For today, we could divide the argument, first on the question of the period that would be covered by the damages. The second question would be the question of benefits, the pension plan.

Now for the other questions, perhaps I could reserve the right to reply, depending on what is presented by the employer on the entire subject.

So the first point is the period covered. We know that the period determined is the period from June '96 to January 21, to January 20, 2002.

When we argued the last time, we first addressed that question and you decided that damages should not be awarded against the employer because, according to what you said, there was no date from which the use of the lock-out by the employer became undue. I am summarizing, but that is essentially

the meaning of the decision you had made.

Last March, the Court of Appeal held that this was not its view and there were necessarily damages that had to be paid to the employees and you had to decide accordingly.

So what has to be determined today is whether or not the damages relate to the entire period. Our view is that the damages do in fact cover the entire period. In fact, that was the view we took in front of you in 2004.

I provided you with an excerpt from "La théorie de l'abus de droit dans le domaine du travail" and the decision in National Bank of Canada. I provided it as a tool for your deliberation.

Essentially, with regard to National Bank of Canada, we can say, and I will take you to the paragraph, in fact it isn't a

paragraph, it's an old decision, so it's at page 145, there was a lot of argument on the issue of abuse of rights, but the Court reached a position that is very illuminating for the purposes of our case. So in the last paragraph in the right-hand column, at page 145, it says:

"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, ...)." Et cetera.

So the Court took the position, and this is the position of the Supreme Court, that this is a social and economic function. I will take you

to a little later, at page 150, section 3, at the bottom of the page, on the right:

"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 Quebec" ...

And then I will take you to the second-last paragraph on the same page:

"In Quebec, the theory of the 'reasonable' exercise of rights seems to have gained acceptance as a standard for the abuse of extra-contractual rights. ... as well as the authorities he cites. ... It is only recently however that such criteria of "reasonableness" has been applied to the abuse of contractual rights. ..."

I will take you now to page 154 where specific examples are given of what constitutes abuse of rights, 154, at the top, on the right:

"...a unanimous bench ruled that proof of malice was not essential."

Mr. Justice Gendreau, following the decision of the Court of Appeal in this case, observed:

"It therefore seems to me that it is this rule [that proof of bad faith is not necessary] which now prevails and must be applied to the case at bar. In some decisions ..."

And I will take you to the second-last paragraph:

"A few cases have concluded that the use of a contract ..."

and I stress what follows:

"... for purposes other than those envisaged by the contracting parties constitutes an abuse of contractual rights. 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. A review of both the theoretical underpinnings of recent trends in civil liability and the current state of Quebec doctrine and jurisprudence leads to the inevitable conclusion that there can no longer be a debate in Quebec law that the less stringent standard

of "the reasonable exercise" of a right, the conduct of the prudent and reasonable individual, as opposed to the more stringent test of malice and the absence of good faith, can ground liability resulting from an abuse of contractual rights."

Those principles are explained more fully in the other document, which is "La théorie de l'abus de droit dans le domaine du travail", and I refer you to that for the purposes of your deliberation.

What happened in the case? In 1996, and I refer you to Exhibit E-4, the employer submitted to the employees, in fact wrote to the bargaining committee, and took the position with respect to the next collective agreement, and explained to the employees that only the employees in the composing room who were assigned work and if they so requested would receive wages. The position adopted thus ran directly counter to the job security that had been bargained.

If you now take, that is dated April 25, if you now take Exhibit S-39, dated May 24, at the time S-39 was written, it's a letter that was again sent to the union bargaining committee, the decision of Arbitrator Foisy was made. Arbitrator Foisy ordered that the composing room be reopened and therefore ordered the employer to reinstate the employees covered by the collective agreement.

Notwithstanding Arbitrator Foisy's decision, notwithstanding the job security agreements, the employer gave notice that the composing room had been completely eliminated from operations and all the positions that existed in the department. It added:

«... however, in a spirit of good faith and with the hope of reaching a speedy settlement, The Gazette would like to offer three (3) add make-up positions, Mac operators to your members. It is understood that these positions included in the creative graphic service of the Advertising Department would be considered as transfers under the collective agreement and remunerated at the wage rate currently applicable and covered by the

working conditions available to that service...»

So at the end of the bargaining, the position was then that there was no longer a composing room, there were no positions, three positions were offered to the 11 people concerned, but outside the bargaining unit and at wages that were not governed by the '82 and '87 agreements. So this was on May 24. On June 3, the employees were called in and the lock-out started.

What was the purpose of the lock-out? The provisions of the Labour Code, the literature and the case law are all unanimous in saying that an employer engages in a lock-out in order to persuade the other party to accept its bargaining position.

In addition to the points I have just made, I would also add the fact that the employer took the position, in writing, that it no longer had an obligation to submit to

binding arbitration.

So starting on June 3, the date when the employer ordered the lock-out, the employer reneged on the job security agreements, reneged on the protection of wages and benefits provided in the collective agreement, particularly wages, reneged on its binding arbitration obligation, and imposed a lock-out in order to have its bargaining position accepted.

If I understand what the Supreme Court said about what constitutes an abuse of rights"
"... the use of a contract for purposes other than those envisaged by the contracting parties constitutes an abuse of contractual rights."

The employer used the right to engage in a lock-out for purposes other than those envisaged by the contracting parties. It wanted to compel the waiver of binding arbitration, the wage guarantee, and job security.

So from the outset, from the outset of the lock-out,

we are looking at a blatant abuse of rights. We don't need to ask, the Supreme Court says, whether an employer is acting in bad faith; that is not a determining question in the debate. We need only determine the context in which the employer exercised its right to engage in a lock-out. And we see that in engaging in it, it committed an abuse of rights, according to the case law.

If the employer has abused its rights from the outset, Mr. Arbitrator, that means the lock-out has been used without justification. "Without justification" obviously means the idea of abuse of rights. An abuse of rights cannot be committed without using an undue right.

It will certainly be argued that the Court of Appeal did not agree to refer the case back to you with directions to pay damages necessarily for the entire period, since the Court of Appeal described the request for that order as lacking nuance.

The fact the Court of Appeal did not specifically order you to do that does not mean that you do not have

jurisdiction to do it. Your jurisdiction must be exercised in accordance with the applicable legal concepts, having regard to the particular context of the case, which context was put in evidence before you and about which the Court of Appeal was not fully informed. The Court therefore left you the necessary latitude to dispose of this question.

So this is the first point on which we base our application, for which the entire period must be subject to damages.

The second aspect of that question is connected with the actual mechanism of bargaining and binding arbitration. You know, you have heard the evidence since the beginning of this entire matter, that the parties have used this mechanism three times: on the renewal of the '90 collective agreement, the renewal of the '93 collective agreement and the renewal of the '96 collective agreement.

On the renewal of the '96 collective agreement, the parties exchanged positions, requested

binding arbitration, but reached an agreement very quickly, in the days that followed.

In '93, the employer had started reneging on its agreements and wanted to put an end to binding arbitration as well as, in part, job security. The exchange of bargaining offers took place, binding arbitration was requested, and the arbitration process ended with an award by Arbitrator Leboeuf in August '94.

We know that after the dates of Arbitrator Leboeuf's decisions, and this is Exhibit S-23, arbitration properly speaking on the content of the collective agreement was held before him from January 7, '94, to August '94, the date of the decision.

Last, the '96 scenario, as you are familiar with. So we have to consider ... Excuse me, I forgot the

fourth, '96, which did not take place, but as a result of an order by the Court of Appeal in January, there was an exchange of employer and union proposals, and after the filing of what the union considered to be an illegal offer aiming to amend section 4 of the collective agreement and therefore the agreements, a grievance was filed in response to that filing. Ultimately, the arbitration concluded with a decision in June 2001.

What can be seen from this more general picture is that the mechanism provides for the parties to make final offers that must not be illegal, that is, must not offer less than the '82 and '87 agreements, and that it must be possible for one party or the other to accept.

Once the employer filed its position in '96, which was contrary to the '82 and '87 agreements, it prevented the union from accepting its proposal and avoiding actual arbitration and

the lock-out.

If the employer had filed a position in April-May '96 that was, that was not contrary to the agreements, it could have avoided not only arbitration but also the lock-out.

On that second proposal, again based on an abuse of rights, it appears that because the employer did not allow for the mechanism to be used, given its illegal position, the entire period must be considered for the purpose of compensating the employees.

Third argument, still regarding the question of the period. The employees challenged the employer's rejection of binding arbitration and ultimately won on that question.

The binding arbitration process went on from January 21, 2000, to June 2001. The employer continued to use its "right to

lock out" during that period.

It could have not continued the lock-out, knowing that binding arbitration would necessarily lead to a collective agreement. Instead, it opted to continue the lock-out, thus depriving the employees of their wages and benefits for more than a year.

The mechanism, the mechanisms provided in the agreements mean that if the employer decides to impose a lock-out during the arbitration process, the employees must comply with the lock-out and lose their pay.

In '99, the Court of Appeal stressed that the lock-out necessarily ended with the advent of a collective agreement imposed by the arbitrator.

The mechanism was not applied in '96-'97 and '98-'99; the mechanism was applied in 2000-2001.

If you decided not to allow the entire period, your decision would be contrary to the '82 and '87 agreements, and would uphold the abuse of rights engaged in by the employer since it would have the effect of imposing two periods of lost pay on the employees for the same binding arbitration.

It would be contrary to the law, as determined by the Supreme Court, and to the implementation of the employees' rights as provided in the agreements on the binding arbitration mechanism, to impose twice the lost income and benefits for a single binding arbitration.

So once again, for this third ground, the entire period must be considered. If the tribunal were to do otherwise, it would be an illegal decision, in my submission.

Second point, the question of benefits, the pension plan. We have filed an excerpt of the hearing on October 19, 2000, on the question of establishing the,

the mathematics of the amount of wages.

When we read the excerpts, and I quote, at page 30, the arbitrator says:
[TRANSLATION] "No, but we had in fact agreed out of court that without prejudice, you were prepared to admit the lost wages ..." In my submission, the entire discussion that follows in fact relates to the lost wages.

The only point that relates to the benefits provided for in the collective agreement is the exhibit that was rejected and that was entered this morning as S-71, I think, it's the exhibit that I gave you during the introduction of DP-4, where it was requested, certain individuals requested, in January 2000, that they be enrolled in the pension plan retroactively to 1996.

Mr. Duggan tried to introduce that document and that resulted in an objection and you upheld the objection and did not admit the document. All that objection and your decision meant was not to permit the

introduction of a document the purpose of which was retroactive enrolment in a pension plan, but after the period covered, total, which ended on January 20.

You therefore decided not to admit in evidence an application relating to a benefit after the period covered. In my submission, no evidence, that is, no decision was made that it was not possible to require that the pension plan be applied to the damages that have to be ordered by the tribunal.

The application of the pension plan still has to be considered as a factor, a benefit provided for in the collective agreement or the agreements. I have provided you with notes on this subject with excerpts from, with decisions of the courts relating to the question.

I will not read you the document itself, but if you look at the document, essentially there are two points; the first, on page 2:

[TRANSLATION] "The pension plan is part of employees' pay and is incorporated into the collective agreement."

This morning we introduced excerpts of the '93-'96 collective agreement as Exhibit S-69 and in section 18 we can see, as I quote it in my text: [TRANSLATION] "... that the company agree to impose no reduction in the benefits provided for in the pension plan for the term of the collective agreement ..."
And a memorandum of understanding relating to the group insurance shows that the parties have to meet and discuss any changes.

In Bisaillon v. Concordia, the Supreme Court was very clear. Pension plans are considered to be incorporated into collective agreements, at least where the pension plan is referred to in the decision [*sic*-Tr.] itself.

I would refer you to the specific pages of

Concordia University that begin at page 687 and you can see, 686, the question is asked, and at 687, paragraphs 36, 37, the decisions of the Quebec Court of Appeal in Albright & Wilson Amérique, Emerson Electric Canada Limitée and eventually Hydro-Québec are discussed, and the Court says, excuse me, at pages 691, 693, the Court reaffirms the reference made in the collective agreements.

And page 694 there is the reference that was set out in the collective agreement regarding Mr. Bisaillon, at paragraph 52, excuse me, paragraph 53, the collective agreement provided that the employer agreed to maintain the coverage and benefit levels that the pension plan currently in use provided for employees. This type of clause is entirely similar to the ones found in the collective agreement, at section 18, and the Supreme Court concluded, at paragraph 55, that the grievance arbitrator had jurisdiction because the pension plan was considered to be incorporated into the collective agreement.

The two other decisions that I have provided to you from the Court of Appeal are cited in the Supreme Court decision and are to the same effect.

So it must be concluded in the case before us that the pension plan is part of the collective agreement, in this case, it is a benefit provided for in the collective agreement.

The Pension Plans Act, I will quote a, section 54 which provides that the period of continuous employment of an employee is the period during which the employee is employed [in the French, "executer un travail": performs work – Tr.]. In this case, in our case, there was no layoff, there was an illegal and abusive exercise of the right of lock-out which prevented the employees from performing work, and thus from having rights vest within the meaning of the pension plan.

This brings us to page 5, 5, 6 and 7, where I refer you to the decisions of the courts that have considered the question of the application of the pension plan in the case of damages for breach of contract.

In Taggar (ph), you have a breach of the applicant's contract of employment. The employer gave 24 months' notice but it ended after only two months. The employee claimed damages for his contributions to the pension plan for the 22 months he lost. The Court allowed his claim and awarded damages relating to the loss of the right to the pension plan.

The court explained:

«... it is for common law contract damages as compensation for the pension benefits the Respondent would have earned had the Appellant not breached the contract of employment. The Respondent had a contractual right to work and to be paid his salary and receive benefits throughout the entire twenty-four (24) month period notice...»

After that, we cite the Craig case in which the British Columbia Supreme Court ruled to the same effect. The first one was a decision of the Ontario Court of Appeal.

And the final case I will draw your attention to is from the British Columbia Court of Appeal in '95, which awarded damages for loss of pension benefits, and the Court discusses two methods for solving the problem:

«... insofar as the damages relate to the period from first (1st) of January ninety-four (94) to March twenty-three (23), ninety-four (94), they should include an amount for loss of pension benefits. Since that period is comparatively short, an actuarial valuation should not be required and I'm not representing the value of the notional employer contribution with respect to that period should simply be added in the calculation of damages. Alternatively, if Mr Sylvester makes the employee contribution for this period, then the period could be regarded as pensionable service...»

So those decisions, coupled with the fact that the pension plan is part of the collective agreement, mean that our claim, to compensate for the loss of service

during the lock-out, must be allowed by the tribunal under its power to award damages as given to it by the Court of Appeal.

On this specific question, I reserved the issue of quantum per se. If you conclude that the employees' must be compensated in relation to the pension plan, that is, that they must be allowed the period of service for the purposes of the pension plan and the employer ordered to do that either by modifying its pension plan or by paying compensation that is equivalent, in actuarial terms, to the loss they have suffered for purposes of the pension plan.

Now, I understand that you have excluded, for the moment, the question of the refund of moneys paid during '98, from February 5, '98, to October 28, '98, so I will not make argument on that issue. I have case law, however, in the event that it becomes necessary.

And the other question we had addressed, in fact, there were two other questions that had been addressed during initial argument, the question of indemnities, I had argued that we wanted you to allow the additional indemnity provided for in the Civil Code and the Labour Code, the employer objected.

And on that point I refer you to the book of authorities that was filed by Mr. Brunet, specifically on the question of indemnities, there is a reference to the literature and to decisions on the question, which say that the additional indemnity is within the jurisdiction of the tribunal. A tribunal that may award damages may necessarily allow the additional indemnity or interest and the additional indemnity because the interest and the additional indemnity are, in a way, damages.

On the other and final question, that was the question of mitigation. Simply recall that we, in fact it was Mr.

Brunet who had submitted evidence through the testimony of Mr. Thompson at the time, who explained that the employees, who were on lock-out, had union activities associated with the lock-out, that they were receiving "union strike" pay, and that they had to engage in their union activities or else they would not receive their pay, so it was not appropriate to ask them to look for a job.

We had submitted a second argument, which was that during a lock-out period, it was not like an employee who is dismissed, they had not lost their employment relationship, the very purpose of the lock-out was for them to return to work because the employer wanted to force them to bargain for a return to work and in those circumstances, an employee who has a job and may be called back to work at any time by their employer, if an agreement is signed, there is no reason to look for another job and thus mitigate damages by looking for another job.

That concludes my representations, subject to

other points that may be raised by the employer.

RONALD McROBIE:
So Mr. Chair, we are again arguing that the Court of Appeal has asked us to look at 1999.

So I would remind you that the Court of Appeal stated, at page 41 of its 1999 decision, that it is possible that the lock-out was unduly prolonged because of the employer's refusal to exchange best offers on April 30, 1999.

The Court also stated that it is possible that the employees would be entitled to damages as a result, and the Court said: [TRANSLATION] "It is up to the arbitrator to decide." So those three statements are fundamental to what you now have to decide.

In addition, in the disposition in the Court of Appeal's decision, at page 42, the case is referred back to you for you to determine, if

applicable, what damages might be awarded to the 11 employees, et cetera.

Obviously, as a result, we know that you have made two decisions to answer the question, the one in 2000, October 11, 2000, and the one on March 2, 2005.

I am going to talk about the one from March 2005, but I think it is important to stress that your decision on October 11, 2000, is final, it was affirmed by the Court of Appeal in its entirety and the Court of Appeal said that as a result, you had disposed of a portion of the merits.

So as I mentioned this morning, well, I am not going to repeat myself, but you decided four points in that decision, including the period that could have been covered by the claims and the nature of the damages, that is, the wages and benefits, the union was denied standing as a claimant, and the employer's right to a breakdown

of the damages for wages.

So after the 2000 decision, in October 2000, before the employees decided to challenge, because initially it seemed there would be no challenge, and you will recall that we proceeded to a hearing before you after that decision and there was preliminary discussion there, where there was an exchange of documents, which I referred to this morning.

So the hearing in October 2000 was in partial execution of your decision in October 2000 where it was decided that the maximum amounts that could be claimed as wages and benefits were $1,63,000 and, approximately, I will spare you the exact amount, I referred to it this morning, but it is important to, the fact that there are delays in a case does not mean we can revisit what has been done and the entire exercise that was carried out in, as we see in Exhibits E-14 and E-17 or in Exhibits

S-65 to S-67, show that the exercise was carried out.

When my colleague now wants to address the question of benefits and the pension plan, well, that has been decided. Regardless of whether the pension plan had the status of an integral part of the collective agreement, the document, the table produced, the tables produced for all 11 employees, identifying the heads of damages for wages and benefits, identified an amount. And they knew what they were doing when they said: [TRANSLATION] "Our claim for wages and benefits is limited to that."

So those are their documents, and then, it is not just the fact that they are their documents, the 11 tables that were provided by Mr. Duggan, Exhibit E-14, it is also the fact that there was argument on the question before you and it was agreed that this was the maximum they could claim under that head, wages and benefits.

This morning I referred to the objection that was made afterward, which you allowed, but the objection takes into account the fact that yes, the claim was made afterward, the document in question was afterward, but also the fact that, exactly as I have just said, the amount of the wages and benefits needs to be identified in their documents, which did not contain any separate figures for the pension plan.

