TAB 12

TAB 12

C A N A D A

ARBITRATION TRIBUNAL

PROVINCE OF QUEBEC

BEFORE: ANDRÉ SYLVESTRE, Arbitrator

BETWEEN:

CEP LOCAL 145

-AND-

RITA BLONDIN ET AL.

-AND-

MONTREAL GAZETTE GROUP INC.

-AND-

ERIBERTO DI PAOLO AND
RITA BLONDON.

APPEARANCES:

PIERRE GRENIER
COUNSEL FOR THE UNION

RONALD McROBIE
DOMINIQUE MONET
COUNSEL FOR THE EMPLOYER

RITA BLONDIN and
ERIBERTO DE PAOLO
REPRESENTING THEMSELVES

HEARING HELD ON: JULY 28, 2008, at Montreal
BRUNO PELLAND, OFFICIAL STENOGRAPHER

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LIST OF OBJECTIONS

OBJECTION 1:

... in your bundle of documents, which were produced earlier, but in any event, as I told you, we object generally to the production of those documents, so I invite you to take them under objection, but ... 58

OBJECTION 2:

Obviously, we object, and we will be making ... 61

ON July 28, 2008, the following persons appeared:

THE CHAIR:

So we will begin. This is the damages claim. I imagine that you agree to assume the burden of proof?

PIERRE GRENIER,

Counsel for the union:

Yes. There is a ...

THE CHAIR:

So, it is an initial point? Yes?

PIERRE GRENIER:

Yes, there is part of the evidence to present.

I had said that I would be checking the documents that were filed. In fact, I do have two documents to file to complete the evidence. Essentially, that is an excerpt from agreement 93-96. We were at S-68, so S-69, if I'm not mistaken.

THE CHAIR:

S-69.

S-69: Excerpt from agreement 93-96

DOMINIQUE MONET,
Counsel for the employer:
69 or 68?
RONALD McROBIE,
Counsel for the employer:
69.
PIERRE GRENIER:
69. 68 is the factum from The Gazette.
RONALD McROBIE:
Yes, 69.
PIERRE GRENIER:
On appeal.
THE CHAIR:
Okay.
RONALD McROBIE:
So this is an excerpt that is already in the record?
PIERRE GRENIER:
I don't have the reference for the exhibit, I think it is in the record, but I don't ...
RONALD McROBIE:
Yes, yes.
PIERRE GRENIER:

... I haven't found it ...

RONALD McROBIE:

Yes.

PIERRE GRENIER:

... but it will be simpler for argument.

RONALD McROBIE:

It's P, that's the collective agreement, the last one before ...

PIERRE GRENIER:

It's 93-96.

RONALD McROBIE:

It's S-1.

THE CHAIR:

The Leboeuf one?

PIERRE GRENIER:

S-1? Okay.

RONALD McROBIE:

The first exhibit in the record.

DOMINIQUE MONET:

Yes, yes, yes.

PIERRE GRENIER:

I don't have it in my exhibits, so that's why ...

RONALD McROBIE:

No, no, but we ...

PIERRE GRENIER:

... I wasn't sure whether that was it.

RONALD McROBIE:

... what we did, if ...

PIERRE GRENIER:

That's fine.

RONALD McROBIE:

... we ever need those exhibits, we amended the Court of Appeal factum in 99, so we have ...

THE CHAIR:

Fine.

PIERRE GRENIER:

Okay.

RONALD McROBIE:

... all the exhibits.

ERIBERTO DI PAOLO:

Mr Arbitrator, I have a lot of evidence to deposit, I'd like to know how we're going to proceed.

THE CHAIR:

Well, the Union will go first, then you will go...

ERIBERTO DI PAOLO:

Okay.

THE CHAIR:

... and the employer will respond.

ERIBERTO DI PAOLO:

Because I'd like to have exhibit numbers of all my evidence.

THE CHAIR:

Yes, o.k.

ERIBERTO DI PAOLO:

Okay?

PIERRE GRENIER:

Well, if you prefer, we can not number it, whatever you like, I don't want to introduce ...

THE CHAIR:

No, no ...

PIERRE GRENIER:

No?

RONALD McROBIE:

No, no, we can number it ...

PIERRE GRENIER:

That's alright?

THE CHAIR:

... S-69, it's o.k.

RONALD McROBIE:

... that's fine.

PIERRE GRENIER:

The second document is a letter from Mr. McRobie sent to me on April 3, '98, regarding the stay order by Justice Israël Mass.

RONALD MCROBIE:

S-70?

THE CHAIR:

S-70, yes.

S-70:Letter dated April 3, 1998, from Ronald McRobie to Pierre Grenier relating to the stay order by Justice Israël Masse.

That concludes the filing of exhibits?

PIERRE GRENIER:

For the exhibits I wanted to introduce, yes. Now, before we

go any further, I would like the situation to be clarified. At the last session we discussed cases we had to argue before you and you did not make a formal decision on that, so the employer's position was that we were arguing only the question of damages in the case referred back by the Court of Appeal on the issue, essentially, of the lock-out from '96 to 2000.

We had asked to also argue the grievance of July 2000 that related to the aftermath of the lock-out following the exchange of best offers in January 2000. I understand there was argument on that issue, the employer argued that it had evidence to present, but you did not make a decision, so I would like to know where that stands.

RONALD McROBIE:

But on that point, there is nothing to argue, Mr. Chair, because you have a separate case before you on the disagreement of July 14, 2000, a whole

case before you that started in 1996 and resumed in 2000, 2004, and now relates to the case that the Court of Appeal referred back to you in response to the declinatory exception filed by the union regarding the employer's claim, the one for unjust enrichment.

The other case is a case that was commenced on July 14, 2000, where you were appointed as arbitrator, but where the hearings have never started. In your decision, you decided to defer the hearing, or not the hearing, but your decision on the employer's unjust enrichment claim and join it with another case.

Now that the Court of Appeal is telling us that we have to dispose of the original issue, it seems clear to me that we are dealing with the case concerning the damages that may be claimed by the employees and the employer's claim for

unjust enrichment.

The other case, that is still before you, subject to the employer's objections, but we have never commenced that case. In fact, in that case, we have a request for production of documents and particulars that was served on the union in 2000, and they have not been produced. So it is very clear that that case, if we postpone dealing with the case that is before you at present, it seems to me that it is not in the interests of the parties, but in any event, the question is moot because we have not started that case.

THE CHAIR:

Listen, I think we should first dispose of the issue of damages, even if it means going into the issue of unjust enrichment a second time and the issue of the disagreement of July 14, 2000. So we have two days to dispose of that, to at least try to dispose of the issue of damages definitively. So I think it is wise

to limit ourselves to deciding that issue today and tomorrow, even if it means coming back later to the two other points.

PIERRE GRENIER:

So I note the limit on argument, but I would make the additional comment that those cases, that is, the issue of unjust enrichment and the issue of the grievance of July 2000, are in evidence before you and I am going to use them in argument.

THE CHAIR:

Fine.

RONALD McROBIE:

I would say, just on that point, we will abide by your decision, obviously, but the distinction is that the unjust enrichment was referred to you in the context of the first case, clearly, if you look at Justice Lemelin's judgment, she says that you may not decide one without deciding the other, but we as well, so, we will present argument on that.

On the other one, I would just like to say that it

is not accurate that the evidence has been presented on everything relating to the claim of July 14, 2000. The claim was filed and that is all. Even the documents I was talking about a moment ago are not before you, that is, the requests for particulars and the requests for production of documents, there is nothing in the record concerning the claim of July 14, except the claim itself, and if you recall, it was produced at our request since we had argued that it was one of the arguments for limiting the claim to January 21, 2000, since that claim related to this later period.

THE CHAIR:

But there is evidence that Mr. Grenier ...

RONALD McROBIE:

It is there.

THE CHAIR:

... may be able to use if ...

RONALD McROBIE:

What is in the record is in the record, I

agree with that.

THE CHAIR:

... if he thinks it is important.

PIERRE GRENIER:

Now, second question to be clarified, in my opinion, before we start the evidence. There is an issue between the parties, perhaps my colleagues will say there is no issue, but in my opinion there is an issue that is not yet clear: what is the amount of the wages being claimed by the employees.

I raise this question because I think it would be preferable to clarify this situation at the outset of the hearing. I am obviously not talking about calculating the interest that will eventually have to be paid once the amount is determined, but that amount, I have a document, it is in front of me, that had been prepared by the employees, that was filed in the document by Mr. Caisse who was representing Mr. Di Paolo at the time, that reflected their position on the wage claim, there were documents that were filed in the record by Mr. Duggan ...

THE CHAIR:

Yes.

PIERRE GRENIER:

... the amounts are not the same, the employer is saying there was an agreement as to the amount in question, and I am speaking solely about the wages claimed as damages. I would like this situation to be clarified to avoid launching into argument on this in response to a decision by the Court.

So I know that at the last meeting my colleagues submitted that there were passages of transcript or supplementary documents that had been filed or discussed between the parties. Because I did not take part in those discussions myself at the time, it was Mr. Duggan with Mr. McRobie and Mr. Money was there as well, and there were other discussions around that when Mr. Caisse came in, at the hearing in 2004, I would like it to be clarified to know where we are on that.

RONALD McROBIE:

So we made representations on that

point at the pre-hearing conference in June and you received, everyone received, the letter from my colleague, Mr. Monet, on July 15. So in that correspondence and in our representations before you, we pointed out that the question of the amounts claimed by the employees was the subject of your decision in October 2000.

If we recall, there were four elements in your decision, the fourth being your order that the complainants had to provide a detailed statement of what they were claiming as wages and benefits, as soon as possible, and also showing any income received as medication [*sic* – mitigation? – Tr.]. So it was in response to that order, and I would point out, Mr. Chair, that although your order was challenged on other points, that aspect was never challenged by anyone at all before the Superior Court or before you. So that order that you made in October led to the correspondence between myself and

counsel for the complainants. I am referring to Exhibits E-14 to E-17.

So if you look at E-14, in E-14 you have, from each of the complainants, a table which is the table that was produced by the complainants, there is one for each of the 11, and it is entitled [TRANSLATION] "Table representing the amounts claimed as lost wages and benefits for the period ...". And it refers to the period that you ordered in your decision, June 1996 to January 2000.

When, so there was a disagreement between the two parties on the calculation because the employer had another calculation, and when the parties resumed the hearings before you in October 2000, Mr. Duggan called Mr. Di Paolo to testify. And Mr. Di Paolo had the same document in front of him, in his case it was in E-14, which had been produced as Exhibit S-65. And in S-65, Mr. Di Paolo claimed, did a calculation with interest that was in the amount of

$208,371.97.

At your invitation, there were discussions between the parties because at that point there was a disagreement as to whether quantum was to be proved or not, and we had submitted that at the pre-hearing conference in February 2000, it had been agreed to postpone any issue of quantum to the end, if necessary. But given the complainants' insistence on calling evidence on quantum, on wages and benefits, and I stress that it was at their request, we said: [TRANSLATION] "Postpone it to the end, if necessary." Ultimately, you asked us to cooperate and so the hearing was suspended and cross-examination of Mr. Di Paolo was suspended, we went away to confer, you were involved, Mr. Grenier was there, Mr. Duggan was there, I was there, Mr. Money was there, and we agreed on the amounts if the employees' claim was allowed in full, and I do say in full, so we said, because at the time, the people were claiming

the entire period from June '96 to January 2000, so we said: [TRANSLATION] "As a mathematical exercise, the maximum that can be claimed, and we divided it into five periods, it would be so much." And I, I produced excerpts from the transcript, you already have them, but I am showing you an excerpt from the transcript, if you want to give a copy to Mr. Di Paolo and Ms. Blondin?

So after the suspension, we cam back before you. I then gave you an excerpt where we see, at page 31, that, well, I, it was understood that the complainants were insisting on putting it in the record right away, so we had already agreed on the amounts outside, then Mr. Duggan wanted to revisit it, so at page 31, I said:

[TRANSLATION] "Well, we are interrupting, we are suspending Mr. Di Paolo's testimony."

And you said:

[TRANSLATION] "Yes."

And so we took S-65 which was the specific claim in the case of Mr. Di Paolo, for

wages and benefits, which was for 208,371.97, and we identified on the following pages the five periods, because we will recall that the wages were adjusted in the summer of each year, on June 30 or July 1 of each year, so we took all the periods and we gave you the maximum amount that could be claimed per period.

