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

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC., AND CANWEST (CANADA) INC.

APPLICANTS

ADJUDICATION OF THE RETIRED TYPOGRAPHERS' CLAIM

BOOK OF AUTHORITIES OF THE COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

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Authorities

1. *Edgewater Casino Inc. (Re)*, [2009] B.C.J. No. 174;

2. *Keewatin v. Ontario (Minister of Natural Resources)*, [2006] O.J. No. 3418;

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

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

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

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).

November 2, 2011

Jesse Kugler
Caley Wray

Pierre Grenier
Melançon, Marceau, Grenier et Sciortino

1. Edgewater Casino Inc. (Re), [2009] B.C.J. No. 174;

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: ***Edgewater Casino Inc. (Re),***
2009 BCCA 40

Date: 20090206
Docket: CA035922; CA035924

In the Matter of the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36, as amended

In the Matter of the *Business Corporations Act*,
S.B.C. 2002, c 57, as amended

In the Matter of Edgewater Casino Inc. and
Edgewater Management Inc.

Between:

Canadian Metropolitan Properties Corp.

Appellant
(Applicant)

And

**Libin Holdings Ltd., Gary Jackson Holdings Ltd.
and Phoebe Holdings Ltd.**

Respondents
(Respondents)

Before: The Honourable Madam Justice Levine
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice D. Smith

J.J.L. Hunter, Q.C. and J.A. Henshall	Counsel for the Appellant
J.R. Sandrelli and A. Folino	Counsel for the Respondents
Place and Date of Hearing:	Vancouver, British Columbia January 7, 2009
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2009

Written Reasons by:
The Honourable Mr. Justice Tysoe

Concurred in by:
The Honourable Madam Justice Levine
The Honourable Madam Justice D. Smith

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Reasons for Judgment of the Honourable Mr. Justice Tysoe:

Introduction

[1] This application raises the question of the nature and application of the test to be utilized when leave is sought to appeal from an order made in proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

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[2] On August 29, 2008, the chambers judge refused Canadian Metropolitan Properties Corp. (the "Landlord") leave to appeal from two orders pronounced on March 5, 2008 and December 18, 2008, by the judge supervising the *CCAA* proceedings (the "*CCAA* judge") concerning Edgewater Casino Inc. and Edgewater Management Inc. ("Edgewater"). The Landlord applies under section 9(6) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77, to vary or discharge the order of the chambers judge so that it is given leave to appeal from the two orders. The respondents, being the original shareholders of Edgewater, oppose the application.

Background

[3] The Landlord and Edgewater entered into a lease agreement dated for reference November 8, 2004 (the "Lease") under which the Landlord leased part of the Plaza of Nations site in downtown Vancouver for the operation of a casino by Edgewater. Edgewater took possession of the leased property on May 4, 2004 and, prior to commencing operation of the casino on February 5, 2005, spent approximately $15 million renovating the main building covered by the Lease. These renovations indirectly led to two disputes between the parties. The first

dispute related to the extent, if any, to which Edgewater was responsible to reimburse the Landlord for increases in property taxes attributable to improvements made by Edgewater. A related issue was whether Edgewater was responsible to pay a portion of the consulting fees incurred by the Landlord in appealing property tax assessments. The second dispute related to Edgewater's responsibility to pay for the cost of utilities supplied to the leased property prior to the commencement of the operation of the casino while Edgewater was in possession and renovating the building.

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[4] Edgewater commenced the *CCAA* proceedings on May 2, 2006, and the *CCAA* judge supervised the proceedings. Edgewater proposed a plan of arrangement by which sufficient funds would be paid into a law firm's trust account in an amount to fully pay all claims of creditors accepted by Edgewater and the asserted amounts of creditor claims disputed by Edgewater. I gather that the plan of arrangement was predicated on a sale of the shares in Edgewater by the respondents to a new owner and that it was agreed that the respondents would be the benefactors of any monies recovered from the Landlord and any monies left in trust following the resolution of the property tax and utilities disputes.

[5] On August 11, 2006, the *CCAA* judge pronounced a "Claims Processing Order" establishing a process for claims to be made by Edgewater's creditors and to be either accepted by Edgewater or adjudicated upon in a summary manner in the *CCAA* proceedings. On August 29, 2006, the *CCAA* judge pronounced a "Closing Order" pursuant to which the plan of arrangement was implemented and sufficient

funds were paid into trust to satisfy the accepted and disputed claims of Edgewater's creditors.

[6] The Landlord filed a proof of claim asserting that Edgewater was indebted to it in the amount by which the property taxes for the leased property had increased since 2004. Edgewater disallowed the proof of claim. Edgewater subsequently claimed a right of setoff against the Landlord in respect of the utilities that it alleged had been improperly charged by the Landlord and had been paid by mistake.

[7] By a case management order dated March 29, 2007, the *CCAA* judge directed that, among other things, the property tax and utilities disputes were to be determined summarily, with the parties exchanging pleadings and having representatives cross-examined on affidavits or examined for discovery. Hearings took place before the *CCAA* judge in August and September, 2007.

[8] In his reasons for judgment dealing with the property tax dispute, indexed as 2008 BCSC 280, the *CCAA* judge held that: (i) clause 3.05 of the Lease, which dealt with Edgewater's responsibility for increases in the property taxes, was sufficiently clear to be enforceable; (ii) the Landlord had not made negligent misrepresentations to Edgewater on matters relevant to the property tax increase; (iii) Edgewater was only responsible for increases in the assessment of the "Lands" (defined as the lands and improvement thereon) solely attributable to the improvements made by it, with the result that Edgewater was only obliged to pay the Landlord the increased taxes based on the increase in the assessed value of the buildings; and (iv) Edgewater was not liable, either in contract, *quantum meruit* or unjust

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enrichment, to reimburse the Landlord for any consulting fees incurred by it in appealing the property tax assessments in question.

[9] In his reasons for judgment dealing with the utilities dispute, indexed as 2007 BCSC 1829, the *CCAA* judge held that: (i) clause 4.01 of the Lease, which was clear on its face, restricted the amount of rent and additional rent during the period preceding the commencement of operation of the casino to the sum specified in the clause, and Edgewater was not responsible to pay for any additional sum in respect of utilities; (ii) the Landlord did not meet the test in order to have the Lease rectified in respect of the payment for utilities during the period of possession preceding the commencement of operation of the casino; and (iii) Edgewater was entitled to the return of the payments for utilities during the period of possession preceding the commencement of the casino made by it as a result of a mistake.

Decision of the Chambers Judge

[10] In dismissing the applications for leave to appeal the two orders, the chambers judge commented that the *CCAA* judge had held the language of clauses 3.05 and 4.01 of the Lease to be clear and unambiguous. Relying on *Re Pacific National Lease Holding Corp.* (1992), 72 B.C.L.R. (2d) 368, 15 C.B.R. (3d) 265 (C.A. Chambers), and *Re Pine Valley Mining Corporation*, 2008 BCCA 263, 43 C.B.R. (5th) 203 (Chambers), the chambers judge stated that leave to appeal in proceedings under the *CCAA* is granted sparingly. He commented that there were none of the time pressures that often attend *CCAA* proceedings.

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[11] The chambers judge noted that the *CCAA* judge had applied settled principles of contractual interpretation and expressed the view that there were very limited prospects of success on appeal. He observed that the issues had been decided in the context of summary proceedings under the *CCAA* and stated that the decision of the chambers judge was entitled to substantial deference.

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Discussion

[12] The parties are agreed that the test to be applied by a reviewing court on an application to review an order of a chambers judge is to determine whether the judge was wrong in law or principle or misconceived the facts: see *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, 3 C.P.C. (5th) 225.

[13] The parties made their submissions on the basis that there is a special test or standard for the granting of leave to appeal from an order made in *CCAA* proceedings. The genesis of this perception is the following passage from the decision of Mr. Justice Macfarlane in *Pacific National Lease*:

> [30] Despite what I have said, there may be an arguable case for the petitioners to present to a panel of this court on discreet questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. In this case a number of orders have been made. Some, including the one under appeal, have not been settled or entered. Other applications are pending. The process contemplated by the Act is continuing.
>
> [31] A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.

> [32] Also, we know that in a case where a judgment has not been entered, it may be open to a judge to reconsider his or her judgment, and alter its terms. In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellate proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

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Numerous subsequent decisions have referred to these comments. These decisions include *Re Westar Mining Ltd.* (1993), 75 B.C.L.R. (2d) 16, 17 C.B.R. (3d) 202 (C.A.) at para. 57; *Re Woodward's Ltd.* (1993), 105 D.L.R. (4th) 517, 22 C.B.R. (3d) 25 (B.C.C.A. Chambers) at para. 34; *Re Repap British Columbia Inc.* (1998), 9 C.B.R. (4th) 82 (B.C.C.A. Chambers) at para. 8; *Luscar Ltd. v. Smoky River Coal Ltd.,* 1999 ABCA 179, 175 D.L.R. (4th) 703 at para. 62; *Re Blue Range Resource Corp.*, 1999 ABCA 255, 12 C.B.R. (4th) 186 (Chambers) at para. 3; *Re Canadian Airlines Corp.*, 2000 ABCA 149, 19 C.B.R. (4th) 33 (Chambers) at para. 42; *Re Skeena Cellulose Inc.*, 2003 BCCA 344, 13 B.C.L.R. (4th) 236 at para. 52; *Re Fantom Technologies Inc.* (2003), 41 C.B.R. (4th) 55 (Ont. C.A. Chambers) at para. 17; and *Re New Skeena Forest Products Inc.*, 2005 BCCA 192, [2005] 8 W.W.R. 224 at para. 20.

[14] The Landlord accepts the general proposition that leave to appeal from *CCAA* orders should be granted sparingly, but says that there should be an exception where, as here, the time constraints present in typical *CCAA* situations do not exist. In this regard, the Landlord relies on the views expressed by Chief Justice

McEachern in *Westar Mining*. After quoting the above passage from *Pacific National Lease*, McEachern C.J.B.C. said the following:

> [58] I respectfully agree with what Macfarlane J.A. has said, but in this case the situation of the Company has stabilized as its principal assets have been sold. The battle for the survival of the Company is over, at least for the time being. What remains is merely to determine priorities, and the proper distribution of the trust fund which was established with the approval of the Court primarily for the protection of the Directors.

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Although McEachern C.J.B.C. was speaking in dissent when making these comments, an appeal to the Supreme Court of Canada was allowed, [1993] 2 S.C.R. 448, and the Court agreed generally with his dissenting reasons.

[15] The respondents submit that there should be the same test for leave to appeal from all orders made in *CCAA* proceedings. The respondents maintain that the test has been consistently applied throughout Canada and that a different test in some circumstances would lead to the result that there would be many more leave applications to appeal orders made in *CCAA* proceedings and appellate courts would be required to analyze the underlying *CCAA* proceeding in every leave application.

[16] The requirement for leave to appeal from an order made in *CCAA* proceedings is found in the *CCAA* itself (section 13), as opposed to the provincial or territorial statutes governing the appellate courts in Canada. This suggests that Parliament recognized that appeals as of right from orders made in *CCAA* proceedings could have an adverse effect on the efforts of debtor companies to reorganize their financial affairs pursuant to the Act and that appeals in *CCAA*

proceedings should be limited: see *Re Algoma Steel Inc.* (2001), 147 O.A.C. 291, 25 C.B.R. (4th) 194 at para. 8.

[17] However, it does not follow from the fact that the statute itself is the source of the requirement for leave that the test or standard applicable to applications for leave to appeal orders made in *CCAA* proceedings is different from the test or standard for other leave applications. It is my view that the same test applicable to all other leave applications should be utilized when considering an application for leave to appeal from a *CCAA* order. In British Columbia, the test involves a consideration of the following factors:

(a) whether the point on appeal is of significance to the practice;

(b) whether the point raised is of significance to the action itself;

(c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(d) whether the appeal will unduly hinder the progress of the action.

The authority most frequently cited in British Columbia in this regard is *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C.C.A. Chambers).

[18] This is not to suggest that I disagree with the above comments of Macfarlane J.A. in *Pacific National Lease*. To the contrary, I agree with his comments, but I do not believe that he established a special test for *CCAA* orders. Rather, his comments are a product of the application of the usual standard used on leave applications to orders that are typically made in *CCAA* proceedings and a

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recognition of the special position of the supervising judge in *CCAA* proceedings. In particular, a consideration of the third and fourth of the above factors will result in leave to appeal from typical *CCAA* orders being given sparingly.

[19] The third of the above factors involves a consideration of the merits of the appeal. In non-*CCAA* proceedings, a justice will be reluctant to grant leave where the order constitutes an exercise of discretion by the judge because the grounds for interfering with an exercise of discretion are limited: see *Silver Standard Resources Inc. v. Joint Stock Co. Geolog*, [1998] B.C.J. No. 2298 (C.A. Chambers). Most orders made in *CCAA* proceedings are discretionary in nature, and the normal reluctance to grant leave to appeal is heightened for two reasons alluded to in the comments of Macfarlane J.A.

[20] First, one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests. Secondly, *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances. These considerations are reflected in the comment made by Madam Justice Newbury in *New Skeena Forest Products* that "[a]ppellate courts also accord a high degree of deference to decisions made by Chambers judges in CCAA matters

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and will not exercise their own discretion in place of that already exercised by the court below" (para. 20).

[21] The fourth of the above factors relates to the detrimental effect of an appeal on the underlying action. In most non-*CCAA* cases, the events giving rise to the underlying action have already occurred, and a consideration of this factor involves the prejudice to one of the parties if the trial is adjourned or if the action cannot otherwise move forward pending the determination of the appeal. *CCAA* proceedings are entirely different because events are unfolding as the proceeding moves forward and the situation is constantly changing – some refer to *CCAA* proceedings as "real-time" litigation.

[22] The fundamental purpose of *CCAA* proceedings is to enable a qualifying company in financial difficulty to attempt to reorganize its affairs by proposing a plan of arrangement to its creditors. The delay caused by an appeal may jeopardize these efforts. The delay may also have the effect of upsetting the balance between competing stakeholders that the supervisory judge has endeavoured to achieve.

[23] Similar views were expressed by Mr. Justice O'Brien in *Re Calpine Canada Energy Ltd.*, 2007 ABCA 266, 35 C.B.R. (5th) 27 (Chambers):

> [13] This Court has repeatedly stated, for example in *Liberty Oil & Gas Ltd., Re*, 2003 ABCA 158, 44 C.B.R. (4th) 96 (Alta. C.A.), at paras. 15-16, that the test for leave under the CCAA involves a single criterion that there must be serious and arguable grounds that are of real and significant interest to the parties. The four factors used to assess whether this criterion is present are:
>
> (1) Whether the point on appeal is of significance to the practice;

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> (2) Whether the point raised is of significance to the action itself;
>
> (3) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) Whether the appeal will unduly hinder the progress of the action.
>
> [14] In assessing these factors, consideration should also be given to the applicable standard of review: *Canadian Airlines Corp., Re*, 2000 ABCA 149, 261 A.R. 120 (Alta. C.A. [In Chambers]). Having regard to the commercial nature of the proceedings which often require quick decisions, and to the intimate knowledge acquired by a supervising judge in overseeing a CCAA proceedings, appellate courts have expressed a reluctance to interfere, except in clear cases: *Smoky River Coal Ltd., Re*, 1999 ABCA 179, 237 A.R. 326 (Alta. C.A.) at para. 61.

Other decisions on leave applications where the usual factors were expressly considered include *Re Blue Range Resource Corp.*, *Re Canadian Airlines Corporation* and *Re Fantom Technologies Inc.*, each of which quoted the above comments of Macfarlane J.A. in *Pacific National Lease.*

[24] As a result of these considerations, the application of the normal standard for granting leave will almost always lead to a denial of leave to appeal from a discretionary order made in an ongoing *CCAA* proceeding. However, not all of the above considerations will be applicable to some orders made in *CCAA* proceedings. Thus, in *Westar Mining*, McEachern C.J.B.C., while generally agreeing with the comments made in *Pacific National Lease*, believed that the considerations mentioned by Macfarlane J.A. were not applicable in that case because the *CCAA* proceeding had effectively come to an end with the sale of the principal assets of the debtor company. Madam Justice Newbury made a similar point in *New Skeena*

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Forest Products at para. 25 (which was a hearing of an appeal, not a leave application), although she found it unnecessary to decide the appeal on the point.