As well, the pension plan that has never been produced before you and there is a reason, like for the July 2000 claim, would show the merit of ending the possible period for the claim in January 2000 because the entire subsequent period was part of the July 2000 claim, we must not forget that we produced the comparative table of claims in E-29, the final best offers, before Arbitrator Ménard in 2001.

So then, I was referring to Exhibit E-29,

In the third column, you will see in the union's final best offers, they were asking that section 2B of the collective agreement to be signed be amended to provide that years of service and service with the company be considered to be continuous, with no interruption since May 1, 1996, in particular, but without limiting it, with respect to the pension plan.

So not only did the employees not identify the pension plan as a benefit claimed in E-14, not only did application to join come afterward, but there was also a reason, as I said before you in 2000, the fact that the tables, the 11 tables, were prepared on that basis was not a mistake, because they knew that the claim was before Arbitrator Ménard for signing a new collective agreement, they could not claim the same thing twice in two separate forums. So that was a strategic choice.

So I think the entire question of the pension plan is precluded. So I am concluding my parenthetical remarks on that subject and I will now come back to what happened before you, after the decision, after the hearing in October 2000, the employees finally decided to mount a challenge.

We were back before you in 2004, after your decision, after the decision of the Court of Appeal upholding your decision of October 2000.

So the hearings on August 24 and 25 and October 14 dealt with what remained to be argued and proved before you.

And we will recall that, you noted in your decision of October 2000, and the Court of Appeal, in 2003, acknowledged it too, that the basis of your jurisdiction was initially S-5, the disagreement of June 4, 1996, S-3, the

1987 agreement, supplemented by what is now the trilogy of the Court of Appeal decision, and we must never forget E-56, which is the judgment of the Superior Court, Justice Lemelin. You decided to defer that aspect, but she attached it as an integral part of the hearing.

Now let's look at the March 2005 decision. The March 2005 decision, although it set aside, although the Court of Appeal set it aside in its 2008 decision, it did not in any way question the fact that you still have to decide the question posed by the Court of Appeal in 1999. It did not decide it in place of you and the three original statements I read to you are still entirely relevant. So it is still up to you to decide.

The Court of Appeal stated that when you decided that The Gazette had done nothing to prolong the lock-out unduly, you did not answer the question for

1999, that is, the Court said that it was of the view that you rule on something other than what was in issue.

I would note, however, that the Court of Appeal did not say that your statement was incorrect. It simply said that it was not the actual subject in issue.

The Court did not state that you were wrong when you decided that The Gazette had not abused its right of lock-out or that you erred in saying that there was no identified point at which The Gazette should have ended the lock-out. What the Court decided was that the question was different.

But I mention this question of abuse because my colleague, I am trying to address my colleague's arguments in turn as well, so somewhat surprisingly, my colleague raised this question of abuse as his first ground.

Why is that surprising? Because before

you, I recall, in reading the transcript of the hearings in 1996, '97, Mr. Côté and Mr. Grenier argued the original case, they tried to argue that question, abuse of right, and it was not accepted, it was not accepted by anyone, so it is somewhat surprising that we are revising it now, in 2008, given that when it was first argued it was not accepted.

But somewhat curiously, you are now being asked to retain something that does not arise out of the questions that the Court of Appeal has invited us to consider, at all.

And second, you are being asked to arrive, you are being invited to err once again, you are being asked to answer the wrong question, whether there was abuse of right, and you are being invited not only to answer the wrong question but to answer differently from the answer you already gave in your 2005 decision, that

The Gazette did not abuse its right of lock-out.

Just as an aside on the question of abuse of right, particularly, my colleague compared, cited the offers by The Gazette and he cited one of the offers, E-4, et cetera. We must never forget that at the time, even according to Mr. Foisy's decision, to which my colleague referred, Mr. Foisy said very clearly at page 11 of S-29 that it was not his intention to interfere in the role, the balance of power between the parties and the employer was free to bargain what it wanted to be relieved of the other constraints in the collective agreement and the appendices.

So at that point, Arbitrator Foisy's understanding was the same as ours, that we were in a situation where the balance of power could allow the parties to propose to bargain whatever they wanted.

In any event, as I mentioned, I think this question of abuse of right has no

place in the discussion before you today, and as I mentioned, you have in fact decided that there was no abuse of right at the time.

Now, in your 2005 decision you also applied the ordinary meaning of the word "indûment" [unduly] and concluded that there was no rule on this point with respect to the length of a work stoppage.

What the Court of Appeal told us in 2008 is that you have to answer the question of whether the lock-out was unduly prolonged by the failure to exchange final offers, by answering the three questions, (a), (b) and (c).

The first question is, if the process had proceeded normally, when the collective agreement would have ended, or in other words, the date on which the lock-out would have ended.

Question (b), and question (b) as put by

the Court, at paragraph 30(b), must be read with paragraphs 31 and 37. So the question would read: [TRANSLATION] "In the event that the evidence to be called showed that the lock-out would have ended before January 20, 2000, not December 15, '99, what wages and benefits would the eleven have been entitled to, and I stress, starting at the end of the lock-out?", starting at the end of the lock-out.

And question (c), would those wages and benefits have been lower than the minimum guaranteed in the '87 agreements.

The employer has not presented any additional evidence before you on those questions, even though the Court of Appeal, in paragraphs 30(b) and 37, contemplated the possibility of evidence to be called before you on those questions. And in fact, in our view, the only evidence that would have been relevant before you today would have been concerning points (a), (b) and (c), as the Court of Appeal said in paragraphs 30(b) and 37.

But why did we ourselves think it was not necessary to call additional evidence on those questions? Because if you look at our argument, in August 2004, we argued, without knowing that the Court of Appeal was going to make that decision, we argued those three points.

In your decision, you disposed of the question in a way that was different from what we argued. Although we defended you decision in the Court of Appeal, it decided otherwise, but if we go back to what we argued before you, in August 2004, and I will submit an excerpt from the transcript on that point at the end, but we argued three main points with points in the alternative.

We argued that there was of fault, we argued that there was no evidence that the lock-out was unduly prolonged, and we argued that even if the lock-out had been unduly prolonged, there

was no causal connection between the prolonging and fault.

And in the alternative, we argued that if it had been unduly prolonged and this caused damages to the complainants, the union must save the employer harmless and indemnify it, and also in the alternative, that there had been contributory fault on the part of the union and the employees.

Obviously, the question of failure to mitigate damages then comes into the equation, the fact that they are not entitled to the additional indemnity provided for in article 1619 of the Civil Code and the starting point for computing the interest. Mr. Monet made representations on this point in August 2004 and he will discuss it in a moment.

Now the question of unjust enrichment, you have decided to defer that, so I will not discuss it for the moment.

Obviously, the question of fault, you did not accept our arguments, yourself, in

2005, on that point. And we have to assume that when the Court of Appeal said there had been a failure to exchange final best offers in, in response to the demand on April 30, 1996, that the employer should have done that.

We argued, if you recall, and I will not revisit that entire question, but recall that we argued that it had to be given limited effect because you had rejected the first grievance that created the second disagreement, et cetera, et cetera.

And it does have to be noted, Mr. Chair, that the other aspect of the case, the final best offer arbitration, where the Court of Appeal penalized the absence, the failure of the employer to exchange, was penalized by a collective agreement from 2001, so this is seven years later now, there was a five-year collective agreement ordered and, well, now, seven years later, so there have been consequences for that.

Now, what was argued before you, if you recall, was that the reason you rejected the first grievance was for the same actions because there could be only one failure to exchange, we are not talking about two successive faults, we are talking about one fault in time. If there had to be a response to the demand, it was in response to the demand of April 30, there weren't two demands, there was no demand after the first grievance.

But it is, even if the question of fault should not be argued now and even if we have to accept the somewhat incongruous and somewhat unsatisfactory situation, in intellectual terms, because it is in fact somewhat incongruous that one grievance can be rejected and another allowed for the same action, and it is somewhat incongruous that the exercise can constitute a fault, but we have to accept that this the legal picture that is before you. But I will come back to this picture in a moment when I talk about the context.

But to come back to the decision of the Court of Appeal in 2008, Court of Appeal number 3, it must be understood that what would be undue in terms of prolonging would be a collective agreement signed later than if The Gazette had done the exchange on May 1 or 2, 1996.

What is very clear in the decision is that the time taken by the process of the demand for the exchange and the final best offer arbitration, the entire time of that process up until the signing of the collective agreement, to use the expression used by the Court of Appeal, that entire process took a normal time, that is the expression used by the Court of Appeal, the process that proceeds normally. That entire time was not undue.

And what was the time? You will recall that we submitted a number of scenarios to demonstrate that the process would have taken the same time even if The Gazette had submitted its final offers.

And in the alternative, we submitted other scenarios comparing the known processes in 1990, '93 and 2000.

In his reply, Mr. Brunet, counsel for the complainants at the time, except Mr. Di Paolo, accused us of inventing scripts with those scenarios. Mr. Grenier, being naturally more elegant, accused us of historical revisionism.

But essentially, what the Court of Appeal is asking us to do is exactly what we submitted to you in 2004. It is perfectly clear that the Court of Appeal rejected the argument made before you by Mr. Brunet and Mr. Grenier: that the entire period from June 4, 1996, to January 20, 2000, is undue.

In fact, what was submitted to you was that every day the failure continued is undue prolonging, that is what was submitted to you.

But the Court of Appeal, in 2008, required that you do a "what if" exercise, what is called in English a "counterfactual" exercise: change one fact and determine whether the change is determinative.

So the fact that is changed is that the employer did exchange final best offers, but we will recall the context, eh? We will recall the context. Why did I say that it would not have taken less time? Because it was the end of the 1996 collective agreement, the arbitration award, which was never challenged, the arbitration award, which was accepted by everyone, regarding the memoranda of understanding in August, in October 1994, I am referring to E-1, E-2, where the parties stated that they wanted to put Mr. Leboeuf's award into effect.

The letter from the union, E-28, August 22, 2004, in response to receipt of

Mr. Leboeuf's decision: "We have a new contract." That new contract was signed, in addition, so we have a collective agreement, S-1, that was signed.

It clearly changed section 2 of the collective agreement to provide that the process now is, now requires the consent of both parties regarding arbitration, to the demand for the exchange and the final best offer arbitration. The same thing, appendix C-1 clearly changes section 11 of appendix C.

So all that happened in 1994, there is absolutely nothing to indicate that it was challenged. Mr. Di Paolo admits it in examination, E-18, the examination held in 1998, notwithstanding his subsequent denials before you, and furthermore, you noted this in your 2005 decision.

As well, S-1, the collective agreement signed

by the union and the employer, was cited as a source of law by the complainants and the union since the grievance, S-28, resulted in the arbitration award by Mr. Foisy, S-25.

So we were approaching the expiry of the collective agreement, there still was not the hint of a possibility that the union and the complainants were going to change tack, but that is what happened.

And what happened in terms of the demand for the exchange of final best offers? The made the demand and Mr. Tremblay replied, on May 3, stating that it had become optional: [TRANSLATION] "We note your position, but it has become optional."

But what we argued before you in 2004 and what we are still arguing today is that the union and the complainants absolutely did not want dispute arbitration, that is, final best offer arbitration in '96.

What the union and the complainants were after was a way to circumvent the collective agreement, S-1, and the Leboeuf award. So how to do that? Was it too late to challenge Leboeuf, since in any event they had signed a collective agreement, so what was the strategy? It was to try to argue that the effects of the collective agreement, the Leboeuf award were limited in time. That is why they awaited until the end, the expiry date of S-1, April 30.

Even though they knew that this presented problems concerning the procedure for the demand and exchange and final best offer arbitration, I analyzed section 11 of appendix C and section 2 on this point, but they tried, and it worked, to do indirectly what they could not do directly.

So they wanted section 2 of the Leboeuf collective agreement, S-1, and appendix C-1, to be superseded by appendix C. But the

last thing they wanted was to proceed immediately before an arbitrator on the final best offers. Why? Because that arbitrator would have found that the procedure had not been followed, for one thing, because it was impossible to make the demand and the exchange and the demand for arbitration within the two weeks before April 30, before May 1, but more importantly, why? Because the demand was made on the last day. It was impossible to comply with the other processes before.

But more importantly, that arbitrator would have said: [TRANSLATION] "Listen, you are asking me to rule on a dispute when that requires both parties' consent." You can't ask the arbitrator, who takes his jurisdiction from a document, to say: [TRANSLATION] "Fine, I am going to go against the document that gives me jurisdiction."

So as I argued before you last time, what they wanted was not that. They wanted an adjudication of rights before proceeding to arbitration of the disputes. Because that

allows us to argue equity and the entire situation and not simply argue the merits of two final offers.

But as I said, it worked. You found for the complainants completely in February 1998. The Court of Appeal nonetheless upheld that strategy in part by ordering arbitration of the final best offers.

But what was argued before you and what is argued before you as the primary argument is that this is a strategic choice. The union and the 11 complainants have to bear the consequences of that strategic choice, which inevitably required some delay, and the delay was the time needed for adjudication of their rights before the final best offers arbitrator.

To the point, and you will recall that you upheld it in you first award, that the complainants were scarcely concerned about the delays, because their new position was that they

had to be paid during the labour dispute, that even though they could be locked out, they were entitled to be paid, notwithstanding the contrary decision by Mr. Leboeuf, S-22, in November 1993, this was their new theory.

And in fact there was a claim to that effect in the disagreements that you allowed, but you will also recall S-62, the same day that they made the demand for the exchange of final best offers, they filed an action in the Superior Court, S-62, to claim wages and benefits during the first dispute, '93 and '94. We know that this was subsequently dismissed by Justice Melançon, but it shows that they were not very concerned about the question of delay at the time because they claimed to be entitled to be paid.

So the Court of Appeal, however, on that point, found against them and acknowledged that the employer was entitled to order a

lock-out that had its usual effects, no wages, no benefits.

Mr. Tremblay committed a fault with S-35, on May 3, 1996, he committed a fault according to the decision of the Court of Appeal. He should not have said, notwithstanding the contract, notwithstanding the agreements signed, he should not have said that the procedure had become optional. He should have understood that what was written in the contract was illegal.

Let's accept this surprising conclusion, that even though a collective agreement that is in force says otherwise, he should have recognized that a collective agreement is worth nothing before a decision to that effect. Take that as the basis.

If it is a fault, it is a fault for the purpose of the exercise, Mr. Chair, it is a fault with no consequences, it is a fault that has no effect at all on the delays. In fact, it is a fault that could have, if the union and

the complainants had wanted, that could have shortened the lock-out rather than prolonging it.

Why? Because the employer does not control this procedure in any way. If we are looking at the original process of exchange and demand, one party may not strip the other of its rights.

Faced with Mr. Tremblay's refusal, the union and the complainants could have simply said: [TRANSLATION] "Regardless, you may consider the procedure optional, you may consider it illegal as in 1993, you can say that it is inapplicable, that the procedure is vitiated, regardless of what you say, we are going to proceed with the exchange, be there."

Section 11 of appendix C says there are 48 hours to exchange: [TRANSLATION] "Be there and if you are there or not there, it is at your risk and your peril, but we are going to make the exchange, but then, we are going to go to

arbitration."

In the union's demand, s-34, we already see that the union was in no hurry, they did not want to go there within 48 hours, they tried to postpone it, we see that they wanted to postpone it to May 10 for discussions concerning Mr. Foisy's award.

But what counts is that if they had said: [TRANSLATION] "Mr. Tremblay, take whatever position you like, we are putting the process in motion", Mr. Tremblay and The Gazette would have had to make an entire decision, either to let the other party proceed ex parte or to proceed under protest.

Mr. Grenier referred to the examples preceding the exchange and arbitration process. Mr. Grenier, '90, that's true, there was an agreement, E-22 and 23, but in '93, look at S-17 and E-26, there was a demand made, the employer argued that the procedure was illegal, not

optional, at that time it was a completely different argument, but argued that it was illegal.

But the union proceeded with the exchange before the conciliator, Mr. Boulanger. So the employer did not run the risk because there was no decision yet and proceeded under protest by way of E-26, and we know what happened then, there was the lock-out that lasted 15 months, four decisions by Mr. Leboeuf concerning that entire process, S-21 to S-24.

But let's come back to what happened in May '96. The Gazette refused. That in no way limits the other party's right to proceed. Why did they not do so? But that is exactly what I said, it was not their strategic choice, it did not suit their strategy. They absolutely wanted an arbitrator to do an adjudication of rights.

They thought at the time that it was a grievance arbitrator,

ultimately they understood that it was a disagreement arbitrator under the Code of Civil Procedure, but regardless, and this is so obvious, Mr. Chair, and I would stress this, so obvious that the union and the complainants never considered making an exchange of arbitration, of final best offers, in 1996, that in spite of multiple demands, they never proceeded, they never produced those final best offers.

They had asked before you, in October 2000, and it could not be found, whether it was from the complainants or the union. You noted it in your decision, that the demand had been made over four years before, and it was not found, and not it is nearly eight years, and we still don't have it.

But it does have to be acknowledged that it was not in anyone's interests to have final best offer arbitration in 1996, in the

spring.

The only conclusion you can reasonably draw, in our submission, is that their final best offers did not even exist at that time. And it was not in their interests to do it, their chances of success were rather slim and so their strategy at that time did not lie there.

And the evidence, the demonstration that the union and the complainants knew that they could force the employer, look at the two examples, in 1998, after your award, 23, look at, E-20, the union said to the employer after your award: [TRANSLATION] "We are voting for Wandlen (ph) to make the exchange." A stay had to be obtained from the Superior Court, E-12, to prevent the process from taking place, but regardless, otherwise, they forced us to make the exchange.

Same thing, even after the decision of Justice Grenier, in October '98, there again, there was a demand

made, E-13, pardon me, E-21, and there was another stay.

All that just to demonstrate to you that they knew they could do that, and from the civil point of view, what does that mean, Mr. Arbitrator? We say that it means yes, failure by Mr. Tremblay, should not have said no, but there was another intervening act, which was the decision by the union and the complainants not to proceed nonetheless.

So within the meaning of article 1479 of the Civil Code, we are not, we, The Gazette, we are not liable for the aggravation of the injury that the victim could have avoided. So if, and I do say if, you reach the conclusion that it would have been faster if there had been an exchange by The Gazette at the time, that delay could have been totally avoided by the union and the complainants if they had proceeded nonetheless.

And I said earlier that in fact, the failure by The Gazette would certainly not have prolonged the process,

it would have had the effect of shortening it, why? Because say the union had really wanted, and when I say "the union" I am saying the union and the complainants, but if, on the other hand, they had really wanted arbitration of the final best offers and they had proceeded by default, it is by no means certain that The Gazette would have produced their final best offers under protest in '93.

They thought that they had no obligation at all. So the arbitration that would have taken place before, say it would have been you appointed as dispute arbitrator or Mr. Ménard, then there would have been no offer from the employer concerning the content of the next collective agreement. There would have been just objections to jurisdiction and things like that, and so possibly a shorter discussion.

But it is obvious that the union and the complainants did not want that because of what I have mentioned. They did not want to run the risk of the arbitrator saying: [TRANSLATION] "Listen, you

yourselves signed C-1, you yourselves signed section 2, I have no jurisdiction." So I submit to you that the employer cannot be made to bear the consequences of their strategic choice.

