2 there's a link to identity.
3 1116. Q. Right. And even for the people on
4 reserves, for example, who aren't actively involved,
5 there's also that link to identity knowing that there are
6 people still engaged in the traditional cultural
7 activities associated with trapping and hunting?
8 A. Yes, I would agree with that.[53]

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[232] The plaintiffs argue that there is still a chance to save their culture and this case is intended to assist in that goal. Through events beyond their control, the Anishnaabe at Grassy Narrows have experienced significant interference with key elements of their traditional way of life in the last decades. Flooding has disrupted their wild rice gathering, and their fisheries were heavily contaminated by mercury. While the older generation has maintained its connection with the land, the involvement of the community in hunting and trapping has declined in recent years. This is due to many factors, but this action is important to the extent that they wish to assert that industrial logging in the Whiskey Jack Forest has been one of the main causes of the problem.

[233] Counsel for the MNR argued that the significance of this case is much less that the Okanagan case which Lebel J. described as "special, even extreme"(at para. 46). Lebel J. did not find however that extreme circumstances were needed before an order for advance costs could be made. In this case there is no doubt that if the plaintiffs succeed, the outcome of this litigation will have a significant impact on the parties and the citizens of this province. In fact counsel for Abitibi tried to impress on the court how serious the consequences could be.

Conclusion on the "public interest" requirement

[234] I have no difficulty in concluding that the treaty interpretation issue is an issue of great public importance. It will be the first time that the "taking up" provision in Treaty 3 is interpreted on the issue of whether or not Ontario has the power to take up the lands. The significance for forestry alone is great and give that the taking up power is also for mining and settlement, the issue has ramifications for other aspects of the province's powers with respect to the Keewatin Lands.

Is this a rare and exceptional case that warrants my exercising my discretion to grant the order sought?

[235] Notwithstanding the Supreme Court's ruling in Okanagan that advance costs funding is possible in certain limited circumstance, it remains an extraordinary remedy. Only very rarely will it be appropriate to compel a party to fund litigation against itself.

[53] Cross-examination of Jean-Philippe Chartrand, December 2, 2005

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[236] In considering the issue of advance costs, Mr. Justice Lebel considered the factor of access to justice, particularly in litigation over matters of public interest. He observed that "[c]oncerns about access to justice and the desirability of mitigating severe inequality between litigants also feature prominently in the rare cases where interim costs are awarded (at para. 31).

[237] In addition to the public importance of this case, the plaintiffs submit that Grassy Narrows is challenging an economic activity that has imposed and will continue to impose on it high cultural costs and that has provided the community and the vast majority of its members with no economic benefits. It is submitted that, in addition to the three elements of the Okanagan test, an advance costs order is warranted by this particular economic imbalance in that pursuant to an advance costs order, Ontario would be paying a relatively small portion of the revenues it derives from forestry in the Whiskey Jack Forest to have tested, once and for all, the constitutionality of those activities, which are being carried out at the expense of Grassy Narrows.

[238] Although the Grassy Narrows Trappers' Council and Roger Fobister, a member of Grassy Narrows do have contracts with Abitibi, and there appears to be untapped economic opportunities as a result of forestry, that Grassy Narrows has not taken advantage of, there remains a serious economic imbalance, and as I have already stated the stakes in this litigation are high.

[239] In my opinion the public interest is not served if the plaintiffs are required, as a result of lack of funds, to abandon this action. Certainly the public interest is served in ensuring that the treaty interpretation issue is tried.

