TAB 28

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COURT OF APPEAL

English version

CANADA
PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

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

DATE: August 6, 2003

CORAM: THE HONOURABLE LOUISE MAILHOT J.A.
FRANÇOIS PELLETIER J.A.
YVES-MARIE MORISSETTE J.A.

***THE GAZETTE*, a division of Southam Inc.**
APPELLANT/impleaded party
v.
RITA BLONDIN, ERIBERTO DI PAOLO, UMED GOHIL, HORACE HOLLOWAY, PIERRE REBETEZ, MICHAEL THOMSON, JOSEPH BRAZEAU, ROBERT DAVIES, JEAN-PIERRE MARTIN, LESLIE STOCKWELL, MARC-ANDRÉ TREMBLAY
RESPONDENTS/petitioners
and
Mtre. ANDRÉ SYLVESTRE
IMPLEADED PARTY/respondent
and
COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145
IMPLEADED PARTY/impleaded party

JUDGMENT

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[1] THE COURT, ruling on the appeal from a judgment rendered on September 4, 2001 by the Superior Court, District of Montréal (the Honourable Nicole Duval Hesler J.S.C.), which allowed, in part and with costs, the respondents' motion to annul the arbitration award;

[2] Having examined the record, heard the parties and taken the case under advisement;

[3] On the grounds given by Morissette J.A., with which Louise Mailhot and François Pelletier JJ.A. concur;

[4] Allows the appeal with costs;

[5] Quashes the judgment annulling in part the October 11, 2000 arbitration award of arbitrator André Sylvestre, dismisses with costs the respondents' motion for annulment served on November 10, 2000 and returns the case to the arbitrator so that he can continue to hear the disagreement between the appellant and the respondents with a view to disposing of it completely on its merits.

(s) LOUISE MAILHOT J.A.
(s) FRANÇOIS PELLETIER J.A.
(s) YVES-MARIE MORISSETTE J.A.

Mtre. Ronald McRobie
Mtre. Dominique Monet
FASKEN, MARTINEAU, DuMOULIN
Counsel for the appellant

Mtre. Martin Brunet
MONTY, COULOMBE
Counsel for the respondents

Mtre. Pierre Grenier
MELANÇON, MARCEAU
Counsel for the impleaded parties

Date of hearing: December 10, 2002

L-G

GROUNDS OF MORISSETTE J.A.

[1] The appellant is appealing from a Superior Court judgment annulling what was considered an interim arbitration award and returning the case to the arbitrator so that he could have [TRANSLATION] "full competence" to rule on the dispute of which he was seized.

[2] On the following grounds, I am of the opinion that the appeal should be allowed, the award annulled by the Superior Court should be reinstated and the case should be returned to the arbitrator so that he can render a decision on the merits after hearing the parties.

Principal facts

[3] This case has a long history. The appellant, the daily newspaper *The Gazette*, employs the 11 respondents. They work in the appellant's composing room.

A. Contractual framework

[4] The dispute originated, directly but remotely, in two series of tripartite agreements entered into in 1982 and 1987 between the appellant, each of the respondents individually and the impleaded party, namely, the union accredited to represent the respondents before the appellant.

[5] Those agreements gave way to collective agreements between the appellant and the union; although they remained in force after they were signed, they were applied fully only between the expiry of one collective agreement and its replacement by a new one. Their general purpose was to allow the appellant to make a number of major technological changes in the typesetting of the newspaper, while preserving, in the manner negotiated by the union and accepted by each employee, the acquired rights of the members of the bargaining unit to which the respondents belonged. The respondents are typesetters; in the early 1980s, their trade was expected to disappear and it has certainly declined greatly since then. There were some 200 typesetters working for the appellant in 1982. Today there are only 11.

[6] Our Court ruled on two occasions regarding the nature, scope and validity of the agreements of 1982 and 1987: first in *Parent* v. *The Gazette*,[1] then in *Syndicat canadien des communications, de l'énergie et du papier, section locale 145* v. *Gazette (The), une division de Southam inc.*[2] The latter decision, which I will call here *The Gazette (No. 1)*, is the most relevant for our purposes, because it involves the same parties at an earlier stage of the same dispute, and it provides some invaluable clues to resolving the present appeal.

