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

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

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

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

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

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

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

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

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

V. Analysis

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

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

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

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

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

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

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

B. *The Arbitrator's Terms of Reference*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. *Copyright, Public Order and Arbitration*

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

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

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

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

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

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

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

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

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

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

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

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

(i) Public Order and the Nature of Copyright

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

65 The Court of Appeal stated at para. 49:

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

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

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

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

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

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

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

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

(v) The Conduct of the Arbitration and Natural Justice

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

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

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

VI. Conclusion

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

Appeal allowed with costs.

Solicitors for the appellants: Fraser Milner Casgrain, Montréal.

Solicitors for the respondent: Tamaro, Goyette, Montréal.

Solicitors for the intervener the Quebec National and International Commercial Arbitration Centre: Ogilvy Renault, Montréal.

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

Solicitors for the intervener the Regroupement des artistes en arts visuels du Québec: Laurin Lamarre Linteau & Montcalm, Montréal.

TAB 5

5. *The Gazette v. Rita Blondin and A. Sylvestre and CEP, local 145,* August 6, 2003 (500-09-011439-015). (Translation by the Court);

Unofficial English Translation

COURT OF APPEAL

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

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

DATE : AUGUST 6, 2003

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

THE GAZETTE, a Division of Southam Inc.
APPELANT/mis en cause
v.

RITA BLONDIN, ERIBERTO DI PAOLO, UMED GOHIL, HORACE HOLLOWAY, PIERRE REBETEZ, MICHAEL THOMSON, JOSEPH BRAZEAU, ROBERT DAVIES, JEAN-PIERRE MARTIN, LESLIE STOCKWELL, MARC-ANDRÉ TREMBLAY
RESPONDENTS/plaintiffs
and
Mtre ANDRÉ SYLVESTRE
MIS EN CAUSE/respondent
and
THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA LOCAL 145
MIS EN CAUSE/mis en cause

JUDGMENT

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

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

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

[4] Allows the appeal with costs;

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

LOUISE MAILHOT J.A.

FRANÇOIS PELLETIER J.A.

YVES-MARIE MORISSETTE J.A.

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

Mtre Martin Brunet
MONTY, COULOMBE
Counsel for the respondent

Mtre Pierre Grenier
MELANÇON, MARCEAU
Counsel for the mis en cause

Date of the hearing: December 10, 2002

DECISION OF MORISSETTE J.A.

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

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

The main facts

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

A. Contractual framework

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

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

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

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

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

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

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

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[1] [1991] R.L. 625, 91 J.E. 91-850.
[2] [2000] R.J.Q. 24, leave to appeal to S.C.C. refused, 5 October 2000 (without written reasons), S.C.C. Bulletin, 2000 at 1613.
[3] *Ibid.* at 29.

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

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

> XI. RENEWAL OF COLLECTIVE AGREEMENTS AND SETTLEMENT OF DISPUTES – Within ninety (90) days before the termination of the collective agreement, the Employer and the Union may initiate negotiations for a new contract. The terms and conditions of the agreement shall remain in effect until an agreement is reached, a decision is rendered by an arbitrator, or until one or the other of the parties exercises its right to strike or lock-out.
>
> Within the two weeks preceding acquiring the right to strike or lock-out, including the acquisition of such right through the application of Article X of the present agreement, either of the parties may request the exchange of "Last final best offers", and both parties shall do so simultaneously and in writing within the following forty-eight (48) hours or another time period if mutually agreed by the parties. The "Last final best offers" shall contain only those clauses or portions of clauses upon which the parties have not already agreed. Should there still not be agreement before the right to strike or lock-out is acquired, either of the parties may submit the disagreement to an arbitrator selected in accordance with the grievance procedure in the collective agreement. In such an event, the arbitrator, after having given both parties the opportunity to make presentations on the merits of their proposals, must retain in its entirety either one or the other of the "Last final best offers" and reject, in its entirety, the other. The arbitrator's decision shall be final and binding on both parties and it shall become an integral part of the collective agreement.

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[4] *Ibid.* at 34.

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

A. History of the disagreement

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

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

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

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

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

[21] Faced with this refusal, the union and the eleven employees formulated a first disagreement dated May 8, 1996, contesting the appellant's refusal to make final offers to them and requesting that certain parts of the Leboeuf award be declared

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[5] *Ibid.* at 38-39.

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

unenforceable against them. On June 3, the appellant issued a lockout notice and ceased remuneration to the eleven respondents. Together with the eleven respondents, the union formulated a second disagreement, dated June 4, in which it attacked the legality of the lockout decreed by the appellant. This disagreement and the amendments that were made to it subsequently were the subject of two awards by arbitrator Sylvestre.