And I will spare you all the figures for the moment, but we can look at them if you are interested, period by period, we did it for the five periods, and on page 36, at the top of the page, we agreed that the calculation of the principal for the five component figures was 163,611.51.

Then Mr. Duggan asked for copies of the tables for everyone and we suspended to be sure that everyone had copies of it, and even, after that, Mr. Duggan, given that we corrected the figures for

periods 3 and 4, he even produced the tables we had submitted, that I have copies of here, as Exhibits S-65 and S-67. These are exhibits already in the record and Mr. Duggan wanted to produce the tables as we showed him with his clients outside because we were correcting the figures he had calculated for periods 3 and 4, and so that is part of the record and it was Mr. Duggan who produced them as Exhibits S-65 and S-67. And at page 38, I said: [TRANSLATION] "We made those admissions to show that when we say something out in the hallway, we say the same thing before you, but that has nothing to do with the evidence that is before you, it will be useful only if we eventually get there ..." Obviously because we were not admitting liability, which is still the case today. Then we went back to a request to produce a document concerning four people's pension plan. I announced at the bottom of page 38 that we were going to object, there was argument on that, and you upheld that objection ...

PIERRE GRENIER:

On what page, please?

RONALD McROBIE:

Page 43, at the bottom of the page. And then why did you uphold the objection? It was, there were two aspects, obviously there was a desire to enter in evidence an application to join the plan that was after the period that was before you because it was an application made in January 2000, but more importantly, what we argued was: [TRANSLATION] "Listen, we have just produced the admissions, and now they are trying to introduce evidence of other benefits", when the document produced by the complainants themselves was entitled [TRANSLATION] "Table representing the amounts claimed as wages and benefits".

So the 163,000 figure from which the 208 derives was, everyone understood, it was the exercise that had just been done and it was as a result of that argument that Mr. Duggan said that he did not have much to add to

what he had said earlier and you upheld the objection.

So for our part, the fact that it is now eight years later does not mean we can revisit a decision that has already been made on the question of the maximum quantum that can be claimed and on the admissibility in evidence of other claims, apart from the ones that were provided by the complainants in accordance with your order in October 2000. The order was made, it has been complied with, as a result of that, there was an agreement on the maximum amounts and that is an end of it.

ERIBERTO DI PAOLO:

Good, I'd like to get my two cents in too.

THE CHAIR:

Is that all?

RONALD McROBIE:

Yes, I have, yes, that is all.

THE CHAIR:

Mr. Di Paolo?

ERIBERTO DI PAOLO:

Mr Arbitrator, why are we here today? The reason we're here today is that the Court of Appeal said

that we have to do the evidence based on nineteen ninety-nine-two thousand o three (1999-2003). So now, we're putting the cart before the horse. He's talking about money. First of all, the money that he's talking about has been annulled, because that was in a hearing of October nineteenth (19th), which was after the tenth (10th) of October hearing and the Court of Appeal has annulled the decision that you gave on two thousand o five (2005), in March, and that goes all the way back to that hearing.

The amounts of money that he's talking about, if we're talking about money, we have to wait till we do the evidence. There's a lot of evidence that the Court of Appeal wants us to produce so that we can come to exactly what it is of money that we're talking about, what's the amount?

And on another note too, at the beginning, I didn't understand very well, am I to understand that the grievance of July fourteenth (14th), you will not take that in consideration? you're not going to take that grievance? The grievance of July 14 ...

THE CHAIR:

That means ...

ERIBERTO DI PAOLO:

... is it ...

THE CHAIR:

Not at this moment. Not at this moment. I want to set up the question of the damages, claim of damages...

ERIBERTO DI PAOLO:

Okay.

THE CHAIR:

... to decide on that definitely...

ERIBERTO DI PAOLO:

But...

THE CHAIR:

... so I'll ask you to produce the papers, the documents you want to produce.

ERIBERTO DI PAOLO:

That's right. I not only want to produce documents, but I want to speak of what I produce...

THE CHAIR:

Yes, of course...

ERIBERTO DI PAOLO:

... but...

THE CHAIR:

... but first, produce these documents.

ERIBERTO DI PAOLO:

Well, that's what I initially wanted to know at the beginning, but...

THE CHAIR:

It's your turn.

ERIBERTO DI PAOLO:

... but they're bringing back what has been annulled.

THE CHAIR:

Produce your documents now and you will argue...

ERIBERTO DI PAOLO:

O.k., so then...

THE CHAIR:

... later.

ERIBERTO DI PAOLO:

... I will give you a copy...

PIERRE GRENIER:

Before ...

THE CHAIR:

Yes?

PIERRE GRENIER:

... we start producing the documents, I would like to finish the

question that we are arguing ...

THE CHAIR:

Fine.

PIERRE GRENIER:

... to be sure of ...

THE CHAIR:

Okay.

PIERRE GRENIER:

... of what we are doing. My understanding, correct me if I am wrong, colleague, is that you have arrived at a total amount?

RONALD McROBIE:

Total after examining five periods. So if you look in the transcript, you have a total per period, I can give you them, the five components, but for the period from June 4 to June 30, 1996, it was $3,180; for the period from July 1, 1996, to June 30, 1997, it was a maximum of $55,041; and so on, so

period 3, it was, that is, for the period of July 1, 1997, to June 30, 1998, it was 34,175.23 ...

PIERRE GRENIER:

What page are you on? I'm sorry, I'm trying ...

RONALD McROBIE:

At the bottom of page 33.

PIERRE GRENIER:

33?

RONALD McROBIE:

Then it is after what Mr. Duggan said: [TRANSLATION] "Right, for period 3, so we are going to produce your table 3", which is Exhibit S-66. Then at the bottom of page 34, period 4, which was July 1, 1998, to June 30, 1999, it was a mathematical calculation that was 38,571.84 ...

PIERRE GRENIER:

Excuse me, so on page 33 ...

RONALD McROBIE:

33, yes.

PIERRE GRENIER:

... when the amount is established at 34,000, it was already reduced by an amount paid by the employer?

RONALD McROBIE:

Yes.

PIERRE GRENIER:

So that is not the full amount of the wages ...

RONALD McROBIE:

No, because it is ...

PIERRE GRENIER:

... not paid?

RONALD McROBIE:

... the way that they had done the calculation, is that they had taken the entire period, applied interest to it, and then, only, deducted the employer's principal. So that was not the right way to do it because then, with those figures, the argument about interest on the principal was being disregarded ...

PIERRE GRENIER:

No, what I mean, from July 1, '97, to June 30, '98, the amount is not 34,000, it is really 56 ...

RONALD McROBIE:

Yes, yes, that's right ...

PIERRE GRENIER:

... 56,000 or ...

RONALD McROBIE:

... it is, the exercise had been done by deducting for each period because of not knowing whether there was a period at all there. So the periods do not correspond to anything other than the wage increase periods in July of each year.

And then period 4 is the period from July 4 to 30, 1998, to June 30, '99, and it is 38,571.84 and ...

PIERRE GRENIER:

And again, it was reduced ...

RONALD McROBIE:

... it was taking into account what had in fact been paid as wages and benefits. And for the fifth period, it was 32,643.44, that is the period from July 1, 1999, to January 20, 2000. So periods 3 and 4 take into account the wages and benefits actually paid by the employer in the two periods, which overlap in the two periods.

PIERRE GRENIER:

The specific amounts were not established without taking into account the wages paid for period 3 and period 4.

RONALD McROBIE:

That means that in their claim, they had made the claim ...

PIERRE GRENIER:

So I have 56,958, and 57,857 ...

RONALD McROBIE:

If you look at E ...

PIERRE GRENIER:

I am on S-65 ...

RONALD McROBIE:

... S-65 ...

PIERRE GRENIER:

Yes.

RONALD McROBIE:

... what they did was calculated ...

PIERRE GRENIER:

56, 58 ...

RONALD McROBIE:

... a figure of 50 ...

PIERRE GRENIER:

... 57 ...

RONALD McROBIE:

It was ...

PIERRE GRENIER:

... 57, which would be the right amount.

RONALD McROBIE:

Fine, not far off. If you look, you would have to compare it with S-1, I think the right amounts are 66, S-66 and S-67, if you look at the

documents you were given.

PIERRE GRENIER:

But then, we don't have the same periods, you have to add, and ...

RONALD McROBIE:

Yes, it is the same periods, periods 3 and 4, it's 56,958.72 according to S-65 and 57,857.80 for period 4. That is according to their claim ... Ah! According, you mean according to us, but you have them in S-66 and S-67.

PIERRE GRENIER:

So it's the same amount, but in S-65.

RONALD McROBIE:

Yes, the gross amount because you have the annual wages for each year, which is higher than our calculations.

PIERRE GRENIER:

On that question, Mr. Arbitrator, I disagree with my colleague, not on that, on the calculation of the wages claimed, but on the question of the pension plans, which I will come back to in my argument.

RONALD McROBIE:

I just wanted to mention, Mr. Chair, that this admission was made in open court, in front of everyone, Mr. Di Paolo was a witness and after that there was, and I am going to produce, at the same hearing, there was an admission by both sides that the evidence would be to the same effect with respect to the other 10 complainants. We refer you specifically to pages 137 and 138 of that same hearing day. So that was done with the full knowledge of everyone.

PIERRE GRENIER:

I had announced the week, at our last meeting, on the question of the pension plans, I asked the Court, in the event that it denied our claim on that item, for the quantum to be calculated after the decision was made.

THE CHAIR:

Okay. That ...

PIERRE GRENIER:

I think that concludes ...

THE CHAIR:

... that is fine?

PIERRE GRENIER:

... the preliminaries.

THE CHAIR:

We will hear ...

RC:

But Mr. ...

THE CHAIR:

... Mr. Di Paolo.

RONALD McROBIE:

... Mr. Di Paolo, then I will respond.

RITA BLONDIN:

Mr. Arbitrator, I would like to urge you to make a comprehensive ruling because by severing your decision like that, we will have, we will have, for another 20 years longer, I have, no one is going to get there, please. It's the same principle, it's the same dispute, it's just because it is so delayed that we have costs, enormous costs, but it is still the same dispute. Even though in 2004 the Court of Appeal said that the prejudice had not ended, it continued, it continued after January 2000. So I would urge you, please, to revisit your decision, and make a

comprehensive ruling so we can live our lives quietly, in peace, please.

ERIBERTO DI PAOLO:

Mr Arbitrator, I object to everything that Mr McRobie said, because we are not coming, he's not coming off from the position of...

THE CHAIR:

Yes, but you'll...

ERIBERTO DI PAOLO:

... two thousand o eight (2008).

THE CHAIR:

... you'll have the opportunity to argue later, I want now you to...

ERIBERTO DI PAOLO:

Now... O.k.

THE CHAIR:

... file your documents.

ERIBERTO DI PAOLO:

O.k. I have a lot of stuff in here, so...

THE CHAIR:

Show them to Mr McRobie and Mr Monet.

ERIBERTO DI PAOLO:

I have copies for them also, but I need an exhibit number for these...

THE CHAIR:

Yes, o.k.

ERIBERTO DI PAOLO :

... so I'm bringing documents that I'm, these, they're just letters that they sent us, so, I just want you to table that too, so I'll need an exhibit number for everyone.

MONSIEUR LE PRÉSIDENT :

O.k.

Me RONALD McROBIE :

We need to see what they are...

MONSIEUR LE PRÉSIDENT :

Yes, first.

Me RONALD McROBIE :

We need to have copies.

ERIBERTO DI PAOLO :

Well, these ones, I didn't take...

Me RONALD McROBIE :

Do you have our copies there?

ERIBERTO DI PAOLO :

Of everything else, except this, because these are the letters that Mr Monet sent us, so what went back and forth for the last few months.

Me RONALD McROBIE :

Well, these are letters from you to Mr Sylvestre?

ERIBERTO DI PAOLO :

Yes.

Me RONALD McROBIE :

Not a letter from Mr Monet.

ERIBERTO DI PAOLO :

No, no, there's, they're in there too.

Me RONALD McROBIE :

But are we going to get copies of what you're presenting?

ERIBERTO DI PAOLO :

Well, that's the only ones. I did not have copies of, because it was letters that he sent us or I sent Mr Sylvestre, but you obviously, you all have a copy of it too.