[7] Describing the effect of the agreements of 1982 and 1987, our colleague Rousseau-Houle J.A. observed on behalf of the Court in *The Gazette (No. 1)*: [TRANSLATION] "[these agreements] essentially provide for (1) guaranteed employment and wages, (2) an accord on the non-renegotiation of guaranteed coverage and (3) a mandatory process for renewing the collective agreement".[3]

[8] Under the agreements in question, all signatory employees kept their jobs with the appellant at conditions similar to those negotiated in 1982, but with indexing of their wages, until their death, resignation, dismissal confirmed by an arbitration award or departure after reaching retirement age. At the time that the agreements of 1982 and 1987 were signed, the last departures for retirement were expected to occur in 2017. Hence, the agreements originally had a potential term of 35 and 30 years respectively.

[9] Apart from the provisions covering the acquired rights of the signatory employees, the agreements of 1982 and 1987 provided for an arbitration procedure for resolving disagreements that could arise concerning the meaning of the agreements as long as they remained in force between the parties. Article IX of the agreement of 1987 reiterated in substance Article VII of the agreement of 1982:

> [TRANSLATION]
> IX. GRIEVANCE SETTLEMENT PROCEDURE – Should a disagreement arise regarding the interpretation, application and/or alleged violation of the present Agreement, the matter shall be judged as a grievance, and submitted and settled in the manner provided for in the grievance settlement and arbitration procedures of the collective agreement between the Company and the Union that is in force at the time that the grievance is submitted. The parties acknowledge that the decision of the arbitrator is final and mandatory.
>
> If the union ceases to exist or is no longer the accredited bargaining agent, an employee appointed under Appendix ii may have recourse to the grievance settlement procedure provided for in the Québec *Labour Code*.

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1 [1991] R.L. 625, 91 J.E. 91-850.
2 [2000] R.J.Q. 24, application for leave to appeal dismissed on October 5, 2000 (no grounds), S.C.C. Bulletin, 2000 at 1613.
3 *Ibid.* at 29.

The Gazette (No. 1) deals with the legal characterization of that arbitration procedure. It establishes that the arbitration is indeed consensual and based on [TRANSLATION] "a perfect arbitration clause obliging the parties to execute the agreements under the ordinary law regime. The grievance procedure that is provided for in the collective agreement and to which the arbitration clause refers is used only as a procedural framework for applying the latter."[4] As a result of this analysis, the [TRANSLATION] "disagreements" submitted to arbitration pursuant to Article IX of the agreement of 1987 are neither "grievances" within the meaning of paragraph (f) of section 1 of the *Labour Code* (R.S.Q., c. C-27), since they do not deal with "the interpretation or application of a collective agreement", nor "disputes" within the meaning of paragraph (e) of section 1 of the Code, since they are not [TRANSLATION] "disagreement[s] respecting the negotiation or renewal of a collective agreement or its revision by the parties under a clause expressly permitting the same". Those "disagreements" actually constitute "disputes" within the meaning of article 944 C.C.P.

[10] Article XI of the agreement of 1987 sets the terms of the renewal of the collective agreements as follows:

> [TRANSLATION]
> XI. RENEWAL OF COLLECTIVE AGREEMENTS AND SETTLEMENT OF DISPUTES – In the ninety (90) days preceding the expiry of the collective agreement, the Employer and the Union may undertake negotiations aimed at establishing a new agreement. The terms and conditions of the agreement shall remain in force until an agreement is entered into, an arbitrator renders a decision or either of the parties exercises its right to strike or to lockout.
>
> In the two weeks preceding the acquisition of the right to strike or to lockout, including the acquisition of such a right through the application of Article X of the present Agreement, either party may demand the exchange of "best final offers", which the two parties must provide simultaneously in writing within the following forty-eight (48) hours or within another period of time mutually accepted by the parties. The "best final offers" shall contain only the clauses or parts of clauses to which the parties have not yet agreed. If there is still no agreement, and before the right to strike or to lockout is acquired, either party may submit the disagreement to an arbitrator selected in the manner provided for in the grievance settlement procedure of the collective agreement. If such a request is made, the arbitrator, after giving both parties an opportunity to make representations on the merits of their proposals, shall accept the whole of one of the "best final offers" and reject the whole of the other. The arbitrator's decision shall be final and mandatory for the two parties and shall become an integral part of the collective agreement.

As we will see, the latter provision has assumed a decisive importance in the dispute now opposing the appellant and the respondents.

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4 *Ibid.* at 34.

B. History of the disagreement

[11] To understand the genesis of the disagreement submitted to arbitration in this case, it is appropriate to provide a brief chronology of relations between the parties. Many of these facts were set forth in *The Gazette (No. 1)*.

