COUR D'APPEL

2010 QCCA 2269 (CanLII)

CANADA
PROVINCE DE QUÉBEC
GREFFE DE MONTRÉAL

N° : 500-09-018934-083
(500-17-034270-069)

DATE : le 10 décembre 2010

CORAM : LES HONORABLES MARC BEAUREGARD, J.C.A.
ALLAN R. HILTON, J.C.A.
MARIE-FRANCE BICH, J.C.A.

MICHEL RHÉAUME
et
MICHEL RHÉAUME INVESTISSEMENT LTÉE (anciennement MICHEL RHÉAUME ET ASSOCIÉS LTÉE)
APPELANTS – Défendeurs
c.

SOCIÉTÉ D'INVESTISSEMENTS L'EXCELLENCE INC.
et
DANIEL RIOPEL
et
ANTOINE PONCE
INTIMÉS – Demandeurs
et

SERGE CROCHETIÈRE
et
MARCEL LEMAY
et
ANDRÉ G. VAUTOUR
En leur qualité d'arbitres
MIS EN CAUSE – Mis en cause

ARRÊT

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[1] **LA COUR**; -Statuant sur l'appel d'un jugement rendu le 8 juillet 2008 par la Cour supérieure, district de Montréal (l'honorable André Roy), qui, entre autres conclusions, a accueilli la requête des intimés en homologation d'une sentence arbitrale prononcée par les arbitres mis en cause, et a rejeté la contestation des appelants et leur demande d'annuler la sentence arbitrale;

[2] Pour les motifs du juge Hilton, auxquels souscrivent les juges Beauregard et Bich :

[3] **REJETTE** l'appel avec dépens.

MARC BEAUREGARD, J.C.A.

ALLAN R. HILTON, J.C.A.

MARIE-FRANCE BICH, J.C.A.

Me Jean-Rémi Thibault
Me Marie-Claude Martel
ARNAULT THIBAULT CLÉROUX
Pour les appelants

Me Jean-Bertrand Giroux
Me Frédéric Côté
BCF s.e.n.c.r.l.
Pour les intimés

Date d'audience : le 30 novembre 2009

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REASONS OF HILTON, J.A.

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I
THE FACTS AND THE PROCEEDINGS

[4] The principal issue raised by this appeal is whether one of three members of an arbitration panel constituted in accordance with article 941 *C.C.P.* violated the obligation of deliberative secrecy incumbent upon him as provided for in article 945 *C.C.P.*, and if so, whether the violation leads inexorably to the annulment of the arbitration award. A subsidiary issue relates to whether, independently of the obligation of deliberative secrecy, arbitrators are also bound to an implicit obligation of confidentiality, and if so, what the sanction is for a violation of that obligation. The matter arises in the context of a motion to homologate the arbitration award. The appellants' contestation of the motion on this and several other grounds failed. Accordingly, the judge of the Superior Court homologated the impugned award.

[5] Before us, the appellants seek not only to have the award annulled, but also to have the award they contend should have been rendered by the arbitrators substituted in its place.

[6] The relevant facts are not in dispute and may be succinctly stated.

[7] On November 8, 2006 the appellant Michel Rhéaume and the respondents Antoine Ponce and Daniel Riopel named Mtre Yves Robillard, Mtre Serge Crochetière, and Marcel Lemay, C.A. as arbitrators to resolve certain questions arising out of the proposed purchase by Messrs. Ponce and Riopel of the interests of Mr. Rhéaume in various insurance companies, including that of the respondent Société d'investissements l'Excellence inc. The arbitration agreement was amended on November 14 to allow for the arbitrators to meet the parties separately and not jointly at a hearing. Mtre Robillard advised them the next day that he could not act, whereupon the parties replaced him with Mtre André G. Vautour.

[8] At this juncture, it is important to note that both Mtre Vautour and Mr. Lemay were directors of Excellence, the control of which Mr. Rhéaume was to sell to Messrs. Ponce and Riopel.

[9] On November 15, Mr. Rhéaume made his submissions to the arbitrators; on November 20, Messrs. Ponce and Riopel did likewise.

[10] At a meeting of the Board of Directors of Excellence on November 27 at which Messrs. Rhéaume, Ponce and Riopel were present, a discussion was initiated with

respect to the proposed transaction, during which a member of the board raised the subject of the arbitration. A partial transcript of the meeting was prepared. The parties agree that the only discussion of the subject relevant to the current dispute is that which is contained in the following transcript:

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[…]

Me ANDRÉ VAUTOUR :

Ce qui est arrivé, c'est que dans l'offre, c'est là l'objet de l'arbitrage. Dans l'offre il était prévu que le prix c'était vingt-deux millions et demi (22,5 M$), sujet aux ajustements nécessaires, pas plus que ça, O.K.

Lorsqu'ils ont fait les deux addenda, ils ont modifié le prix mais ils n'ont jamais changé, sujet aux ajustements, et qu'est-ce que ça voulait dire.

MONSIEUR ANTOINE PONCE :

Je peux-tu faire une correction, c'est que le prix était de (inaudible), et la transaction se faisait en date du premier (1er) mars avec les ajustements (inaudible).

Me ANDRÉ VAUTOUR :

Donc, il y avait comme une espèce de (inaudible), peu importe la date à laquelle le « closing » se faisait, les parties voulaient que ça (inaudible) en date du premier (1er) mars.

Me ANDRÉ VAUTOUR :

Il y a eu une extension de la date originale du trente et un (31) août au premier (1er) septembre. Michel a accepté de prolonger d'une journée. Et ça s'est signé le premier (1er) septembre. Il y a eu trois conventions qui ont été signées le premier (1er) septembre, une convention de vente d'actions. Ça a commencé par une convention de vente des actifs de Michel Rhéaume et associés, de l'entreprise, la vente des actions de Michel Rhéaume et associés et des actions de Beaulne et (inaudible). Ce qui permettait aux deux présidents d'être dans les mêmes souliers que ce que Michel Rhéaume était avant la transaction.

Ce qui était prévu dans les conventions, c'est que elle remplaçait l'offre des deux addenda que le « closing » formel, le paiement du prix de vente devait se faire sur réception de l'autorisation ministérielle qui devait être obtenue avant le trente (30) novembre. Et en fait (inaudible), c'est ce qui était prévu dans la convention et c'était trois jours après la réception de l'autorisation ministérielle si elle n'était pas (inaudible) des conditions particulières et c'était dix jours si il y

avait des conditions particulières dans l'approbation ministérielle. Donc le paiement pouvait se faire jusqu'au trois (3) novembre ou au dix (10) novembre, selon ce qu'il y avait dans l'approbation ministérielle.