MONSIEUR LE PRÉSIDENT :

This... Show them to...

ERIBERTO DI PAOLO :

Well, I'll get them their copies. This has been tabled and this here, I'd like to produce this, table it, please? And this here, I'll just need an exhibit number, because I don't have another copy, it was presented to you...

MONSIEUR LE PRÉSIDENT :

By Maître Caisse?

ERIBERTO DI PAOLO :

Yes.

MONSIEUR LE PRÉSIDENT :
Yes, I have, o.k.
ERIBERTO DI PAOLO :
You have? You have?
MONSIEUR LE PRÉSIDENT :
In the office, yes.
ERIBERTO DI PAOLO :
But I need an exhibit number, because I don't have another one, so I'm keeping this, it's just to show you...
MONSIEUR LE PRÉSIDENT :
Well...
ERIBERTO DI PAOLO :
... they had it also, because in two thousand o four (2004), they got a copy, because this is the story of the damages, this is not the real damages.
MONSIEUR LE PRÉSIDENT :
Yes, it was produced in...
Me RONALD McROBIE :
It was produced...
ERIBERTO DI PAOLO :
It was...
Me RONALD McROBIE :
... and they ended ruled inadmissible.

ERIBERTO DI PAOLO :
Yes, but now, the Court of Appeal, what did they do in two thousand o eight (2008)? They annulled the decision of two thousand o five (2005) and bringing it back in.
Me RONALD McROBIE :
Do you want me to make my representations on that right away or...
MONSIEUR LE PRÉSIDENT :
Yes...
Me RONALD McROBIE :
... or wait?
MONSIEUR LE PRÉSIDENT :
... yes, please? Yes.
RONALD McROBIE:
Okay. In English or in French?
THE CHAIR:
In English, yes, yes.
RONALD McROBIE:
As to the first group of documents, I understand that it's a correspondence relating to this case since April of two thousand eight (2008), that Mr Di Paolo wants to produce. It's already in the file, but I have no particular objection to having it produced as an exhibit. I don't know

if it's...

MONSIEUR LE PRÉSIDENT :

So...

Me RONALD McROBIE :

... complete...

MONSIEUR LE PRÉSIDENT :

... it will be DP-1? is that o.k. with you?

ERIBERTO DI PAOLO :

Sure.

MONSIEUR LE PRÉSIDENT :

DP-1...

Me RONALD McROBIE :

Just to complete...

MONSIEUR LE PRÉSIDENT :

... correspondence...

DP-1 : Correspondence relating to the case since April of 2008.

Me RONALD McROBIE :

... it, however, Mr Chairman, there's one piece of correspondence that's not there, which is, if we can add to it, which is the letter to Mr Di Paolo of July twenty-fifth (25th)...

ERIBERTO DI PAOLO :

I had that in my other...
Me RONALD McROBIE :
But it's not in...
MONSIEUR LE PRÉSIDENT :
But you didn't put it in your...
Me RONALD McROBIE :
... it's not in the...
Me DOMINIQUE MONET :
It's the letter to...
ERIBERTO DI PAOLO :
No, because I wanted to...
Me DOMINIQUE MONET :
... it's the letter to the Arbitrator.
ERIBERTO DI PAOLO :
... I wanted to talk about that.
MONSIEUR LE PRÉSIDENT :
I already have it.
Me RONALD McROBIE :
Yes, you already have it, but since he's reproducing all of the correspondence...
MONSIEUR LE PRÉSIDENT :
It will be complete.
Me RONALD McROBIE :
... to you...
ERIBERTO DI PAOLO :

But I wanted to speak about this letter.

MONSIEUR LE PRÉSIDENT :

This one here, o.k.

ERIBERTO DI PAOLO :

Yes, this one here.

MONSIEUR LE PRÉSIDENT :

July the twenty-fifth (25th), o.k.

Me RONALD MCROBIE :

Yes, so, add it to the file there and...

MONSIEUR LE PRÉSIDENT :

So I, all of you have a copy of this letter.

ERIBERTO DI PAOLO :

Already has.

Me RONALD MCROBIE :

And I would ask for a copy of what has been produced as DP-1 just so that we know exactly what was in DP-1, because there's various letters in there, but not all, anyway...

Me DOMINIQUE MONET :

And...

Me RONALD MCROBIE :

... so we'll get subsequently a copy of DP-1?

Me DOMINIQUE MONET :

But we...

Me RONALD MCROBIE :

with the addition of July twenty-fifth (25th), two thousand and eight (2008) letter.

Me DOMINIQUE MONET :

Well, I'd like July twenty-fifth (25th), two thousand and eight (2008) letter to be an E exhibit, not a DP-1 exhibit.

Me RONALD McROBIE :

Well, o.k., fine, we can produce it then as our exhibit which would then be 78, so, produced as E-78, that's your copy, Mr Di Paolo and I have a copy for Mr Grenier, si vous pouvez remettre à maître Grenier, s'il vous plaît?

E-78 : Letter to Mr Di Paolo of July 25th, 2008.

Now, as for...

THE CHAIR:

That is the photocopy? Ah! Okay, okay ...

RONALD McROBIE:

Yes, that's right.

THE CHAIR:

It's here, o.k.

RONALD McROBIE:

Now, Mr Chairman, there's another document that Mr Di Paolo has put beside you there, where

I see «Cour d'appel», that yellow page, is that a document that he wishes to produce?

ERIBERTO DI PAOLO :

Yes.

Me RONALD McROBIE :

Yes?

THE CHAIR:

Factum of the appellants/applicants Rita Blondin and Eriberto Di Paolo, but I have that already.

RONALD McROBIE:

Well, you received it ...

ERIBERTO DI PAOLO:

Already received.

RONALD McROBIE:

... at one point, I think it was served on you?

THE CHAIR:

Yes.

ERIBERTO DI PAOLO:

Can you give me a number, if you have it, I would like to have some evidence, because ...

THE CHAIR:

Well, it's already in the record.

ERIBERTO DI PAOLO:

It's in the record, but ...

THE CHAIR:

Okay, okay, so DP-2.

RONALD McROBIE:

So the appeal factum of Mr. Di Paolo and Ms. Blondin is being produced as an exhibit ...

THE CHAIR:

Yes.

RONALD McROBIE:

... in the Court of Appeal?

THE CHAIR:

Yes.

DP-2: Appeal factum of Rita Blondin and Eriberto Di Paolo in the Court of Appeal

RONALD McROBIE:

I think, Mr. Chair, I don't object formally, but if you do refer to that factum, obviously, you have the others from Mr. Grenier for the other complainants and our factum ...

THE CHAIR:

I have all that, yes.

RONALD McROBIE:

... but it hasn't been given a number formally, so

it's ...

ERIBERTO DI PAOLO:

That is why I am bringing it ...

RONALD McROBIE:

If you do refer to that appeal factum, you have ours as well, even though they have not been produced ...

THE CHAIR:

That's right.

RONALD McROBIE:

... formally before you.

ERIBERTO DI PAOLO:

Here, I only have one copy, because that's all they sent me.

PIERRE GRENIER:

That is DP-2?

ERIBERTO DI PAOLO:

This is the answer to our factum by the company and I only have one copy, but I want an exhibit number.

THE CHAIR:

DP-3.

ERIBERTO DI PAOLO:

And that could be for your file, that's for you.

RONALD McROBIE:

Subject to the same objection, obviously.

THE CHAIR:

Yes.

PIERRE GRENIER:

That's the reply of?

THE CHAIR:

That's the reply of the employer, it's, in fact it's the outline of the argument of the respondent The Gazette, the response to the factum of Rita Blondin and Eriberto Di Paolo.

DP-3: Outline of argument of the respondent The Gazette, response to the factum of Rita Blondin and Eriberto Di Paolo.

ERIBERTO DI PAOLO:

Can you give me a number, please?

THE CHAIR:

DP-3.

ERIBERTO DI PAOLO:

DP-3. Now, it's because Rita, are you taking down the numbers?

RITA BLONDIN:

Yes, and yes.

ERIBERTO DI PAOLO:

You are taking down the numbers, okay, [English]so you'll take the numbers. After that, I have that, and then, I'll the others, I'll go get the others.

THE CHAIR:

Wait, show it to …

ERIBERTO DI PAOLO:

I'll go get the …

THE CHAIR:

Ah! You have copies?

ERIBERTO DI PAOLO:

Yes.

PIERRE GRENIER:

What is that? Excuse me.

THE CHAIR:

It's correspondence sent to me, to Mr. Brunet, and excerpts from the Labour Code and a copy of the agreement …

RONALD McROBIE:

Is it …

THE CHAIR:

… from April 13, '90…

DP-4: Bundle of documents. (under objection)

RONALD McROBIE:

I have several couple of documents twice.

RITA BLONDIN:

Excuse me, perhaps each page should be given a number because we are going to get lost in this.

ERIBERTO DI PAOLO:

That was harder to do because it was letters.

RITA BLONDIN:

We will take them again one by one, we will number them one by one.

RONALD McROBIE:

Perhaps, Mr. Chair, we should have just produced them in a bundle, subject to my objections as to relevance, to expedite the conduct of the hearing. There are a lot of those documents that were already produced, others that are of no relevance, but I don't know whether you want us to present argument, perhaps it would be ...

THE CHAIR:

No.

RONALD McROBIE:

... simpler, simply to produce them in a bundle, subject ...

THE CHAIR:

No, as ...

RONALD McROBIE:

... to other objections ...

THE CHAIR:

... Mr. Di Paolo is proposing, we will enter them in a bundle and you will come back to ...

RITA BLONDIN:

Enter them all?

THE CHAIR:

... to each of the documents.

ERIBERTO DI PAOLO:

I thought it was better to enter it all at once ...

THE CHAIR:

Fine, that's right, exactly, you agree with Mr. McRobie on that.

ERIBERTO DI PAOLO:

That's right, I don't have a lot to do.

THE CHAIR:

No, no.

ERIBERTO DI PAOLO:

Another three (3) or four minutes (4 min).

RITA BLONDIN:

So that is DP-4?

THE CHAIR:

Yes, DP-4. I could have put DPB-4. Excuse me, Ms. Blondin.

RITA BLONDIN:

That's fine.

THE CHAIR:

So we will suspend for five minutes, time for Mr. Di Paolo ...

ERIBERTO DI PAOLO:

Yes, yes, yes, time ...

THE CHAIR:

... to be able to identify his exhibits.

PIERRE GRENIER:

Are we suspending?

THE CHAIR:

Yes, five minutes.

HEARING SUSPENDED

HEARING RESUMED

RITA BLONDIN:

What is happening is that we don't have the list of the

things ...

RONALD McROBIE:

No ...

RITA BLONDIN:

... that were produced ...

RONALD McROBIE:

... there are ...

RITA BLONDIN:

... so ...

RONALD McROBIE:

... a lot of things, Ms. Blondin, that are ...

RITA BLONDIN:

Yes, but we don't know, we ...

RONALD McROBIE:

OBJECTION 1:

... in your bundle of documents, which have already been produced, but in any event, as I said, we object generally to the production of those documents, so I urge you to take them under objection, but ...

THE CHAIR:

Okay. So DP-5 will be collective agreement

between The Gazette and Le Syndicat québécois de l'imprimerie, May eighty-seven (87) to April ninety (90), DP-5.

DP-5 : Collective agreement between The Gazette and Le Syndicat québécois de l'imprimerie, May 87 to April 90. (under objection)

PIERRE GRENIER:

What is DP-4?

THE CHAIR:

DP-4 is the bundle of documents.

PIERRE GRENIER:

The bundle here, okay.

THE CHAIR:

Okay?

RONALD McROBIE:

Well there was another pile that he, I don't know whether it's in, the second pile there is part of DP-1.

THE CHAIR:

Wait a minute. I have a document here that is dated today, that is dated July 28, 2008. This

will be DP-6, it's a document dated July the twenty-eight (28).

DP-6 : Document dated July twenty-eighth (28th). (under objection)

ERIBERTO DI PAOLO :
The twenty-eighth (28th).

THE CHAIR:

Yes, o.k.

PIERRE GRENIER:

It's another one, I have the decisions here.

THE CHAIR:

No, but ...

RONALD McROBIE:

There is ...

THE CHAIR:

... it's just that document.

RONALD McROBIE:

Oh.

