TAB E

This is Exhibit "E" referred to in the

affidavit of Eileen Flood

sworn before me, this 14th

day of April, 2011.

A Commissioner for Taking Affidavits

COMMISSAIRE À L'ASSERMENTATION
SALIMA CHOUIOUKH #191,732
POUR TOUS LES ACTES JUDICIAIRES DU QUÉBEC

** 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.)

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 F

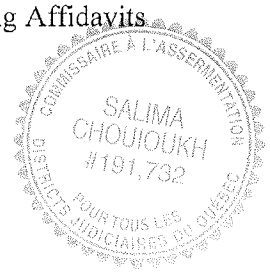
This is Exhibit "F" referred to in the

affidavit of Eileen Flood

sworn before me, this 14th

day of April, 2011.

A Commissioner for Taking Affidavits



Intitulé de la cause :

The Gazette, division de Southam inc. c. Blondin

Entre
The Gazette, une division de Southam inc., demanderesse, et
Rita Blondin, Eriberto Di Paolo, Ulmed Gohil, Horace Holloway, Pierre Rebetez, Michael Thomson, Joseph Brazeau, Robert Davies, Jean-Pierre Martin, Leslie Stockwell et Marc-André Tremblay, défendeurs, et
La Section locale 145 du Syndicat canadien des Communications, de l'Énergie et du Papier, mise en cause

[2001] J.Q. no 4083

No 500-17-009722-011

Cour supérieure du Québec
(Procédure allégée)
District de Montréal

La juge Louise Lemelin

le 14 août 2001.

(38 paras)

Avocats :

Ronald J. McRobie et Dominique Monet (Fasken Martineau DuMoulin), pour la demanderesse.
Pierre Grenier (Melançon Marceau Grenier), pour les défendeurs et la mise en cause.

MOTIFS DU JUGEMENT

1 **LA JUGE LOUISE LEMELIN** :-- La demanderesse réclame des défendeurs le remboursement de salaires et avantages qu'elle leur aurait payés en trop pour la période du 5 février 1998 et 30 octobre 1998.

2 Les défendeurs et leur syndicat la mise en cause, présentent une requête en moyen déclinatoire plaidant l'incompétence rationae materiae de la Cour supéricure, seul l'arbitre peut se saisir du dossier, ils demandent le rejet de l'action.

3 Un survol de l'historique de la relation des parties est nécessaire pour situer le litige. Le Tribunal ne réfère qu'aux éléments essentiels de ce long conflit pour disposer de la requête.

4 Jusqu'en 1982, le Syndicat et la Gazette étaient liés par des conventions collectives qui conféraient au Syndicat une juridiction exclusive sur les fonctions exercées par ses membres. L'employeur, afin de pouvoir introduire des changements technologiques, négocie avec la mise en cause et les 200 typographes de la salle de composition des ententes tripartites en 1982 et 1987. Les salariés, le Syndicat et la Gazette signent ces ententes qui garantissent une sécurité d'emploi et de salaire jusqu'à l'âge de 65 ans et un mécanisme d'arbitrage obligatoire.

5 Il n'est pas contesté que les défendeurs sont membres de la mise en cause.

6 Ces ententes font partie des conventions collectives qui seront signées par la suite. En mai 1993, en l'absence d'entente des parties pour le renouvellement de la convention, l'arbitre Leboeuf fut saisi du différend. Le 17 mai 1993, la Gazette déclare un lock-out touchant alors les 70 typographes toujours en emploi à la salle de composition.

7 Le 18 août 1994, l'arbitre Leboeuf rend une décision où il retient les meilleures offres finales de la demanderesse et il ajoute deux nouvelles annexes soit B-1 et C-1. L'arbitre a notamment supprimé le mécanisme obligatoire prévu pour le renouvellement des conventions, il reformule l'article 2 b) de la convention collective et la clause XI de l'entente de 1987 pour remplacer le mécanisme obligatoire par un mécanisme facultatif. Les annexes B-1 et C-1 font partie de la convention collective 1993-1996, comme les annexes B et C, les ententes tripartites de 1982 et 1987. Les annexes B-1 et C-1 ne sont pas signées par les salariés.

8 En octobre 1994, il ne reste que 11 typographes, les défendeurs dans cette cause. Ils ne sont rappelés au travail qu'après la décision de l'arbitre Foisy le 25 avril 1996, laquelle accueille le grief et ordonne leur réintégration dans les postes qu'ils occupaient avant le lock-out de 1993.

9 Les défendeurs et la mise en cause demandent le 30 avril 1996, à The Gazette de transmettre ses meilleures offres finales tel que prévu à l'Entente tripartite de 1987 et l'annexe C de la convention collective.

10 Le 3 mai 1996, la demanderesse décline la demande d'échanger les meilleures offres prétendant que, depuis la décision de l'arbitre Leboeuf, ce mécanisme est facultatif. The Gazette met les 11 typographes en lock-out le 3 juin 1996, situation qui perdure lors de l'audition de la requête.

11 Le 30 avril 1996, ces 11 salariés poursuivent The Gazette pour recouvrer les salaires qui n'avaient pas été payés durant le lock-out de 1993-1994. La Cour supérieure accueille la requête en exception déclinatoire de l'employeur et déclare que la réclamation est la compétence exclusive de l'arbitre de grief.

12 L'arbitre Sylvestre fut saisi de deux mésententes, une soumise le 8 mai 1996 puis une seconde le 4 juin 1996, soit après le lock-out. L'arbitre, dans sa sentence du 5 février 1998, rejette la mésentente du 8 mai et se prononce ainsi sur celle déposée en juin :

- "il ordonne à l'employeur de se soumettre au processus d'échange des meilleures offres finales et de transmettre, sans délai, ses dernières offres finales au syndicat et aux 11 plaignants;
- il déclare que les ententes tripartites conclues les 12 novembre 1982 et 5 mars 1987 sont pleinement en vigueur et obligent l'employeur à les respecter;
- il ordonne à l'employeur de continuer à verser à chacun des plaignants le salaire et autres avantages découlant des ententes tripartites de novembre 1982 et mars 1987;
- il ordonne le remboursement de tout salaire et tout avantage perdus suite ou en raison du lock-out, le tout avec intérêts;
- ..."[2]

13 La demanderesse signifie une requête en révision judiciaire de la sentence et elle obtient, le 3 avril 1998, une ordonnance partielle de sursis tel qu'il appert de la pièce D-8;

14 The Gazette paie le salaire et les avantages aux 11 défendeurs du 5 février 1998 jusqu'à la date du jugement de la juge Grenier du 30 octobre 1998[3].

15 Après une analyse détaillée des clauses, plus particulièrement des annexes B, C et B1, C1, la juge conclut que l'arbitre ne pouvait, sans excéder sa compétence, ignorer les annexes B-1 et C-1 incorporées à la convention. L'arbitre Leboeuf avait modifié l'obligation initiale contraignant les parties à transmettre les meilleures offres laquelle serait devenue discrétionnaire, selon la juge Grenier, l'arbitre Sylvestre ne pouvait donc enjoindre à The Gazette de soumettre ces dites offres.

16 La juge Grenier rappelle, qu'au moment du lock-out, l'arbitre ne peut se saisir d'un grief vu l'absence de convention collective en vigueur. L'arbitre aurait donc excédé sa compétence en concluant à l'existence d'ententes civiles autonomes qui produiraient des effets après l'expiration de la convention. Même si l'arbitre avait eu raison de conclure à la survie de ces ententes après le lock-out, la juge Grenier affirme qu'en l'absence de clause compromissoire dans ces ententes, l'arbitre s'est saisi d'un litige qu'il qualifie de "civil" sans en avoir la compétence.

17 La juge déclare également non fondée la conclusion de l'arbitre Sylvestre ordonnant le paiement des salaires et avantages aux salariés pendant le lock-out et tous remboursements de montants perdus lors du lock-out et elle écrit :

> "Le lock-out tout comme la grève constituent des rouages essentiels du régime des rapports collectifs de travail. Les articles 58, 106 et 109 C.T. sont d'ordre public. Seule une disposition expresse aurait pu limiter le droit de l'employeur de décréter un lock-out. Or, loin de l'exclure, les parties ont prévu expressément son exercice dans l'entente elle-même"[4].

18 La requête en évocation de The Gazette est accueillie et la sentence arbitrale rendue par Me Sylvestre le 5 février 1998 pour le grief du 4 juin 1996 est cassée. Le Syndicat en appelle de ce jugement et l'honorable juge Deschamps émet une ordonnance de sursis d'exécution de la décision de Me Sylvestre.

19 Le pourvoi du Syndicat et des défendeurs est accueilli en Cour d'appel le 15 décembre 1999[5] qui ordonne à l'employeur de se soumettre au processus d'échange des meilleures offres finales dans les 30 jours du jugement. Les deux ordonnances de l'arbitre relatives au paiement et au rembourse-

ment du salaire et des avantages perdus en raison du lock-out sont cassées. L'honorable juge Rousseau-Houle renvoie le dossier à l'arbitre Sylvestre "afin qu'il détermine, s'il y a lieu, les dommages-intérêts qui pourraient être accordés aux 11 salariés par suite du non-respect par l'employeur de l'article XI de l'entente de 1987".

20 La compétence de l'arbitre est à nouveau soulevée dans la présente requête. Le Tribunal est lié par le jugement de la Cour d'appel où l'honorable juge Rousseau-Houle conclut que l'arbitre pouvait se saisir de la mésentente soumise le 4 juin 1996 en vertu de la convention collective de travail et des ententes tripartites de 1982 et 1987.

21 Elle ne partage pas l'opinion de la juge de première instance soulignant que certains éléments factuels n'ont pas été considérés. La mésentente du 4 juin 1996 stipule qu'elle est soumise en vertu de la convention collective et des ententes tripartites de 1982 et 1987. Ces ententes contiennent une clause relative à la Procédure de griefs qui prévoit que :

> "Dans l'éventualité d'une mésentente quant à l'interprétation, l'application et/ou violation alléguée à la présente entente, l'affaire en question serait jugée comme étant un grief et sera soumise et réglée de la façon prévue aux procédures de règlements de griefs et de l'arbitrage de la convention collective."

22 L'honorable juge Rousseau-Houle déclare que l'arbitre Sylvestre a, de plus, été nommé de consentement pour disposer des mésententes. Elle affirme que les parties ont convenu d'un mécanisme spécifique de règlement de griefs qui, à son avis, constitue :

> "... une clause compromissoire parfaite obligeant les parties à exécuter les ententes en vertu du régime du droit commun. La procédure de griefs prévue à la convention collective à laquelle réfère la clause compromissoire n'est utilisée que comme cadre procédural pour mettre cette dernière en application.
>
> L'examen de l'ensemble des dispositions des ententes démontre bien que les parties ont voulu que la procédure prévue à la convention collective de travail soit utilisée pour forcer l'exécution des obligations mutuellement contractées par les trois parties dans le cadre des ententes"[6].

23 La juge ajoute que, par application de la clause II de l'entente de 1987, les ententes tripartites entrent en vigueur lorsque la convention collective prend fin, disparaît, est nulle ou pour tout autre raison, est devenue caduque ou inapplicable. Les annexes B et C ont survécu au lock-out et elles habilitent l'arbitre à se saisir de la mésentente. Ce qui ne serait pas le cas des ententes B-1 et C-1 non signées par les syndiqués qui avaient une durée plus restreinte soit celle de la durée de la convention de 1993 à 1996, lesquelles ont expiré à la fin de la convention collective.

24 L'honorable juge Rousseau-Houle souligne que le pouvoir de révision de la Cour supérieure n'est pas ouvert à l'encontre de la sentence d'un arbitre consensuel, le seul recours étant la demande d'annulation (947 C.p.c.). Pour annuler ou écarter la sentence, une des circonstances énumérées à l'article 946 C.p.c. doit être établie. La Cour d'appel a donc analysé les allégations de The Gazette en prenant en compte que, les motifs soulevés dans la requête en révision judiciaire ne diffèrent pas essentiellement de ceux qui auraient pu être invoqués en vertu de l'article 946.4 C.p.c. pour demander l'annulation.

25 La Cour d'appel conclut que le lock-out n'a pas suspendu l'application des annexes B et C mais cela ne justifiait pas l'arbitre d'exiger de l'employeur de payer à ses employés leurs salaires et avantages pendant le lock-out. Les parties n'ont jamais exclu le droit de grève ou de lock-out, elles y réfèrent dans leurs conventions.

26 Mais l'article XI de l'entente de 1987, comme l'écrit la juge Rousseau-Houle[7] :

> "... vient fixer une limite à l'exercice du droit au lock-out en prévoyant un processus obligatoire de renouvellement de la convention collective selon l'arbitrage des meilleures offres finales. Il assure forcément que tout conflit de travail se terminera éventuellement par l'imposition par un tiers d'une nouvelle convention collective. Il est possible que le lock-out ait été indûment prolongé en raison du refus par l'employeur d'échanger ses meilleures offres finales comme le lui avait demandé le syndicat dans les délais prévus le 30 avril 1996 et que les salariés aient droit à des dommages-intérêts en conséquence. Il appartiendra à l'arbitre d'en décider."

27 L'arbitre a, depuis, été saisi de nouveau du dossier afin de se prononcer sur les dommages qui, selon les salariés, leur sont dus suite au refus de l'employeur d'échanger les meilleures offres finales en 1996.

28 La demanderesse soutient que la Cour d'appel ayant cassé les deux ordonnances de la sentence arbitrale relatives au paiement des salaires pendant le lock-out, il y aurait chose jugée quant au droit des défendeurs à ces montants. The Gazette plaide que son recours distinct exercé dans un contexte civil relève de la compétence de la Cour supérieure.

29 The Gazette suggère que l'arrêt Tassé c. St-Sauveur-des-Monts[8] soutient leur prétention que la Cour supérieure est le forum approprié pour réclamer le remboursement d'un trop payé. Il faut distinguer les circonstances de ce dossier dans lequel la Cour d'appel avait reconnu le droit de l'employeur de réclamer le remboursement d'une avance faite au salarié en l'absence de toute mention à la convention collective. Le paiement versé par The Gazette, il ne faut pas l'oublier, découle, entre autres, de la sentence de Me Sylvestre et de l'ordonnance de sursis émise en Cour supérieure.

30 Plus récemment, la Cour d'appel dans l'arrêt Boily[9], s'appuyant sur les décisions de la Cour suprême dont Weber[10], Nouveau Brunswick c. O'Leary[11] et Dayco (Canada) Ltd. c. T.C.A. (Canada)[12], reconnaît la compétence exclusive de l'arbitre de disposer de la demande de répétition de l'indu de l'employeur même réclamée contre une personne qui n'est plus à son emploi.

31 Le Tribunal ne peut qu'endosser la conclusion du juge Rochon dans la cause Verdon c. Lauzon[13], une demande de restitution ne doit pas être faite nécessairement en même temps qu'une demande de déclaration de nullité d'un acte. Mais ce n'est pas le contexte factuel et juridique inédit dans lequel se trouvent les parties.

32 La Cour d'appel, dans son jugement du 15 décembre 1999 ne se prononce pas sur les sommes déjà payées par The Gazette pendant le lock-out et elle n'ordonne pas le remboursement. Mais l'honorable juge Rousseau-Houle reconnaît la compétence de l'arbitre d'où son renvoi pour qu'il adjuge sur les dommages qu'auraient pu subir les défendeurs par le non respect de l'employeur de son obligation de transmettre les meilleures offres finales conformément à la clause XI de l'entente de 1987.