Là où la chicane a pris, par après, c'est : qu'est-ce que ça veut dire : avec les ajustements nécessaires, qu'on retrouvait dans l'offre originale du mois de février, parce que pour Michel Rhéaume ce que c'était, c'est… lui dit : le prix de vingt-deux millions et demi (22,5 M$) que (inaudible) est sur la base des états financiers de fin d'exercice de Beaulne Rhéaume, Michel Rhéaume et associés qui étaient en date du trente et un (31) septembre, trente (30) septembre deux mille cinq (2005) et des projets d'états financiers de l'Excellence, en date du trente et un (31) décembre. Et que lorsque les états financiers définitifs de l'Excellence ont été obtenus et qu'on prendrait en compte, on devrait également prendre en compte les opérations de Beaulne Rhéaume et Michel Rhéaume et associés du trente (30) septembre au premier (1er) mars, la date effective, si les opérations de l'Excellence du premier (1er) janvier au vingt-huit (28) février, jusqu'au premier (1er) mars. Ce qui entraînerait une augmentation du prix si ça, ça fait partie des ajustements, ça fait partie de l'augmentation du prix de à peu près un million (1 M$) par rapport à ce qu'il était le vingt-deux millions (22 M$) qu'il avait convenu. Alors pour Michel, l'ajustement, ce n'était pas juste l'ajustement postérieur à la date effective, mais ces ajustements pour nous ramener à la date des états que vous avez du trente (30) septembre ou du trente et un (31) décembre, selon les compagnies dont on parle, au premier (1er) mars. Puis en plus on va ajuster pour la fin.

MONSIEUR ARSENAULT :

Et dans la convention il n'y a rien de clair.

Me ANDRÉ VAUTOUR :

Dans la convention il n'y a rien qui dit ça, elle ne parle que d'ajustements. Dans la convention du mois de septembre, on dit qu'elle remplace les offres et on dit que les ajustements au premier (1er) mars ont été faits. Là, la question qu'on a à trancher, nous c'est : est-ce qu'on doit ajuster pour une période antérieure au premier (1er) mars, première question!

Deuxième question : du premier (1er) mars au « closing », c'est quoi le montant des ajustements. C'est là-dessus que ça porte.

MONSIEUR YVON GUILBAULT :

Bien l'enjeu est de combien.

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MONSIEUR YVON GUILBAULT :

Bien, entre une décision négative et une décision…

Me ANDRÉ VAUTOUR :

Deux millions (2 M$) à peu près.

MONSIEUR :

(Inaudible)

MONSIEUR :

Ça prend une décision unanime?

Me ANDRÉ VAUTOUR :

Non, ça prend une majorité deux sur trois. Et on s'est rencontrés aujourd'hui et il va y avoir une décision unanime, parce que là tout…

[…]

[Transcribed as written – Emphasis added]

[11] Following this meeting, Mr. Rhéaume wrote to the arbitrators seeking the recusation of Messrs. Vautour and Lemay. On November 29, the three arbitrators issued their award, in which they sustained the position of Messrs. Ponce and Riopel, and held that Mr. Rhéaume owed them $557,141 as adjustments on the purchase price. The award was delivered to the parties the same day as it was issued.

[12] In the concluding paragraph of their award, the arbitrators specified that they had received the appellants' request to recuse Mr. Lemay and Mtre Vautour after the termination of their advisement and the drafting of the award. They further indicated they took no account of the request in the preparation of the award inasmuch as it had not been brought to the attention of Messrs. Ponce and Riopel and was thus irregular.

[13] On November 29, Messrs. Ponce and Riopel paid the purchase price to Mr. Rhéaume, less the amount of the adjustments to which they were entitled as a result of the arbitration award. They then initiated proceedings to homologate the award in their favour, which Mr. Rhéaume contested vigourously. His frontal attack included a motion to recuse Messrs. Vautour and Lemay, which was deferred to the judge of the Superior Court hearing the motion in homologation.

[14] With the dust now having somewhat settled, all that remains for the Court to consider is the appellants' arguments concerning the alleged violation of deliberative

secrecy or implicit confidentiality and the consequences that follow should such a violation be found to have occurred.

[15] In his judgment, the motions' judge reproduced the partial transcript of the meeting of Excellence's Board of Directors during which Mtre Vautour spoke of the parties' financial interests at play and the fact that the decision the arbitrators were about to render was unanimous, although unanimity was not required. He then noted that the comments of Mtre Vautour occurred during the advisement, for which he gave the following definition:

> **Délibéré**
>
> **1.** Phase de l'instance qui succède à l'instruction et au cours de laquelle le juge s'accorde une période de réflexion avant de rendre jugement. ou
>
> Phase *secrète* du jugement qui s'intercale entre les débats et le prononcé.
>
> [References omitted]

[16] His reasoning rejecting the contention of Mr. Rhéaume is contained in the following extract from his judgment:

> [91] En effet, il tient ces propos en soirée du 27 novembre alors que la sentence arbitrale sera signée le 29 novembre à 12 h 46.
>
> [92] Le caractère confidentiel du délibéré est un élément crucial qui participe d'une règle fondamentale, celle de l'indépendance judiciaire. Il va sans dire que les arbitres y sont soumis.
>
> [93] Il s'agit d'une règle stipulée à la fois en faveur du décideur et en faveur des parties.
>
> [94] Le premier doit jouir de la liberté intellectuelle requise avec l'assurance qu'il n'aura pas à révéler le processus mental suivi pour en arriver à une décision ni comment et pourquoi il est parvenu à cette conclusion.
>
> [95] Pour les parties, c'est l'assurance que le décideur va agir sans influence extérieure quelconque. C'est là un des aspects de l'impartialité du tribunal à auquel elles sont en droit de s'attendre.
>
> [96] Que protège le secret du délibéré? De l'avis du Tribunal, il protège la démarche intellectuelle pour en arriver à la décision, comment et pourquoi le décideur a conclu comme il l'a fait. En d'autres mots, c'est le processus décisionnel que l'on veut confidentiel.

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> [97] Les faits allégués pour soutenir que le secret du délibéré a été violé doivent être graves et de nature à satisfaire aux critères objectifs de la théorie de la « crainte raisonnable de partialité ».
>
> [98] Les propos de Me Vautour, reproduits plus haut, n'inciteraient pas une personne raisonnable et informée de conclure à la partialité de celui-ci.
>
> [99] Il s'adresse aux administrateurs de l'Excellence, une entreprise visée par la transaction entre Rhéaume et Ponce et Riopel. Il mentionne que le différend porte sur les ajustements qui en découlent et annonce que la décision des arbitres (à laquelle ils en sont venus le matin-même) sera unanime.
>
> [100] Nulle part ne révèle-t-il quoi que ce soit concernant ce qu'ont décidé les arbitres ni comment ni pourquoi ils en sont venus à cette décision.
>
> [References omitted]

II
ISSUES

[17] I propose to treat the issues the appeal raises in the following sequence:

(1) What is the content of the obligation of deliberative secrecy imposed on arbitrators by article 945 *C.C.P.*, and if there has been a breach of the obligation in this case, is annulment of the arbitration award and the substitution of the award that the appellants contend the arbitrators should have issued the appropriate sanction?