But the Court of Appeal invites us to assume that the exchange was made, so there was an exchange, Mr. Grenier referred to the employer's position, E-4, among other things, versus the union's position. Would there have been an agreement? I think the answer is self-evident. The chances that there would have been a meeting of minds at that point, the only factor that changes in the exercise we are doing, Mr. Chair, is that the employer's offer was submitted. Would the offers have been similar? Impossible.

Even in 2000, even after the decisions of the Court of Appeal, look at, I think it's S-58, the final best offer submitted by the employer in January 2000, the employer softened its position considerably in comparison to E-4 and its position in

1996.

The union, if you compare E-5 which was its position in '96 with S-57 which was its final best offers in 2000, we see that the union and the complainants took a harder line, it is a more radical position. So even four years later, there was no agreement, and the process even took 16 months before Arbitrator Ménard and we know what happened after Arbitrator Ménard's decision.

So if we put ourselves in 1996, it is impossible that there would have been an agreement, what would have had to be done? The dispute arbitrator would have had to hear the entire debate. But we know there was you and then there was Mr. Ménard.

Let's say it would have been you for the whole thing, in 1996. Would bringing everything together before an arbitrator have been faster?

The arbitrator would have had to decide all the points that you yourself decided in your decision of February '98, all the challenges you dealt with.

There would necessarily have been challenges in the Superior Court, the Court of Appeal, so your two decisions, in '97 and '98, but then the case comes back to you, it isn't Ménard, it's you, you also have the joy of deciding on the final best offers. But Mr. Ménard will also have made two decisions, as we see in the record, in 2000 and 2001.

All that, and I don't see how it would have been faster if it was before one arbitrator versus another. I think that in view of all the complexity in the case and the points to be decided, it would have taken exactly the same time.

And certainly, even if we ignore, we do another exercise because the Court

has invited us to look at the possibilities, even if we ignore the applications to the Superior Court and the Court of Appeal, the procedure before you lasted 20 months, June '96 to February '98, but then it didn't end in February '98. You have to decide what Ménard decided, it took him six days of hearing. The process was from January 2000 to June 2001, over 16 months, after February '98.

All that to say that in our view, why was it long? And I said last time, it startled my colleagues, but when I said it was longer in '96 because, in a sense, everything was not resolved from '94, the 15-month lock-out in '94 had not, we thought it had all been resolved, but it had not all been resolved.

If, in fact, the unions, the complainants and the unions had continued the battle before, in 1994 by challenging Leboeuf, well, there would have been an entire process before the Superior Court, Court of Appeal, we can speculate on that, but it is obvious that the people would not have had the benefit of the collective agreement in '94, there would have been a process that would have lasted years after that.

So that is why I said that people have to live with the consequences of the fact that the legal situation completely changed in 1996 as compared to 1994.

So we can do the exercise, but I think it is a little tedious, but my conclusion is that it would not have been faster if everything had been brought together before a dispute arbitrator than before a grievance arbitrator or disagreement arbitrator and a dispute arbitrator. All the points that would have been decided would have been

decided by the other arbitrator. So we are talking about the period from '96 to 2001, or even 2002 ... Mr. Arbitrator, can we take a five-minute break?

THE CHAIR:

Ten minutes.

HEARING SUSPENDED

HEARING RESUMED

RONALD McROBIE:

So Mr. Chair, everything I have just argued was in the context of what the Court of Appeal invited you to do in paragraph 30(a), that is, that if the exchange process had taken place, when would the collective agreement have been signed, or, in other words, on what date would the lock-out have ended?

So ultimately, we are doing a what is called in English a counterfactual exercise, and for the reasons I have already stated, I invite you to conclude that, first, it was the union and the complainants who decided

not to have a final best offer arbitration, and that if there had been a final best offer arbitration, moreover, it would not have taken less time than the time that we have unfortunately seen.

The Court of Appeal says, in paragraph 30(a), that we have to look at when the collective agreement would have been signed. And we will recall that in the Court of Appeal's decision in 1999, it referred to the fact that the process of final best offer arbitration resulted in the imposition of a collective agreement by a third party, not an arbitrator, but a third party, it could have been an arbitrator.

But the reality shows that the term "tiers" [third party] was perhaps a very good choice because we know that in reality, Mr. Ménard's collective agreement, in June 2001, was challenged by the complainants and it was as a result of the decision, after waiting several months, in fact six months, the union decided after waiting for six

months to homologate Mr. Ménard's award, in December 2001, that led to the decision of Justice Frappier, E-50, in 2002, in May 2002.

And I would remind you that it was, Justice Frappier refused to order provisional execution of his judgment because the complainants had engaged in judicial guerrilla warfare.

And had it not been for the lock-out, there would have been no return to work because, given that there was no provisional execution, there could have been an appeal with further delays and it was the employer that offered not to appeal if the other parties understood that there would be no appeal.

So technically, the labour dispute ended because of that offer, which was accepted, but if there had been no lock-out, we would again have been before the courts arguing whether Mr. Ménard's arbitral award was illegal or not because there was

no economic penalty for the employees not to pursue the legal battle, it would have been another long time.

So even if the lock-out did not have the effect intended by the employer at all, ultimately, it led to the resolution of the labour dispute.

But what is most important for the purposes of our discussions here today is that, I would say, the collective agreement was signed within the meaning of 30(a) by being homologated by final judgment, and that is when the lock-out ended.

We know there was a decision by Mr. Leboeuf, not Mr. Leboeuf, pardon me, I have the wrong arbitrator, by Mr. Gravel concerning the period from June 2001 to May 2002, rejecting the grievance that had been filed for that period, and that decision was upheld by the Superior Court, by Justice Wagner, that is the judgment I submitted to you this morning.

So in our submission, the meaning of section 33, ordinarily, the collective agreement was signed on the same date it was actually signed.

In the alternative, in this counterfactual exercise you have to do, let's take, let's ignore the applications to the Superior Court and the Court of Appeal, let's look just at the process before the arbitrators. I think it is obvious that there would have been no final best offer arbitration without deciding all the points that you and Mr. Ménard actually decided.

If we combine those delays, we see that in your case, it was June '96 to February '98, and Mr. Ménard, it was January 2000 to June 2001. This brings us to July or August 1999 if we combine the two periods. So that would leave the period from August to January 2000, that is, about six months, but we know that the employer has already

paid nine months in that period, so there would be a deficit in the employer's favour of two or three months.

The other experiment we could cite for comparison purposes is Ménard, that took 18 months; Leboeuf, that took over 15 months. Then if we add 15 months rather than Mr. Leboeuf's period, Mr. Ménard's, we get to May '99, if we combine your case and Mr. Leboeuf's. So that would leave eight months before the period, the expiry of the period in January 200, and nine months have already been paid, there is a deficit in the employer's favour of one month.

So there we have two scenarios, two other possible sub-scenarios, but I don't think they are the most probable scenarios, but they are the most possible scenarios and they are certainly much more probable scenarios than what is being claimed before you.

Because to my great surprise, in spite of what was said by the Court of Appeal, the same position is being argued as was argued, by the union and the complainants, in August 2004, they are arguing the entire period.

Listen, it is very clear that the Court of Appeal is inviting us to do an exercise over time, so starting in April '96 and proceeding from there. And when the Court of Appeal says at pages, paragraphs 36 and 37 that the conclusions sought by the appellants go too far, and that is the claim I referred to a moment ago, they reiterate the statements by the Court of Appeal that the lock-out produced those effects during the process.

And at paragraph 37, the Court of Appeal says: [TRANSLATION] "It is by no means certain that the process that was to lead to an arbitral award, ending the lock-out initiated on April 30, would have been concluded before June 3 of that year ..."
The date when the lock-out started.
"... even if The Gazette had not committed

the fault identified by the Court. In other words, it is by no means certain that the entire period of the lock-out unduly caused the losses of the wages and benefits otherwise guaranteed to the typographers by the tripartite agreement. From this perspective, it be possible to determine the solution to the problem from the evidence to be introduced before the arbitrator in relation to the three questions I identified earlier as (a), (b) and (c) ..."

So you have all the evidence in the record. I would submit that what is very clear is that, rightly or wrongly, there would never have been an agreement before June 1996 and there would never have been an agreement at all without the intervention of the courts.

And that is why I think that if you change that one factor, that the employer made an exchange, it is impossible, based on all the evidence in the record, to believe (a) that there would have been an agreement or (b) that an arbitrator, whoever it was, would have been able to produce a collective agreement

accepted by the parties before 2002 as actually happened.

But I submitted two main reasons why it should be concluded that there is no evidence that the lock-out was prolonged, no causal connection in any prolonging that may have occurred, in fact because the complainants and the unions could have avoided there being no final best offer arbitration, I submitted secondary scenarios.

But what was submitted to you as evidence to demonstrate the other scenario, according to what the Court of Appeal has invited us to do? Nothing. I heard nothing at all in argument that invites you to believe there would have been a more plausible scenario. The demand is maintained from the outset.

How can you conclude that there would have been an arbitral award imposing a collective agreement accepted by the parties on

June 4, 1996, on the evidence in the record? I submit, with respect, I think that this is a legal impossibility. There would not even have been an arbitrator appointed by June 4, 1996.

And it is very clear that the Court of Appeal was considering a process between June and, '96, and January 2000 because in (b), and I am at (b):
[TRANSLATION] "In the event that the evidence to be called showed that the lock-out would have ended before December 15, 1999, ..."
And we know that they then invited us to consider January 20, 2000.
"... what wages and benefits would the eleven have been entitled to starting at the end of the lock-out?"

So you are being asked to say: [TRANSLATION] "Okay, so, demand, exchange, demand, arbitration, litigation, et cetera, of the convention signed

within the meaning of (a) exists."

Let's assume that you think it would have been one of the alternative scenarios I submitted to you. So we will take the date of July 1999, even though I think that is not the most probable scenario. It is clear that at that point, you have to calculate the wages and benefits starting from the end of the lock-out, so, for the purposes of the exercise, it is May '99, so we have to consider between June '99 and January 2000 in that example and it is very clear, what you are being asked to do is sequential.

Now, there is question (c) which follows on from question (b): [TRANSLATION] "Would those wages and benefits have been less than the minimum guaranteed by the tripartite agreement, 1987 version?"

Let's think about that. I was someone puzzled when I read it the first time: [TRANSLATION] "What can that

really mean?" because we know that appendix C, first, there were no benefits at all in appendix C, the benefits are only in the collective agreement, but let's forget that aspect for the moment, appendix C says that the wage is a minimum wage that may not be bargained.

We can, we have to assume that the Court of Appeal knew that the parties, under the Ménard and Frappier decisions, that the parties could not bargain a lower wage. In fact, there was never any question before Ménard of bargaining lower wages.

But here the Court is contemplating the possibility that the wages, after the end of the lock-out, might be lower than that minimum. Is that a contradiction? No. Why? Because we are in a case about damages to replace wages and benefits.

The Court of Appeal, in '99, said: [TRANSLATION] "You will determine the damages, if any", the

2003 decision tells us on what basis, wages and benefits. So it then becomes clear what is meant by (c).

Yes, it may be less than the total in my example between June '99 and January 2000, even if you conclude that the lock-out was unduly prolonged, by The Gazette's acts. Why? Well, several things: fault on the part of the union, fault on the part of the complainants, failure to mitigate damages, exactly the point we have argued. It is impossible to believe that the Court of Appeal asked us to do an exercise pointlessly.

So we have submitted that the union committed a fault and it is the union at least that, as co-signer of the agreements in E-1, E-4 and S-1, created the legal situation that it must now be concluded was illegal, according to the Court of Appeal's decision in 1999.

Since the beginning of the process that started again before you in 1980, in

2000, pardon me, since the Court of Appeal's decision in '99, the employer has impleaded the union.

At the pre-hearing conference on February 26, 2000, E-8, and the summary, pardon me, the summary, it's the employer's summary, E-8, and in the transcript of February 25, you will recall that we held the union liable in the alternative if there were any fault on the part of The Gazette that caused damages to the complainants. And I refer you to paragraphs B-11 and C-17 of our summary.

And why? I have already argued that point, so I will be brief, but the employer, why did Mr. Tremblay commit the fault of saying: [TRANSLATION] "It is optional, it is not mandatory"? That was the fault. There is one reason why he committed that fault, it is because there was a collective agreement in front of him that said it, and he relied on what had been signed, he relied on what Leboeuf had

decided, there was nothing that said otherwise at that point.

There was never any indication from the union that it thought this was not true, that it was incorrect. On the contrary, there is the letter from the union, E-28, that I quoted earlier, in August 1994, that "we have a new contract".

There was a lot of talk about equity in that case, there was a lot of talk about fool's bargains, but how can we conclude that someone who acts in accordance with what the other party tells them is correct should be held liable for damages caused to third parties?

Is it not impossible to think otherwise than that the union led the employer to believe that its apparent right was an uncontested right? by waiting for the end of the collective agreement before filing the grievances and the disagreements, without ever complaining of anything before that? by expressly saying that it agreed with the employer to make

Mr. Leboeuf's decision effective and by then signing the collective agreement, S-1P?

That is the question. If you come to that question, I think you will not have to come to that question, based on my first arguments, but if you come to answer that question, that is the ultimate test, whether the Leboeuf process, all the agreements signed after that and agreement S-1, is it really a fool's bargain for the employer?

You criticized us in February 1998, in your first award, for not honouring our commitments. At least, the employer had a defence before you, to say that it believed that Arbitrator Leboeuf had given it that right and contracts and collective agreements and that Arbitrator Leboeuf had changed the parties' commitments legally.

But what can the union cite

to justify the fact that it did not honour its commitment to the employer? What can it cite?

The Gazette at least, in '96, acted and had the benefit of Mr. Leboeuf's judgment. The union simply repudiated, "the new contract we have", when its word, its signature, its commitment, should have consequences, whether in terms of article 1458 of the Civil Code or "minimally", and here I come to my sub-alternative argument, that there was joint participation in the fault under articles 1478 and 1479 of the Civil Code, I submitted this in my book of authorities last time, I assume you still have it in the record, I am not going to bog your record down further with more copies or the case law that was in it.

But there was certainly, then, this fault by the union, but I would say, very much in the alternative, that there was also contributory fault by the employees in all that, and Justice Grenier refers to it, Madam Justice Grenier refers to it ...

OFF THE RECORD DISCUSSION

RONALD McROBIE:

So, but the, Mr. Brunet referred to it last time, the judge's comments, Mr. Brunet referred to it last time, to the comments by Justice Grenier, that even though she allowed our motion, she was not gentle with The Gazette, but she also made comments about the attitude of the union and the complainants, and she referred to the inertia, at least, of the parties in respect of Mr. Leboeuf's decision, but as I said earlier, it is clear that it was more than inertia, it was positive acceptance of the legal situation created by Mr. Leboeuf.

And even in respect of the complainants, I don't want to twist the knife, but it is clear that Mr. Di Paolo said, in 1998, that the Leboeuf award had been accepted by everyone, not just the employer or the union, but by everyone, that was his sworn testimony.

He tried to go back on that afterward before you, in 2000, with various explanations, I will leave it to you to assess his credibility.

So "minimally", if there was fault, it has to be accepted, under the Court of Appeal's judgment, that there was fault on the employer's fault, there was also contributory fault that, I would submit that it amounted to one-third, one-third, one-third to the union, employees and employer or if you rule out fault on the part of the employees, it would be 50/50 employer and union.

In terms of the maximum quantum that may be claimed, we talked about that at length already this morning.

And so what remains are the questions of mitigation and the question of the additional indemnity that I will leave to my colleague, Mr. Monet, to argue.

OFF THE RECORD DISCUSSION

THE CHAIR:

We will suspend for five minutes.

RONALD McROBIE:

Okay, just before, I had ...

THE CHAIR:

Ah, okay.

RONALD McROBIE:

... said that I would submit an excerpt from my, from the 2004 transcript because I have not reiterated each and every one of my arguments, so I submit it as an aide-mémoire ...

PIERRE GRENIER:

I understand that it is not a ...

RONALD McROBIE:

... there is another copy for Mr. Di Paolo ...

PIERRE GRENIER:

... I understand it's not an exhibit, it's your argument?

RONALD McROBIE:

It's my argument.

THE CHAIR:

So five minutes for the coffee break.

HEARING SUSPENDED

HEARING RESUMED

THE CHAIR:

Mr. Monet?

DOMINIQUE MONET:

Mitigation of damages, some, perhaps some, returning to some provisions. First, in the decision of December 15, 1999, there was a, no, I would say more a fairly detailed analysis by the Court of Appeal on the question of the nature of the arbitration, is it a grievance arbitration or a consent arbitration under the Code of Civil Procedure?

Because it will be recalled that at that time, The Gazette was arguing that it was a grievance arbitration and ultimately the Court of Appeal decided that it was an arbitration under Book VII of the Code of Civil Procedure of Quebec, that was one of the fundamental messages of that decision.

And there is a passage in the decision that states: [TRANSLATION] "... the specific mechanism of the grievance resolution procedure set out in each of the tripartite agreements of '82 and

'87 constitutes, in my opinion, a perfect arbitration clause that compels ..."

And I would stress this.

"... compels the parties to carry out the agreements under the rules of the jus commune."

"Compels the parties to carry out the agreements under the rules of the jus commune." So lawyers, the common law, we all know somewhat what that means, the jus commune, it refers in Quebec mainly to the Civil Code, substantive provisions, the basic provisions of our legal system are found in the Civil Code, the Civil Code which is the foundation of all the laws, with the new preamble, and one of the fundamental principles of the civil law is that a party is not bound to remedy an injury that the other party could have avoided.

That is expressed in various ways, in various articles of the Code, but it is a, I would say a basic principle of the jus commune, that the civil law, which is remedial law, which is not punitive law, which is not criminal or penal law, is civil law.

So the Court of Appeal, as early as '99, invited us to carry out, in accordance with the jus commune, and in the decision of March 2008, we see that the Court of Appeal, and I am thinking particularly of paragraph 30(c), once we do the analysis of whether The Gazette had exchanged, when would we have had an agreement, just like the exercise my colleague invited you to do that brings us, I submit, to a period, the same period, ultimately, in which we ended up in reality here, but in paragraph (c), the compensation, ultimately, if you were to conclude that there is a compensation period, a period where there could be compensation for lost wages and benefits, can we end up in a situation where the wages and benefits would be less than what is stipulated, the minimum guaranteed in the agreements?

The answer is yes, because if you conclude that the employees failed to meet their duty to mitigate their damages, they are necessarily going to receive less

compensation than what is provided in the agreements.

Now, Mr. Grenier's position is the same as he argued the last time, that to him, the duty simply does not apply.

He tells us that because we are not dealing with a loss of employment situation, it is not a case where there was a dismissal and they are seeking reinstatement, the obligation does not apply. I believe, however, that the duty to mitigate damages is much broader and much more fundamental than that and that it does not apply solely in the case of dismissal.

In fact, that question was argued and debated before the Ontario Labour Relations Board in Burlington Northern Air Freight, Toronto Typographical Union Local 91, in which the question arose, it was an illegal lock-out and the question arose of whether the duty to mitigate damages applied to persons, to employees who were illegally locked out, and

the Board, I refer you specifically to paragraphs 27 and 28, the Board concluded yes, the duty applies.

On that point, article 1479 of the Civil Code was cited. So if we go to paragraph 28, which is found on page 14,394, at the top:

«... having carefully considered the able submissions of counsel, we have concluded that employees who are unlawfully locked out by their employer are obliged to take reasonable mitigatory actions...»