33 Le défaut de The Gazette a pu prolonger la durée du lock-out et c'est ce que devra évaluer l'arbitre. Le dommage, le plus prévisible est certes la perte de salaires et avantages des employés affectés par la décision de la demanderesse.

34 Il est admis que les défendeurs entendent réclamer, à titre de dommages causes par l'attitude de The Gazette, les pertes de salaires et avantages notamment pour la période du 5 février 1998 au 30 octobre 1998, période visée dans la réclamation de la demanderesse. Les salariés entendent aussi réclamer des pertes de revenus pour d'autres périodes.

35 Dans le débat devant l'arbitre sur l'adjudication de dommages s'il y a lieu, la somme payée par la demanderesse aux défendeurs est un élément qui sera pris en compte et qui pourrait même faire l'objet de compensation. Autoriser la continuation du dossier devant la Cour supérieure, c'est empêcher l'arbitre d'adjuger complètement dans un domaine de compétence que lui a reconnu expressément la Cour d'appel.

36 On peut affirmer a contrario que, devant la Cour supérieure, les défendeurs peuvent être privés du droit à une défense entière dès qu'ils voudront soulever les dommages subis suite au défaut de la demanderesse de transmettre ses meilleures offres, ils se feront opposer le jugement de la Cour d'appel où l'arbitre fut déclaré compétent pour établir les dommages.

37 Prenant en compte tous ces éléments, le Tribunal décline compétence et renvoie le dossier à l'arbitre.

38 POUR CES MOTIFS, LE TRIBUNAL :

ACCUEILLE partiellement la requête des défendeurs et de la mise en cause;

DÉCLINE compétence quant à l'action de la demanderesse The Gazette;

RENVOI le dossier à l'arbitre;

Le tout avec dépens.

LA JUGE LOUISE LEMELIN

cp/s/qlabl/qlana

1 Eriberto Di Paola et al c. The Gazette, C.S.M. 500-05-016404-960, jug. 24-10-97.

2 The Gazette c. Syndicat Canadien des Communications de l'Énergie et du Papier, section locale 145, SCEP et Mme Rita Blondin et al - Griefs No. TG01-145-96-01 et TG01-145-96-02, sentence du 5 février 1998, p. 113.

3 The Gazette c. Me André Sylvestre et Syndicat canadien des communications, de l'énergie et du papier, [1998] A.Q. no 3233, C.S.M. 500-05-0039701-980.

4 Citée à 2 p. 23.

5 Syndicat canadien des Communications, de l'Énergie et du Papier, section locale 145 et al c. The Gazette, une division de Southam Inc. et Me André Sylvestre, [1999] J.Q. no 5543, C.A.M. 500-09-007384-985, jugement 15 décembre 1999.

6 Id. note 5, p. 24.

7 Citée à 4 p. 41.

8 Tassé c. St-Sauveur-des-Monts (Municipalité du village de), [1991] A.Q. no 1062, C.A.M. 500-09-000270-918, jugement du 17 juin 1991, rapporté à 91T-277.

9 Boily c. For-Net Inc., [1999] A.Q. no 101, C.A. Québec 200-09-002289-988, jugement du 8 janvier 1999 rapporté à 99T-135.

10 Weber c. Ontario Hydro [1995] 2 R.C.S. 929.

11 Nouveau Brunswick c. O'Leary [1995] 2 R.C.S. 967.

12 Dayco (Canada) Ltd. c. T.C.A. (Canada) [1993] 2 R.C.S. 230.

13 C.S. Laval 540-05-003678-988, jugement du 14 septembre 1998, J.E. 98-2096.

TAB G

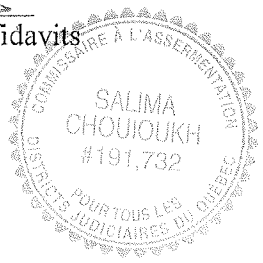
This is Exhibit "G" referred to in the

affidavit of Eileen Flood

sworn before me, this 14th

day of April, 2011.

A Commissioner for Taking Affidavits



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2008 CarswellQue 1939, EYB 2008-131151, 2008 QCCA 522, J.E. 2008-730, D.T.E. 2008T-292

S.C.E.P., Local 145 c. Sylvestre

La section locale 145 du Syndicat canadien des communications, de l'énergie et du papier (SCEP), Rita Blondin, Robert Davies, Umed Gohil, Jean-Pierre Martin, Leslie Stockwell, Marc-André Tremblay, Joseph Brazeau, Horace Holloway, Pierre Rebetez, Michael Thomson et Eriberto Di Paolo, Appelants-requérants, c. The Gazette, une division de Southam inc., Intimée-mise en cause, et André Sylvestre, ès qualités d'arbitre, Mis en cause-intimé

Cour d'appel du Québec

Beauregard J.C.A., Forget J.C.A., Pelletier J.C.A.

Heard: 10 décembre 2007
Judgment: 17 mars 2008
Docket: C.A. Qué. Montréal 500-09-016637-068

Counsel: *Me Pierre Grenier*, pour les appelants sauf Rita Blondin et Eriberto Di Paolo

Rita Blondin et Eriberto Di Paolo, appelants-requérants, personnellement

Me Ronald J. McRobie, Me Dominique Monet, pour l'intimée

Subject: Labour and Employment; Civil Practice and Procedure

Beauregard J.C.A., Forget J.C.A., Pelletier J.C.A.:

1 *LA COUR*; - Statuant sur l'appel d'un jugement rendu le 31 mars 2006 par la Cour supérieure, district de Montréal (l'honorable Claude Larouche), qui a rejeté la requête des appelants en annulation de la sentence arbitrale de l'arbitre André Sylvestre rendue le 18 mars 2005, avec dépens;

2 Après avoir étudié le dossier, entendu les parties et délibéré;

3 Pour les motifs du juge Pelletier, auxquels souscrivent les juges Beauregard et Forget :

4 *ACCUEILLE* l'appel avec dépens contre l'intimée The Gazette, une division de Southam Inc., exception faite de ceux afférents aux cahiers de sources;

5 *INFIRME* le jugement de la Cour supérieure; et procédant à rendre le jugement qui aurait dû être rendu :

ACCUEILLE la requête des requérants en annulation de la sentence arbitrale de l'arbitre André Sylvestre rendue le 18 mars 2005 avec dépens contre la mise en cause The Gazette, une division de Southam Inc.;

ORDONNE le retour du dossier à l'arbitre Sylvestre pour qu'il se conforme aux arrêts de la Cour d'appel des 15 décembre 1999 et 6 août 2003.

Pelletier J.C.A.:

6 Les personnes physiques Rita Blondin et al. sont des typographes à l'emploi de l'intimée « The Gazette ». Elles sont aussi membres du syndicat appelant.

7 Par leur pourvoi, elles recherchent de concert avec leur syndicat l'infirmation du jugement de la Cour supérieure qui a rejeté leur requête en annulation d'une sentence prononcée par le mis en cause Sylvestre le 18 mars 2005. Cette sentence détermine qu'il n'y a pas lieu d'ordonner à The Gazette d'indemniser les typographes pour les salaires et avantages sociaux perdus pendant toute ou partie de la période écoulée entre le 3 juin 1996 et le 21 janvier 2000. De l'avis de l'arbitre, ce dispositif se justifie parce que The Gazette n'aurait pas indûment prolongé le lock-out en vigueur pendant cette période.

8 Les parties en sont à leur troisième passage à notre cour. J'éviterai donc de reprendre en détail l'exposé des faits, puisque leur récit couvre déjà des dizaines de pages de sentences arbitrales, de jugements et d'arrêts des tribunaux de droit commun[FN1]. Voici, pour l'essentiel, de quoi il retourne.

9 En relation avec ce conflit qui dure depuis 1996, le mis en cause Sylvestre agit à titre d'arbitre de différend au sens du *Code de procédure civile*. Cette situation, assez insolite il faut bien le reconnaître, tire son origine d'une entente civile tripartite, typographes, syndicat et employeur, conclue en 1982 et modifiée en 1987. Par-delà les conventions collectives présentes et à venir, l'entente visait à accorder une protection très spéciale aux typographes dont la sécurité d'emploi était irrémédiablement menacée par la nécessaire introduction de changements technologiques à la salle de rédaction du journal. Pour l'essentiel, The Gazette offrait à chacun des typographes des garanties salariales et une sécurité d'emploi jusqu'à l'âge de 65 ans. Il convient de préciser que l'ajout introduit en 1987 a incorporé un ingrédient plutôt indigeste à cette recette déjà inusitée. Pour la bonne compréhension de ce qui va suivre, je reproduis le texte de l'une des deux nouvelles dispositions convenues en 1987 :

> XI. RENOUVELLEMENT DES CONVENTIONS COLLECTIVES ET RÈGLEMENTS DES DIFFÉRENDS
>
> Dans les quatre-vingt-dix (90) jours précédant l'expiration de la convention collective, l'Employeur et le Syndicat peuvent entreprendre des négociations visant à établir la nouvelle convention. Les termes et conditions de l'entente demeureront en vigueur jusqu'à ce qu'une entente soit conclue, qu'une décision soit rendue par un arbitre, ou jusqu'à ce que l'une ou l'autre des parties exerce son droit de grève ou de lock-out.
>
> Dans les deux semaines précédant l'acquisition du droit de grève ou de lock-out, incluant l'acquisition d'un tel droit par l'application de l'Article X de la présente entente, l'une ou l'autre des parties peut requérir l'échange de « Meilleures offres finales », les deux parties devant s'exécuter simultanément, par écrit, dans les quarante-huit (48) heures qui suivent ou à l'intérieur d'une autre période de temps mutuellement acceptée par les parties. Les « Meilleures offres finales » contiendront seulement les clauses ou parties de clauses sur

> lesquelles les parties ne se sont pas déjà entendues. S'il ne devait toujours pas y avoir entente, et avant que le droit de grève ou de lock-out ne soit acquis, l'une ou l'autre des parties peut soumettre la mésentente à un arbitre sélectionné de la façon prévue par la procédure de règlement des griefs de la convention collective. Si une telle requête est soumise, l'arbitre, après avoir donné aux deux parties l'opportunité de faire leurs représentations sur le mérite de leurs propositions respectives, devra retenir dans sa totalité l'une des « Meilleures offres finales » et rejeter l'autre dans sa totalité. La décision de l'arbitre sera finale et obligatoire pour les parties et deviendra partie intégrante de la convention collective.
>
> [Soulignements ajoutés]

10 La compétence originale de l'arbitre relève donc de cette entente tripartite, dans sa version de 1987, de même que d'un avis de mésentente transmis à The Gazette par le syndicat et par les 11 typographes le 4 juin 1996.

11 La portée et les conséquences juridiques des documents dont il s'agit ont été définies par notre cour en 1999, de sorte qu'on peut, de façon générale, affirmer que l'arrêt prononcé à cette époque circonscrit la compétence de l'arbitre, celle en vertu de laquelle l'arbitre a prononcé la sentence dont le syndicat et les typographes requièrent aujourd'hui l'annulation.

12 En 1999, après avoir annulé en partie la première sentence arbitrale prononcée par l'arbitre Sylvestre, la Cour a retourné le dossier à Me Sylvestre pour qu'il tranche une question demeurée en suspens :

> CASSE les deux ordonnances de l'arbitre relatives au paiement et au remboursement de salaire et avantages perdus en raison du lock-out;
>
> RENVOIE le dossier à l'arbitre afin qu'il détermine, s'il y a lieu, les dommages-intérêts qui pourraient être accordés aux 11 appelants par suite du non respect par l'employeur de l'article XI de l'entente de 1987;

13 La Cour a aussi ordonné à The Gazette de respecter l'obligation créée par l'article XI reproduit ci-haut en procédant à l'échange des meilleures offres finales dans les 30 jours suivant le dépôt de l'arrêt :

> ORDONNE à l'intimée de se soumettre au processus d'échange des meilleures offres finales, dans les 30 jours du présent arrêt;

14 Les conclusions de notre arrêt de 1999 ont donc donné le coup d'envoi à la tenue de deux débats, lesquels ont suivi un cheminement parallèle et indépendant.

15 D'une part, en exécution de la conclusion lui ordonnant de se soumettre au processus élaboré dans l'entente tripartite, The Gazette a échangé avec le syndicat ses meilleures offres finales le 21 janvier 2000.

16 À peine un mois plus tard, de nouveau confrontées à une situation d'impasse, les parties ont saisi M^{e} Jean-Guy Ménard du différend les opposant.

17 À l'analyse, on constate que ce différend comportait non seulement un volet régi par le *Code du travail*, mais aussi un volet civil dans la mesure où l'arbitre se voyait saisi d'une application de l'entente tripartite dans le cadre d'un débat auquel les 11 typographes participaient dorénavant à titre de partie indépendante du syndicat.

18 Le 5 juin 2001, M^{e} Ménard rendait une sentence imposant une convention collective entrant en vigueur le jour même. Celle-ci ne comportait aucun effet rétroactif, se contentant de fixer les conditions de travail pour les cinq années à venir. Chacun de leur côté, cette fois, les typographes et The Gazette ont requis la Cour supérieure d'en prononcer l'annulation. Ils ont échoué lorsque, au mois de mai 2002, le juge Jean Frappier a rejeté chacune des requêtes. Personne n'a interjeté appel des jugements de rejet.

19 D'autre part, en application de l'ordonnance de renvoi figurant aussi dans les conclusions de l'arrêt de 1999, l'arbitre Sylvestre a repris les audiences sur le litige visant à déterminer « s'il y a[vait] lieu » la quotité des salaires et avantages sociaux perdus par les typographes entre le 3 juin 1996 et le 21 janvier 2000 « par suite du non-respect par The Gazette de l'article XI de l'entente de 1987 ».

20 Me Sylvestre a choisi de se prononcer d'abord sur deux questions préliminaires, l'une portant sur l'identification des chefs de dommages pertinents à l'espèce, et l'autre sur celle de la période pendant laquelle le préjudice en cause aurait été susceptible de se matérialiser.

21 Par sa sentence rendue au mois d'octobre 2000, M^{e} Sylvestre a établi que le préjudice visé ne concernait que les salaires et avantages sociaux qui auraient été perdus pendant la période écoulée entre le 3 juin 1996 et le 21 janvier 2000 exclusivement.

22 À nouveau les typographes se sont adressés à la Cour supérieure en attaquant cette sentence au moyen d'une requête en annulation. Le juge leur a donné raison, mais son jugement n'a pas survécu au pourvoi alors interjeté par The Gazette. C'est ainsi que, en 2003, sous la plume du juge Morissette, notre cour a conclu que, bien que n'ayant pas entièrement vidé le débat, la sentence arbitrale avait néanmoins tranché des questions de fond se situant au coeur du litige dont l'arbitre était saisi. Le dispositif de l'arrêt se présente sous la forme que voici :

> [5] Infirme le jugement annulant partiellement la sentence arbitrale de l'arbitre André Sylvestre en date du 11 octobre 2000, rejette avec dépens la requête en annulation des intimés signifiée le 10 novembre 2000 et retourne le dossier à l'arbitre pour qu'il poursuive l'audition de la mésentente entre l'appelante et les intimés afin d'en disposer entièrement au fond.

23 C'est dans ce contexte que Me Sylvestre a repris les audiences qui avaient été interrompues par les recours entrepris contre sa décision interlocutoire. Il faut cependant garder en mémoire qu'au moment de la reprise la situation avait évolué. La convention collective imposée par Me Ménard était alors en vigueur, et ainsi que souligné précédemment, elle ne prévoyait ni effet rétroactif ni indemnité susceptible d'anéantir ou de diminuer le préjudice découlant d'une éventuelle prolongation indue du lock-out décrété par The Gazette en juin 1996.