(2) Are Quebec arbitrators also subject to an implicit obligation of confidentiality, and if so what is the sanction for a breach of the obligation?

III
ANALYSIS AND DISCUSSION

(1) What is the content of the obligation of deliberative secrecy imposed on arbitrators by article 945 *C.C.P.*, and if there has been a breach of the obligation in this case, is annulment of the arbitration award and the substitution of the award that the appellants contend the arbitrators should have issued the appropriate sanction?

(i) The content and extent of the obligation of deliberative secrecy

[18] While the Supreme Court has from time to time been called upon to consider the ambit of deliberative secrecy, it has usually occurred in a context quite different from that of this appeal. Similarly, there is very little doctrinal comment or other case law that

has treated the subject. In many instances, judgments have considered the issue from the perspective of the immunity conferred on decision-makers, rather than the substance of the obligation incumbent on them.

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[19] *MacKeigan v. Hickman*[1] was such a case. Writing on behalf of the majority on this point, McLachlin, J., as she then was, examined whether members of a panel of the Nova Scotia Court of Appeal could be compelled to testify at the hearings of a provincial commission of inquiry established to examine the circumstances that led to the prosecution, wrongful conviction and sentencing of an accused. The panel in question concluded, on a reference from the Attorney General of Canada, that the accused had been improperly convicted. Several of their comments, however, left no doubt that in their minds the accused had facilitated his conviction by his conduct during the police investigation and trial, and that, to use their words, "[a]ny miscarriage of justice is, however, more apparent than real."[2] In rejecting the compellability of the appellate judges, McLachlin, J. said this:

> The judge's right to refuse to answer to the executive or legislative branches of government or their appointees as to how and why the judge arrived at a particular judicial conclusion is essential to the personal independence of the judge, one of the two main aspects of judicial independence: *Valente v. The Queen*, […]; *Beauregard v. Canada,* […]. The judge must not fear that after issuance of his or her decision, he or she may be called upon to justify it to another branch of government. The analysis in *Beauregard v. Canada* supports the conclusion that judicial immunity is central to the concept of judicial independence. As stated by Dickson C.J. in *Beauregard v. Canada*, the judiciary, if it is to play the proper constitutional role, must be completely separate in authority and function from the other arms of government. It is implicit in that separation that a judge cannot be required by the executive or legislative branches of government to explain and account for his or her judgment. To entertain the demand that a judge testify before a civil body, an emanation of the legislature or executive, on how and why he or she made his or her decision would be to strike at the most sacrosanct core of judicial independence.
>
> I return to ss. 3 and 4 of the *Public Inquiries Act*. Nothing in the language of those sections suggests that the legislators intended to clothe the Commission with power to abrogate the fundamental principle that judges cannot be compelled to testify as <u>to how and why they arrived at their decisions</u>. […] Reading ss. 3 and 4 together in accordance with the established principles of statutory construction, I conclude that the Act does not empower the Commission

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1 [1989] 2 S.C.R. 796.
2 *Ibid*., p. 817.

> to compel the justices who sat on the Marshall appeal to testify as to the grounds for their decision, including the record relied on.[3]
>
> [References omitted, emphasis added]

[20] Clearly, for McLachlin, J., the principal object of the immunity conferred on decision-makers during the deliberative process was the "how and why" the judicial reasons were developed.

[21] In a similar vein, this Court recently allowed an appeal from a judgment of the Superior Court that had dismissed a motion to quash a subpoena directed to an administrative decision-maker that would have required him, to use the words of Gendreau, J.A., to answer a question "[…] au coeur de son processus décisionnel et donc protégée par le **secret du délibéré**."[4] Elsewhere in Canada, courts have also recognized that the "how and why" of a decision can never be the subject of testimony by a decision-maker.[5]

[22] That being said, I respectfully disagree with the motions' judge in this case to the extent that he limited the purview of deliberative secrecy to the protection of decision-makers from intrusion into the "how and why" of their decisions. The very wording of article 945 *C.C.P.* imposes on arbitrators an affirmative duty to maintain deliberative secrecy, irrespective of any attempts to compel them to testify which, as we have seen, are likely to fail.

[23] Despite the paucity of authorities dealing with the consequences of arbitrators breaching their duty, the respondents do not seem to dispute that deliberative secrecy enjoys protection beyond immunity. They write in their factum that the deliberative period as such "[…] vise à protéger deux autres principes fondamentaux de justice : l'impartialité des décideurs et la stabilité des décisions […]." The affirmative obligation in article 945 *C.C.P.* exists as well to secure the integrity of the process by ensuring that only the parties can participate in the presentation of evidence and argument, and to ensure that the decision-makers are immune from external influence.

[24] McEwan and Herbst, treating the issue of deliberative secrecy in arbitrations, emphasize the notion of judicial independence, which is a corollary of the duty to limit participation in the arbitral process to the parties and the arbitrators:

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3 *Ibid*., at pp. 830 and 831.

4 *Comité de révision de l'aide juridique v. Denis*, J.E. 2007-424, 2007 QCCA 126, at para. [30]. [Emphasis in the original] The matter was complicated by the regrettable decision of the administrative tribunal to file a substantive defence to the respondent's judicial review proceedings. A Superior Court judge had been presented a motion to strike the defence, but instead of adjudicating it, he deferred it to the trial judge, thus giving rise to the subpoena to the decision-maker to be examined on discovery.

5 *Agnew v. Ontario Association of Architects*, 64 O.R. (2d) 8 (Ont. Div. Ct.); *Cherubini Metal Works Ltd. v. Nova Scotia (Attorney General)*, 253 N.S.R. (2d) 134, 2007 NSCA 37.

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> The confidentiality principle or the rule of deliberative secrecy has always been regarded as a hallmark of judicial independence and one worthy of protection. Its purpose is to preserve adjudicative independence so that adjudication occurs with circumspection and reflection and in freedom. The arbitral context dictates that the rule is at least as important in arbitration as it is in litigation. In the case of a specialized tribunal representing different interests, the process of discussion and compromise among different points of view would not work if stripped of its confidentiality.[6] […]
>
> [References omitted]

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[25] In my opinion, the affirmative duty imposed on arbitrators pursuant to article 945 *C.C.P*. requires them to abstain from communicating with third parties about the matter to be decided once it has been taken under advisement. The ultimate purpose is to ensure that the arbitral award reflects the opinion of the arbitrators alone, and not those of anyone else, whether such third parties have an interest in the outcome or not.

