedings in this case from the outset. There are serious difficulties involved in this problem, both because of the manner in which the arbitration proceedings were conducted and because of how the application for annulment that is now before this Court has been conducted. We can only regret that the parties and the arbitrator did not clearly define what his terms of reference included. That precaution would probably have reduced the number and length of the conflicts between the parties.

22 The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. As we shall later see, that agreement comprises the arbitrator's terms of reference and delineates the task he or she is to perform, subject to the applicable statutory provisions. The primary source of an arbitrator's competence is the content of the arbitration agreement (art. 2643 *C.C.Q.*). If the arbitrator steps outside that agreement, a court may refuse to homologate, or may annul, the arbitration award (arts. 946.4, para. 4 and 947.2 *C.C.P.*). In this case, the arbitrator's terms of reference were not defined by a single document. His task was delineated, and its content determined, by a judgment of the Superior Court, and by a lengthy exchange of correspondence and pleadings between the parties and Mr. Rémillard.

23 First, however, we must note the importance of the judgment of the Superior Court rendered by Bisaillon J. As mentioned earlier, the parties' court battles had begun with the filing by Chouette of a motion for declaratory judgment. Chouette wanted to have the agreements between it and Desputeaux and L'Heureux declared to be valid, and its exclusive distribution rights in Caillou confirmed. Relying on s. 37 of the *Act respecting the professional status of artists*, the respondent brought a declinatory exception seeking to have the dispute referred to an arbitrator. Bisaillon J. allowed the motion in part. He referred the case to arbitration, except the question of the actual existence of the contract, and the validity of that contract, which, in his opinion, fell within the jurisdiction of the Superior Court. That judgment, which has never been challenged, limits the arbitrator's competence by removing any consideration of the problems relating to the validity of the agreements from him. That restriction necessarily included any issues of nullity based on compliance by the agreements with the

requirements of the *Act respecting the professional status of artists*. The tenor of the judgment rendered by Bisaillon J. means that one of the respondent's criticisms, her complaint that he had not considered or applied that Act, may therefore be rejected immediately. Given the decision of the Superior Court, the arbitrator had to proceed on the basis that this problem was not before him. What now remains to be determined is whether the question of copyright, and ownership of that copyright, was before Mr. Rémillard.

24 On this point, we must refer to the materials exchanged by the parties. The arbitration agreement in question in this case took the form of an exchange of letters rather than a single, complete instrument exhaustively stipulating all the parameters of the arbitration proceeding. While we may regret that the parties thus failed to circumscribe the arbitrator's powers more clearly, we must acknowledge that the rule made by the legislature in this respect was a very flexible one, despite the requirement that there be a written instrument: "An arbitration agreement shall be evidenced in writing; it is deemed to be evidenced in writing if it is contained in an exchange of communications which attest to its existence or in an exchange of proceedings in which its existence is alleged by one party and is not contested by the other party" (art. 2640 *C.C.Q.*).

25 Neither the courts below nor the arbitrator dwelt at length on the question of the actual content of the arbitration agreement. By letter dated May 13, 1997, the arbitrator confirmed his mandate to the parties, but he did not specify the scope of his terms of reference (Appellants' Record, at p. 61). There is no clear statement by the arbitrator in the arbitration award of the limits of his competence, with the exception of a few comments asserting that he was competent to interpret the contracts, but not to

nullify them (see, for example, pp. 11 and 15 of the arbitration award and the first "Whereas" in the award (Appellants' Record, at pp. 65 *et seq.*)).

26 Nor does the succinct decision given by the Superior Court contain any indication as to the scope of the arbitrator's mandate. On that point, Guthrie J. simply said, at p. 3, without discussing the content of the agreement:

> [TRANSLATION] Whereas the applicant has not proved that the arbitration award dealt with a dispute that was not covered by the provisions of the arbitration agreement;
>
> . . .
>
> The Court dismissed the amended motion with costs.

Thus the trial judge failed to consider the question of the scope of the agreement having regard to all of the facts, although the evidence in the record shows that this question was argued before him. Guthrie J. in fact refused to hear evidence concerning the argument made as to the scope of the arbitrator's mandate, because there was no transcript of argument before the arbitrator. (Excerpts from counsel's argument, Respondent's Record, at pp. 10 *et seq.*; Respondent's Factum, at para. 25; see also the amended motion by the respondent-applicant Hélène Desputeaux seeking to have the arbitration award annulled, October 28, 1997, Appellants' Record, at pp. 14 *et seq.*)

27 The Court of Appeal also addressed the question of the limits placed on the arbitrator's mandate by the agreement only briefly. It found that [TRANSLATION] "[i]t is difficult to argue, when we consider the relief sought by counsel for the appellant in the statement of facts that they submitted to the arbitrator, that the arbitration award dealt

with a dispute that was not specifically mentioned in the arbitration agreement" (para. 31).

28 In the appellants' submission, the arbitrator's mandate was such that it was open to him to address the co-authorship question. The arbitrator was competent to interpret the contracts submitted to arbitration. In fact, art. 1 of the licence contract states that the appellant L'Heureux and the respondent are co-authors. Desputeaux analysed the content of the arbitrator's mandate much more restrictively. In her submission, the parties had agreed that the arbitrator was not to dispose of the co-authorship question. She further criticized the arbitrator for not having expressly stated that he was competent to dispose of that matter, and argued that this failure had made it impossible for her to contest that competence or place the relevant evidence on the record.