[12] April 30, 1993 marked the expiry of a collective agreement that contemplated the respondents' bargaining unit and of which the agreements of 1982 and 1987 were an integral part. The bargaining that followed engendered a dispute within the meaning of the *Labour Code* and a lockout, ordered on May 17, 1993. On August 18, 1994, arbitrator Leboeuf settled the dispute through the submission of an arbitration award (hereinafter, the Leboeuf award), which served as a collective agreement until April 30, 1996. The validity of the award was not legally contested but, because of *The Gazette (No. 1)*,[5] it is now accepted in the debate that the award in question violates the agreements of 1982 and 1987, particularly because it makes the mandatory final offer arbitration procedure provided for in Article XI of the agreement of 1987 optional and because it allows the appellant to transfer its staff for the purpose of eventually closing its composing room.

[13] Between August 18 and October 1, 1994, 51 of the 62 typesetters still at their posts accepted the employment security redemption offers that the appellant made.

[14] On April 25, 1996, arbitrator Foisy rendered a decision[6] regarding a disagreement considered a "grievance" resulting from the closure of the composing room by the appellant. The arbitrator concluded that the closure violated Article III of the agreement of 1982 and he ordered the appellant to reopen the composing room in order to reinstate the 11 complainants, who are none other than the 11 respondents in the present appeal. (Arbitrator Foisy noted, however, that [TRANSLATION] "the 11 complainants did not sustain monetary losses, as they were compensated under the terms of the collective agreement [since its coming into force].)

[15] Five days later, on April 30, 1996, the collective agreement stemming from the Leboeuf award ended. That same day, the union invited the appellant to submit its final offers to arbitration. The appellant refused to do so because, in its opinion, the arbitration of final offers provided for in Article XI of the agreement of 1987 was not mandatory after the Leboeuf award. We know that that contention was dismissed in *The Gazette (No. 1)*.

[16] Given that refusal, the union and the 11 employees formulated an initial disagreement on May 8, 1996, contesting the appellant's refusal to transmit final offers to them and requesting that certain parts of the Leboeuf award be declared

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5 *Ibid.* at 38-39.

6 *Syndicat canadien des communications, de l'énergie et du papier, section locale 145* v. *Gazette (The), une division de Southam inc.*, [1996] T.A. 562.

unenforceable against them. On June 3, 1996, the appellant ordered a lockout and ceased to pay the 11 respondents. On June 4, in agreement with the 11 respondents, the union formulated a second disagreement, in which it attacked the legality of the lockout ordered by the appellant. That disagreement and the subsequent amendments to it were the subject of two awards by arbitrator Sylvestre.

[17] On February 5, 1998, arbitrator Sylvestre ruled on the disagreements of May 8 and June 4, 1996 (hereinafter, the Sylvestre No. 1 award). He rejected the first disagreement, inasmuch as it was introduced [TRANSLATION] "pursuant to the grievance settlement procedure provided for in the [Leboeuf award] and asked that remedies be provided that ran counter to the provisions of that imposed collective agreement".[7] He allowed the second disagreement and, among other conclusions, ordered the appellant to submit its final offers to arbitration and to pay the respondents the wages and benefits lost during the lockout.

[18] On October 30, 1998, the Superior Court, which was seized of a motion for judicial review, quashed the part of the Sylvestre No. 1 award that allowed the disagreement of June 4, 1996.[8]

[19] The judgment was appealed from and quashed on December 15, 1999 in *The Gazette (No. 1)*.[9] Written by Rousseau-Houle J.A. as I said, the ruling of our Court concluded in essence that (1) arbitrator Sylvestre was seized of the disagreements of May 8 and June 3, 1996 in his capacity as a consensual arbitrator (which means that his award resolved the "disputes" according to the terms of article 944 C.C.P.), (2) article 946.4 C.C.P. exhaustively lists the grounds for refusal of homologation or annulment of such a sentence, (3) the agreements of 1982 and 1987 could not be amended without the consent of the signatory employees, and the appellant was obliged to submit its final offers to arbitration, as the arbitrator rightly believed, but (4) the arbitrator committed an error that justified judicial intervention when he decided that, according to the agreements of 1982 and 1987, the appellant had to pay wages and benefits during the lockout. For those reasons, the Court allowed the appeal, ordered the appellant to submit to the final offer exchange process, and sent the case to the arbitrator for a legal ruling on the disagreement.