[26] That being said, what are the boundaries of the duty of non-disclosure? Obviously, they include at least the "how and why" of the deliberative process, which is consistent with the principle that decision-makers cannot be compelled to disclose the reasoning of their decisions.

[27] The motions' judge in this case, as I have mentioned, limited the extent of the duty to that aspect of the process. He concluded that for there to have been a breach of deliberative secrecy, the facts giving rise to the breach have to be "graves et de nature à satisfaire aux critères objectifs de la théorie de la « crainte raisonnable de partialité »". In so doing, he referred to the position of Monet, J.A. in *Commission des affaires sociales du Québec v. Tremblay* to the following effect:

> Il va de soi que, en l'absence de circonstances exceptionnellement graves, le caractère secret du délibéré doit être respecté, affirmé et sauvegardé. Dès lors, il importe que des faits précis soient allégués. Pas n'importe quels faits. Il est essentiel que ces faits soient carrément de nature à satisfaire aux critères de la théorie de la « crainte raisonnable de partialité ».[7]

[28] In my view, it is unnecessary to apply the theory of reasonable apprehension of bias to determine what is comprised within the concept of deliberative secrecy.

[29] First, it should be noted that Monet, J.A. was dissenting in *Tremblay*, and that the subsequent appeal to the Supreme Court of Canada was dismissed.[8] The context of

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6 James Kenneth McEwan and Ludmila Barbara Herbst, *Commercial Arbitration in Canada, A Guide to Domestic and International Arbitrations*, Aurora, Cartwright Group, 2008, no. 9:30.50, p. 9-22.

7 [1989] R.J.Q. 2053, at p. 2058 (C.A.).

8 *Tremblay v. Québec (C.A.S.)*, [1992] 1 S.C.R. 952.

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that case, which had to do with the practice in an administrative tribunal to have draft decisions submitted for review and discussion with all tribunal members, indicates that Monet, J.A. was examining the only circumstances he considered could lead to a decision-maker being compelled to testify to explain his reasons. His opinion did not purport to describe exhaustively the component features of deliberative secrecy, but rather analyzed the extent of the decision-makers' immunity, since there had been an objection to evidence based on deliberative secrecy. In any event, Gonthier, J., on behalf of the Supreme Court, did not adopt the position of Monet, J.A. to which the motions' judge referred,[9] which in any event was of no assistance in establishing the boundaries of deliberative secrecy set forth in article 945 *C.C.P.*

[30] The parties take radically different positions with respect to the extent of the affirmative duty of deliberative secrecy set out in article 945 *C.C.P.* For the appellants, not only the intellectual process in which the arbitrators are engaged to arrive at a decision is covered, but also the substantive material that is being examined, including of course the evidence and the parties' submissions. The respondents acknowledge that arbitrators cannot be compelled to reveal the content of their deliberations. They argue, however, that an arbitrator's spontaneous disclosure to a third party of the substance of a matter under advisement, provided it does not bring to light the "how and why" of the reasoning process in which they are engaged, is not a breach of article 945 *C.C.P.*

[31] I think it is logical to relate the extent of the duty of deliberative secrecy to its primary purposes: first, to secure the independence of the arbitrators so that they are free from external influence, and second, to ensure they decide the matter before them on the basis of the evidence they have heard and the submissions the parties have made to them. It is, in effect, the integrity of the decision making process that the duty of deliberative secrecy aims to protect.

[32] With those objectives in mind, the substance of the duty of deliberative secrecy should not be extended to that which is not necessary to achieve those objectives. I would therefore reject this aspect of the appellants' contentions to the extent they argue for a broader appreciation of what constitutes deliberative secrecy.

(ii) The existence of a breach in this case

[33] The three arbitrators had met on the afternoon of November 27, 2006, while the board meeting of Excellence took place later that evening. Messrs. Ponce and Riopel, as well as two of the arbitrators, Mtre Vautour and Mr. Lemay, were present in their capacity as directors, while Mr. Rhéaume was present for reasons unrelated to the arbitration.

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9 *Ibid.*, p. 966.

[34] Mtre Vautour testified that the arbitrators had agreed at their afternoon meeting what award they would issue. Nothing had been reduced to writing, however, nor had any result been communicated to the parties. It is therefore clear that despite the agreement the arbitrators had reached, and their mistaken belief that the advisement had terminated, as reflected in the final paragraph of their award, the matter nevertheless was still under advisement (article 945.2 *C.C.P.*) when the discussion took place at the board of directors' meeting. To hold otherwise would lead to the untenable conclusion that Mtre Vautour was at liberty to reveal the result during the course of the discussion.

[35] The context in which the impugned breach of the obligation of deliberative secrecy occurred should not be ignored. The three parties to the arbitration were present, as were two of the arbitrators, and the transcript of the meeting that the parties agree is complete for present purposes does not disclose Mr. Rhéaume objecting to any portion of the discussion.

[36] While this context did not dispense Mtre Vautour from complying with the provisions of the *Code of Civil Procedure*, his remarks should nevertheless be assessed with that context in mind. To be sure, the rule of deliberative secrecy enunciated in article 945 *C.C.P.* is intended to preserve the integrity of deliberations, collegial or otherwise, from external influence. Not only is there nothing in the evidence to suggest that the discussion in which Mtre Vautour participated included the exercise of any such external influence, the presence of all of the parties to the arbitration would militate against any such possibility. It is also clear that Mtre Vautour's explanation of the purpose of the arbitration and the respective positions of the parties did not disclose the decision at which the arbitrators had arrived earlier that day, nor the basis of their decision.

[37] It is also reasonable to infer that the individuals the parties selected as arbitrators were chosen for their familiarity with the subject matter and their ability to arrive at a decision promptly. The *ex parte* manner in which the arbitrators heard the competing positions of the parties is also suggestive of their confidence in the integrity of the arbitrators, as is the fact that two of them were board members of a company that was the object of the transaction. In hindsight, however, the fact that two of the arbitrators were not as totally disinterested in the transaction between the parties as complete outsiders would have been may have contributed to the apparent ease with which Mtre Vautour volunteered the information he did at the board of directors' meeting. In other words, what transpired at that meeting, during an informal discussion initiated by a board member, unfortunately might have been an accident waiting to happen.

[38] That being said, Mtre Vautour had an affirmative obligation to keep secret what had transpired during the advisement, which had not yet been completed despite the unanimous decision the arbitrators had reached earlier that day. Ensuring *ex post facto* that the breach of the obligation was in fact inconsequential does not satisfy the

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obligation of deliberative secrecy. If some aspect of the adjudicative process is revealed, the obligation that was incumbent on Mtre Vautour pursuant to article 945 *C.C.P.* was not respected.