[240] Counsel for the MNR argues that inevitably, an advance costs order limits or eliminates incentives on plaintiffs to litigate in an efficient and responsible manner, and very considerable sums of public money are in issue. He referred to the Tsilhqot-in v. British Columbia[54] action that followed from the Okanagan ruling, where the plaintiffs' counsel estimated the costs in 2001 as likely being in the neighbourhood of $600,000. The plaintiffs' actual costs of that proceeding have since that time exceeded $10 million and the matter is far from complete. It is argued that in this matter, the plaintiffs' estimates for costs have already dramatically escalated, from "tens of thousands or possibly more than a hundred thousand", to "in excess of 2 million", to 2.8 million or more

[241] Plaintiffs' counsel submitted that it is not in the plaintiffs' interests to protract the litigation given that logging is ongoing. He also argues that the court can control the process to avoid abuse including the phasing of issues.

[242] As the court in Okanagan held, where an order for advance costs is granted, "the order must be carefully fashioned and reviewed over the course of the proceedings to ensure that concerns about access to justice are balanced against the need to encourage the reasonable and efficient conduct of litigation, which is also one of the purposes of costs awards. When making

[54] (2001), 12 C.P.C. (5th) 292 (B.C.S.C.); (2002) 21 C.P.C. (5th) 32 (B.C.C.A.)

these decisions courts must also be mindful of the position of defendants. The award of interim costs must not impose an unfair burden on them." (at para. 41)

[243] The parties agreed that this hearing would focus on whether such an order should be made, leaving aside the issue of the appropriate terms of such an order, to be dealt with at a later time, if necessary. The issue of the scale of costs, hourly rates and form of any order for advance costs that I might make were not argued before me. Obviously lessons learned from past experiences with these types of orders will need to be applied to avoid these difficulties and ensure that an order for advance costs does not undermine the usual incentive plaintiffs have to conduct litigation in a cost effective manner. I am confident that as the Rule 37.15 judge that I will be able to fashion an order that balances these interest and one that will be reviewed on a regular and ongoing basis to ensure that this litigation is conducted in a reasonable and efficient way.

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[244] By dealing first with the question of the proper interpretation of the "taking-up" provision of Treaty 3 and specifically whether or not the province of Ontario has the authority to take up the Keewatin Lands for forestry, I will also be able to address the concerns raised by Abitibi that as a private litigant that they not be burdened with great expense which will be unrecoverable. The plaintiffs seek a declaration against Abitibi that the forestry activities carried out by Abitibi pursuant to its forest license violate the plaintiffs' rights to hunt and fish guaranteed by Treaty 3. The plaintiffs have not argued that the issues raised in the claims against Abitibi meet the Okanagan test. The claim against Abitibi will not be dealt with in the first instance and although Abitibi will be indirectly affected by the outcome of the treaty interpretation issue, that is really an issue as between the plaintiffs and the Crown. Abitibi is not caught in that dispute and it will not be necessary for Abitibi to participate in the determination of that issue. If Abitibi chooses to do so it cannot in my view complain that it has been unfairly burdened by irrecoverable costs.

Disposition

[245] Accordingly, I order that the MNR pay the costs of the plaintiffs on a partial indemnity basis, in advance, and in any event of the cause, with respect to the plaintiffs' claim as set out in paragraph 1(b) of the Amended Statement of Claim. The order is limited to the cost of determining the issue of the interpretation of the "taking-up" provision of Treaty 3 and if necessary, the plaintiffs' constitutional division of powers argument, so that it can be determined, as a threshold issue, whether or not the province of Ontario has the authority to take up the Keewatin Lands for forestry.

[246] In coming to this conclusion I am of the opinion that this action should proceed first with the determination of the treaty interpretation issue concerning the "taking up" provision of Treaty 3, which I presume is the basis of the declaration sought in paragraph 1(b) of the claim. The argument of the motion proceeded on this basis and this is the issue that in my view meets the requirements of the Okanagan test. I have added the constitutional division of powers

argument advanced by the plaintiffs but as set out above, I am not certain if that aspect of their argument is in dispute. The scope of the issue to be tried can be determined on the next attendance before me.

[247] I ask that counsel consider the best means by which this treaty interpretation issue could be tried as a threshold issue and that the definition of the issue to be tried, the procedure for the determination of this issue and the other terms of this order including hourly rates, budgets and the timing and quantum of payment be brought before me for determination as soon as possible.