29 Although the letters exchanged by the parties in this respect were not reproduced in the appeal record, we do have a description of the content of those letters in the amended motion introduced by Ms. Desputeaux in the Superior Court, seeking to have the arbitration award annulled (amended motion of the respondent-applicant Hélène Desputeaux for annulment of an arbitration award, October 28, 1997, Appellants' Record, at pp. 12 *et seq.*). It seems that the first proposed mandate was prepared by Chouette on May 20, 1997. That proposal clearly addressed the question of co-authorship. In para. 8.1c), it said: [TRANSLATION] "[i]n the event of a decision favourable to Hélène Desputeaux on the interpretation of contracts R-1 (RR-3) and R-2 (RR-5), arbitration on the concept of co-authorship in order to establish the parties' rights". The respondent replied to that proposal on May 21, 1997, stating the question of co-ownership status as follows: [TRANSLATION] "Whether or not the decision is favourable to our client, are Ms. L'Heureux and Ms. Desputeaux the co-authors of

Caillou?" On May 23, 1997, the appellant Chouette sent the respondent a true copy of a letter sent to the arbitrator in which the following passages, concerning the arbitrator's mandate, appear:

> [TRANSLATION] Accordingly, before going any further and before considering any other question, we should determine what interpretation is indicated by Exhibits R-1 (RR-3) and R-2 (RR- 5), we should see whether they are compatible and see what obligations they indicate for each of the parties.
>
> When that question has been disposed of, in accordance with your decision, we will be able to consider what financial obligation arises from those contracts, and the question of co-authorship.

30 On June 3, 1997, the respondent sent her record to the arbitrator; it included documents that were relevant in establishing copyright. On June 9, 1997, she again defined the arbitrator's mandate, in response to another letter sent to the parties by the arbitrator on June 4, 1997 (unfortunately not reproduced in the record). She confirmed at that time that she understood from that letter that the arbitrator intended to rule on the question of co-authorship. She then described the scope of the arbitrator's mandate as follows:

> [TRANSLATION] Mr. Rémillard will therefore consider the question of the real scope of Exhibits R-1 (RR-3), R-2 (RR-5) and R-3 (RR-15) and of what powers are available to Les Éditions Chouette (1987) inc. (point (a) of your letter of May 20, 1997).
>
> In our view, that interpretation will necessarily lead to the question of co-authorship, which you raised at the beginning of your letters of June 4, 1997, and May 20, 1997. Mr. Rémillard will have to tell us whether Exhibits R-1 (RR-3) and R-3 (RR-15), as interpreted in the entire context of the contractual relationship between the parties, is or is not an agreement between co-authors concerning their respective rights and obligations. . . .

31 On June 11, 1997, the appellant Chouette sent its final proposal for a mandate to the respondent and the arbitrator. It states as follows:

> [TRANSLATION] For our part, we in fact continue to believe that we should first address the interpretation of Exhibits R-1 (RR-3), R-2 (RR-5) and R-3 (RR-15), which obviously cannot be separated from their context.
>
> The other stage, the question of co-authorship, we are keeping on the agenda, and we are certain that Me Rémillard has complete competence to hear it. However, we still maintain that in the event that the interpretation of the contracts, Exhibits R-1 (RR-3), R-2 (RR-5) and R-3 (RR-15), is favourable to us, that discussion will be moot. We are therefore not committing ourselves to proceed on that subject.

The letter goes on to say, in respect of evidence that might be presented:

> [TRANSLATION] Obviously, if the discussion goes ahead on the question of the co-authorship concept, we reserve the right to reverse this decision and require that witnesses be heard and additional exhibits be introduced.

32 On June 11, 1997, the respondent ultimately reconsidered her understanding of the mandate, in the last letter exchanged between the parties. According to that letter, the question of co-authorship had been suspended and the arbitrator's competence in that respect depended on a new mandate being negotiated.

> [TRANSLATION] We note that we are in minimal agreement to proceed in respect of the interpretation of Exhibits R-1 (RR-3), R-2 (RR-5) and R-3 (RR-15).
>
> We shall therefore proceed on that clearly stated question. With respect to the other stages you suggest, we shall see whether it is possible to agree on a mandate that could be given to an arbitrator. We are not committing ourselves to any agreement in this respect and we reiterate our earlier correspondence.

33 That same day, adding to the confusion, the respondent amended the statement of facts she had submitted to the arbitrator, contradicting what it had said earlier. It now again sought to have the arbitrator rule as to the status of L'Heureux and the respondent as co-authors:

> [TRANSLATION] FOR ALL OF THE FOREGOING REASONS, MS. DESPUTEAUX ASKS THE HONOURABLE ARBITRATOR: . . . TO INTERPRET that, in accordance with the publishing contracts, Exhibit R-2, Ms. Desputeaux is the sole author and sole owner of the copyright in her illustrations of the Caillou character and in the character itself;

34 Subsequently, counsel for the respondent removed from the record all of the exhibits that could have been used by their client as evidence on the question of co-authorship. In the appellants' submission, and in the opinion of the Court of Appeal, the scope of the arbitrator's mandate is confirmed by the statement of the relief sought by the respondent in her statement of facts. In their view, the respondent cannot both expressly ask the arbitrator to rule on a question and subsequently argue that he exceeded his mandate by ruling on the question (see Court of Appeal decision, at para. 31). However, the respondent now replies that the relief she sought was amended before the arbitrator, and that he annotated the statement of facts on the first day of the arbitration proceeding. Guthrie J. of the Superior Court refused to admit the annotated version of the statement of facts, and no copy was introduced by the parties in this Court. We therefore cannot consider that amendment to be an established fact in determining the scope of the mandate assigned to Mr. Rémillard.