[39] In my view, the extent to which the arbitrators agree is a part of the deliberative process, even if the result of that agreement is not disclosed. Anyone who has participated in a collegial decision-making process knows that the decision is not final until it is signed and formally issued, at which point the decision-makers become *functus officio*. To use a sporting analogy made famous by Yogi Berra, "It ain't over 'till it's over."

[40] The fact that Mtre Vautour indicated on November 27 that the decision was unanimous did not preclude any of the arbitrators from coming to a different conclusion than the one they ultimately issued on November 29. Announcing publicly to the parties, and to third parties who may be affected by the outcome, that the arbitrators have agreed unanimously on the result, may well have a chilling effect on an arbitrator who might otherwise be inclined to file a dissenting opinion despite the agreement reached earlier. Such a dissenting opinion in theory could disclose a significant irregularity, such as a breach of the *audi alteram partem* rule, which in turn could have a bearing on the homologation of the award.

[41] I acknowledge that there is no evidence of any such possibility in this case. The determination of whether a breach of deliberative secrecy has occurred, however, should not be measured by whether the breach had any impact on the outcome. To hold otherwise would weaken the substance of deliberative secrecy, and encourage the kind of revelation seen in this case.

[42] A breach of the obligation of deliberative secrecy having been established, it remains to be seen whether the nullity of the decision and the substitution of Mr. Rhéaume's proposed result are the proper sanctions to impose.

[43] As far as Mr. Rhéaume's other complaints concerning the disclosure of the financial aspects of the transaction and the parties respective positions with respect to the allocation of adjustments are concerned, I believe they would be more appropriately treated under his contention that Mtre Vautour violated an implicit obligation of confidentiality incumbent on arbitrators in Quebec.[10] Although these disclosures also occurred during the deliberative process, they are of a different nature than the disclosure of the unanimous character of the decision to be rendered. Instead, they recount some of the evidence heard and the parties' positions during the process without any characterization of the evidence, assessment of the arguments, nor disclosure of the reasoning process in which the arbitrators engaged.

[10] See paragraph [65] and following of these reasons.

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(iii) The appellants' proposed sanction

[44] It is not disputed that the only remedies against an arbitral decision are to contest its homologation or to seek to have it declared null. The courts have no power of surveillance or control beyond those that are contained in Book VII of the *Code of Civil Procedure* respecting arbitration proceedings,[11] which are to the following effect:

> 946.4. The court cannot refuse homologation except on proof that
>
> (1) one of the parties was not qualified to enter into the arbitration agreement;
>
> (2) the arbitration agreement is invalid under the law elected by the parties or, failing any indication in that regard, under the laws of Québec;
>
> (3) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise unable to present his case;
>
> (4) the award deals with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or it contains decisions on matters beyond the scope of the agreement; or
>
> (5) the mode of appointment of arbitrators or the applicable arbitration procedure was not observed.
>
> In the case of subparagraph (4) of the first paragraph, the only provision not homologated is the irregular provision described in that paragraph, if it can be dissociated from the rest.
>
> 946.5. The court cannot refuse homologation of its own motion unless it finds that the matter in dispute cannot be settled by arbitration in Québec or that the award is contrary to public order.
>
> […]
>
> 947.2. Articles 946.2 to 946.5, adapted as required, apply to an application for annulment of an arbitration award.

[45] Recently, Forget, J.A., on behalf of the Court, said this with respect to the standard of intervention of courts called upon to consider the homologation of an arbitral award or a motion to annul one:

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[11] *Desputeaux v. Éditions Chouette*, [2003] 1 S.C.R. 179, 2003 SCC 17, paras. 65 – 68.

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> La norme de contrôle
>
> [46] Avant d'examiner les motifs retenus par le premier juge pour annuler la sentence arbitrale, il importe d'examiner la norme de contrôle qu'il devait utiliser en semblable matière. Cette norme est fort restrictive et a fait l'objet d'une codification législative au *Code de procédure civile* :
>
> […]
>
> [47] Le fardeau sur les épaules du requérant est donc plus lourd qu'en matière de révision judiciaire. Il ne s'agit pas de déterminer si la décision de l'arbitre est correcte ou raisonnable, il faut établir l'un des motifs d'annulation prévus aux articles 946.4 et 946.5 *C.p.c.*[12]

[46] In light of the foregoing, in my view it is unnecessary to embark on an interpretative exercise of the meaning of article 945 *C.C.P.*, as the appellants propose, in order to determine whether Mtre Vautour's disclosure leads to a declaration of nullity. In this respect, the cautionary words of Prof. Pierre-André Côté bear repeating:

> 922. Le législateur n'étant pas censé vouloir que sa loi produise des résultats injustes, on présumera qu'il n'entend pas assortir une disposition d'une sanction de nullité s'il en résulte un mal social ou individuel trop important compte tenu de l'objet de la disposition.[13]
>
> [Reference omitted]

[47] As Book VII of the *Code of Civil Procedure* clearly states the conditions that give rise to the annulment of an award, it is unnecessary to determine what the framers of article 945 *C.C.P.* intended in terms of a sanction. The only relevant questions are whether the appellants established one of the grounds of nullity contemplated by articles 946.4 and 946.5 *C.C.P.* and, if so, whether the inevitable consequence is the relief they claim. In so doing, the Court must keep in mind that the standard of intervention is a very restrictive one.

[48] Moreover, to the extent the appellants contend that the obligation of deliberative secrecy is a matter of public order, the breach of which allows a court to invoke it and refuse homologation of its own motion, the concept of public order in arbitration is a limited one, as LeBel, J. observed in *Desputeaux*, albeit in a somewhat different context:

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[12] *Compagnie d'assurance Standard Life du Canada v. Lavigne*, J.E. 2008-714, 2008 QCCA 516.

[13] Pierre-André Côté, *Interprétation des lois*, 4th Ed., Pierre-André Côté, with the collaboration of Stéphane Beaulac and Mathieu Devinat, Montreal, Éditions Thémis, 2009, number 884 *et seq*.