[20] Two paragraphs of *The Gazette (No. 1)*, regarding Article XI of the agreement of 1987, *supra*, proved decisive in the subsequent progress of the case:

> [TRANSLATION]
> Regardless of the scope of the clauses regarding job security, guaranteed wages adjusted to the cost of living, and the term of the agreements and their non-

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7 *Gazette (The), une division de Southam inc.* v. *Syndicat canadien des communications, de l'énergie et du papier, section locale,* 145 D.T.E. 98T-270 at 109.

8 *Gazette (The), une division de Southam inc.* v. *Sylvestre,* [1998] R.J.Q. 3201.

9 *See supra* note 2.

renegociation, those clauses do not change the content of Article XI of the agreement of 1987, which allows the exercise of the right to strike and the right to lockout. The usual effect of a lockout is to suspend the obligation of the employer to pay the wages of the employees and to allow them access to work. Article XI in no way deprives the employer of that enshrined right in the labour relations field.

However, that article sets a limit on the exercise of the right to lockout by providing for a mandatory collective agreement renewal process according to the arbitration of the best final offers. It necessarily ensures that any labour dispute will eventually be resolved by the imposition by a third party of a new collective agreement. It is possible that the lockout was prolonged unduly by the employer's refusal to exchange the best final offers as the union had requested by the deadline of April 30, 1996 and that, hence, the employees are entitled to damages. It is up to the arbitrator to decide.

[21] Between February 25, 2000, the date of the pre-hearing conference called by arbitrator Sylvestre further to *The Gazette (No. 1)*, and October 28, 2000, the date on which the arbitrator informed the parties of his interim decision (the Sylvestre No. 2 award), the appellant, the respondents and the impleaded union pursued the contestation regarding the disagreement of June 4, 1996. At the end of the pre-hearing conference of February 25, 2000, the parties actually agreed that certain legal questions concerning admissible heads of damages would be the object of an interim decision by the arbitrator and that the arbitration procedure would then continue in order to resolve the quantum of damages, among other matters. Hence, in its initial phase, the discussion dealt mainly with the heads of damages that the respondents could claim. On February 25, March 15 and June 9, the respondents, through their successive attorneys, amended their claim and indicated the heads of damages on which they based their contentions. For a proper understanding of the Sylvestre No. 2 award, it is worthwhile to cite the various claims.

[22] The disagreement of June 4, 1996 marked the starting point for the dispute before arbitrator Sylvestre; it indicated in these terms the relief sought by the respondents:

[TRANSLATION]
1 – order the employer to submit to the final best offer exchange process and transmit, without delay, its "last final offers" to the union and the 11 complainants;

2 – declare that the tripartite agreements entered into on or around November 12, 1982 and March 5, 1987 are wholly in force and oblige the employer to abide by them;

3 – order the employer to continue to pay each of the complainants the wages and other benefits stemming from the collective labour agreement and the tripartite agreements of November 1982 and March 1987;

4 – order the payment of any wages or benefits lost further to or because of the lockout, the whole with interest;

5 – issue any other order conducive to safeguarding the rights of the parties ....

During the pre-hearing conference of February 25, 2000, counsel for the respondents reiterated the damages claimed by his clients and announced that other damages of a pecuniary nature, moral damages and exemplary damages would be added to the benefits and wages lost. It was agreed that the respondents would provide a written description thereof the following March 15, which they did. The list of claims then read as follows:

[TRANSLATION]
5. The employees claim:

(a) the equivalent of the wages lost between May 3, 1996 and January 21, 2000;

(b) the other job-related benefits (such as the retirement plan and the group insurance plan) from May 3, 1996 to January 21, 2000.

6. The employees also claim compensation for monetary prejudice, such as:

(a) fiscal prejudice, loss of interest and loss of capitalization stemming from the withdrawal of money from RRSPs;

(b) fiscal prejudice, loss of interest and loss of capitalization for the absence of contributions to RRSPs;

(c) interest expenses and other expenses stemming from personal loans or the refinancing of hypothecary loans;

(d) disbursements by the employees to cover expenses and claims that would have been covered by the employer's group insurance.

7. The employees also seek compensation for moral prejudice, such as inconvenience, suffering, stress, anxiety and impact on family life.

8. Some employees also seek compensation for prejudice to their physical and psychological health.

9. Lastly, exemplary damages are sought from the arbitrator, based on violation of the constitutional and quasi-constitutional guarantees of the right to security, the right to dignity and the right to fair and reasonable working conditions.