24 Cette précision faite, il importe de rappeler que l'arrêt de notre cour de 1999 avait identifié très clairement la faute contractuelle commise par The Gazette en contravention avec les dispositions de l'article XI de l'entente tripartite, version 1987. Interpellée par un avis transmis le 30 avril 1996, soit à la date même de l'expiration de la convention collective imposée en 1993 par l'arbitre Leboeuf, The Gazette devait échanger avec le syndicat ses meilleures offres finales, et ce, au plus tard le 2 mai suivant. Or, elle ne s'est pas exécutée et c'est là la faute que notre cour avait pointée comme étant celle susceptible d'avoir provoqué un préjudice. Pour l'arbitre, il s'agissait dès lors de déterminer si ce manquement contractuel avait eu pareil effet dans la réalité et, le cas échéant, de quantifier la hauteur de l'indemnisation appropriée.

25 Malheureusement, et de son propre aveu, l'arbitre a perdu le fil du raisonnement qui, en décembre 1999,

avait conduit la Cour à lui retourner le dossier pour qu'il tranche l'affaire. Selon toute probabilité, M^{e} Sylvestre a été dérouté par le fait que, à cette occasion, la Cour avait cassé son ordonnance de paiement du salaire et des avantages sociaux découlant de l'entente tripartite, version 1987. Voici en quels termes il exprime son incompréhension[FN2] :

> [97] Dans sa sentence du 5 février 1998, l'arbitre a décidé que l'employeur devait être tenu d'indemniser les plaignants dès après le déclenchement du lock-out puisque les lettres d'entente entraient alors en vigueur et l'obligeaient à verser aux plaignants leurs salaires et avantages sociaux. Or la Cour d'appel s'est dite en désaccord avec cette décision et conclu que l'arbitre avait erré en décidant que les conditions de travail contenues dans les ententes de 1982 et 1987 se sont maintenues malgré le lock-out. Ce tribunal a écrit, pp. 40 et 41 :
>
> « Cependant, l'article XI de l'entente de 1987 reconnaît le droit de lock-out de l'employeur. Les appelants ne l'ont d'ailleurs pas contesté devant l'arbitre. Ils demandaient que ce droit soit assorti de la procédure de renouvellement obligatoire de la convention collective prévue à l'article XI et que durant l'exercice du lock-out, l'employeur maintienne le versement des salaires et autres avantages sociaux en alléguant que la clause d'ajustement des salaires au coût de la vie leur garantit le maintien à un certain niveau de vie même durant un lock-out.
>
> En agréant à cette dernière partie de la demande des appelants et en ordonnant en conséquence à l'employeur : 1) de continuer à verser à chacun des plaignants le salaire et les autres avantages découlant des ententes tripartites de 1982 et 1987 et 2) de rembourser tout salaire et tout avantage perdus en raison du lock-out, le tout avec intérêts, l'arbitre a commis une erreur qui justifie l'intervention judiciaire.
>
> En tenant pour acquis que l'article XI n'est pas un obstacle au maintien de l'accès à l'emploi et du paiement du salaire régulier ajusté au coût de la vie pendant le lock-out, l'arbitre donne aux dispositions de l'entente un sens qu'elles ne peuvent rationnellement soutenir.
>
> Quelle que soit la portée des clauses relatives à la sécurité d'emploi, à la garantie du salaire ajusté au coût de la vie, à la durée des ententes et à leur non renégociation, ces clauses ne changent pas le contenu de l'article XI de l'entente de 1987 qui permet l'exercice du droit de grève et de lock-out. Or l'effet usuel d'un lock-out est de suspendre l'obligation de l'employeur de payer le salaire des employés et de permettre leur accès au travail. L'article XI n'a nullement pour effet de priver l'employeur de ce droit consacré dans le domaine des relations de travail.
>
> Toutefois ce dernier article vient fixer une limite à l'exercice du droit au lock-out en prévoyant un processus obligatoire de renouvellement de la convention collective selon l'arbitrage des meilleures offres finales. Il assure forcément que tout conflit de travail se terminera éventuellement par l'imposition par un tiers d'une nouvelle convention collective. Il est possible que le lock-out ait été indûment prolongé en raison du refus par l'employeur d'échanger ses meilleures offres finales comme le lui avait demandé le syndicat dans les délais prévus le 30 avril 1996 et que les salariés aient droit à des dommages-intérêts en conséquence. Il appartiendra à l'arbitre d'en décider. »
>
> [98] Ce tribunal a ainsi écarté la proposition syndicale à l'effet que, durant la durée du lock-out, l'employeur devait être tenu de maintenir le versement de toute rémunération aux 11 typographes. Il a

qualifié d'erreur justifiant l'intervention judiciaire la conclusion de l'arbitre faisant droit à cette requête, mentionné que le contenu de l'article XI de l'entente permettait l'exercice du droit de lock-out et rappelé ses effets, savoir la suspension de l'obligation de payer le salaire des employés et l'interdiction de leur accès à leurs lieux de travail.

[99] Le problème que l'arbitre rencontre, en l'espèce, résulte de la directive que lui a donnée la Cour d'appel qui, après avoir écrit qu'il « *est possible que le lock-out ait été indûment prolongé* », lui a retourné le dossier « *afin qu'il détermine, s'il y a lieu, les dommages-intérêts qui pourraient être accordés aux 11 salariés par suite du non respect par l'employeur de l'article XI de l'entente de 1987* ». Dans le paragraphe précédent, la juge Rousseau-Houle avait écrit que l'article XI fixait une limite à l'exercice du droit au lock-out en prévoyant le processus obligatoire du renouvellement de la convention par l'arbitrage des meilleures offres finales et que le conflit de travail prendrait éventuellement fin lorsqu'un tiers imposerait une nouvelle convention collective.

[100] Or, que doit-on comprendre par la mention de cette possibilité que l'employeur ait indûment prolongé le lock-out en raison de son refus d'échanger ses meilleures offres finales? L'arbitre doit admettre sa plus complète perplexité. Il s'infère de cet arrêt que le retard indu à mettre fin au lock-out n'a pu débuter le 3 juin 1996, au jour de l'imposition du lock-out. En effet, la Cour d'appel a souligné que, l'arbitre, en arrivant à une telle conclusion, contredisait le texte de l'article XI qui « n'a nullement pour effet de priver l'employeur de ce droit consacré dans le domaine des relations de travail. » Cependant, la durée de ce lock-out a été extrêmement longue puisqu'il s'est prolongé pendant près de quatre ans. Faut-il pour autant conclure qu'il a été indûment prolongé par l'employeur? L'usage de l'adverbe « *indûment* » ne jette aucun éclairage sur le sens de ce commentaire de la Cour d'appel. Le Grand dictionnaire encyclopédique Larousse offre cette définition de l'adjectif « *indu* » : « *Serge Côté, notaire honoraire, régisseur dit de ce qui est contre la règle, contre l'usage, contre la raison. . . .* ». Cette définition n'aide pas davantage à la compréhension de la directive de ce tribunal car l'arbitre ignore ce que serait une règle, un usage ou une raison en une matière telle que la durée d'un arrêt de travail, grève ou lock-out.

26 Devant ce qu'il a considéré être une énigme, l'arbitre s'est mis à la recherche d'une autre faute que l'employeur aurait pu commettre pendant la période du lock-out[FN3] :

[103] En d'autres termes, selon ce que l'arbitre comprend de ses directives, la Cour d'appel lui a confié le pouvoir de décider d'accorder des dommages-intérêts s'il conclut à l'exercice abusif, par l'employeur, de son droit de lock-out. Or, sauf la très longue durée du lock-out, l'arbitre ne peut découvrir, dans la preuve, un moment précis survenu après le 3 juin 1996 où l'employeur aurait dû mettre un terme au lock-out. En maintenant sa position jusqu'au 21 janvier 2000 par son refus de l'échange de ses meilleures offres finales, il n'a pas fait montre de clémence face à ses 11 typographes. Cependant ces derniers, comme l'ont confirmé messieurs Di Paolo et Thomson, étaient tellement assurés de leur bon droit qu'ils n'entendaient faire aucune concession.

27 N'en ayant pas trouvé, il conclut en ces termes[FN4] :

[104] Devant l'ensemble de ce tableau, l'arbitre ne peut conclure de la preuve que l'employeur a prolongé le lock-out de façon indue. Pour ces raisons, il ne peut lui ordonner de verser les dommages-intérêts réclamés par les 11 plaignants pour la période du 3 juin 1996 au 21 janvier 2000.

28 J'estime, avec égards, qu'il y a eu méprise et que la confusion qui a habité l'arbitre l'a conduit à dénaturer le différend dont il était saisi.

29 En concluant qu'un lock-out ne pouvait être continué de façon indue, l'arbitre n'a pas répondu à la question formulée par la Cour dans son arrêt de 1999. Ce faisant, il n'a pas exercé la compétence qui lui avait été attribuée.

30 Il importe de bien garder en mémoire qu'à l'époque où notre cour a prononcé son arrêt, soit à la mi-décembre 1999, la problématique comportait les quatre grandes inconnues que voici :

> a) Si le processus d'échange des offres s'était déroulé normalement après l'envoi de l'avis du 30 avril 1996, quand la convention collective aurait-elle été arrêtée ou, autrement dit, à quelle date le lock-out aurait-il pris fin?
>
> b) Dans l'hypothèse où la preuve à venir révélerait que le lock-out aurait pris fin avant le 15 décembre 1999 (date de l'arrêt), à quels salaires et à quels avantages sociaux les 11 typographes auraient-ils eu droit à partir de la fin du lock-out?
>
> c) Ces salaires et ces avantages sociaux auraient-ils été inférieurs au minimum garanti par l'entente tripartite, version 1987?
>
> d) De plus, l'échange à venir des meilleures offres finales en exécution de la conclusion « [o]rdonne à l'intimée de se soumettre au processus d'échange des meilleures offres finales dans les 30 jours du présent arrêt » allait-il ou non permettre d'annihiler ou de diminuer l'éventuelle perte que la réponse aux trois questions précédentes permettrait d'identifier?

31 Voilà ce à quoi l'arbitre devait apporter une réponse en exécution de l'arrêt de 1999 lui retournant le dossier. Prenant en compte sa propre décision interlocutoire d'octobre 2000, devenue finale par l'effet de notre arrêt de 2003, l'arbitre avait, lui, à considérer une éventuelle indemnisation pour une période pouvant s'étendre non pas jusqu'au 15 décembre 1999, mais bien jusqu'au 21 janvier 2000 exclusivement en se livrant à l'analyse que je viens de décrire.

32 Depuis le prononcé de l'arrêt de décembre 1999, le sort qu'a connu l'échange des meilleures offres finales fait au début de l'année 2000 a démontré que le préjudice éventuel des typographes n'avait nullement été diminué par la nouvelle convention collective. Depuis les jugements de rejet rendus par le juge Frappier, lesquels ont cristallisé cette situation, on connaît donc la réponse à la question que j'ai précédemment identifiée sous la lettre « d ».

33 À ce jour, toutefois, les trois autres questions demeurent sans réponse puisque l'arbitre ne les a tranchées d'aucune façon.

34 En décidant que The Gazette n'avait rien fait pour prolonger indûment le lock-out, l'arbitre Sylvestre s'est prononcé sur autre chose que ce qui était visé par l'arrêt. J'estime donc que sa sentence tombe sous le coup du quatrième paragraphe de l'article 946 du *Code de procédure civile*, lequel reçoit application en matière de demande d'annulation par le renvoi que fait le législateur à l'article 947.2 C.p.c.

35 Je suis donc, en définitive, d'avis que la Cour supérieure aurait dû faire droit à la requête en annulation.

36 Les conclusions recherchées par les appelants vont cependant trop loin. Ils demandent en effet qu'il soit ordonné à l'arbitre Sylvestre de considérer sans nuance toute la période du 3 juin 1996 au 21 janvier 2001 comme étant la période où le lock-out a été indûment prolongé et d'accorder une indemnité en conséquence. Or, l'arrêt de 1999 avait déjà déterminé que l'entente tripartite reconnaissait à l'employeur le droit de décréter légalement un lock-out, ce qui emportait le droit de cesser le paiement aux typographes de leurs salaires et avantages[FN5] :

> Quelle que soit la portée des clauses relatives à la sécurité d'emploi, à la garantie du salaire ajusté au coût de la vie, à la durée des ententes et à leur non-renégociation, ces clauses ne changent pas le contenu de l'article XI de l'entente de 1987 qui permet l'exercice du droit de grève et de lock-out. Or l'effet usuel d'un lock-out est de suspendre l'obligation de l'employeur de payer le salaire des employés et de permettre leur accès au travail. L'article XI n'a nullement pour effet de priver l'employeur de ce droit consacré dans le domaine des relations de travail.

37 Il est loin d'être certain que le processus devant conduire à une sentence arbitrale mettant fin au lock-out et initié le 30 avril 1996 aurait connu son aboutissement avant le 3 juin de la même année, date de déclenchement du lock-out, et ce, même si The Gazette n'avait pas commis la faute identifiée par notre cour. Autrement dit, il n'est nullement acquis que toute la période du lock-out a indûment provoqué la perte des salaires et avantages autrement garantis aux typographes par l'entente tripartite. Sous ce rapport, c'est la preuve à être administrée devant l'arbitre en relation avec les trois questions que j'ai précédemment identifiées sous les lettres « a », « b » [FN6], et « c » qui permettra de dégager la solution au problème.

38 Je propose en conséquence d'accueillir l'appel avec les dépens des deux cours contre The Gazette, d'infirmer le jugement de la Cour supérieure, d'accueillir la requête en annulation des requérants et d'ordonner le retour du dossier à l'arbitre Sylvestre pour qu'il se conforme aux arrêts de notre cour des 15 décembre 1999 et 6 août 2003.

Solicitors of record:

Melançon, Marceau, Grenier et Sciortino, pour les appelants sauf Rita Blondin et Eriberto Di Paolo

Fasken Martineau DuMoulin, pour l'intimée

FN1 *Syndicat canadien des communications, de l'énergie et du papier, section locale 145 c. Gazette (The), une division de Southam inc.*, EYB 1999-15534 (C.A.); *The Gazette c. Blondin*, EYB 2003-45981 (C.A.).

FN2 SOQUIJ AZ-50307135.

FN3 SOQUIJ AZ-50307135.

FN4 SOQUIJ AZ-50307135.

FN5 *Syndicat canadien des communications, de l'énergie et du papier, section locale 145 c. Gazette (The), une division de Southam inc.*, EYB 1999-15534, paragr. 82 (C.A.).

FN6 La date de fin de période est cependant celle du 21 janvier 2000, telle que déjà déterminée par la décision interlocutoire rendue par M^{e} Sylvestre. Voir à ce sujet le paragr. [31].

END OF DOCUMENT

TAB H

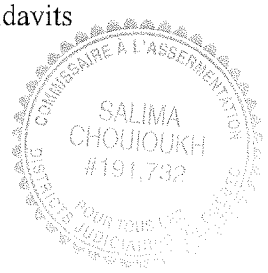
This is Exhibit "H" referred to in the

affidavit of Eileen Flood

sworn before me, this 14th

day of April, 2011.

A Commissioner for Taking Affidavits



403 Bronson Road
P.O. Box 335
Marmora, Ontario
K0K 2M0

April 6, 2011

I, Valerie Kennedy, a Certified Translator and member of the Association of Translators and Interpreters of Ontario since 1991 (member #1785), certify that the attached document, Exhibit N - Arbitral Award of André Sylvestre dated January 21, 2009, is to the best of my knowledge and belief a true and accurate translation of the original document from French to English.