So I think that on the first point, the application of the duty, it is also worth noting that in article 944.10 of the Code of Civil Procedure we read:

"The arbitrators shall settle the dispute ..."

And that is arbitration under an arbitration clause ...

I provided you with articles 1478 and 1479 of the Civil Code which you have in hand, that is,

I think that these, the article is an expression of the principle found in several other articles of the Cdoe and that is the general principle that a party must not compensate for injury that the other party can avoid.

Article 944.10 of the Code of Civil Procedure states, on the subject of arbitration clauses, under arbitration clauses:
"The arbitrators shall settle the dispute according to the rules of law which they consider appropriate ..."
944.10, very important.

So if you are in Quebec, and you have to carry out agreements in accordance with the jus commune, I have to ask what other appropriate rules, even though if you decided to apply Ontario law, you would have the decision of the Ontario Labour Relations Board that would confirm that in Ontario as well there is a duty to mitigate damages.

Now, did the complainants breach that duty? A set of transcripts from

various examinations in January 2001 were produced, Exhibits E-78 to E-87, in which all the complainants were examined on their efforts to find a new job or to find a new source of income since the lock-out. And generally speaking, we can tell you that it is apparent that none of the complainants had prepared a job application, none of the complainants had done a real search to find a job elsewhere.

You also had the testimony that was called the somewhat consolidating testimony of Mr. Thompson, in October 2004, who explained that the employees, their main task was to challenge and fight The Gazette, "our job is to fight The Gazette, we are fighting The Gazette." So that is the activity to which the 11 complainants dedicated themselves.

And in fact, the complainants fought all the way to the Court of Appeal to get their wages during the lock-out because it was their initial demand and we have seen that this was explained

somewhat by the strategic positioning.

Initially, the length of the lock-out was of less concern because they were demanding to be paid, so, being paid during the lock-out, the length of the lock-out was not a consequence that was negative for the complainants.

But certainly, from the point when the Superior Court set aside your decision, October 30, 1998, and when the Superior Court held that the employees were not entitled to their wages during a lock-out, in the meantime, I submit, this duty to mitigate damages must have come up along the way and they could no longer, at that point, have said to themselves that they were going to dedicate themselves entirely to the court battle, but that they had to take concrete action to mitigate those damages.

And we see from all the, and I will not review them all, but you see, and I will also not name them, but you will see on examining the testimony that has been

given on those points, there are, there is one complainant, for example, who asked me when I asked him: [TRANSLATION] "Well, why did you not make efforts to find a job?", who replied: «Why should I? Why should I?» why, fine.

But in fact, the complainants knew, since at least November '93, that a lock-out might occur during final best offer arbitration and in our case, there was in fact a long dispute foreseeable.

Then there are others, again, I am just going to go over them quickly, another one replied that he did not look for a job because he was receiving $300 a week in compensation from the union and that to get a comparable wage he would have to earn 500 gross a week. That was another answer that was given.

Another employee told us that he stopped,

over a period of three and a half years, once in a shopping centre and he had occasion to use a computer.

Mr. Di Paolo, in particular, E-81, page 49:

«A. The last time I looked for work was back in nineteen ninety-seven (1997).»

E-81, page 49.

Ms. Blondin, in particular Ms. Blondin, E-78, at pages 6 and 7, she explained that she had operated a Bonisoir convenience store with her husband since 1980, they have two part-time employees, there is a dairy. Between June '96 and January 2000, she worked, but she did not declare an income. The company has a federal charter, its name is J.R. Blondin Limited. That is what she said in E-78, pages 6 and 7.

Over a period of three and a half years, while the dispute was ongoing, when no wages were being received after October 30, '98, a duty to

mitigate damages arose.

As well, I referred to Danielle Grenier, the judgment by Danielle Grenier that set aside your decision to allow wages, to order The Gazette to pay wages and benefits during the lock-out. Justice Grenier set aside that order and we will recall that the union and the 11 complainants went to the Court of Appeal, immediately filed an appeal, and argued that filing an appeal, you know, that filing the appeal stays the judgment, so your initial decision that order the exchange, and that order payment of wages, that filing an appeal from the Grenier judgment revived your orders, and that is where they asked us to go to the Wyndham Hotel to exchange within 48 hours, and obviously they asked us, they asked that they continue to be paid wages.

We had to go and seek a stay from Marie Deschamps, Marie Deschamps who is

now on the Supreme Court of Canada, we had to, in the Court of Appeal, we had to seek a stay from Marie Deschamps, and then, the Court of Appeal, under Marie Deschamps, ordered everything stayed, including the payment of wages.

So at that point, it is no good thinking that our position is the best, that our, and we know that in 1999 the Court of Appeal upheld that there were no wages during a lock-out and again, here we are again, we are once again trying to resolve that question, but certainly, starting with the judgment of Marie Deschamps, at some point, that duty to mitigate damages had to come into the equation.

So I think they, (1) the duty applies, (2) they failed to meet it and I think the consequences we can take from that are you must, in the event that you make an award or you find a period of compensation, you must necessarily reduce the compensation to take into account

the failure to mitigate.

And for example, in Larose v. Microrama, which I submit, a decision of the Commission, it was held that five or six job applications over 14 months were insufficient and, at page 7, it assessed the applicant's share of liability as 50%, and it therefore reduced, at page 7, third paragraph, after concluding that the applicant had not mitigated his damages, it applied a reduction of 50% to the quantum of damages.

So I would invite you, I would submit that the failure to mitigate is at least as serious as in that case since to all intents and purposes, apart from a few rare examples, there was practically no effort, so any compensation would have to be reduced by at least 50%.

And this also answers the Court of Appeal's question (c) because the Court of Appeal says: [TRANSLATION] "Would

the compensation, because we are necessarily referring to compensation, be less than the wages and benefits?", but necessarily if you apply the duty to mitigate damages, you are going to order less than the full salary under the agreements for the period in question.

Additional indemnity. The additional indemnity, I argued, also, the last time, I did submit a number of decisions on the additional indemnity.

The additional indemnity is not interest, the additional indemnity is damages. The rules are codified in article 1619 of the Civil Code, which I hasten to provide you with. 1619:
"An indemnity may be added to the amount of damages awarded for any reason, which is fixed by applying to the amount of the damages, from either of the dates used in computing the interest on them, a percentage equal to the excess of the rate of interest fixed for claims of the State under section 28 of the Tax Administration Act

over the rate of interest agreed by the parties or, in the absence of agreement, over the legal rate."

So obviously there is no agreement between the parties as to the rate of interest. In terms of the starting point for the rate of interest, I have representations to make on that also, but on the subject of the additional indemnity, it is clear that it is damages in itself, it is a, considered to be a head of damages and there is res judicata on that point.

The claim for the additional indemnity appears for the first time in or case in Mr. Duggan's claim S-54, it is the claim dated June 9, 2000, it is item 13.

They said there were, they said this morning that there were 14 heads of damages in Mr. Duggan's claim, the fourteenth, well there are 13, the fourteenth is "reserve of jurisdiction", that is not a claim for indemnity. There are 13, in fact, and the thirteenth is

the additional indemnity. So the additional indemnity had never been claimed as damages before June 9, 2000.

And obviously, we, the argument was about what heads of damages may be claimed. In your decision of October 11, you held that the only admissible heads of damages were the lost wages and benefits, that the other heads of damages that were claimed in S-54 were inadmissible. You even held that it was ultra petita, that if you were to allow those heads of damages, you would be acting ultra petita.

The Superior Court did not agree with that, it reversed you. This time it was us who went to the Court of Appeal. In 2003, it was The Gazette that appealed and it was The Gazette's appeal that was allowed.

So we defended your decision, we defended your decision in 2005 also, your 2005 decision,

but we defended your 2000 decision. It was the employees who challenged it, saying that you should allow them to claim all the damages they wanted.

And we know the outcome of the story. The Court of Appeal said that your decision was correct; the Court of Appeal said they could not claim anything other than wages and benefits and, in fact, that disposed of part of the merits of the case.

Paragraph 43 of the Court of Appeal's decision of August 6, 2003, Justice Morissette wrote:
[TRANSLATION] "There seems to me to be no doubt that by limiting the admissible heads of claim as he did, and by rejecting, for example, ..."
For example.
"... moral, exemplary or punitive damages ..."
Because we saw on Mr. Duggan's list there were 13 heads of damages, but ...:
"... by rejecting, for example,

moral, exemplary or punitive damages from the remedies to which the respondents might be entitled, the arbitrator in that case disposed of a substantive issue between the appellant and the respondents. In so doing, he disposed of part of the dispute that had been submitted to him ..."

Fine, so, the Court of Appeal decided that you had, you ruled within your mandate, you ruled as to what was admissible as heads of damages, necessarily, you rejected the claims, the claim for the additional indemnity that was made in S-54.

It is clear that at present, awarding damages as additional indemnity is not part of your mandate and that is res judicata and is clear.

Now, there was also discussion of the criteria for granting the additional indemnity and we know that, there was discussion of the Snyder (ph) case which is in our casebook, at tab 15. There was also discussion of another case, R. v. L,

another 2003 decision, at tab 16, tabs 15 and 16 of our book of authorities.

And we have seen that Justice Beaudoin in Snyder does an exhaustive study of the additional indemnity, and explains that it is discretionary, explains that a party who bears a share of responsibility for the delays is not entitled to an additional indemnity.

And in particular, in Snyder, in Snyder, we know that, we are all somewhat familiar with that story. Mr. Snyder had sued a series of newspapers and radio stations and he had, he had brought separate actions against each and every one of them, and then decided to take a test case, he went all the way to the Supreme Court, then he went back to the civil action, in the Superior Court, and in short, there were all sorts, this entire kind of strategy, I think there are already enough of them in this case, I am not going to go into everything

that happened in Snyder, but ultimately ...

THE CHAIR:

That was a jury trial, eh? in civil court?

DOMINIQUE MONET:

Yes, jury trials in civil court, in addition, but Snyder had decided to divide his claims against each and every one and make one wait for the outcome of the other ...

THE CHAIR:

He had even sued The Gazette.

DOMINIQUE MONET:

He had sued The Gazette. Yes, yes.

THE CHAIR:

Right.

DOMINIQUE MONET:

So ultimately, when the delays, and this is what the Court of Appeal held in that judgment, when the delays resulting from strategies, the Court of Appeal says it clearly in Snyder: [TRANSLATION] "Listen, they were entitled to start all the actions they wanted, they were entitled to use all the strategies they wanted, to make all the appeals they

wanted, to make all the applications they wanted, but they have to live with the consequences of the delays that it causes and they will not be allowed any additional indemnity."

I, in this case, you know ... After the Court of Appeal referred the matter back to you the first time, we had a pre-hearing conference on February 25, 2000; February 25, 2000.

On February 25, 2000, on February 25, 2000, Mr. Côté, as he then was, "as he then was", started to claim moral damages, punitive damages, exemplary damages, all sorts of additional damages, on February 25, 2000.

Then we exchanged summaries, Mr. Côté added to his damages. Then, we spent two days, June 9 and June 13, 2000, arguing before you as to the admissible heads of damages.

Are they limited to wages and benefits or do they include all other heads of damages?

All that, all that argument ... And then we were going to continue because then you took the matter under reservation and you gave a decision on October 11, 2000. You said the wages, the damages were limited to lost wages and benefits. It took nine months to get the award to argue, two days of argument, exchange of pleadings, decision, and then what happened? They challenged it, the complainants went to the Superior Court, and they said: [TRANSLATION] "No, we want to expand, we want to claim more than wages and benefits."

They won in the Superior Court. The Gazette appealed and The Gazette won on appeal, on August 6, 2003, The Gazette won on appeal.

It took three years, all that. I think we tend to forget that all that argument on,

ultimately, the same argument they are still trying to make today on whether they can claim more than wages and benefits, just to exhaust it, it took three years, but all that, it could have been avoided if they had not made those claims.

Because if on February 25, 2000, they had said: [TRANSLATION] "We are going to proceed on the period, on causality", the entire argument we are having today, and to date, counsel, my colleague, Mr. Grenier, started at one o'clock this afternoon, it is now four o'clock, I am just about to finish. We have had it, the argument. That argument could have been made in 2000 if we had not had to argue whether to award fiscal injury, whether to award moral damages, whether to award damages, for all the damages that Mr. Duggan claimed, it made us waste three years.

That is another reason why I submit that there is no additional indemnity in the

case.

Interest, final point. Interest, it is five percent, the rate of interest is five percent. That isn't, it's a federal statute that sets it, it isn't a subject of argument. But the date from which it is claimed, interest can be claimed, that is also provided in the Code, it's article 1618. I gave you 1619, so I will give you the page that comes before, that is why I was asking for a stapler a moment ago, I am not managing to put ...

THE CHAIR:

Excuse me ...

DOMINIQUE MONET:

... a big clip.

THE CHAIR:

... I didn't know it was part of my mandate to supply staplers.

OFF THE RECORD DISCUSSION

DOMINIQUE MONET:

So 1618, so here, we have to specify the kind of obligation there is. The obligation that

The Gazette violated is the obligation to exchange final best offers, the obligation to submit its best offer.

That obligation is not an obligation to pay a sum of money, it is an obligation to do something, there are obligations to do things, there are obligations not to do things and there are obligations to pay.

That is why the obligation to do something could have been the subject of performance in kind. When a party has an obligation to do something, the other party can compel the party to perform.

So it is an obligation to do something and in the case of an obligation other than delay in performance of paying a sum of money, it is provided that the interest for, from the default or from any other later date in the discretion of the Court.
"... any other later date which the court considers appropriate, having regard to the nature of the injury and the circumstances."

The first time damages were claimed was on February 25, 2000. Mr.Côté, at the pre-hearing conference, claimed damages equivalent to lost wages and benefits between June 4, '96, and January 21, 2000. Then, in writing, on March 15, 2000, Exhibit S-56, paragraph 5A.

So I submit that the interest cannot begin to run before ... When I argued the case in October, I am going to submit that too, I also, the argument in October 2004, I had, I argued, Mr. Arbitrator, that it was only beginning on December 15, '99, that it was a question of ...

THE CHAIR:

I, pardon me, well, I have three copies of it, for the purposes ...

DOMINIQUE MONET:

Well, you should give two to Mr. Grenier ...

THE CHAIR:

Ah, yes of course, that's right.

DOMINIQUE MONET:

... please? And Mr. Grenier gets one on behalf of Mr. Di Paolo and Ms. Blondin.

THE CHAIR:

Right.

DOMINIQUE MONET:

And so, I pointed out, in 2004, that the interest, I pointed out that the damages, the claim could not arise before the Court of Appeal established it, that claim, ultimately.

And it was only after the decision of the Court of Appeal on February 15, '99, that they claimed damages at the pre-hearing conference on February 25, 2000.

So for all these reasons, I would submit that interest would have to start to run only on February 25, 2000, in this case,

in the event that you acknowledge that there are damages that were caused by the employer's failure to exchange, to which, I think, Mr. McRobie has amply replied. Thank you.

THE CHAIR:

Listen, it's four fifteen ...

PIERRE GRENIER:

Mr. Di Paolo needs how much time?

THE CHAIR:

That's right, Mr. Di Paolo, you are going to have ...

ERIBERTO DI PAOLO:

At least an hour and a half, an hour, an hour and a half.

THE CHAIR:

Fine, so we will be back tomorrow morning.

ERIBERTO DI PAOLO:

And also Ms. Blondin.

RITA BLONDIN:

Me too.

THE CHAIR:

There will be no repetition?

ERIBERTO DI PAOLO:

No, we have tried to ...

RITA BLONDIN:

No.

ERIBERTO DI PAOLO:

... to divide it.

RONALD McROBIE:

Excuse me, do you expect it to be an hour and a half each, or together?

RITA BLONDIN:

No, each.

RONALD McROBIE:

Each? So, three hours?

RITA BLONDIN:

If not more.

ERIBERTO DI PAOLO:

Max., well...

THE CHAIR:

But we're talking about argument, we aren't talking about evidence.

RITA BLONDIN:

Yes, argument to answer questions (a), (b) and (c).

ERIBERTO DI PAOLO:

To answer the questions, to answer to these questions, I have to go with the decisions.

THE CHAIR:

Yes.

RONALD McROBIE:

Well, you'll be finishing in the morning, we'll have time to finish it in the morning tomorrow? three hours (3 h)?

ERIBERTO DI PAOLO:

It depends, I think I eliminated a few things, because...

RONALD McROBIE:

Well, as long as we finish tomorrow, that's all, I mean, we...

ERIBERTO DI PAOLO:

No, tomorrow, we will finish.

THE CHAIR:

O.k. See you at nine-thirty (09H30) tomorrow morning?

HEARING ADJOURNED

I, the undersigned, BRUNO PELLAND, official stenographer, certify under my oath of office that the foregoing pages are and contain a faithful and accurate transcript of the evidence and testimony taken in this case by stenomask.

As provided by law.

And I have signed,

B.B. [signed]

B.P. _____

Certified true translation

K E Barnard

Kathryn E. Barnard. B.A., LL.B.

Ottawa, Ontario, Canada

TAB 11

CANADA

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No. 500-17-049725-099

SUPERIOR COURT
(Civil chamber)

COMMUNICATIONS, ENERGIE AND PAPERWORKERS UNION OF CANADA, LOCAL **145, (CEP),** an employee association that is certified under the Labour Code, L.R.Q., c, C-27. and having its main place of business located at 4555, Metropolitain East, office 201 in St-Leonard, district of Montreal, province of Quebec, H1R 1ZA;

-and-

ROBERT DAVIES, typographer, domiciled and residing at 1471A, Giovannie-Caboto street, Ville Lasalle, district of Montreal, province of Quebec, H8N 3E1;

-and-

UMED GOHIL, typographer, domiciled et residing at 7809, Thelma street, Lasalle, district of Montreal, province of Quebec, H8P 1W8;

-and-

JEAN-PIERRE MARTIN, typographer, domiciled and residing at 7100, boul. Cousineau, app. 7, Saint-Hubert, district of Longueuil, province of Quebec, J3Y 9K8;

-and-

LESLIE STOCKWELL, typographer, domiciled et residing at 160, Cloutier street, app.4107, Rosemère, district of Terrebonne, province of Quebec, J7A 3Y5 ;

-and-

MARC-ANDRÉ TREMBLAY, typographer, domiciled and residing at 184, Gouin, Châteauguay, district of Beauharnois, province of Quebec, J6J 5L5;

-and-

JOSEPH BRAZEAU, typographer, domiciled et residing at 18, Robitaille street, Notre-Dame de l'Ile Perrot, district of Beauharnois, province of Québec, J7V 6S7;

-and -

HORACE HOLLOWAY, typographer, domiciled and residing at 601, Blaise street, Fabreville, district of Laval, province of Québec, H7P 5M7;

-and-

PIERRE REBETEZ, typographer, domiciled et residing at 3205, Appleton street, Montreal, district of Montreal, province of Quebec, H3S 1L6;

-and-

MICHAEL THOMSON, typographer, domiciled and residing at 4015, Brahms street, Brossard, district of Longueuil, province of Quebec, J4Z 2W9 ;

PLAINTIFFS

V.