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> 54 Public order arises primarily when the validity of an arbitration award must be determined. The limits of that concept's role must be defined correctly, however. First, as we have seen, arbitrators are frequently required to consider questions and statutory provisions that relate to public order in order to resolve the dispute that is before them. Mere consideration of those matters does not mean that the decision may be annulled. Rather, art. 946.5 *C.C.P*. requires that the award as a whole be examined, to determine the nature of the result. The court must determine whether the decision itself, in its disposition of the case, violates statutory provisions or principles that are matters of public order. In this case, the *Code of Civil Procedure* is more concerned with whether the disposition of a case, or the solution it applies, meets the relevant criteria than with whether the specific reasons offered for the decision do so. An error in interpreting a mandatory statutory provision would not provide a basis for annulling the award as a violation of public order, unless the outcome of the arbitration was in conflict with the relevant fundamental principles of public order. That approach, which is consistent with the language used in art. 946.5 *C.C.P*., corresponds to the approach taken in the law of a number of states where arbitration is governed by legal rules analogous to those now found in Quebec law. The courts in those countries have limited the consideration of substantive public order to reviewing the outcome of the award as it relates to public order. (See: E. Gaillard and J. Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (1999), at pp. 955-56, No. 1649; J.-B. Racine, *L'arbitrage commercial international et l'ordre public*, vol. 309 (1999), at pp. 538-55, in particular at pp. 539 and 543; *Société Seagram France Distribution v. Société GE Massenez*, Cass. civ. 2e, May 3, 2001, *Rev. arb.* 2001.4.805, note Yves Derains.) And lastly, in considering the validity of the award, the clear rule stated in art. 946.2 *C.C.P*., which prohibits a court from inquiring into the merits of the dispute, must be followed. In applying a concept as flexible and changeable as public order, these fundamental principles must be adhered to in determining the validity of an arbitration award.[14]

[49] In my opinion, the obligation of deliberative secrecy contained in article 945 *C.C.P.* is part of "the applicable arbitration procedure", as mentioned in numbered paragraph 5 of the first paragraph of article 946.4 *C.C.P.*, which, according to the same provision, "was not observed". It would be difficult to consider it otherwise, given the importance of the objectives that deliberative secrecy is meant to secure. But is that the end of the debate? Does a court seized of a contestation of a motion to homologate an arbitral award or of a motion to nullify one based on the applicable

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[14] *Supra*, note 11. See also my reasons in *Acier Leroux inc. v. Tremblay*, [2004] R.J.Q. 839, at paras. [36] – [38] (C.A.).

procedure not having been observed nevertheless conserve the discretionary power to homologate the award or decline to nullify it?

[50] The appellants argue forcefully that without having to satisfy any criterion other than the mere occurrence of a procedural irregularity, a court has no choice but to refuse to homologate or to annul an award, as the case may be, since those are the only two remedies the legislature has provided in the event of a breach. They draw comfort from the following comments of Bich, J.A. in *Coderre v. Coderre*:

> [45] […] Il ne s'agit donc pas ici de se demander si les motifs ou les dispositifs des sentences litigieuses sont appropriés, opportuns, corrects, justes, équitables ou raisonnables, l'article 946.2 C.P.C. interdisant au tribunal de l'homologation ou de l'annulation d'examiner le fond du différend. Il s'agit uniquement de s'assurer que ces sentences ou le processus qui y a mené ne comportent pas l'un ou l'autre des vices indiqués à l'article 946.4 C.P.C. […]
>
> [46] Aux fins de cet exercice, aucune déférence particulière n'est due à la sentence arbitrale. Les règles de justice naturelle tout comme celles qui régissent le respect des termes de la convention d'arbitrage sont d'ordre public, l'article 940 C.P.C. interdisant du reste qu'on y déroge. Leur violation empêche l'homologation et justifie l'annulation.[15] […]
>
> [References omitted]

[51] In that case, the Court dismissed an appeal from a judgment refusing to homologate an arbitration award and granting a motion to annul it on the basis that an arbitrator had exceeded the jurisdiction the parties had conferred upon him and had not respected the rule of *audi alteram partem*. In other words, the Court was faced with much more than a mere procedural irregularity.

[52] In Quebec, as is the case elsewhere in Canada, there is a distinct jurisprudential trend affirming the existence of a residual discretion not to grant contestations of motions to homologate or to annul arbitral awards for what appears to be a procedural defect.

[53] Thus, in *Europcar Italia S.p.A. v. Alba Tours International Inc.*,[16] the Ontario Court of Justice was called upon to interpret section 36 of the *Model Law on International Commercial Arbitration*, on which articles 946.4 and 946.5 *C.C.P.* are based.[17] In the course of his judgment, Dilks, J. explained:

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15 [2008] R.J.Q. 1245 (C.A.), 2008 QCCA 888.
16 23 O.T.C. 376 (Ont. C.J.), [1997] O.J. No. 133.
17 *Coderre v. Coderre*, *supra*, note 15, at para. [48].

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> 12 No suggestion has been made that the applicant has failed to satisfy the procedural requirements of Article 35 sub (2). Accordingly the only obstacle to recognition and enforcement in Ontario lies in the possible application of one of the circumstances set out in Article 36(1). In the preamble to this article it is the word "may" that is used. It is therefore clear that even should one of these circumstances exist, enforcement could still be ordered in the exercise of judicial discretion.
>
> [Emphasis added]

[54] Similarly, in British Columbia, the statutory language in the *International Commercial Arbitration Act*[18] and the *Foreign Arbitral Awards Act*[19] both have been recognized as simply "permitting" rather than requiring a refusal to grant enforcement applications.[20]

[55] More recently, in Quebec, Silcoff, J. had occasion to consider the effect of the non-respect of the applicable arbitration procedure in *Holding Tusculum, b.v. v. Louis Dreyfus, s.a.s. (SA Louis Dreyfus & Cie)*.[21] He declined to sanction inconsequential irregularities by the remedy of annulment, assuming the irregularities to have existed.[22] In reaching this conclusion, Silcoff, J. had the benefit of expert testimony on international commercial arbitration practice. On the issue of what kind of procedural irregularity might give rise to the sanction of nullification, the experts' reports left no doubt as to what was required, although there was disagreement as to whether that standard was met in that case:

> Judicial review of procedural issues in international arbitration practice is narrowly defined and is intended to permit intervention in extreme cases only to prevent flagrant denial of due process to an arbitrating party. This is typified by provisions V(1)(b) and V(1)(d) of the New York Convention pursuant to which a recognition court may (it is not mandatory) decline to recognize and enforce a foreign award where [arbitral procedure was not in accordance with the agreement of the parties].[23]
>
> [Emphasis added]
> [Report prepared by William Lawrence Craig]
>
> The standard of a "material breach of procedure" or a breach that "presumably affected the award" and the requirement of a prejudice, *simpliciter*, sufficient or

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18 R.S.B.C. 1996, c. 233.
19 R.S.B.C. 1996, c. 154.
20 *Javor v. Francoeur*, 13 B.C.L.R. (4th) 195, 2003 BCSC 350 (Holmes, J.).
21 J.E. 2009-451, 2008 QCCS 5904. Appeal discontinued on January 28, 2010, C.A.M. 500-09-019302-090.
22 *Ibid.*, paras. [135] and [136].
23 *Ibid.*, para. [134].