[248] I am not satisfied that any of the other claims in the action warrant this extraordinary remedy and so the motion is dismissed with respect to the balance of the action without prejudice to the plaintiffs to bring a further motion if they are successful on the treaty interpretation issue.

SPIES J.

DATE: May 23, 2006

2006 CanLII 35625 (ON SC)

COURT FILE NO.: 05-CV281875 PD
DATE: 2006-05-23

2006 CanLII 35625 (ON SC)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: WILLIE KEEWATIN, ANDREW KEEWATIN JR., and JOSEPH WILLIAM FOBISTER on their own behalf and on behalf of all other members of GRASSY NARROWS FIRST NATION, Plaintiffs and MINISTER OF NATURAL RESOURCES and ABITIBI-CONSOLIDATED INC. Defendants

COUNSEL: ROBERT J. M. JANES and DOMINIQUE NOUVET, for the Plaintiffs

D. THOMAS H. BELL, MICHAEL STEPHENSON and PETER LEMMOND, for the Defendant MINISTER OF NATURAL RESOURCES,
CHRISTOPHER H. MATTHEWS and COLLEEN E. BUTLER for the Defendant Abitibi-Consolidated Inc

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REASONS FOR DECISION

SPIES J.

2006 CanLII 35625 (ON SC)

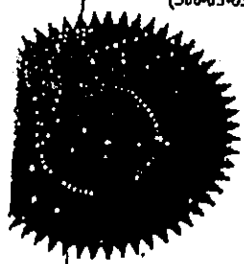
TAB 3

3. *Communications, Energy and Paperworkers Union of Canada, local 145 v. Gazette (The), a division of Southam Inc.*, December 15, 1999 (500-09-007384-985);

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

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



December 15, 1999

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

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

APPELLANT - (impleaded party)

and

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

APPELLANTS - (impleaded parties)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

MTRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY - (respondent)

VALIDATING CODE = BBZQ2BRERO

500
00-025427-997

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

Having examined the file, heard the evidence and deliberated;

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

ALLOWS the appeal in part;

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

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

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

VALIDATING CODE - BBZQ2HRERO

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

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

December 15, 1999

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

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

APPELLANTS - (impleaded parties)

and

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

APPELLANT - (impleaded party)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

MTRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY - (respondent)

VALIDATING CODE = BBZQ2BRBRO

500
00-025427-997

THE WHOLE with costs in both courts.

(s) Thérèse Rousseau-Houle J.A.

(s) Jacques Chamberland J.A.

(s) André Forget J.A.

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

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

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

Date of hearing: November 9, 1999

VALIDATING CODE - BBZQ2BRERO

THE WHOLE with costs in both courts.

(s) Thérèse Rousseau-Houle J.A.

(s) Jacques Chamberland J.A.

(s) André Forget J.A.

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

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

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

Date of hearing: November 9, 1999

VALIDATING CODE = BBZQ2BRSRO

261

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

Having examined the file, heard the evidence and deliberated;

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

ALLOWS the appeal in part;

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

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

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

VALIDATING CODE = BBZQ2BRERO

THE WHOLE with costs in both courts.

(s) Thérèse Rousseau-Houle J.A.

(s) Jacques Chamberland J.A.

(s) André Forget J.A.

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

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

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

Date of hearing: November 9, 1999

VALIDATING CODE = BBZQZBRERO

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

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

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

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

APPELLANT - (impleaded party)

and

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

APPELLANTS - (impleaded parties)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

M'TRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY - (respondent)

VALIDATING CODE = BBZQ2BRERO

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

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

APPELLANTS - (impleaded parties)

and

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145, CEP

APPELLANT - (impleaded party)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

MTRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY

OPINION OF ROUSSEAU-HOULE J.A.