35 Despite the unfortunate uncertainties that remain as to the procedure followed in defining the terms of reference for the arbitration, they necessarily included the problem referred to as "co-authorship" in the context of this case. In order to understand

the scope of the arbitrator's mandate, a purely textual analysis of the communications between the parties is not sufficient. The arbitrator's mandate must not be interpreted restrictively by limiting it to what is expressly set out in the arbitration agreement. The mandate also includes everything that is closely connected with that agreement, or, in other words, questions that have [TRANSLATION] "a connection with the question to be disposed of by the arbitrators with the dispute submitted to them" (S. Thuilleaux, *L'arbitrage commercial au Québec: droit interne — droit international privé* (1991), at p. 115). Since the 1986 arbitration reforms, the scope of arbitration agreements has been interpreted liberally (N. N. Antaki, *Le règlement amiable des litiges* (1998), at p. 103; *Guns N'Roses Missouri Storm Inc. v. Productions Musicales Donald K. Donald Inc.*, [1994] R.J.Q. 1183 (C.A.), at pp. 1185-86, *per* Rothman J.A.). From a liberal interpretation of the arbitration agreement, based on identification of the objectives of the agreement, we can conclude that the question of co-authorship was intrinsically related to the other questions raised by the arbitration agreement. For example, in order to determine the rights of Chouette to produce and sell products derived from Caillou, it is necessary to ascertain whether the owners of the copyright in Caillou assigned their patrimonial rights to Chouette. In order to answer that question, we must then identify the authors who were authorized to assign their patrimonial rights in the work.

36 Certain elements of the letters exchanged by the parties and of the arbitration award confirm the validity of that interpretation. For instance, in her letter of June 9, 1997, the respondent said that the interpretation of the contracts and the determination of the powers held by the appellant Chouette [TRANSLATION] "will necessarily lead to the question of co-authorship" (amended motion of the respondent-applicant Desputeaux to have an arbitration award annulled, Appellants' Record, at p. 16). In reply to that letter, Chouette pointed out that in the event that the

interpretation of the contracts was favourable to it, the discussion of the question of co-authorship would become moot (amended motion of the respondent-applicant Desputeaux to have an arbitration award annulled, Appellants' Record, at p. 17). In addition, the following passage from p. 7 of the arbitration award indicates that the interpretation of the contracts in respect of ownership of the copyright is connected with questions relating to the powers of Chouette and the economic and moral rights associated with the commercial exploitation of the Caillou character:

> [TRANSLATION] The respective claims of the parties are based on ownership of the copyright in Caillou. What we must do is define that concept, in accordance with the law. We must determine whether those rights apply to everything connected with Caillou, or only in respect of some of the components, if there is more than one owner of the copyright; we must also determine the respective shares both of the economic and moral rights deriving from the original literary and artistic production and of the rights in what are referred to as "derivative products".

37 Section 37 of the *Act respecting the professional status of artists* provides that every dispute arising from the interpretation of a contract between an artist and a promoter shall be submitted to an arbitrator. The nature of the questions of interpretation submitted to the arbitrator meant that it was necessary to consider the problem of ownership of the copyright. Plainly, that problem was intimately and necessarily connected to the interpretation and application of the agreements that the arbitrator had to examine. Because that question was in fact before the arbitrator, we must now consider whether the applicable legislation prohibited consideration of the question being assigned to him, as the respondent argues. Desputeaux's argument on that point is two-pronged. The first part is based on federal copyright legislation, which, in her submission, prohibits the question of the intellectual property in a work being referred to arbitration. The second is based on the provisions of the *Civil Code* and the *Code of Civil Procedure*,

which provide that questions relating to personality rights may not be referred to arbitration. As we know, the decision that is on appeal here accepted both elements of that argument.

C. *Section 37 of the Copyright Act and Arbitration of Disputes Relating to Copyright*

38 In the opinion of the Court of Appeal, s. 37 of the *Copyright Act* prevented the arbitrator from ruling on the question of copyright, since that provision assigns exclusive jurisdiction to the Federal Court, concurrently with the provincial courts, to hear and determine all proceedings relating to the Act (para. 41). With respect, in my view the Court of Appeal has substantially and incorrectly limited the powers of arbitrators in relation to copyright. Its approach is inconsistent with the trend in the case law and legislation, which has been, for several decades, to accept and even encourage the use of civil and commercial arbitration, particularly in modern western legal systems, both common law and civil law.

39 The purpose and context of s. 37 of the *Copyright Act* demonstrate that it has two objectives. First, its intention is to affirm the jurisdiction that the provincial courts, as a rule, have in respect of private law matters concerning copyright. Second, it is intended to avoid fragmentation of trials concerning copyright that might result from the division of jurisdiction *ratione materiae* between the federal and provincial courts in this field.