[25] The chambers judge did give consideration to the usual factors in the present case, but none of the considerations I have mentioned were applicable to the two orders. The *CCAA* judge was deciding questions of law in each case and was not exercising his discretion. The knowledge gained by the *CCAA* judge during the reorganization process was not relevant to his decisions, which involved events that occurred prior to the commencement of the *CCAA* proceeding. The plan of arrangement made by Edgewater has been implemented, and appeals from the two orders will not delay or otherwise jeopardize the reorganization process. There is no prospect that the outcome of the appeals will affect the continuing viability of Edgewater; indeed, although the disputes involve Edgewater in name, the parties with a monetary interest in the disputes are the Landlord and the respondents, who are the former shareholders of Edgewater. In the circumstances, there was no reason to give substantial deference to the *CCAA* judge.

[26] I am not saying that the considerations I have mentioned will never apply to a determination of claims pursuant to a claims process in a *CCAA* proceeding. For example, a plan of arrangement may only be successful if the total amount of claims against the debtor company is less than a specified sum. An appeal from an order quantifying a claim of a creditor would delay the *CCAA* proceeding and could jeopardize the company's reorganization.

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[27] I have no doubt that there will be other circumstances in which the claims process will have an impact on the reorganization process. Even if the claims process will not jeopardize the reorganization process, some of the other considerations I have mentioned may apply to the determination of the claims. For example, the outcome of an appeal may affect the amounts received by other creditors and may delay the full implementation of the plan of arrangement. The fact that section 12 of the *CCAA* mandates the determination of claims to be by way of a summary application to the court illustrates that Parliament recognized that the claims process will often be sensitive to time constraints.

[28] There is one other point about the order relating to the utilities dispute that differentiates it from the typical *CCAA* order. The dispute did not involve a claim against Edgewater but, rather, it was a claim by Edgewater to have the Landlord refund utilities payments made by it. Such a claim would normally be pursued in a normal lawsuit and, if it was determined on a summary application (i.e., a Rule 18A application), there would have be an appeal as of right, and leave would not have been required. It was only because the claim was raised as a setoff to the Landlord's property tax claim that it came to be determined in the *CCAA* proceeding.

[29] I now turn to a consideration of the usual factors in relation to the order dealing with the property tax dispute:

1. As stated by the chambers judge, the point in issue is of no significance to the practice.

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2. As conceded by the respondents on the application before the chambers judge, the point in issue is of significance to the action itself (in the sense that it finally determines the Landlord's claim).

3. The order did not involve an exercise of discretion by the *CCAA* judge. The chambers judge was mistaken in his belief that the *CCAA* judge held that clause 3.05 was clear and unambiguous; the first issue considered by the *CCAA* judge was whether the clause was sufficiently clear as to make it enforceable. In my opinion, the appeal is not frivolous.

4. The appeal will not unduly hinder the progress of the action because Edgewater's plan of arrangement has been implemented and the *CCAA* proceeding has come to a conclusion.

On a consideration of all of the factors, it is my view that leave to appeal the order dealing with the property tax dispute should be given.

[30] A consideration of the usual factors in relation to the order dealing with the utilities dispute leads to the same observations with one exception. As conceded by the Landlord on this application, the prospects of success of an appeal do not appear to be as high as the prospects in an appeal from the other order. However, I am not persuaded that the appeal has so little merit that it amounts to a frivolous appeal. If the dispute had not become intertwined with the property tax dispute as a result of Edgewater's claim of a right of setoff, the dispute would not have been determined in the *CCAA* proceeding, and the Landlord would have had an appeal as

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of right. In all the circumstances, it is my view that leave to appeal from the order dealing with the utilities dispute should also be given.

Conclusion

[31] I would discharge the order made by the chambers judge dismissing the leave application, and I would grant the Landlord leave to appeal from both of the orders.

"The Honourable Mr. Justice Tysoe"

I agree:

"The Honourable Madam Justice Levine"

I agree:

"The Honourable Madam Justice D. Smith"

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2. *Keewatin v. Ontario (Minister of Natural Resources)*, [2006] O.J. No. 3418;

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

2006 CanLII 35625 (ON SC)

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
WILLIE KEEWATIN, ANDREW KEEWATIN JR., and JOSEPH WILLIAM FOBISTER on their own behalf and on behalf of all other members of GRASSY NARROWS FIRST NATION	)	ROBERT J. M. JANES and DOMINIQUE NOUVET for the Plaintiffs
	)	
Plaintiffs	)	
	)	
- and -	)	
	)	
	)	
MINISTER OF NATURAL RESOURCES and ABITIBI-CONSOLIDATED INC.	)	D. THOMAS H. BELL, MICHAEL STEPHENSON and PETER LEMMOND, for the Defendant Minister of Natural Resources CHRISTOPHER H. MATTHEWS and COLLEEN E. BUTLER for the Defendant Abitibi-Consolidated Inc.
	)	
Defendants	)	
	)	
	)	
	)	**HEARD:** March 29-31, 2006

SPIES J.

REASONS FOR DECISION

INTRODUCTION

[1] The plaintiffs are Anishnaabe (also referred to as Ojibway) and members of the Grassy Narrows First Nation ("Grassy Narrows") and of the Grassy Narrows Trappers' Council.

Each is the holder of a registered trap line located near the Grassy Narrows' reserve, in northwestern Ontario, just north of Kenora, near the English River.

[2] In this proceeding, the plaintiffs seek to set aside the validity of the permits and licences issued by the defendant, Minister of Natural Resources (MNR), to the defendant, Abitibi-Consolidated Inc., which allows certain regulated logging activities within the trap line areas held by the Grassy Narrows trappers in the Whiskey Jack Forest. The position of the plaintiffs is that these activities invalidly infringe upon the harvesting rights that members of Grassy Narrows enjoy under Treaty 3, and in particular their right to trap and hunt on lands surrendered to the Crown under Treaty 3.

[3] The plaintiffs raised essentially the same claims regarding their Treaty 3 rights in an earlier judicial review application: Keewatin v. Ontario (M.N.R.).[1] The MNR and Abitibi succeeded in having the application quashed. In rendering his decision, Then J. held that some of the relief claimed was not available in a judicial review proceeding and on that ground quashed the application with leave to the applicants to commence an action (at para.19). He also concluded that in any event, the matter ought to be converted to a trial given the complexity of the issues raised and their general public importance (at paras. 59-61).

[4] The plaintiffs have now commenced this action and bring two motions, one for an order granting leave to continue this action as a representative proceeding on behalf of themselves and all members of Grassy Narrows pursuant to Rule 12.08 of the Rules of Civil Procedure (Motion for Representation Order) and secondly, for an order that the MNR pay the plaintiffs their costs in advance (Advance Costs Motion). I have been assigned to hear all motions in this action pursuant to Rule 37.15.

ISSUES

Motion for Representation Order

[5] This motion for an order granting leave to the plaintiffs to continue this action as a representative proceeding has been largely settled between the parties. The defendants do not oppose an order converting the action into a representative proceeding in the name of the plaintiffs on behalf of all members of Grassy Narrows and many terms to the order have been agreed to. The sole dispute is whether or not, as an additional term to the order sought, I should order that Grassy Narrows First Nation be jointly and severally liable for any costs ordered against the plaintiffs.

[6] For the reasons that follow, I grant leave to the plaintiffs to continue this action as a representative proceeding on the terms agreed to, but I decline to order, at least at this time,

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[1] (2003), 66 O.R. (3d) 370 (Div. Ct.)

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that Grassy Narrows First Nation be jointly and severally liable for any costs ordered against the plaintiffs. The terms of this order are set out in Schedule "A" attached.

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Motion for Advance Costs

[7] This motion, for an order that the MNR pay the costs of the plaintiffs of this action, in advance, in any event of the cause, on a partial indemnity scale, is vigorously opposed by both defendants. The resolution of this motion must be determined by an application of the legal test that the plaintiffs must meet, as established by the Supreme Court of Canada in British Columbia (Minister of Forests) v. Okanagan Indian Band [2] to the evidence before me.

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

MOTION FOR REPRESENTATION ORDER

Terms of Representation Order

[9] At an early stage in this action, counsel for the MNR advised plaintiffs' counsel that whether or not the plaintiffs had been authorized by the Grassy Narrows First Nation to bring this action on its behalf would be a central issue in the determination of the MNR's response to the plaintiffs' motion for a representation order. The defendants decided not to oppose the order sought, subject to agreement on terms, when they were advised that the law firm of Cook Roberts has, from the outset of the action, been retained in a solicitor-client relationship by the plaintiffs as well as Grassy Narrows (through its Council) and that it takes its instructions from both.

[10] To their credit, counsel were then able to resolve all but one of the proposed terms to the order. It is agreed that an order be granted in the form out in Schedule A. Those terms are in my view reasonable. Paragraph 8 of the order will ensure that all decisions and findings made in this action will be binding upon Grassy Narrows, its Council and all of its members. The test as set out by Nordheimer J. in Ginter v. Gardon[3] for a representation order has been met and the order sought is appropriate.

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[2] (2003) 233 D.L.R. (4th) 577
[3] (2001), 53 O.R. (3d) 489 at 494 (Ont. Sup. Ct.)

Should the Grassy Narrows First Nation be jointly and severally liable for any costs ordered against the plaintiffs?

[11] The sole remaining issue is whether or not, as an additional term to the order sought, I should order that Grassy Narrows First Nation be jointly and severally liable for any costs ordered against the plaintiffs.

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The Facts

[12] The facts relevant to this motion are not in dispute and are as follows.

[13] The plaintiffs are each members of the Grassy Narrows Trappers Council, a special interest group within the community, which acts as a support group for Grassy Narrows' trappers. Andrew Keewatin and Joseph Fobister are two of the organization's five elected "leaders". The plaintiffs' witness, Gabriel Fobister, is the president.

[14] The Trappers Council is composed of approximately 60 members and includes all registered Grassy Narrows trappers. As such, it represents approximately 5% of the community's 1200 members.

[15] The Grassy Narrows Council is the elected leadership of the Grassy Narrows. It speaks for the community and makes decisions on behalf of the community as a whole. Grassy Narrows does not have an alternative Band leadership, such as a hereditary chief or band council.

[16] The Chief of Grassy Narrows filed an affidavit on these motions and deposed that the Band Council decided that the named plaintiffs in this action should be members who are or have been very active trappers, rather than the Band Council Chief and that they made this decision because it is the regular trappers whose way of life and livelihood is most directly affected by forestry activity.

[17] The Grassy Narrows Band Council Resolution No. 3050, dated January 24, 2006, resolved that the law firm of Cook Roberts is jointly retained by both the plaintiffs and the Grassy Narrows in this action to act as counsel and solicitors of record. It further resolves that Grassy Narrows has no objection to the plaintiffs acting as representative plaintiffs for the members of Grassy Narrows and that the law firm of Cook Roberts shall report to and take instructions on behalf of the First Nation through its Chief or Deputy Chief Councilor.

Position of the defendants

[18] The defendants do not take the position that Grassy Narrows must be formally added as a plaintiff to this action but do say that it is common practice in these types of actions that the Band, its Chief or a person of authority within the band be included as a party to the

representative action. They argue that I should order that Grassy Narrows be jointly and severally liable with the plaintiffs for any award of costs that may be made against the plaintiffs in favour of the defendants. Counsel for the MNR advised that the intention is to bind the assets of Grassy Narrows as an entity, not the assets of individual members. In this regard I note that the members of Grassy Narrows may include persons who are not Indians within the meaning of the Indian Act[4] and therefore not members of the Grassy Narrows Band. Abitibi proposes, in the alternative, that I order that Grassy Narrows shall be considered a party for the purposes of any request for costs made by the defendants in this proceeding.

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[19] The defendants argue that such an order is necessary in that it is really the Band Council that is in control of this action and such an order will encourage both the plaintiffs and the Council to litigate the action in a disciplined and efficient manner and with a high level of accountability to Grassy Narrows' members. They submit that the defendants should know from the outset who might be responsible for costs.

Position of the plaintiffs

[20] Mr. Janes argues that it is premature and inappropriate to expose Grassy Narrows to a cost order. It is his position that the naming of the plaintiffs in this case was entirely appropriate and in keeping with the law. He relies on a decision of the British Columbia Supreme Court, Nemaiah Valley Band v. Riverside Forest Products Ltd., [5] where the court found that there was no requirement that the representative plaintiff be a chief and that he or she need only be a member of the class (at page 106).

[21] The plaintiffs also rely on the recent decision of our Court of Appeal, Moja Group (Canada) v. Pink[6] which set aside costs orders made against the appellant personally in a claim brought by the corporation. The appellant was not a party to the litigation and the court held that:

> to require the controlling mind of a company to pay costs personally in litigation brought by the company, the company must be sham or a "man of straw" put forward by the person who is the real litigant to shield himself from liability for costs (at para. 5).

[22] It is submitted that the named plaintiffs are not men of straw and that the term sought by the defendants should not be added to the order.

[23] It was also submitted that pursuant to section 89 of the Indian Act, real and personal property of an Indian or a band situated on a reserve is immune from execution. I accept the submissions of counsel for the MNR however, that the issue of exigibility is not relevant to the issue that I must decide.

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[4] R.S., 1985, c. 1-5

[5] (1999), 37 C.P.C. (4th) 101

[6] [2005] O.J. No. 5023

[24] Finally the plaintiffs argue that I will have an ongoing supervisory role in this litigation and impose, if necessary, the discipline with respect to the action suggested by the defendants.

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Analysis

[25] As already stated, there is no suggestion that Grassy Narrows or the Band Council be formally added as a plaintiff. This issue therefore, must be considered from the perspective of the court's jurisdiction to order costs against a non-party.

[26] The Moja Group decision relied upon by the plaintiffs, applied the law as established by the Court of Appeal in Television Real Estate Ltd. v. Rogers Cable T.V. Ltd.[7], where the court held that the court has inherent jurisdiction to award costs against a non-party where it is shown that the non-party had status to bring the action himself, that the plaintiff was not the true plaintiff and that the plaintiff was a "man of straw" put forward to protect the non-party from liability for costs.

[27] In this case, there is no doubt that Grassy Narrows or the Band Council could have been named as the representative plaintiffs and that they have status to bring this action. The plaintiffs however have provided a reasonable explanation for why they have been named as the representative plaintiffs as opposed to Grassy Narrows or the Band Council. Furthermore, there is no suggestion that the plaintiffs are not proper representatives of the class.

[28] Furthermore, although the Band Council is instructing counsel for the plaintiffs, they are doing so in conjunction with the named plaintiffs and so it cannot be said that the named plaintiffs are not legitimate representatives of the class or that the Band Council, on its own, is the real litigant.

[29] Finally, there is no allegation that the named plaintiffs, who are exposed to costs orders, are "men of straw". Although on the record before me, there is no evidence that either Willie Keewatin or Andrew Keewatin Jr. have any significant assets or means to pay any cost order, Joseph Fobister has significant assets which the defendants rely on in defence of the Advance Costs Motion as a basis to say that the plaintiffs are not impecunious and ought to contribute to the litigation. Given Mr. Fobister's assets, I do not see how I could conclude that the selection of these plaintiffs is a sham put up to shield Grassy Narrows or the Council from liability for costs.

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[7] (1997), 34 O.R. (3d) 291 at p. 296. The defendants also rely on Ridgely (in trust) v. Ridgely Design Inc. (1991), 3 O.R. (3d) 695 (Gen. Div) but that decision does not set out the full test and was decided before Television Real Estate Ltd.

[30] For these reasons I accept the submissions of counsel for the plaintiffs that there is no basis at this time to order that as a non-party, Grassy Narrows should be jointly and severally liable with the plaintiffs for any award of costs that may be made in favour of the defendants. I also accept his submission that as the case management judge I will be able to perform a supervisory role and ensure that the action proceeds in an efficient manner. That role will be even more important given my disposition of the Advance Costs Motion.

[31] I have considered the alternative language proposed by Abitibi but reject that proposal as well. Such an order would automatically expose Grassy Narrows to a cost order every time the defendants seek a cost order against the plaintiffs and would require that submissions be made on behalf of Grassy Narrows. In light of my ruling, unless there is some new evidence upon which the defendants wish to rely, which suggests that the Band Council has abused the litigation process, run up costs and as such should be exposed to a cost order, it is unnecessary to have submissions on their exposure to costs made every time.

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Disposition

[32] For these reasons I am not prepared to add a term to the Representation Order that Grassy Narrows be jointly and severally liable with the plaintiffs for any award of costs that may be made against the plaintiffs in favour of the defendants or that Grassy Narrows be considered a party for the purposes of any request for costs made by the defendants in this proceeding.