THE CHAIR:

Okay?

RONALD McROBIE:

Okay.

PIERRE GRENIER:

Excuse me.

THE CHAIR:

So DP-7 will be the actuarial report ...

RONALD McROBIE:

Wait, you don't have the same order as us.

THE CHAIR:

Oh, right.

RONALD McROBIE:

OBJECTION 2:

Obviously, we object and we will be making ...

THE CHAIR:

Under objection.

RONALD McROBIE:

... representations, but you can assume that we object ...

THE CHAIR:

Okay.

RONALD McROBIE:

... to the filing in general.

THE CHAIR:

So DP-7 will be the actuarial report dated June 26, 2008.

DP-7: Actuarial report dated June 26, 2008.
(under objection)

PIERRE GRENIER:
Excuse me, DP-6, you say it is a letter dated July 28?
THE CHAIR:
It's a document dated July 28 that is not signed.
RONALD McROBIE:
I think it's the pleading by ...
PIERRE GRENIER:
Okay, I have it, that's fine.
RONALD McROBIE:
... Mr. Di Paolo and ...
PIERRE GRENIER:
That's fine.
RONALD McROBIE:
... Ms. Blondin.
PIERRE GRENIER:
That's fine.
THE CHAIR:
Okay?
PIERRE GRENIER:

Yes.

THE CHAIR:

This document here.

ERIBERTO DI PAOLO:

This, well, this is your copy.

THE CHAIR:

Yes.

ERIBERTO DI PAOLO:

... and...

THE CHAIR:

What is it?

ERIBERTO DI PAOLO:

I'll speak about it after. Well, answer to questions (a)...

THE CHAIR:

O.k., it's...

ERIBERTO DI PAOLO:

... (b) and (c); (a), (b) and (c).

THE CHAIR:

It's a summary of your argument?

ERIBERTO DI PAOLO:

Yes, it's... That's right.

THE CHAIR:

O.k., that's o.k.

ERIBERTO DI PAOLO:

The evidence that I have to make.

THE CHAIR:

DP-8 will be the, Leboeuf's arbitration award...

RONALD McROBIE:

Again...

THE CHAIR:

It's...

RONALD McROBIE:

... it's an English translation that's not, we don't even know who's produced it, but...

THE CHAIR:

Under objection.

RONALD McROBIE:

... it's not Leboeuf's award which has already been produced, it's someone's English translation of Leboeuf's award that's already been produced, but again, under reserve.

THE CHAIR:

Under objection.

DP-8 : English translation of Leboeuf's arbitration award. (under objection)

DP-9 is the appellants' factum submitted to the Court of Appeal by Ms. Blondin and Mr.

Di Paolo ...

RONALD McROBIE:

It isn't DP-2?

THE CHAIR:

No, no, DP-2 is ...

RONALD McROBIE:

I had ...

DOMINIQUE MONET:

Yes, yes.

THE CHAIR:

These are the exhibits, wait, no, it's the second volume, DP-2, his ...

RONALD McROBIE:

Ah, DP-2, that's volume II?

THE CHAIR:

That's right, yes.

RONALD McROBIE:

Okay. So that's DP-9, the appeal factum?

THE CHAIR:

D-9, yes.

DP-9: Appellant's factum submitted to the Court of Appeal by Ms. Blondin and Mr. Di Paolo. (under objection)

PIERRE GRENIER:

I don't have that.

RITA BLONDIN:

No, because there was one copy short ...

PIERRE GRENIER:

Okay, that's fine, that's good, DP-9?

THE CHAIR:

DP-9, yes. DP-10 is the transcript of the hearing, the hearing on June 16, 2008, before the Court of Appeal.

DP-10: Transcript of hearing on June 16, 2008, before the Court of Appeal. (under objection)

RONALD McROBIE:

That is the contempt of court issue?

THE CHAIR:

Yes. DP-11 is the decision of the Court of Appeal dated August 6, 2003.

DP-11 Decision of the Court of Appeal dated August 6, 2003. (under objection)

DP-12 is the decision of the Court of Appeal dated December 15,

1999.

DP-12: Decision of the Court of Appeal dated December 15, 1999. (under objection)

RONALD McROBIE:

It's an ...

DOMINIQUE MONET:

It's an English version.

RONALD McROBIE:

... English version, I don't know where it came from, but it's an English version ...

THE CHAIR:

Wait a minute, no ...

ERIBERTO DI PAOLO:

You have, I have read it in English, it's easier for me, but you have, the version in French ...

THE CHAIR:

Wait, I have the decision in French. What I have is the decision in French.

RONALD McROBIE:

Ah! What I have is the English version, I don't know ...

ERIBERTO DI PAOLO:

Yes because I gave it to the Arbitrator in French, what I had, and I did not have a lot in French ...

DOMINIQUE MONET:

There is no English version of the judgment, it isn't in the Supreme Court of Canada, but in any event ...

THE CHAIR:

But I am bound by DP-12, that is the French version.

DOMINIQUE MONET:

Yes, and it is already in the record.

THE CHAIR:

Yes, yes, it is already in ... DP-13, the applicants' motion for a special order to appear on a charge of contempt of court.

DP-13: Motion by the applicants for a special order to appear on a charge of contempt of court. (under objection)

DP-14 is an arbitral award made between

the parties by Claude Foisy ...

RONALD McROBIE:

Already in the record.

THE CHAIR:

Already in the record, dated April 25, '96.

DP-14: Arbitral award made between the parties by Claude Foisy on April 25, '96. (under objection)

DP-15 is the decision of the Court of Appeal dated March 17, 2008

DP-15: Decision of the Court of Appeal dated March 17, 2008. (under objection)

DP-16 is a decision of the Court of Appeal dated September 16, '96, between the Journal de Montréal, François Hamelin and Local 41M.

DP-16: Decision of the Court of Appeal dated September 16, '96, between the Journal de Montréal, François Hamelin and Local 41M. (under objection)

DP-17 is a letter dated January 21, 2002, 2000, that is, January 21, 2000 ...

DOMINIQUE MONET:

It is the final best offers of The Gazette, already in the record.

THE CHAIR:

... that reiterates the final best offers of The Gazette, to the union, Local 145, and each of the 11 complainants, by Mr. Tremblay, on January 21.

DP-17: Letter dated January 21, 2000, which reiterates the final best offers of The Gazette, to the union, Local 145, and to each of the 11 complainants, by Mr. Tremblay. (under objection)

RONALD McROBIE:

That is the French version of S-58.

THE CHAIR:

And DP-18 is a, it seems to be an article published in The Globe and Mail in '93 and written by Harvey Enchin, E-N-C-H-I-N.

DP-18: Article published in The Globe and Mail in '93 and written by Harvey Enchin.

So that completes the tour, oh, no ...

ERIBERTO DI PAOLO:

Other ...

THE CHAIR:

... no, there are others ...

ERIBERTO DI PAOLO:

I brought you a whole bunch.

THE CHAIR:

Oh! I see. DP-19 is the summary of a judgment on lawyers' fees claimed as damages.

DP-19: Summary of a judgment on lawyers' fees claimed as damages. (under objection)

DP-20 is an article published in The Gazette on Thursday, Tuesday, April 30, 1991.

DP-20: Article published in The Gazette on April 30, 1991. (under objection)

DP-21 is an article from The Gazette dated April 23, 2002 ...
RONALD McROBIE:
April 23 ...
THE CHAIR:
February, excuse me.

DP-21: Article from The Gazette dated April 23, 2002. (under objection)

DP-21 is an article ...
PIERRE GRENIER:
DP-22, eh?
THE CHAIR:
22, yes, an article, it seems to be, from The Gazette, entitled "Financial CIBC, Court Told", there is no date.

DP-22: Article, it seems to be, from the Gazette, entitled "Financial CIBC, Court Told". (under objection)

DP-23 is a summary of a recent decision by, written by Mr. Rhéaume-Perrault, lawyer, entitled "Condamnation à payer des dommages-intérêts" [award of damages].

DP-23: Summary of a recent decision by, written by Mr. Rhéaume-Perrault, lawyer, entitled "Condamnation à payer des dommages-intérêts". (under objection)

I think the other documents, we can produce them in a bundle, so DP-24, relating to the proceedings underway.

PIERRE GRENIER:

What do you have in there?

THE CHAIR:

There is an article from The Gazette dated February 5, '98, an article from the National Post dated July 13, 2007 ...

RONALD McROBIE:

All that is going under 24?

THE CHAIR:

Yes. An article from The Gazette dated Tuesday, March 18, a letter from Mr. Tremblay to

Ms. Blondin dated May 27, '96, a letter, ah, right, we have that one already ...

RONALD McROBIE:

It's E-78 already.

THE CHAIR:

Yes, E-78, we can set it aside, and last, the decision I made on October 11, 2000.

PIERRE GRENIER:

I have another document here, with the amounts.

DP-24: Documents in a bundle, article from The Gazette dated February 5, 1998, article from the National Post dated July 13, 2007, article from The Gazette dated Tuesday, March 18, decision made by André Sylvestre on October 11, 2000, and a document with the amounts. (under objection)

ERIBERTO DI PAOLO:

I gave you a copy of that.

PIERRE GRENIER:

Pardon me?

ERIBERTO DI PAOLO:

I gave you a copy.

PIERRE GRENIER:

Yes, is it to file?

ERIBERTO DI PAOLO:

He's got...

THE CHAIR:

No, I don't have this cover.

ERIBERTO DI PAOLO:

I thought I had...

THE CHAIR:

I don't have it.

ERIBERTO DI PAOLO:

Now, this is for you.

PIERRE GRENIER:

Now, there's two (2) copies, one for the...

ERIBERTO DI PAOLO:

There you go, he's got to have it, I'm not over. Peut-être j'ai mélangé les photocopies. You didn't get a copy of this?

THE CHAIR:

No, well, I have, but, I had a copy of this one...

ERIBERTO DI PAOLO:

Yes.

THE CHAIR:

... but not of this one here.

ERIBERTO DI PAOLO:

Well, it's probably behind it.

THE CHAIR:

Oh! o.k. o.k., I've got it.

ERIBERTO DI PAOLO:

o.k.?

THE CHAIR:

It's o.k. It was attached to the actuarial report, DP-7, okay.

RONALD McROBIE:

Are there other documents?

PIERRE GRENIER:

What is that?

RITA BLONDIN:

Other documents.

PIERRE GRENIER:

Eh?

DOMINIQUE MONET:

That's, that' still argument.

PIERRE GRENIER:

Other documents?

RITA BLONDIN:

To enter, yes.

ERIBERTO DI PAOLO:

That is DP-7.

THE CHAIR:

Fine, so DP-25 ...

RONALD McROBIE:

DP-25?

THE CHAIR:

Yes. Ms. Blondin, I'm asking you, is that your outline of argument?

RITA BLONDIN:

Yes, yes ...

THE CHAIR:

With the exhibits?

RITA BLONDIN:

... it will be part of my evidence, do you want to give them separate numbers ...

THE CHAIR:

No, we will put it in a bundle.

RITA BLONDIN:

In a bundle?

THE CHAIR:

Yes, DP-25.

DP-25: In a bundle, outline of argument of Rita Blondin with exhibits. (under objection)

Does that conclude the entering of your exhibits?

ERIBERTO DI PAOLO:

For me, yes.

RITA BLONDIN:

Yes.

THE CHAIR:

Okay? Right. So Mr. Grenier, your exhibits have also been entered?

PIERRE GRENIER:

Yes.

THE CHAIR:

Mr. Monet, Mr. McRobie ...

RONALD McROBIE:

But listen, we are ...

DOMINIQUE MONET:

We have one exhibit, yes.

RONALD McROBIE:

... just going to produce a document that would be E-79, just to complete, the last time, in 2004, we did not have the benefit of the decision, I'm going to give a copy to Mr. Di Paolo and Ms. Blondin, it's the decision of the Superior Court dated February 15, 2005, by Judge Wagner, Mr. Justice Richard Wagner.

THE CHAIR:

February 15, 2005.

RONALD McROBIE:

Yes, so that would be E-...

THE CHAIR:

79.

RONALD McROBIE:

79.

E-79: Decision of the Superior Court dated February 15, 2005, by Mr. Justice Richard Wagner.