On June 9, 2000, the new counsel for the respondents filed an undated document during the hearing at which arbitrator Sylvestre presided that day. The document, filed as Exhibit S-54 during the arbitration proceedings, and R-8 in first instance before the Superior Court, established a new list of heads of damages:

1. Loss of wages and benefits for the period commencing June 4th, 1996 to the effective date of resumption of work.

2. Lost benefits for the same period.

3. Restitution of the pension plan contributions and earnings for the same period.

4. Compensation for loss of RRSP contributions and earnings for the same period.

5. Compensation for losses incurred for cashing in RRSPs prematurely for the same period.

6. Compensation for cost of loans and mortgages.

7. Compensation for damages due to stress and anxiety and inconvenience as well as loss of enjoyment of life, impact on family and damages to health for the same period.

8. Moral damages and damages for abuse of rights.

9. Exemplary and punitive damages for the same period.

10. Compensation for all fiscal prejudice.

11. Compensation for job search costs and business losses for the same period.

12. Legal fees and costs.

13. Interest and the additional indemnity provided for under article 100.12 of the Labour Code.

14. Reserve of competence for arbitrator Me André Sylvestre.

As we see, several counts of damages were added to the claim between the initial submission of the disagreement and the interim decision of the arbitrator.

[23] In addition to those arbitration proceedings, the appellant instituted, against the respondents in the Superior Court, recourse for overpayment of the wages and benefits it paid between February 5, 1998, the date on which the Sylvestre No. 1 award concluded that the appellant could not order a lockout against the respondents, and October 30, 1998, the date on which the Superior Court quashed the Sylvestre No. 1 award. That recourse was the object of a declinatory exception filed by the respondents, which was allowed on August 14, 2001,[10] as the Court felt that the question was within the competence of arbitrator Sylvestre and that he could ensure judicial compensation for any amounts overpaid by the appellant.

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10 *Gazette (The), une division de Southam inc.* v. *Blondin*, B.E. 2001BE-803.

[24] Lastly, at about the same time as the pre-hearing conference on February 25, 2000, the parties brought the "dispute"[11] still between them before arbitrator Ménard, on March 6, 2000, in order to obtain an award that would adjudicate between the final offers they exchanged the previous January 21. A motion for an injunction, filed by the respondents and aimed at ending the lockout ordered by the appellant as of January 21, 2000, the date on which the final offers were submitted, was subsequently dismissed by the Superior Court.[12] Arbitrator Ménard rendered his award on June 5, 2001 and set the content of the collective agreement between the appellant and the respondents for the next five years. A motion for homologation of that award, filed by the impleaded union and contested by the appellant and the respondents for reasons that are irrelevant here, was allowed by the Superior Court on May 2, 2002.[13]

[25] The Sylvestre No. 2 award, which would be quashed by the judgment appealed from here, was issued on September 28, 2000.[14] The detailed grounds on which the arbitrator based his ruling were filed the following October 11.

[26] On September 4, 2001, the Superior Court annulled that award pursuant to articles 943.1 and 947 C.C.P.[15]

The award attacked in Superior Court

[27] It will be recalled that the Sylvestre No. 2 award was an "interim" award.

[28] The arbitrator informed the parties of his decision by letter dated September 28, 2000. He expressed in these terms the conclusions that the Superior Court would subsequently annul in part:

> [TRANSLATION]
> 2 – the damages to which the 11 complainants [the respondents] are entitled are limited to the wages and other benefits lost and provided for in the collective agreement, if it is proven, to use the terms of the Court of Appeal, "that the lockout was prolonged unduly by the employer's refusal to exchange the best final offers as the union had requested by the deadline of April 30, 1996";
>
> 3 – furthermore, as stipulated [by counsel for the complainants], the claim period must end on January 21, 2000, the date on which the employer submitted its best final offers;

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11 This time, it was indeed a dispute within the meaning of paragraph (e) of section 1 of the *Labour Code* and article XI of the agreement of 1987, dealing with the "best final offers" that would serve as a collective agreement between the parties.

12 *Blondin* v. *Gazette (The), une division de Southam inc.*, J.E. 2001-1328.

13 *Syndicat canadien des communications, de l'énergie et du papier, section locale 145* v. *Ménard*, J.E. 2002-935; the judgment was not appealed from.

14 *Syndicat canadien des communications, de l'énergie et du papier, section locale 145* v. *Gazette (The), une division de Southam inc.*, D.T.E. 2001T-137.

15 Rendered orally, the judgment is unpublished.

> 4 – each of the complainants shall, within a reasonable period of time, submit a document containing a breakdown of the amounts he claims in wages and benefits lost during the period from June 6, 1996 to January 21, 2000 [*sic*] and the employment income he received during the same period, in order to thereby mitigate his damages.