[33] This order does not preclude the defendants from moving at a later date for an order that Grassy Narrows should be responsible for costs, if there is new evidence suggesting a proper basis for making such a request that has not been considered on this motion. Should that occur, the defendants must of course formally put Grassy Narrows on notice so that the issue can be fully argued.

[34] Accordingly a Representation Order shall go in accordance with the form of order attached to this decision as Schedule A.

MOTION FOR ADVANCE COSTS

The Test

[35] In Okanagan, Mr. Justice Lebel, speaking for the majority, held that in those jurisdictions like Ontario, where the courts have retained a general discretion in awarding costs, an advance costs order may be granted, prior to the final disposition of a case and in any event of the cause, if the party seeking advance costs satisfies all of the following conditions:

(a) The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made.

(b) The claim to be adjudicated is *prima facie* meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means.

(c) The issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases (at para. 40).

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[36] The court went on to find that even where all of these specific conditions are present, this will not necessarily be sufficient to establish that such an award should be made;

> that determination remains in the discretion of the court. If all three conditions are established, courts have a narrow jurisdiction to order that the impecunious party's costs be paid prospectively...Within these parameters it is a matter of the trial court's discretion to determine whether the case is such that the interests of justice would be best served by making the order" (at para. 41).

[37] Lebel J. emphasized that these orders should be granted sparingly and reserved for that narrow class of cases where there are special circumstances sufficient to satisfy the court that this extraordinary exercise of the court's powers is appropriate (at para. 36).

[38] The parties agree that this is a correct statement of the test and so the issues raised in the Advance Cost Motion revolve around the application of the evidence to these requirements and if I determine that the requirements are met, my decision as to whether or not, in my discretion, this is one of those rare cases where such an order should be made.

[39] While Abitibi is not a target of the requested advance costs order, it is a third party caught in the dispute. Accordingly, it has status to make submissions on the costs motion, as it could be subject to significant expense, which would be unrecoverable, if a costs order were granted[8]. In circumstances where public interest litigation involves private litigants, LeBel J. in Okanagan instructed courts to:

> be particularly sensitive to the position of private litigants who may, in some ways, be caught in the crossfire of disputes which, essentially, involve the relationship between the claimants and certain public authorities, or the effect of laws of general application (at para 41).

[8] As explained below, the advance costs order granted in this case does not expose Abitibi to unrecoverable costs, as it will not need to intervene on the treaty interpretation issue.

Are the plaintiffs genuinely unable to prosecute this case in the absence of funding from the MNR?

The Law

[40] As set out above, in Okanagan, the Supreme Court of Canada framed the financial component of the advance costs test as follows:

> The party seeking interim costs genuinely cannot afford to pay for the litigation, and no other realistic option exists for bringing the issues to trial -- in short, the litigation would be unable to proceed if the order were not made (at para. 40).

[41] In an earlier passage, Lebel J. described this requirement as follows:

> The party seeking the order must be impecunious to the extent that, without such an order, that party would be deprived of the opportunity to proceed with the case (at para. 36).

[42] One of the issues I must consider is whether or not individual members of Grassy Narrows should be required to contribute to the cost of the litigation. Although Okanagan is silent on the point, as submitted by Mr. Janes, there was no inquiry in that case as to the financial means of individual members, nor any indication that such an inquiry should be made. He argued that this line of inquiry was not pursued in the Okanagan case even though it is well known in British Columbia that two other first nations that are part of the Okanagan Nation are well off.

[43] I do not read the Okanagan decision however, as precluding an inquiry as to the financial means of members of the representative class. It appears that the issue was not raised in Okanagan as it has been argued before me. In fact there are several cases where the courts have made such an inquiry in order to consider the first requirement of the Okanagan test.

[44] After oral submissions concluded counsel provided brief written submissions on two additional cases, which they were not aware of at the time of the hearing. The first, Deans v. Thachuk,[9] is a case where the Alberta Court of Appeal reversed the decision of the chambers judge who had refused to order advance costs in a representative proceeding by beneficiaries of a pension trust fund who were alleging mismanagement of their fund. The chambers judge had found that there was no organized funding campaign to collect donations to fund the litigation. The evidence was that the members of the Plan had been informally canvassed but only a small percentage of the beneficiaries of the Plan responded and agreed to contribute financially towards the legal costs. The chambers judge found that before asserting that they could not afford the litigation the appellants should have formally canvassed all members of the Plan on whose behalf the action was brought or pursued a contingency fee arrangement.

[9] [2005] A.J. No. 1421 (C.A.) reversing [2004] A.J. No. 470 (Q.B.), leave refused, [2005] S.C.C.A. No. 555

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[45] The court on appeal concluded that because only a small percentage of members responded to the informal canvassing for funds that it could be "inferred" that a majority of them were not dissatisfied with the administration of the fund and that "it seems patent" that any formal canvas for funds to support the litigation would have been futile. There was no evidence that a contingency arrangement was a viable alternative and the court, on this part of the test concluded that the chambers judge had erred in relying on the lack of evidence of a formal canvas or little prospect of a contingency arrangement, and disregarding undisputed evidence of the appellants' personal impecuniosity.

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[46] The plaintiffs argue that the Deans case reinforces their position that it is not incumbent upon the plaintiffs to demonstrate that they canvassed every member of Grassy Narrows or other three First Nations bands when the evidence establishes that such efforts would not bear fruit.

[47] Counsel for the plaintiffs also drew my attention to the recent decision of the Manitoba Court of Appeal; Dominion Bridge Inc. (Trustees) v. Retirement Income Plan of Dominion Bridge[10] where the Court of Appeal set aside a decision of a chambers judge granting an advance costs order. The case also involved a dispute over the payment of a surplus in a retirement income pension plan. There were about 53 persons in the plan.

[48] The court on appeal stated that it was difficult to see how the plan members met any of the three conditions in Okanagan. On the issue of impecuniosity, the evidence was that about half of the plan members had been contacted and 20 plan members had contributed approximately $2,000 in total. There was no specific evidence that the plan members were unable to find the necessary funds to obtain a legal opinion after the examination of the relevant documents without the order for costs and on that basis this part of the test was not met.

[49] Counsel for the respondents submit that the decisions must be read in the context of the specific facts of the case. I agree. Both cases are examples of the application of this part of the Okanagan test to a specific set of facts, but they do illustrate that the court will consider evidence concerning the financial means of the members of the representative group.

[50] In Townsend v. Florentis, G.D.Lane J.[11] denied an advance costs order to an individual litigant (not a representative plaintiff) on a number of bases, including a finding that the applicant had chosen not to work and earn an income and to instead devote his time to harassing his ex-wife with litigation. In this case, there is no suggestion that the impecuniosity of most of the members of Grassy Narrows is self-inflicted.

[51] Counsel for the MNR relies on Gitxsan First Nation v. British Columbia (MNR of Forests),[12] where Halfyard J. of the British Columbia Supreme Court found that the evidence of impecuniosity was insufficient and that it was not unreasonable to expect at least 1,000 of an

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[10] (2004) MBCA 180
[11] [2004] O.J. No. 5770 (S.C.J)
[12] [2005] B.C.J. No. 1531 at para. 70 (B.C.S.C.)

assumed number of 4,000 persons represented in that action to contribute a modest amount to a fund which could be used to retain counsel. He was not persuaded that reasonable efforts had been made to achieve this and he found that the evidence was as consistent with an unwillingness to contribute to legal expenses as with the inference that they were unable to contribute.

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[52] The evidence in that case consisted of affidavits of the representative applicants and each of them had a very limited income. There was not a great deal of evidence about the financial circumstances of the Band itself, although there was a reference to high unemployment at 95% and that most Gitxsan people lived in poverty. The respondents however filed an affidavit of a Wing Chief of one of the Gitxsan houses, which comprise the Gitxsan Nation, attesting that a number of the people represented by the applicants were employed and earning reasonable incomes or had other sources of income.

[53] Clearly in this case the court considered the financial means of individual members of the represented class. The evidence filed on behalf of the respondents that a significant number of members of the class had means to contribute at least a modest amount to the cost of the litigation certainly appears to have conflicted with the very general evidence of the applicants.

[54] The case is distinguishable from the case before me in that the evidence before me of impecuniosity of the Grassy Narrows community is quit detailed and unchallenged. This is not a case where I could reasonably conclude that a significant proportion of the members of Grassy Narrows could contribute a modest amount to fund the litigation. On the evidence only a handful could.

[55] The defendants also rely on Re Charkaoui[13] where the Federal Court denied the cost award because the litigant, who qualified for Quebec legal aid, wanted to hire more expensive counsel instead. Noel J. found this unacceptable, particularly given his view that there were well-qualified counsel who likely could have taken Mr. Charkaoui's case at the legal aid rates. That issue does not arise here because Legal Aid is not available to the Plaintiffs.

The Issues

[56] The MNR concedes that the Band Council of the Grassy Narrows First Nation does not appear to have the necessary funds to prosecute this case, at least without jeopardizing other pressing priorities. The position of the MNR is that the plaintiffs have not met the onus on them to establish that they do not have other means to raise money for the costs of this litigation

[57] The defendants argue that notwithstanding the economic problems faced by the people of Grassy Narrows, that the plaintiffs have failed to make serious efforts to raise funds and support for this case. It is submitted by the defendants that if, as the plaintiffs claim, this is a

[13] (2004), 256 F.T.R. 93 (F.C.T.D.)

case of such importance to the members of Grassy Narrows and other Treaty 3 First Nations, that advance costs funding is appropriate, surely they should seek funding from those individuals and groups. They submit that if those individuals and groups, the potential beneficiaries of the case, do not consider the case of sufficient merit and importance to support it with any of their funds, the court should not conclude that it must be funded by the MNR. Most telling, it is submitted, is the refusal of the plaintiff, Mr. Fobister to contribute anything to the costs of this proceeding.

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[58] The specific issues raised by the defendants are as follows:

(a) The plaintiffs and the Chief and Council of Grassy Narrows have made no effort to try to raise money to support this litigation from other members of their community, including accessing the income from the Grassy Narrows trust fund.
(b) The plaintiffs have made no effort to secure the support of other Treaty 3 signatory communities or their members, including the three Treaty 3 signatory communities that also have harvesting areas in the Keewatin Lands as defined below: the Lac Seul, Wabauskang and Wabaseemoong First Nations.
(c) The plaintiffs have not sought the support of any regional, provincial or national aboriginal organizations, outside of limited inquiries to Grand Council Treaty.
(d) The plaintiffs have failed to investigate whether other legal counsel could and would be willing to prosecute the case at lower cost than the Cook Roberts firm, which is located in Victoria, British Columbia.

The Facts

The financial resources of the Grassy Narrows community

[59] The defendants did not contest the evidence relied upon by counsel for the plaintiffs concerning the general economic conditions of the Grassy Narrows community, which includes the following:

(a) Grassy Narrows receives virtually all of its funding from the Canadian and provincial governments. That funding is earmarked for specific programs, such as health, education, social assistance, and capital infrastructure projects.
(b) Grassy Narrows has operated at a deficit in several of the previous fiscal years, including 2004-2005. It has substantial outstanding liabilities including a $1.6 million long term debt owing to CMHC.
(c) The unemployment rate in the Grassy Narrows community currently sits at about 80%, and most people rely on social assistance as their main source of income. Most of the local jobs are with the Band itself. Community members often need to seek emergency loans from the Band for matters such as travel for hospitalization, funerals, and hydro bills.
(d) Grassy Narrows lacks adequate housing for their members. Many are living in over-crowded homes or off reserve, waiting for new housing. Grassy Narrows cannot afford to build more than a couple of new houses per year. Furthermore,

much of the existing housing is substandard, and the Band lacks the funding to carry out all of the necessary repairs. In 2004, six homes on the reserve were condemned by Health Canada, but Grassy Narrows members generally continued to live in condemned houses as they have nowhere else to live.

(e) Grassy Narrows does not have an adequate water supply. The current water treatment plant does not meet provincial standards. In two sections of the reserve, residents must drink bottled water as the tap water is not safe. Grassy Narrows cannot afford to build a new water treatment plant until it receives a special grant from Indian and Northern Affairs (INAC).

(f) 60% of the population on the reserve is under the age of 20.

(g) Grassy Narrows does not have adequate recreational facilities for its youth. A skating arena is under construction, but work on that has been stalled for several years now for lack of the $400,000 needed to complete it. Aside from this, the only communal gathering place for youths on the reserve is a gymnasium. Given that Grassy Narrows is almost an hour's drive from Kenora, this lack of facilities to promote healthy activities for youths is a serious problem, and many youths resort to drugs and alcohol for entertainment. However, the problem is not one that the community can afford to address at this time.

[60] Apart from government funding, Grassy Narrows has access to two trust funds. The first is from Casino. Like other Ontario Indian bands, Grassy Narrows receives revenues from Casino Rama, which are distributed through the First Nations Limited Partnership Agreement, and, in the case of Grassy Narrows, placed in a trust. In recent years, the total revenues generated by the Trust have averaged about $350,000. The defendants have not disputed the fact that the Rama money is not available for this litigation given the terms of the limited partnership agreement, which limits the capital and/or operating expenditures of Casino Rama monies to specified purposes, namely: community development, health, education, economic development, and cultural development.

[61] There is also a Grassy Narrows trust fund, which results from a settlement with Ontario Hydro and Canada for the flooding of Grassy Narrows' original reserve. Under the terms of that trust agreement, only the interest can be spent which is in the range of $500-$600,000 per year. The members of Grassy Narrows vote on how those interest payments are to be spent and most of the time they vote in favour of individual payouts which usually range in the amount of $150-$200 to each member per year.

<u>The financial resources of certain members of Grassy Narrows</u>

[62] One of the plaintiffs, Joseph Fobister, is a successful businessman with personal assets exceeding $425,000, excluding the value of his general store. Approximately $370,000 of Fobister's assets are in his RRSP. The balance is in assets such as boats and trucks. He has 5 children and no pension.

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[63] Mr. Fobister has stated he will not use any of his personal income or assets to finance the prosecution of this action, and that it would not be reasonable to expect other financially successful Band members to contribute anything either.

[64] There is no evidence that any of the other members of Grassy Narrows have significant assets save that two other members of Grassy Narrows have had some financial success.

Other sources of funding

[65] The Sierra Legal Defence Fund assisted with and helped fund the judicial review application and paid some of the plaintiffs' legal fees and provided some direct legal support. Sierra has advised however that it lacks the resources to become involved in a trial.

[66] The plaintiffs only pursued funding from Legal Aid for this action when prompted by a Rule 39.03 examination on this issue initiated by the MNR. As a result Grassy Narrows members made a group/test case application to Legal Aid Ontario. However, they have been denied funding on the basis that the case is too expensive. Although the defendants complain that the application was brought late, there is no suggestion that Legal Aid might fund this action.

[67] The plaintiffs applied for funding to the federal government's Indian and Northern Affairs Canada "Test Case Funding" and were denied on the basis that the funding is restricted to cases on appeal.

[68] Representatives of Grassy Narrows approached the Grand Council of Treaty 3 on a couple of occasions to seek funding for this litigation. They were advised that although the Council had a fund available for discretionary spending, accessing this required the agreement of all Chiefs, and it would not be possible to secure agreement for the Grassy Narrows' litigation. No further effort was made to secure the support of the Grand Council Treaty 3 or its chiefs.

[69] The plaintiffs have not attempted to make use of the Treaty and Aboriginal Rights Research group operated by Grand Council Treaty 3. Mr. Janes acknowledged that they do have a research arm, which he would try to access.

[70] Further affidavit evidence filed on behalf of the plaintiffs was admitted on consent, which disclosed a number of other attempts to contact various groups for funding, all without success.

The costs of this litigation

[71] The costs of litigating this case for the plaintiffs are estimated at just over $2.8 million. This figure is based on a detailed budget for an estimated 12-week trial on all issues and it provides for use of experts (scientific, historical, archival, and anthropological).

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[72] Most of the work by counsel for Grassy Narrows has gone unpaid, and most of what has been collected has been paid not by Grassy Narrows, but Sierra Legal Defence Fund.

[73] Grassy Narrows paid Cook Roberts LLP a bill of $18,391.54 in December 2005. Grassy Narrows obtained this money by making a special request to INAC for the Band's Ottawa trust fund monies.