With respect to all the documents produced by Mr. Di Paolo and Ms. Blondin, also, there were some documents that were produced in duplicate, that's fine. With respect to the other documents, given, rather than go through an exercise that would be very lengthy and proceed document by document, we invited you to take the documents under objection, but I would like to point out that we are proceeding in that way simply to expedite argument and I am giving you an example of the impermissible way this is being done.

In Dp-4, they are producing, in the bundle of documents, the same document that you refused to allow to be produced in October 2004, that is, concerning the application to join the pension plan retroactively, so it's an illustration of how they are trying to do indirectly what they can't do directly, but I will make my representations on the documentation as a whole, if necessary, in argument.

PIERRE GRENIER:

On Mr. McRobie's comments, particularly in relation to that document, I was going to produce it for the purpose of argument. I understand that you rejected it at the hearing, but to understand what happened at the hearing, I was going to produce it, I ...

THE CHAIR:

Under objection?

PIERRE GRENIER:

Yes.

THE CHAIR:

Fine. S-...

RONALD McROBIE:

70?

THE CHAIR:

70.

PIERRE GRENIER:

71.

THE CHAIR:

71?

RONALD McROBIE:

Yes.

THE CHAIR:

71, that's right.

S-71: Application to join the pension plan retroactively. (under objection)

So you have a copy of it?

PIERRE GRENIER:

Yes, it was in DP-4.

THE CHAIR:

Ah, okay.

PIERRE GRENIER:

You have it in DP-4, but ...

THE CHAIR:

No, that's right. So we ...

PIERRE GRENIER:

... I can give it to you.

THE CHAIR:

S-71. So does that conclude the entering of exhibits, by both sides?

RITA BLONDIN:

Yes.

THE CHAIR:

Okay?

RITA BLONDIN:

Yes.

THE CHAIR:

That's okay, Ms. Blondin? That's okay, Mr. Grenier?

PIERRE GRENIER:

Yes.

THE CHAIR:

That's okay, Mr. Monet, Mr. McRobie?

RONALD McROBIE:

Yes.

THE CHAIR:

So Mr. Grenier, do you have witnesses to call or is your evidence ...

PIERRE GRENIER:

I have no witnesses.

THE CHAIR:

... complete? That's okay? Mr. McRobie?

RONALD McROBIE:

No, our evidence is complete.

THE CHAIR:

Evidence is complete?

RITA BLONDIN:

I would like to start by ...

THE CHAIR:

No, no, no, wait ...

RITA BLONDIN:

No?

THE CHAIR:

... we are talking about evidence, is your evidence complete with the entering of those documents?

RITA BLONDIN:

We may have witnesses, but ...

ERIBERTO DI PAOLO:

We may have witnesses, why ...

THE CHAIR:

But precisely, the union and the employer have no witnesses, do you have any witnesses?

ERIBERTO DI PAOLO:

Certainly we are going to have witnesses, we're going to have...

THE CHAIR:

Witnesses?

ERIBERTO DI PAOLO:

Yes, witnesses pertaining to my damages.

THE CHAIR:

Well, are you ready to present them or...

ERIBERTO DI PAOLO:

I would like to testify on behalf of my damages, and then if you then want a witness, obviously, I will produce a witness, but we didn't foresee that we had to have a witness today...

RITA BLONDIN:

Or even tomorrow...

ERIBERTO DI PAOLO:

... because...

RITA BLONDIN:

... it's impossible for tomorrow.

ERIBERTO DI PAOLO:

... because if it's an expert witness, I will need a couple of dates so that I could have him choose which day he would be able to...

THE CHAIR:

We're talking about the actuary?

ERIBERTO DI PAOLO:

Yes, we're talking about some of the damages that we're claiming and the reason why we're claiming

those damages.

RONALD McROBIE:

Mr. Chair, we have tried to expedite matters by producing the documents under objection, but for the testimony as to damages, the Court of Appeal did not refer the case back to you for testimony on damages, the Court of Appeal referred the case back to you to do an analysis concerning liability and so on.

So the question of damages was dealt with by the 2003 decision of the Court of Appeal, after which, so we proceeded on the rest, but the question of damages, I referred to that this morning ...

ERIBERTO DI PAOLO:

On the contrary, two thousand o three (2003) decision sent it back to you, Mr Arbitrator, so that you could do "le fond" on what was not done in two thousand (2000).

RONALD McROBIE:

That's correct and that's what we did in two thousand and four (2004) and now, the Court of Appeal says: «If you have any further proof on

points relating to (a), (b) and (c), do the proof», it has nothing to do with damages.

ERIBERTO DI PAOLO:

It does, because we never were heard on what the Court of Appeal said in two thousand o three (2003), my damages were never heard in two thousand o four (2004) and the Arbitrator, he overturned the decision of two thousand (2000), we were never heard and that's still outstanding, that issue of the damages, that we have to be heard, nobody has been heard here and since you bring up letters going back to October of two thousand (2000), there was a letter by Duggan, it says that he sent you a letter on the seventeenth (17th) of October saying that on the nineteenth (19th), we were going to be heard...: «My clients were going to be heard on the damages», we never were heard. Since you want to bring back things that I said was annulled, we never were heard then and we never were heard in two thousand o four (2004), so as far as damages is concerned, that the Court of Appeal states, we have never been heard.

RONALD McROBIE:

Mr. Chair, the fact that,

and I said this in my last letter, the fact that the complainants don't understand the meaning of the 2003 order does not mean that they can call evidence that has already been decided and that is of no relevance.

If we revisit the question of damages, that was decided by you in 2000, it was confirmed by the Court of Appeal in 2003, we had the same debate when Mr. Caisse was in front of you in 2004, they tried to produce an application for Mr. Di Paolo, which was over a million dollars.

After the pre-hearing conference in June, he submitted a claim to us totalling five or six million dollars. We can see that this covers the periods of the first lock-out, the second lock-out, after January 2000, we have had that debate, so we are in favour of continuing on this forever, we are in favour ...

ERIBERTO DI PAOLO:

I ...

RONALD McROBIE:

... of arguing the question that the Court of Appeal has submitted to you, full stop.

ERIBERTO DI PAOLO:

... I'd like to know what this meaning of the, this is a decision of two thousand o three (2003), since I don't understand what I'm reading. In paragraph 5:

«... quashes the judgment annulling in part the October eleventh (11th), two thousand (2000) arbitration award of Arbitrator André Sylvestre, dismisses with costs the Respondents' motion for annulment served on November tenth (10th), two thousand (2000)...»

And returns the case to the Arbitrator, that's why we're here today, for this, because it was never done...:

«... so that he can continue to hear the disagreement between the Appellant and the Respondents with a view of disposing of it completely on its merits...»

When was that done? I never remember being interviewed on my damages, so, when was it done?

THE CHAIR:

Well, anyway, today and tomorrow, you won't be

ready to have witnesses testify on other damages than wages and, your wages and "avantages sociaux" which, lost wages and "avantages sociaux"? [benefits]

ERIBERTO DI PAOLO:

Well, I can testify upon my damages, other damages, she can do the same, except where we, obviously, would need an expert witness to back up our claim that could be for another time, o.k., just that portion for...

THE CHAIR:

But today, I would like to hear you only on your lost wages and "avantages sociaux".

ERIBERTO DI PAOLO:

So, today, you're saying, o.k., so...

THE CHAIR:

Monetary damages.

ERIBERTO DI PAOLO:

Monetary damages? Well, I gave you my report and it's not the report that Mr Monet and McRobie gave you, I gave you the updated version of the monetary damages that are due by...

THE CHAIR:

But when we're talking about monetary damages, we're talking about lost wages.

ERIBERTO DI PAOLO:

Yes, lost wages in a form of damages...

THE CHAIR:

Yes.

ERIBERTO DI PAOLO:

... that's the report I also sent you a copy, that was prepared by an actuary and that was what the Court of Appeal said was due.

THE CHAIR:

Yes, but I will have previously to decide about the objection presented by Maître McRobie, I will have to look again at the Court of Appeal's judgment to see if you may be heard on these other damages and lost wages or not.

ERIBERTO DI PAOLO:

Well, I have it right here and...

THE CHAIR:

Well, it's your interpretation, but...

ERIBERTO DI PAOLO:

No, not my interpretation, it's exactly what it says...

THE CHAIR:

Yes, well...

ERIBERTO DI PAOLO:

... and in the last letter that I sent to Maître

Monet there...

THE CHAIR:

Well, here, there are at least two (2) interpretations, yours and Maître McRobie's.

ERIBERTO DI PAOLO:

This, to me, is, when I read it, it's not my interpretation, it is exactly what it says. If I read you paragraph 46, it's not me interpreting here, I'm going by the result, the specific conclusions of the Arbitrator in the Sylvestre number 2 award:

«... it is impossible to conclude that that question decided then by the Arbitrator had no connection with the disputes submitted to him. Much to the contrary, it is at the very heart of the dispute between the parties...»

The salary was already set aside, so what was he talking about, what is the dispute submitted to them that is at the heart of the dispute between the parties, what is it? That's what we, when we annulled the part where you didn't want to hear our damages, our total damages.

THE CHAIR:

But anyway, we'll have to go forward if we don't want to lose this day and tomorrow, so I will ask

Maître Grenier to argue about the damages, then Maître McRobie and you'll see what to do after hearing these two (2) lawyers.

ERIBERTO DI PAOLO:

Before we go on any further, Madam Blondin has something that she, I think, should have started very early, but we couldn't do it, so, she'd like to set things aside.

RITA BLONDIN:

I would like to be sure we are in the right legal framework. So I just wrote you a letter yesterday, signed by Eriberto also, and it's under, in a bundle under number 25. Right, it's, it talks about confirmation [?] of the arbitration agreement.

The arbitration agreement is in writing. It is in each of the tripartite agreements that attest to its existence. On several occasions, we have stated, by letter and orally, but it's like whistling in the wind. We are challenging the arbitration procedure as it has been used in the past and rèfuted on several occasions.

We have not acquiesced in or consented to you acting as conciliator or to a private civil arbitration process, whether commercial, administrative or other. We have an arbitration procedure that is provided, and the contractual framework agreed to between all the parties is still in force in the same way as the tripartite agreements are in force.

If one party or another does not agree, let them prove it to me by showing that I have signed a document showing a change of arbitration. Personally, I have proved my claim by entering the, each of, a copy of each of my agreements.

In 2003, the Court of Appeal, in section 44, quoted: [TRANSLATION] "Subsection 4 of article 944.4, 946.4, refers to the arbitration agreement, which here must mean section 9 of the 1987 agreement. This provision of the contract provides that in the event of a disagreement with respect to the interpretation, application and/or alleged

violation of the disagreement [*sic*-Tr.], the case in question will be determined as if it were a grievance. In so far as the respondents' claim relates to the prejudice suffered because of the employer's delay in submitting its final offers to arbitration very certainly relate to the interpretation, application and/or alleged violation of the '82 and '87 agreements and more specifically section 11 of the '87 agreement. It therefore cannot be seriously argued that this is a dispute ..."

That is what they said in 2003. And in 2007, 2008, on March 17, 2008, in sections 10 and 11, the Court of Appeal established the legal framework in which you acquired jurisdiction. The arbitrator's original jurisdiction therefore derives from the tripartite agreement, in the '87 version, and a notice of disagreement submitted to The Gazette by the union and by the 11 typographers on June 4, '96.

The scope of the, and the legal consequences of the documents in question were defined by this Court in '96, and so it cannot be said, generally speaking, that the decision made at that time circumscribes the arbitrator's jurisdiction, under which the arbitrator made the award against the union and the typographers.

That is what the Court of Appeal, in 2008, it told you that we must refer back to the judgment of the Court of Appeal in '99. So we refer back to the analyses by the judges of the Court of Appeal, Thérèse Rousseau-Houle, Chamberland and Forget, and the employer, in argument, at page 21, said:
[TRANSLATION] "The employer has never recognized that the arbitrator has jurisdiction other than the jurisdiction of a grievance arbitrator under the Labour Code and appointed under the 93-96 collective agreement."
It formally reiterated the basis of the arbitrator's jurisdiction. At the hearing before him, it objected to our presence.

The analysis by the Court of Appeal on December 15, at page 23, it stated:

[TRANSLATION] "The disagreement of June 4 stated: this disagreement is submitted under the collective agreement and each of the tripartite agreements signed on November 12, '82 and November 12, '87."