ME ANDRÉ SYLVESTRE, in his quality as arbitrator, having his office at 1300, Notre-Dame street, Berthierville, district of Joliette, province of Quebec, J0K 1A0;

DEFENDANT

-and-

THE GAZETTE, A DIVISION OF CANWEST PUBLISHING INC. **(previously known as** « THE GAZETTE, A DIVISION OF SOUTHAM INC. »), legally constituted corporation, having its place of business at 1010, Ste-Catherine street West, suite 200, Montreal, district of Montreal, province of Quebec, H3B 5L1;

-and-

Postmedia Network inc., successor of THE GAZETTE, A DIVISION OF CANWEST PUBLISHING INC. **(previously known as** « THE GAZETTE, A DIVISION OF SOUTHAM INC. »), legally constituted corporation, having its place of business at 1010, Ste-Catherine street West, suite 200, Montreal, district of Montreal, province of Quebec, H3B 5L1 ;

-and-

ERIBERTO DI PAOLO, typographer, residing and domiciled at 6752, Jean-Milot, Montreal, district of Montreal, province of Quebec, H1M 2Y9;

-and-

RITA BLONDIN, typographer, residing and domiciled at 588, boul. Antoine-Séguin,

Saint-Eustache, district of Terrebonne, province of Quebec, J7P 5N6;

IMPLEADED PARTIES

MOTION TO INTRODUCE PROCEEDINGS IN ANNULMENT
(Art. 947 and following of the C.p.c.)
AFFIDAVIT AND NOTICE OF PRESENTATION

The Plaintiff states that:

1. The Plaintiff (Union) is certified under the Labour Code in order to represent the typographers in the employ of the impleaded party Postmedia and The Gazette (Employer), and constitutes an employee association, such as it appears from the certificate issued under section 60 of the C.p.c. **(P-1)**;

Preamble

2. The Union and the Employer have been bound in the past by successive collective agreements governing the work conditions of the typographers represented by the Union ;

3. They have also been bound, and are still bound, by tripartite Civil Agreements (1982 et 1987) between the Union, the Employer and each of the employees that were in the employ of The Gazette;

4. These agreements guaranteed, for the employees that were in the employ of the Employer at the time of the signing of the agreements, that their regular employment would be maintained in the composing room, until each of them reached the age of 65;

5. Moreover, the 1987 Agreement provided in its article XI that each of the parties agreed to transmit to the other upon request its best final offers within the framework of the negotiation of a new collective agreement; the idea was to incorporate into the agreement a mandatory arbitration scheme in case the negotiations between the Employer and the Union for the renewal of the collective agreement failed;

6. Once the decision of the arbitrator was rendered, it would be final and binding for the parties and constitute their collective agreement;

7. The guarantees provided in the 1987 Agreement aimed to ensure the perennial nature of the Employer's contractual obligations (employment security and the maintaining of the standard of life);

8. The original guarantees of 1982 as well as the additional guarantees of 1987 were obtained following fundamental concessions with regards to the provisions

of the collective agreement concerning the Union's exclusive jurisdiction over the tasks carried out by its members;

9. The Employer obtained the right to introduce technological changes that it desired to make and the employees represented by the Union obtained guaranteed job security and the maintaining of the standard of life until the age of 65; on the date of the signing of the tripartite agreements of 1982, there were 200 typographers in the employ of the employer whereas in 1987, at the time of the signing of the new tripartite agreements, there were 132 left;

10. On May 17th 1993, whereas there were only 70 some employees left in the composing room, all of whom being signatories to the Agreements of 1982 and 1987, the Employer declared the first lock-out concerning the 11 employees that are implicated in the present legal proceedings;

11. The ruling of the arbitrator seized of the mandatory arbitration was rendered on August 18th, 1994;

12. At the expiry of the 1993-1996 collective agreement, the Employer, who had still not called back to work the employees in its employ in the fall of 1994, decided to impose upon them on June 3rd 1996 a second lock-out;

13. At the expiry of the 1993-1996 collective agreement, the Employer received from the Union a request for the parties to exchange their best final offers in view of a mandatory arbitration within the meaning of the Agreement in 1987;

14. The Employer refused to proceed to such an exchange which led to the filing of two (2) disagreements under both the expired collective agreement and the 1982 and 1987 Agreements;

The right to mandatory arbitration as well as damages

15. Following a hearing on the disagreements in front of arbitrator Sylvestre, he rendered his arbitration decision on February 5th, 1988;

16. In his decision, arbitrator Sylvestre ordered among others the exchange of the best final offers and the submission to mandatory arbitration for the purposes of imposing a collective agreement as well the payment of salary and benefits as provided for in the collective agreement for the whole duration of the lock-out ;

17. This arbitration decision was annulled in judicial review by the Superior Court on October 30th 1998;

18. This Superior Court judgment was the subject of an appeal at the Quebec Court of Appeal which rendered judgment **(P-2)** on December 15th 1999, judgment by which the Court of Appeal ordered the following:

> *« Therefore, I would ALLOW the appeal in part, ORDER the employer to submit to the process of exchanging best final offers within the 30 days following this decision, QUASH the two orders on payment and reimbursement of*

> *the salaries and benefits lost because of the lock-out and RETURN the file to the arbitrator, who will determine whether any damages should be awarded the 11 employees as a result of the employer's failure to respect article Xi of the 1987 agreement. »*;
> (Underlined by us.)

The arbitration of the damages

19. Following this judgment by the Court of Appeal, the hearings began again in front of Arbitrator Sylvestre *for him to determine, if such is the case, the damages that can be awarded to the 11 employees as a result of the Employer's failure to respect article XI in the 1987 agreement;*

20. As of March 18th 2005, Arbitrator Sylvestre rendered its decision **(P-3)**; this decision was rendered following the referral of the Court of Appeal and according to the powers provided by the Code of civil procedure in sections 940 and following;

21. In his decision, the arbitrator rejects the entire request for damages filed by the employees stating that there was no fault other than the failure to respect section XI of the 1987 Agreement, whereas the Court of Appeal specifically referred to this fault;

22. As such, five years after the Court of Appeal judgment, the arbitrator disregards the judgment of the Court of Appeal and refuses to exercise his mandate;

The annulment of the arbitration (P-3) by the Court of Appeal

23. As of June 14th 2005, the plaintiffs have filed a motion for annulment for the main reason that the arbitrator had refused to apply the Court of Appeal order provided in its decision of December 15th 1999 **(P-2);**

24. After the Superior Court refused to annul the arbitration decision (P-3), the Court of Appeal rendered judgment on March 17th, 2008 **(P-4)**, cancelling this decision by rendering the following rulings:

> *« **[4] GRANTS** t he appeal with costs against the respondent, The Gazette, A Division of Southam Inc., except for the costs relative to the books of authorities;*
>
> ***[5] QUASHES** the Superior Court judgment; and, proceeding to render the judgment that should have been rendered:*
>
> > ***GRANTS** the petitioners' motion for annulment of arbitrator André Sylvestre's arbitration award of March 18th 2005 with costs against the impleaded party, The Gazette, a division of Southam Inc.;*
> >
> > ***ORDERS** that the case be remanded to arbitrator Sylvestre so that he may comply with the Court of Appeal judgments of December 15, 1999 and August 6, 2003.*

25. The reasons of the Court, given by Justice Pelletier, are particularly clear as to the arbitrator's mandate. He must, among other things, determine the period during which damages must be awarded taking into account the following question (provided for in paragraph 30, a) :

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

The new arbitration decision concerning the damages

26. The arbitrator, after having started the hearing of the dispute again, rendered on January 21st 2009, a new arbitration decision **(P-5)** which determines the period during which the employees have the right to damages;

27. This decision provides that :

> *« [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. (...). »*

The new arbitration decision is illegal in that it does not respect the decisions of the Court of Appeal rendered on December 15th 1999, August 6th 2003 and March 17th 2008

28. The plaintiffs are requesting the annulment of the arbitration decision for the main reason that it does not respect the decisions of the Court of Appeal rendered on December 15th 1999, August 6th 2003 and March 17th 2008, the last one aiming to specify the scope of the previous decisions;

29. The arbitrator, after having stated the facts that were relevant according to him, analyzes the questions that were submitted by the parties, which are the Union and the 11 typographers, two of which being M. DiPaolo and Ms. Blondin who represent themselves personally;

30. The question that the arbitrator had to rule on was not related to the evaluation of the employees' behaviour but the fault of the employer, such as it was underlined by the Court of Appeal in its decision **P-4:**

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

breach had had that effect in reality and, if so, determine the appropriate amount of compensation. »;

31. His analysis of the question begins on paragraph 52 and ends on paragraph 56 of the decision;

32. The only paragraph that deals with the fault in question is paragraph 56, the previous paragraphs constitute an evaluation by the arbitrator of certain facts, an evaluation that is tainted by partiality against the typographers;

33. The arbitrator begins by underlining that the Union and the plaintiffs have *acted in an intransigent manner, and this, since arbitrator Leboeuf was seized of the file* :

> « [52] *The whole of the evidence showed that if 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, Me 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.* »

34. Which intransigence is at issue and on whose part?

35. It is true that the employer could not come to an agreement with the Union in 1993 and that he triggered a lock-out to force the Union and its members into accepting its position. But we have to remember that the Employer, at that moment, was putting into question the perennial nature of the 1982 and 1987 agreements by demanding, among other things, that mandatory arbitration on the collective agreement become optional in the event of a disagreement concerning the renewal of the collective agreement;

36. However, the Court of Appeal had decided that these agreements and the rights that are provided within have to be considered as being acquired rights for the employees, since its decision on December 15th 1999:

> « *These agreements are not individual work contracts. They are tripartite contracts that exist only through the will of the signatories even if their incorporation info the collective agreement may have extended their effects to an employée who had not signed them[21]. These agreements deal with vested rights, collectively speaking, and cannot be changed by the union and the employer without the consent of the employees. Otherwise, the duration of the agreements desired by all*

the parties would be repudiated and the employees would then have signed a fool's agreement. »
(Underlined by us)

37. As we can see, the Court of Appeal decided that these agreements could not be amended by the decision of Arbitrator Leboeuf who, by his arbitration decision, illegally amended the collective agreement by rendering the arbitration of the agreement optional;

38. The Arbitrator avoids mentioning that before the other arbitrator, the employer contested his competence to rule on the dispute as well as the legality of the obligatory arbitration clause;

39. Arbitrator Leboeuf rendered three decisions on questions relating to his competence and to the legality of the process which are the September 28th 1993 **(P-6)**, the November 18th 1993 **(P-7)** and January 7th 1994 **(P-8)** decisions;

40. The Arbitrator continues his tally of what he calls a *short truce* on the part of the Union and the employees underlining in paragraph 53 that :

> *« [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 Me Claude H. Foisy, who ruled in the union's favour on April 25, 1996. ».*

41. There as well, the arbitrator presents the current file as though the Union and its members were intransigent whereas the employer, despite the fact that the arbitrator had accepted its position as being the collective convention, paid his employees without making them work when all they wanted was to provide work in exchange for the payment of the salary;

42. Finally, in paragraph 55 of his decision, the arbitrator underlines the entanglements concerning the period after the one for which he had to decide if he should award damages;

43. Incidentally, the employees have had, until this day, no compensation for the period after January 21st 2000;

The hypothesis retained by the arbitrator to determine the period of compensation

44. After having tried to show the intransigence of the employees, the arbitrator finally comes to the determination of the period during which the employees would have the right to compensation by choosing one of the hypotheses proposed by employer's attorneys. He expresses himself in the following manner:

> *« [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 Me 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 »*;

45. As such, the arbitrator, relying in all appearance on his previous comments, confirms that the Union *was not ready to exchange best final offers* and they *preferred to choose arbitration of their dispute by a grievance arbitrator in order to have their rights adjudicated*;

46. The Court of Appeal, in its decision on March 17th 2008 **(P-4)** ment ions at paragraph 25 that:

> « [25] *Unfortunately, and by his own admission, the arbitrator lost the thread of the reasoning that, in December 1999, had led the Court to remand the case to him for a ruling on the matter. In all likelihood, Mtre. Sylvestre was disconcerted by the fact that, at that time, the Court had set aside his order to pay the wages and benefits under the 1987 version of the tripartite agreement.* (...). ».

47. The Court adds in paragraphs 26, 27 and 28 that:

> « [26] *Faced with what he considered an enigma, the arbitrator began looking for a separate fault that the employer might have committed during the lock-out period*[1] *:*
>
> > *[103] In other words, based on what the arbitrator understands from its directives, the Court of Appeal conferred on him the power to award damages if he found that the employer had engaged in the abusive exercise of its right to lock-out. However, apart from the extremely long duration of the lock-out, the arbitrator was unable to find evidence of a specific tie after June 3, 1996 when the employer should have terminated the lock-out. In standing firm until January 21, 2000, by its refusal to exchange its last final best offers, it did not demonstrate clemency toward its 11 typographers. But, as confirmed by Messrs. Di Paolo and Thomson, the typographers were*

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> *so confident of being right that they had no intention of making any concessions. .*
>
> [27] *Not having found one, he concluded as follows*[2] *:*
>
> *[104] Given the picture as a whole, the arbitrator cannot find, on the basis of the evidence, that the employer unduly prolonged the lock-out. Therefore, he cannot order it to pay the damages claimed by the 11 complainants for the period from June 3, 1996 to January 21, 2000.*
>
> [28] *With respect, I believe that there was a misunderstanding and that the arbitrator's confusion led him to distort the dispute of which he was seized.*
>
> [29] *In finding that a lock-out could not be unduly continued, the arbitrator did not answer the question asked by the Court in its 1999 judgment. In so doing, he did not exercise the jurisdiction ascribed to him.*»;

48. The plaintiffs submit here that once again here the arbitrator distorted the dispute he was seized of by trying via another way to find another fault, this time on the part of the Union and the employees, in order to avoid determining correctly the period of compensation;

49. Indeed, the Arbitrator criticizes the Union for not having been ready to exchange their best final offers;

50. However, this was neither the question nor the evidence filed in front of the arbitrator, evidence on the basis of which the Court of Appeal rendered its decisions;

51. In its decision dated December 15th 1999 **(P-2)**, the Court of Appeal, on page 30 states that:

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

52. The evidence is to the effect that the Union transmitted a notice on April 30th 1996 to the employer so that it proceeds to the exchange of the offers. However, the employer refused by a letter dated May 3rd 1996 by invoking that he did not have any obligation in this regard since the arbitration had become optional;

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53. The question is not to know if the Union had or did not have a draft of final offers since the employer refused to proceed by advising the Union. Incidentally, we note paragraph 24 of the Court of Appeal decision **(P-4) :**

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

54. The arbitrator opted for the employer's hypothesis by invoking that :

> « [56] (...)*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.* (...). » ;

55. There is a fundamental mistake on the part of the arbitrator concerning the notions that are at issue which were a part of his mandate. Indeed, considering the categorical refusal of the employer to participate in the process of arbitration, the only recourse the Union had was in accordance with the very text of the 1982 and 1987 agreements to proceed to the filing of the disagreements as though it was a grievance in order to obtain from the arbitrator an order for the employer to submit to the process of exchanging the best offers in accordance with the Agreements;

56. Incidentally, the Court of Appeal analyzed this question in order to conclude that the disagreement requesting an order to force the employer to submit to the process had been duly filed in accordance with the Agreements; the Court reminds the relevant texts on page 18 of its decision from December 15th 1999 :

> « 1) *The grievance of June 4th 1996 provided that:*
> *The present grievance is filed in under the collective labour agreement and each of the tripartites agreements concluded on or about November 12, 1982 and March 5th, 1987.*
>
> *2) The 1982 and 1987 tripartite agreements stipulated in the clause on grievance procedures that:*
>
> *In case of a disagreement over the interpretation, application and/or alleged violation of this agreement, the matter will be deemed a grievance and settled in the manner provided for in the grievance and arbitration procedures of the collective agreement. (emphasis added)*

57. The grievance that had been allowed by the arbitrator in February 1998 and maintained for the process by the Court of Appeal included the demand that the arbitrator issue an order for the employer to submit to the exchange process (see paragraphs 8 and 9 in **P-5**);

58. It is incidentally this demand that was reiterated by the Court of Appeal. The ruling from the Court only concerned the employer and not the Union:

> *« order the employer to submit to the process of exchanging the best final offers within 30 days of the present decision ».*

59. The exchange finally took place, after this ruling, on January 21st 2000;

60. Considering these events and the decisions of the Court of Appeal, the decision by the arbitrator to attribute to the Union the fault of, when faced with an interpretation of the Agreements, using the recourse provided by these Agreements in order to have them be respected, cannot be justified and is contrary to his mandate which is to make a determination within the context of the respect of the process and not its violation and the recourse that it led to;

The duration of the arbitration process

61. The evidence showed that the lock-out began on June 3rd 1996, that the Employer accepted to respect the order by the Court of Appeal to participate in the mandatory arbitration on January 21st 2000, and that the arbitration tribunal seized of the dispute on the renewal of the collective agreement pronounced its decision on June 4th 2001 and, finally, that the lock-out ended by the homologation of this decision in May 2002, homologation which allowed the return to work for the employees;

62. As we have seen, the arbitrator should have taken for granted that the process had been engaged without contestation in May 1996;

63. In such a context, there can only be two possibilities: after the exchange the parties agree or the arbitration proceeds for the imposition of a collective agreement;

64. The evidence revealed that in 1990 after the exchange of the offers, the parties settled the collective agreement in the days that followed;

65. When there was an arbitration in 1993 in front of Leboeuf, he was seized of various objections or contestations as to his competence or the legality of the process; he rendered his last decision on these questions on January 7th 1994 **(P-8)** by mentioning on page 6 that:

> *« Consequently, we are of the view that the argument raised by the employer should not be retained and that we should now examine the merits of the "best final offers" of the parties».*

66. This evaluation took place between January 7th and August 18th 1994, which is the date of the decision imposing the collective agreement **(P-9) ;**

67. The arbitrator chose this arbitration as a point of reference for the duration of the process. If this had to be the decision, then the process took from January 7th to August 18th, which is a little over 7 months;

68. The only possible durations according to the evidence were a few days if there was an agreement or, failing which, a little over 7 months;

69. In respecting his mandate, the arbitrator could not have arrived to any other conclusions. This is not what he has done and he has, as such, once again refused to accomplish the mandate that the Court of Appeal had given him a second time;

70. The plaintiffs submit that, as decided by the Court in its decision dated March 17th 2008 **(P-4)** the decision falls under the fourth paragraph of section 946 of the *Code of civil procedure*, which is applicable in a matter of annulment by the referral that the legislator provides for in section 947.2 C.p.c.;

The Pension Plan issue

71. The arbitrator decides that the demand related to the Pension Plan is not admissible; he analyses this question in paragraphs 47 and 48 of his decision (**P-5**) ;

72. We have to relocate this issue in the context of the debate on the nature of the damages that can be claimed by the plaintiffs;

73. Upon the return of the file in front of the arbitrator after the hearing of the Court of Appeal in 1999, the parties had convened to file in the file a summary account of their claims;

74. The Union and the plaintiffs filed these accounts on March 15th 2000; the arbitrator, in its decision dated October 11th 2000 **(P-10)**, refers to them on page 30 :

> *« (...)*
> *5. The employees claim;*
> *a) the equivalent of the salary lost between May 3rd 1996 and January 21st 2000*
> *b) the benefits related to employment (such as the pension plan, collective insurance plan, etc.) and this, on May 3rd 1996 and January 21st 2000;.*
>
> *6. The employees also claim compensation for other monetary damages such as : (...) » ;*