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> substantial, have one thing in common: they all operate to avoid the trivialization of judicial review in cases of minor violation of the procedure while at the same time avoiding the risk of subsuming this separate ground of review under other grounds referring to due process or public order.[24]
>
> […]
>
> [Emphasis added]
> [Report prepared by Fabien Gélinas]
>
> In practice, very few awards are annulled or refused enforcement under the international instruments on the ground that there was a violation of the applicable arbitration procedure. This is likely due in part to the generality of the terms of arbitral rules of procedure, which give a broad discretion to arbitrators [...].[25]
>
> [Reference omitted]
> [Report prepared by Fabien Gélinas]

[56] In a companion judgment released concurrently, Silcoff, J. concluded that the nature of a particular procedural irregularity was nevertheless sufficiently serious to warrant a declaration of nullity of portions of an award in *Louis Dreyfus, s.a.s. (SA Louis Dreyfus & Cie) c. Holding Tusculum, b.v.*[26] where an arbitration tribunal had not respected the rule of *audi alteram partem*.

[57] In my view, the principles of autonomy that apply to arbitration, in the sense of absence of judicial surveillance except on limited grounds, as well as the clear deference the legislature intended courts to observe with respect to arbitral awards, is incompatible with the automatic annulment of an award in which there has been a flaw, however minor, in the arbitral procedure. Prof. Merkin, in *Arbitration Law*, sets out the state of English law on the subject of the homologation of arbitration awards, which he indicates also draws its origins from Article V of the New York Convention:

> Enforcement is mandatory in all but the cases specified in the legislation, and if any of those defences is made out on the balance of probabilities the enforcement of the award may be refused. It was suggested by Mance LJ. […] that the discretion to enforce an award despite a good defence being made out is a strictly limited one, and is for the most part confined to the situation in which the respondent has lost the right to contest the award, eg, by reason of waiver. However, the view has been taken in other cases that while there is a presumption of enforcement the discretion is somewhat wider, and that there is

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[24] *Ibid.*, para. [129].
[25] *Ibid.*, para. [127].
[26] J.E. 2009-372, 2008 QCCS 5903. Appeal discontinued on January 28, 2010, C.A.M. 500-09-019301-092.

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> residual discretion to order enforcement where the breaches made out are trivial or where they were raised at the "eleventh hour" in a manner which diluted their significance.[27]
>
> [References omitted]

[58] With respect to inconsequential procedural breaches, the author says this:

> […] it is apparent that not every breach of agreed procedure can confer the power on the English court to refuse enforcement, as the intention of the New York Convention would otherwise be undermined. The English courts will have regard only to material breaches of procedures.[28]

[59] In support of this proposition, Merkin cites the British Columbia Supreme Court judgment in *Javor v. Francoeur*.[29]

[60] An analogous approach can be seen in the United States, where, in confirming a judgment of the District Court for the Southern District of Texas that granted a motion to recognize an arbitral award despite an inconsequential procedural irregularity, the Fifth Circuit Court of Appeals stated:

> [6] Article V, § 1(d) of the Convention provides a defense against confirmation of an arbitral award if the respondent can prove that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place." 9 U.S.C. § 201, Art. V(1)(d). At least one district court faced with an objection to enforcement of an arbitral award based on Article V(1)(d) has concluded that because of the clear "pro-enforcement bias" of the New York Convention, it is appropriate to "set aside an award based on a procedural violation only if such violation worked substancial prejudice to the complaining party." *Compagnie des Bauxites de Guinee v. Hammermills, Inc.*, […]; *American Const. Mach. & Equip. Corp.* […]. The Court finds the Hammermills decision well-reasoned and adopts it as persuasive authority.[30] […]
>
> [References omitted]

[61] Without necessarily adopting the respondents' position that only a significant and prejudicial procedural irregularity would justify a refusal to homologate or give rise to the annulment of an award, it would be wholly inconsistent with the intention of the

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27 Robert Merkin, *Arbitration Law*, London, LLP, 2004, p. 820, para. 19.50.
28 *Ibid.*, p. 823, para. 19.55.
29 *Supra*, note 20.
30 *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2004), 364 F.3d 274 (5th Cir.).

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legislature and the current jurisprudential trend to treat every breach of the applicable procedure, however minor and however inconsequential, as requiring a court to refuse to homologate an award or to annul it if so requested. A court called upon to adjudicate such a proceeding must balance the nature of the breach in the context of the arbitral process that was engaged, determine whether the breach is of such a nature to undermine the integrity of the process, and assess the extent to which the breach had any bearing on the award itself.

[62] This Court had occasion to reach a similar conclusion in an appeal that was decided before the new legislative regime came into force. In *Springdale Canada Inc. v. Lu-Den Casuals Ltd.*, a case in which the Court dismissed an appeal from a judgment of the Superior Court homologating an arbitration award, L'Heureux-Dubé, Vallerand, and Rothman, JJ.A. held that not every irregularity in the arbitral process would give rise to a refusal to homologate the awards:

> 10 Finalement, le fait que, dans le cours du délibéré l'arbitre Greenberg ait consulté des documents de nature statistique provenant de l'Institut canadien du Textile et qu'il ait par téléphone vérifié auprès d'un tiers certaines données de ces statistiques afin de tenter de convaincre l'arbitre dissident et après qu'une décision de principe fut arrêtée, ne constitue, dans les circonstances de l'espèce, ni une démonstration de partialité ni une contravention à la règle *audi alteram partem* ou aux règles de justice naturelle. S'il est reconnu que les arbitres, même lors d'un arbitrage privé comme c'est le cas ici, sont tenus d'observer les règles de justice fondamentale telle la règle *audi alteram partem* bien qu'ils ne soient pas soumis à toutes les règles de droit et de procédure, toute irrégularité ou informalité ne constitue pas nécessairement un accroc à telle règle de justice naturelle.
>
> 11 Tout en reconnaissant, comme le premier juge, qu'il eût été plus sage pour l'arbitre de s'abstenir de recourir à des informations extérieures sans en informer les parties et sans leur donner la chance d'exposer leur point de vue, compte tenu de la nature de l'arbitrage, des circonstances révélées par la preuve quant à la nature des renseignements ainsi obtenus et, vu entre autres le moment où ils ont été obtenus, de l'absence de préjudice qui en a résulté, ce moyen ne saurait être retenu.[31]
>
> [Emphasis added]

[63] With that perspective in mind, the procedural irregularity created by Mtre Vautour's disclosure that the decision to be rendered was unanimous, in the context I have described, should not be considered as one that prevents the homologation of the award or renders it null. To accede to Mr. Rhéaume's contentions would be an exaggerated response to what is essentially a benign indiscretion on the

[31] [1986] J.Q. No. 623.

part of Mtre Vautour, which Mr. Rhéaume did not succeed in showing had the slightest bearing on the outcome of the arbitration. In such circumstances, it must be recognized that courts have a residual discretion to homologate an arbitral award or to refuse to nullify one when the breach of the applicable procedure does not affect the integrity of the process as a whole.