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

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

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

The facts

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

The main points of this agreement are as follows:

- The agreement shall only come into effect once the agreement on job security provided for in the collective agreement or in subsequent collective agreements terminates, is cancelled, lapses or becomes inapplicable (art. 1).
- The agreement shall remain in effect until all the employees who signed it have ceased their employment, ultimately until 2017, and no party shall raise the subjects of the present agreement during future negotiations for the renewal of a collective agreement (art. 11).
- In return for the right to go ahead with technological changes, the employer agrees to guarantee and guarantees to protect the employees named in Appendix I against the loss of regular full-time employment in the composing room. The full-

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

- The agreement shall only cease to apply to an employee by reason of death, voluntary resignation, end of employment at the age of 65 or dismissal (art. IV).
- The agreement shall bind any buyer, successor or assignee of the employer (art. V).
- An employee transferred to another department shall remain subject to the agreement (art. VI).
- In case of a dispute over the interpretation, application or violation of this agreement, the grievance procedure provided for in the collective agreement in effect at the time the grievance is filed shall apply (art. VII).
- Should the union cease to exist or cease to act as the certified bargaining agent, an employee named in Appendix I shall have recourse to the grievance procedure provided for in the *Labour Code*.

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

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

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

[Translation]

X. AMENDMENTS

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

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

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

XI. RENEWAL OF COLLECTIVE AGREEMENTS AND DISPUTE SETTLEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[Translation]

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

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

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

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

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

We ask the arbitrator to declare and order the following:

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

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

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

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

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

and, in the interim:

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

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

Arbitrator Sylvestre allowed this grievance on February 5, 1998.

<u>The arbitral award</u>

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

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

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

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

...

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

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

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

<u>The Superior Court decision</u>

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

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

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

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

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

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

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

Grounds for appeal

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

Analysis

1. Arbitrator's original jurisdiction

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

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

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

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

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

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

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

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

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

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

However, she failed to consider the following facts:

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

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

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

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

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

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

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

> [Translation]
> *II - APPLICATION - This agreement applies to all the employees of the Composing Room (and those transferred to the Shipping Department) as at March 6, 1987 who signed the agreement and who had signed the previous agreement (Job security - Technological changes) and whose names appear in Appendix II attached to these presents. These employees are covered by the present agreement only if they remain members in good standing of the Union. The agreement will apply to transferred employees only when such employees work in the Composing Room.*
>
> *The present agreement will come into force only once the collective labour agreement between the above-mentioned Employer and Union or a subsequent collective agreement terminates, is removed, is cancelled, or lapses or becomes inapplicable for any other reason.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[Translation]

...

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Refer to page 2

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

The whole WITH COSTS in both courts.

(s) Thérèse Rousseau-Houle J.A.

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TAB 4

4. *Desputeaux c. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178 ;

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

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

v.

Hélène Desputeaux *Respondent*

and

Régis Rémillard *Mis en cause*

and

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

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

Neutral citation: 2003 SCC 17.

File No.: 28660.

2002: November 6; 2003: March 21.

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

on appeal from the court of appeal for quebec

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Copyright Act, R.S.C. 1985, c. C-42, ss. 2 "work of joint ownership", 9 [rep. & sub. 1993, c. 44, s. 60], 13, 14.1 [ad. 1985, c. 10 (4th Supp.), s. 4], 37 [am. 1997, c. 24, s. 20].

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

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

Normand Tamaro, for the respondent.

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

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

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

English version of the judgment of the Court delivered by

LEBEL J. —

I. Introduction

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

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

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

II. Origin of the Case

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

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

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

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

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

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

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

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

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

III. Relevant Statutory Provisions

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

2. . . .

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

13. . . .

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

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

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

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

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

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

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

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

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

(1) the nature of the contract;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

946.4. The court cannot refuse homologation except on proof that

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

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

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

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

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

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

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

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

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

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

IV. Judicial History

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

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

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

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