The grounds for that award, which were submitted a few days later, indicate that the arbitrator based his conclusions on two crucial considerations.

[29] First, the arbitrator interpreted *The Gazette (No. 1)*, and drew the following teaching from it: [TRANSLATION] "It must be understood from the whole of that decision that the damages to which that conclusion alluded cover only the wages and benefits provided for in the agreement. I would find it *ultra petita* if the other damages claimed by the 11 complainants as set forth in the documents submitted by [the respondents' attorneys] were granted".

[30] Second, the arbitrator ruled that the respondents, though their attorney, admitted that the damages in question, i.e. the loss of wages and of the other benefits provided for in the collective agreement, could not extend beyond January 21, 2000. It was on that date that the appellant, to abide by *The Gazette (No. 1)*, submitted its final offers and thus ceased to violate Article XI of the agreement of 1987. The arbitrator commented that the position of the respondents' attorney [TRANSLATION] "was wholly logical", and was in the nature of a confession binding its mandators.

The judgment of the Superior Court

[31] The Sylvestre No. 2 award was attacked by the respondents through a [TRANSLATION] "motion pursuant to article 943.1 C.C.P. and for annulment of the arbitration award pursuant to articles 947 *et seq.* C.C.P." The record shows that a ruling was handed down on that motion from the bench on September 4, 2001. The Court allowed the motion in part and, without giving more ample grounds, pronounced the following judgment:

> [TRANSLATION]
> Annuls in part the arbitration award issued by arbitrator André Sylvestre on October 11, 2000 to the extent that it declared that he did not have the competence to grant damages other than the wages and other benefits provided for in the collective agreement or the agreements of 1982 and 1987;
>
> Returns the case to the respondent arbitrator so that he has full competence to rule on the damages that the petitioners may claim in the case of which he is seized, until January 21, 2000, apart from the interest on any amounts that may be granted, which will accrue before and after that date.

Grounds invoked on appeal

The appellant's main argument was that the recourse exercised by the respondents was necessarily in the form of a motion for annulment according to article 947 C.C.P. and that, therefore, the Sylvestre No. 2 award could be annulled only in accordance with subparagraph (4) of the first paragraph of article 946.4 C.C.P. According to the appellant, the respondents' motion did not meet the requirements of that provision.

[32] Subsidiarily, the appellant contended firstly that the arbitrator did not commit an error of law by ruling that the respondents' claims for damages had to be limited to the wages and benefits lost during the lockout. It maintained secondly that, because of the conduct of their attorney after the decision of September 28, 2000, the respondents acquiesced in any case to the conclusions of the arbitrator regarding admissible damages.

[33] The respondents joined issue on each of these points. They claimed that, in his decision of September 28, 2000 (the grounds of which, I repeat, were submitted only on October 11, 2000), the arbitrator ruled on his competence, thereby giving rise to the application of article 943.1 C.C.P. By limiting the respondents' claims as he did, the arbitrator erroneously ruled on his own competence, thereby justifying the intervention of the Superior Court. Moreover, the respondents did not acquiesce in the arbitrator's conclusions.

[34] Lastly, note that the respondents are seeking confirmation of the judgment of first instance from which they have not appealed. Like the Sylvestre No. 2 award, that judgment set January 21, 2000 as the date on which the period for claiming damages owed the respondents ended.

Analysis

[35] Despite the use of the words [TRANSLATION] "grievance settlement procedure" in Article IX of the agreement of 1987, it is admitted by all the parties that, since *The Gazette (No. 1)*, a consensual arbitration procedure is involved here.

[36] The provisions of the *Code of Civil Procedure* that are the most immediately relevant in disposing of the appeal are as follows:

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

[37] As long as the Court has not ruled, the arbitrators may pursue the arbitration procedure and render their award.

...

944. 10 *The arbitrators shall settle the dispute according to the rules of law which they consider appropriate and, where applicable, determine the amount of the damages.*

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

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

...

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

...

946.4 The court cannot refuse homologation except on proof that

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

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

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

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

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

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

...

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

> **947.1** Annulment is obtained by motion to the court or by opposition to a motion for homologation.
>
> **947.2** Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award.

