COUR D'APPEL

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-013709-035
(500-11-017543-022)

DATE : LE 11 MARS 2004

CORAM: LES HONORABLES MARC BEAUREGARD J.C.A.
JACQUES DELISLE J.C.A.
ALLAN R. HILTON J.C.A.

ACIER LEROUX INC.
APPELANTE -- Défenderesse intimée
et
RUSSEL METALS INC.
APPELANTE EN REPRISE D'INSTANCE pour ACIER LEROUX INC.

c.

DENIS Y. TREMBLAY
INTIMÉ – Demandeur requérant

et
3652581 CANADA INC.
et
3652599 CANADA INC.
et
3652661 CANADA INC.
et
GESTION GILLES LEROUX INC.
et
GILLES D. LEROUX
et
SYLVAIN LEROUX
et
SERGE BERGERON
et
CATHERINE FRIGON
et

LE GROUPE CANAM MANAC INC.
et
MARCEL E. DUTIL
MIS EN CAUSE -- Défendeurs intimés

et
POUTRELLES DELTA INC. / DELTA JOISTS INC.
et
GILLES LACHANCE
et
RÉNALD FILLION
et
DELTA STEEL JOIST INC.
et
VINCENT R. FERLISI
MIS EN CAUSE **--** Mis en cause

ARRÊT

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[1] LA COUR; -Statuant sur l'appel d'un jugement rendu le 14 juillet 2003 par la Cour supérieure, district de Montréal (l'honorable Denis Lévesque), qui a rejeté la requête de l'appelante en exception déclinatoire;

[2] Après avoir étudié le dossier, entendu les parties et délibéré;

[3] Pour les motifs du juge Allan R. Hilton, auxquels souscrivent le juge Marc Beauregard et le juge Jacques Delisle;

[4] **REJETTE** l'appel avec dépens.

MARC BEAUREGARD J.C.A

JACQUES DELISLE J.C.A

ALLAN R. HILTON J.C.A

Me George J. Pollack
Me Mélanie Joly
DAVIES WARD PHILLIPS & VINEBERG
Pour les appelantes et les mis en cause 3652581 CANADA INC. et 3652599 CANADA INC.

Me Chantal Perreault
Me Guy Paquette
PAQUETTE GADLER
Pour l'intimé

Me Guy Turner
LANGLOIS KRONSTRÖM DESJARDINS
Pour les mis en cause GESTION GILLES LEROUX INC., GILLES D. LEROUX, SYLVAIN LEROUX, SERGE BERGERON et CATHERINE FRIGON

Date d’audience : 14 novembre 2003

REASONS OF HILTON, J.A.

INTRODUCTION

[5] The principal issue in this appeal is whether an arbitration clause in a shareholders' agreement has the effect of ousting the jurisdiction of the Superior Court to decide a multi-facetted recourse brought by a minority shareholder seeking injunctive relief and damages. The claim is directed principally against the majority shareholder, but it also seeks a wide spectrum of relief against other shareholders and parties. Most of the claim has its source in the oppression remedy found in section 241 of the ***Canada Business Corporations Act (the CBCA)***,[1] while other allegations and conclusions relate to the occurrence and consequences of unfair competition.[2]

[6] An alternative argument urges the Court to hold that the allegations and conclusions on the subject of unfair competition are within the exclusive purview of the Competition Tribunal[3] pursuant to the ***Competition Act***.[4]

[7] The issue arises in the context of a declinatory exception brought by the majority shareholder, which was dismissed by the Superior Court.[5]

THE FACTS AS ALLEGED IN THE PROCEEDINGS

[8] The ***CBCA*** company which is the subject of the dispute is Poutrelles Delta Inc./Delta Joists Inc. (Poutrelles Delta). Its principal business is the conception, manufacture and sale of steel joists destined for the construction of commercial and industrial businesses in the Canadian market of Ontario, Quebec and the Maritime provinces, and in the American market of the six New England states plus the states of New York, New Jersey, Maryland and Pennsylvania.

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1 R.S.C. 1985, c. C-44.

2 On September 29, 2003 the respondent obtained permission under section 239 of the ***CBCA*** from the judge of the Superior Court to institute a derivative action in the name of the company against the defendants to bring an end to what he alleges is unfair competition against it. That judgment has not been appealed.

3 ***Competition Tribunal Act***, R.S.C. 1985 (2nd supp.), c. 19.

4 R.S.C. 1985, c. C-34.

5 Declinatory exceptions were also asserted by two other parties that are not shareholders but against whom relief is being sought by the minority shareholder. These declinatory exceptions were also dismissed by the same judgment under appeal, and they are the subject of separate appeals that are being decided today in case numbers 500-09-013708-037 and 500-09-013710-033. In a separate judgment rendered the same day, the judge of the Superior Court dismissed a motion by a party that is not a shareholder seeking to compel the respondent to opt between different recourses pursuant to Article 168(4) ***C.C.P.*** That judgment has not been appealed.

[9] The plaintiff in the Superior Court and respondent in this Court is Denis Tremblay, who has been in the employ of Poutrelles Delta as its director general since 1995. In June of 1996, Mr. Tremblay acquired 11.11% of the Class A shares issued by the company, which are voting and participating common shares.

[10] When the judgment of the Superior Court was rendered, the other holders of Class A shares were the appellant Acier Leroux Inc. (Acier Leroux) in the proportion of 66.66%, which it acquired on August 1, 1997, Gilles Lachance in the proportion of 11.11%, and Rénald Filion in the proportion of 11.11%. Acier Leroux also holds 200,000 Class B shares, which are non-voting and non-participating preferred shares.