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Analysis

Funding from individual members of Grassy Narrows

[74] The first issue is whether or not I should consider this motion on the basis that Mr. Fobister and a couple of other members of Grassy Narrows with financial means should be expected to contribute to the cost of this litigation.

[75] Given the evidence of the financial circumstances of the Grassy Narrows community, as the Alberta Court of Appeal found in the Deans v. Thachuk, I am able to infer that canvassing the members of the community would be futile as they are impoverished and could not reasonably be expected to make any financial contribution to this action. The only evidence of a Band member with any significant assets concerns Mr. Fobister. Given that most of the other members of Grassy Narrows are on social assistance, Mr. Fobister is in a relatively unique position in his community, financially speaking.

[76] I do not accept the arguments advanced by the defendants that Mr. Fobister and the couple of other members of Grassy Narrows who do have some financial means ought to be expected to contribute to or fund this litigation.

[77] The rights that are being pursued by the plaintiffs in this action are communal rights that belong to all of the members of Grassy Narrows. Mr. Fobister represents those communal interests, not his personal interests. As such Mr. Fobister does not have an individual or direct pecuniary interest in this litigation. He could not for example, exclude the other members of the Grassy Narrows community from benefiting from this action[14]. It is not reasonable to expect Mr. Fobister to sacrifice his retirement fund for this litigation. These are the only retirement savings of a man in his late 40s.

[78] Furthermore, I agree with the submission by Mr. Janes that given most of the members of Grassy Narrows could not contribute to the cost of this action, that it is not appropriate to consider whether a few individual members should do so. Where, as in this case, there are only a very small number of individuals who could reasonably be expected to make any kind of financial contribution, and where the evidence establishes that the remaining members of the representative group could not reasonably be expected to make any financial contribution

[14] See for example R v. Sundown (1999), 170 DLR (4th) 385 (S.C.C.)

whatsoever, in my opinion it is not appropriate for the court to expect that the few members who might be able to make a contribution exhaust all of their assets for the benefit of the entire group before a finding will be made that the first requirement of the Okanagan test has been met.

[79] I also agree with the submission by the plaintiffs that there is a danger in placing too much emphasis on the income or assets of a few members of the Band, in that it puts the interests of the collective at the mercy of a few individuals. The situation might be different if a large proportion or a substantial number of Band members could collectively, and without hardship, make a significant contribution or bear the burden of the litigation. In that case, it might be reasonable to expect some contribution by individual members. However, it would be quite different to make the litigation conditional on one Band member contributing all or a significant part of his retirement savings.

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Funding from the Grassy Narrows trust funds

[80] The Band membership collectively has access to approximately $5-600,000 per year in trust fund income that could be devoted to this case. Although no budget was prepared on this basis, it seems likely that if the litigation were phased, that sum would cover the first phase dealing with the interpretation of the treaty.

[81] This issue then is should I find that the impecuniosity requirement in the Okanagan test has not been met because this fund is available? If the test was solely that of unqualified "impecuniosity", I would have to accept the submission of the defendants and effectively compel the members of Grassy Narrows to decide whether or not this case is important enough to warrant the use of these funds.

[82] Lebel J. however did not limit this part of the test to a consideration solely of financial means. He stated the party seeking the order must be impecunious "to the extent that, without such an order; that party would be deprived of the opportunity to proceed with the case" (at para. 36). In Okanagan the evidence filed, like the evidence here, was that the Bands were all in extremely difficult financial situations. The Bands had no way to raise the money needed for the action and even if they did there were many more pressing need which would have to take priority over funding the litigation (at paras. 4-5).

[83] I am satisfied on the evidence before me that Grassy Narrows is an impoverished community. The settlement funds in question generate in the range of $150-$200 per person per year which is a very modest sum, but given that most members of Grassy Narrows are unemployed and on social assistance they are obviously dependent on that funding to meet basic needs. For the most part, the members of Grassy Narrows have such immediate pressing social problems it would not be reasonable to expect them to divert any of the income that they receive from the settlement to fund this litigation Even if individual members could reasonably be expected to leave this income in the trust, which I do not accept, like the Bands of Okanagan, the

Council of Grassy Narrows would clearly have more pressing needs that would take priority over funding this litigation.

[84] I recognize that the payment of the order for advanced costs will come from the public purse. The British Court of Appeal said in Little Sisters[15] that while the gay and lesbian communities had other priorities for their funds than the lawsuit in question, "so does the public purse." It is therefore not enough for an applicant to argue that they have other priorities for funds at hand and should be relieved of an obligation to utilize those funds. In this case however, one could hardly question the priorities of the Council given that the Grassy Narrows community lacks adequate infrastructure. If I were to accept the submissions of the defendants on this point I would be compelling the members of Grassy Narrows to choose between attempting to provide for the basic necessities of life, such as adequate housing and securing a safe water supply, that most citizens of Ontario take for granted, and pursuing this litigation. In the circumstances, the reasonable choice would not be to divert those funds to this litigation. Accordingly I reject the submission that I consider the availability of these settlement funds in considering this requirement of the test.

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Funding from other sources

[85] The MNR argues that at the very least the plaintiffs have an obligation to inquire to seek support from the other three Treaty 3 First Nations with harvesting areas in the Keewatin Lands. They argue that their failure to do so is fatal, as they have not established that the other First Nations could not and would not provide financial support.

[86] In the Federal Court decision of Re Charkaoui the court stated that if there is no possibility of recourse to other means or of access to other financial sources, it is important for the applicant to say so, as the burden of proof in such a motion is on the applicant (at para. 24).

[87] There is no evidence before me as to whether or not the other three First Nations with harvesting areas within the Keewatin Lands could or would assist with funding this litigation. The plaintiffs did not ask them for support, even though those First Nations are potential beneficiaries of the litigation and of the treaty negotiations. I was advised that counsel for the MNR suggested for the first time, during the cross-examinations, that the plaintiffs seek funding from other First Nations in the area.

[88] The defendants argue that the onus is on the plaintiffs to establish that the other First Nations are unable to fund this litigation. The plaintiffs argue that Okanagan does not require them to prove that there is absolutely no one else who can bear the costs of the litigation. Mr. Janes' position is that going to an Indian band is not an obvious source of funding and that

[15] [2005] B.C.J. No. 291 (leave to appeal granted, [2005] S.C.C.A. No. 190)

there is no evidence that these other First Nations have any funds that could be used on this litigation.

[89] Although the onus of satisfying me that the plaintiffs meet the test in Okanagan is on the plaintiffs, I accept the submission of Mr. Janes that the plaintiffs only have to act reasonably in following up with possible sources of funding and that without more, other First Nation communities in Ontario would not be an obvious source of funding.

[90] If the MNR intended to seriously suggest that these other First Nations should be canvassed, notwithstanding that the onus is on the plaintiffs, in my opinion counsel ought to have alerted Mr. Janes to this in sufficient time that he could pursue the matter, as was done with the issue of Legal Aid or alternatively, put forward some evidence that these other First Nations have some financial resources that could be used to fund the litigation. Had he done so and the plaintiffs had decided not to pursue the matter, this argument might have had some force. As it is, I have no evidence that these other First Nations are unable or unwilling to assist and I am not prepared to find that they were an obvious source. That presumes that they are not faced with the same type of financial problems that the members of Grassy Narrows face as only then could this be considered a reasonable suggestion.

[91] Mr. Janes argues that making aboriginal group coalitions a prerequisite to an advance cost award is problematic in that different First Nations may have different social, political and economic goals. For example, counsel for the MNR admitted that one of the other First Nations is logging to a significant extent. It may be that that First Nation would not support the position of Grassy Narrows on this issue. That however could be dealt with on a motion like this because if there was evidence that other bands were not in favour of the litigation, as the court did in Deans, it could then be "inferred" that a request for funds to support the litigation would be futile. The Okanagan test does not require that everyone who stands to benefit from the litigation be in support of the action.

[92] However, what the argument of the defendants does not consider is that if other First Nations agree to contribute to the cost of the litigation they would in no doubt demand some say in how the litigation proceeds. That would require a high level of cooperation and could lead to internal disputes. I do not read the first requirement in Okanagan as going so far as to, in circumstances like these, seek to join in other First Nation bands to this litigation.

[93] As Mr. Janes submitted, the Okanagan case illustrates the reality that different groups may make different decisions on how to advocate and advance their rights. In that case there were originally three sets of proceedings: two claims involving Okanagan First Nations (the Okanagan Indian Band and the Westbank First Nation) and a claim involving a number of Secwepemc First Nations. Westbank, settled with the Crown quite quickly by entering into a

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forestry agreement with the Crown. The Okanagan band did not; it proceeded with the litigation and ultimately obtained an advance costs order[16].

[94] The defendants also suggest that the plaintiffs should pursue the Grand Council of Treaty 3, but on the evidence two requests were made and denied. No reasons were given. There is no evidence to suggest that further attempts would result in funding. As for the research group I accept Mr. Janes' advice that he will try to access this research program for this case. I expect this to be done immediately so their position can be taken into account in the budget.

[95] Finally, as for the suggestion that there are other unspecified aboriginal organizations that the plaintiffs should contact, I accept the submission of Mr. Janes that the plaintiffs do no have to provide negative evidence on funding availability for all aboriginal groups and organizations to which they have any connection, when the defendants have provided no evidence that funding might reasonably be available from any specific group.

[96] For these reasons therefore, I am satisfied that the plaintiffs do not have any other sources of funds that could reasonably be diverted or obtained to fund this action.

Cost of counsel

[97] Although not pursued in oral argument, counsel for the MNR suggests in its factum that Grassy Narrows will increase the costs of the litigation by virtue of its decision to retain Cook Roberts LLP, which is located in Victoria. The Crown does not suggest that the plaintiffs' budget for this trial is misguided. For example, there is no allegation that the length of trial is overestimated or that the experts identified are inappropriate.

[98] As counsel for the plaintiffs submits, Okanagan and the cases that have applied it consider the complexity of the proposed litigation. It may be possible to prosecute a simple case with the assistance of counsel acting on a pro-bono basis, at significantly reduced rates, or even possibly without counsel. However, a complex case will require the assistance of counsel, who will likely need specialized knowledge and who will likely require payment at normal or close to normal rates.

[99] In this case, the defendants moved to convert the application for judicial review to a trial on a number of bases, including the complexity of the issues raised and the fact that they could not be resolved justly on a summary basis. They successfully argued that the case would require the detailed examination of historical, anthropological and scientific evidence, and the making of difficult legal arguments, and this was one of the reasons that Justice Then converted this matter to an action.[17] In fact many courts have noted the inherent complexity of

[16]British Columbia (MNR of Forests) v. Okanagan Indian Band (2000) BCSC 1135; (rev'd) [2002] 1 C.N.L.R. 57 (B.C.C.A.); British Columbia (MNR of Forests) v. Westbank First Nation [1999] B.C.J 2161 (B.C.S.C.).

[17] Keewatin, supra, at paras.44-52

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aboriginal rights litigation which often involves complex factual records and difficult legal questions

[100] Mr. Janes has extensive experience in aboriginal law. This is a specialized area and in my view, a lawyer with special expertise in this area is required to properly advance the plaintiffs' claim. Furthermore, presumably someone like Mr. Janes, who has this kind of expertise, will be able to prepare the case more efficiently. In my view the plaintiffs' choice of Mr. Janes as counsel is reasonable give the nature of this action.

[101] The budgeted rates set out in Mr. Janes' budget are approximately in line with the partial indemnity hourly rates established by the old Costs Grid by the Subcommittee of the Rules Committee. The hourly rate will be argued at a later date but it is not suggested by the defendants at this stage that the rates are too high.

[102] The only issue remaining then, is the fact that Mr. Janes is from British Columbia. There is no suggestion that the plaintiffs could not retain experience Ontario counsel, but they have chosen Mr. Janes to represent them.

[103] As Mr. Janes points out, Ontario counsel would need to fly to Winnipeg to reach Grassy Narrows, which is where extensive work needs to be carried out, and their travel costs would likely not be much less than lawyers coming from Victoria. Furthermore, extra disbursement costs will be small relative to the costs of this action.

[104] These issues are really more appropriately dealt with when terms of the order are argued. If at that stage I am persuaded that it is inappropriate for British Columbia counsel to represent the plaintiffs or that the rates proposed are too high, that can be dealt with when the terms of the order for advanced costs are established. It would not be appropriate reject the application for advance costs on this basis.

Scope of the action

[105] As already stated, I have come to the conclusion that only a determination of the treaty interpretation/division of powers issue meets the Okanagan test. If the case proceeds with a trial on this issue alone, then only a portion of the costs estimated by Mr. Janes will be incurred. There was no specific evidence before me as to what the estimate for those costs would be and in fairness to counsel, that issue was to be dealt with in the next stage, but I have considered the fact that the threshold treaty interpretation/division of powers portion of the plaintiffs' case would be much less costly to litigate than the action as a whole in considering whether or not the plaintiffs meet the first requirement of Okanagan.

[106] Counsel for the MNR referred me to the decision of the British Columbia Court of Appeal in Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)[18] and the criticism by the appeal court of the trial judge who concluded that the

[18] 2004 B.C.S.C. 823; (2005) D.L.R. (4th) (B.C.C.A.) 695

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applicants met the first requirement of the Okanagan test regardless of the scope of the litigation, given her failure to consider whether a ruling on the narrow issue could be pursued by the applicant.

[107] The trial of the treaty interpretation/division of powers issue would be expensive and the funding required would still be significant. Based on the evidence before me I can certainly conclude that a trial limited to the treaty interpretation/division of powers issue would still be a trial involving the expected complexity of aboriginal rights litigation with a complex factual record including expert evidence and novel legal questions. It is to be noted that on the motion before me the plaintiffs, presumably because of a lack of funds, led no expert evidence. Obviously they would wish to retain experts to respond to the experts called by the defendants. Even with the reduced cost of a trial dealing only with the treaty interpretation/division of powers issue, the cost of that proceeding would not be within a range I could reasonably expect the Grassy Narrows community to fund from the Grassy Narrows trust funds. Furthermore, for the reasons already given, I would not require financial contributions from Mr. Fobister or the other couple of band members with some financial resources.

Conclusion on the "impecuniosity" part of the Okanagan test

[108] For these reasons, I conclude that the plaintiffs meet the "impecuniosity" part of the Okanagan test.

[109] I should add that even if I had concluded that certain members of the Grassy Narrows community such as Mr. Fobister, could reasonably be expected to financially contribute to this litigation or that some portion of the income from the Grassy Narrows trust funds should be applied to the litigation in the future, I would not have dismissed the motion on this basis. By way of example only, in a case where the court determines that the plaintiffs and the members of the representative group can or should be expected to contribute 25% of the costs of the litigation, but could not afford to proceed with the litigation if an advance cost order was not made to cover 75% of the costs, if the other requirements of Okanagan were met, in my view the appropriate decision would be to award reduced advance costs. The plaintiffs in those circumstances would still meet the test of impecuniosity because without the order the action could not proceed.

[110] As Mr. Janes points out, the plaintiffs do not seek a costs order covering 100% of their litigation costs, nor are advance cost orders generally meant to achieve this. In Okanagan, the British Columbia Supreme Court made an advance costs order of 50% of special costs (the British Columbia equivalent of substantial indemnity costs).

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Is the claim to be adjudicated prima facie meritorious?

The Law

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[111] In Okanagan, the second requirement of the test is stated as follows:

> The claim to be adjudicated is prima facie meritorious; that is, the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means (at para. 40).

[112] In an earlier passage, Justice Lebel describes this condition as follows: "The claimant must establish a **prima facie case of sufficient merit to warrant pursuit**...Although a litigant who requests interim costs must establish a case that is strong enough to get over the **preliminary threshold of being worthy of pursuit**, the order will not be refused merely because key issues remain live and contested between the parties (at paras. 36 and 37, emphasis added).

[113] The consideration of whether or not the case is of sufficient merit to warrant pursuit is consistent with comments of Lebel J. characterizing the findings of the trial judge in that case, and in particular the view of the trial judge that "although the claim [of the Band] was not so clearly valid that there was no need for it to be tested through the trial process, it was certainly strong enough to warrant pursuit" (at para. 45).

[114] The standard for determining whether a claim is sufficiently meritorious to potentially warrant an award of advance costs has been considered by a number of Ontario cases.