Valerie Kennedy

Valerie Kennedy

ARBITRATION BOARD

CANADA
PROVINCE OF QUEBEC

Docket N°:

Date: January 21, 2009

PRESIDING: ANDRÉ SYLVESTRE, Lawyer

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

and

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

and

THE GAZETTE, A DIVISION OF SOUTHAM INC.

Ms. Rita Blondin and
Mr. Eriberto Di Paolo,
Representing themselves,

M[e] Pierre Grenier,
Counsel for the Union and the other nine complainants,

M[es] Ronald McRobie and Dominique Monet,
Counsel for the Employer.

ARBITRAL AWARD

THE FACTS

[1] The origins of this entire matter date back to 1982, when the parties and the 200 typographers then employed by The Gazette signed tripartite agreements under which these employees were granted wage protection and job security to the age of 65. By 1987, 132 typographers remained in The Gazette's employ. At that time, the two parties and the remaining typographers signed a further series of agreements incorporating the provision that, within the two weeks preceding the acquisition of the right to strike or lock-out, either party could request the exchange of "last final best offers". Both parties would be required to submit their offers simultaneously and in writing within 48 hours. Should no agreement be reached before the right to strike was acquired, either party could submit the disagreement to an arbitrator. The arbitrator's mandate, after having heard both parties, was to retain in their entirety the final offers with the most merit and reject in their entirety the others.

[2] The collective agreement then in force expired in 1993. Despite a dozen or so meetings between February and May 1993, some in the presence of a conciliator, the parties failed to reach an agreement. On May 17, 1993, the employer declared a lock-out. The union filed a grievance challenging The Gazette's right to make this decision, alleging that it was bound to retain all of its typographers on staff and respect the working conditions provided under the expired collective agreement throughout the process of exchanging and arbitrating final best offers. M^{e} Leboeuf was appointed arbitrator. In an interim decision on November 18, 1993, arbitrator Leboeuf ruled that the employer was fully within its rights to maintain a lock-out during this exchange process. In his words, [TRANSLATION] *"given that the right to strike or lock-out is a recognized right in the field of labour relations, it follows that this right may be exercised at any time from the moment it is acquired."*

[3] On May 4, 1993, the union initiated the process of exchanging last final best offers. When the parties failed to reach an agreement, M^{e} Leboeuf was mandated to arbitrate the

dispute. His award was issued on August 18, 1994 and received by the employer on August 22. That same day, Mr. McKay, the union bargaining agent, sent the following memo to management:

> *We now have a new contract. Union representatives are available now to complete the necessary formalities with their counterparts at The Gazette. Our members are available to return to work now.*
>
> *We offer you cooperation in implementing M^e Leboeuf's decision and normalizing relations between the parties in a timely and efficient manner.*

[4] It bears noting that in this award, arbitrator Leboeuf had modified Article XI of the 1987 tripartite agreement, by making optional the previously mandatory process of exchanging last final best offers. The award also altered the 1982 agreement by allowing The Gazette to transfer typographers as needs arose in other departments, without prior union approval.

[5] The Gazette ended the lock-out on August 24, 1994. It offered an attractive retirement package, which 51 typographers accepted. In the end, only the 11 complainants remained on staff. On October 14, the parties signed the collective agreement incorporating the 1982 and 1987 agreements, as well as the appendices containing the modifications introduced by the Leboeuf award.

[6] However, the 11 complainants were not called back to work, although they continued to receive their salary. On February 8, 1995, the union filed a grievance demanding they be recalled. Arbitrator Foisy heard the parties and ruled in the complainants' favour on April 25, 1996, ordering The Gazette to reopen the composition room and recall the said employees by no later than April 30.

[7] That same day, the employer sent the union a first written proposal with the intention of renewing the expiring collective agreement. The union, without giving notice and without filing a counter-proposal, requested that the employer exchange last final best offers pursuant to the 1987 tripartite agreement. In a letter dated May 3, Mr. Tremblay

reminded his counterparts that under the renewed collective agreement signed in October 1994, the exchange process had become optional. On May 8, the union filed a disagreement challenging the employer's refusal to exchange offers. On May 24, the employer sent the union a second proposal. On May 29, the union submitted its only counter-proposal.

[8] Finally, with neither side willing to budge, the employer declared a lock-out on June 3. The next day, the union and the 11 complainants filed the following disagreement:

> [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 fail to consent to the process of exchanging "last final best offers", as required by notice from the union and the 11 complainants on April 30, 1996;*
>
> - *decree a lock-out as of June 3, 1996 resulting in an interruption of earnings for the 11 complainants and the suspension of other benefits provided for under the collective 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 27of the collective agreement and despite the guarantee to maintain the standard of living provided for in the tripartite agreement reached on or about March 5, 1987.*
>
> *The present disagreement 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 final best offers and to send "last final best offers" to the union and the 11 complainants without delay;*

2. *To declare that the tripartite agreements reached on or about November 12, 1982 and March 5, 1987 are in full force, and that the employer is obligated to respect them;*

3. *To order the employer to continue to pay each complainant the salary and other benefits provided for under the collective labour agreement and the tripartite agreements of November 1982 and March 1987;*

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

5. *To make any other order necessary to protect the parties' rights;*

and, on an interim basis:

6. *To order the employer to maintain, until the final ruling is made, the conditions in force before the lock-out was declared;*

7. *To make any other order necessary to protect the parties' rights.*

Signed at Montreal, June 4th, 1996.

[9] On February 5, 1998, the arbitrator issued an award in which he concluded:

[TRANSLATION]
For all these reasons, the arbitrator dismisses the disagreement of May 8, 1996 but sustains the disagreement filed on June 4, 1996:

- *he orders the employer to submit to the process of exchanging final best offers and to send "last final best offers" to the union and the 11 complainants without delay;*

- *he declares that the tripartite agreements reached on November 12, 1982 and March 5, 1987 are in full force and that the employer is obligated to respect them;*

- *he orders the employer to continue to pay each complainant the salary and other benefits provided for under the tripartite agreements of November 1982 and March 1987;*

- *he orders the reimbursement of any salary and other benefits lost following or as a result of the lock-out, with interest;*

- *he orders the employer to maintain, until the final ruling is made, the conditions in force before the lock-out was declared;*

- *and, lastly, he reserves jurisdiction to settle any dispute arising from the application of this award.*

[10] The employer challenged this decision by filing a motion for judicial review. On October 30, 1998, Justice Danielle Grenier allowed the motion, found that the arbitrator had exceeded his jurisdiction in hearing the disagreement of June 4, 1996, and quashed the arbitral award that resulted in this remedy.

[11] The union appealed to the Court of Appeal. In a judgment rendered on December 19, 1999, this Court noted that Article XI of the agreement recognized the employer's right to declare a lock-out. This being the case, the arbitrator had made a reviewable error by ordering the employer to pay the complainants' salaries and social benefits during the lock-out, the usual effect of which is to suspend the employer's obligation to pay its employees' wages and to allow them access to the workplace. However, Justice Rousseau-Houle reasoned that, while Article XI did not prevent the employer from exercising this right, it did set a limit by prescribing a mandatory collective agreement renewal process in the form of final best offer arbitration. She went on to say (p. 42):

> [TRANSLATION]
> *It inevitably assures that any labour dispute will eventually end in the imposition of a new collective agreement by a third party. It may well be that the lock-out was unduly prolonged by the employer's refusal to exchange its final best offers within the prescribed time limit as requested by the union on April 30, 1996, and consequently, the employees may well be entitled to damages. This will be up to the arbitrator to decide.*
>
> *THEREFORE, I would ALLOW the appeal in part, ORDER the employer to submit to the process of exchanging final best offers within 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 to 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.*

[12] Between February 5 and October 30, 1998, while the Superior Court judgment was pending, The Gazette complied with one of the arbitrator's orders by paying the

11 complainants their salaries and benefits. These payments subsequently became the subject of an action to recover the salaries and benefits paid between these two dates, brought by the employer on February 1, 2001. On August 14, 2001, Superior Court Justice Louise Lemelin granted the motion for a declinatory objection filed by the union citing her court's lack of jurisdiction *rationae materiae*, declined jurisdiction and referred the matter back to the arbitrator.

[13] On January 21, 2000, to comply with the Court of Appeal's order, the union and The Gazette exchanged their last final best offers, without the participation of the 11 complainants. On March 6, the parties appointed M[e] Jean-Guy Ménard as arbitrator. On May 17, the union and the complainants applied to the arbitrator to reject the employer's last final best offers on the basis that they ran counter to the 1982 and 1987 tripartite agreements. In a preliminary exception raised on June 1, The Gazette challenged the arbitrator's jurisdiction, claiming the union had failed to follow the procedure provided for in the 1987 agreement.

[14] At the first hearings held by arbitrator Ménard, June 7 and June 21, 2000, only preliminary objections were argued. On September 21, arbitrator Ménard rendered an interim decision stating he would take these arguments under advisement and reconvening the parties to hearings on the merits. These hearings were held from September 2000 to January 2001. Arbitrator Ménard made his determination on June 5, 2001. On August 2, 2001, the 11 complainants filed a motion to vacate this award and, on August 30, The Gazette did the same. On December 21, the union filed a motion to homologate this same award. On May 2, 2002, Justice Jean Frappier made a ruling, writing the following comments prior to concluding:

> [TRANSLATION]
> *(141) Lastly, the Court finds that the arbitrator did not err in relying on the well-known legal principle to the effect that, if a contract contains an invalid clause, that clause can be deemed not written without the entire contract necessarily being declared nul and void.*

(142) Given the facts, the Court finds that the arbitrator made correct decisions and did not exceed the terms of Article XI of the 1987 tripartite agreement, that is, the arbitration agreement.

(143) Moreover, the specific circumstances in this case, where each party unilaterally and deliberately included in its final best offers clauses incompatible with the 1982 and 1987 tripartite agreements, which had been in full force since the 1993-1998 collective agreement had expired, justified the arbitrator interpreting them in such a way as to give them effect. This was the only solution and the arbitrator was right to resort to it in order to avoid chaos and fulfil his mandate of formulating the terms of a collective agreement.

(144) The soundness of the arbitrator's decision on the whole lies in the fact that, on one hand, he could not incorporate into the collective agreement he was mandated to formulate clauses overriding the 1982 and 1987 tripartite agreements, and on the other hand, had he simply quashed the parties' two final best offers, he would have, to all practical purposes, been rendering the arbitration clause non-binding, allowing both parties, at will, to readily bypass it.

(145) As for the motion for execution notwithstanding appeal, the Court would have been inclined to allow it given that the lock-out had been ongoing since May 1996.

(146) However, the 11 employees decided to formulate a motion to vacate respondent Ménard's arbitral award and to challenge the motion to homologate by proposing grounds for annulment.

(147) They decided to carry on the legal battle rather than accept the arbitral award, as the union did.

(148) In these circumstances, the Court finds no justification for ruling that the judgment may be executed notwithstanding appeal.

[15] The judge dismissed the two motions to vacate and confirmed M[e] Ménard's award.

[16] On June 6, 2002, the union filed a group grievance seeking, on behalf of the 11 complainants, the payment of salaries, pension plan contributions, insurance premiums and the other social benefits lost between June 5, 2001 and May 12, 2002. This grievance was sent to arbitration before M[e] Marc Gravel, who made his determination on November 24, 2003. Arbitrator Gravel justified his decision to dismiss the grievance in the following terms (p. 30):

[TRANSLATION]
The 11 typographers could hardly today invoke the fact that their Union enjoys a monopoly of representation to argue that, as of June 5, 2001, the Employer should have ended the lock-out and recalled them to work with no further discussion. They are in a situation of "estoppel by conduct" and none of them was available to return to work unconditionally, or so the legal proceedings would certainly lead one to conclude, unless they recognized the validity and legality of the "Ménard" award, their collective agreement as of June 5, 2001. This is not a case of good faith betrayed, deceit or even misrepresentation on the part of the Employer or the Union, because both parties, throughout this matter, were advised by competent professionals. If they decided, with the approval of their advisors, to continue bargaining after the Ménard award was signed, to not return to work in the case of the Union and employees, and to not offer the option of returning to work in the case of the Employer, it was a right they felt entitled to at that time. It is certainly not my place to say that the bargaining should have ended on June 5, 2001, although in retrospect that certainly would have been preferable; rather, I must acknowledge that this is what the parties wanted. On one hand, a final discharge is being sought, be it justified or not, and on the other hand, clear guarantees are being sought. This is legitimate in bargaining and even if arbitrator Ménard's decision had applied as of June 5, 2001, there was nothing preventing the parties from seeking accommodations satisfactory to each before making it effective.

However, it flies in the face of the principle of fairness, of which the parties were not thinking at the time, to try to turn back the clock and claim the benefits of a collective agreement that they did not want to make effective at the moment it should have been.

The Union cannot today claim on behalf of the 11 typographers the application of a collective agreement they refused to have applied to them as long as certain conditions, legitimate or not, had not been met by the Employer to their satisfaction. Throughout this period, they were unavailable, refusing to return to work as long as the conditions sought had not been accepted by the Employer and their claim to this effect must not be allowed. The Union cannot now adopt a legal position that would give the 11 typographers more rights than they themselves wanted during the period in question. They did not want the Ménard award to take effect and they did not make themselves unconditionally available to report to work and perform their duties.

[17] In the meantime, the matter had been referred back to the arbitrator. At a hearing on June 9, 2000, M[e] Duggan, then counsel for the complainants, presented a claim listing additional heads of damages sought by the complainants:

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 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 article 100.12 of the Labour Code.*

14. *Reserve of jurisdiction for arbitrator M^e Andre Sylvestre.*

[18] The arbitrator dismissed this claim in an interim award issued October 11, 2000, reasoning as follows (pp. 28 and 31):

> [TRANSLATION]
> *From the (Court of Appeal) judgment as a whole, it must be understood that the damages referred to in the disposition cover only the salaries and benefits provided for under the collective agreement. The undersigned would be acting* ultra petita *were he to allow the additional damages sought by the*

> *11 complainants, which are identified in the documents filed by Me Côté and Me Duggan.*
> ...
>
> *The arbitrator must therefore conclude that the damages were incurred up to January 21, 2000.*

[19] The union and the complainants referred the matter to the Superior Court. On September 4, 2001, Justice Duval-Hesler granted in part the motion to quash the arbitral award, inasmuch as the arbitrator had declared himself without jurisdiction to award damages other than salaries and benefits lost, and referred the matter back to the arbitrator, instructing him to assume full jurisdiction with respect to the whole of the damages the applicants may be entitled to claim up to January 21, 2000.