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

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

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

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

[TRANSLATION]

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[7] *Gazette (The), a division of Southam Inc. v. Communications, Energy and Paper Workers Union of Canada, Local 145*, D.T.E. 98T-270 at 109.
[8] *Gazette (The), a division of Southam Inc. v. Sylvestre*, [1998] R.J.Q. 3201.
[9] See *supra* note 2.

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

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

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

> [TRANSLATION]
>
> 1 - order the employer to subject itself to the last best offer process and to send its "last final best offers" to the union and the 11 respondents without delay:

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

3 - order the employer to continue to pay each respondent the salary and other benefits arising out of the collective labour agreement and the tripartite agreements of November 1982 and March 1987;

4 - order the refund of any lost wages and any benefits lost as a result of the lockout, the whole with interest;

5 - make any other order aimed at safeguarding the rights of the parties ... .

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

5. The employees claim:

a) the equivalent of the salaries lost between May 3, 1996 and January 21, 2000

b) other employment-related benefits (such as the pension plan, collective insurance plan, etc.) from May 3, 1996 to January 21, 2000.

6. The employees also claim compensation for monetary damage including:

a) tax damage, loss of interest, and loss of capitalization resulting from cashing in RRSPs;

b) tax damage, loss of interest, and loss of capitalization resulting from non-contribution to RRSPs;

c) interest and other charges resulting from personal loans or mortgage refinancing;

d) amounts spent on fees and claims that would have been covered by the employer's group insurance and were assumed by the employees;

7. Moreover, the employees request compensation for moral damage such as inconvenience, stress, anxiety, and impact on family life.

8. Certain employees also seek compensation for damage related to their physical and psychological health.

9. Finally, the arbitrator is asked to award exemplary damages based on the violation of constitutional and quasi-constitutional guarantees of the employees' right to health, safety, dignity, and fair and reasonable working conditions.

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

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

2. Lost benefits for the same period.

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

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

5. Compensation for losses incurred for cashing in RRSP's prematurely for the same period.

6. Compensation for cost of loans and mortgages.

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

8. Moral damages and damages for abuse of rights.

9. Exemplary and punitive damages for the same period.

10. Compensation for all fiscal prejudice.

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

12. Legal fees and costs.

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

14. Reserve of jurisdiction for arbitrator Me André Sylvestre.

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

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

[29] Finally, around the time of the February 25, 2000 pre-hearing conference, namely, on March 6, 2000, the parties brought the "dispute"[11] still opposing them before

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

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

arbitrator Ménard seeking an award decided on the basis of the final offers exchanged on January 21. A motion brought by the respondents for an injunction aimed at putting an end to the lockout declared by the appellant as of January 21, 2000, the date of submission of the final offers, was subsequently rejected by the Superior Court.[12] Arbitrator Ménard rendered his award on June 5, 2001 and defined the content of the collective agreement between the appellant and the respondents for the next five years. A motion for homologation of this award, presented by the union mis en cause and disputed by the appellant and the respondents for reasons that are not relevant here, was allowed by the Superior Court on May 2, 2002.[13]

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

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

The award challenged in Superior Court

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

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

> [TRANSLATION]
>
> 2 – the damages to which the 11 plaintiffs [the respondents] are entitled shall be limited to the salaries and other benefits as set forth in the collective agreement, if it can be shown, in the words of the Court of Appeal [TRANSLATION] "that the lockout was unduly prolonged as a result of the employer's refusal to submit its last final best offers as requested by the union before the specified deadline of April 30, 1996";

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[12] *Blondin v. Gazette (The), a division of Southam Inc.*, J.E. 2001-1328.
[13] *Communications, Energy and Paper Workers Union of Canada, Local 145 v. Ménard*, J.E. 2002-935; this judgment was not appealed.
[14] *Communications, Energy and Paper Workers Union of Canada, Local 145 v. The Gazette, a division of Southam Inc.*, D.T.E. 2001T-137.
[15] This judgment was rendered orally and was never published.

> 3 – in addition, as stipulated [by counsel for the respondents], the period of the claim shall end on January 21, 2000, the date on which the employer shall submit its last final best offers;
>
> 4 – each respondent shall, within a reasonable time, produce a document detailing the sums claimed in terms of wages and benefits lost during the period from June 6, 1996 to January 21, 2000 and of employment earnings received during the same period in order to offset the losses.