[11] Subsequent to the hearing of the appeal in this Court, Acier Leroux was dissolved, and pursuant to an agreement filed with an amended affidavit in continuance of suit by Russel Metals Inc., Acier Leroux transferred all of its assets to Russel Metals, which has assumed all of its liabilities, contingent or otherwise. Since Acier Leroux was the party involved in the events giving rise to the litigation, I will continue to refer to it instead of to Russel Metals, and to the facts as they existed at the time of the hearing in this Court.

[12] In addition to Mr. Tremblay, the directors of Poutrelles Delta are the defendants Gilles D. Leroux, Sylvain Leroux, Serge Bergeron and Catherine Frigon, all of whom are representatives of Acier Leroux, and the mis en cause Gilles Lachance and Rénald Fillion.

[13] Acier Leroux is the largest distributor of steel in Eastern Canada and an important participant in the American market. Its business consists of the purchase, storage, transformation and distribution of some 3000 steel products to more than 8000 customers in various sectors of activity in North America. Acier Leroux' directors now include the defendants Gilles Leroux and Marcel E. Dutil, who Acier Leroux acknowledges are related directors, and five others who are not related, the latter expression meaning directors who are independent of its management and free of any conflicts of interest.

[14] Gilles Leroux is the chief executive officer of Acier Leroux and its majority shareholder.

[15] Mr. Dutil is a principal shareholder of the defendant Le Groupe Canam Manac Inc., which is effectively the only competitor of Poutrelles Delta in the markets it serves. In essence, the fact that Canam Manac became a significant although not majority shareholder of Acier Leroux in November of 1999, and that Mr. Dutil sits on its board of directors, is a major source of concern for Mr. Tremblay in his multiple capacities as an employee, shareholder and director of Poutrelles Delta.

[16] From the inception of its business activities in March of 1994 until the end of its sixth financial year in October of 1999, at which time Mr. Tremblay contends the miseries began that led to the initiation of his proceedings, Poutrelles Delta experienced impressive increases in its business income, growing from $3,722,883 for the initial 11 month period to $23,102,249. In subsequent years, according to Mr. Tremblay, its business income has decreased as a direct result of the abusive conduct and deliberate

manoeuvres of the various defendants, which he alleges have as their ultimate objective the eventual elimination of Poutrelles Delta as a competitor of Canam Manac.

[17] On August 1, 1997, when Acier Leroux became a shareholder of Poutrelles Delta, but before the participation of Canam Manac in the shareholdings of Acier Leroux, the shareholders of Poutrelles Delta[6] entered into a shareholders' agreement in order, according to its preamble: "*(i) de réglementer leur détention des Actions Ordinaires, (ii) d'assurer une direction stable et une expansion ordonnée des affaires de (Poutrelles Delta), et (iii) de prévenir tout différend entre eux relativement à ces questions*".

[18] In its declinatory exception, Acier Leroux describes Mr. Tremblay's reproaches against it in his proceeding in the following manner:

- (i) not having respected the shareholders' agreement and in particular clause 7.1 which operated as a bar to the sale or other transfer of shares in Poutrelles Delta to Canam Manac until August 1, 2001;
- (ii) in or around November of 1999, having discussed a supposed deal with Mr. Dutil, according to which Acier Leroux undertook to sell its shares in Poutrelles Delta to Canam Manac in contravention of the shareholders' agreement;
- (iii) despite having represented at a board of directors meeting of Poutrelles Delta that it was abandoning its intention to sell its shares in Poutrelles Delta to Canam Manac, having again entered into such discussions on or about August 7, 2001;
- (iv) having refused to furnish a new draft shareholders' agreement or provide its comments on a draft prepared by Mr. Tremblay;
- (v) on or about November 3, 1999, having reached an agreement with Canam Manac to create a new entity to negotiate the purchase of all of their steel products for it and Canam Manac, and, for Canam Manac to have acquired shares in the capital stock of Acier Leroux, the whole in contravention of the clause in the shareholders' agreement prohibiting the sale or transfer of shares in Poutrelles Delta to Canam Manac;
- (vi) having refused to discuss the foregoing transaction at a special shareholders' meeting of Poutrelles Delta on January 7, 2000;
- (vii) having demanded that Mr. Tremblay reimburse two loans totalling $36,000;
- (viii) having refused Mr. Tremblay's offer of May 10, 2000 to acquire its shares in Poutrelles Delta, and having made an unsatisfactory counter-offer to Mr. Tremblay;

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[6] Acier Leroux, Gilles Lachance, Rénald Filion and Denis Tremblay were the signatories as shareholders, while Poutrelles Delta and 2994283 Canada Inc., of which Gilles Leroux was its president, signed as intervenants.

- (ix) having given access to the financial statements of Poutrelles Delta to Mr. Dutil in his capacity as a director of Acier Leroux;
- (x) having replaced Gilles Lachance with Gilles Leroux as chairman of the board of directors of Poutrelles Delta;
- (xi) having attempted to obtain the price list of Poutrelles Delta for certain of its products;
- (xii) having asked Poutrelles Delta to proceed to the transfer of funds to it for its benefit;
- (xiii) having presented what Mr. Tremblay describes as a ridiculously low offer to him and two other shareholders, Gilles Lachance and Rénald Filion, for the purchase of their shares in Poutrelles Delta;
- (xiv) having harassed Mr. Tremblay with a view to appropriating to it his shares in Poutrelles Delta;
- (xv) having engaged in unfair competition with Poutrelles Delta.