[115] In Townsend v. Florentis, G.D.Lane J. considered a request for interim costs in the context of an action against solicitors for negligence in the conduct of his action for support, access and custody. The defendants brought a cross-motion to have the plaintiff declared a vexatious litigant. Lane J. considered the test from Okanagan, and although he concluded that the plaintiff's case against the defendants was not a "powerful one", he concluded that "this type of motion is not the forum in which to decide these issues, and the action is at a pre-discovery stage. If the credibility issues are resolved in favour of the plaintiff, there could be some damages awarded. It is not possible for me to say that the case is not worthy of pursuit" (at para. 55). This language is consistent with the language of Justice Lebel in Okanagan although I note it may be different than saying as Lebel J. did,that the case is worthy of pursuit.

[116] In Kelly v. Palazzo[19], Horkins J. considered the issue of advance costs claimed by the plaintiff, made during the course of a trial seeking damages for alleged racial profiling. She referred to the British Columbia Court of Appeal decision of Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue). In that case the court opined

[19] [2005] O.J. No. 5364 at paras. 24-25 (S.C.J)

that the requirement of a prima facie meritorious case "has a low standard of proof" and requires only that a case attain a status "above that of being merely frivolous" (at para. 28). It seems that Horkins J. approved of this statement, although that is not clear, as she made no further comment about it. She went on to find that the plaintiff's claim was not *prima facie* meritorious.

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[117] Counsel for MNR relies on the Ontario Divisional Court decision in Broomer (Litigation Guardian of) v. Ontario (Attorney General)[20]. In that case, the applicants were impecunious and had been represented on a pro bono basis in a Charter application. Before the matter was heard a settlement was reached. In considering the submission on costs, Ferrier and O'Connor JJ., speaking for the majority of the panel of the Divisional Court, found that the applicants were successful in that they received the outcome they desired. They noted that costs can be used as an instrument of policy and that making Charter litigation accessible to ordinary citizens is recognized as a legitimate and important public policy objective, citing with approval the decision of Epstein J. in Rogers v. Greater Sudbury (City) Administrator of Ontario Works[21]. The court went on to state that:

> This is not to say the government should be treated as a bottomless pit of funding for every Charter challenge thought up by inventive legal minds. The applicants must be able to show significant merit to their cause, that is, a real possibility of ultimate success, or, as in this case, the actuality of success (at para. 18).

[118] The court also considered the Okanagan test, which it found applicable to all cases of public interest litigation, and without commenting further on that test, found that the three conditions of the Okanagan had clearly been met in the case before them. Counsel for the MNR submits that I should adopt the language of the Divisional Court, set out above, as the proper formulation of the second condition in the Okanagan test. I do not do so as the court did not expressly link that statement of what applicants must show in Charter cases to the principles set out in the second condition of the Okanagan test.

[119] Having said this, I do not believe there is much, if any distinction between determining whether or not a case has "a real **possibility** of ultimate success" or considering whether or not the case is of sufficient merit to warrant pursuit, in the way that phrase is used by Lebel J.. In either case, the court is not determining ultimate liability. In fact counsel for the plaintiffs characterized the test as whether or not the plaintiffs have a "real prospect of success".

[120] I agree, however, with the submissions of counsel for the MNR, that the restatement of this part of the Okanangan test by the British Columbia Court of Appeal in Little Sisters is not consistent with the test as expressed by Lebel J. in Okanagan and in particular with his comments that advance costs should only be reserved for a narrow class of cases that warrant this extraordinary exercise of the court's powers. It is not sufficient to find that a case is not frivolous. There must be some consideration of the merits in order to determine that the case is of sufficient merit to warrant pursuit. In addition to the merits of the plaintiffs' claim, this will also

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20(2003), 3 C.P.C. (6th) 194 at 200 (¶ 18) (Div. Ct.)
[21] (2001), 57 O.R. (3d) 467 (S.C.J.)

require a consideration of the nature of the case and whether it would be contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the plaintiffs lack financial means. This brings into focus the third part of the test, namely whether or not the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases.

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[121] Typically, at the time when such motions are heard, key issues will remain live and contested between the parties. As Lebel J. stated, this is not a reason to refuse such a request (at para. 45). Applications for advance costs are typically considered in cases where the facts are complex and there is a need to test the claim in a trial process. Justice Then has already held that this is the case for this claim, and as he noted, aboriginal law claims, and in particular claims involving treaty issues can only be properly dealt with in an action.[22]

[122] It is important, as submitted by counsel for the plaintiffs, that the court not put the plaintiffs in an impossible situation and require the plaintiffs to marshal all of the evidence, particularly the expert evidence that they would hope to call at trial. Where there is impecuniosity, the plaintiffs will naturally lack the resources to do this. The threshold enunciated by Lebel J., for this portion of the test, recognizes that this is not the time to embark on a mini trial involving heavy and time-consuming litigation.[23]

[123] In Deans v. Thachuk the Alberta Court of Appeal described this part of the Okanagan test as requiring:

> that the case be strong enough to get over the preliminary threshold of being worth of pursuit. It does not require a close examination of the merits of the dispute, nor the prospects of success, including the likelihood of recovery. The action here is of sufficient merit to warrant pursuit …(at para. 39).

[124] This is an accurate summary of this part of the Okanagan test in my view. It does not change it.

[125] In my opinion, there is no need to attempt to restate the "merits" component of the test for making an order for advance costs as set out in Okanagan. Any question as to what the court meant by requiring that the claim be "*prima facie* meritorious" is adequately explained in the language that follows, as set out above: "the claim is at least of sufficient merit that it is contrary to the interests of justice for the opportunity to pursue the case to be forfeited just because the litigant lacks financial means" and the comments of Lebel J. that a prima facie case is one of "sufficient merit to warrant pursuit".

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[22] Keewatin, supra at para 48

[23] The English Court of Appeal applies a similar approach for applications for protective costs orders, see for example R (on the application of Corner House Research) v. Secretary of State for Trade and Industry [2005] EWCA Civ 192 at para. 73

The Issues

[126] A determination of whether or not the plaintiffs have a *prima facie* case of sufficient merits to warrant pursuit involves a consideration of the constitutional division of powers between the federal and provincial governments and an interpretation of Treaty 3, which was signed in 1873.

[127] The key part of Treaty 3, for the purposes of this motion, is the following:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, subject to such regulations as may from time to time be made by Her Government of Her Dominion of Canada, and **saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada**, or by any of the subjects thereof duly authorized therefore by the said Government (emphasis mine).

[128] There is no dispute among the parties that the reference to hunting includes trapping. What is in dispute is whether or not the bolded portion of this passage of the Treaty, which is referred to as the "taking up" provision, should be interpreted to restrict the right to "take up" land for such purposes as lumbering, to the federal government, given the reference in the treaty to "Her Government of the Dominion of Canada.

[129] The plaintiffs' central argument is that the "taking up" clause reserves the right to "take up" land for forestry to the federal government and that at least on the Keewatin Lands, as defined below, Ontario lacks the jurisdiction to unilaterally, without the involvement of the federal government, authorize forestry and "take up" land for that purpose. The plaintiffs argue that to the extent that Ontario authorizes forestry activities that significantly infringe the hunting and trapping rights guaranteed by Treaty 3, it intrudes impermissibly into federal jurisdiction.

[130] A determination of the plaintiffs' claim will require a consideration of the distinction created over time between the Northwest Angle and the Keewatin Lands. . Both are within the area covered by Treaty 3. The Northwest Angle lands are located south of the English River, while the Keewatin Lands lie north of the English River and east of Ontario's present boundary with Manitoba. The ownership of the Northwest Angle lands had not been settled when Treaty 3 was signed, as both Canada and Ontario claimed them. This claim was ultimately resolved in Ontario's favour. The Ontario Boundaries Extension Act added the Keewatin Lands to the province of Ontario in 1912.[24]

[131] The specific issues that I must consider to determine whether or not the plaintiffs have a *prima facie case* of sufficient merit to warrant pursuit, were narrowed a great deal during

[24] S.C. 1912, 2 Geo. V. c.40

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the course of argument, for which I thank counsel. Certain concessions for the purpose of this motion only, were made by both counsel for the plaintiffs and counsel for the MNR and they are as follows:

(a) Counsel for the plaintiffs conceded that he could only meet the "merits" test in Okanagan with respect to that portion of the lands covered by Treaty 3, that for the purpose of this motion were identified as the Keewatin Lands. Part of Grassy Narrows traditional territory lies within the Northwest Angle Lands, and part of it lies within what were called the Keewatin Lands. A large part of the Whiskey Jack forest is in the Keewatin Lands. Most of the planned logging is to take place in the Keewatin Lands.

(b) Counsel for the MNR conceded that if I find that the plaintiffs have met the "merits" test on their position that Ontario does not have the power to "take up" the Keewatin Lands for the purpose of authorizing forestry, that Ontario's right to authorize forestry is limited by the parameters set out in R. v. Sparrow[25] (Sparrow). Because of the complexity of the issues that arise in considering those parameters, it is not argued, for the purpose of this motion, that there is no meaningful interference or "*prima facie* infringement" with hunting and trapping rights as a result of the forestry activities in question, within the meaning of Sparrow. Accordingly it is not necessary for me to analyze in detail the evidence led by all parties on the issue of the extent to which the forestry activities infringe on the plaintiffs' treaty rights to trap and hunt.

(c) Counsel for the plaintiffs also conceded that if he cannot meet the "merits" test on his position that Ontario does not have the power to "take up" the Keewatin Lands for the purpose of authorizing forestry, that he could not meet the test in so far as the issues of *prima facie* infringement/justification of that infringement/ lack of consultation arguments are concerned, in that that the law concerning those issues has been decided in Misikew Cree First Nation v. Canada (Minister of Canadian Heritage)[26] (Misikew) and as a result these issues would no longer qualify as a test case.

[132] Accordingly, as a result of the concessions made by counsel for the plaintiffs and the MNR, for the purpose of considering whether or not the plaintiffs' claim meet the "merits" test in Okanagan, I have limited my deliberations to the plaintiffs' claim as set out in paragraph 1(b) of the <u>Amended</u> Statement of Claim which seeks a declaration that the MNR had no authority to approve any forest licences, forest management plans, work schedules or make or give any other approvals or authorizations for forest operation, within the Keewatin Lands so as to infringe, violate, impair, abrogate, or derogate from, the right to hunt and fish guaranteed to the plaintiffs by Treaty 3.

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[25] (1990), 70 D.L.R. (4th) 385
[26] (2005) 259 D.L.R. (4th) 610

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[133] The central issue in dispute is whether or not Ontario has the right to "take up" the Keewatin Lands for forestry. That involves an interpretation of the taking up provision of Treaty 3 and a consideration of the constitutional division of powers.

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The Facts and relevant legislative and history

Events following the signing of Treaty 3

[134] In 1884 the Privy Council decided that Ontario owned the North-West Angle Lands and this was enacted in 1889 in the Canada (Ontario Boundary) Act, 1989[27].

[135] Ontario's ownership of the Northwest Angle Lands created problems for Treaty 3, as Canada had obligations to create reserves under the treaty but lacked the title required to create them. In 1891 the federal and provincial governments passed two statutes, which have been referred to as reciprocal legislation, which resolved the issue of the selection of the reserves.[28]

[136] In 1912, Ontario's boundaries were extended to include the Keewatin Lands through the Ontario Boundaries Extension Act. Once this was done, all Treaty 3 lands were under Ontario's jurisdiction, except for a small segment that fell within Manitoba.

Forestry activities in the Treaty 3 territory

[137] Ontario began to authorize forestry in the Treaty 3 territory in 1923. Since that time, there has been extensive logging, including logging in the Grassy Narrows traditional territory. The Ontario government manages forestry activity on Crown lands, including the Whiskey Jack Forest, pursuant to the Crown Forest Sustainability Act, 1994[29].

[138] In recent years, forestry activity in the Whiskey Jack Forest has been governed by Forest Management Plans ("FMP"). These are 20 year logging plans that are required under s. 8(2) of the Crown Forestry Sustainability Act and prepared according to the Forest Management Planning Manual, as well as numerous other policies and guidelines that are renewed every five years. The current plan is the 2004-2024 FMP and authorizes logging on the Grassy Narrows Traditional Territory, including logging on the trap lines held by Grassy Narrows' members.

[139] The logging carried out under the FMP is clear-cutting. Clear-cutting is accompanied by road building, the establishment of culverts, the removal of beaver dams to

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[27] 52 and 53 Vict., Chap. 28

[28] An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, S.C. 1891, 54-55 Victoria, c. 5 and An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands, S.O. 1891, 54 Victoria, c.3

[29] S.O. 1994 c. 25

prevent road flooding, brush burning, the establishment of work camps, tree planting, herbicide spraying, and other related activities on the land.

[140] There was a great deal of evidence filed on this motion as to the impact of past and proposed logging on the trap lines of the Grassy Narrows people. The respondents say that only 0.7% of the forest is harvested annually, but the plaintiffs argue that, given the size of the forest, the issue is where that logging is taking place. The impact of that logging is also subject to fierce debate. In addition to impact on the trap lines themselves, the plaintiffs argue that the effects of clear-cutting extend to other areas of the forest. Given the concessions made by counsel, it is not necessary for me to consider this evidence except to say that the parties are far apart on these issues.

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Analysis

Division of powers argument

[141] It is the plaintiffs' position that if Ontario does not have the power to "take up" the Keewatin Lands pursuant to the terms of Treaty 3, that it cannot unilaterally authorize forestry because of the constitutional division of powers between the federal and provincial governments, which imposes a substantive limit upon a province's authority to interfere with aboriginal treaty rights.

[142] I do not need to deal with this submission because for the purpose of this motion the MNR conceded that if Ontario does not have the power to "take up" the Keewatin Lands for the purpose of authorizing forestry, that Ontario's right to authorize forestry is limited by the parameters set out in Sparrow. The MNR's position is that Ontario has been issuing permits for logging in the Treaty 3 lands, relying on the Crown's treaty right to take up the lands. I will however summarize the legislative and common law background briefly as it assists in understanding the significance of the issues in dispute.

[143] The Constitution provides two important substantive protections for aboriginal people. First, section 91(24) of the Constitution Act, 1867[30] assigns exclusive jurisdiction over aboriginal matters (including the protection of their treaty and other rights) to the federal government. According to Professor Peter Hogg, the main reason for section 91(24) of the Constitution Act, 1867 seems to have been the idea that the federal government would be more likely to protect aboriginal people against the interest of local majorities.[31]

[30] formerly the British North America Act, 1867, (U.K.), 30 & 31 Victoria, c. 3

[31] P. Hogg, Constitutional Law of Canada (Looseleaf 4th Ed) (Toronto: Carswell, 1997) at p. 27-2

[144] Second, section 35 of the Constitution Act, 1982 protects aboriginal and treaty rights from both levels of government by imposing substantive constraints on the ability of either level of government to interfere with these rights.[32]

[145] The common law and s. 35 of the Constitution Act, 1982 also provide procedural protection, as they require the government to engage in meaningful consultation with aboriginal people before making decisions that have the potential to impact their aboriginal or treaty rights.

[146] In the Ontario forestry regime context, all of these protections are reinforced by the statutory protections contained in s. 6 of the Crown Forest Sustainability Act, 1994 which states:

> This Act does not abrogate, derogate from or add to any aboriginal or treaty right that is recognized and affirmed by section 35 of the Constitution Act, 1982.

[147] In Sparrow, the Supreme Court of Canada held that section 35(1) of the Constitution Act, 1982 "affords aboriginal peoples constitutional protection against provincial legislative power" (at p. 406).

[148] This is reinforced by section 88 of the Indian Act[33], which provides that "[s]ubject to the terms of any treaty and any other Act of Parliament" general provincial laws that are not inconsistent with that Act, are applicable to Indians as defined in the Indian Act.

[149] It is the position of the plaintiffs that the provinces are excluded from regulating aboriginal affairs or adversely affecting aboriginal treaty rights unless expressly empowered to do so by federal statute or a treaty instrument. For example with respect to treaty rights, the Supreme Court of Canada in R. v. White and Bob[34] held that British Columbia could not prohibit hunting by aboriginal people that was occurring pursuant to the Douglas Treaties.

[150] In Sparrow, the Supreme Court of Canada held that even where a government has the jurisdiction to interfere with aboriginal or treaty rights, it can only do so if it can justify this interference on a strict test. The justification test requires demonstrating that the Crown had a pressing legislative objective, that it gave priority to the aboriginal right, and that it consulted and generally acted honourably towards the aboriginal group.