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

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

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

The judgment of the Superior Court

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

> [TRANSLATION]
>
> Annuls in part the arbitral award rendered by arbitrator André Sylvestre on October 11, 2000 inasmuch as he declares himself without jurisdiction to award any damages other than the salary and other benefits specified in the collective agreement or the agreements of 1982 and 1987;

> Refers the file back to the arbitrator-respondent so that he may assume full jurisdiction with regard to the damages that the applicants may claim in the matter before him, until January 21, 2000, except for the interest on any sums that may be granted which shall accrue, as applicable, both before and after this date.

Grounds for the appeal

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

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

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

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

Analysis

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

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

940.3. A judge or the court cannot intervene in any question governed by this Title except in the cases provided for therein.

...

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

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

...

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

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

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

...

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

...

946.4. The court cannot refuse homologation except on proof that:

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

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

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

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

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

> In the case of subparagraph (4) of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.
>
> ...
>
> 947. The only possible recourse against an arbitration award is an application for its annulment.
>
> 947.1. Annulment is obtained by motion to the court or by opposition to a motion for homologation.
>
> 947.2. Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award.

[43] Article 940.3 sets the tone of Book VII of the *Code of Civil Procedure*. In the case of proceedings under arts. 33 and 846 *C.C.P.*, the review of the legality of decisions by the court of general jurisdiction is the rule, but the legislator may restrict this power of intervention of the court of general jurisdiction, a power that it usually exercises by means of a privative clause. In the case of consensual arbitration tribunals, the reverse is now the rule. As set out in art. 940.3 *C.C.P.*, the judge may only intervene when so permitted by law. Article 946.2 *C.C.P.* specifies that a judge seized with a request for homologation or annulment of an award cannot enquire into the merits of the dispute, and it is impossible for the parties to an arbitration agreement to contract out of this rule. Nor may they derogate from para. 4 of art. 946.4 *C.C.P.*, except for reasons of annulment (or refusal of homologation) likely to apply in this instance. Once again pursuant to art. 940, other provisions of Title I of Book VII are also of public order and relate to the decisions that the judge may be required to make in appointing an arbitrator (941.3), making a determination about the recusation or revocation of his mandate (942.7), recognizing his competence (943.2), or safeguarding the rights of the parties awaiting an arbitration award (945.8). By establishing that these legal decisions are final and without appeal, the Code reinforces the autonomy of the arbitration procedure and its conduct. By limiting the grounds for annulling or refusing the homologation of an award, the Code reinforces the autonomy of the arbitration process and its outcome. The adoption of these provisions [TRANSLATION] "marked a turning point in the conventional arbitration system in Quebec", as Thibault J.A. accurately stated for the Court in *Laurentienne-vie (La), compagnie d'assurances inc. v. Empire (L'), compagnie d'assurance-vie*.[16] However, in the context of a review of arbitral competence, a thorough reconsideration of the points of law an arbitrator may have to rule on—a consideration bordering on a judicial review of the appeal itself—creates a risk of stepping back from this turning point.

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

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

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

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

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

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[17] 2003 SCC 17 at para. 68.
[18] See *supra* note 2 at 40.

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

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

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

[49] Paragraph 4 of art 946.4 *C.C.P.* refers to the "arbitration agreement", which here must mean Article IX of the 1987 agreement reproduced above. This contractual clause stipulates that "[i]n the event of a disagreement with respect to the interpretation, application, and/or alleged violation of this agreement, the matter shall be deemed to be a grievance... ." The respondents' claim, insofar as it relates to the damage suffered as a result of the employer's delay in submitting its final offers to arbitration, doubtless relates to the "interpretation", "application" or the "alleged violation" of the agreements of 1982 and 1987, and in particular of Article XI of the 1987 agreement. One cannot therefore seriously propose that it concerns a "dispute not contemplated by or not falling within the terms of the arbitration agreement".

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

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

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

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

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

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

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

YVES-MARIE MORISSETTE J.A.

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

TAB 6

6. *Local 145 of the Communications, Energy and Paperworkers (CEP) et als v. The Gazette and André Sylvestre*, March 17. 2008 (Translation by the Court).

COURT OF APPEAL

CANADA
PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

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

Traduction non-officielle

DATE: March 17, 2008

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

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

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

v.

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

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

JUDGMENT

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

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

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

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

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

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

MARC BEAUREGARD J.A.

ANDRÉ FORGET J.A.

FRANÇOIS PELLETIER J.A.

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

Rita Blondin
Eriberto Di Paolo
Self-represented

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

Date of hearing: December 10, 2007

REASONS OF PELLETIER J.A.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2 SOQUIJ AZ-50307135.

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

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

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

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

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

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

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

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

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

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3 SOQUIJ AZ-50307135.
4 *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FRANÇOIS PELLETIER J.A.

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

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

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST GLOBAL COMMUNICATIONS CORP. et. al

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

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA

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