75. The plaintiffs were thereafter represented by another attorney who claimed other damages, but maintains the one related to the pension plan;

76. The arbitrator decides that the damages can only concern the damages related to salary and other benefits provided for by the collective agreement;

77. During a hearing referred to by the arbitrator in his reasons (par. 47 and 48, decision **P-5**), there is an agreement on the capital due to the employees as compensation;

78. When the hearings in July 2008 resumed, prior to the contested decision, the attorney for the plaintiffs requested, as it had been done before, that an order be rendered for the applicable period to the effect that the Employer proceed to give the employees recognition for the purposes of the application of the pension plan for this period as being service to be credited and used to accumulate rights in the Pension Plan. The rehabilitation of the rights of the employees in the Pension Plan was not a sum to be paid to the employees and cannot be considered as being part of the capital mentioned in paragraph 77; the pension plan is integrated into section 18 of the collective agreement **(Extract, P-12)** ;

79. This claim is provided for in the decision **(P-10)** and the judgment of the Court of Appeal on August 6th 2003 **(P-11);**

80. Consequently, the arbitrator refused to apply his own decision and especially the mandate that was confirmed to him by the Court of Appeal judgment dated March 17th 2008 **(P-4)** ;

The question of the employer's claim for the salary paid from February 5th to October 30th 1998

81. The employer filed a suit against the 11 plaintiffs to claim the reimbursement of the salary paid after the February 5th 1998 arbitration decision which allowed the employees whole claim;

82. The employer had stopped paying the salary on October 30th 1998, date on which the Superior Court had annulled this decision and, by its claim, contends that the employees had no right to their salary and must reimburse it;

83. This claim was the subject of a judgment by the Superior Court on a motion to dismiss based on competence; the Court transferred the file to the arbitrator for him to decide **(P-13)**;

84. The arbitrator seized of this claim decides to not adjudicate (par. 59 and 60, decision **(P-5);**

85. The plaintiffs submit that this claim must now be rejected, since the period for which the salary was paid coincides with that during which the arbitrator should have ordered compensation including the salary;

The disagreement of July 14th 2000

86. The arbitrator is also seized of a disagreement **(P-14)** filed by the Union and the plaintiffs in order to obtain compensation for salary and benefits lost following the filing by the employer of a better offer on January 21st 2000;

The referral of the file to another arbitrator

87. The plaintiffs submit that, for what has to be done following the annulment of the contested decision, the files should be sent in front of another arbitrator ;

88. Indeed, this is the second time that the arbitrator refuses to respect the mandate given by the Court of appeal and the plaintiffs submit that it is no longer possible for this arbitrator to adjudicate; the respect of the rule that justice must not only be served, but must appear to have been demands that a new arbitrator be put in charge;

89. Moreover, since the contested decision, the two individual impleaded plaintiffs sued the arbitrator for contempt of court in front of the Superior Court which rendered judgment, this case is the subject of a recourse in front of the Court of Appeal **(P-15)**;

90. In these circumstances, the plaintiffs submit that the arbitrator cannot act with the serenity that is required and he must be relieved of these files;

For these reasons, the plaintiff requests that this present Court:

Allow the motion for annulment;

Annul the arbitration decision of arbitrator André Sylvestre dated January 21st 2009 **(P-5)**;

Declare that the period between June 3rd 1996 and January 21st 2000 can only be reduced, for the purposes of compensation, by 7 months and that all the rest of this period must be the subject of payment of salaries and the rehabilitation of the rights of the employees of the pension plan;

Declare that the employer's claim is rejected;

Order that the file be returned to an arbitrator chosen by the parties or failing which to be named under sections 941 and 942 C.p.c. so that he may award damages accordingly;

Order that the file concerning the disagreement of July 14th 2000 be returned to an arbitrator chosen by the parties or failing which to be named under sections 941 and 942 C.p.c.;

Render any other order that it will deem appropriate under the circumstances;

The whole with fees awarded against the parties that will contest.

Montréal, April 16th 2009

MELANÇON, MARCEAU, GRENIER ET SCIORTINO, s.e.n.c.
Attorneys for the plaintiffs

TAB 12

[TRANSLATION]

C A N A D A

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

SUPERIOR COURT

No.: 500-17-049725-099

LA SECTION LOCALE 145 DU SYNDICAT CANADIEN DES COMMUNICATIONS, DE L'ÉNERGIE ET DU PAPIER,

and

ROBERT DAVIES

UMED GOHIL

JEAN-PIERRE MARTIN

LESLIE STOCKWELL

MARC-ANDRÉ TREMBLAY

JOSEPH BRAZEAU

HORACE HOLLOWAY

PIERRE REBETEZ

MICHAEL THOMSON

Plaintiffs

v.

M^tre^ ANDRÉ SYLVESTRE,

Defendant

and

THE GAZETTE, A DIVISION OF CANWEST PUBLISHING INC.

Mise en cause of the First Part

and

ERIBERTO DI PAOLO

RITA BLONDIN

Mis en Cause of the Second Part

CONTESTATION

OF THE MISE EN CAUSE OF THE FIRST PART

THE GAZETTE, A DIVISION OF CANWEST PUBLISHING INC.

IN RESPONSE TO THE ALLEGATIONS CONTAINED IN THE MOTION IN ANNULMENT, THE MISE EN CAUSE OF THE FIRST PART THE GAZETTE, A DIVISION OF CANWEST PUBLISHING INC., (HEREINAFTER "THE GAZETTE") HEREBY AFFIRMS THE FOLLOWING:

1. It admits the allegations contained in paragraphs 1 and 2 of the Motion in Annulment; however, the parties have not only been bound by collective agreements "in the past"; there is currently a collective agreement in force with the Plaintiff La Section locale 145 du Syndicat canadien des communications de l'énergie et du papier (hereinafter the "Union");

2. It denies the allegations as drafted in paragraph 3 of the Motion in Annulment, adding that the Civil Agreements do not apply when a collective agreement is in force;

3. It denies the allegations as drafted in paragraph 4 of the Motion in Annulment, and adds that the guarantee provided in the 1982 and 1987 agreements is a guarantee only against the loss of employment due to technological changes, the whole as appears from a copy of the said 1982 agreements filed in support hereof as Exhibit **M-1** and from a copy of the 1987 agreements filed in support hereof as Exhibit **M-2**;

4. At paragraph 5 of the Motion in Annulment, it takes note of the Plaintiffs' admission that Section XI of the 1987 agreements in their original form were created to provide for arbitration "[TRANSLATION] should negotiations to renew the collective agreement break down between the employer and the Union" and adds that the Plaintiffs and the Mis en Cause of the Second Part Mr. Eriberto Di Paolo and Ms. Rita Blondin (hereinafter referred to as "Mis en Cause Di Paolo and Blondin" or the "Mis en Cause") suddenly requested, on April 30, 1996, the arbitration of best and final offers without even making any kind of proposal to renew the collective agreement that was still in force at the time;

5. At paragraphs 6 and 7 of the Motion in Annulment, it refers to the 1987 agreements and their subsequent interpretation by various arbitrators and tribunals, and adds that the Union has already, at the very least, recognized the necessity of duly signing a new collective agreement in 1994 and of homologating any arbitration award in 2001 after the arbitration of best and final offers;

6. It denies the allegations contained in paragraphs 8 and 9 of the Motion in Annulment, save and except the number of typographers working for The Gazette in 1982 and 1987 and, for the rest, refers to the 1982 and 1987 agreements, **M-1** and **M-2**;

7. It admits the allegations contained in paragraph 10 of the Motion in Annulment, but adds that The Gazette declared a lock-out on May 17, 1993 because of a total breakdown in the collective bargaining talks that began in February of 1993 and unfolded over the

course of approximately ten (10) meetings, including conciliation meetings at the Ministry of Labour;

8. It admits the allegations contained in paragraph 11 of the Motion in Annulment, and adds that there were at least fifteen (15) days of hearings in front of Arbitrator M^tre^ Raymond Leboeuf between September 1993 and July 1994, at the end of which process Arbitrator Leboeuf, in an arbitration award dated August 18, 1994, notably abolished the compulsory nature of the best and final offer process at a party's request and made it optional, the whole as appears from a copy of Arbitrator Leboeuf's arbitration award already filed by the Plaintiffs as Exhibit **P-9** and that the Union fully endorsed on behalf of the Plaintiffs and the Mis en Cause the changes made by Arbitrator Leboeuf by signing a new collective agreement on October 3, 1994 with The Gazette, the whole as appears from a copy of the 1993-1996 collective agreement and from the agreements reached in August and October 1994 filed in support hereof *en liasse* as Exhibit **M-3**;

9. It denies the allegations as drafted in paragraph 12 of the Motion in Annulment, and adds that The Gazette had to declare a lock-out on June 3, 1996 because of the impossibility of reaching an agreement with the Plaintiffs and the Mis en Cause Di Paolo and Blondin on future working conditions and because of the total breakdown of collective bargaining;

10. It denies the allegations as drafted in paragraph 13 of the Motion in Annulment, and adds that the Plaintiffs and the Mis en Cause sent The Gazette a request on April 30, 1996 (while the 1993-1996 collective agreement was still in force) that invoked both the collective agreement and the 1987 agreements **M-2** before even having submitted any kind of proposal to renew the collective agreement, the whole as appears from a copy the April 30, 1996 request filed in support hereof as Exhibit **M-4**;

11. It admits the allegations contained in paragraph 14 of the Motion in Annulment, but adds that The Gazette replied to the Union on May 3, 1996 that the best and final offer process was now optional pursuant to both the P-9 arbitration award of Arbitrator Leboeuf and the 1993-1996 collective agreement M-3 freely signed by The Gazette and the Union, the whole as appears from a copy of the May 3, 1996 letter filed in support hereof as Exhibit **M-5,** and that the Union initially challenged The Gazette's position by filing a grievance on May 8, 1996 and the Plaintiffs subsequently submitted a dispute on June 4, 1996, as appears from a copy of the said grievance and dispute filed *en liasse* in support hereof as Exhibit **M-6**;

12. It denies the allegations as drafted in paragraph 15 of the Motion in Annulment, and adds that after six (6) days of hearings between December 5, 1996 and July 9, 1997, Arbitrator M^tre^ André Sylvestre (hereinafter "Arbitrator Sylvestre") rendered an arbitration award on February 5, 1998 in which he dismissed the May 8, 1996 grievance but allowed the June 4, 1996 dispute, the whole as appears from a copy of the conclusions of the February 5, 1998 award filed in support hereof as Exhibit **M-7**;

13. At paragraph 16 of the Motion in Annulment, it refers to the conclusions of the February 5, 1998 award filed in support hereof as Exhibit **M-7,** and denies anything that does not comply therewith;

14. It admits the allegations contained in paragraph 17 of the Motion in Annulment;

15. It admits the allegations contained in paragraph 18 of the Motion in Annulment, and refers to the Court of Appeal judgment already filed by the Applicants as Exhibit **P-2**;

16. It denies the allegations as drafted in paragraph 19 of the Motion in Annulment, and adds that there was a case management conference before Arbitrator Sylvestre on February 25, 2000 and that hearings were held to argue certain legal issues on June 9 and 13, 2000 and it refers, with regard to the representations and commitments made by the parties involved, to the stenographic notes of the case management conference of February 25, 2000 filed in support hereof as Exhibit **M-8**, to Arbitrator Sylvestre's October 11, 2000 award on these legal issues already filed by Plaintiffs as Exhibit **P-10**, as well as to the Court of Appeal judgment upholding the arbitrator's award already filed as Exhibit **P-11**;

17. At paragraph 20 of the Motion in Annulment, it admits that Arbitrator Sylvestre rendered an award dated March 18, 2005 and adds that this award was rendered after three (3) days of hearings on August 24 and 25, 2004 and October 14, 2004;

18. It denies the allegations contained in paragraphs 21 and 22 of the Motion in Annulment, and adds that the Plaintiffs and the Mis en Cause have themselves, on various occasions in the past and during the most recent hearings before Arbitrator Sylvestre, taken positions which disregard the Court of Appeal's judgment;

19. At paragraph 23 of the Motion in Annulment, it admits that the Plaintiffs filed a Motion in Annulment against the award of March 17, 2005, but adds that this fact is irrelevant to this case;

20. At paragraph 24 of the Motion in Annulment, it refers to the Court of Appeal judgment dated March 17, 2008, already filed as Exhibit **P-4**;

21. At paragraph 25 of the Motion in Annulment, it refers to the March 17, 2008 judgment, Exhibit **P-4**, and adds that Arbitrator Sylvestre has effectively answered this question in his January 21, 2009 award already filed as Exhibit **P-5;** it adds that, contrary to what the Plaintiffs allege, the Honourable Justice Pelletier of the Court of Appeal never concluded that "[TRANSLATION] damages must be awarded";

22. It admits the allegations contained in paragraphs 26 and 27 of the Motion in Annulment and prays act of the admission contained in paragraph 26 that the Arbitrator has determined the period of time for which the employees are entitled to damages;

23. It denies the allegations contained in paragraph 28 of the Motion in Annulment;

24. At paragraph 29 of the Motion in Annulment, it refers to the arbitration award dated January 21, 2009 already filed as Exhibit **P-5**;

25. It denies the allegations contained in paragraph 30 of the Motion in Annulment;

26. At paragraphs 31, 32, 33, 34 and 35 of the Motion in Annulment, it denies that the Arbitrator's assessment is biased and, as for the rest, it refers to the arbitration award dated January 21, 2009 already filed as Exhibit **P-5,** which must be read in its entirety, and denies anything that does not comply therewith;

27. At paragraphs 36 and 37 of the Motion, it refers to the Court of Appeal judgment dated December 15, 1999 and denies anything that does not comply therewith;

28. It denies the allegations contained in paragraph 38 of the Motion in Annulment, and adds that Arbitrator Sylvestre has duly and faithfully fulfilled his mandate;

29. At paragraph 39 of the Motion in Annulment, it admits that Arbitrator Lebœuf rendered awards P-6, P-7 and P-8 ruling on preliminary objections, issues of law and questions of jurisdiction, and adds that this is part of the mandate of the arbitrator of best and final offers in the context of the normal process;

30. As for the allegations set forth in paragraphs 40, 41 and 42 of the Motion in Annulment, it refers to the January 21, 2009 award, Exhibit **P-5**, and denies anything that does not comply therewith;

31. It denies the allegations set forth in paragraph 43 of the Motion in Annulment, adding that the Plaintiffs have been receiving their full wages and benefits since early May of 2002, that they filed a dispute on July 14, 2000 claiming wages and benefits for the period beginning January 21, 2000 and ending June 5, 2001, and that they filed a grievance for the period beginning June 6, 2001 and ending May 12, 2002, which grievance was dismissed by Arbitrator Marc Gravel, as appears at greater length at pages 9 and 10 of the arbitration award **P-5**;

32. At paragraphs 44 and 45 of the Motion in Annulment, it refers to the January 21, 2009 award, Exhibit **P-5**, and denies anything that does not comply therewith;

33. At paragraphs 46 and 47 of the Motion in Annulment, it refers to the Court of Appeal judgement dated March 17, 2008, and denies anything that does not comply therewith;

34. It denies the allegations set forth in paragraph 48 of the Motion in Annulment, and adds that Arbitrator Sylvestre duly and faithfully fulfilled his mandate;

35. It denies the allegations set forth in paragraph 49 of the Motion in Annulment, adding that Arbitrator Sylvestre simply concluded, as a question of fact, that neither the Plaintiffs nor the Mis en Cause were ready to effectively proceed with the exchange of best and final offers in May of 1996, the whole as appears at greater length from the January 21, 2009 award;

36. It denies the allegations set forth in paragraph 50 of the Motion in Annulment, adding that ample evidence was adduced before Arbitrator Sylvestre that neither the Plaintiffs nor the Mis en Cause were ready to proceed with the exchange of best and final offers in the spring of 1996, and were therefore not ready to proceed with the arbitration process at issue;

37. At paragraph 51 of the Motion in Annulment, it refers to the Court of Appeal judgement **P-2**, and denies anything that does not comply therewith;

38. At paragraph 52 of the Motion in Annulment, it reiterates its allegations set forth in paragraphs 10 and 11 of this Contestation;

39. At paragraph 53 of the Motion in Annulment, it refers to the Court of Appeal judgement **P-4**, and denies anything that does not strictly comply therewith;

40. At paragraph 54 of the Motion in Annulment, it refers to the January 21, 2009 award, Exhibit **P-5**, adding that the obvious choice made by the Union and the Plaintiffs to submit a grievance and a dispute to arbitration entails an obvious and material impact on the length of the collective agreement renewal process by means of arbitration of the best and final offers;

41. It denies the allegations set forth in paragraph 55 of the Motion in Annulment, adding that Arbitrator Sylvestre duly and faithfully fulfilled his mandate;

42. At paragraphs 56, 57 and 58 of the Motion in Annulment, it refers to the Court of Appeal judgement **P-2** and denies anything that does not comply therewith;

43. It admits the allegations set forth in paragraph 59 of the Motion in Annulment, adding that the exchange of best and final offers only took place on January 21, 2000 owing to a second order issued by the Court of Appeal on January 13, 2000;

44. It denies the allegations set forth in paragraph 60 of the Motion in Annulment, adding that Arbitrator Sylvestre in no way attributed a fault to the Union but simply reported the facts relevant to the mandate assigned to him, namely to determine the "[TRANSLATION] *actual*" (in French, the Court of Appeal said "dans la réalité") length of the best and final offers arbitration process had the fault identified by the Court of Appeal not occurred; in that regard, the conduct and choices of the Plaintiffs are relevant;

45. It denies the allegations set forth in paragraphs 61, 62 and 63 of the Motion in Annulment, adding that it was not the homologation that allowed the employees to return to work on May 12, 2002, but rather the waiver of the rights to appeal, the Honourable Justice Frappier having explicitly refused to declare the homologation judgement dated May 2, 2002 enforceable notwithstanding appeal owing to the aggressive conduct of the Plaintiffs and the Mis en Cause, as appears from a copy of the Superior Court judgement filed in support hereof at Exhibit **M-9**;

46. It admits the allegations set forth in paragraph 64 of the Motion in Annulment, adding that no best and final offers arbitration took place in 1990 because the Union had accepted the best and final offer submitted by The Gazette, which was not the case in 1993 or during the process that took place on January 21, 2000, and this owing to the obvious intransigence of the Plaintiffs and the Mis en Cause;

47. At paragraphs 65, 66, 67 and 68 of the Motion in Annulment, it refers to the January 21, 2009 award, Exhibit **P-5**, and denies anything that does not comply therewith, adding that the Plaintiffs or the Mis en Cause never raised these arguments before Arbitrator Sylvestre;

48. It denies the allegations set forth in paragraph 69 of the Motion in Annulment;

49. It denies the allegations set forth in paragraph 70 of the Motion in Annulment, adding that Arbitrator Sylvestre duly and faithfully fulfilled his mandate;

50. At paragraphs 71, 72, 73, 74, 75 and 76 of the Motion in Annulment, it refers to the January 21, 2009 award, P-5, and denies anything that does not comply therewith;