[38] Article 940.3 sets the tone of Book VII of the *Code of Civil Procedure*. In the cases contemplated by articles 33 and 846 C.C.P., control over the legality of decisions rendered by the court of original general jurisdiction is the rule, but the legislator can restrict the power of the court of original general jurisdiction to intervene, usually through a privative clause. In the case of courts of consensual arbitration, the reverse is now the rule. As article 940.3 C.C.P. stipulates, the judge can intervene only where the law permits. Seized of an application for homologation or annulment of an arbitration award, the judge, according to article 946.2 C.C.P., cannot inquire into the merits of the dispute, and it is impossible for the parties to an arbitration agreement to be contractually excluded from that rule. Nor can they derogate from subparagraph (4) of the first paragraph of article 946.4 C.C.P, which provides the sole ground for annulment (or refusal of homologation) likely to apply in this case. Again through article 940, other provisions in Title I of Book VII are also of public order and involve decisions that the judge may be asked to make in appointing an arbitrator (941.3), ruling on the arbitrator's recusation or the revocation of the arbitrator's appointment (942.7), recognizing the arbitrator's competence (943.2) or safeguarding the rights of the parties awaiting an arbitration award (945.8). By establishing that those judicial decisions are final and without appeal, the Code seeks to reinforce the autonomy of the arbitration procedure as it unfolds. By limiting the grounds for annulment or refusal of homologation of an award, the Code seeks to strengthen the autonomy of the arbitration procedure in terms of its outcome. The adoption of those provisions [TRANSLATION] "marked a turning point in Québec's conventional arbitration regime", as Thibault J.A. correctly pointed out for the Court in *Laurentienne-vie (La), compagnie d'assurances inc.* v. *Empire (L'), compagnie d'assurance-vie.*[16] In reintroducing, as a control over arbitration competence, a detailed examination of the legal questions that the arbitrator may have been led to resolve—an examination similar to reforming power or even an appeal—there is a risk of turning back the clock.

[39] Very recently, in *Desputeaux* v. *Éditions Chouette (1987) inc.*,[17] LeBel J., writing for the Supreme Court of Canada, made the following comments about a related question, i.e. the public order mentioned in article 946.5 C.C.P.:

> Despite the specificity of these provisions [articles 946.2, 946.4, 946.5 and 947.2] of the *Code of Civil Procedure* and the clarity of the legislative intention apparent in them, there have been conflicting lines of authority in the Quebec case law regarding the limits

16 [2000] R.J.Q. 1708 at para. 23.
17 2003 SCC 17 at para. 68.

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

These foundations having been laid, it is now time to examine the parties' claims regarding the award impugned here.

[40] Does the Sylvestre No. 2 award constitute a case contemplated by article 943.1 C.C.P.? The article in question deals with situations in which arbitrators "declare themselves competent during the arbitration proceedings" and it provides that a party can then ask the court to rule in turn "on that matter", but without interrupting the arbitration proceedings. In the case at bar, as of February 25, 2000, the arbitrator simply resumed the examination of the disagreement of June 4, 1996 in the light of *The Gazette (No. 1)*. That decision had quashed his two orders concerning the wages and benefits lost during the lockout and sent the case back to him [TRANSLATION] "so that he can determine whether damages can be granted to the 11 employees further to the employer's non-compliance with Article XI of the agreement of 1987".[18] It seems to me that that is exactly what the arbitrator sought to determine, that he ruled through an interim award for the sake of procedural convenience and that the award did not deal with his competence or the arbitrability of the dispute submitted to him, but rather with the merits of the dispute. Unless it is contended that any decision of an arbitrator deals, at least implicitly, with the arbitrator's competence, which I do not feel can be supported according to article 943.1 C.C.P. and its context, it must be concluded that article 943.1 C.C.P. was inapplicable here. The Superior Court therefore could not use that provision as a basis for reforming the Sylvestre No. 2 award as it did.

[41] But could the Superior Court intervene on the ground that the Sylvestre No. 2 award, according to subparagraph (4) of the first paragraph of article 946.4, "deal[t] with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or ... contain[ed] decisions on matters beyond the scope of the agreement"?

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18 See *supra* note 2 at 40.

[42] That ground can be raised only in the framework of an application for annulment according to articles 947, 947.1 and 947.2 C.C.P., or in defending an application for homologation according to article 946.1 C.C.P. The respondents proceeded in this case by means of an application for annulment.