[19] Acier Leroux goes on to identify the various provisions in the shareholders' agreement that it contends call for an interpretation in light of Mr. Tremblay's allegations:

- (i) representation on Poutrelles Delta's board of directors (clause 3);
- (ii) issuance and distribution of shares in Poutrelles Delta (clause 4);
- (iii) the obligation of a shareholder to submit an offer to purchase of its shares in Poutrelles Delta received from a third party to the other shareholders (clause 5);
- (iv) the obligation of a shareholder to offer its share in Poutrelles Delta to the other shareholders if it wishes to dispose of them in whole or in part (clause 6);
- (v) the prohibition to sell or transfer shares in Poutrelles Delta to Canam Manac or a person related to it for a period of four years (clause 7);
- (vi) the means to establish to vale of shares for purposes of transfer pursuant to the shareholders' agreement (clause 8);
- (vii) the means to effect payment for the transfer of shares (clause 9);
- (viii) the purchase of its common shares by Poutrelles Delta (clause 10);
- (ix) the obligation of a shareholder to offer its shares to the other shareholders in the event of its cessation of business, as defined (clause 11);
- (x) the dismissal for cause of Messrs. Tremblay, Lachance and Fillion (clause 12);
- (xi) obligations of a shareholder to maintain control of a moral person that acquires its shares in Poutrelles Delta (clause 14);

- (xii) the obligations of Messrs. Tremblay, Lachance and Fillion not to compete with Poutrelles Delta as long as they remain shareholders of Poutrelles Delta (paragraph 15);

- (xiii) the obligation of Messrs. Tremblay, Lachance and Fillion not to solict clients of Poutrelles Delta for a period of five years after the cessation of their status as shareholders (clause 16).

[20] The arbitration clause on which Acier Leroux relies in support of its declinatory exception reads as follows:

> ARTICLE 24 -- ARBITRAGE
>
> 24.1 Tout différend, mésentente ou réclamation entre les parties portant sur les dispositions de ce contrat, leur interprétation ou leur application ou sur le défaut d'une partie aux présentes de respecter ces dispositions doit être soumis à l'arbitrage conformément aux dispositions applicables du Code civil du Québec et du Code de procédure civile du Québec et ce, à l'exclusion de tout tribunal et de toute cour. Nonobstant l'article 941 du Code de procédure civile du Québec, il n'y aura qu'un seul arbitre qui devra être choisi d'un commun accord entre les Vendeurs et l'Acheteur dans les dix jours du fait ou de l'événement qui requiert l'utilisation de l'arbitrage. À défaut d'entente entre les parties, la nomination de l'arbitre devra être effectuée par un juge de la cour supérieur du district judiciaire de Québec, à la requête de l'une des parties. Toute décision ainsi rendue est finale et sans appel. (Transcrit tel quel)

[21] In examining the applicability of the arbitration clause to Mr. Tremblay's allegations and the provisions of the shareholders' agreement Acier Leroux invokes in its declinatory exception, account must be taken of the substantive conclusions for permanent relief against Acier Leroux and others in Mr. Tremblay's action. These are:

- i) an order that Acier Leroux offer to sell all of its common shares in Poutrelles Delta in equal shares to Messrs. Tremblay, Lachance and Fillion for a price equal to the book value of the shares on November 3, 1999 with a right of accession if favour of any of the potential buyers who do not wish to purchase the shares, the whole within 60 of the judgment to be rendered becoming final;

- (ii) an order that Acier Leroux and other named defendants stop their abusive corporative and disciplinary measures or other gestures of a similar nature against Mr. Tremblay;

- (iii) an order that Acier Leroux and other named defendants not change or amend the working conditions of Mr. Tremblay, or relocate him or do any thing else or pose any other act relative to Mr. Tremblay's employment;

- (iv) an order that Acier Leroux and other named defendants cease their unfair competition against Poutrelles Delta;

- (v) a declaration disqualifying Gilles D. Leroux as chairman of the board of Poutrelles Delta and ordering that Gilles Lachance replace him;

- (vi) a declaration invalidating the resolution of Poutrelles Delta replacing Mr. Tremblay as Poutrelles Delta's representatives on the board of directors of its American subsidiary Delta Steel Joist Inc. by Gilles Leroux and Catherine Frigon;

- (vii) an order that Catherine Frigon return the minute book of Poutrelles Delta to the latter's head office within a specified delay;

- (viii) an order preventing Mr. Dutil from consulting the financial statements or any other information of any nature whatsoever concerning Poutrelles Delta and Delta Steel Joists;

- (ix) an order preventing Mr. Dutil or Canam Manac from soliciting or hiring any past or present employee of Poutrelles Delta or Delta Steel Joist for five years from the date of the final judgment;

- (x) an order that Acier Leroux and other named defendants not pose any act contrary to the financial, operational or corporate interests of Poutrelles Delta, and reserving to Mr. Tremblay the right to ask the Court to bring an end to any conduct that violates the foregoing order;

- (xi) a declaration that the defendants Gilles Leroux, Sylvain Leroux, Serge Bergeron and Catherine Frigon are disqualified from acting as directors of Poutrelles Delta and Delta Steel Joists and removing them from such position, and ordering them not to disclose any financial information or information of any nature about Poutrelles Delta and Delta Steel Joists to anyone.