[20] The employer appealed this judgment. On August 6, 2003, the Court of Appeal allowed the appeal, with Justice Yves-Marie Morissette reasoning as follows (p.18):

> [TRANSLATION]
> *If we focus on the result, that is, the arbitrator's specific findings in Sylvestre award no. 2, we cannot conclude that the issue decided by the arbitrator here has no direct connection to the dispute before him; on the contrary, it is at the very core of the dispute between the parties. Perhaps a detailed consideration of the arbitrator's reasons might show that another arbitrator would have dealt differently with one or more of the issues before arbitrator Sylvestre. However, that is not the question. Let it be recalled that, on a motion to vacate pursuant to Article 947, a court cannot consider the merits of the case. Perhaps the question would appear in a different light had the arbitrator failed to comply with the order issued in "Gazette No. 1", but this was not the case here.*
>
> *For these reasons, I would allow the appeal with costs, set aside the judgment quashing in part arbitrator André Sylvestre's award of October 11, 2000, dismiss the respondents' motion with costs, and refer the matter back to the arbitrator so that he may continue hearing the disagreement between the appellant and the respondents and decide the issues on their merits.*

[21] The arbitrator resumed the proceedings, hearing the parties on October 14, 2004. The following March 18, he rendered an award in which he concluded as follows:

[TRANSLATION]
(103) In other words, as the arbitrator understands his instructions, the Court of Appeal has empowered him to decide to award damages should he find that the employer improperly exercised its right to declare a lock-out. Other than the prolonged duration of the lock-out, the arbitrator finds nothing in the evidence to indicate a specific time after June 3, 1996 at which the Employer should have ended the lock-out. By holding firm to its position, until January 21, 2000, in refusing to exchange its final best offers, the Employer showed no leniency toward its 11 typographers. However, the latter, as confirmed by Messrs. Di Paolo and Thomson, were so confident they were in the right that they had no intention of making any concessions.

(104) Given these circumstances, the arbitrator cannot conclude from the evidence that the employer unduly prolonged the lock-out. For these reasons, he cannot order the employer to reimburse the damages being claimed by the 11 complainants for the period from June 3, 1996 to January 21, 2000.

[22] The union and the complainants challenged this award in the Superior Court. On March 31, 2006, Justice Claude Larouche dismissed their motion to vacate.

[23] The union and the complainants appealed this judgment. On March 18, 2008, the Court granted the appeal, with Justice Pelletier reasoning as follows:

[TRANSLATION]
(28) In my opinion, with respect, there was a misunderstanding and the confusion in the arbitrator's mind led him to misconstrue the dispute before him.

(29) In concluding that a lock-out could not be unduly prolonged, the arbitrator neglected to deal with the question put by the Court in its 1999 judgment. In so doing, he failed to exercise the jurisdiction he had been assigned.

(30) It is important to bear in mind that when our Court rendered its judgment, in mid-December 1999, there were four major unknowns in the matter, as follows:

a) If the process of exchanging offers had proceeded normally after the notice of April 30, 1996, when would the collective agreement have been finalized, in other words, on what date would the lock-out have ended?

b) In the event that the evidence to come were to show that the lock-out would have ended prior to December 15, 1999 (date of the judgment), how much in salaries and social benefits would the 11 typographers have been entitled to at the end of the lock-out?

> c) *Would the said salaries and social benefits have amounted to less than the minimum guaranteed by the 1987 tripartite agreement?*
>
> ...

[24] The Court of Appeal, in this manner, strictly defined the arbitrator's mandate, directing him to answer these three questions and determine any damages to which the complainants may be entitled for the period from June 1996 to January 2000. However, the Court held that the redress sought by the appellants went too far by asking the arbitrator to consider, with no latitude, the entire period from June 3, 1996 to January 21, 2000 as the period during which the lock-out was unduly prolonged and to assess their compensation accordingly. Indeed, the 1999 judgment had held that the tripartite agreement recognized the employer's right to legally decree a lock-out, which carries with it the right to stop paying the typographers their salaries and benefits.
Justice Pelletier went on to say:

> [TRANSLATION]
> *(37) It is far from certain that the process intended to culminate in an arbitral award putting an end to the lock-out, initiated on April 30, 1996, would have been concluded before June 3 of that year, the date on which the lock-out was declared, even if The Gazette had not committed the wrong identified by our Court. In other words, it is in no way established that, throughout the entire period of the lock-out, the typographers suffered unduly the loss of the salaries and benefits they were otherwise guaranteed under the tripartite agreement. In this regard, it is the evidence to be heard by the arbitrator with respect to the three questions I identified above, labelled "a", "b" and "c", that will hold the solution to the problem.*

[25] The matter was referred back to the arbitrator. At a hearing on July 28, 2008, M^{cs} McRobie, Monet and Grenier announced they had no witnesses to be heard and confined themselves to producing a few documents to conclude their evidence. For their part, Ms. Blondin and Mr. Di Paolo did have evidence to submit in support of their claims for damages, including an actuary to be heard as a witness. Mr. Di Paolo maintained that the March 2008 judgment had quashed the arbitrator's earlier awards, in particular, the October 11, 2000 award limiting the damages the complainants were entitled to claim to salaries and social benefits lost between June 4, 1996 and January 21,

2000. Mr. Di Paolo then produced a report showing actuarial calculations for the sums claimed, an excerpt of which follows:

[TRANSLATION]
5. Summary table

The table below summarizes the calculations for each of the items considered.

Damages	*Professional fees*	*REER buy-backs*	*Salaries*	*RRSP*	*Pension Fund*	*Quebec Pension Plan*	*Total*
DI PAOLO							
$4,749,526	*$109,178*	*$72,147*	*$975,891*	*$58,440*	*$20,373*	–	*$5,985,555*
BLONDIN							
$4,737,856	*$19,304*		*$975,891*	*$6,077*	*$23,691*	*$4,609*	*$5,817,428*

[26] Counsel for The Gazette objected to this evidence on the basis that the issue of damages in excess of the loss of salaries and social benefits had long since been settled. Firstly, the Court of Appeal's August 6, 2003 judgment had allowed the employer's appeal and quashed the Superior Court judgment granting the judicial motion ordering the arbitrator to assume full jurisdiction with respect to the whole of the damages claimed. Secondly, counsel for The Gazette raised the agreement reached with M^{e} Duggan, at the October 19, 2000 hearing, to the effect that the total claim for lost salary and social benefits for each of the 11 complainants was $163,611.50. Mr. Di Paolo responded that the March 2008 judgment had voided these facts, that he was totally opposed to the employer's position and, lastly, that he had never consented to M^{e} Duggan's acceptance of this amount.

[27] The arbitrator chose to deal with the disputed interpretation of the effect of the March 18, 2008 judgment before hearing evidence on the merits of the claim filed by Ms. Blondin and Mr. Di Paolo. These two complainants agreed to postpone submission of this evidence and to begin by presenting their arguments on the salaries and social benefits they felt were owing to them and their entitlement to the whole of the damages summarized on the above table.

POSITION OF THE PARTIES

[28] M[e] Grenier was the first to address the Board. He began by reiterating that the period covered by the claim began on June 4, 1996 and ended on January 21, 2000. He maintained that in the present matter, the arbitrator should be guided by the abuse of rights doctrine to order the employer to pay the 11 complainants the whole of the damages claimed throughout this period. In support of this argument, he produced precedents, the first being *Houle v. Canadian National Bank, [1990] 3 S.C.R. 122,* in which Madam Justice L'Heureux-Dubé wrote (p. 145):

> *But more fundamentally, the doctrine of abuse of contractual rights today serves the important social as well as economic function of a necessary control over the exercise of contractual rights. While the doctrine may represent a departure from the absolutist approach of previous decades, consecrated in the well-known maxim "la volonté des parties fait loi" (the intent of the parties is the governing factor), it inserts itself into today's trend towards a just and fair approach to rights and obligations (by way of example of this trend: consumer protection legislation, family law as regards the disposition of family assets upon divorce and death, the notion of "lesion between persons of full age" in the proposed reforms to the Quebec Civil Code, etc.). Such uncertainty which the doctrine of abuse of rights may bring to contractual relationships, besides being worth that price, may be counterbalanced by the presumption of good faith which remains basic in contractual relationships.*

[29] She went on to say (pp. 150 and 154):

> *This theory holds that an abuse of rights occurs when the right is not exercised in a reasonable manner or in a manner consistent with the conduct of a prudent and diligent individual. This makes it unnecessary either to determine whether the user of the right acts in good faith or to examine the social function of the right in question.*
>
> ...
>
> *In accordance with the evolution of the Quebec doctrine and jurisprudence on this issue, the time has come to assert that malice or the absence of good faith should no longer be the exclusive criteria to assess whether a contractual right has been abused.*

[30] In the matter at hand, the evidence showed that on June 3, 1996, the employer contravened the agreements guaranteeing its typographers job security and protecting the salary and benefits provided for in the collective agreement as well as its obligation to submit to the mandatory process of final best offer arbitration, imposing instead a lock-out to try to force agreement to its bargaining position. It clearly used its right to lock-out for a purpose other than that intended by the parties, that is, for the purpose of compelling the union and the complainants to forgo mandatory arbitration, wage protection and job security. This amounts to a typical abuse of rights. The arbitrator need not determine whether The Gazette was acting in good faith. He need only establish the context in which the employer exercised this right. By abusing the right from the outset, it follows that the employer improperly used it.

[31] Moreover, if, in April or May 1996, the employer had filed a position in accordance with the agreements, it would not have resorted to the lock-out and would have avoided arbitration. M[e] Grenier proposed, as a remedy for this second instance of abuse of rights, the refusal to submit to final best offer arbitration, that the entire period from May 1996 be considered in awarding damages to the complainants.

[32] Thirdly, the 11 complainants had challenged the refusal to submit to mandatory arbitration and had eventually won their case. From January 2000 to June 2001, the arbitration process took place, but the employer maintained the lock-out. The employer could have ended the lock-out knowing that this arbitration would lead to a renewed collective agreement. But this did not happen, even though the Court of Appeal, in its 1999 judgment, made it clear that the lock-out would necessarily end once a new collective agreement was imposed by the arbitrator.

[33] Raising a further issue, M[e] Grenier submitted that the complainants were entitled to pension plan benefits as part of the damages to be awarded by the arbitrator. This plan is an integral part of the employee's remuneration and must be incorporated in the collective agreement. Thus, the arbitrator should allow the request to compensate the length of service lost during the lock-out.

[34] Counsel for the employer responded, first addressing the pension plan issue. They began by noting that, in the tables filed by the union at the October 19, 2000 hearing, the heads of damages were identified as salaries and social benefits. The claim was limited to these sums, which represented the maximum amount. Secondly, they held that M[e] Grenier's proposal was not admissible because it came after the dispute was sent to arbitration. Indeed, it was dated January 21, 2000. Lastly, the pension plan was never produced before the undersigned, although it had been submitted to arbitrator Ménard. The complainants had not included this plan in their claim and the 11 tables reflected this, since the claim was before M[e] Ménard. Therefore, they could not claim the same benefit twice before two separate authorities.

[35] They went on to argue that M[e] Grenier's allegation that there had been an abuse of rights was baseless. The March 2005 arbitral award found that The Gazette had done nothing to unduly prolong the lock-out. In its March 2008 judgment, the Court of Appeal did not find that the arbitrator had erred in determining there was no abuse of rights; instead it held that the question to be decided by the arbitrator was altogether different. Moreover, this issue had been raised by M[es] Grenier and Côté as early as 1996, in arguing the original case, and this argument had never been admitted. Lastly, and more importantly, this argument in no way addressed the three questions posed by the Court of Appeal.

[36] The Court of Appeal's first question asks the arbitrator to decide on what date the collective agreement would have been finalized and the lock-out would have ended had the exchange of final best offers taken place. According to M[e] McRobie, the duration of the process of exchanging and arbitrating final best offers up to the signing of the collective agreement was within the normal time frame. The process would have taken the same amount of time if The Gazette had filed its final offers in June 1996. Indeed, in 1996, the union and the complainants wanted nothing to do with final best offer arbitration and were instead seeking a way to circumvent the Leboeuf award. Their strategy was to do indirectly what they could not do directly. They had to avoid interest

arbitration because the appointed arbitrator would have recognized the failure to follow due process, given that the request would have come from the union alone. Therefore, it was best to opt for another forum, grievance arbitration, to obtain an adjudication of their rights before entering interest arbitration.

[37] Therefore, the union and the complainants had to bear the consequences of this strategic choice, which delayed final best offer arbitration by the time necessary for adjudication of their rights. In any event, according to their position, they had no need to worry about time limits because they were to continue receiving their salaries for the duration of the labour dispute. Lastly, their strategy worked, because in February 1998 the arbitrator found fully in their favour and his award was upheld in part by the Court of Appeal, which ordered the parties to proceed with final best offer arbitration.

[38] Counsel for the employer further noted that the 1994 award was never challenged by the union. On the contrary, following receipt of M^{e} Leboeuf's award, Mr. McKay wrote on August 22, 2004, "*we have a new contract*". Subsequently, the parties signed this new collective agreement, article 2 of which provided that the process of exchanging final best offers required the consent of both parties. On April 30, 1996, the union requested that the employer enter into the exchange process. On May 3rd, Mr. Tremblay replied that the process had become optional. Mr. Tremblay committed a wrong, according to the Court of Appeal, but he had nevertheless relied on the collective agreement signed by the parties following M^{e} Leboeuf's award. Regardless, this wrong had no effect on the time frames. Indeed, if the union and the complainants had wanted to engage in final best offer arbitration, they had only to invite the employer to exchange offers, and if the employer failed to accept, to then proceed by default. This might have been the case in 1993. However, the employer, while maintaining that the process was illegal, did not take the risk of not appearing before the conciliator. It therefore submitted to the process, but under protest. The union did not adopt the same strategy in 1996, deciding instead to address the grievance arbitrator. A fact worth noting is that the union was not even prepared to enter into the exchange, given that its final best offers could not be found in either 2000 or 2008, proof that they never existed. It was not in the complainants'

interests to do so, because they had less chance of success before the interest arbitrator. According to the employer, The Gazette's failure to submit its final best offers actually had the effect of shortening time frames, because the union and the complainants would have proceeded by default had they wanted arbitration of their offers. The employer would never have gone ahead under protest, as it had done in 1993, but would have instead confined itself to filing objections on the legality of the process. The union and the complainants did not want to take the risk that the arbitrator might find he lacked jurisdiction, given that the employer had refused to submit to the exchange process.

[39] However, following the first Court of Appeal judgment, the parties submitted to the process. While The Gazette made more generous offers than in 1996, the union took a more radical stance. Finally, with no agreement being reached after four years, the arbitration was referred to M^{e} Ménard, who made his determination 16 months later. It would have been no faster to proceed directly before an interest arbitrator instead of first passing through a grievance arbitrator followed by an interest arbitrator, since the union challenged the collective agreement imposed by M^{e} Ménard in June 2001. It was several months before the union agreed to confirmation of this award.

[40] If the employer committed a wrong, it was of no consequence since it had no effect on time frames. The Gazette could not be held responsible for any aggravated hardship the complainants may have suffered. As a first step, in 1996 and 1997, the union and the 11 complainants presented their case to the undersigned and he made a determination in February 1998. It took M^{e} Leboeuf 15 months to render his award. Arbitrator Ménard took 18 months to reach his decision. Thus, combining the time taken by the undersigned to make an award, from June 1996 to February 1998, and the time taken by M^{e} Ménard, from January 2000 to June 2001, would put the renewal of the collective agreement and the end of the lock-out at August 1999. The complainants would therefore be entitled to six months of lost salaries and social benefits. However, they had already received these over a period of nine months, from February to October 1998. For his part, M^{e} Leboeuf took more than 15 months to render his award. Adding this period to the time taken by

the undersigned would put the date at May 1999, or eight months prior to January 21, 2000.

[41] The second question the Court of Appeal has asked the arbitrator to answer is how much in salaries and social benefits the complainants would be entitled to from the end of the lock-out if it had ended before January 21, 2000. The answer is simple. For example, if the lock-out had ended in July 1999, payment of salaries and social benefits should have commenced as of that date.

[42] Lastly, question (c) asks whether the salaries and social benefits would have been less than the minimum guaranteed by the 1987 tripartite agreement. According to counsel for the employer, if an affirmative answer were possible, the main reason would be the complainants' lack of effort in mitigating their damages. But the arbitrator also had to consider the union's wrong as co-signatory, in October 1994, of a collective agreement deemed illegal by the Court of Appeal in 1999.