The tripartite agreements provided, in the clause relating to the grievance resolution procedure, in the event of a disagreement regarding the interpretation, application and/or alleged violation of this agreement, the matter would be dealt with as if it were a grievance and would be submitted and resolved in the way provided in the grievance resolution procedure for arbitration under the collective agreement, and that is stressed by the Court of Appeal.

Arbitrator Sylvestre was appointed by consent to dispose of the disagreements between the parties. The specific grievance resolution procedure mechanism set out in each of the tripartite agreements from '82 to '87

constitute, in my opinion, a perfect arbitration clause that requires the parties to perform the agreements under the common law rules.

The grievance procedure set out in the collective agreement, to which the arbitration clause refers, is used only as a procedural framework for implementing the agreement. If we examine all of the provisions of the agreements, they clearly show that the parties intended that the procedure set out in the collective agreement be used to compel the performance of the obligations mutually contracted by the three parties in the agreements.

Here we have the sections, in the '82 agreements, in section 7, I don't have to reiterate, and the same sections in the '87 agreements, in section 9, if, which is the grievance resolution procedure.

But given provisions this clear and lucid,

it is impossible to compel us to use a different arbitration process from the one agreed to by our agreements ...

THE CHAIR:

Ms. Blondin, listen, it is very well written, I promise that I will read all the rest of it.

RITA BLONDIN:

I would like to be certain that we are indeed in an arbitration clause, but governed by the ...

THE CHAIR:

The Labour Code.

RITA BLONDIN:

... the Labour Code, because ...

THE CHAIR:

That is the actual intention of the parties that was expressed repeatedly in the collective agreements and the individual agreements.

RITA BLONDIN:

Yes, but I, I am not certain that I am in the right arbitration because on June 15, I read, at number 6, and it is marked: [TRANSLATION] "... an arbitration clause agreed to between the parties ...".

THE CHAIR:

Yes, that's right. That's right, an arbitration clause, normally, is agreed to between the parties.

RITA BLONDIN:

But still, the legal framework, still, it's the Labour Code ...

THE CHAIR:

Yes, yes.

RITA BLONDIN:

... it's grievance arbitration, and there are no other kinds of arbitration, there has to be compliance ...

THE CHAIR:

Listen ...

RITA BLONDIN:

... with the law ...

THE CHAIR:

... that ...

RITA BLONDIN:

... in the Labour Code.

THE CHAIR:

... what the Court of Appeal is asking me to do is to rule on the damages owing to you ...

RITA BLONDIN:

Yes, but what I want to know ...

THE CHAIR:

... so ...

RITA BLONDIN:

... what legal framework I am in.

THE CHAIR:

Well, you are in the legal framework created by the Court of Appeal. But the important thing, the important issue, is that you argue on the damages owing to you.

RITA BLONDIN:

Yes, but if I am not ...

THE CHAIR:

... so it is the ...

RITA BLONDIN:

... in the right framework ...

THE CHAIR:

Listen, we are in a hearing room and the purpose of the hearing is to allow the parties to argue on the damages that are owing to each of the 11 typographers.

RITA BLONDIN:

Right. But can you confirm for me that we are in the Labour Code and that it has been commuted into an arbitration clause? but the

procedural framework is still the Labour Code?

THE CHAIR:

Yes.

RITA BLONDIN:

Fine.

THE CHAIR:

And I, all that remains for me to do, is to obey the instructions given to me by the Court of Appeal. I think we all agree on that.

RITA BLONDIN:

Okay.

THE CHAIR:

Mr Di Paolo, could you now testify, this morning, only on the lost wages and certain benefits that you lost during the period specified by the Court of Appeal?

ERIBERTO DI PAOLO:

The lost wages...

RONALD McROBIE:

Subject to our position that it has already been done, there is already a legal admission in the record, Mr. Arbitrator.

THE CHAIR:

Well, you've read Mr Monet's letter about the admissions that Maître Duggan had made in...

RONALD McROBIE:

October...

THE CHAIR:

... the hearing of October nineteen

RONALD McROBIE:

Two thousand (2000).

THE CHAIR:

... two thousand (2000).

ERIBERTO DI PAOLO:

Say, could you please repeat that again? the letter that, which date was the letter?

RONALD McROBIE:

It's not a letter, a testimony.

DOMINIQUE MONET:

No, the letter is July fifteenth (15th).

THE CHAIR:

July fifteenth (15th), yes.

ERIBERTO DI PAOLO:

You hear them?

THE CHAIR:

Yes, yes, July fifteenth (15th), you've got it?

ERIBERTO DI PAOLO:

Yes, I have it.

THE CHAIR:

Look at paragraph (b).

ERIBERTO DI PAOLO:

So...

THE CHAIR:

Paragraph (b).

ERIBERTO DI PAOLO:

Paragraph (d), (b)?

THE CHAIR:

Yes.

ERIBERTO DI PAOLO:

[TRANSLATION] "Second, claims ..."

So, as I said before, and I'll say it again, the nineteenth (19th) of October two thousand (2000) hearing goes with the position that you gave on March eighteenth (18th), two thousand o five (2005) and we didn't even get that money. Did any of you people get a hundred and sixty-three thousand (163 000)?

THE CHAIR:

No...

ERIBERTO DI PAOLO:

So we never got that hundred...

THE CHAIR:

The answer is no. No, but what I'm asking you, do you agree with what Mr Monet said, wrote in

his letter?
ERIBERTO DI PAOLO:
No, I don't agree.
THE CHAIR:
No?
ERIBERTO DI PAOLO:
No, because it, first of all, I don't agree, but it's been annulled, what he wrote in his letter has been annulled, we have new figures today.
THE CHAIR:
Well, this is your interpretation.
ERIBERTO DI PAOLO:
It has been annulled and...
THE CHAIR:
According to you?
ERIBERTO DI PAOLO:
I beg your pardon?
THE CHAIR:
According to you?
ERIBERTO DI PAOLO:
Not according to me, according...
THE CHAIR:
According to...
ERIBERTO DI PAOLO:
... to the evidence that, according to you, Sir,

too, according to you and your decision of two thousand (2000), October eleventh (11th), you said that the damages ran until two thousand (2000), January twenty-first (21st) and according to you, the decision of nineteen ninety-eight (1998), backed up by the Court of Appeal said that the annexes came into effect specifically when there's a lockout and that you could recognize the validity of the working conditions as soon as the collective agreement came to an end. So this amount does not represent the time. It does not represent the time frame of the damages, of the salary damages, according to you, Sir. I have it here and I was going to testify

THE CHAIR:

But I'm bound by what the Court of Appeal recently wrote.

ERIBERTO DI PAOLO:

Yes, you're bound by what the Court of Appeal recently wrote and that's exactly what I'm saying. They said you have to do the, you have to go and, back and you have to look at the nineteen ninety-nine (1999) decision and the two thousand o three (2003). You have to

comply with those decisions, and I have the evidence in front of me, I have the evidence on what you said and what they said was right and what you said and what they said was right was not what Maître Monet says over here. So, if we do it that way, then we have a problem, because I don't agree with what he wrote here, because then I'd be going against your decision and the Court of Appeal's.

THE CHAIR:

Well, if you don't mind, I would like to hear what Maître Grenier has to plead, to argue about the damages due to your confrères?

ERIBERTO DI PAOLO:

Mm hmm.

THE CHAIR:

And then to hear what Maître Monet and Maître McRobie will answer, will respond to these arguments, and then I will hear you and Mrs Blondin.

ERIBERTO DI PAOLO:

Okay.

THE CHAIR:

Is that o.k. with you? o.k. Would you like a recess, a five minute recess? you're ready?

PIERRE GRENIER:

It will be ...

THE CHAIR:

Are you ready?

PIERRE GRENIER:

... it will be very brief on the quantum of damages. You made an initial decision that was reversed on the issue of the wages and benefits set out in the collective agreement in '99 by the Court of Appeal which referred the matter back for the damages to be, damages caused by the use of the lock-out, the lock-out, be determined by the tribunal.

You made a decision, initially, that the damages could not relate to the wages and benefits set out in the collective agreement, as I understand it. That decision was challenged in the Superior Court on judicial review. The Court set aside your decision and referred the matter back to you to hear all of the damages including damages other than those identified in your first award.

That decision of the Superior Court was appealed and the Court of Appeal set aside or quashed the judgment of the Superior Court and decided that the arbitration tribunal established under an arbitration clause, under the provisions of the Code of Civil Procedure, the Court of Appeal decided not to set aside your decision, so your decision of October 2000 was upheld by the Court of Appeal.

More recently, you made a decision in 2005 ruling that there were no damages owing to the employees in the bargaining unit, a decision that was recently set aside, in March 2008, by the Court of Appeal, and the Court of Appeal referred the case back to you, excuse me, I would just like to have the Court of Appeal, I'm not finding it, it was right here two seconds ago ...

DOMINIQUE MONET:

Are you looking for the judgment of the Court of Appeal?

PIERRE GRENIER:

I'm looking for the judgment of the Court of Appeal, yes.

DOMINIQUE MONET:

I'll give you a hand.

THE CHAIR:

Here you are.

PIERRE GRENIER:

So the Court of Appeal decided, and I will read it:

[TRANSLATION] "... sets aside the judgment of the Superior Court, allows the applicant's motion to set aside the arbitral award, and more specifically, orders that the matter be referred back to Arbitrator Sylvestre for him to comply with the decisions of the Court of Appeal on December 15, '99, and August 6, 2003 ..."

In the judgment, more specifically, the judge states:

[TRANSLATION] "... from this perspective, it is the evidence ..."

And I am at paragraph 37:

[TRANSLATION] "... to be introduced before the arbitrator in relation to the three questions I identified earlier as (a), (b) and (c) ..."

From which the solution to the problem before you can be determined, those are my comments.

RONALD McROBIE:

Mr. Chair, essentially we agree with Mr. Grenier that your decision in October 2000 settled four points: the union may not claim damages, that was point 1; point 2, the period covered ends on January 21, 2000; point 3, the damages that can be claimed are limited to wages and benefits; and 4, that the complainants have to provide a precise breakdown of their wage and benefits claims, including any income earned in mitigation.

So that decision was challenged, as I mentioned earlier, on two points, the period covered and the type of damages that could be claimed. At the hearing before the Superior Court, Madam Justice Nicole Duval-Hesler, the complainants and the union withdrew their challenge regarding the period covered. So they then pursued their challenge concerning only the part of your decision that related to the heads of damages that must be claimed.

The Superior Court found in their favour on that point and the Court of Appeal reversed the decision of the Superior Court and upheld your decision of October 2000 in its entirety, and the reasons for that judgment were that you had disposed of a portion of the merits when you made your decision. So those four points were decided and we are resuming the case as it stood after the 2003 judgment.

So we have got to 2003, the four points have been decided, and we know that on the question of the nature of the wages and benefits, the amounts of the wages and benefits, you held hearings and the amount was discussed and agreed to as a mathematical exercise, with no admission of liability.

So all that remains, we seem to have some confusion on the part of the two complainants, who are representing themselves, between a decision being set aside and the evidence that has been introduced being set aside. All the evidence that has been introduced in the case since

1996 is still there and what remains to be done, and only remains to be done, is all evidence, if there is any, concerning points (a), (b) and (c), as Mr. Grenier has just said.

So just as Mr. Di Paolo tried to increase his claim in 2004 and that was rejected and held to be inadmissible, it is very clear that it is as inadmissible in 2008 as in 2004.

So what remains to be done, in our view, since the union's case is closed and the case for the nine other complainants is closed, if there is evidence to introduce from Mr. Di Paolo and Ms. Blondin concerning points (a), (b) and (c), is that we proceed with that evidence, but that that evidence not relate to the heads of damages that may be claimed or even the calculations of the wages and benefits. That is all.

PIERRE GRENIER:
Before Mr. Di Paolo replies,

I would like to note that I do not agree with the position that, the position of The Gazette that the breakdown of the damages has been decided. What has been decided is that the damages could relate only to wages and benefits. The question of benefits was not definitively decided in your previous arbitral awards.

THE CHAIR:

Mr. Di Paolo, it's your turn.