[22] It will be seen that most of the conclusions are either directly or indirectly related to Mr. Tremblay's allegations relating to conflict of interest and unfair competition which he seeks to have redressed by various means involving not only Acier Leroux but other directors of Poutrelles Delta named by Acier Leroux, as well as Canam Manac and Mr. Dutil.

[23] In addition to permanent injunctive relief, Mr. Tremblay's action seeks a joint and several condemnation of $500,000 against Acier Leroux, Canam Manac, Gilles Leroux and Marcel Dutil as moral damages for stress, humiliation, damage to his reputation, troubles and inconveniences, as well as a joint and several condemnation of $1,000,000 against the same defendants as exemplary and punitive damages for abuse of right, wilful oppression and bad faith.[7]

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[7] As mentioned in footnote 2, Mr. Tremblay's claim in his action under section 239 of the ***CBCA*** for permission to initiate a derivative action in the name of Poutrelles Delta against the defendants to bring an end to alleged unfair competition has already been granted, and that judgment has not been appealed.

THE JUDGMENT OF THE SUPERIOR COURT AND THE CONTENTIONS OF THE PARTIES

[24] In dismissing the declinatory exception, the judge of the Superior Court noted that Mr. Tremblay's action alleged both contractual and extra-contractual faults, and that while in theory a civil action and arbitration proceedings could both proceed, it was more practical that everything be heard in the Superior Court. He also found that the allegations relating to unfair competition were not within the exclusive purview of the Competition Tribunal under the terms of the ***Competition Act***.[8]

[25] In defence of its decision to invoke the jurisdiction of the Superior Court rather than to have recourse to arbitration, Mr. Tremblay argues first that his oppression remedy, being one of public order, is not subject to conventional arbitration, and also submits that:

- the arbitration clause is limited in scope to disputes bearing on the provisions of the shareholders' agreement, their interpretation or their application, or the default of one of the parties to respect its terms, and is not a free-standing clause involving any disputes between shareholders;
- the essence of his claim relates to unfair competition, which is not exclusively based on a breach of the shareholders' agreement;
- that in reality Acier Leroux is attempting to relate all of his claim to a breach of the provision in the shareholders' agreement precluding a sale or transfer of shares in Poutrelles Delta to Canam Manac or a related person, a clause which he now acknowledges has not been breached since Canam Manac is not a shareholder in Poutrelles Delta, and the effect of which said clause in any event had expired when Canam Manac obtained shares in Acier Leroux;
- the result of the foregoing is that there is nothing to submit to an arbitrator relating to a supposed breach of the now expired prohibition;
- the oppressive conduct alleged in the action rests in the main on the breach of directors' fiduciary duties, breach of the overarching duty of good faith and unfair competition, all of which is unrelated to what the arbitration clause would require him to submit to arbitration.

[26] He also places considerable reliance on the judgment of this Court in ***Camirand v. Rossi***[9] in which Fish, J.A., as he then was, concluded that a particular arbitration clause in a shareholders' agreement did not amount to an explicit or implicit renunciation by any of the parties to apply to the Superior Court under section 241 of the ***CBCA*** for an oppression remedy against other shareholders.

[27] Acier Leroux disputes the applicability of the judgment in ***Camirand*** to the circumstances of this case inasmuch as counsel who had brought the declinatory exception there conceded that the arbitrator lacked competence to consider and resolve

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8 ***Supra***, n. 4.

9 [2003] R.J.Q. 1081 (C.A.). Leave to appeal to the Supreme Court of Canada refused on October 9, 2003, case number 29810 (McLachlin, C.J., Bastarache and Deschamps, JJ.).

the issues that were at the heart of that dispute. Acier Leroux takes the position that the text of Clause 24 cited in paragraph [20] does give an arbitrator who would be named in accordance with its terms the power to grant all of the injunctive orders and damages sought by Mr. Tremblay in the Superior Court.

[28] Acier Leroux further argues that Mr. Tremblay has not identified any disadvantage to him of the arbitration process that he agreed to establish in the event of a dispute, that the arbitration provisions of the ***Civil Code of Quebec*** and the ***Code of Civil Procedure*** provide adequate procedural safeguards, that the presence of defendant parties who are not shareholders is not a basis to refuse arbitration, and that public order does not preclude an arbitrator from entertaining a claim such as that of Mr. Tremblay.

ANALYSIS AND DISCUSSION

A) The arbitration clause

[29] In light of the conclusion at which I have arrived, it is not necessary to consider all of the arguments advanced by Acier Leroux. Although I consider that an oppression remedy can be made the subject of conventional arbitration in a shareholders' agreement, I am nevertheless of the opinion that Acier Leroux has failed to demonstrate that Mr. Tremblay's claim is properly one that is arbitrable under the provisions of the arbitration clause that governs the relationship of Poutrelle Delta's shareholders.