[43] The two complainants presented their arguments in turn. Essentially, Ms. Blondin maintained that the tripartite agreements were contracts providing for specific conditions designed to protect the interests of the typographers up to 2017. She went on to say (pp. 36 and 37 of the transcript of stenographic notes from the July 29, 2008 hearing):

> [TRANSLATION]
> *The function of an arbitrator is to restore the wronged party to the situation that existed before the right was infringed. It therefore follows that the arbitrator may order that damages be paid if it is impossible to ensure the execution of the right claimed. The administration of justice must not be brought into disrepute.*
>
> *At this time, you have everything you need before you to establish the harm caused: three (3) decisions relevant to the grievance at hand, which will lead you to a binding decision, a legal decision, a decision that respects our rights.*
>
> ...
>
> *You must make a determination on each of the damages suffered. The Court of Appeal does not say:* "Damages awarded must be equal to salaries lost"*; no, it does not stop at salaries.*

> *Even compensation of a substantial nature would not make up for the pain and suffering experienced, the years of financial insecurity, the loss of enjoyment of life, but it would at least ease our hurt.*

[44] For his part, Mr. Di Paolo argued that the March 2008 judgment had rendered nul and void the arbitrator's decision regarding damages in his October 11, 2000 award. Thus, the damages he was legally entitled to claim covered not only the salary and benefits lost but also all the items listed on the actuarial report summary. For example, he explained (pp. 123 and 124 of the transcript of stenographic notes):

> *What was the dispute that was submitted to the Arbitrator? It was global damages. We went to the Appeal Court, we wanted global damages. Has much to the contrary, it is at the very least of the dispute between the parties ... we weren't talking about global damages. So, what are we to make of what he just said?*
>
> *We're not talking about salary, the Court here is not talking about salary, we're there, because one purpose, we were there, because we believed that we had to get, it was our duty to get global damages, because the Court of Appeal, in 1999 says,* "no, you're not going to get salary, but damages it may be" *and when you bring in the word "damages", if you look at the word damages, it constitutes an array everything that you've been subject to.*

REASONS AND DECISION

[45] Firstly, the arbitrator must rule on the union's proposal that he allow the complainants' entire claim for salaries and social benefits lost from June 4, 1996 to January 21, 2000, on the basis that the complainants had suffered as a result of the employer's improper use of its right to lock-out.

[46] Respectfully, the arbitrator cannot accept this argument. The Court of Appeal judgments did not consider this proposal because it ran counter to the December 19, 1999 judgment, which criticized the arbitrator for deciding to this effect and thereby denying the employer the right to impose the lock-out. Thus, the complainants could not be entitled to salaries and social benefits retroactive to June 1996. Regardless, the union

proposal sheds no light on question (a) posed by the Court of Appeal asking the arbitrator to determine the date on which the lock-out would have ended if the exchange of final offers had proceeded normally, while noting that the redress sought by the appellants went too far.

[47] As regards the pension plan, the arbitrator notes that, at the October 19, 2000 hearing, counsel for the employer and M[e] Duggan, then counsel for the complainants, agreed on the contents of tables showing the sums claimed by the complainants in terms of salaries and social benefits lost during the period from June 4, 1996 to January 21, 2000. This amount totalled $163,611.51. M[e] Duggan then wanted to produce an additional claim, for four complainants (Ms. Blondin and Messrs. Di Paolo, Rebetez and Thomson) seeking to join the employer's pension plan retroactively to May 1st, 1996. Counsel for The Gazette objected to this claim, dated January 21, 2000, on the grounds that it was not included in the tables filed by M[e] Duggan and, furthermore, it was pending before arbitrator Ménard.

[48] At the October 19, 2000 hearing, the arbitrator allowed this objection. Counsel for the complainants had agreed at that time on the quantum of damages due to his clients in the event the arbitrator found the employer liable for the whole of the damages. Therefore, M[e] Duggan could not add this head of damages without altering his prior acceptance. In any event, this claim had been submitted to arbitrator Ménard, who had dismissed it. The undersigned finds no reason to revisit this decision, eight years later. For these reasons, he dismisses the claim.

[49] The arbitrator must also rule on the claim filed by Ms. Blondin and Mr. Di Paolo. His first consideration is the fact that at the October 19, 2000 hearing, the parties had accepted the cash settlement calculated for each of the complainants' claims to be $163,611.51. This is far from the claim recently submitted by Ms. Blondin and Mr. Di Paolo, in the order of six million dollars. Their claim is intended to reignite a debate closed by the Court of Appeal judgment of August 6, 2003. In this judgment, the Court granted the appeal of a Superior Court judgment quashing the award of the

undersigned, which limited the 11 typographers' claim for damages to salaries and benefits provided under the collective agreement for the period ending January 21, 2000.

[50] Lastly, it remains for the arbitrator to determine how much the 11 complainants lost in terms of salaries and benefits due to The Gazette's wrong in refusing to submit to final best offer arbitration in response to the union's request of April 30, 1996. In the December 15, 1999 judgment, Justice Rousseau-Houle found that the arbitrator had made a reviewable error by granting the union's request to maintain payment of salaries and other social benefits and ordering the employer to continue making these payments and to reimburse salaries and benefits lost as a result of the lock-out. By finding that Article XI preserved these rights during the lock-out, the arbitrator had given the provisions of the agreement a meaning they could not reasonably bear. However, Justice Rousseau-Houle concluded by saying the lock-out may well have been unduly prolonged by the employer's refusal to exchange its final best offers and that the employees may well be entitled to damages, which would be a matter for the arbitrator to decide.

[51] Moreover, in the March 17, 2008 judgment, after noting that the arbitrator had decided the wrong question, Justice Pelletier went on to say that the redress sought by the complainants went too far in asking that the entire period from June 1996 to January 2000 be categorically considered the period during which the lock-out had been unduly prolonged, and that compensation be granted accordingly.

[52] The whole of the evidence showed that while The Gazette never intended to acquiesce to all of the demands made by the union and the complainants, the latter demonstrated no willingness to compromise, from the time the matter was before arbitrator Leboeuf. Indeed, the employer imposed a lock-out in May 1993 after negotiations begun the previous February failed to produce an agreement. The union filed a grievance requesting that the 11 complainants be maintained in their jobs and that their working conditions as provided under the collective agreement be respected. On November 18 of that year, M^{e} Leboeuf dismissed this grievance, noting that the right to lock-out was recognized and could be exercised at any time after it had been acquired.

The same arbitrator, in his final award rendered on August 18, 1994, accepted the employer's final best offers. Four days later, Mr. McKay informed management that "*we now have a new contract*". The parties signed the renewed collective agreement in October 1994.

[53] However, the truce was short-lived. On February 8, 1995, the union filed a grievance against the employer for failing to recall the 11 complainants, seeking as remedy that they be recalled forthwith. The dispute was sent to arbitration before M[e] Claude H. Foisy, who ruled in the union's favour on April 25, 1996.

[54] This date, which was about the time the collective agreement expired, marked the beginning of a long legal saga. The employer decreed a lock-out early in June 1996, which ended in 2002 with Justice Frappier's ruling.

[55] For their part, the complainants could not invoke the employer's wrong to cast all the blame on the employer for the considerable monetary losses they suffered. To a large extent, they were the authors of their own misfortune. The following excerpt from arbitrator Gravel's November 24, 2003 award gives an indication of their attitude (p. 29):

> [TRANSLATION]
> *It is true that the union, upon being apprised of arbitrator Ménard's award, fully supported it and its immediate application effective June 5, 2001. On the other hand, the only remaining union members from the composition room, specifically the 11 typographers who were the complainants in all previous proceedings, categorically rejected M[e] Ménard's award, which, had it been unconditionally accepted, would necessarily have led, at the end of the lock-out, to the recognition of a valid and acceptable collective agreement, the "Ménard" agreement, for whatever duration this arbitrator would have decreed.*

[56] In order to answer question (a), determining a date on which the collective agreement would have been finalized and the lock-out would have ended had the employer agreed to exchange final best offers, the arbitrator had to consider several different scenarios. The most logical stems from the claim by counsel for the employer that, on April 30, 1996, the union was not ready to exchange its final best offers. Indeed,

in 2000 and 2008, the union offers could not be located and no reason for this was ever given by the union or the complainants. The arbitrator concludes from this that the latter preferred to opt for their disagreement to be heard by the grievance arbitrator to obtain adjudication of their rights. This first stage was eventually to be followed by a second, interest arbitration of final best offers. In these circumstances, the undersigned considers the scenario proposed by counsel for the employer to be the least flawed. Therefore, to answer the question, he has added the time he took to settle the disagreement, from June 1996 to February 1998, and the 15 months it took M^{e} Leboeuf to render his award. Under this optimistic scenario, an arbitral award deciding the dispute would have been rendered in May 1999, followed a few days later by the signing of a renewed collective agreement and the end of the lock-out.

[57] It follows that the answer to question (b) is that the complainants would have been entitled to the salaries and social benefits lost as of May 1999.

[58] Lastly, question (c) raises the issue of mitigation of damages. The arbitrator does not think it appropriate to reduce the sums due to the complainants. Their small group's involvement in union business prevented them from engaging in other activities. Indeed, to survive on the union's strike pay, they would have had to participate in union business or risk losing this pay. Therefore, the salaries and social benefits owing to the complainants could not be less than the minimum guaranteed by the 1987 tripartite agreement.

[59] In the circumstances, the salaries and benefits owed by The Gazette to the complainants cover the period from the month of May 1999 to January 2000. However, the arbitrator's mandate does not end with this finding, because he has yet to dispose of the employer's claim for reimbursement of overpayments made to the complainants between February and October 1998.

[60] For these reasons, should the parties fail to reach a basis of agreement to settle their dispute once and for all, the undersigned will hear them on a date to be arranged with counsel for the parties, Ms. Blondin and Mr. Di Paolo.

ANDRÉ SYLVESTRE, Lawyer

TAB I

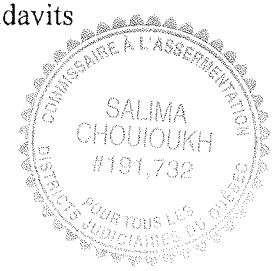
This is Exhibit "I" referred to in the

affidavit of Eileen Flood

sworn before me, this 14th

day of April, 2011.

A Commissioner for Taking Affidavits



CITATION: Canwest Global Publishing Inc., 2011 ONSC 6818
COURT FILE NO.: CV-10-8533-00CL
DATE: 20110105

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, 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.

COUNSEL: *Nina V. Fernandez* and *Christian Pare*, counsel for the Moving Parties Eriberto Di Paolo and Rita Blondin
Douglas J. Wray and *Jesse B. Kugler*, counsel for the Moving Party Communications, Energy and Paperworkers' Union of Canada, Local 145 ("CEP")
Fred Myers and *Logan Willis*, counsel for the Respondent Postmedia Networks Inc.
Maria Konyukhova, counsel for the Monitor, FTI Consulting Canada Inc.

PEPALL J.

REASONS FOR DECISION

Relief Requested

[1] The Moving Party, the Communications, Energy and Paperworkers' Union of Canada, Local 145, ("CEP" or the "Union") is the certified bargaining agent for typographers who worked at The Gazette, an English language newspaper in Montreal which is now owned by the Respondent, Postmedia Networks Inc. Once there were 200 typographers; now there are eleven, two of whom, Eriberto Di Paolo and Rita Blondin, are also Moving Parties. Of the remaining nine, six are retired or resigned. The CEP and Mr. Di Paolo and Ms. Blondin (the "Moving Parties") request an order asserting that their claims are liabilities to be assumed by the Respondent Purchaser, Postmedia Networks Inc., pursuant to an Asset Purchase Agreement dated May 10, 2010, entered into with Canwest Publishing Inc., Canwest Limited

Partnership, and certain related entities (the "LP Entities"), and that they are excluded from the claims process in the *CCAA* proceedings. The motion is resisted by the Respondent Purchaser. The Monitor, FTI Consulting Canada Inc., takes no position.

Facts

[2] The LP Entities were granted protection from their creditors by the court pursuant to the *Companies' Creditors Arrangement Act*[1] on January 8, 2010.

[3] On May 17, 2010, an order was granted approving an amended claims procedure and an Asset Purchase Agreement ("APA") dated May 10, 2010, in which the purchaser bought certain assets and assumed certain liabilities of the LP Entities. The APA was subsequently assigned by the purchaser to Postmedia Networks Inc. (the "Respondent Purchaser"). On June 18, 2010, a vesting order was granted.

[4] The issue before me relates to the scope of the liabilities assumed by the Respondent Purchaser pursuant to the provisions of the APA and whether the claims of the Moving Parties are included. I have also been asked to consider whether the claims are excluded from the *CCAA* claims process.

[5] The terminology used in this motion is somewhat confusing as the APA refers to Assumed Liabilities and Excluded Liabilities and the *CCAA* Amended Claims Procedure Order refers to Excluded Claims. Excluded Liabilities and Excluded Claims are distinct and different concepts, the former referring to liabilities not assumed by the Purchaser in the APA and the latter referring to claims that are not part of the *CCAA* claims process for the LP Entities.

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[1] R.S.C., c. C-36 as amended.

(a) History

[6] The provenance of this dispute lies in an extraordinarily troubled relationship involving typographers employed by The Gazette, an English language newspaper in Montreal. This is indeed a sorry saga. Forty six decisions have been rendered by various levels of tribunals and courts and the Union and The Gazette have attended before the Quebec Court of Appeal on at least four occasions.

[7] Approximately 200 typographers worked in the composing room of The Gazette. Historically, they performed the function of composing the type for the printing of the newspaper. With the expansion of computerized technology, this function was becoming obsolete and by the early 1980s, the typographers' positions at The Gazette were becoming redundant.

(i) 1982 Agreement

[8] The Union, CEP, and The Gazette (also referred to as the company) were party to collective agreements that governed the typographers. Consistent with the applicable law at the time, these collective agreements expired every three years.[2] In 1982, the Union negotiated an agreement with The Gazette and the 200 typographers (the "1982 Agreement"). It was signed on April 15, 1983 but dated November 12, 1982. The 1982 Agreement was stated to cover the 200 typographers and was to come into effect "only at the time when the collective agreement between the employer and the Union as mentioned below, similarly in the case of future collective agreements, shall end, disappear, become without value or, for any other reason become null and void or inapplicable."

[9] In return for the right to proceed with technological changes, The Gazette guaranteed to protect the typographers from the loss of regular full-time employment in the composing room due to technological changes. The full-time employment covered by the guarantee was

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[2] The Labour Code was amended in 1994 to allow collective agreements to run for more than three years.

to be at full pay and at not less than the prevailing union rate of pay as agreed to in the collective agreements negotiated from time to time by the parties. A job transfer was to be agreed upon by The Gazette, the Union and the employee and if required by the applicable collective agreement, any other union involved.

[10] The term of the 1982 Agreement was described as follows:

> "This agreement shall remain in effect until the employment of all the persons named in the attached Appendix 1 has ceased. Neither party shall raise any matter dealt with in this Agreement in future negotiations for any new collective agreement."

[11] In the event of a dispute as to the interpretation, application or breach of the agreement, the grievance procedure to be followed was that laid out in the collective agreement between the company and the union which was in effect at the time that the grievance was initiated.