ERIBERTO DI PAOLO:

Yes. My global damages and Madam Blondin's global damages are receivable, because the Court of Appeal said that you have to conform to nineteen ninety-nine (1999) and two thousand o three (2003) in these hearings and it's not what Maître Monet says. What Maître Monet says was that that was taken away, that was annulled, because you didn't give us anything in two thousand o five (2005), you didn't give the salary, you didn't give global damages, you gave us nothing, so that's all scrap. So that's why the Court of Appeal says you have to abide by nineteen ninety-nine (1999) and two thousand o

three (2003).

And if you look at what's in those decisions, there's a lot, it's not just salary, they're talking about damages. Nineteen ninety-nine (1999) specifically says no salary, but damages, "s'il y a lieu".

And it's not that I don't understand, like, the letter that I got there from, twenty-fifth (25th), vingt-cinq (25), ah! here, the twenty-fifth (25th), I got, well, I got a copy, you got a letter on the twenty-fifth (25th) of July, this was sent to you and I got a copy of it, it says:
«We have received a copy of the letter addressed to you by Mr Di Paolo and Mrs Blondin on July eighteenth (18th), two thousand o eight (2008). It is manifest from their correspondence that unfortunately, both Mr Di Paolo and Mrs Blondin have fundamental misunderstandings of the decisions and judgments rendered in the present matter...»
Before I go any further, I would like to state that because we don't have representation today,

it doesn't mean that we have not consulted, we have consultation. And they don't say the same thing as what Maître McRobie and Maître Monet are saying.

And then I'll go on to the second paragraph, that's where Maître Monet contradicts himself. In that paragraph, there's two (2) sentences, one says the opposite of the other:
«In particular, and most basically, these Complainants along seem to believe that your decision of October eleventh (11th), two thousand (2000) actually awarded damages to them rather than simply establishing the maximum period for which the damages may be claimed...»

So he's saying that the only thing that was awarded then was the maximum period of where damages could be claimed. Then in the next sentence, he goes on to say:
«Secondly, they also purport to believe that they are entitled to claim not only salary and benefits as decided in your October eleventh (11th), two thousand (2000) decision, maintained by the Court of Appeal...»

So now, the second sentence says that: «Yes, you have decided on salary in your October eleven (11) decision, backed up by the Court of Appeal», but the first part of the sentence says that...: «No, no, no, you haven't come to the conclusion of the damages yet, it's only the established time», so he contradicted himself in the same paragraph and he's telling me what I don't understand.

THE CHAIR:

Listen, I think the problem is precisely that, Ms. Blondin and Mr. Di Paolo. It's really a dispute over interpretation that you have, you, Mr. Monet and Mr. McRobie. It's a dispute over interpretation regarding the meaning of the '99 and 2008 decisions.

I think I will have to rule on that and determine which of you two, the two parties, is right, you or The Gazette. So, because if I find for you, at that point, you will be able to call your witnesses, the actuary, testify yourself as to damages other than pecuniary losses and benefits,

Ms. Blondin will be able to do the same. But if I find against you, on the other hand, then you will not have to call that evidence.

ERIBERTO DI PAOLO:

To find for us, yes or no, you, it says that you have to conform, now, to nineteen ninety-nine (99) and two thousand o three (2003). Now, if you're going to listen to what they're saying, you're certainly not going to be able to conform. They're saying the opposite of what the Court of Appeal is telling you what to do.

THE CHAIR:

That is your interpretation.

ERIBERTO DI PAOLO:

Well...

RITA BLONDIN:

But if you have to decide on the evidence, we have to have the opportunity to present our evidence. To date, we have never been able to. And the Court of Appeal refers the case back, precisely, gives us rights so you could hear our ...

THE CHAIR:

Listen, according to the employer, rightly or wrongly, I will have to review the judgments,

in a decision I made, I think in 2000, when you were represented by Mr. Duggan, I, who, Mr. Duggan had claimed at that time, I don't know, I think 12 heads of damages ...

ERIBERTO DI PAOLO:

Fourteen.

THE CHAIR:

... 14, so I had decided that you were entitled only to the lost wages and lost benefits. It went to the Superior Court which found against me and said I had to open, allow, allow you to call evidence of the full range of all those damages and the Court of Appeal said, finally: "No...". At least, that is my interpretation: "No, the arbitrator was right to rule that the damages were limited to lost wages and benefits."

ERIBERTO DI PAOLO:

It was the Court of Appeal that said that? Can you point out where exactly?

THE CHAIR:

Well, it's ...

RONALD McROBIE:

But ...

THE CHAIR:

... it's submitted by counsel for the employer.

ERIBERTO DI PAOLO:

Well I have not seen a direct, a direct link from the Court of Appeal saying that...

THE CHAIR:

No, no, but what I want you to understand is that ...

ERIBERTO DI PAOLO:

... that's it, them, they said it, they said it, yes, Mr. Monet, he said it ...

THE CHAIR:

They say, wait, they say the opposite of what you are claiming. Maybe you're right, maybe the employer is right. But in any event, you aren't ready, today and tomorrow, to call evidence on damages other than lost wages and benefits. So if you want, I will make a decision on your respective positions on that question and a decision on the pecuniary losses suffered in terms of lost wages and benefits.

ERIBERTO DI PAOLO:

Can I say something?

THE CHAIR:

Yes, yes.

ERIBERTO DI PAOLO:

Even for that, we have to call evidence, the wages as damages, we have to present our evidence that it is not 15 months, 18 months, 22 months, what is it? What are the damages regarding wages? It's, it's what, our contract, what, and what did the Court of Appeal say about our contract? This is what they're giving it, the ball back to you and the answers (a), (b) and (c), I have it here, it's all in the decisions of nineteen ninety-nine (1999) and two thousand o three (2003).

I mean, you're going to do a decision on the monetary aspects of damages, but we have to find out, but what does it say? what do they say? what did they say about your contracts? what your contracts give, when do they start, when do they finish, when does it come into effect? Does it come into effect only after an arbitrator has

come with a decision or does it come into effect after article 2 kicks in, because you have no more collective agreement?

THE CHAIR:

Mr. Monet?

DOMINIQUE MONET:

Mr. Arbitrator, it is always the same thing when we argue and re-argue and argue and re-argue and argue and re-argue, it could go on for eternity, I mean, it isn't ...

First, there is a difference when a court sets aside a decision, when the Court sets aside a decision, the Court does not cancel out all the hearings that were held, the Court does not order that all the exhibits be withdrawn, the Court does not set that aside, this is a basic principle, Mr. Arbitrator, it is plainly not understood, so that is why Mr. De Paolo chooses to say that everything that was done in the past, that is against his interests, does not exist.

So Mr. Di Paolo reiterates that there was

No hearing on October 19, 2000, that the admissions were not made, that Ms. Blondin is telling us she was not represented, she has had several lawyers who represented her, we have it all in writing, more than once, and we are re-hearing it again today and if we continue like that we are set to re-hear it. We have already wasted the morning …

THE CHAIR:

No, but wait …

DOMINIQUE MONET:

… we are going to waste the entire afternoon …

THE CHAIR:

No, no, no, no …

DOMINIQUE MONET:

We are going to waste the entire day tomorrow and that will certainly not be …

THE CHAIR:

No, Mr. Monet, I made the following proposal to Mr. Di Paolo: that I rule on the pecuniary damages and benefits. Obviously, there is a position taken by Mr. Grenier who says that the evidence is not complete on that, but we will come back to that.

But will also rule on the contrary position that you and Mr. Di Paolo and Ms. Blondin have on what mandate the Court of Appeal has given me in its previous decisions. May I, is it asking me to reopen the entire question of damages other than pecuniary losses and benefits? Or not? I would like to rule on that, so in any event the session today could be oddly shortened.

PIERRE GRENIER:

Now, Mr. Arbitrator, to avoid any future problems, because you are rejecting the request by Mr. Di Paolo and Ms. Blondin to call evidence on damages other than those associated with the collective agreement, the agreements ...

THE CHAIR:

Well, I am not rejecting it definitively, I will have ...

PIERRE GRENIER:

No, no, I understand ...

THE CHAIR:

... to rule on it.

PIERRE GRENIER:

... you are rejecting it for the moment and you will rule on it and if you agree with them, ultimately you will allow them to call that evidence.

THE CHAIR:

Exactly.

PIERRE GRENIER:

Now that you are taking that position, to avoid problems in future, I think the tribunal, if Ms. Blondin and/or Mr. Di Paolo want to be heard specifically on the application of the collective agreement, the wages and benefits, if they want to be heard as witnesses and not parties presenting argument, I think you should hear them.

THE CHAIR:

No, well, that is what I asked Mr. Di Paolo and Ms. Blondin. You don't agree with the admission that Duggan made in 2000 on the amount of 60,000-something, for the period covered, you don't agree with that?

ERIBERTO DI PAOLO:

No.

RITA BLONDIN:

No.

THE CHAIR:

Are you able to testify, and we are talking about within that period, that the wages and benefits are higher than the amounts admitted by Duggan?

RITA BLONDIN:

In answer to questions (a), (b) and (c)?

THE CHAIR:

Yes.

PIERRE GRENIER:

Excuse me, perhaps to be more precise for Mr. Di Paolo and Ms. Blondin, we are not calling specific evidence on the final quantum here, we have an interest calculation to be doing ...

THE CHAIR:

No, no, no.

PIERRE GRENIER:

... et cetera.

THE CHAIR:

No, but I want to know whether there are ...

PIERRE GRENIER:

But for the period covered ...

ERIBERTO DI PAOLO:

What I ...

PIERRE GRENIER:

... what we submit is that there ...

THE CHAIR:

Is there evidence ...

PIERRE GRENIER:

... was a specific agreement ...

THE CHAIR:

... important evidence that Duggan neglected to consider when he admitted the $63,000 figure?

RONALD McROBIE:

Mr. Chair, I think that is exactly what I was saying in our last letter, they are being given more rights than if they were represented by counsel. It is totally unacceptable to be allowing them to do whatever they like before you because they do not have counsel, it was decided, so listen, you are in charge, obviously ...

THE CHAIR:

Subject to ...

RONALD McROBIE:

... of the procedure ...

THE CHAIR:

... subject to what is in the record, I imagine that that evidence should not take too long?

DOMINIQUE MONET:

But we may be surprised.

ERIBERTO DI PAOLO:

I stand maybe to be corrected, but I don't believe that I have to testify against an amount of money that Duggan said at the time was one sixty, whatever the amount was, that was taken away from you, you annulled the decision, it's scrap, so, like, why do we have to talk about that if it's been scrapped?

And it's like Maître Monet says: «Hey! not everything is annulled». Of course, he's going to take what was good between two thousand (2000) and two thousand o five (2005), but it was annulled. It, we go back to two (2) things the Court of Appeal said, nineteen ninety-nine (1999), two o three (2003).

THE CHAIR:

No, this isn't the same problem now. No, what

I'm asking you is that in, at this hearing of, in two thousand (2000), Duggan made an admission that you had lost one hundred and sixty thousand dollars (160 000$). So what I'm asking you is that, and there's an objection that you should not go further, but anyway, I'll take your testimony under advisement, under reserve, do you have something to add to the amount that...

ERIBERTO DI PAOLO:

I have the full amount...

THE CHAIR:

... that Duggan...

ERIBERTO DI PAOLO:

Yes, I have the full amount, because I'm backed up by what you said, Mr Arbitrator. If I may be permitted...

THE CHAIR:

Where is it the full amount?

ERIBERTO DI PAOLO:

Well, not in quantum, the full amount, I didn't say you gave an amount, but you said, this is what you said, so, then we're taking this from the Court of Appeal, this is what you said, so, if that's what it is, it's not their amount, it says the arbitral award, the Arbitrator accepted

the proposals made by the Union and the eleven (11) employees according to which the two (2) agreements signed in eighty-two (82) and eighty-seven (87) had survived the expiration of the collective agreement in nineteen ninety-six (1996) and the declaration of a lockout.

You have to, you, what you said there is that the collective agreement ended, but the annexes survived...

THE CHAIR:

No, no, I know what I said, I wrote.

ERIBERTO DI PAOLO:

Well, so, then what it's, what I'm trying to say is that these decisions, they talk about no loss between the end of a collective agreement and the beginning of another one, because you have a mechanism that's supposed to work, if you apply it, there's quite a few articles that say: «You're protected.»

And when we were in front of you, in two thousand o four (2004), and then you gave your decision in two thousand o five (2005), you said: «No». So we went to the higher Court and we got a decision

from the Court of Appeal that sends it back to you...