[30] Despite doctrinal support for the notion that the oppression remedy under the ***CBCA*** is one of public order since it invokes concepts of fraud and bad faith,[10] I believe that the evolution of the case-law demonstrates that in principle the parties to a shareholders' agreement can fashion an arbitration clause that would enable an arbitrator to adjudicate an oppression remedy. That conclusion is implicit from this Court's judgment in ***Camirand***, and flows as well from the elaborate judgment of LeBel, J. in ***Desputeaux v. Éditions Chouette Inc.***[11] in which he noted the virtually unfettered autonomy of parties in deciding what they may submit to arbitration, and which also emphasized the liberal and generous interpretation that courts should give to arbitration clauses.[12]

[31] On the latter subject, the comments of Rayle, J., as she then was, in ***Bridgeport International Canada Inc. v. Ericsson Canada Inc.***[13] bear repetition:

> [8] Since the 1986 modifications to the Civil Code of Lower Canada, arbitration agreements must no longer be treated as constituting an exception to the principle of unconditional access to the judicial process. As pointed out by

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10 Martel et Martel, *La Compagnie au Québec : Les aspects juridiques*, Vol. 1, Montréal, Éditons Wilson & Lafleur, 2002, aux pp. 31-99, 31-100 et 34-41, Martel, P., «L'incidence des conventions entre actionnaires sur les recours» dans *Développements récents en droit commercial*, (1991), Cowansville, Les Éditions Yvon Blais Inc., 1991, aux pp. 6 à 28.

11 [2003] 1 S.C.R. 178.

12 ***Ibid***, at pp. 198 and 201.

13 J.E. 2001-1233 (S.C.), appeal settled out of court (C.A.M. 500-09-011059-011) on October 29, 2001.

> Professor John E.C. Brierley, arbitration agreements now constitute a complete alternative means to dispute-solving by the courts.
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> [9] These agreements should not therefore be perceived as limiting the rights of the parties. They simply identify, **when clearly drafted**, a preferred way by which these rights may be exercised.
>
> [10] They should, therefore, be interpreted in a liberal way.
>
> (Emphasis added)

[32] ***Desputeaux*** was a case from Quebec that concluded that a provision of the ***Copyright Act***[14] did not preclude an arbitrator from ruling on a disputed question of copyright between an artist and a promoter such that the arbitration award should not be annulled. LeBel, J. analyzed the approach courts should take in determining whether a particular subject matter was one of public order which, consistent with article 2639 ***C.C.Q.***, would preclude it from being arbitrable, despite the trend in legislative enactments and the case law that offers encouragement to the use of civil and commercial arbitration as a complete dispute resolution process. He noted that the mechanism established under Quebec law had as an objective "the preservation of certain values that are considered to be fundamental in a legal system, despite the freedom that the parties are given in determining the methods of resolution of their disputes".[15] He went on to observe that while "the shifting or developing nature of the concept of public order sometimes makes it extremely difficult to arrive at a precise or exhaustive definition of what it covers", nevertheless, "the development and application of the concept of public order allows for a considerable amount of judicial discretion in defining the fundamental values and principles of a legal system".[16]

[33] LeBel, J. emphasized that the purpose of paragraph 2 of article 2639 ***C.C.Q.*** "was clearly to put an end to an earlier tendency by the courts to exclude any matter relating to public order from arbitration", and that with the exception of what he described as "certain fundamental matters, relating, for example, strictly to the status of persons, as was found by the Quebec Superior Court to be the case in ***Mousseau***,[17] an arbitrator may dispose of questions relating to rules of public order, since they may be the subject of the arbitration agreement".[18]

[34] In discussing the process to ascertain the correct definition of the limit of the concept of public order, LeBel, J. said this:

> First, as we have seen, arbitrators are frequently required to consider questions and statutory provisions that relate to public order in order to resolve the dispute that is before them. Mere consideration of those matters does not mean that the decision may be annulled. Rather, art. 946.5 *C.C.P.* requires that the award as a whole be examined, to determine the nature of the result. The

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14 R.S.C. 1985, c. C-42, s. 37.

15 ***Supra***, n. 11, at p. 211.

16 ***Ibid***.

17 ***Mousseau v. Société de gestion Paquin Itée.***, [1994] R.J.Q. 2004 (S.C.).

18 ***Supra***, n. 11, at pp. 212 and 213.

> court must determine whether the decision itself, in its disposition of the case, violates statutory provisions or principles that are matters of public order. In this case, the *Code of Civil Procedure* is more concerned with whether the disposition of a case, or the solution it applies, meets the relevant criteria than with whether the specific reasons offered for the decision do so. An error in interpreting a mandatory statutory provision would not provide a basis for annulling the award as a violation of public order, unless the outcome of the arbitration was in conflict with the relevant fundamental principles of public order. That approach, which is consistent with the language used in art. 946.5 *C.C.P.*, corresponds to the approach taken in the law of a number of states where arbitration is governed by legal rules analogous to those now found in Quebec law. The courts in those countries have limited the consideration of substantive public order to reviewing the outcome of the award as it relates to public order. (Citations omitted) And lastly, in considering the validity of the award, the clear rule stated in art. 946.2 *C.C.P.*, which prohibits a court from inquiring into the merits of the dispute, must be followed. In applying a concept as flexible and changeable as public order, these fundamental principles must be adhered to in determining the validity of an arbitration award.

[35] In applying the analysis of LeBel, J. in ***Desputeaux***, I have no difficulty in concluding that a shareholder's oppression remedy is not one that it is necessary to have adjudicated by a court, to use his words, in order "to preserve certain values that are fundamental in a legal system". The mere fact that there are allegations of fraud or bad faith in an oppression remedy is not enough to engage issues of fundamental values that are comparable to the legal status of persons.