40 The respondent's argument is that s. 37 of the *Copyright Act* does not permit questions of copyright to be referred anywhere other than to the public judicial system. Both Parliament and the provincial legislature, however, have themselves recognized the

existence and legitimacy of the private justice system, often consensual, parallel to the state's judicial system. In Quebec, for example, recognition of arbitration is reflected in art. 2638 *C.C.Q.*, which defines an arbitration agreement as "a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts". The *Civil Code* excludes from arbitration only "[d]isputes over the status and capacity of persons, family members or other matters of public order" (art. 2639 *C.C.Q.*). In like manner, the Parliament of Canada has recognized the legitimacy and importance of arbitration, for example by enacting the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.). That Act makes the *Commercial Arbitration Code*, which is based on the model law adopted by the United Nations Commission on International Trade Law on June 21, 1985, applicable to disputes involving the Canadian government, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters. Article 5 of the Code in fact makes arbitration the preferred method of resolving disputes in matters to which it applies.

41 However, an arbitrator's powers normally derive from the arbitration agreement. In general, arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators. Nonetheless, arbitration is still, in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities.

42 The purpose of enacting a provision like s. 37 of the *Copyright Act* is to define the jurisdiction *ratione materiae* of the courts over a matter. It is not intended to exclude arbitration. It merely identifies the court which, within the judicial system, will have jurisdiction to hear cases involving a particular subject matter. It cannot be assumed to exclude arbitral jurisdiction unless it expressly so states. Arbitral jurisdiction is now

part of the justice system of Quebec, and subject to the arrangements made by Quebec pursuant to its constitutional powers.

43 Section 92(14) of the *Constitution Act, 1867* gives the provinces the power to constitute courts that will have jurisdiction over both provincial and federal matters. Section 101 of that Act allows the Parliament of Canada to constitute courts to administer federal laws. Unless Parliament assigns exclusive jurisdiction over a matter governed by federal law to a specific court, the courts constituted by the province pursuant to its general power to legislate in relation to the administration of justice will have jurisdiction over any matter, regardless of legislative jurisdiction (H. Brun and G. Tremblay, *Droit constitutionnel* (4th ed. 2002), at p. 777). As this Court stated in *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626, at para. 28:

> Thus, even when squarely within the realm of valid federal law, the Federal Court of Canada is not presumed to have jurisdiction in the absence of an express federal enactment. On the other hand, by virtue of their general jurisdiction over all civil and criminal, provincial, federal, and constitutional matters, provincial superior courts do enjoy such a presumption.

44 In *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206, this Court had to determine whether a province had the power to grant jurisdiction to a small claims court to hear admiralty law cases. La Forest J. found that grant of jurisdiction to be constitutionally valid, as follows, at p. 228:

> I conclude that a provincial legislature has the power by virtue of s. 92(14) of the *Constitution Act, 1867* to grant jurisdiction to an inferior court to hear a matter falling within federal legislative jurisdiction. This power is limited, however, by s. 96 of that Act and the federal government's power to expressly grant exclusive jurisdiction to a court established by it under s. 101 of the Act. Since neither of these exceptions applies in the

present case, the grant of jurisdiction in s. 55 of the *Small Claims Courts Act* authorizes the Small Claims Court to hear the action in the present appeal.

45 A province has the power to create an arbitration system to deal with cases involving federal laws, unless the Parliament of Canada assigns exclusive jurisdiction over the matter to a court constituted pursuant to its constitutional powers or the case falls within the exclusive jurisdiction of the superior courts under s. 96 of the *Constitution Act, 1867*. The Parliament of Canada could also grant concurrent jurisdiction to specific provincial courts. For example, it could enact a provision stipulating that "the Federal Court shall have concurrent jurisdiction with provincial superior courts to hear all proceedings in relation to the administration of the Act". However, this is not what it did in this case.

46 Section 37 of the *Copyright Act* gives the Federal Court concurrent jurisdiction in respect of the enforcement of the Act, by assigning shared jurisdiction *ratione materiae* in respect of copyright to the Federal Court and "provincial courts". That provision is sufficiently general, in my view, to include arbitration procedures created by a provincial statute. If Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so (for a similar approach, see *Automatic Systems Inc. v. Bracknell Corp.* (1994), 113 D.L.R. (4th) 449 (Ont. C.A.), at pp. 457-58; J. E. C. Brierley, "La convention d'arbitrage en droit québécois interne", [1987] *C.P. du N.* 507, at para. 62). Section 37 is therefore not a bar to referring this case to arbitration. We must now consider whether doing so is prohibited by the civil law and rules of procedure of Quebec.

D. *Copyright, Public Order and Arbitration*

47 At this point, this case is governed by the statutory arrangements for arbitration in Quebec. The legal nature of the arbitration proceeding in question, however, requires further comment. The matter was referred to arbitration under s. 37 of the *Act respecting the professional status of artists*. That provision establishes arbitral jurisdiction. It allows one party to require that a matter be referred to an arbitrator. However, it allows the parties to renounce submission of a case to an arbitrator; that means that, unlike, for example, grievance arbitration under Canadian labour relations legislation, the procedure is consensual in nature. (See, for example, *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.)