[151] The Supreme Court of Canada in recent decisions culminating with Mikisew held that a taking up clause, such as the clause in Treaty 3, expands the range of activities that the Crown can authorize without having to meet the Sparrow justification test. The court rejected the proposition that any interference with the right to hunt is a *prima facie* infringement, which must be justified under the Sparrow test in the case of exercising a taking up provision. In those circumstances, interference with treaty harvesting rights is only an infringement requiring

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[32] Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.) 1982, c. 11
[33] R.S.C. 1985, c. I-5
[34] (1964), 50 D.L.R. (2d) 613 (B.C.C.A.) (per Davey J.A.); aff'd (1965), 52 D.L.R. (2d) 281 (S.C.C.)

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justification, where no meaningful right remains, assessed in relation to the traditional harvesting areas of a particular signatory community.

[152] There were some submissions as to what rights Ontario will have if any, to authorize logging, if it does not have the right to "take up" the land for forestry pursuant to the terms of Treaty 3. Counsel for the MNR set out in his factum that the plaintiffs' argument creates a constitutional vacuum where no one can authorize logging on Treaty 3 lands. Plaintiffs' counsel responded that that is not the case and that if the court ultimately accepts their position, Ontario has two options: one to ask the federal government to exercise its power under the "taking up" clause for the benefit of Ontario or Ontario can negotiate with Grassy Narrows to permit logging to continue on terms acceptable to all parties. He referred by example to the Nisga'a Final Agreement and the Nisga'a Final Agreement Act[35], which resulted from a negotiated settlement following the commencement of litigation.

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[153] It is not necessary for me to consider what Ontario's position will be if the plaintiffs succeed in their treaty interpretation argument. For the purpose of this motion, it is sufficient to observe that there is no doubt that the issue of whether or not Ontario has the authority to "take up" the Keewatin Lands pursuant to Treaty 3 is an important issue with significant consequences for the parties. The threshold that the plaintiffs must establish for infringement of their hunting and trapping rights is much lower if Ontario cannot rely upon the taking up clause, and if that threshold is established, on the plaintiffs' argument, Ontario will need coordinated action or legislation by the federal government in order to authorize this type of logging.

The decision of Mr. Justice Then

[154] The defendants have already successfully argued that this matter is of such complexity that it cannot be disposed of on a summary basis and instead requires a trial. The plaintiffs submit that this position weighs heavily in favour of a finding that there is a prima facie meritorious case. They argue that if their case was devoid of merit or very weak, the defendants presumably would have favoured a summary disposition via a judicial review or would have moved to strike the claim as disclosing no triable issue. In fact they argue that it is inconsistent to say that the case is so difficult that it requires a trial and cannot be decided summarily but so easy that I can determine that it is not a *prima facie* case.

[155] Although I find that the position taken by the defendants before Then J. as to the public importance of this litigation to be relevant to the third condition of the Okanagan test, I do not accept the plaintiffs' position that I should consider the fact that the defendants have not sought to dispose of the claim in a summary fashion and draw an inference that the plaintiffs have a *prima facie* meritorious claim. There is no motion before me to strike the claim as disclosing no reasonable cause of action and the test on such a motion is quite different than the test as expressed by Lebel J. I therefore reject this submission.

[35] S.C. 2000, c.7

[156] The plaintiffs also submitted that Mr. Justice Then acknowledged the meritorious nature of this case. I disagree. He considered the matter in the context of a procedural motion and the issue he decided was whether or not, given the nature of the plaintiffs' claims, the matter should proceed by way of application for judicial review or by way of action.

[157] Furthermore, the issue of whether Ontario has the authority to take up the land for forestry was not seriously argued or developed in the limited evidence before Then J., except to explain the nature of the case in relation to whether it should proceed by way of application or action. This issue is of material importance on this motion and is the subject of considerable evidence that was not before Justice Then.

[158] For these reasons, I have not considered the decision of Then J. in determining whether or not the plaintiffs meet the "merits" requirement of the Okanagan test.

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The plaintiffs' interpretation of the "taking up" provision in Treaty 3

[159] The wording of the clause in Treaty 3 that contains the "taking up" provision is as follows:

> Her Majesty further agrees with Her said Indians that they, the said Indians, shall have right to pursue their avocations of hunting and fishing throughout the tract surrendered as hereinbefore described, …saving and excepting such tracts as may, from time to time, be required or taken up for settlement, mining, lumbering or other purposes by Her said Government of the Dominion of Canada...

[160] The plaintiffs rely upon the clause in issue as it is worded and argue that, on its plain meaning, it is the federal government that has the power to take up the lands governed by the treaty, for the purpose of forestry. Specifically Mr. Janes argues that the reference to the "Dominion of Canada" is a reference to the federal government, the party that negotiated the treaty.

[161] If a trial court were to find that there is some ambiguity in the meaning of "Dominion Government", the plaintiffs will be able to rely on the general rule that doubtful or ambiguous phrases in treaties are to be interpreted against the drafters of the treaty and in favour of the aboriginal people or at least not be interpreted to the prejudice of the aboriginal people if another construction is reasonably possible[36]. Thus, in this case, if there is any ambiguity in the meaning of "Dominion Government", the plaintiffs can argue that the term should be interpreted narrowly to mean only the federal government in that aboriginal people could generally assume

[36] R. v. Nowegijick, (1983) 144 D.L.R. (3d) 193 (S.C.C.) at p. 198; aff'd in numerous cases, including R. v. Marshall, (1999), 177 D.L.R. (4th) 513 (S.C.C.) at para. 51 (per McLachlin J. (as she then was))

that term refers to the federal government which has the constitutional duty to protect their rights and privileges.

[162] The meaning of the "taking up" clause has not been explicitly considered in any previous case. Counsel for the plaintiffs however relies on other cases where the courts have interpreted similar terms. For example in R. v. Horseman,[37] the phrase the "Government of the Country" in Treaty 8 was specifically interpreted in an obiter comment to mean the "Government of Canada". There are other cases interpreting the regulatory limitations contained in the hunting/trapping rights clauses of various treaties suggesting that the meaning of "Government of the Country" or "Government of the Dominion" is restricted to the federal government and its laws.[38] In fact, as set out below, it seems clear that at least at the time the treaty was signed, that the reference to the "Dominion Government" was a reference to the federal government.

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The defendants' interpretation of the "taking up" provision

[163] Counsel for the MNR submits that on its face, Treaty 3 was an agreement entered into between the Queen and the Ojibway First Nations and that in interpreting the "taking up" provision of Treaty 3 a number of principles will be applied that will lead to the conclusion that Ontario can exercise the taking up power, namely:

(a) Treaties with significant constitutional implications must be interpreted in light of the constitution; and
(b) Specific terms in a treaty will not be given a meaning that diverges from the constitutional framework.

[164] On the application of these principles to this case, counsel for the MNR relies on the unitary concept of the Crown; the treaty was between the First Nations and the Crown, not with one level of government or the other and submits that the references to the Dominion Government were references to which level of government as agent could exercise the rights of the Crown. At the time Treaty 3 was negotiated, the position of the federal government was that the lands being addressed were entirely outside of Ontario, which were held and administered by the federal Crown. In that context, the Treaty 3 references to the Dominion government can and should be seen as references to the emanation of the Crown they believed to be relevant. The federal government's understanding that it was the relevant emanation of the Crown was subsequently proven to be incorrect for much of the Treaty 3 lands. It is submitted that accordingly the relevant emanation of the Crown for the lands in question is Her Majesty the Queen in right of Ontario, and the treaty has and should be read in that manner.

[165] It is also submitted that the plaintiffs' interpretation of the treaty is contrary to Ontario's authority under s. 109 of the Constitution Act, 1867 to administer surrendered Crown

[37] [1990] 1 S.C.R. 901 at p. 935 (per Cory J.)
[38] See for example R. v. Batisse, (1978) 19, O.R. (2d) 145 (Ont. Dist. Ct.) at p. 153 cited by the Supreme Court of Canada in R. v. White and Bob, supra

lands situated in Ontario, including the licensing of lumbering on such lands. This is dealt with below in connection with the St. Catherine's Milling case.

[166] In addition to s.109, the defendants also rely on s. 92.5 of the Constitution Act, 1867 which confers on the original provinces the power to make laws in relation to "the [m]anagement and sale of the Public lands belonging to the Province and of the Timber and Wood thereon". With the Privy Council having authoritatively resolved that surrendered Treaty 3 lands were provincial public lands, it is submitted that s. 92.5 confirms provincial legislative authority over the timber and wood on those lands.

[167] The defendants also argue that the way in which the Crown would "take up" the land for forestry would be to issue logging permits and since the federal government cannot do so, the provincial government must be able to exercise the "taking up" rights as the beneficial owner of the lands. Counsel for Abitibi argued that the taking up right must run with the land and the Crown administering it. None of the parties to the treaty intended that there would be two levels of government involved in taking up lands, or that there might be a bifurcation of the ability to take up lands from the ability to license activities on such lands. The treaty did not contemplate the two-step process that would be required if the plaintiffs' submissions were correct. If Ontario does not have the right to take up the lands for these purposes, they argue, there is nothing left for the province to do.

[168] In response to the arguments of the defendants, that the need for concurrent federal authorization is incongruous with the fact that Ontario beneficially owns the land, the plaintiffs argue that the constitutional division of powers will sometime require coordinated action on the part of the Crowns and that even when the province has clear title to the land it can still be burdened by valid federal legislation. He refers by way of example to the federal government's jurisdiction over fisheries and the fact that in the case of forestry, margins must be left around rivers so that the forestry activities do not interfere with fish habitat. He argues that by analogy the situation here is the same. If logging by Abitibi will interfere in a meaningful way (i.e. engage the test in Sparrow) with the rights of Grassy Narrows members to hunt, then Abitibi needs approval from the federal government.

<u>The extrinsic evidence</u>

[169] An interpretation of Treaty 3 at trial will no doubt involve a consideration of extrinsic evidence in addition to a consideration of the language of the treaty itself and how it should be interpreted. There was no dispute amongst counsel that the court could consider this evidence in interpreting the treaty and that seems clear from the judgment of Binnie J. in R. v. Marshall[39]

[39] supra at pp. 523-526

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[170] The plaintiffs argue that the extrinsic evidence supports their interpretation of the taking up provision and that the Ojibway were consciously negotiating with the Ottawa government. Counsel for the defendants disagree.

[171] The plaintiffs rely on extrinsic evidence concerning the negotiations, which they allege support their interpretation of the treaty. The plaintiffs argue that the Ojibway were very concerned to establish who they were dealing with and and that they understood that while the treaty would be with "the Queen", a real person residing across the Great Waters, they were in fact dealing with a centralized government situated in Ottawa, i.e. the Government of the Dominion. On several occasions the Commissioners explained that they did not act alone but took their instructions from the Queen, who in turn was guided by her Council [that governs a great Dominion]. Furthermore at several points in the negotiations there was specific mention of the "Government in Ottawa"and "Parliament in Ottawa" and its role in honouring and enforcing any treaty concluded. In particular they argue that their interpretation of the treaty is consistent with the evidence of Dr. Chartrand, who gave evidence on behalf of the MNR, that the aboriginal signatories to Treaty 3 conceived of themselves as dealing with an organized government situated in Ottawa and had no reason to even conceptualize of themselves as dealing with Ontario.

[172] Counsel for the MNR argues however, that the uncontradicted evidence of Dr. Chartrand contradicts the plaintiffs' position. He submits that the Ojibway who negotiated Treaty 3 did not have any detailed knowledge of a Canadian constitutional distinction between federal and provincial authorities, and any such distinction was not, to them, a meaningful aspect of the treaty. The defendants rely on his evidence from his affidavit and his statement:

> that "[i]t is implausible that the Ojibway who negotiated Treaty 3 held any detailed knowledge of a Canadian constitutional distinction between Dominion and Provincial authorities, or that any such distinction was to them a meaningful aspect of the Treaty". In their eyes, and in the eyes of the Commissioners, the Treaty was with the Queen.[40].

[173] Dr. Chartrand was examined and in re-examination stated in part, as follows:

> 1201. Q. In taking you through the extracts from
> 10 the Manitoban, Mr. Janes put to you a number of specific
> 11 sentences where references were made to "council for the
> 12 Dominion of Canada" or "council in Ottawa." Is it your
> 13 opinion based on your research that the Ojibway would have
> 14 understood a distinction or as between a council, a
> 15 government in Ottawa, as opposed to a provincial
> 16 government?
> 17 A. In a strict sense, that's impossible to

[40] Affidavit of Jean-Philippe Chartrand sworn July 28, 2005, pp. 11-13 at ¶ 27-30 (MNR's Motion Record, Vol. 1, Tab 6)

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18 answer given the **lack of any reference to a provincial**
19 government by either the Ojibway or the treaty
20 representatives. It's a non-entity. So that the answer
21 is a qualified no qualified by the fact that the absence
22 of any reference to Ontario precludes indicating whether a
23 distinction was even possible at the time. But...
24 1202. Q. All right. Does it remain your view
25 that in the conception of the aboriginals negotiating for
00301
1 and ultimately signing Treaty 3 they were dealing with the
2 Crown -- I believe that's how you expressed it in your
3 affidavit -- that the Queen as a person and has what's
4 gone on or has anything you've seen in the last day
5 altered that view?
6 A. No. And I would base that answer on
7 the preponderance of references to the Queen and to the
8 treaty being made between the Queen and the Ojibway that
9 are found in records detailing verbatim or near-verbatim
10 statements by the participants as well as in, for example,
11 the 1969 list of demands.
12 MR. JANES: 1869.
13 THE DEPONENT: 1869. I tend to do that
14 from time to time. The title of that document, I'm sure I
15 don't have it perfectly exact, but it's something like,
16 "List of Demands for Agreeing to a Treaty with the Queen's
17 Commissioners." I may not have it perfectly correct but
18 the reference to the "Queen's commissioners" I can
19 positively recall.
20 I do not dispute any contention, in fact,
21 there is very good evidence in the documentary record to
22 the effect that the Ojibway understood that they were
23 dealing with individuals who belonged to a central
24 government that was established at a place called Ottawa.
25 On the other hand, again, the totality of
00302
1 explanations given to the Ojibway indicate that that
2 government had at its ultimate head and source of
3 authority the Queen.

[174] This evidence clearly qualifies the evidence in Dr. Chartrand's affidavit. Obviously if Ontario was not privy to the negotiations, nor referred to in the negotiations, it is too simplistic to say that the Ojibway who negotiated Treaty 3 did not have any detailed knowledge of a Canadian constitutional distinction between Dominion and Provincial authorities. As Dr. Chartrand acknowledges however, that does not mean that the Ojibway did

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not appreciate the distinction between the Queen and that there was a central government referred to in the treaty as the Dominion of Canada.

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[175] In my view, considering the totality of the evidence of Dr. Chartrand, there is certainly support for the plaintiffs' position that the phrase "Dominion Government" at the time was the federal government and that that is how the parties to the Treaty understood it.

The St. Catherine's Milling case

[176] Counsel for the MNR takes the position that the plaintiffs' case will fail in that this issue has already been decided against the plaintiffs, in the Privy Council decision of St. Catherine's Milling and Lumber Co. v. Ontario (A.G.)[41]. He argues that St. Catherine's Milling held that the surrender of the land was to the Queen and even if it was meant to be the Dominion Government this decision determined that the federal government could not take up the lands and that by "necessary implication" Ontario can in its emanation of the Crown that can do so. He argues that this is not offensive to the Indian signatories because they would have had no expectation that there would be two levels of government involved, one having a veto and that the Ojibway who negotiated the treaty did not appreciate the constitutional distinction.

[177] In St. Catherine's Milling, the federal government had issued a logging licence to St. Catherine's Milling. The Ontario government sought an injunction against St. Catherine's Milling on the basis that the province owned the trees. The federal government was allowed to intervene. The court declared the permit issued by the federal government for logging invalid.

[178] In my view an accurate summary of what the St. Catherine's case stands for can be found in a statement by the Privy Council in Ontario Mining Company v. Seybold[42]:

> It was decided by this Board in the St. Catherine's Milling Co.'s Case that prior to that surrender [referring to the North-West Angle Lands] the province of Ontario had a proprietary interest in the land, under the provisions of s. 109 of the British North America Act, 1867, subject to the burden of the Indian usufructuary title, and upon the extinguishment of that title by the surrender the province acquired the full beneficial interest in the land subject only to such qualified privilege of hunting and fishing as was reserved to the Indians in the treaty.