[12] The 1982 Agreement was to cease to apply to an employee for one of the following reasons: death, voluntary resignation, termination of employment on reaching age 65 or final permanent discharge which could only occur for a major offence. In essence, the agreement was to remain in effect until each of the typographers had ceased his or her employment and ultimately until 2017.

[13] The 1982 Agreement also was to be binding on purchasers, successors or assigns of the company.

[14] The 1982 Agreement was incorporated into the 1981-1984 collective agreement and all subsequent collective agreements. The collective agreements stated:

> "The parties agreed to duplicate hereunder the text of an agreement entered into between them the 12th day of November, 1982. This agreement forms an integral part of the present labour agreement without affecting its civil status beyond the collective agreement. Therefore, the parties declare that it is their intent that said agreement remains fully

> enforced, subject to the terms and conditions contained therein, notwithstanding the expiry of the present labour agreement."[3]

[15] Where this paragraph uses the term labour agreement, the French version of this provision uses the term collective agreement.

(ii) 1987 Agreement

[16] In 1987, The Gazette, CEP and the then remaining 132 typographers entered into a further agreement (the "1987 Agreement"). This agreement contained language similar to that of the 1982 Agreement and included a cost of living formula. It also included a final best offer mechanism which said:

> "Within 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 rights 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."

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[3] This same language was used with respect to the 1987 Agreement except that the November 12, 1982 date was changed to March 5, 1987.

[17] As such, if there was no agreement prior to the acquisition of a right to strike or lock-out, either of the parties could require that best final offers be exchanged and submitted to the arbitrator selected in accordance with the grievance procedure contained in the collective agreement. The arbitrator would choose one of the last final best offers which then would be binding on the parties and become part of the collective agreement.

[18] The 1987 Agreement was incorporated into the 1987-1990 collective agreement and all subsequent collective agreements. The incorporation language was similar to that used for the 1982 Agreement. The 1987 Agreement was also to be binding on purchasers, successors and assigns of the company.

[19] Typically, each collective agreement would expire after three years. There would then be a hiatus during which time a new collective agreement would be negotiated. It would then be signed and back dated to commence on the first day following the termination of the last collective agreement. So, for example, on November 12, 1982, the parties signed a collective agreement that covered the period July 1, 1981 to June 30, 1984 and then on September 16, 1985 they signed a collective agreement that covered the period July 1, 1984 to April 30, 1987. The last collective agreement covers the period 2010 to 2017. It too is to be binding on purchasers, successors and assigns of the company.

(iii) 1991 Decision of Québec Court of Appeal

[20] Disputes arose regularly amongst the typographers, the Union and The Gazette. On numerous occasions, the Québec Court of Appeal has been obliged to rule on these disputes and on the impact and purport of both the 1982 and 1987 Agreements.

[21] In an appeal brought by two typographers in 1991, the critical question before the Québec Court of Appeal was whether the terms of the 1982 Agreement which was attached and described as Entente C to the collective agreement constituted discrimination on the grounds of age because it required retirement by the age of 65. The two typographers had not signed the 1982 Agreement. After their 65 birthdays, they were told that their employment would end on June 8, 1985. The typographers filed complaints on June 10 and 17, 1985. The

collective agreement had expired on June 30, 1984 and a new collective agreement was not reached until September, 1985. The Superior Court judge concluded that the 1982 Agreement was in the nature of a civil contract and as the two typographers had not signed it, they were not bound by its terms.

[22] Rothman, J.A. had to determine whether the 1982 Agreement which was only signed by some typographers extended to cover all typographers as would have been the case if the 1982 Agreement were a collective agreement. He observed that the September, 1985 collective agreement again incorporated "the provisions of Entente "C" [the 1982 Agreement] which had formed part of the previous collective agreement."

[23] He went on to write:

> "In my respectful opinion, the Entente was not merely a "civil contract" as the Superior Court suggests. It was negotiated and signed by The Gazette and the Union that had been certified to represent the composing room employees and it was specifically stated to form part of the Collective Agreement to which it was annexed. If the Entente was valid, it would have been legally binding on all of the employees whether or not they signed it."[4]

[24] He stated that the collective agreement could not have a term exceeding three years. He went on to state:

> "In my view, the Entente formed part of the Collective Agreement and any of the Employees who did not sign would nonetheless be bound by it. The Entente was negotiated on behalf of all of the composing room employees by a Union that was certified to represent them. It covered conditions of employment and it was expressly stated to form part of the Collective Agreement. If it was valid, I can see no reason why it would not have been legally binding on all of the composing room employees, whether or not they signed it."[5]

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[4] Page 515 of Motion Record of Di Paulo and Blondin.

[5] *Ibid* p. 516

[25] Having concluded that the 1982 Agreement covered all typographers regardless of whether they were signatories to it, he then went on to consider whether the Entente was valid in light of the provisions of the *Labour Standards Act*[6] and the *Québec Charter of Human Rights and Freedoms*[7] prohibiting discrimination on the grounds of age. He concluded that it did not contravene either statute.

(iv) 1999 Québec Court of Appeal Decision

[26] The parties attended before the Quebec Court of Appeal in 1999, 2003 and 2008. I do not intend to summarize each decision but will extract certain key components.

[27] On June 3, 1996, the applicable collective agreement being at an end, The Gazette had issued a lockout notice and stopped paying the 11 typographers. The Union and the 11 typographers challenged The Gazette's failure to participate in the final best offer procedure outlined in the 1987 Agreement and submitted that the 11 were entitled to salaries and benefits lost since the lockout.

[28] In 1999, the Court of Appeal had to determine the nature and scope of the 1982 and 1987 Agreements to decide "whether they could still produce effects after the lockout of June 3, 1996." The Court concluded firstly that The Gazette had breached the 1987 Agreement by refusing to exchange final best offers. Secondly, the Court determined that the 11 typographers were entitled to damages if the lock-out was unduly prolonged due to the employer's refusal to participate in the process. The Court of Appeal was of the view that the arbitrator should decide that question.

[29] In reaching the Court's decision, Rousseau-Houle J.A. wrote that the 1987 Agreement was incorporated into the collective agreement as was the 1982 Agreement. The parties intended that the 1982 and 1987 Agreements remain in full force notwithstanding the expiry

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[6] R.S.Q. ch. N-1.

[7] R.S.Q. ch. C-12.

of the collective agreements.[8] The 1982 and 1987 Agreements provided: (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. The 1982 and 1987 Agreements created vested rights collectively and they had to survive the expiry of the collective agreement. "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."[9] Rousseau-Houle J.A. referred to the Supreme Court of Canada's decision in *Dayco Canada Ltd. v. TCA Canada*[10] dealing with vested rights the exercise of which could be requested after the end of a collective agreement. She observed that the Agreements came into effect as independent civil agreements if the collective agreement was cancelled, lapsed or became inapplicable.

(v) 2003 Québec Court of Appeal decision

[30] This time the issue before the Court was whether an interim ruling of the arbitrator was correct. The arbitrator had ordered that the damages of the typographers were limited to compensation for lost salary and benefits during the lockout and that the period was limited to June 4, 1996 to January 21, 2000, when The Gazette submitted its final best offer. This interim ruling was upheld by the Court of Appeal. In writing for the court, Yves-Marie Morissette J.A. observed that:

> a) the 1982 and 1987 Agreements were applicable only between the expiry of one collective agreement and its replacement by a new one; and
>
> b) the 1999 Court of Appeal decision dealt with the legal characterization of the arbitration procedure. "It establishes

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[8] Page 25.

[9] Page 26.

[10] [1993] 2 S.C.R. 230.

> that the procedure is indeed consensual, and 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 that is provided for in the collective agreement and to which the arbitration clause refers is used only as a procedural framework for applying the latter." As a result of this analysis, the [TRANSLATION] "disagreements" submitted to arbitration pursuant to the terms of Article IX of the 1987 agreement are neither "grievances" within the meaning of paragraph 1(f) of the *Labour Code*, R.S.Q. c. C-27, since they do not deal with "the interpretation or application of a collective agreement", nor "disputes" within the meaning of para. 1(e) of the *Code*, since they are not [TRANSLATION] "disagreement[s] respecting the negotiation or renewal of a collective agreement or its revision by the parties under a clause expressly permitting the same". Those "disagreements" actually constitute "disputes" within the meaning of article 944 *C.C.P.*"

C.C.P. refers to the *Code of Civil Procedure* that governs civil actions in Quebec.

[31] While appealing one of the arbitral decisions, The Gazette had paid salaries and benefits between February 5, 1998 and October 30, 1998. In February, 2001, The Gazette commenced a civil action against the typographers to recover these amounts. This action is still outstanding. It was acquired by the Respondent Purchaser as part of the APA.

(vi) 2008 Quebec Court of Appeal Decision

[32] In deciding whether the lockout had been unduly prolonged so as to justify an award of damages, the arbitrator interpreted the issue to be considered as requiring him to determine whether there had been an abuse of rights by The Gazette which unduly prolonged the lockout. In 2008, the Court of Appeal determined that the arbitrator had addressed the wrong issue. The only issue that needed to be addressed was whether the lockout would have ended earlier than January 21, 2000 had the exchange of final best offers taken place following the April 30, 1996 request. The Court of Appeal remitted the matter to the arbitrator to answer that question.

[33] Since then, the arbitrator has determined that had the final best offer procedure been adhered to, the lockout would have lasted until May, 1999. Therefore the typographers were

entitled to damages covering the nine month period from May, 1999 to January, 2000. He did not order this amount to be paid, however, because The Gazette's request for reimbursement was still outstanding and had to be addressed. He therefore gave the parties an opportunity to settle the issue but retained jurisdiction. The Union and the typographers then challenged the arbitrator's January 21, 2009 decision.

[34] As mentioned, on January 8, 2010, an initial CCAA order was granted and proceedings against the LP Entities were stayed including those involving The Gazette and the typographers. Subsequently, the Respondent Purchaser acquired the assets of the LP Entities on a going concern basis for approximately $1.1 billion. I approved both the APA and the claims procedure to be used with respect to the CCAA plan.

[35] As mentioned, six of the 11 typographers have now retired or resigned although one retired after the closing of the APA. The remaining five, including Mr. Di Paulo and Ms. Blondin, are still employed at The Gazette by the Respondent Purchaser as "Transferred Employees" under the APA.

(b) The APA

[36] The APA delineates the assets purchased, the liabilities that are assumed and those that are excluded. The purchase price included the amount of the Assumed Liabilities as defined in the APA.

[37] The focus of this review of the APA is to ascertain whether the Respondent Purchaser assumed the liabilities that relate to the typographers. The relevant provisions of the APA with emphasis added by me are as follows:

(i) The Purchase and Sale

> s 2.1 On the Acquisition Date effective as at the Acquisition Time, pursuant to the Sanction and Vesting Orders, the LP Entities shall sell and Purchaser shall purchase the Acquired Assets, free and clear of all Encumbrances (other than Permitted Encumbrances) and Purchaser shall

assume the Assumed Liabilities, in each case, on the terms of and subject to the conditions of this Agreement, the *CCAA* Plan and the Sanction and Vesting Orders.

[38] Therefore, generally speaking, if the claims of the Moving Parties constitute Assumed Liabilities, the Respondent Purchaser is responsible for them. To assist in finding the answer to this question, one must examine the definitions found in the APA.

(ii) Definitions

(a) Assumed Liabilities

s1.1(19) "Assumed Liabilities" means (i) Accounts Payable, Deferred Revenue Obligations, Accrued Liabilities and Insured Litigation Deductibles, (ii) the other Liabilities of the LP Entities relating to the Business accrued due on, or accruing due subsequent to the Acquisition Date under the Assumed Contracts, Licences and the Permitted Encumbrances, (iii) the Liabilities of the LP Entities relating to the Transferred Employees, and (iv) other Liabilities to be assumed by Purchaser as specifically provided for under this Agreement.

(b) Liabilities

s 1.1(86) "Liabilities" of a Person means all Indebtedness, obligations and other liabilities of that Person whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due.[11]

s 1.1(3) "Accrued Liabilities" means liabilities relating to the Business incurred by the LP Entities as of the Acquisition Time but on or after the Filing Date in the Ordinary Course of Business and in accordance with the terms of the Initial Order and this Agreement, including liabilities in respect of pre and post-filing accruals for vacation pay for Transferred Employees, customer rebates and allowance for product returns,

(c) Assumed Contracts

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[11] Person includes a corporation.

s 1.1(18) "Assumed Contracts" means all Contracts, Personal Property Leases and Real Property Leases, other than the Excluded Contracts and Leases.

s 1.1(40) "Contracts" means all contracts and agreements relating to the Business to which any of the LP Entities is a party at the Acquisition Time...

Acquisition Time is defined as being three days after the sanction and vesting orders became final.

Excluded Contracts and Leases are described in Schedule 3.1(3). It includes certain lease agreements, financing agreements and material contracts. The Schedule does not include any collective agreements nor does it include the 1982 or 1987 Agreements.

(d) Transferred Employees

s 1.1(147) "Transferred Employees" means (i) Union Employees and (ii) non-Union Employees who accept offers of employment by Purchaser or who begin active employment with Purchaser as of the Acquisition Date or their next scheduled work day.

(e) Employees

s 1.1(52) "Employees" means any and all (i) employees who are actively at work (including full-time, part-time or temporary employees) of the LP Entities, including Misaligned CMI Employees; and (ii) employees of the LP Entities who are on approved leaves of absence (including maternity leave, parental leave, short-term disability leave, workers' compensation and other statutory leaves).

(f) Union Employees

s 1.1 (149) "Union Employees" has the meaning given to it in section 5.1(2)(a).

[39] Employee matters are addressed in Article 5 of the APA. Under this Article, the Purchaser was to offer employment to all Employees subject to certain terms. The definition of Union Employees is found in this article. It and other relevant subsections state:

s 5.1(2) Subject to section 5.1(3) and section 5.1(4)[12], Purchaser shall offer employment, effective as of the Acquisition Date and conditioned on the completion of the Acquisition, to all Employees immediately prior to the Acquisition Date on the following terms and conditions:

(a) to Employees who are part of a bargaining unit ("Union Employees") in respect of which a collective agreement is in force, or has expired and the terms and conditions of which remain in effect by operation of law, the terms and conditions provided for in such collective agreement, or expired collective agreement if such terms and conditions remain in effect by operation of law, subject to any amendments or alterations to the terms thereof to which the bargaining agent under such collective agreement or expired collective agreement consents; and

(b) to all other Employees ("Non-Union Employees") on substantially similar terms and conditions as their then existing employment immediately prior to the Acquisition Date, excluding any equity or equity-like compensation, supplementary retirement or supplementary pension arrangements or plans.

s 5.4(1) The provisions of this Article 5 insofar as they relate to unionized Employees shall be subject and subordinate to the provisions of the relevant collective agreements (including expired collective agreements that continue by operation of law) and Purchaser shall be bound as a successor employer to such collective agreements to the extent required by Applicable Law[13].

s 5.1(9) No Employee or Person other than the LP Entities and Purchaser shall be entitled to any rights or privileges under this Section 5.1 or under any other provisions of this Agreement. Without limiting the foregoing, no provision of this Agreement shall: (i) create any third party beneficiary or other rights in any bargaining agent representing Employees or in any other Employee or former employee of an LP Entity

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[12] These sections are not relevant to the facts before me.

[13] The definition of Applicable Law is all encompassing. It means, in respect of any Person, property, transaction, event or other matter, any law, statute, regulation, code, ordinance, principle of common law or equity, municipal by-law, treaty or Order, domestic or foreign, applicable to that Person, property, transaction, event or other matter and all applicable requirements, requests, official directives, rules, consents, approvals, authorizations, guidelines, and policies, in each case, having the force of law, of any Governmental Authority having or purporting to have authority over that Person, property, transaction, event or other matter and regarded by such Governmental Authority as requiring compliance.