THE CHAIR:

And the Court of Appeal said that I was wrong and I was wrong, o.k.?

ERIBERTO DI PAOLO:

O.k. So...

THE CHAIR:

But so, today, I have to hear you about the damages owed to you and your confrères...

ERIBERTO DI PAOLO:

So...

THE CHAIR:

... so, Mr Grenier and Maître McRobie and Maître Monet said everything was, they argued that everything in their case is closed, so...

ERIBERTO DI PAOLO:

Not...

THE CHAIR:

I will repeat myself...

ERIBERTO DI PAOLO:

... not for us, it's not.

THE CHAIR:

I know. I will repeat myself. According to you, the Court of Appeal told me that I had to

consider other damages than lost salaries and lost social benefits. According to the opponents, according to Maître McRobie and Maître Monet, this question was, has been already decided, so, I will have to settle about who is right and who is wrong.

ERIBERTO DI PAOLO:

Well, you settle it, but...

THE CHAIR:

O.k.? But I will also have to decide about the damages due to you and your confrères, the lost wages and lost social benefits. According to The Gazette, this thing is already, this question is already settled, has already been settled by Maître Duggan's admission in October two thousand (2000).

ERIBERTO DI PAOLO:

October nineteenth (19th), two thousand (2000).

THE CHAIR:

Yes.

ERIBERTO DI PAOLO:

I disagree that you can hold somebody responsible for that admission back then when we never got the money for it. We were told: «You get no salary», so, what was done then doesn't count,

because, no, because...

RONALD McROBIE:

It was a calculation that was done...

ERIBERTO DI PAOLO:

... because you took it away.

RONALD McROBIE:

... it was very clear, it was a mathematical

ERIBERTO DI PAOLO:

Because you...

RONALD McROBIE:

... only if...

ERIBERTO DI PAOLO:

... took it away from us...

RONALD McROBIE:

... anything...

ERIBERTO DI PAOLO:

... and now that you took it away and the years went by and the Court of Appeal, in nineteen, and the Court of Appeal in two thousand o eight (2008)...

THE CHAIR:

And the Court of Appeal said that I was wrong.

ERIBERTO DI PAOLO:

Not, I'm pointing to another one now. They said

in paragraph 31, they said that by the 2003 decision, the 2000 decision became final, **you got my amounts, those are the amounts, I'm not going to bring you back amounts that you said: «No, I'm not going to give it to you.»**

DOMINIQUE MONET:

But that is precisely it, Mr. Adjudicator, if I may? Once again, Mr. Di Paolo, he thinks you ordered The Gazette to pay the amounts in October 2000, when you, it was simply decided, perhaps because it was thought that it would expedite matters, (a) what the period is, (b) what the amounts are, all that work was done.

ERIBERTO DI PAOLO:

No way.

DOMINIQUE MONET:

... so Mr. Di Paolo thinks that you made an order against The Gazette, he says: **«You awarded us that amount of money, it was never paid». You never awarded that amount of money.** So it's obvious, as I just said, that this is going to continue, this, that kind of argument, it is going

to continue tomorrow and it may continue this afternoon, Mr. Di Paolo is still going to believe that, what he believes, so it is not possible to get out of this.

THE CHAIR:

No, no, but what I am offering Mr. Di Paolo is to ...

DOMINIQUE MONET:

But ...

THE CHAIR:

... to rule on that question.

ERIBERTO DI PAOLO:

The 2003 decision ...

DOMINIQUE MONET:

We don't, Mr. Chair, we don't have to listen to Mr. Di Paolo all day.

THE CHAIR:

No, no, no, I am trying ...

DOMINIQUE MONET:

You know, when he, when Mr. Di ...

THE CHAIR:

I am trying to shorten ...

DOMINIQUE MONET:

... I was there when ...

THE CHAIR:

... I am trying to hear argument.

DOMINIQUE MONET:

We are too. When, I was there when Mr. Di Paolo and Ms. Blondin went to the Court of Appeal, you know, they got five minutes, so it was not, in any event ...

RITA BLONDIN:

We got five minutes in the Court of Appeal?

DOMINIQUE MONET:

Ten minutes.

RITA BLONDIN:

We have the tape recording here.

THE CHAIR:

No, no, no, we are not going ...

DOMINIQUE MONET:

Well, five to ten minutes, Ms. Blondin, you had in the Court of Appeal ...

ERIBERTO DI PAOLO:

Another case ...

DOMINIQUE MONET:

... I was there.

ERIBERTO DI PAOLO:

... while we're at it, like, you know, I don't know what I'm talking about, eh? This is the CD

from the Court of Appeal...

THE CHAIR:

Yes, yes.

ERIBERTO DI PAOLO:

... on December tenth (10th) and there is, the voice is Judge Pelletier and he says that...: [TRANSLATION] "We simply referred the matter back to the arbitrator." He never said that he had limited damages as Mr. Monet is saying.

I have it right here, would you like a copy, sir?

THE CHAIR:

No, no, thank you. Listen, I think I have, I have enough to decide. I have enough to decide, particularly from the opposing views between you regarding what interpretation to give to the various decisions of the Court of Appeal, to know whether I have to hear you on damages other than lost wages and lost benefits and decide on the wages and benefits you were deprived of.

If I find for you on the damages other than lost wages and benefits, we will agree on another date or

other dates to hear you on the question, here, obviously, not just you, other witnesses and your actuary.

ERIBERTO DI PAOLO:

You say that you heard enough, but the questions, the answers to questions (a), (b) and (c) haven't been addressed, I have it here, I mean...

RONALD McROBIE:

Well, we're going to make the argument...

ERIBERTO DI PAOLO:

... I have a copy...

RONALD McROBIE:

... on that, that's coming next, that's what we're going to argue, that's the point of the hearing today and tomorrow.

THE CHAIR:

Okay, so listen, it's noon, we can suspend for lunch and resume at one o'clock?

PIERRE GRENIER:

At what time?

THE CHAIR:

One o'clock? Is that suitable? So at that time, Mr. Grenier, you will be presenting argument?

PIERRE GRENIER:

Yes.

THE CHAIR:

And you will be replying?

RONALD McROBIE:

Well, I don't know whether, they are going to reply to both, I presume?

THE CHAIR:

I would really like you to reply ...

RONALD McROBIE:

Right, I will reply.

HEARING SUSPENDED

HEARING RESUMED

THE CHAIR:

Yes?

PIERRE GRENIER:

But in fact, I am going to divide my argument ... Well, a preliminary remark before beginning, we already argued the case before you, in October 2004, if I recall correctly, we had started in August as well, so I refer you, of course, to the argument we submitted at that time.

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

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

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

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

the meaning of the decision you had made.

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

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

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

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

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

"But more fundamentally, the doctrine of abuse of contractual rights today serves the important social as well as economic function of a necessary control over the exercise of contractual rights. While the doctrine may represent a departure from the absolutist approach of previous decades, consecrated in the well-known maxim "*la volonté des parties fait loi*" (the intent of the parties is the governing factor), it inserts itself into today's trend towards a just and fair approach to rights and obligations (by way of example of this trend: consumer protection legislation, ...)." Et cetera.

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

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

"This theory holds that an abuse of rights occurs when the right is not exercised in a reasonable manner or in a manner consistent with the conduct of a prudent and diligent individual. This makes it unnecessary either to determine whether the user of the right acts in good faith or to examine the social function of the right in question. In Quebec" ...

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

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

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

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

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

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

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

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

and I stress what follows:

"... for purposes other than those envisaged by the contracting parties constitutes an abuse of contractual rights. In accordance with the evolution of the Quebec doctrine and jurisprudence on this issue, the time has come to assert that malice or the absence of good faith should no longer be the exclusive criteria to assess whether a contractual right has been abused. A review of both the theoretical underpinnings of recent trends in civil liability and the current state of Quebec doctrine and jurisprudence leads to the inevitable conclusion that there can no longer be a debate in Quebec law that the less stringent standard

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

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

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

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

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

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

working conditions available to that service...»

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

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

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

binding arbitration.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the lock-out.

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

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

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

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

lock out" during that period.

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

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

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

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

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

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

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

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

the mathematics of the amount of wages.

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

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

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

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

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

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

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

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

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

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

I would refer you to the specific pages of

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

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

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

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

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

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

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

The court explained:

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

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

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

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

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

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

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

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

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

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

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

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

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

That concludes my representations, subject to

other points that may be raised by the employer.

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

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

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

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

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

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

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

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

of the damages for wages.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Why is that surprising? Because before

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

was no causal connection between the prolonging and fault.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As well, S-1, the collective agreement signed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

arbitration."

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

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

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

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

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

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

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

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

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

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

spring.

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

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

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

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

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

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

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

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

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

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

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

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

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

1996.

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

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

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

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

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

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

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

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

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

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

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

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

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

THE CHAIR:

Ten minutes.

HEARING SUSPENDED

HEARING RESUMED

RONALD McROBIE:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

accepted by the parties before 2002 as actually happened.

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

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

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

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

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

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

within the meaning of (a) exists."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

But what can the union cite

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

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

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

OFF THE RECORD DISCUSSION

RONALD McROBIE:

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

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

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

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

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

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

OFF THE RECORD DISCUSSION

THE CHAIR:

We will suspend for five minutes.

RONALD McROBIE:

Okay, just before, I had ...

THE CHAIR:

Ah, okay.

RONALD McROBIE:

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

PIERRE GRENIER:

I understand that it is not a ...

RONALD McROBIE:

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

PIERRE GRENIER:

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

RONALD McROBIE:

It's my argument.

THE CHAIR:

So five minutes for the coffee break.

HEARING SUSPENDED

HEARING RESUMED

THE CHAIR:

Mr. Monet?

DOMINIQUE MONET:

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

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

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

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

And I would stress this.

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

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

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

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

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

compensation than what is provided in the agreements.

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

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

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

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

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

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

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

"The arbitrators shall settle the dispute ..."

And that is arbitration under an arbitration clause ...

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

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

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

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

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

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

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

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

somewhat by the strategic positioning.

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

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

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

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

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

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

Another employee told us that he stopped,

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

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

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

E-81, page 49.

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

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

mitigate damages arose.

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

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

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

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

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

the failure to mitigate.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that happened in Snyder, but ultimately ...

THE CHAIR:

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

DOMINIQUE MONET:

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

THE CHAIR:

He had even sued The Gazette.

DOMINIQUE MONET:

He had sued The Gazette. Yes, yes.

THE CHAIR:

Right.

DOMINIQUE MONET:

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

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

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

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

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

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

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

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

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

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

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

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

case.

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

THE CHAIR:

Excuse me ...

DOMINIQUE MONET:

... a big clip.

THE CHAIR:

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

OFF THE RECORD DISCUSSION

DOMINIQUE MONET:

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

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

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

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

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

RITA BLONDIN:

No.

ERIBERTO DI PAOLO:

... to divide it.

RONALD McROBIE:

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

RITA BLONDIN:

No, each.

RONALD McROBIE:

Each? So, three hours?

RITA BLONDIN:

If not more.

ERIBERTO DI PAOLO:

Max., well...

THE CHAIR:

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

RITA BLONDIN:

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

ERIBERTO DI PAOLO:

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

THE CHAIR:

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

THE CHAIR:

Listen, it's four fifteen ...

PIERRE GRENIER:

Mr. Di Paolo needs how much time?

THE CHAIR:

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

ERIBERTO DI PAOLO:

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

THE CHAIR:

Fine, so we will be back tomorrow morning.

ERIBERTO DI PAOLO:

And also Ms. Blondin.

RITA BLONDIN:

Me too.

THE CHAIR:

There will be no repetition?

ERIBERTO DI PAOLO:

No, we have tried to ...

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

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

THE CHAIR:

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

DOMINIQUE MONET:

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

THE CHAIR:

Ah, yes of course, that's right.

DOMINIQUE MONET:

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

THE CHAIR:

Right.

DOMINIQUE MONET:

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

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

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

Yes.

RONALD McROBIE:

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

ERIBERTO DI PAOLO:

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

RONALD McROBIE:

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

ERIBERTO DI PAOLO:

No, tomorrow, we will finish.

THE CHAIR:

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

HEARING ADJOURNED

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

As provided by law.

And I have signed,

B.B. [signed]

B.P. _____

Certified true translation

K E Barnard

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

Ottawa, Ontario, Canada