[179] The issue in the St. Catherines Milling case was which level of government had the beneficial interest in the land and the timber on the North West Angle Lands. Although the court concluded that section 109 of the British North America Act gave the entire beneficial interest of the Crown in the lands in question to Ontario, the court expressly declined to consider other questions such as "the right to determine to what extent, and at what periods, the disputed territory, over which the Indians still exercise their avocations of hunting and fishing is to be

[41] (1888), 14 App.Cas. 46.
[42] [1903] A.C. 73

taken up for settlement or other purposes, but none of these questions are raised for decision in the present suit."

[180] In my view this statement by the court disposes of the argument advanced by counsel for the MNR that the issues in the case before me have already been decided. The court did not consider the issue of whether the federal government or the provincial government has the power to take up the land. Furthermore, the First Nations peoples were not before the court.

[181] The defendants are really suggesting that because this decision confirmed that Ontario, not the federal government, owns the beneficial interest in the land including the trees and that the federal government cannot authorize logging, that it must follow that the federal government does not have the power to take up the lands for forestry and Ontario must have that right.

[182] The defendants rely on Ontario v. Canada[43], which concerned a Dominion claim for compensation from Ontario for the surrender of Treaty 3 lands. Idington J. stated for the majority:

> It is alleged Ontario entered into possession and therefore must pay.
> It always had been in possession. Its civil laws and administration of justice reigned over it all. The administration of criminal justice so far as needed devolved upon that province. Its inhabitants hunted and fished there as well as the Indians, and **when the cloud [of Indian title] was removed the duty devolved, as of course, on its government to facilitate the land's development**. It is alleged the land had turned out rich in minerals and timber. Is the obligation one turning upon the nature of the soil? or would it not exist if timber and gold had not been found there, but only a vast barren waste?
>
> Nor did the province come to the court seeking aid as against the Dominion or any one else to recover possession of the lands in question. **The province did nothing but discharge those duties of government of which settling, selling, leasing or improving lands are in new countries such expensive, but common, incidents**. It is not the case of an individual who could refrain from acting or accepting. The duty which arose, the only duty the province owed the Dominion, was to do all these things when given a chance. (emphasis added)

[183] As Mr. Janes submits however, the taking up power is a power in the treaty to limit treaty rights of the First Nations people, not a power to grant property, or issue licenses for logging. He submits that although the Privy Council held that Ontario owned the land in the province pursuant to s. 109 of the Constitution Act, 1867 and that as a result Ontario has the exclusive power to deal with the ownership and disposition of the lands in the province, including the trees on the lands, to the extent that Ontario proposes to interfere with the burden

[43] (1909), 42 S.C.R. 1 (S.C.C.)

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on its title imposed by the combined operation of the Treaty 3 hunting and trapping rights and s. 91(24) of the Constitution Act, 1867, Ontario requires coordinated action or legislation on the part of the federal government. As the courts noted both in St. Catherine's Milling and Ontario Mining Company v. Seybold, Ontario's title to those lands continued to be burdened by the Treaty 3 hunting, fishing and trapping rights

[184] The court in St. Catherine's Milling described the position of the Dominion and Ontario with respect to the lands in question, as each "maintaining that the legal effect of extinguishing the Indian title has been to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty." Although the court went on to state that the case related exclusively to the right of the federal government to dispose of the timber in question it necessarily involved the determination of the "larger question between that government and the province of Ontario with respect to the legal consequences of the treaty of 1873 [Treaty 3]"(at pages 52-53). This statement however was made in order to explain why the federal government intervened. It is clear from the decision itself that the court did not embark on an analysis of all of the legal consequences of Treaty 3.

[185] I note however that the court was clearly of the view that the references in Treaty 3 to the Dominion Government were to the federal government; although the court did not consider which level of government would exercise the taking up clause given that beneficial ownership of the land was with Ontario. This aspect of the decision supports the plaintiffs' plain wording interpretation of the treaty.

[186] Counsel for the MNR relies on the observations by the court that expressions referring to public land belonging to the Dominion or the province merely mean the right to its beneficial use and subject to the control of its legislature but that in accordance with the theory of the unity of the Crown, the land itself was vested in the "Crown" (see page 56). This however is not dispositive of the issue before me as it is not suggested that Ontario does not have the beneficial ownership of the lands or the ability to administer those lands..

[187] In the St. Catherine's decision the court rejected the Dominion's argument that the surrender of the land in the North West Angle by the Indians pursuant to the terms of Treaty 3 "to the Government of the Dominion of Canada" was in effect a conveyance of the whole rights of the Indians to the Dominion. The Indian habitants were not owners of the land in fee simple but rather Indian title was a burden on the land that had vested in the Crown. The court found that section 109 of the British North America Act gave to Ontario the entire beneficial interest of the Crown in the lands within its boundaries.

[188] The court rejected the argument advanced by the federal government that section 91(24) of the Act, which conferred upon the Parliament of Canada exclusive jurisdiction to make laws for "Indians, and lands reserved for the Indians" gave the Dominion any patrimonial interest the Crown might have had in the reserved lands and concluded that the power of legislating for Indians, and for lands which are reserved to their use, that has been entrusted to

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the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue "whenever the estate of the Crown is disencumbered of the Indian title." Again this speaks to the province's beneficial interest in the lands as a result of their surrender and does not deal with the taking up provision in Treaty 3.

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[189] . In my view there is a great deal of merit to the position of the plaintiffs that while St. Catherine's Milling held that the federal government had no jurisdiction to deal with the ownership of timber in the Northwest Angle (and therefore could not grant logging licences for that area), that case does not stand for the proposition that Ontario has the right to interfere with the Treaty 3 Hunting and Trapping Rights. The extent of Ontario's power in that regard, and in particular, its ability to rely on the "taking up" clause, remains to be decided.

[190] This interpretation of St. Catherine's Milling is reinforced by the statement on the last page of the decision that "the fact, that it [referring to the federal government] still possesses exclusive power to regulate the Indians' privilege of hunting and fishing, cannot confer upon the Dominion power to dispose, by issuing permits .. of that beneficial interest in the timber which has now passed to Ontario" This language appears to be a reference to the provision in Treaty 3 that states that it is the Government of the Dominion of Canada that has the power to "regulate" the Indians "avocations of hunting and fishing throughout the tract surrendered" . There is a reasonable argument that by analogy the same applies to the balance of that part of Treaty 3 which uses similar language and that the "taking up" of the land must also be done by the Government of the Dominion of Canada, namely the federal government.

[191] The interpretation of the St. Catherine's Milling case is important because if the position of the defendants is correct, it determines the plaintiffs' interpretation argument and the plaintiffs would not be able to meet the second and third Okanagan requirements. For the reasons set out herein, I do not accept those submissions however. There is significant merit to the position taken by the plaintiffs that this decision does not determine the issue of which level of government can exercise the taking up power. Furthermore I do not accept the proposition that the findings in St. Catherine's Milling by "necessary implication" support the position of the defendants that Ontario and not the federal government can exercise the taking up power.

The impact of the reciprocal legislation

[192] In 1891, two statutes, which have been referred to as reciprocal legislation, were passed, one by the federal government and the other by the Ontario provincial government.[44] There is no dispute between counsel that the effect of section 1 of the provincial statute was that the province of Ontario could exercise the "taking up" power under Treaty 3 with respect to the North West Angle Lands. The ability of the federal government to pass such legislation is not challenged in this case.

[44] An Act for the settlement of certain questions between the Governments of Canada and Ontario respecting Indian Lands, S.C. 1891, 54-55 Victoria, c. 5 and An Act for the settlement of questions between the Governments of Canada and Ontario respecting Indian Lands, S.O. 1891, 54 Victoria, c.3

[193] Section 1 is worded in part as follows:

> With respect to the tracts to be from time to time taken up for settlement, mining, lumbering or other purposes and to the regulations required in that behalf as in the said Treaty mentioned, it is hereby conceded and declared that, as the Crown lands in the surrendered treaty have been decided to belong to the Province of Ontario, or to Her Majesty in right of the said Province, the rights of hunting and fishing by the Indians throughout the tract surrendered, not including the Reserves to be made thereunder, do not continue with reference to any tracts which have been, or from time to time may be required or taken up for settlement, mining, lumbering or other purposes by the Government of Ontario…..

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[194] As set out above, it is conceded by the plaintiffs for the purpose of this motion, that the plaintiffs could not meet the third part of the Okanagan test with respect to the North-West Angle Lands because as a result of this legislation Ontario has the right to "take up" the land for forestry and whether or not the plaintiffs can succeed in their claim will be determined by an application of Misikew.

[195] This legislation does have an impact on how a court might interpret the "taking up" power with respect to the Keewatin Lands. Without considering what evidence there may be surrounding the negotiations between the province and the federal government that led to this legislation, which was not before me, there were two competing submissions as to how the language of section 1 impacts on the plaintiffs' treaty interpretation argument. On the one hand, counsel for the plaintiffs argues that this section establishes that it was the federal government that could exercise the taking up power under Treaty 3 and that that power was in effect delegated to the province by virtue of this section.

[196] The defendants argue however that the language "conceded and declared" is consistent with their position that it was always understood, once the issue of title was settled, that Ontario could exercise the taking up power and that this was therefore characterized as a concession in the legislation. They refer to the title of the statute: "Act for the settlement of certain questions between the Government of Canada and Ontario respecting Indian Lands".

[197] I am not able to accept, solely on the wording of the statute, that the reference to "conceded and declared" on the defendants' interpretation could be treated as an admission by the federal government that applies into the future that it does not have any rights to exercise the taking up clause in the Keewatin Lands. I should also say that I do not consider the reference in the decision of Then J. to the reciprocal legislation "delegating" the taking up power to the province as a specific conclusion that he came to. He was clearly not considering the merits of the issues that have been argued before me.

[198] Unless a court could conclude that there was an admission by the federal government, which in my view is not a conclusion that can be made from the statute alone, what is significant is that there is no comparable legislation for the Keewatin Lands, where there is an

express reference to the province being able to take up the lands for lumbering and other purposes.

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The aftermath of St. Catherine's Milling

[199] In the aftermath of St. Catherine's Milling, the province of Ontario resisted efforts by the Dominion of Canada to seek an indemnity for costs incurred in negotiating and administrating Treaty 3. Litigation ensued. In the province's factum filed in that matter, the province argued that Treaty 3 was a contractual arrangement between Canada and the Ojibway and that the treaty was made without the privity or any mandate from the province. It was also submitted that the treaty was entered into by the Dominion for broad national purposes, not the interest of the province and any benefits the province received flowed not from Treaty 3 but from its ownership of land. Again this reinforces the plaintiffs' argument that at the time of the signing of the treaty the reference to the "Dominion Government" was a reference to the federal government.

[200] The Privy Council accepted these arguments and held that in making the treaty the Dominion government acted upon the rights conferred by the Constitution and was motivated in the interests of the Dominion as a whole, not any special benefit to Ontario, that the Dominion government did not act as agent for the province and they neither thought they required not purported to act upon any authority from the provincial government. Accordingly they ruled that Ontario was not responsible for bearing the financial costs of the Treaty.[45]

[201] Counsel for the plaintiffs argues that given Ontario argued that it was not privy to the treaty negotiations and did not have any obligations pursuant to the treaty; it cannot receive the benefit from the "taking up" provision. The aboriginal hunting rights protected by the treaty are part of the consideration flowing to the aboriginal people in exchange for their surrender of the land. [46]

[202] Again the decision is not on point. I do not need to consider the plaintiffs' argument that the province of Ontario should not be able to take a position now, that is contrary to the position taken in that action, but I do find that the conclusions reached in this case are consistent with the plaintiffs argument that the reference in Treaty 3 to "Her Dominion Government" supports the plaintiffs argument that that is a reference to the federal government.

[203] Counsel for the MNR argues however that following St. Catherine's Milling, the federal government accepted that the Keewatin Lands were vested in the Crown and would be administered by the Crown on the advice of the provincial government and that Ontario would enjoy the full benefit of surrendered public lands. Modern development and use of public, non-reserve lands throughout this area, including the development of transportation, power generation and transmission infrastructure, forestry operation and mining, and private settlement of the lands has taken place since the settlement of these issues. This raises issues of estoppel and

[45] . A.G. (Ont.) v. A.G. (Can.), supra at pp. 644- 645 Privy Council)
[46] See for example, Province of Ontario v. Dominion of Canada, [1908] S.C.R. 1(S.C.C) at page 24

how that might impact on the rights of the First Nations people, which were not argued before me.

The impact of the Ontario Boundaries Extension Act.

[204] Section 2(a) of the Ontario Boundaries Extension Act states: "...the province of Ontario will recognize the rights of the Indian inhabitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofore recognized such rights..."

[205] Counsel for the plaintiffs submits that the reference to "surrender" in section 2(a) of the Act is not a reference to a "taking up" power, which can be exercised unilaterally, but rather a reference to a voluntary transaction whereby rights are given up and a treaty is executed. He relies on an extract from a dissenting judgment from the Supreme Court of Canada, referred to with approval by the court in a much later case, Marshall v. The Queen[47].

[206] Section 2(c) of the Act provides that "the trusteeship of the Indians in the said territory and the management of any lands now or hereafter reserved for their use, shall remain in the Government of Canada subject to the control of Parliament."

[207] The plaintiffs argue that this section, confirming that the federal government remains the trustee, is also consistent with their position that unless expressly conferred in the Act, the performance of the treaty obligations, which the courts have considered involve a trust assumed by the Crown means that the terms and conditions expressed in Treaty 3 must continue to be fulfilled by the federal government.

[208] Counsel for the MNR argues however that during the course of events which lead to the extension of Ontario's boundaries in 1912 the question of jurisdiction over lands and resources was directly considered by federal and provincial officials who were aware of and accepted the principle that Ontario enjoyed the benefits of title to surrendered public lands within its boundaries including control over natural resources such as timber. Debates in the House of Commons and statements by then Prime Minister, Robert Borden are relied upon and it is submitted this is the actual basis on which the extension of Ontario's boundaries has unfolded in practice since 1912.

[209] I am of the view that the submissions by both counsel for the plaintiffs and the MNR have merit although I can not conclude, nor is it argued, that I should interpret the Ontario Boundaries Extension Act as delegating the taking up power for the Keewatin Lands to Ontario. Whether it can be argued that that was not stated expressly because it was previously conceded by the federal government and if so how that impacts the plaintiffs will be for the court determining the merits to decide.

[47] aupra at para. 50

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<u>The relevance of the legislation in the western provinces</u>

[210] Using Saskatchewan as an example, counsel for Abitibi referred me to The Saskatchewan Act[48], which established the province of Saskatchewan. Pursuant to the terms of that statute, the federal government administered the lands vested in the Crown, and the province did not have the beneficial interest in the lands.

[211] In the Constitution Act, 1930[49] that followed, to give effect to certain agreements entered into between the government of the Dominion of Canada and the governments of the provinces of Manitoba, British Columbia, Alberta and Saskatchewan, the interest of the Crown in all Crown lands, mines minerals were transferred to the province. Counsel argued that there was no express delegation of the right to "take up" the lands in that Act because that is not necessary. Treaty 6, which applies to lands in Saskatchewan, has the identical wording of the taking up provision to Treaty 3. Furthermore, in the case of Treaty 6, at the time of the treaty the federal government owned the beneficial interest in the land and could exercise the taking up power. Given that there was no need for the federal government to expressly delegate that power to the province in the Act, counsel argues that this supports his argument that there does not need to be an express delegation of the right to take up the lands by the federal government to the province of Ontario.

[212] In developing his argument counsel for Abitibi referred to R. v. Horseman[50], which dealt with Treaty 8 in Alberta. In that case the court referred to the Transfer Agreement of 1930 between the federal government and the province of Saskatchewan, which was confirmed by the Constitution Act, 1930. As the court noted, paragraph 12 of the Transfer Agreement changed the government authority that would regulate aspects of hunting. Pursuant to paragraph 12 the federal government agreed that the laws respecting game in force in the province would apply to the Indians in the province but that they would have access to all unoccupied Crown lands for hunting for food. There was no express reference to a delegation of the "taking up" power.

[213] Counsel for the plaintiffs replied to this argument and argued that what happened in the western provinces in fact supports his position. In each of the western provinces the federal and provincial governments reached agreements that were confirmed by the Constitution Act, 1930. In R. v. Horseman[51] the court found that the agreement between the federal government and the province of Saskatchewan unilaterally modified the Treaty rights as to hunting and replaced those rights with different rights. As the court noted the ability of the federal government to do this unilaterally was not before the court. Mr. Janes argues that section 12 of the Transfer Agreement simply reflected different wording that replaced the hunting rights in the treaty and that the federal government gave up its rights.