51. It denies the allegations set forth in paragraph 77 of the Motion in Annulment, adding that during the hearing of October 19, 2000 before Arbitrator Sylvestre there was an admission between the parties as to the total amount of wages and benefits that would have been earned had the employees worked during the period beginning June 4, 1996 and ending January 21, 2000, as appears from the stenographic notes of the hearing filed in support hereof as Exhibit **M-10**;

52. It denies the allegations as worded in paragraph 78 of the Motion in Annulment, adding that, on the one hand, the admission of the parties at the October 19, 2000 hearing dealt both with wages and benefits, including the retirement plan and, on the other hand, that the Union and the Plaintiffs raised new arguments in paragraph 78 regarding the scope of the October 19, 2000 admission, which arguments were never submitted before Arbitrator Sylvestre and would, at any rate, run contrary to the Court of Appeal decisions dated December 15, 1999, August 6, 2003 and March 17, 2008, which limit the Plaintiffs' claims to damages for wages and benefits lost during the specified period ending January 21, 2000 and do not provide for the possibility of retroactively crediting years of employment for the purposes of a retirement plan;

53. It denies the allegations set forth in paragraphs 79 and 80 of the Motion in Annulment, adding that Arbitrator Sylvestre duly and faithfully fulfilled his mandate as prescribed by the Court of Appeal;

54. It admits the allegations set forth in paragraph 81 of the Motion in Annulment, but adds that The Gazette is also claiming reimbursement of the benefits offered for the same period;

55. It admits the allegations set forth in paragraph 82 of the Motion in Annulment;

56. At paragraphs 83 and 84 of the Motion in Annulment, it refers to the judgment of the Superior Court, Exhibit **P-13,** and the January 21, 2009 award, Exhibit **P-5,** and adds that Arbitrator Sylvestre did not refuse to pronounce himself, but rather decided to suspend his decision;

57. It denies the allegations set forth in paragraph 85 of the Motion in Annulment;

58. It denies the allegations as worded in paragraph 86 of the Motion in Annulment, adding that the **P-14** dispute constitutes a distinct dispute and a completely different case from the dispute that gave rise to the January 21, 2009 award, Exhibit **P-5**;

59. It denies the allegations set forth in paragraphs 87 and 88 of the Motion in Annulment;

60. It admits the allegations set forth in paragraph 89 of the Motion in Annulment, adding that this involves Mis en Cause Di Paolo and Blondin;

61. It denies the allegations set forth in paragraph 90 of the Motion in Annulment;

AND NOW, TO RE-ESTABLISH THE FACTS, IT AFFIRMS THE FOLLOWING:

(a) Labour dispute and best and final offers arbitration before Arbitrator Raymond Lebœuf

62. On May 17, 1993, The Gazette ordered a lock-out in light of the complete breakdown of the collective bargaining process that began in February of 1993 and occurred over approximately ten (10) meetings, including the conciliation meetings at the Ministry of Labour;

63. The best and final offers process was initiated in 1993 at the Union's request, the whole as appears from a copy of the May 4, 1993 letter filed in support hereof as Exhibit **M-11**, and gave rise to Arbitrator Leboeuf's final arbitration award dated August 18, 1994, Exhibit **P-9**;

64. At that time, despite the fact that it was contesting the validity of the best and final offers mechanism, The Gazette had to file its best and final offer "under protest" since the Union had called a meeting and had, at any rate, presented its best and final offer to the conciliator on May 6, 1993 at 1 p.m. at the Ministry of Labour, the whole as appears from Exhibit **M-11** and from the response of The Gazette also dated May 6, 1993, filed in support hereof as Exhibit **M-12**;

65. Moreover, in the context of this labour dispute, the Union filed grievance #93-02 contesting The Gazette's right to order a lock-out and, on November 18, 1993, Arbitrator Lebœuf ruled that The Gazette was perfectly entitled to order and maintain a lock-out during the exchange and the arbitration of the best and final offers, the whole as appears from Exhibit **P-7** already filed by the Plaintiffs;

66. The Gazette received the arbitration award **P-9** from Arbitrator Raymond Lebœuf on Monday, August 22, 1994 and, that same day, The Gazette received a copy of a letter from the national representative of the Union, Mr. Don Mackay, in which he declared the following:

> [ORIGINAL ENGLISH] *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 our cooperation in implementing Mtre. Leboeuf's decision and normalising relations between the parties in a timely and efficient manner.*

the whole as appears from a copy of a letter dated August 22, 1994 from the Union's national representative, Mr. Don Mackay, filed in support hereof as Exhibit **M-14**; [*handwritten: M-13*]

67. Afterwards, The Gazette and the Union settled the labour dispute resulting from the lock-out on May 17, 1993 by providing for the Plaintiffs' and the Mis en Cause's integration into the payroll journal and, on October 3, 1994, The Gazette and the Union duly signed a collective agreement completely enshrining the arbitration award of M[tre] Lebœuf dated August 18, 1994, including the optional best and final offers mechanism, the whole as appears at greater length in the 1993-1996 collective agreement, already filed in support hereof as Exhibit **M-3**;

(b) Labour dispute beginning in 1996 and Arbitrator Sylvestre's decision dated February 5, 1998

68. On January 31, 1996, The Gazette served on the Union a notice of meeting pursuant to the Labour Code confirming its intent to renegotiate the collective agreement **M-3** upon its expiry and, on April 25, 1996, The Gazette submitted to the Union its first written proposal to renew the agreement;

69. On April 30, 1996, without prior notice and even before having presented a proposal to renew the collective agreement, the Plaintiffs and the Mis en Cause asked The Gazette to proceed with the exchange of best and final offers in accordance with the collective agreement and the 1987 Agreement, the whole as appears from a copy of the request of the Plaintiffs and the Mis en Cause and the Union dated April 30, 1996, already filed in support hereof as Exhibit **M-4**;

70. Neither the Union, the Plaintiffs or the Mis en Cause indicated throughout the term of the collective agreement **M-3** that they considered the provisions thereof or of the August 18, 1994 arbitration award, Exhibit **P-9,** to be illegal, null, void or contrary to the 1982 and 1987 Agreements;

71. On May 3, 1996, The Gazette responded by letter to the **M-4** request by declaring to the Union that the process of exchanging best and final offers was henceforth optional, the whole as appears from a copy of the said letter already in support hereof as Exhibit **M-5**;

72. On May 8, 1996, the Union filed a grievance to contest The Gazette's refusal to proceed with the exchange of best and final offers and reported that it considered the renewal provisions of the **M-3** agreement to be null and void, the whole as appears from a copy of the said grievance already filed *en liasse* in support hereof as Exhibit **M-6**;

73. Faced with a total breakdown of collective bargaining and a stalemate between the parties, The Gazette ordered a lock-out on June 3, 1996 in accordance with the provisions of the Labour Code;

74. On June 4, 1996, the Plaintiffs and the Mis en Cause filed a "dispute" specifically contesting The Gazette's right to order a lock-out and requesting that The Gazette be ordered to pay their wages and benefits for the entire term of the lock-out, the whole as appears from a copy of the said dispute already filed *en liasse* in support hereof as Exhibit **M-6**;

75. The May 8, 1996 grievance and the June 4, 1996 M-6 dispute, *en liasse*, were submitted to Arbitrator Sylvestre, who held six (6) days of hearings between December 5, 1996 and July 9, 1997 to adjudicate on the rights and obligations of the parties under the circumstances;

76. On February 5, 1998, Arbitrator Sylvestre handed down his arbitration award on the merits, **M-7**, in which he ordered The Gazette to proceed with the exchange of best and final offers and to:

- continue, throughout the lock-out, to pay to each of the Plaintiffs and the Mis en Cause the wages and other benefits stemming from the 1982 and 1987 tripartite agreements;

- reimburse any wages and benefits lost after or owing to the June 3, 1996 lock-out;

the whole as appears from the conclusions of the arbitration award already filed in support hereof as Exhibit **M-7**, at page 113;

(c) December 15, 1999 intervention of the Court of Appeal and best and final offer arbitration before Arbitrator Jean-Guy Ménard

77. The arbitration award **M-7** was quashed by the October 30, 1998 decision of the Superior Court;

78. On September 15, 1999, the Court of Appeal ordered The Gazette to submit to the best and final offers process within thirty (30) days but reaffirmed that it was necessary to set aside Arbitrator Sylvestre's orders regarding the payment of the wages and benefits during the lock-out, the whole as appears at greater length from the Court of Appeal decision already filed by the Plaintiffs as Exhibit **P-2**;

79. Moreover, in its decision P-2, the Court of Appeal returned the matter to Arbitrator Sylvestre so that he could determine the damages, if any, that might be awarded to the Plaintiffs following the refusal to proceed with the best and final offers process in 1996;

80. Following the suspension of proceedings order issued by the Court of Appeal of Québec on January 13, 2000, The Gazette and the Union finally exchanged their best and final offers on January 21, 2000;

81. On March 6, 2000, the parties agreed to the appointment of Arbitrator M^{tre} Jean-Guy Ménard to act as the arbitrator of the best and final offers;

82. On May 17, 2000, the Union submitted before Arbitrator Ménard a preliminary application for the dismissal of the best and final offer submitted by The Gazette, the whole as appears at greater length from a copy of the statement of facts and the letter dated May 17, 2000, filed in support hereof as Exhibit **M-15**;

83. As appears from Exhibit **M-14**, the Union argued, among other things, that the best and final offer of The Gazette was null and void because it contained, according to the Union amendments, additions and withdrawals to the 1982 and 1987 Agreements and that

Arbitrator Ménard essentially had to accept the best and final offer of the Union by default;

84. On May 23, 2000, the Plaintiffs and the Mis en Cause, through the intermediary of their counsel at the time, M^tre^ Robert Côté, fully subscribed to the preliminary objections raised by the Union before Arbitrator Ménard, the whole as appears from a copy of the letter dated May 23, 2000 filed in support hereof as Exhibit **M-16**;

85. The Gazette specifically asserted, in response to the Union's preliminary application for dismissal, that the best and final offer filed by the Union on January 21, 2000 contained the same alleged defects that the Union accused The Gazette of, the whole as appears from pages 3 and 4 of The Gazette's response dated June 1, 2000 filed in support hereof as Exhibit **M-17**;

86. Having taken the preliminary objections under advisement, Arbitrator Ménard handed down his award on June 5, 2001; Arbitrator Ménard retained the best and final offers of The Gazette, though he struck out some of the provisions deemed not to have been written, the whole as appears from Arbitrator Ménard's June 5, 2001 award filed in support hereof as Exhibit **M-18**;

(d) Plaintiffs' contestation of the results of the best and final offers arbitration and the eventual return to work on May 12, 2002

87. On August 2, 2001, the Plaintiffs and the Mis en Cause filed a motion to annul the award of Arbitrator Ménard;

88. On August 30, 2001, The Gazette also filed a motion to annul the award of Arbitrator Ménard;

89. On December 21, 2001, the Union filed a motion to homologate the award of Arbitrator Ménard;

90. Meanwhile, on August 24 and September 24, 2001, The Gazette presented a settlement and return-to-work proposal to the Plaintiffs and the Mis en Cause based on Arbitrator Ménard's award; they refused the offer, however, on November 8, 2001, the whole as appears from the correspondence between the parties filed *en liasse* in support hereof as Exhibit **M-19**;

91. On May 2, 2002, Honourable Justice Jean Frappier, of the Superior Court, dismissed the two (2) motions in annulment of the Plaintiffs and the Mis en Cause and of The Gazette, and homologated Arbitrator Ménard's award, the whole as appears from the Superior Court judgment already filed in support hereof as Exhibit **M-9**;

92. However, even if he homologated Arbitrator Ménard's award, the Honourable Justice Frappier of the Superior Court did not order the provisional execution of his judgment for the following reasons :

> [TRANSLATION] *Regarding the motion for execution notwithstanding appeal, the Tribunal would have been inclined to grant it given that the lock-out has been in effect since May of 1996.*
>
> *However, the 11 employees chose to present a motion to annul the arbitration award of respondent Ménard and to object to the motion for homologation by raising grounds of nullity.*
>
> *They decided to pursue the legal dispute instead of submitting to the arbitration award, as did the Union.*

the whole as appears at greater length from the judgment already filed as Exhibit **M-9**;

93. Afterwards, the parties exchanged correspondence regarding the Plaintiffs' and the Mis en Cause's right to appeal and the return to work in May of 2002, and that correspondence effectively ended the lock-out that had lasted since June 3, 1996, the whole as appears from the said correspondence filed *en liasse* in support hereof as Exhibit **M-20**;

94. The Plaintiffs and the Mis en Cause returned to work for The Gazette on May 12, 2002; no labour dispute ensued and the new collective agreement that the parties entered into after Arbitrator Ménard's award will end on June 4, 2010;

(e) The Gazette's claim for the reimbursement of wages and benefits

95. On February 1, 2001, The Gazette filed an action against the Plaintiffs and the Mis en Cause seeking reimbursement of the wages and benefits paid for the period beginning February 5, 1998 and ending October 30, 1998;

96. On February 22, 2001, the Union filed a motion for declinatory exception against The Gazette's action under article 164 of the *Code of Civil Procedure*;

97. On August 14, 2001, the Honourable Justice Louise Lemelin of the Superior Court partially allowed the Union's motion and referred to Arbitrator Sylvestre The Gazette's claim for reimbursement of the wages and benefits it allegedly overpaid for the period beginning February 5, 1998 and ending October 30, 1998, the whole as appears from the judgment of the Superior Court already filed in support hereof as Exhibit **P-13**;

98. In its August 14, 2001 , the Superior Court writes:

> [TRANSLATION] *To authorize this matter to proceed before the Superior Court is to prevent the arbitrator from fully adjudicating in an area of jurisdiction that the Court of Appeal has explicitly recognized him to have.*

the whole as appears from page 7 of judgment **P-13**;

99. On September 25, 2001, counsel for The Gazette asked Arbitrator Sylvestre to seize himself of the action for reimbursement of the wages and benefits paid as decreed by the

Superior Court, the whole as appears from the correspondence of The Gazette filed in support hereof as Exhibit **M-21**, and the arbitrator did in fact seize himself of the case;

100. However, in the January 21, 2009 award, **P-5**, Arbitrator Sylvestre decided on his own initiative to suspend his decision regarding The Gazette's claim and indicated that he will rule "[TRANSLATION] *should the parties fail to reach an agreement to settle their dispute once and for all*";

(f) Definition of Arbitrator Sylvestre's mandate: Court of Appeal's August 6, 2003 and March 17, 2008 decisions

101. On October 11, 2000, Arbitrator Sylvestre ruled on the issues of law that had been preliminarily argued by the parties on June 9 and 13, 2000, the whole as appears at greater length from the decision already filed in support hereof as Exhibit **P-10**;

102. Arbitrator Sylvestre specifically concluded that the Plaintiffs and the Mis en Cause could only claim damages for the wages and social benefits lost during the lock-out, and this for the period beginning June 3, 1996 and ending January 21, 2000;

103. Afterwards, following the arbitration award **P-10** dated October 11, 2000, correspondence was exchanged between M^tre^ James Duggan, counsel for the Plaintiffs and the Mis en Cause, and counsel for The Gazette regarding the communication of information pertaining to the amount claimed by the Plaintiffs and the Mis en Cause, the whole as appears from a copy of the said correspondence filed *en liasse* in support hereof as Exhibit **M-22**;

104. On October 19, 2000, the hearings for damages before Arbitrator Sylvestre resumed without the least bit of objection or opposition on the part of the Plaintiffs or the Mis en Cause through the intermediary of their counsel M^tre^ Duggan;

105. Quite the contrary, the Plaintiffs and the Mis en Cause, through the intermediary of their counsel M^tre^ James Duggan, themselves wanted to begin adducing evidence on the issue of wages and benefits lost, the whole as appears at greater length from the stenographic notes dated October 19, 2000 already filed in support hereof as Exhibit **M-10**;

106. Moreover, as appears at greater length from pages 25 to 36 of the stenographic notes, **M-10**, of the October 19, 2000 hearing, the parties made admissions before Arbitrator Sylvester on what the value of the lost wages and benefits would have been had the employees worked throughout the period beginning June 3, 1996 and ending January 21, 2000, and the total amount of wages and benefits per employee was set at one hundred and sixty-three thousand six hundred eleven dollars and fifty-one cents ($163,611.51).

107. The admission of one hundred and sixty-three thousand six hundred eleven dollars and fifty-one cents ($163,611.51) per employee was determined, as appears from the notes **M-10**, based in part on the numbers that the Plaintiffs and the Mis en Cause provided themselves to establish the value of lost wages and benefits;

108. Moreover, the Plantiffs and the Mis en Cause, through the intermediary of their counsel M[tre] Duggan, specifically made the following representations before Arbitrator Sylvestre at the beginning of the October 19, 2000 hearing:

> [TRANSLATION] *Moreover, we have the benefit of your decision, which we say considerably narrows the scope of your jurisdiction, and it is within that framework that we intend to provide our evidence.*

the whole as appears from the stenographic notes for October 19, 2000, Exhibit **M-9**, at page 10;

109. However, on November 10, 2000, the Plaintiffs and the Mis en Cause, through the intermediary of their new counsel, M[tre] Jacques Castonguay, nevertheless served a motion to annul the arbitration award dated October 11, 2000, Exhibit **P-10**;

110. The proceedings undertaken by the Plaintiffs and the Mis en Cause to annul the arbitration award dated October 11, 2000 failed and the Court of Appeal upheld in its August 6, 2003 decision that Arbitrator Sylvestre had acted rightly and handed down a decision that was fully within the confines of his mandate;

111. On August 6, 2003, the Court of Appeal effectively ruled that the Plaintiffs and the Mis en Cause could not claim before Arbitrator Sylvestre anything other than damages for the wages and benefits lost during the lock-out, and this for the period beginning June 3, 1996 and ending January 21, 2000;

112. Although it did serve to better define the arbitrator's mandate, the ill-founded action of the Plaintiffs and the Mis en Cause against the October 11, 2000 decision of Arbitrator Sylvestre still delayed the examination of the merits of the rest of the case for several years;

113. Indeed, Arbitrator Sylvestre resumed his examination of the case in the summer of 2004 and, following hearings held August 24 and 25, 2004 and October 14, 2004, he handed down an arbitration award on March 18, 2005, Exhibit **P-3**, which, in turn, was attacked by the Plaintiffs and the Mis en Cause;

114. On March 17, 2008, the Court of Appeal annulled the March 18, 2005 award and returned the matter to Arbitrator Sylvestre, giving specifications on the issues he would have to rule on, including the following:

> [TRANSLATION] a) *If the best and final offers process had unfolded normally after the notice was sent on April 30, 1996, when would the collective agreement have been entered into or, in other words, when would the lock-out have ended?"*

the whole as appears from paragraph [30] of the March 17, 2008 decision, Exhibit **P-4**;

115. Moreover, the Court of Appeal does not fail to emphasize in its March 17, 2008 decision that the Plaintiffs and the Mis en Cause adopted an extreme position that is contrary to

the December 15, 1999 decision by requesting that damages be paid to them for the period beginning June 3, 1996 and ending January 21, 2000:

> [TRANSLATION] *However, the conclusions sought by the appellants go too far. In effect, they are asking that Arbitrator Sylvestre be ordered to consider, without nuance, the entire period beginning June 3, 1996 and ending January 21, 2001 (sic) as being the period for which the lock-out was unduly extended and grant an indemnity accordingly. However, the 1999 decision had already determined that the tripartite agreement acknowledged the employer's right to legally decree a lock-out, which included the right to cease paying the typographer's wages and benefits."* (pages 8 of P-4)

116. This specification that the Court of Appeal made in its March 17, 2008 decision was necessary, because the Plaintiffs and the Mis en Cause had argued before Arbitrator Sylvestre in 2004 that the lock-out was undue from the very first day and that The Gazette should be ordered to pay damages for the entire term covered by the claim, namely from June 3, 1996 to January 21, 2000;

(g) Resumption of hearings before Arbitrator Sylvestre on July 28 and 29, 2008 and position adopted by the Union and the Plaintiffs

117. In accordance with the March 17, 2008 decision, Arbitrator Sylvestre resumed his examination of the case and heard the parties once again on July 28 and 29, 2008;

118. The Gazette made representations bearing directly on the core issue identified by the Court of Appeal in the March 17, 2008 decision, namely "[TRANSLATION] if the best and final offer process had unfolded… when would the lock-out have ended?"