> (or on any beneficiary or dependant of any Employee or former employee of an LP Entity); (ii) constitute or create an employment agreement or collective agreement; or (iii) constitute or be deemed to constitute an amendment to any of the Purchaser Established Benefit Plans, National Post Benefit Plans or LP Benefit Plans.

[40] Except as specifically provided for in the APA, the Purchaser did not assume liabilities.

> s 3.2 Except as specifically provided in this Agreement, Purchaser shall not assume and shall not be obliged to pay, perform or discharge any Liabilities of any LP Entity which arise or relate to the Business or otherwise. Without limiting the generality of the foregoing, Purchaser shall not assume and shall have no obligations in respect whatsoever of any of the Excluded Liabilities or any Claims relating thereto.

[41] "Excluded Liabilities" are defined in section 1.1(62) as meaning all liabilities of the LP Entities other than the Assumed Liabilities, and for certainty includes all of the Liabilities described in Schedule 1.1(62). Schedule 1.1(63) is in fact the schedule that lists the Excluded Liabilities. The following are Excluded Liabilities:

> s 1.1(63) (i) Certain Employee-Related Liabilities:
>
> (i) all Liabilities of any kind, howsoever arising, in respect of any Employees or former employees other than the Transferred Employees (other than in connection with: the LP Pension Plans, as required by any collective agreement or the Purchaser Assumed Benefit Plans)
>
> ...
>
> (k) Litigation:
>
> All Liabilities in respect of any litigation proceedings, lawsuits, court proceedings or proceedings before any Governmental Authority against any of the LP Entities and their predecessors in respect of any matters, events or facts occurring prior to the Acquisition Time, other than the Insured Litigation Deductibles and the obligation to defend and/or settle all claims in connection therewith pursuant to Section 9.15.

[42] Representations and Warranties are found in section 7.6(2) of the APA. It states:

> Except as disclosed in Schedule 7.6(2), neither any LP Entity nor National Post is a party to or bound by any collective agreement, labour contract, letter of understanding, memorandum of understanding, letter of intent, voluntary recognition agreement, or other legally binding commitment to any labour union, trade union, employee association or similar entity in respect of any Employees...

[43] Schedule 7.6(2) includes the most recent collective agreement between The Gazette and the CEP dealing with the typographers and which in turn includes the 1982 and 1987 Agreements.

(c) The *Québec Labour Code*

[44] Section 45 of the *Québec Labour Code* provides:

> The alienation or operation by another in whole or in part of an undertaking shall not invalidate any certification granted under this Code, any collective agreement or any proceeding for the securing or for the making or carrying out of a collective agreement.
>
> The new employer, notwithstanding the division, amalgamation or changed legal structure of the undertaking, shall be bound by the certification or collective agreement as if he were named therein and shall be ipso facto a party to any proceeding relating thereto, in the place and stead of the former employer.

(d) Claims Procedure

[45] As mentioned, the Amended Claims Procedure Order was granted on May 17, 2010. It delineated, amongst other things, how proofs of claim in the *CCAA* proceedings were to be filed by creditors and how certain claims were to be excluded from the procedure. An Employee Claim consisted of "any claim by an employee or former employee of the LP Entities arising out of the employment of such employee or former employee by the LP Entities that relates to a Prefiling Claim or a Restructuring Period Claim other than an Excluded Claim or any employee-related liabilities that are being assumed by the Purchaser pursuant to the Purchase Agreement." Excluded Claims included "all Grievances or claims that can only be advanced in the form of a Grievance pursuant to the terms of a collective bargaining agreement". Grievance was defined as meaning "all grievances filed by

bargaining agents (the "Unions") representing unionized employees of the LP Entities, or their members, under applicable collective bargaining agreements".

[46] Mr. Di Paulo and Ms. Blondin filed claims for $6,604,376.80 and $6,431,536.80 respectively. CEP also filed a claim on behalf of the remaining 9 typographers on a without prejudice basis so as to preserve their rights. Each claim amounted to $500,000.

(e) LP Entities' and Monitor's Correspondence on Claims Procedure

[47] On May 31, 2010, counsel for the LP Entities, Sven Poysa of Osler, Hoskin & Harcourt LLP, wrote to counsel for Mr. Di Paulo and Ms. Blondin stating:

> "The Claims Procedure Order excludes certain claims from the Claims Procedure, including claims arising from grievances filed by bargaining agents (the "Unions") representing unionized employees of the LP Entities, or their members, under applicable collective bargaining agreements. Holders of Excluded Claims (as defined in the Claims Procedure Order) are not included in the Claims Procedure and can proceed to advance such claims outside of the Claims Procedure in the ordinary course. The above Grievance Matter is properly characterized as an Excluded Claim. Accordingly, your claim will not be included in the Claims Procedure."

[48] Mr. Poysa went on to state that the APA had been approved by the court and the Purchaser would be assuming certain liabilities of the LP Entities on closing "which may include the Grievance Matter".

[49] On July 14, 2010, Quebec counsel acting on behalf of 9 typographers filed a proof of claim to preserve their clients' rights. In response, the Monitor's counsel wrote that pursuant to the APA, the Respondent Purchaser had agreed to purchase substantially all of the assets and assume substantially all of the liabilities of the LP Entities. Counsel wrote:

> "The Claims Procedure Order excludes certain claims from the Claims Procedure, including claims arising from grievances filed by bargaining agents (the "Unions") representing unionized employees of the LP Entities, or their members, under applicable collective bargaining agreements which are Assumed Liabilities under the APA. Holders of Excluded Claims (as defined in the Claims Procedure Order) are not included in the Claims Procedure and can proceed to advance such claims outside of the Claims Procedure in the

ordinary course which in the case of Assumed Liabilities is against the Purchaser.

In your letter of July 14, 2010, you stated that you were of the view that your clients' claim was an Excluded Claim. If your position remains that your clients' claim is an Excluded Claim, you must withdraw the claim from the Claims Procedure and pursue your claim against and through the Purchaser. Please note that if you withdraw your claim from the Claims Procedure and are ultimately unsuccessful in establishing that your claim is an Assumed Liability under the APA, you will not be able to share in the distributions to be made under the Plan to the LP Entities' creditors."

Issue

[50] I must determine whether the claims asserted against The Gazette by the Moving Parties have been assumed as liabilities by the Respondent Purchaser under the APA and whether they are Excluded Claims under the Amended Claims Procedure Order.

Positions of the Parties

[51] In brief, the positions of the parties are as follows. The Moving Party Union submits that the claim is an Excluded Claim according to the definitions contained in the Amended Claims Procedure Order and that this view is shared by both counsel to the LP Entities and counsel to the Monitor.

[52] In addition, the Union states that the claim is an Assumed Liability under the APA. The APA provides that the Liabilities of the LP Entities relating to the Transferred Employees and other Liabilities as specifically provided for under the APA are to be assumed by the Purchaser. Section 5.4 of the APA provides that the Purchaser shall be bound as a successor employer to such collective agreements to the extent required by Applicable Law. This means that the Purchaser assumes all collective agreement liabilities. This is confirmed by Schedule 1.1(63) of the APA which excludes all liabilities except those required by any collective agreement and also by the provisions of the Quebec Labour Code.

[53] The Union also submits that past judicial consideration and equity support the Union's interpretation and position. Lastly, and in the alternative, the 5 remaining typographers are clearly within the ambit of Assumed Liabilities under the APA.

[54] The position of Mr. Di Paulo and Ms. Blondin is similar to that of the Union. Additionally, they submit that the Purchaser is bound by the obligations of the LP Entities found in the 2010-2017 collective agreement which again includes the 1982 and 1987 Agreements both of which provide that they are binding on third party purchasers and also as a result of the application of the Quebec Labour Code.

[55] The Respondent Purchaser takes the position that the liability of The Gazette represents a pre-filing civil liability for damages for breach of contract and is not in the nature of a grievance. Secondly, the claims of the Moving Parties do not fall within the definition of Assumed Liabilities contained in the APA. Furthermore, as litigation, the claims are expressly excluded from the ambit of the APA. Such an interpretation is consistent with the overall interpretation of the APA read as a whole. Similarly, the claims for damages do not arise as successor employer obligations under the collective agreement. The Respondent Purchaser has never had any involvement with or connection to the claims of the typographers.

Discussion

[56] The claims of the Moving Parties that are in issue represent in part damages consisting of wages and benefits that would have been paid to the typographers had The Gazette participated in the final best offer procedure set forth in the 1987 Agreement. The damages flowed from a breach of the Agreement at a time when the old collective agreement had expired and a new collective agreement had not yet been negotiated. As noted by the Quebec Court of Appeal in 1999 and 2003, the dispute fell within the parameters of the Code of Civil Procedure that governs civil actions in the Province of Quebec.

[57] The arrangement negotiated by the Union and The Gazette was unusual. It was designed to provide protection to the typographers in exchange for which The Gazette was free to proceed with the technological changes it desired unencumbered by a resistant union

and typographers. Due to the applicable law then in force, a collective agreement could not exceed three years in duration. The 1982 and 1987 Agreements were negotiated to provide for seamless protection for the workers. They would cover any hiatus between collective agreements and were incorporated into every subsequent collective agreement. Based on the decisions of the Quebec Court of Appeal in 1999 and 2003, the claims of the Moving Parties are not technically grievances although their origins are tied to the collective agreements negotiated by the Union and The Gazette.

[58] I do note that the Quebec Court of Appeal treated the Agreements as hybrid creatures. In 1991, the Court stated that the Agreements encompassed all typographers including those who were not signatories. As J. A. Rothman stated, the Entente or the 1982 Agreement was not simply a "civil contract". In contrast, Yves-Marie Morissette J.A. described the disagreements relating to the 1982 and 1987 Agreements as being disputes within the meaning of the Code of Civil Procedure.

(a) Transferred Employees

[59] The APA contemplates that the Purchaser will continue to operate all of the businesses of the LP Entities in substantially the same manner as they had been operated and would offer employment to substantially all of the employees of the LP Entities. The existing collective agreements including that governing the typographers will continue.

[60] As part of the purchase transaction, the Purchaser agreed to assume certain liabilities and indeed the purchase price included the amount of the Assumed Liabilities. The Assumed Liabilities expressly included the liabilities of the LP Entities relating to the Transferred Employees. Liabilities are given a very broad definition in the APA. They encompass all obligations and other liabilities whether absolute, accrued, contingent, fixed or otherwise, or whether due or to become due.

[61] One must then consider who is included in the definition of Transferred Employees. Transferred Employees include Union Employees in respect of which a collective agreement is in force or has expired.

[62] This then leads one to the definition of Union Employees. Union Employees consist of active employees and employees on approved leaves of absence who are part of a bargaining unit in respect of which there is a collective agreement. This definition causes me to conclude that under the APA, as active employees, Mr. Di Paulo and Ms. Blondin are Transferred Employees and The Gazette's liability to them is assumed by the Respondent Purchaser as is the liability to the other four typographers who were not retired or who had not resigned as of the date of the closing of the APA.

[63] In my view, the description of Excluded Liabilities found in the APA does not detract from this conclusion. Firstly, the Assumed Liabilities are specifically enumerated. Secondly, Excluded Liabilities means all Liabilities of the LP Entities other than the Assumed Liabilities. Thirdly, the exclusions themselves expressly except liabilities of the Transferred Employees. Even if one were to accept that the language of the litigation exception is broad enough to encompass the Moving Parties' claims, it does not overcome these other explicit provisions.

[64] It seems to me clear therefore that the parties to the APA intended that the Assumed Liabilities would extend to cover liabilities relating to the Transferred Employees. This would cover the typographers still employed by the LP Entities and would cover "liabilities relating to them" as stated in section 1.1(19)(iii) of the APA. I would also add that the third party provision contained in the APA does not serve to relieve the Respondent Purchaser from these obligations.

[65] This conclusion is also consistent with the Amended Claims Procedure order. Under paragraph 21 of that order, the LP Entities are to deliver a LP Entities' claims package to each LP Creditor with an Employee Claim as soon as practicable. Employee Claim is defined as "any claim by an employee or former employee of the LP Entities arising out of the employment of such employee or former employee by the LP Entities that relates to a Prefiling Claim or a Restructuring Period Claim other than an Excluded Claim or any employee-related liabilities that are being assumed by the Purchaser pursuant to the Purchase Agreement." It is therefore clear that the claims process did not apply to employee related liabilities assumed by the Purchaser.

[66] In conclusion, The Gazette's liability to the Transferred Employees is assumed by the Respondent Purchaser. The Transferred Employees include Mr. Di Paulo, Ms. Blondin and the four other typographers who had not retired or resigned as of the closing of the APA. They need not participate in the *CCAA* claims procedure.

(b) Remaining Typographers

[67] The next issue to consider is whether The Gazette's liability to the remaining five typographers who retired or resigned before the closing of the APA is assumed by the Respondent Purchaser. Certainly they are not Transferred Employees within the definition of the APA. Similarly, they are not captured by Article 5 which addresses Employees who are actively at work or on a leave of absence. It is possible to argue that the definition of Assumed Liabilities extends to include the remaining typographers, however, in my view, this is straining the interpretation of the APA and does not accord with the intention of the contracting parties. Dealing firstly with section 1.1(19)(ii) of the APA, while the collective agreement which includes the 1982 and 1987 Agreements is an Assumed Contract within the meaning of the APA, any obligation to the remaining typographers accrued due well before the Acquisition Date. Similarly, the remaining typographers' claims are not within section 1.1(19) (iv) of the APA as the liability is not specifically provided for under the APA. Rather, the remaining typographers are specifically addressed in the provisions of the APA dealing with Excluded Liabilities. Schedule 1.1(63) expressly provides that all Liabilities of any kind in respect of former employees are excluded (other than pension plans). It seems to me therefore, that the claims advanced by the CEP on behalf of the remaining typographers do not represent liabilities that are assumed by the Respondent Purchaser pursuant to the provisions of the APA.

[68] As for the provisions of the Amended Claims Procedure Order, it excluded claims that could only be advanced as a grievance or in the form of a grievance pursuant to the terms of a collective bargaining agreement. The claims asserted by the CEP on behalf of the remaining typographers do not fall within that description. Accordingly, they may be submitted and disposed of in accordance with the Amended Claims Procedure Order.

Conclusion

[69] In conclusion, the claims of the Transferred Employee typographers are Assumed Liabilities within the meaning of the APA and those typographers need not participate in the claims process. The claims of the remaining typographers are not and their claims may be submitted and disposed of in accordance with the Amended Claims Procedure Order. Accordingly, the motion brought by the Moving Parties Di Paulo and Blondin is granted. The motion brought by CEP is granted insofar as it relates to the other Transferred Employees and is otherwise dismissed. The Monitor is to establish a reserve for the claims of all of the Moving Parties until the requisite time for any appeals has expired.

Pepall J.

Released: January 5, 2011

CITATION: Canwest Global Publishing Inc., 2011 ONSC 6818
COURT FILE NO.: CV-10-8533-00CL
DATE: 20110105

ONTARIO

SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, 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.

REASONS FOR DECISION

Pepall J.

Released: January 5, 2011

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.

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

ONTARIO
SUPERIOR COURT OF JUSTICE-
COMMERCIAL LIST

Proceeding commenced at Toronto

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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

April 12, 2011
1/2 day motion fixed for May 16, 2011 before me at 393 University Ave, 8th floor, room 808.
Farley, J.

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ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

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