[36] Without diminishing the importance of this remedy to minority shareholders, it is of no greater significance in the commercial world than many other types of recourses that are submitted routinely to arbitration where questions of fraud or bad faith may be raised without any suggestion that public order is offended. Such an approach is consistent with the concept that public order should not be given a broad interpretation so as to unduly limit recourse to so potentially an effective and expeditious process as arbitration. This is especially so in circumstances where the parties are in a position to choose as an arbitrator someone with vast experience and expertise in the particular subject matter in issue, qualities that are not necessarily as readily available in the judicial system where the choice of a decision-maker may not be a function of experience or expertise but rather of unrelated factors.

[37] An example of what was intended by the use of the expression "legal status of persons" found in article 2639 ***C.C.Q.*** can be seen by the conclusions in Mr. Tremblay's action that sought permission to institute a derivative action on behalf of Poutrelles Delta under section 239 of the ***CBCA***. Since the attribution of legal status to act in a manner that someone would not otherwise enjoy is at the heart of a derivative action, it is easy to see that the determination of whether such status should be granted is not one that is properly arbitrable, especially since the rights of third parties are involved.

[38] The limited nature of the concept of public order can also be seen from certain illustrations in Quebec case-law. First, in ***Mousseau***, Guthrie, J. noted that the "other

matters" in the second paragraph of article 1926.1 of the ***Civil Code of Lower Canada***, the predecessor provision to article 2639 ***C.C.Q.***, had to be analogous to or of the same importance of the status and capacity of persons and family matters.[19] Such was found to be the case in ***Larochelle v. Svekolkine***, where the Rental Board held that the provisions of a residential lease that were subject in large measure to rules of public order as well as public policy and economic considerations were not arbitrable so as to exclude its jurisdiction.[20] On the other hand, this Court has held in ***Ouellette v. Société de récupération, d'exploitation et de développement forestiers du Québec (Rexfor)*** that the fact that severance payments pursuant to contract came from public funds did not exclude the jurisdiction of arbitrators.[21]

[39] A consideration of the text of the arbitration clause and the various elements of Mr. Tremblay's claim lead me to conclude, however, that he cannot be compelled to make use of the arbitration process in the Poutrelles Delta shareholders' agreement. Nevertheless, he could, if he was so-minded, consent to submit his claim to arbitration instead of pursuing it in the Superior Court with the subsequent agreement of Acier Leroux and the other affected parties.

[40] Although Acier Leroux is right to note the important distinctions between the arbitration clause that was examined in ***Camirand*** and the one in issue here, it is nevertheless constant that the content of an agreement to arbitrate is, to use the words of LeBel, J., the "primary source" of an arbitrator's jurisdiction. An arbitration award that steps outside its terms of reference may not be homologated, or it may be annulled.[22] Similarly, before a decision is made to invoke an arbitration clause, the jurisdiction to do so must be found within the terms of the clause itself.

[41] I do not see an intention of the parties to have an oppression remedy subject to arbitration reflected in Clause 14 of the Poutrelles Delta shareholders' agreement, nor do I find the essence of the allegations and conclusions of Mr. Tremblay's action to require the interpretation or application of the provisions of the shareholders' agreement.

[42] The text of the arbitration clause itself is inconsistent with some of the terminology employed in the rest of the shareholders' agreement, and raises doubt as to what the parties truly intended by its inclusion in the shareholders' agreement. It therefore lacks the clarity of which Rayle, J. spoke in her judgment in ***Bridgeport International Canada***.[23]

[43] For example, in every other clause of the agreement in which reference is made to the agreement, it is described as "*la présente convention*" or "*des présentes*", yet in the first sentence of the arbitration clause, it is referred to as "*ce contrat*". Although that anomaly alone would not necessarily give rise to much concern, what is more startling is the terminology reserved for the parties themselves. While the shareholders'

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19 ***Supra***, n. 17.

20 [1995] R.L.

21 J.E. 97-1658 (C.A.).

22 ***Supra***, n. 11, at 198.

23 ***Supra***, n. 13.

agreement defines the shareholders collectively as the "*Actionnaires*" and describes each of them individually as an "*actionnaire*", the second sentence of the arbitration clause refers, inexplicably, to the "*Vendeurs*" and the "*Acheteur*" as the parties who may invoke the arbitration clause. These two terms are not defined in the agreement and are nowhere used elsewhere in the agreement to describe a shareholder in any way that might be germane to this case. In any event, since Mr. Tremblay is neither a "*Vendeur*" nor an "*Acheteur*" for the purposes of the clause, he cannot be compelled to invoke an arbitration process that does not apply to him.

[44] Another example of carelessness can be seen in the misspelling of the word "*supérieur*" in the title of the Superior Court in the third sentence of the clause, and the failure to capitalize the word "*cour*". Such carelessness is not to be found in the other clauses of the agreement, which is otherwise a well-drafted and comprehensive document.

[45] The foregoing leads me to wonder whether Clause 14 was simply lifted from some other agreement, in all likelihood one of sale, and inserted into the shareholders' agreement without any serious analysis of its content or its applicability to the rest of the agreement. In any event, I do not see that the essence of what Mr. Tremblay is claiming in his proceeding can be said to be the result of any *"différend, mésentente ou réclamation entre les parties portant sur les dispositions de ce contrat, leur interprétation ou leur application"* (emphasis added).