119. In order to answer this question, Arbitrator Sylvestre necessarily had to consider hypotheses regarding the length of the best and final offers process; in that respect, The Gazette validly emphasized the following relevant elements:

(a) the conduct of the Union, which in 1994 entered into a collective agreement and signalled that it accepted that the best and final offers process no longer be mandatory in the wake of the awards of Arbitrator Lebœuf and subsequently changed its position the very day of its expiry, which ensured that the parties would wind up in a complex and litigious legal situation thereafter;

(b) the choice, by the Union and the Plantiffs, to proceed by means of grievances and disputes to contest The Gazette's refusal to exchange its best and final offer following the expiry of the collective agreement on April 30, 1996, rather than summoning the employer and filing its own best and final offer, as it had done in 1993;

(c) furthermore, the evidence adduced before Arbitrator Sylvestre reveals without any doubt that such a best and final offer had not even been prepared at the time by

the Union, the Plantiffs and the Mis en Cause, since they were unable to produce one before Arbitrator Sylvestre despite The Gazette's repeated requests, a fact that necessarily would have prolonged the best and final offers process and delayed the end of the lock-out;

(d) the inherent delays of the best and final offers process and of the adjudicative process given the unusual legal situation in which the parties found themselves; and

(e) the intransigence of the Plaintiffs and the Mis en Cause, who were trying to perpetuate the legal battle instead of modifying their negotiating stance, which necessarily extended the best and final offers arbitration process;

120. For their part, the Union and the Plaintiffs did not submit any hypothesis in response to Arbitrator Sylvestre regarding the question formulated by the Court of Appeal in the March 17, 2008 decision, namely "[TRANSLATION] *if the best and final offers process had unfolded... when would the lock-out have ended?*"

121. Indeed, before Arbitrator Sylvestre, the Union and the Plaintiffs maintained the position that The Gazette had to pay damages for the entire period beginning June 3, 1996 and ending January 21, 2000, and this without in any way taking into consideration the teachings of the Court of Appeal, more specifically those found in paragraph 36 of the March 17, 2008 decision;

122. As appears from the following excerpts taken from the stenographic notes of the July 28, 2008 hearing, filed in support hereof as Exhibit **M-23**, the Plaintiffs relied on the doctrine of abuse of right to argue that they should be indemnified for the entire period:

[TRANSLATION]

P.140 *What must be determined today is whether or not the damages apply for the entire period. Our point of view is that the damages do indeed apply for the entire period. That, moreover, was the point of view we had adopted before you in two thousand and four (2004).*

[emphasis added]

I have submitted an excerpt of the theory of abuse of right in the field of labour, as well as the National Bank of Canada decision, so that you may use them as a tool for your consideration.

P.147 *So, from the start, from the beginning of the lock-out, we are in the presence of a blatant abuse of right (...)*

P.148 *Saying that the employer has abused its right from the very beginning, Mr. Arbitrator, is tantamount to saying that the lock-out was improperly used. "Improperly" obviously suggests the notion*

> *of an abuse of right. One cannot commit an abuse of right without using a right improperly.*
>
> P.149 *Therefore, this is the first point on which we base our request that the entire period be subject to damages.*

123. The legal stance adopted by the Plaintiffs before Arbitrator Sylvestre in July of 2008, that they had the right to receive damages for the entire period beginning June 3, 1996 and ending January 21, 2000, contradicts the mandate that the Court of Appeal entrusted to Arbitrator Sylvestre in the December 15, 1999 decision to adjudicate whether the lock-out had been unduly extended and, if appropriate, award damages to the Plaintiffs;

124. The Plaintiffs's position also flagrantly contradicts the additional specification made by the Court of Appeal in the March 17, 2008 decision that the Plaintiffs went too far by requesting an indemnification for the entire period in question, since The Gazette was fully entitled to impose a lock-out on June 3, 1996, with the usual effect of suspending its obligation to pay wages and grant access to the workplace;

(h) Position adopted by The Gazette at the July 28 and 29, 2008 hearings and merits of the dispute

125. For its part, The Gazette submitted several relevant hypotheses to Arbitrator Sylvestre regarding the date on which the lock-out would have ended had The Gazette immediately exchanged its best and final offer following the April 30, 1996 request, including the hypothesis retained by the Arbitrator:

> [TRANSLATION]
> *In the opinion of the undersigned, under these circumstances the scenario submitted by the employer's counsel appears to be the least imperfect. Consequently, to summarize the problem, he adds the period of time it took to dispose of the claim, from June 1996 to February 1998, and the 15 months it took M^tre Lebœuf to hand down his decision. Consequently, based on this optimistic scenario, an arbitration award adjudicating the dispute would have been handed down in May of 1999, followed by an agreement signed a few days later and the end of the lock-out.*
>
> [emphasis added]

126. Indeed, Arbitrator Sylvestre had to determine, in accordance with the Court of Appeal decisions, if and when a collective agreement would have been entered into and the lock-out would have ended between June 3, 1996 and January 21, 2000, by supposing the occurrence of an event that did not take place, in other words by supposing that the parties had instituted the best and final offers process immediately after the notice was sent on April 30, 1996;

127. In that respect, it is obvious that if the best and final offers process had begun after the notice was sent on April 30, 1996, the legal situation between the parties would have required debates on several preliminary objections, issues of law and questions of jurisdiction, as was the case moreover during the process of 1993-1994 and 2000-2001;

128. What is more, The Gazette would have filed its best offer, as it did during the 1993 process, "under protest" and argued that the arbitrator did not have jurisdiction over the best and final offers;

129. The parties' experience both during the 1993-1994 as well as the 2000-2001 best and final offer processes illustrates without any doubt that the preliminary objections, issues of jurisdiction and questions of law form an integral part of the normal best and final offers process;

130. In its representations, The Gazette therefore submitted various hypotheses to Arbitrator Sylvestre at the July 28 and 29, 2008 hearings in order to allow him to fulfill his mandate that had been entrusted to him by the Court of Appeal, including the three (3) following scenarios:

(a) that if the best and final offers process had taken place after the notice was sent on April 30, 1996, the process would have taken just as long and the lock-out would still have only ended in May of 2002 (see stenographic notes, Exhibit **M-22**, pages 203 to 208);

(b) subsidiarily, that if the best and final offers had been exchanged after the notice was sent on April 30, 1996, the process would have taken at least until August 1999, and this by adding the initial arbitration period for the June 4, 1996 dispute before Arbitrator Sylvestre from June 1996 to February 1998 (9 months) and the arbitration period before Arbitrator Ménard from January 2000 to June 2001 (18 months) (see stenographic notes, Exhibit **M-22**, at page 209);

(c) once again, subsidiarily, that if the best and final offers had been exchanged after the notice was sent on April 30, 1996, the process would have taken at least until May of 1999, and this by adding the initial arbitration period of the June 4, 1996 dispute before Arbitrator Sylvestre from June 1996 to February 1998 (9 months) and the arbitration period before Arbitrator Lebœuf from May 1993 to August 1994 (15 months) (see stenographic notes, Exhibit **M-22**, at page 209);

131. As appears from the arbitration award dated January 21, 2009, Exhibit **P-5**, Arbitrator Sylvestre chose the subsidiary scenario indicated in subparagraph (c) of paragraph 130 above, namely that the process would have ended in May of 1999, a scenario that Arbitrator Sylvestre himself describes as being "optimistic" under the circumstances;

132. Arbitrator Sylvestre specifically fulfilled the mandate that had been entrusted to him by the Court of Appeal when he responded that the collective agreement would have been entered into and the lock-out would have ended in May of 1999;

133. By deciding that the collective agreement would have been entered into and the lock-out would have ended in May of 1999, Arbitrator Sylvestre was adjudicating on the merits of the dispute;

134. Arbitrator Sylvestre's adjudication on the merits to the effect that the lock-out would have ended in May of 1999 fell fully within the scope of his mandate, as delineated by the Court of Appeal in the December 15, 1999, August 6, 2003 and March 17, 2008 decisions;

(i) Retirement Plan

135. When the hearing before Arbitrator Sylvestre resumed on July 28, 2008, the Plaintiffs tried to add a new claim, namely the loss of years of employment credited to their retirement plan at The Gazette.

136. As already mentioned above, the total amounts claimed in damages for wages and benefits lost by the Plaintiffs and the Mis en cause for the period beginning June 3, 1996 and ending January 21, 2000 had already been established by admission at the October 19, 2000 arbitration session, the whole as appears from the stenographic notes already filed in support hereof as Exhibit **M-9**;

137. During the October 19, 2000 hearing, Arbitrator Sylvestre sustained from the bench an objection to the evidence regarding the retirement plan, the whole as appears from pages 39 to 43 of the stenographic notes, **M-9**;

138. Arbitrator Sylvestre effectively sustained the objection that was based on three grounds, namely (i) the parties had already admitted the total amount claimed in damages for lost wages and benefits (ii) the request to participate in the retirement plan was dated after January 20, 2000 and (iii) Arbitrator Jean-Guy Ménard was also seized of the same application in the context of the best and final offers process;

139. Had they wanted to do so, the Plaintiffs or the Mis en Cause could have challenged Arbitrator Sylvestre's October 19, 2000 decision to refuse the evidence regarding the retirement plan in the context of their motion in annulment dated November 10, 2000, but they did not;

140. The Plaintiffs and the Mis en Cause could not revisit this question when the hearings before Arbitrator Sylvestre resumed in July of 2008, since an uncontested final decision had been handed down by Arbitrator Sylvestre nearly eight (8) years earlier;

141. Moreover, the Plaintiffs' attempt to add a new claim runs contrary to the Court of Appeal decisions dated December 15, 1999, August 6, 2003 and March 17, 2008, which limit the Plaintiffs' recourses to damages for the period ending January 20, 2000;

142. The Plaintiffs' new claim requests a special order from Arbitrator Sylvestre sentencing The Gazette to pay capital into the retirement plan to buy back past services does not constitute a claim for damages;

143. Moreover, since the request to participate in the pension plan came after January 20, 2000, the new claim therefore contemplates an element that does not fall within the June 4, 1996 - January 20, 2000 timeframe;

144. Consequently, Arbitrator Sylvestre was perfectly right in dismissing the new claim in arbitration award **P-5** and was acting well within the terms of the arbitration clause;

(j) The Impartiality of Arbitrator Sylvestre

145. The Plantiffs and the Union do not allege any fact demonstrating a bias or reasonable fear of bias on the part of Arbitrator Sylvestre;

146. The Plaintiffs and the Union never asked, at any of the hearings before Arbitrator Sylvestre, that he recuse himself, nor did they even invoke at those hearings the possibility that he might be biased;

147. In fact, when hearings resumed in July of 2008, the Plaintiffs and the Union even asked Arbitrator Sylvestre to proceed immediately with his examination of the July 14, 2000 dispute, which is an entirely separate matter, the whole as appears from pages 13 to 17 of the stenographic notes, **M-22**;

148. Besides the fact that he is the consensual arbitrator selected by all of the parties, it is obvious that Arbitrator Sylvestre, having been involved since 1996 in the labour dispute between The Gazette, the Plaintiffs and the Mis en Cause, and having rendered five (5) awards on the subject, has an in-depth knowledge of this dispute and has all the expertise needed to hand down the January 21, 2009 award, which is well founded in fact and in law even if it does not accept the claims of the Plaintiffs and the Mis en Cause; indeed, it does not agree with the main position of The Gazette, but rather only its subsidiary arguments;

149. As for action P-15 instituted by the Mis en Cause before the Court of Appeal, it is a manifestly ill-founded proceeding and an *ad hominem* attack against Arbitrator Sylvestre; the Plaintiffs cannot invoke the turpitude of the Mis en Cause to question the jurisdiction of Arbitrator Sylvestre;

(k) The action in annulment instituted by the Union and the Plaintiffs against the January 21, 2009 arbitration award

150. In their motion in annulment, the Plaintiffs are deforming the mandate of Arbitrator Sylvestre and disregarding the teachings of the Court of Appeal in its December 15, 1999, August 6, 2003 and March 17, 2008 decisions;

151. What is more, the Plaintiffs are asking this honourable Court to examine and rule explicitly on the merits of the dispute between the parties, the whole contrary to the provisions of Article 946.2 of the *Code of Civil Procedure*;

152. Worse still, the Plaintiffs are raising arguments that were never submitted before Arbitrator Sylvestre and wish to introduce new debates before the Superior Court;

153. Within these new arguments, the Plaintiffs are completely deforming the arbitration of best and final offers process, of which Arbitrator Raymond Lebœuf was seized in 1993-1994, by alleging that that the process took only seven (7) months and supposedly began on January 7, 1994;

154. This is false, as the process of exchanging best and final offers began on May 6, 1993 and continued until August 18, 1994, namely a period of fifteen (15) months;

155. Arbitrator Raymond Lebœuf, as it appears from Exhibit **P-9**, began hearing the parties on October 22, 1993 and, though he had to render interlocutory decisions on preliminary objections, questions of jurisdiction and issues of law, any evidence submitted before Arbitrator Lebœuf from the moment the hearings began counted towards the arbitration of the best and final offers;

156. Nothing allows the Plaintiffs to contend that the evidence pertaining to the final offers was produced only starting January 7, 1994; at any rate, this specification is irrelevant since it is uncontested that between the process of exchanging best and final offers in May of 1993 and the arbitration award **P-9** imposing the 1994 collective agreement in August, a period of fifteen (15) months, not seven (7) months, had elapsed;

157. Finally, in their motion in annulment, the Union and the Plaintiffs essentially invite this Honourable Court to ignore the arguments that have already been made and Arbitrator Sylvestre's award and to purely and simply substitute itself for the arbitrator, since they are asking in the conclusions of their Motion in Annulment that the matter be referred to another arbitrator with the instruction that "[TRANSLATION] *for the period from June 3, 1996 to January 21, 2000, only 7 months can be subtracted for the purposes of compensation, and that the remainder of this period should be subject to payment of the wages and adjustment of the retirement plan*";

158. The Union and the Plaintiffs are therefore inviting this Honourable Court to hand down an arbitration award in lieu of Arbitrator Sylvestre, which the Court of Appeal has specifically always abstained from doing, as this is prohibited by the *Code of Civil Procedure*;

(l) Intervention criteria under Chapter VII of the *Code of Civil Procedure*

159. Arbitration award R-5 is a consensual arbitration award and, as such, enjoys a particular status under Québec law since the parties have agreed to settle their dispute other than through the common law courts;

160. The courts will only intervene in the cases provided for in Articles 943.1, 946.4 and 947 of the *Code of Civil Procedure*, and this matter does not fall within any of those cases;

161. By ruling that the lock-out ended in May of 1999, Arbitrator Sylvestre ruled on the merits of the dispute that was entrusted to him by the Court of Appeal, and his decision is unassailable;

162. Arbitrator Sylvestre rendered an arbitration award on January 21, 2009 dealing with the dispute contemplated by the arbitration agreement and falling well within the terms thereof;

163. Award **P-5** rendered by Arbitrator Sylvestre does not contain decisions on matters beyond the scope of the arbitration agreement between the parties;

164. Arbitrator Sylvestre did not commit any reviewable error in his award **P-5** dated January 21, 2009;

165. The Motion in Annulment is ill-founded in fact and in law;

166. The Gazette's contestation is well-founded in fact and in law;

FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

DISMISS the Motion in Annulment;

THE WHOLE, with costs

Montreal, July 29, 2009

(s) Fasken Martineau DuMoulin

Fasken Martineau DuMoulin LLP
Counsel for Mis en Cause of the First Part

[STAMP] certified true copy
(s) *Fasken Martineau DuMoulin*
Fasken Martineau DuMoulin LLP

I, the undersigned, **JEAN-PIERRE TREMBLAY,** practicing my profession at 1010 Saint-Catherine Street West, Suite 200, Montreal, Québec, H3B 5L1, do hereby solemnly swear the following:

I. I am Vice-President, Human Resources of the Mise en Cause, whose exact corporate name is The Gazette, a division of Canwest Publishing Inc. (hereinafter "The Gazette");

II. I have been working for The Gazette since April 9, 1984;

III. As Vice-President, Human Resources, I am responsible at The Gazette for labour relations with three (3) separate unions representing thirteen (13) bargaining units, including labour relations with the Plaintiff Section locale 145 du Syndicat des communications, de l'énergie et du papier (hereinafter the "Union") for its bargaining units consisting exclusively of the Plaintiffs (hereinafter the "Plaintiffs") and Mis en Cause of the Second Part Eriberto Di Paolo and Rita Blondin (hereinafter the "Mis en Cause of the Second Part");

IV. I am also responsible for labour negotiations with the unions as well as for the employer's application and interpretation of the collective agreements that apply to the bargaining units within the corporation;

V. Within the performance of my duties, I acted as spokesperson for The Gazette during the labour negotiations held with the Union (or its predecessor) specifically in 1986, 1987, 1990, 1993 and 1996 with a view to renewing the collective agreement applicable to the bargaining unit that includes the Plaintiffs and the Mis en Cause of the Second Part;

VI. I was also The Gazette's spokesperson when the 1987 individual tripartite agreements were entered into (hereinafter the "1987 Agreements") containing provisions on maintaining standards of living and on the best and final offers process in order to renew the collective agreement;

VII. I also participated in the best and final offers arbitration process before Arbitrator Jean-Guy Ménard in 2000-2001;

VIII. I have examined the "Motion in Annulment (art. 947 and following c.c.p.), affidavit and notice of presentation" served by the Union and the Plaintiffs on April 17, 2009 in this case;

IX. I have examined the "Contestation of the Mise en Cause of the First Part The Gazette, a division of Canwest Publishing Inc." dated July 29, 2009 (hereinafter the "Contestation");

X. To my personal knowledge, all of the facts alleged in the "Contestation" are true.

AND I HAVE SIGNED

Montreal, July 30, 2009

(s) Jean-Pierre Tremblay
Jean-Pierre Tremblay

Sworn before me in Montreal
on July 30, 2009

(s) Lucie Côté #56046
Commissioner of Oaths
for the district of Montreal

[STAMP] Commissioner of Oaths
LUCIE CÔTÉ
#56,046
JUDICIAL DISTRIST OF LONGUEUIL AND MONTREAL

POSTMEDIA NETWORK INC.

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

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

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

COMPENDIUM
(Claims Hearing November 15, 2011)

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