48 The legal framework that governs this arbitration procedure is therefore the same as the one established by the relevant provisions of the *Civil Code* and the *Code of Civil Procedure*. The *Civil Code* recognizes the existence and validity of arbitration agreements. With the exception of questions of public order, and certain matters such as the status of persons, it gives the parties the freedom to submit any dispute to arbitration and to determine the arbitrator's terms of reference (art. 2639 *C.C.Q.*). The *Code of Civil Procedure* essentially leaves the manner in which evidence will be taken, and the procedure for the arbitration, to the parties and the authority of the arbitrator (arts. 944.1 and 944.10 *C.C.P.*).

49 Relying on arts. 946.5 *C.C.P.* and 2639 *C.C.Q.*, the Court of Appeal held that cases involving ownership of copyright may not be submitted to arbitration. In the Court's opinion, copyright, like moral rights, attaches to the personality of the author (at para. 40):

> [TRANSLATION] The right to fair recognition as the creator of a work, like the right to respect for one's name, carries a purely moral connotation that derives from the dignity and honour of the creator of the work. From that standpoint, the question of ownership of copyright cannot be arbitrable.

50 In addition, the Court of Appeal took the view that cases relating to ownership of copyright, as well as cases concerning the scope and validity of copyright, must be assigned exclusively to the courts because the decisions made in such cases may, as a rule, be set up against the entire world. The fact that they may be set up against third parties would therefore mean that they could not be left to arbitrators to decide, and rather must be disposed of by the public judicial system (para. 42).

51 Article 2639 *C.C.Q.* expressly provides that the parties may not submit a dispute over a matter of public order or the status of persons, which is, in any event, a matter of public order, to arbitration. Logically, art. 946.5 *C.C.P.* provides that a court can refuse homologation of an award where the matter in dispute cannot be settled by arbitration or is contrary to public order. Thus the law establishes a mechanism for overseeing arbitral activity that is intended to preserve certain values that are considered to be fundamental in a legal system, despite the freedom that the parties are given in determining the methods of resolution of their disputes. However, we must analyse the relationship between the application of rules that are regarded as matters of public order and arbitral jurisdiction in greater depth. Ultimately, that question deals with the limitations placed on the autonomy of the arbitration system and the nature of, and restraints on, intervention by the courts in consensual arbitration, which is governed by the civil law and civil procedure of Quebec.

52 In order to determine whether questions relating to ownership of copyright fall outside arbitral jurisdiction, as the Court of Appeal concluded, we must more clearly define the concept of public order in the context of arbitration, where it may arise in a number of forms, as it does here, for instance, in respect of circumscribing the jurisdiction *ratione materiae* of the arbitration (Thuilleaux, *supra*, at p. 36). Thus a matter may be excluded from the field covered by arbitration because it is by nature a "matter of public order". The concept also applies in order to define and, on occasion, restrict the scope of legal action that may be undertaken by individuals, or of contractual liberty. The variable, shifting or developing nature of the concept of public order sometimes makes it extremely difficult to arrive at a precise or exhaustive definition of what it covers. (J.-L. Baudouin and P.-G. Jobin, *Les obligations* (5th ed. 1998), at pp. 151-52; *Auerbach v. Resorts International Hotel Inc.*, [1992] R.J.Q. 302 (C.A.), at p. 304; *Goulet v. Transamerica Life Insurance Co. of Canada*, [2002] 1 S.C.R. 719, 2002 SCC 21, at paras. 43-46) The development and application of the concept of public order allows for a considerable amount of judicial discretion in defining the fundamental values and principles of a legal system. In interpreting and applying this concept in the realm of consensual arbitration, we must therefore have regard to the legislative policy that accepts this form of dispute resolution and even seeks to promote its expansion. For that reason, in order to preserve decision-making autonomy within the arbitration system, it is important that we avoid extensive application of the concept by the courts. Such wide reliance on public order in the realm of arbitration would jeopardize that autonomy, contrary to the clear legislative approach and the judicial policy based on it. (*Laurentienne-vie, compagnie d'assurance inc. v. Empire, compagnie d'assurance-vie*, [2000] R.J.Q. 1708 (C.A.), at p. 1712; *Mousseau v. Société de gestion Paquin ltée*, [1994] R.J.Q. 2004 (Sup. Ct.), at p. 2009, citing J. E. C. Brierley, "Chapitre XVIII de la convention d'arbitrage, art. 2638-2643", in Barreau du Québec et Chambre des notaires

du Québec, *La réforme du Code civil: obligations, contrats nommés* (1993), vol. 2, at pp. 1067, 1081-82; J. E. C. Brierley, "Une loi nouvelle pour le Québec en matière d'arbitrage" (1987), 47 *R. du B.* 259, at p. 267; L. Y. Fortier, "Delimiting the Spheres of Judicial and Arbitral Power: 'Beware, My Lord, of Jealousy'" (2001), 80 *Can. Bar Rev.* 143)