[46] Mr. Tremblay's claim is the result of his belief that his future as a shareholder of Poutrelles Delta and the company itself has been compromised by the alleged abuse of Acier Leroux' position as the majority shareholder by allowing Canam Manac to gain an unfair competitive advantage through its shareholdings in Acier Leroux. Although it is certainly open to argument based solely on the allegations that in so doing, Acier Leroux disregarded the interests of Poutrelles Delta and the minority shareholders, it cannot be said that the current situation is the result of Acier Leroux having breached any of the terms of the shareholders' agreement.

[47] The only two provisions of the shareholders' agreement potentially in issue in this respect are Clauses 7 and 14.

[48] Clause 7 precluded any shareholder from directly or indirectly selling any of their shares to Canam Manac or a party related to it until August 1, 2001. No such sale ever occurred, although Acier Leroux did evince an intention to do so in 1999 that was never consummated. Nevertheless the duration of that prohibition has now expired and had already expired when Mr. Tremblay initiated his action in the Superior Court.

[49] Clause 14 obliges the minority shareholders, Messrs. Tremblay, Lachance and Fillion, to retain majority control of any corporate entity any one of them might create to which they might transfer their shares in Poutrelles Delta, and similarly, Acier Leroux undertook that the Leroux family would retain control of that company for the duration of the agreement. The fact that Canam Manac has a minority interest in the shareholdings of Acier Leroux therefore does not amount to a breach of Clause 14. Whatever other consequences the position of Canam Manac in Acier Leroux may have, they are unrelated to any of the provisions of the shareholders' agreement.

[50] Mr. Tremblay's action also contains allegations that relate to his status as an employee of Poutrelles Delta in that he seeks orders of injunction requiring Acier Leroux and other named defendants to cease allegedly abusive disciplinary measures against him and to refrain from changing his working conditions or relocating him. In support of that conclusion, he contends that he was the victim of retribution by having a loan he contracted to purchase shares in Poutrelles Delta precipitously recalled when he was at a client's office in Toronto.

[51] There are provisions in the shareholders' agreement that do touch on his status as an employee, such as Clause 12 which would require him to offer to sell all of his shares to the other shareholders if he was dismissed for cause, or Clauses 15 and 16 which deal with obligations not to compete with Poutrelles Delta or to solicit its employees for defined periods of time after he ceases to be a shareholder, but these provisions are also unrelated to his claim in the Superior Court.

[52] The fact that a general subject matter such as Mr. Tremblay's status as an employee is dealt with in both the shareholders' agreement and his action does not mean that it is necessary to interpret, apply or enforce Clauses 12, 15 and 16 of the shareholders' agreement. The same is true of Mr. Tremblay's allegations relating to his having borrowed money to enable him to purchase shares. There is simply nothing in the shareholders' agreement that treats his status as a borrower for that purpose.

[53] The only conclusion which might be said to arise from the shareholders' agreement is the one in which Mr. Tremblay seeks an order that Acier Leroux be ordered to offer to sell all its shares in Poutrelles Delta to the other shareholders for a price equal to the book value of the shares on November 3, 1999, which is the date that Canam Manac became a shareholder in Acier Leroux. This could be said to require an interpretation of Clauses 6 and 8 of the shareholders agreement dealing with offers of a shareholder to sell its shares to other shareholders and the means to establish the value of such shares.

[54] With that potential lone exception, Mr. Tremblay's remedies do not really relate to the interpretation, application or enforcement of the shareholders' agreement. They are oppression remedies designed to secure the proper management of Poutrelles Delta in light of the alleged conflict arising out of the status of Canam Manac as a shareholder of Acier Leroux and the unfair competitive advantage created in favour of Canam Manac by the presence of Mr. Dutil on the board of directors of Acier Leroux.

[55] The shareholders' agreement essentially provides a framework for the shareholders regarding what they can and cannot do with their shares in Poutrelles Delta while they hold them as well as certain consequences should they wish to sell them, and not otherwise. Whatever other legal consequences they may entail, the facts alleged by Mr. Tremblay do not disclose Acier Leroux' breach of the shareholders' agreement by reason of Canam Manac's acquisition of a minority position in Acier Leroux, nor the nomination of Mr. Dutil to its board of directors. Even on a generous and liberal view of the text of the arbitration clause, it does not extend to the adjudication of disputes relating to the parties' rights and obligations as shareholders under the law of general application, and especially those provisions of law relating to the duty to act in good faith and the fiduciary duties of directors.

B) The jurisdiction of the Competition Tribunal

[56] Although Acier Leroux' declinatory exception does not invoke the exclusive jurisdiction of the Competition Tribunal as a basis to dismiss Mr. Tremblay's action or otherwise affect its conclusions, its counsel did argue the point before the judge of the Superior Court and in this Court as well. It submits that the allegations of unfair competition are within the domain of Part VII.I or Part VIII of the ***Competition Act***,[24] with the result that the Competition Tribunal has exclusive jurisdiction.

[57] Mr. Tremblay's proceeding does make reference to sections 66.2, 77, 78, 79 and 85 of that Act in its title, along with sections 239, 240, 241, 242, 243, 247 and 248 of the ***CBCA*** as well as several articles of the ***Civil Code of Quebec*** that in the main deal with the duty to act in good faith. There are indeed allegations in Mr. Tremblay's claim that can be specifically related to provisions of the ***Competition Act***,[25] for example:

- the denial of salary increases and bonuses for his refusal to willingly accept the presence of Marcel Dutil on the board of Acier Leroux (section 66.2);
- the assertion that Acier Leroux and Canam Manac engaged in exclusive dealing and market restrictions (section 77);
- the supposed abuse by Acier Leroux and Canam Manac of their dominant position in the marketplace (section 78); and,
- the engagement by Acier Leroux and Canam Manac in a specialization agreement (sections 85 to 90).