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[48] S.C. 1905, c. 42 (Canada)
[49] 20-21 George V, c. 26(U.K.)
[50] [1990] 1 S.C.R. 901
[51] supra

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[214] In my view there is merit to the argument of Mr. Janes that in fact this other legislation supports his position .his is yet another issue that the court will have to consider on the trial of the treaty interpretation issue.

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Conclusion of the "merits" part of the Okanagan test

[215] In my opinion, based on the plain wording of the treaty itself, without considering any of the extrinsic evidence and the interpretation arguments based on constitutional grounds, the plaintiffs have a strong argument that the reference to "Her Government of Her Dominion of Canada" at the time the treaty was signed was a reference to the federal government. On its face therefore, there is at least a *prima facie* meritorious argument that based on the language of the treaty only the federal government has the power to take up the lands covered by the treaty for the purpose of lumbering.

[216] The position of the defendants is not so much to challenge the plain wording of the treaty but rather to argue that, given that Ontario in fact is the beneficial owner of the land, the treaty must be interpreted on the basis that the Crown for the lands in question is Her Majesty the Queen in right of Ontario and that Ontario has the power to take up the lands for forestry.

[217] For the reasons stated, in my view this is a serious issue that had not yet been squarely decided or even considered in any case before. There is merit in both positions and in my view the plaintiffs' argument is clearly worthy of pursuit. The plaintiffs have a solid *prima facie* argument that the province is limited in its ability to interfere with the hunting and trapping rights set out in Treaty 3 on account of the division of powers between the federal and provincial government, and that the province is precluded from relying on the "taking-up" provision because that power is specifically assigned in the treaty to the federal government.

[218] On this basis, I conclude that the plaintiffs meet the "merits" requirement of the Okanagan test with respect to the question of the interpretation of the "taking-up" provision of Treaty 3 and if necessary, the plaintiffs' constitutional division of powers argument so that it can be determined, as a threshold issue, whether or not the province of Ontario has the authority to take up the Keewatin Lands for forestry.

Do the issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases?

The law with respect to this part of the test

[219] With respect to the issue of the "extent to which the issues raised are of public importance, and the public interest in bringing those issues before a court", the Supreme Court of

Canada in Okanagan explained that this means that the "issues raised transcend the individual interests of the particular litigant, are of public importance, and have not been resolved in previous cases." (at paras. 39-40).

[220] Lebel J. stated that it is for the trial court to determine whether a particular case, which might be classified as "special" by its very nature as a public interest case, "is special enough to rise to the level where the unusual measure of ordering costs would be appropriate" (at para 38).

[221] In Townsend v. Florentis, G.D. Lane J. stressed the importance of ensuring that this element of the Okanagan test is applied with some rigour:

> recalling that the circumstances must be special, that the class is narrow, and that the exercise of the power is extraordinary, it is clear that there must exist some factor which decisively lifts the applicant's case out of the generality of cases. The existence of issues going beyond the interests of the parties alone would seem to be one possible example of the minimum required, ...The mere "leveling of the playing field", although an admirable objective, would deprive the Third Test [in Okanagan] of any real meaning...(at paras. 57-57)

Analysis

[222] The court in Okanagan found that the circumstances of that case were special, "even extreme" in that the case raised a claim for aboriginal title to certain land in a province where the same claim could be advanced for most of the province's land mass. Counsel for MNR submits that this case is not like that and that the impact of a decision in this case in favour of the plaintiffs would not be as great. In this case there is no issue that the lands in question were surrendered by treaty and the taking up power expressly includes the power to take up the lands for logging.

[223] Counsel for the plaintiffs acknowledges that the Okanagon case will develop the case law in an important area but says it will only in fact decide the rights of one group of First Nations. It is submitted that this case raises a number of novel issues, which are of importance to a wider community of interest than just Grassy Narrows. The question of the proper interpretation of the application of the "taking-up" provision of Treaty 3 is unresolved and significant.

[224] The interpretation of the taking up clause has not been judicially considered before. A determination of this issue will affect the other Treaty 3 First Nations as well as the forestry and possibly other authorizations issued by the province for activities that 'take up" Treaty 3 land. This case will also have implications for the other numbered treaties, which reference "the Government of the Country" either in the "taking-up" or regulation clause.

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[225] In considering the plaintiffs application for judicial review, Justice Then held that the determination of the issues raised by the plaintiffs, if decided in their favour, "will have a profound impact on the lives and business of the people living in those areas of Northwestern Ontario subject to Treaty 3, including Abitibi and its employees. The economies of the communities will also be greatly affected". He was also of the view that the constitutional issues raised by the plaintiffs are of "significant importance and interest to the public" (at paras. 60-61).

[226] Given the position taken by the respondents before Then J. they are not in a position to argue before me that this case is not of significant public importance. As counsel for the MNR acknowledged in his factum, apart from the merits, the plaintiffs' central argument that Ontario lacks the jurisdiction to take up lands under Treaty 3, is clearly of "broad significance".

[227] This is consistent with the position taken by the respondents in the application before Then J. In the factum filed by the MNR, counsel stated:

> (4)The determination of the issues raised and relief requested by the Applicants may have very wide ranging and serious effects. This application has the potential to affect all provincially authorized land uses in the …[Keewatin Lands] that are subject to Treaty 3 that might impinge on hunting and fishing by members of First Nations that are signatories to Treaty 3
>
> (8) Furthermore, this application raises constitutional law issues with respect to Ontario's legislative capacity to authorize activities in the ..[Keewatin Lands].

[228] In the factum filed by Abitibi, counsel stated:

> (9) The determination of the issues, if decided in the applicants' favour, will have a profound impact on the lives and businesses of the people living in those areas of northwestern Ontario subject to Treaty 3, including Abitibi and its employees. The economies of the communities will also be greatly affected.
>
> (41) The constitutional issues raised by the applicants are also of significant importance and interest to the public.

[229] The province of Ontario has reaped the benefits of mining, forestry, the development of hydroelectric power and settlement as a result of Treaty 3. The evidence from the MNR is that from the Whiskey Jack Forest alone Ontario reaps important economic benefits valued in the range of $2.3 million per year. The Abitibi mill in Kenora employs almost 1,600 people and there is no doubt that the forest industry is important to the citizens of northwestern Ontario and the province. The stakes in this action are high.

[230] Some of the evidence relied upon by the defendants, focuses on the fact that there are only a few members of Grassy Narrows who actively trap (less than 1%) and that trapping is

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a break even proposition in terms of any financial reward. I do not intend to review this evidence in detail as in my view it does not adversely impact on this part of the Okanagan test in this case given that the issues raised by the case are so clearly of public importance. In any event the defendants do not challenge the plaintiffs' position that hunting and trapping is an important part of the culture of the Grassy Narrows people. Hunting and trapping is important to the larger community, not just the people actively involved in hunting and trapping and is important to the cultural identity of the people of Grassy Narrows. The evidence before the court is that the Anishnaabe at Grassy Narrows have maintained their culture, but that culture is in crisis and at risk of dying.

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[231] This was acknowledge by Dr. Chartrand on his cross-examination when he stated in part as follows:

> 435. Q. From the perspective of the aboriginal
> 17 people, their engagement in hunting and fishing practices
> 18 would be very much a part of their identity in terms of
> 19 something that defines culturally who they are?
> 20 A. Yes, certainly.
> 21 436. Q. And in a similar fashion, it's hunting
> 22 in the lands to which they belong, in a sense, that's an
> 23 important part of that cultural identity, correct? [52]

> 1111. Q. And as a general matter, will you agree
> 4 with me that on the basis of what we know, it's clear that
> 5 an Ojibway culture has survived into the present in
> 6 northwestern Ontario?
> 7 A. Yes.
> 14 1113. Q. And also that culture has continued to
> 15 include subsistence hunting?
> 16 A. Yes.
> 17 1114. Q. And trapping?
> 18 A. Yes.
> 19 1115. Q. And those are important parts of the
> 20 what I'll call the entire cultural package of the Ojibway?
> 21 A. Well, certainly for those individuals
> 22 who are involved in Ojibway full-time -- you know, I'm
> 23 using a wage lever (phon.) term for this, but who are
> 24 intensively involved in conducting traditional activities,
> 25 yes, these are terribly important. And even for those
> 00279
> 1 Ojibway who might live in an urban environment, the --

[52] Cross-examination of Jean-Philippe Chartrand on December 1, 2005

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

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

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

Conclusion on the "public interest" requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Disposition

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

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

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

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

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

SPIES J.

DATE: May 23, 2006

2006 CanLII 35625 (ON SC)

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

2006 CanLII 35625 (ON SC)

SUPERIOR COURT OF JUSTICE - ONTARIO

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

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

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

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REASONS FOR DECISION

SPIES J.

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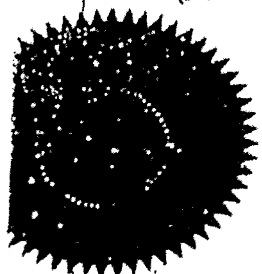
3. *Communications, Energy and Paperworkers Union of Canada, local 145 v. Gazette (The), a division of Southam inc.*, December 15, 1999 (500-09-007384-985);

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

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



December 15, 1999

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

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

APPELLANT - (impleaded party)

and

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

APPELLANTS - (impleaded parties)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

MTRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY - (respondent)

VALIDATING CODE = BBZQ2BRERO

500
00-023427-997

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

Having examined the file, heard the evidence and deliberated;

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

ALLOWS the appeal in part;

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

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

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

VALIDATING CODE = BBZQ2BRERO

COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

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

December 15, 1999

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

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

APPELLANTS - (impleaded parties)

and

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

APPELLANT - (impleaded party)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

MTRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY - (*respondent*)

VALIDATING CODE = BBZQ2BRBRO

500
00-025427-997

THE WHOLE with costs in both courts.

(s) Thérèse Rousseau-Houle J.A.

(s) Jacques Chamberland J.A.

(s) André Forget J.A.

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

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

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

Date of hearing: November 9, 1999

VALIDATING CODE = BBZQ2BRERO

THE WHOLE with costs in both courts.

(s) Thérèse Rousseau-Houle J.A.

(s) Jacques Chamberland J.A.

(s) André Forget J.A.

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

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

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

Date of hearing: November 9, 1999

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500
00-025427-997

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

Having examined the file, heard the evidence and deliberated;

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

ALLOWS the appeal in part;

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

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

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

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THE WHOLE with costs in both courts.

(s) Thérèse Rousseau-Houle J.A.

(s) Jacques Chamberland J.A.

(s) André Forget J.A.

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

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

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

Date of hearing: November 9, 1999

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COURT OF APPEAL

PROVINCE OF QUÉBEC
MONTRÉAL REGISTRY

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

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

COMMUNICATIONS, ENERGY AND PAPERWORKERS UNION OF CANADA, LOCAL 145

APPELLANT - (impleaded party)

and

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

APPELLANTS - (impleaded parties)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

MTRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY - (respondent)

VALIDATING CODE = BBZQ2BRERO

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

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

APPELLANTS - (impleaded parties)

and

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

APPELLANT - (impleaded party)

v.

THE GAZETTE, A DIVISION OF SOUTHAM INC.,

RESPONDENT - (petitioner)

and

MTRE. ANDRÉ SYLVESTRE,

IMPLEADED PARTY

OPINION OF ROUSSEAU-HOULE J.A.

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

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

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

The facts

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

The main points of this agreement are as follows:

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

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

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

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

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

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

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[Translation]

X. AMENDMENTS

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

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

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

XI. RENEWAL OF COLLECTIVE AGREEMENTS AND DISPUTE SETTLEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[Translation]

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

- refuse or omit to consent to the process of exchanging "best final offers", as required by a notice from the union and the 11 complainants on April 30, 1996;
- decree a lock-out as of June 3, 1996 with, as a result, an interruption of earnings for the 11 complainants and the suspension of other benefits provided for under the collective labour agreement and the tripartite agreements of November 12, 1982 and March 5, 1987;
- refuse to maintain the conditions in force before the lock-out was declared, that is, the paid presence at work of the complainants, despite the provisions of article 27 of the collective agreement and despite the guarantee to maintain the standard of living provided for in the tripartite agreement concluded on or around March 5, 1987.

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

We ask the arbitrator to declare and order the following:

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

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

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

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

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

and, in the interim:

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

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

Arbitrator Sylvestre allowed this grievance on February 5, 1998.

The arbitral award

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

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

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

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

...

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

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

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

__The Superior Court decision__

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

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

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

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

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

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

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

Grounds for appeal

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

Analysis

1. Arbitrator's original jurisdiction

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

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

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

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

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

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

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

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

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

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

However, she failed to consider the following facts:

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

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

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

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

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

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

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

> [Translation]
> **II - APPLICATION** - This agreement applies to all the employees of the Composing Room (and those transferred to the Shipping Department) as at March 5, 1987 who signed the agreement and who had signed the previous agreement (Job security - Technological changes) and whose names appear in Appendix II attached to these presents. These employees are covered by the present agreement only if they remain members in good standing of the Union. The agreement will apply to transferred employees only when such employees work in the Composing Room.
>
> The present agreement will come into force only once the collective labour agreement between the above-mentioned Employer and Union or a subsequent collective agreement terminates, is removed, is cancelled, or lapses or becomes inapplicable for any other reason.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[Translation]

...

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

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

...

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

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

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

...

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Refer to page 2

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

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The whole WITH COSTS in both courts.

(s) Thérèse Rousseau-Houle J.A.

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

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

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

v.

Hélène Desputeaux *Respondent*

and

Régis Rémillard *Mis en cause*

and

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

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

Neutral citation: 2003 SCC 17.

File No.: 28660.

2002: November 6; 2003: March 21.

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

on appeal from the court of appeal for quebec

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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Approved: *Laurentienne-vie, compagnie d'assurance inc. v. Empire, compagnie d'assurance-vie*, [2000] R.J.Q. 1708; *Mousseau v. Société de gestion Paquin ltée*, [1994] R.J.Q. 2004; *Compagnie nationale Air France v. Mbaye*, [2000] R.J.Q. 717; *International Civil Aviation Organization v. Tripal Systems Pty. Ltd.*, [1994] R.J.Q. 2560; *Régie intermunicipale de l'eau Tracy, St-Joseph, St-Roch v. Constructions Méridien inc.*, [1996] R.J.Q. 1236; *Régie de l'assurance-maladie du Québec v. Fédération des médecins spécialistes du Québec*, [1987] R.D.J. 555; *Tuyaux Atlas, une division de Atlas Turner Inc. v. Savard*, [1985] R.D.J. 556; **referred to:** *Guns N'Roses Missouri Storm Inc. v. Productions Musicales Donald K. Donald Inc.*, [1994] R.J.Q. 1183; *Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *Ontario (Attorney General) v. Pembina Exploration Canada Ltd.*, [1989] 1 S.C.R. 206; *Automatic Systems Inc. v. Bracknell Corp.* (1994), 113 D.L.R. (4th) 449; *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *Auerbach v. Resorts International Hotel Inc.*,

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

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

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

Normand Tamaro, for the respondent.

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

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

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

English version of the judgment of the Court delivered by

LEBEL J. —

I. Introduction

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

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

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

II. Origin of the Case

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

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

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

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

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

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

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

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

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

III. Relevant Statutory Provisions

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

> **2.** . . .
>
> "work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors;
>
> **13.** . . .
>
> (3) Where the author of a work was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine or similar periodical.
>
> **14.1** (1) The author of a work has, subject to section 28.2, the right to the integrity of the work and, in connection with an act mentioned in section 3, the right, where reasonable in the circumstances, to be associated with the work as its author by name or under a pseudonym and the right to remain anonymous.
>
> (2) Moral rights may not be assigned but may be waived in whole or in part.
>
> (3) An assignment of copyright in a work does not by that act alone constitute a waiver of any moral rights.
>
> (4) Where a waiver of any moral right is made in favour of an owner or a licensee of copyright, it may be invoked by any person authorized by

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

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

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

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

(1) the nature of the contract;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

946.4. The court cannot refuse homologation except on proof that

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

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

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

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

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

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

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

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

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

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

IV. Judicial History

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

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

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

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

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.

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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.

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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

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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):

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> [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

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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

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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

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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.
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> (*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.

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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.
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> 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

[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.

<u>The judgment of the Superior Court</u>

[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

[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.

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

Traduction non-officielle

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

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

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[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.