53 A broad interpretation of the concept of public order in art. 2639, para. 1 *C.C.Q.* has been expressly rejected by the legislature, which has specified that the fact that the rules applied by an arbitrator are in the nature of rules of public order is not a ground for opposing an arbitration agreement (art. 2639, para. 2 *C.C.Q.*). The purpose of enacting art. 2639, para. 2 *C.C.Q.* was clearly to put an end to an earlier tendency by the courts to exclude any matter relating to public order from arbitral jurisdiction. (See *Condominiums Mont St-Sauveur inc. v. Constructions Serge Sauvé ltée*, [1990] R.J.Q. 2783, at p. 2789, in which the Quebec Court of Appeal in fact stated its disagreement with the earlier decision in *Procon (Great Britain) Ltd. v. Golden Eagle Co.*, [1976] C.A. 565; see also *Mousseau*, *supra*, at p. 2009.) Except in certain fundamental matters, relating, for example, strictly to the status of persons, as was found by the Quebec Superior Court to be the case in *Mousseau*, *supra*, an arbitrator may dispose of questions relating to rules of public order, since they may be the subject matter of the arbitration agreement. The arbitrator is not compelled to stay his or her proceedings the moment a matter that might be characterized as a rule or principle of public order arises in the course of the arbitration.

54 Public order arises primarily when the validity of an arbitration award must be determined. The limits of that concept's role must be defined correctly, however. First, as we have seen, arbitrators are frequently required to consider questions and

statutory provisions that relate to public order in order to resolve the dispute that is before them. Mere consideration of those matters does not mean that the decision may be annulled. Rather, art. 946.5 *C.C.P.* requires that the award as a whole be examined, to determine the nature of the result. The court must determine whether the decision itself, in its disposition of the case, violates statutory provisions or principles that are matters of public order. In this case, the *Code of Civil Procedure* is more concerned with whether the disposition of a case, or the solution it applies, meets the relevant criteria than with whether the specific reasons offered for the decision do so. An error in interpreting a mandatory statutory provision would not provide a basis for annulling the award as a violation of public order, unless the outcome of the arbitration was in conflict with the relevant fundamental principles of public order. That approach, which is consistent with the language used in art. 946.5 *C.C.P.*, corresponds to the approach taken in the law of a number of states where arbitration is governed by legal rules analogous to those now found in Quebec law. The courts in those countries have limited the consideration of substantive public order to reviewing the outcome of the award as it relates to public order. (See: E. Gaillard and J. Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at pp. 955-56, No. 1649; J.-B. Racine, *L'arbitrage commercial international et l'ordre public*, vol. 309 (1999), at pp. 538-55, in particular at pp. 539 and 543; *Société Seagram France Distribution v. Société GE Massenez*, Cass. civ. 2e, May 3, 2001, *Rev. arb.* 2001.4.805, note Yves Derains.) And lastly, in considering the validity of the award, the clear rule stated in art. 946.2 *C.C.P.*, which prohibits a court from inquiring into the merits of the dispute, must be followed. In applying a concept as flexible and changeable as public order, these fundamental principles must be adhered to in determining the validity of an arbitration award.

55 This case raises a number of aspects of the application of the rules and principles that form part of public order. We must first ask whether copyright, as a moral right, is analogous to the matters enumerated in art. 2639, para. 1 *C.C.Q.* and is therefore outside the jurisdiction *ratione materiae* of the arbitration system. Second, we must determine whether that provision prohibits arbitration as to the ownership of copyright based on the *erga omnes* nature of this type of decision. And third, although the question of the validity of the contracts was not before the arbitrator in this case, as we have seen, because of the discussion that took place between the parties, it is nonetheless useful to consider whether the arbitrator might have had the authority to declare the publishing contracts invalid because of the defects of form that were alleged to exist in them, under the rules set out in ss. 31 and 34 of the *Act respecting the professional status of artists*.

(i) Public Order and the Nature of Copyright

56 In my view, the Court of Appeal was in error when it said that the fact that s. 14.1 of the *Copyright Act* provides that moral rights may not be assigned means that problems relating to the ownership of copyright must be treated in the same manner as questions of public order, because they relate to the status of persons and rights of personality, and must therefore be removed from the jurisdiction of arbitrators. The opinion of the Court of Appeal is based on an incorrect understanding of the nature of copyright in Canada and of the way in which the legal mechanisms that govern copyright and provide for it to be exercised and protected operate.

57 Parliament has indeed declared that moral rights may not be assigned, but it permits the holders of those rights to waive the exercise of them. The Canadian legislation therefore recognizes the overlap between economic rights and moral rights in

the definition of copyright. This Court has in fact stressed the importance placed on the economic aspects of copyright in Canada: the *Copyright Act* deals with copyright primarily as a system designed to organize the economic management of intellectual property, and regards copyright primarily as a mechanism for protecting and transmitting the economic values associated with this type of property and with the use of it. (See *Théberge v. Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, 2002 SCC 34, at paras. 11-12, *per* Binnie J.)

58 In the context of Canadian copyright legislation, although the work is a "manifestation of the personality of the author", this issue is very far removed from questions relating to the status and capacity of persons and to family matters, within the meaning of art. 2639 *C.C.Q.* (M. Goudreau, "Le droit moral de l'auteur au Canada" (1994), 25 *R.G.D.* 403, at p. 404). The Act is primarily concerned with the economic management of copyright, and does not prohibit artists from entering into transactions involving their copyright, or even from earning revenue from the exercise of the moral rights that are part of it. As the intervenors UNEQ and CMA point out, an artist may even charge for waiving the exercise of his or her moral rights (see *Théberge*, *supra*, at para. 59).