[58] Mr. Tremblay has made these allegations, amongst many others, in the context of his claim for injunctive relief and damages. He is essentially seeking corporate law remedies to protect his own interest as a minority shareholder given the decrease in the business income of Poutrelles Delta since 1999, which he says is the direct result of the conduct of the various defendants against whom orders and damages are sought, as well as extra-contractual remedies which have their foundation in the violation of the duty of everyone to conduct their affairs in good faith.

[59] The Competition Tribunal is an administrative tribunal created by section 3 of the ***Competition Tribunal Act***,[26] and section 8(1) of that statute provides, insofar as relevant, that:

> "The Tribunal has jurisdiction to hear and dispose of all applications made under Part VII.I or VIII of the ***Competition Act*** and any related matters …"

[60] With the exception of section 66.2, which is in Part VII, the provisions of the ***Competition Act***[27] to which Mr. Tremblay has referred in his proceeding are part of the Competition Tribunal's jurisdiction as they are found within Part VIII of that Act. But is that enough to hold that the Superior Court lacks jurisdiction? I do not believe that Parliament could have so intended.

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[24] ***Supra***, n. 4.

[25] ***Ibid***.

[26] ***Supra***, n. 3.

[27] ***Supra***, n. 4.

[61] First, the language used in section 8(1) to grant jurisdiction, which is the only provision in either statute dealing with jurisdiction, is not cast in terms that would suggest that the jurisdiction is an exclusive one. Moreover, the functions of the Competition Tribunal have over time been more regulatory than civil in nature as only the Commissioner had the authority to bring any matter before the Tribunal. Thus, whatever civil recourses that did exist were unavailable to private parties.[28]

[62] Although the recent addition of section 103.1 of the ***Competition Act*** has made it possible for private parties to commence certain proceedings based on a violation of sections 75 and 77 of that Act,[29] the latter of which Mr. Tremblay has referred to in his proceeding, this amendment only came into force on June 21, 2002,[30] which was after Mr. Tremblay initiated his recourse under the ***CBCA*** in the Superior Court in February of 2002. There is nothing in the amending legislation that would have the effect of requiring the transfer of a pending proceeding in a provincial superior court to the Competition Tribunal. For that reason alone, Mr. Tremblay can hardly be blamed for commencing and continuing the prosecution of his proceeding in the Superior Court.

[63] In any event, even if the amendment had been in force at the relevant time, I am of the opinion that the history of the Competition Tribunal as a regulatory tribunal means that it makes sense to understand this recent grant of jurisdiction as one that does not exclude that of provincial superior courts to entertain an oppression remedy that alleges unfair competition, especially where Parliament has provided for a clear grant of jurisdiction to the Superior Court in section 2 defining "court" and in section 241 of the ***CBCA***. To hold otherwise would also violate the rule of statutory interpretation to the effect that it is "presumed that the legislature does not intend to alter existing jurisdictions, and particularly to transfer jurisdiction out of superior courts".[31]

[64] I am also mindful that the Competition Tribunal is composed of both judges of the Trial Division of the Federal Court of Canada as well as members named by the federal Minister of Industry, that they hold office as members of the Tribunal for a seven year mandate which is renewable, and that for the most part, they sit in panels of three or five members, with only Federal Court judges who are members of a panel being able to decide questions of law while the other members who are not judges are able to decide questions of fact as well as mixed questions of fact and law[32] In my opinion, the composition of the Tribunal and its adjudicative methodology tend to emphasize its

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[28] Y. Bériault, M. Renaud & Y. Comtois, *Le Droit de la Concurrence au Canada*, (Toronto: Carswell, 1999), at pp. 3 and 55. See also: ***Canada (A.G.) v. Alex Couture inc.***, [1991] R.J.Q. 2534 at p. 2554 (C.A.). "La partie VIII (art. 75 à 107) ajoute, dans l'intérêt du public, des mesures de protection contre la concurrence indue, mais les dispositions de la partie VIII ne fondent pas de recours civils en dommages-intérêts au profit de parties privées par suite d'un délit de concurrence déloyale. Elles n'accordent aucun droit à un particulier. Seul le directeur des enquêtes et recherches peut présenter une demande au Tribunal de la concurrence."

[29] ***Supra***, n. 4, s. 103.1, as enacted by S.C. 2002, c. 16, s. 12.

[30] S.I./2002-100, C. Gaz. 2002.II.1641.

[31] R. Sullivan, ed., *Sullivan and Dreidger on the Construction of Statutes*, 4th ed. (Markham: Butterworths Canada, 2002), at p. 398.

[32] ***Supra***, n. 3, sections 2, 3, 5, 10 and 12.

essentially regulatory role despite the recent grant of a limited jurisdiction to entertain certain non-regulatory applications. In such circumstances, I do not believe that Parliament intended to have a proceeding that contains allegations and conclusions such as those of Mr. Tremblay decided by the Competition Tribunal.

[65] Accordingly, this argument of Acier Leroux also fails, with the result that I am of the opinion that Mr. Tremblay's proceeding was properly initiated in the Superior Court.

CONCLUSION

[66] I would dismiss the appeal with costs.

ALLAN R. HILTON, J.A.