[43] An initial difficulty concerns the status of what is considered an "interim" award. It is not certain that the Sylvestre No. 2 award per se could have been the object of an application for homologation. Could it, in these circumstances, be the object of an application for annulment? Or was it simply a procedural order, the stage prior to the elaboration of a possibly final award on the merits, which alone could have been the object of an application for homologation or an application for annulment at the proper time?[19] I do not doubt that, by limiting, as he did, the admissible heads of damages and by setting aside, for example, the moral, exemplary or punitive damages of the remedy to which the respondents may have been entitled, the arbitrator in this case ruled on a substantive issue opposing the appellant and the respondents. In doing so, he decided, in part, the dispute submitted to him. His decision therefore constituted an award subject to annulment pursuant to article 947 C.C.P. In saying this, I am aware that other considerations of legal policy may come into play in the case of an "interim" award of an international commercial arbitration court, as illustrated by the recent decision in *Compagnie nationale Air France* v. *Mbaye*.[20] But those considerations do not apply in a case like this one, which is characterized by a labour relations dynamic wholly governed by internal law and already highly subject to judicial control.

[44] Subparagraph (4) of the first paragraph of article 946.4 C.C.P. refers to the "arbitration agreement", which is what should be understood in this case to be Article IX of the agreement of 1987, cited above. That contractual provision provides that [TRANSLATION] "[s]hould a disagreement arise regarding the interpretation, application, and/or alleged violation of the present Agreement, the matter shall be judged as a grievance ...". The respondents' contention, inasmuch as it deals with the prejudice sustained because of the employer's delay in submitting its final offers to arbitration, very definitely concerns "the interpretation", "application" or "alleged violation" of the agreements of 1982 and 1987, and particularly Article XI of the agreement of 1987. Hence, it cannot be seriously argued that this is a dispute "not contemplated by or not falling within the terms of the arbitration agreement".

[45] However, again applying subparagraph (4) of the first paragraph of article 946.4 C.C.P., we must also ask ourselves whether the Sylvestre No. 2 award contains "decisions on matters beyond the scope of the [arbitration] agreement". Wondering what

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19 See the article that LeBel J. refers to in the passage in *Desputeaux* v. *Éditions Chouette (1987) inc.* cited above: Frédéric Bachand "Arbitrage commercial: Assujettissement d'un tribunal arbitral conventionnel au pouvoir de surveillance et de contrôle de la Cour supérieure et contrôle judiciaire d'ordonnances de procédure rendues par les arbitres" (2001), 35 R.J.T. 465. The author takes stock, at 481 *et seq.*, of the distinction between a procedural order and an arbitration award.

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

meaning should be given that circumlocution, our colleague Thibault J.A. wrote in *Laurentienne-vie (La), compagnie d'assurances inc.* v. *Empire (L'), compagnie d'assurance-vie*:[21]

> [TRANSLATION]
> I feel that, to decide whether the arbitration award is beyond the scope of the arbitration agreement, the interpretation that led to the result must be disregarded in order to concentrate on the result itself. In addition to being in keeping with article 946.2 C.C.P., which prohibits the court seized of an application for annulment of an arbitration award from examining the merits of the dispute, that interpretation of the ground for annulment provided for in subparagraph (4) of the first paragraph of article 946.4 C.C.P. abides by the approach recommended by author Sabine Thuilleaux.

A quote from author Sabine Thuilleaux follows; LeBel J. would cite it in turn in *Desputeaux* v. *Éditions Chouettte (1987) inc.*:[22] The evaluation of that grievance depends on the [TRANSLATION] "connection between the question to be disposed of by the arbitrators and the dispute submitted to them".[23]

[46] Going by the result, i.e. the specific conclusions of the arbitrator in the Sylvestre No. 2 award, it is impossible to conclude that that question decided then by the arbitrator had no connection with the dispute submitted to him. Much to the contrary; it is at the very heart of the dispute between the parties. The detailed examination of the arbitrator's grounds would perhaps show that another arbitrator might have disposed differently of one or more of the questions submitted to arbitrator Sylvestre. The problem does not lie there, however. Bear in mind that a court seized of an application for annulment filed under article 947 cannot examine the merits of the dispute. The problem might be posed in a different light if the arbitrator had not abided by the order in *The Gazette (No. 1)*, but nothing of the kind happened in this case.

[47] THEREFORE, I propose that the appeal be ALLOWED with costs, that the judgment annulling in part the October 11, 2000 arbitration award of arbitrator André Sylvestre be QUASHED, that the respondents' motion be DISMISSED with costs and that the case be RETURNED to the arbitrator so that he can continue to hear the disagreement between the appellant and the respondents with a view to disposing of it completely on its merits.

21 See *supra* note 16 at para. 44.
22 See *supra* note 17 at para. 35.
23 *L'arbitrage commercial au Québec - Droit interne - Droit international privé* (Cowansville: Yvon Blais, 1991) at 115.