59 In addition, the Quebec legislation recognizes the legitimacy of transactions involving copyright, and the validity of using arbitration to resolve disputes arising in respect of such transactions: in s. 37 of the *Act respecting the professional status of artists*, the legislature has expressly provided that in the absence of an express renunciation, every dispute between an artist and a promoter shall be submitted to an arbitrator. Contracts between artists and promoters systematically contain stipulations relating to copyright. It would be paradoxical if the legislature were to regard questions

concerning copyright as not subject to arbitration because they were matters of public order, on the one hand, and on the other hand to direct that this method of dispute resolution be used in the event of conflicts relating to the interpretation and application of contracts that govern the exercise of that right as between artists and promoters.

60 Accordingly, the award in issue in this case does not deal with a matter that by its nature falls outside the jurisdiction of the arbitrators. It is therefore not contrary to public order; if it had been, a court would have been justified in annulling it (art. 946.5 *C.C.P.*). On the contrary, it is a valid disposition of a matter, ownership of copyright, that is one of the primary elements of the dispute between the parties in respect of the interpretation and application of the agreements between them.

(ii) Public Order and the *Erga Omnes* Nature of Decisions Concerning Copyright

61 In the opinion of the Court of Appeal, the fact that a decision in respect of copyright may be set up against the entire world, and accordingly the nature of its effects on third parties, was a bar to the arbitration proceeding. Those characteristics meant that only the courts could hear such cases (Court of Appeal decision, at paras. 42 and 44). That interpretation is based on an error as to the nature of the concept of *res judicata* and the extent to which decisions made in the judicial system may be set up against third parties.

62 First, the *Code of Civil Procedure* does not consider the effect of an arbitration award on third parties to be a ground on which it may be annulled or its homologation refused (art. 946.4 *C.C.P.*). As the appellants assert, the opinion of the Court of Appeal on this question fails to have regard to the principle of *res judicata*,

which holds that a judgment is authoritative only as between the parties to the case (art. 2848 *C.C.Q.*; see J.-C. Royer, *La preuve civile* (2nd ed. 1995), at pp. 490-91). The arbitration proceeding in this case was between two private parties involved in a dispute as to the proper interpretation of a contract. The arbitrator ruled as to the ownership of the copyright in order to decide as to the rights and obligations of the parties to the contract. The arbitral decision is authority between the parties, but is not binding on third parties who were not involved in the proceeding. To illustrate this point, there would be nothing to prevent someone who was not a party to the arbitration agreement who had also been involved in writing the texts for the Caillou books from applying to a court to have his or her copyright recognized.

(iii) Sections 31 and 34 of the *Act respecting the professional status of artists*

63 In the alternative, the Court of Appeal held that the arbitrator had a duty to ensure that the mandatory formalities imposed by ss. 31 and 34 of the *Act respecting the professional status of artists* had been complied with in the formation of the contracts, and that he had failed to perform that duty (Court of Appeal decision, at paras. 48-49). Our examination of the conduct of the arbitration disposed of that criticism, because the problem of contract validity was excluded from the arbitrator's mandate by the decision of Bisaillon J. of the Superior Court.

64 At this stage in the consideration of the appeal, it is worth recalling certain features of the mechanism for submitting disputes to an arbitrator under s. 37 of the *Act respecting the professional status of artists*. Either of the two parties may decide to refer a dispute arising from the interpretation and application of the provisions of a contract subject to the Act to the arbitrator. However, if both parties agree to limit the arbitrator's

terms of reference, he may not expand his mandate on his own initiative. Nonetheless, to the extent that his terms of reference included an examination of the validity of the contracts and in particular of the formalities and rules characterized as mandatory that are found in ss. 31 and 34 of the Act, such as those relating to the term for which the parties were bound by their agreement, the arbitrator should have decided whether the contracts were valid. The contrary solution would result in a multiplicity of proceedings in cases where a dispute related to both the interpretation of the clauses of the contract and the validity of the contract. That solution would offend one of the fundamental principles of arbitration, which is designed to provide parties to a contract with an effective and efficient forum for resolving their disputes (*Compagnie nationale Air France v. Mbaye*, [2000] R.J.Q. 717 (Sup. Ct.), at p. 724). And lastly, it would indeed be surprising if an arbitrator could rule as to the ownership of copyright, having regard to the provisions of the *Copyright Act*, but not as to the mandatory provisions of the *Act respecting the professional status of artists*, which, after all, deals only with the terms and conditions for the exercise of copyright itself.

(iv) Limits on Review of the Validity of Arbitration Decisions

65 The Court of Appeal stated at para. 49:

> [TRANSLATION] Where an arbitrator, in performing his or her mandate, is required to apply the rules of public order, he or she must apply them correctly, that is, in the same manner as do the courts.

66 That statement runs counter to the fundamental principle of the autonomy of arbitration (*Compagnie nationale Air France*, *supra*, at p. 724). What it necessarily leads to is review of the merits of the dispute by the court. In addition, it perpetuates a concept

of arbitration that makes it a form of justice that is inferior to the justice offered by the courts (*Condominiums Mont St-Sauveur*, *supra*, at p. 2785).

67 The legislature has affirmed the autonomy of arbitration by stating, in art. 946.2 *C.C.P.*, that "[t]he court examining a motion for homologation cannot enquire into the merits of the dispute". (That provision is applicable to annulment of an arbitration award by the reference to it in art. 947.2 *C.C.P.*) In addition, the reasons for which a court may refuse to homologate or annul an arbitration award are exhaustively set out in arts. 946.4 and 946.5 *C.C.P.*

68 Despite the specificity of these provisions of the *Code of Civil Procedure* and the clarity of the legislative intention apparent in them, there have been conflicting lines of authority in the Quebec case law regarding the limits of judicial intervention in cases involving applications for homologation or annulment of arbitration awards governed by the *Code of Civil Procedure*. Some judgments have taken a broad view of that power, or sometimes tended to confuse it with the power of judicial review provided for in arts. 33 and 846 *C.C.P.* (On this point, see the commentary by F. Bachand, "Arbitrage commercial: Assujettissement d'un tribunal arbitral conventionnel au pouvoir de surveillance et de contrôle de la Cour supérieure et contrôle judiciaire d'ordonnances de procédure rendues par les arbitres" (2001), 35 *R.J.T.* 465.) The judgment in issue here illustrates this tendency when it adopts a standard of review based on simple review of any error of law made in considering a matter of public order. That approach extends judicial intervention at the point of homologation or an application for annulment of the arbitration award well beyond the cases intended by the legislature. It ignores the fact that the legislature has voluntarily placed limits on such review, to preserve the autonomy of the arbitration system. Public order will of course always be relevant, but solely in

terms of the determination of the overall outcome of the arbitration proceeding, as we have seen.

69 This latter approach has been adopted by a significant line of authority. It recognizes that the remedies that may be sought against arbitration awards are limited to the cases set out in arts. 946 *et seq. C.C.P.* and that judicial review may not be used to challenge an arbitration decision or, most importantly, to review its merits (*Compagnie nationale Air France*, *supra*, at pp. 724-25; *International Civil Aviation Organization v. Tripal Systems Pty. Ltd.*, [1994] R.J.Q. 2560 (Sup. Ct.), at p. 2564; *Régie intermunicipale de l'eau Tracy, St-Joseph, St-Roch v. Constructions Méridien inc.*, [1996] R.J.Q. 1236 (Sup. Ct.), at p. 1238; *Régie de l'assurance-maladie du Québec v. Fédération des médecins spécialistes du Québec*, [1987] R.D.J. 555 (C.A.), at p. 559, *per* Vallerand J.A.; *Tuyaux Atlas, une division de Atlas Turner Inc. v. Savard*, [1985] R.D.J. 556 (C.A.)). Review of the correctness of arbitration decisions jeopardizes the autonomy intended by the legislature, which cannot accommodate judicial review of a type that is equivalent in practice to a virtually full appeal on the law. Thibault J.A. identified this problem when she said:

> [TRANSLATION] In my view, the argument that an interpretation of the regulation that is different from, and in fact contrary to, the interpretation adopted by the ordinary courts means that the arbitration award exceeds the terms of the arbitration agreement stems from a profound misunderstanding of the system of consensual arbitration. The argument makes that separate system of justice subject to review of the correctness of its decisions, and thereby substantially reduces the latitude that the legislature and the parties intended to grant to the arbitration board.
>
> (*Laurentienne-vie, compagnie d'assurance*, *supra*, at para. 43)

(v) The Conduct of the Arbitration and Natural Justice

70 Desputeaux alleged that the arbitrator failed to hear testimony or consider evidence relating to ownership of the copyright. In her submission, that error justified annulling the award. Articles 2643 *C.C.Q.* and 944.1 *C.C.P.*, as we know, affirm the principle of procedural flexibility in arbitration proceedings, by leaving it to the parties to determine the arbitration procedure or, failing that, leaving it up to the arbitrator to determine the applicable rules of procedure (*Entreprises H.L.P. inc. v. Logisco inc.*, J.E. 93-1707 (C.A.); *Moscow Institute of Biotechnology v. Associés de recherche médicale canadienne (A.R.M.C.)*, J.E. 94-1591 (Sup. Ct.), at pp. 12-14 of the full text). The rules in the *Code of Civil Procedure* governing an arbitration proceeding do not require that the arbitrator hear testimonial evidence. The methods by which evidence may be heard are flexible and are controlled by the arbitrator, subject to any agreements between the parties. It is therefore open to the parties, for example, to decide that a question will be decided having regard only to the contract, without testimony being heard or other evidence considered. A decision made on the record, without witnesses being heard in the presence of the arbitrator, does not violate any principle of procedure or natural justice, and may not be annulled on that ground alone.

71 Nonetheless, the arbitrator clearly does not have total freedom in respect of procedure. Under arts. 947.2 and 946.4, para. 3 *C.C.P.*, an arbitration award may be annulled where "the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case". The record considered here, however, does not support a complaint of that sort. Its content does not show that the facts that are needed in order for

it to be reviewed exist, and therefore does not justify this Court's intervention in that regard.

VI. Conclusion

72 The arbitrator acted in accordance with his terms of reference. He made no error such as would permit annulment of the arbitration award. For these reasons, the appeal must be allowed, the decision of the Court of Appeal set aside and the application for annulment of the award dismissed with costs throughout.

Appeal allowed with costs.

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POSTMEDIA NETWORK INC.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

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

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF POSTMEDIA NETWORK INC. (Claims Hearing November 15, 2011)

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