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[64] Had I been of a different view and been prepared to invalidate the award for the reasons advanced on behalf of Mr. Rhéaume, I would not have substituted the result for which Mr. Rhéaume contended before the arbitrators. Even on the assumption that the award was null, it does not follow that it was wrong on the merits and that the arbitrators should have adopted Mr. Rhéaume's position. This Court would have had no basis on which to reach any conclusion in that respect, especially since article 946.2 *C.C.P.* precludes a court called upon to homologate an award from enquiring into its merits. It therefore would have been up to the parties to determine how the question of the adjustments on the sale of Mr. Rhéaume's interest in the various insurance companies should be resolved.

(2) Are Quebec arbitrators also subject to an implicit obligation of confidentiality, and if so what is the sanction for a breach of the obligation?

[65] In addition to their contentions concerning deliberative secrecy, the appellants further complain that the motions' judge failed to consider their submission that the arbitrators were subject to an implicit obligation of confidentiality that they also breached. In this respect, they argue that conventional arbitrations such as the one that is the object of these proceedings are private in nature. They add that the proceedings are held *in camera*, and that the general confidentiality of the process, which is one of the advantages of arbitration, amounts to an implicit obligation of confidentiality that binds arbitrators and parties alike, even in the absence of a specific legislative provision to that effect.

[66] In support of their position, they invoke section 8 of the code of ethics of the Institut de Médiation et d'Arbitage du Québec that provides that a member of the institute "doit être fidèle à la relation de confiance et de confidentialité inhérente aux fonctions d'arbitre […]," as well as section 33 of the national arbitration rules of the ADR Institute of Canada, Inc., which provides that parties, witnesses and arbitrators agree to keep confidential that which transpires during the arbitration process. They further note that the three arbitrators were also subject to obligations of confidentiality in conformity with their respective professional codes of ethics as advocates (sections 3.06.01 and 3.06.03)[32] and chartered accountants (section 48).[33]

[67] The appellants recognize that the extent of this inherent obligation is greater than that of deliberative secrecy since it encompasses everything that transpires during the

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[32] *Code of ethics of advocates,* R.R.Q. 1981, c. B-1, r.1.
[33] *Code of ethics of chartered accountants*, R.R.Q. 1981, c. C-48, r.4.

process, and they still contend that the consequence of a breach of the obligation is the nullity of the award.

[68] While they agree that arbitrations are generally conducted in private, the respondents do not concede that this fact creates an obligation of confidentiality, which they say only exists if the parties so provide in their agreement. There being no such provision in the initial arbitration agreement and its subsequent amendment in this case, they contend that there was no obligation of confidentiality that Mtre Vautour breached by his disclosure of the financial aspects of the transaction and the respective positions of the parties at the board of directors meeting of Excellence at which Messrs. Rhéaume, Ponce and Riopel were all present. What is more significant is that none of them objected when the disclosure occurred, which suggests they had no expectation of confidentiality.

[69] It should first be noted that there are no Quebec or other Canadian statutory, jurisprudential or doctrinal authorities that are directly on point and support the appellants' position, nor have they established that the provisions in the Quebec and Canadian codes of ethics in arbitration matters on which they rely actually apply to the three arbitrators in this case.

[70] Finally in this respect, the provisions of a code of ethics enacted pursuant to the *Professional Code*[34] to which the appellants refer do not necessarily govern the conduct of arbitrators since they are not acting in their capacities as members of a professional corporation when they perform their role as arbitrators, nor is it clear that their terms would apply on their face to discharging the role of an arbitrator. These provisions are to the following effect:

> Advocates
>
> 3.06.01. An advocate shall not use, for his benefit, for the benefit of the partnership or joint-stock company within which he engages in his professional activities or for the benefit of a person other than the client, confidential information obtained while he engages in his professional activities.
>
> 3.06.03. An advocate shall take reasonable measures to ensure that any person who cooperates with him or engages is his activities within the partnership or joint-stock company in which the advocate engages in his professional activities maintains the absolute confidentiality of confidences the advocate receives while he practices his profession.

[34] R.S.Q., c. C-26.

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Chartered Accountants

> 48. A member is bound by professional secrecy and may not disclose confidential information revealed to him by reason of his profession, unless he is authorized to do so by the person who confided such information to him or by an express provision of law. In addition, the member is released from his obligation of professional secrecy in the case and in accordance with the terms and conditions set out in section 48.1.

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[71] In any event, since anyone can act as an arbitrator, even if they are not professionals who are subject to a specific code of ethics, it would be wrong to apply such a standard to all arbitrators.

[72] Relatively few Canadian cases have addressed the matter.

[73] In *Hi-Seas Marine Ltd. v. Boelman*, the issue did arise for consideration in British Columbia but Davies, J. concluded that he did not have to resolve it for the purposes of the case before him.[35] In Ontario, Farley, J. held that although the parties had agreed to treat an arbitral award in confidence, its appeal would nevertheless be public once "'re-entering' the court system after functionally having been in the private confidential sector before the Arbitrator […]."[36] Cameron, J. of the Ontario Superior Court of Justice, in *ADESA Corp. v. Bob Dickenson Auction Service Ltd*.[37] later took much the same position. Despite a confidentiality provision in an arbitration agreement and a finding of fact that there was an expectation of privacy in the arbitration, he nevertheless held that confidentiality was not essential to the arbitration process. He went on to say that while there were advantages to confidentiality:

> [56] […] In balancing the interests served by confidentiality against the interests served in determining the truth and disposing correctly of the litigation, I do not think the confidentiality of arbitration proceedings should be elevated to the status of a privilege such as solicitor-client or spousal privilege or, on occasion, doctor-patient or spiritual adviser-penitent. I am not persuaded that the confidentiality of the arbitration process, including the need to encourage the truth of the evidence therein, is so important as to outweigh the need in this court for justice if that requires the disclosure. […][38]

[74] On the international scene, the English Court of Appeal has recognized an implicit obligation of confidentiality, in part because of what it considered the essentially private nature of arbitration.[39] The Australian High Court, which is that country's

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35 (2006), 17 B.L.R. (4th) 240, 2006 BCSC 488, para. 66.
36 *887574 Ontario Inc. v. Pizza Pizza Ltd*. (1994), 23 B.L.R. (2d) 239 (Ont. C.J.).
37 (2005), 247 D.L.R. (4th) 730 (Ont. Sup. Ct. J.).
38 *Ibid*.
39 *Ali Shipping Corp v. Shipyard Trogir*, (1997) [1998] 2 All E.R. 136 (Eng. C.A.).

supreme court, nevertheless rejected the concept in *Esso Australia Resources Ltd. v. Plowman*,[40] holding that parties who sought such protection were obliged to contract to that effect.

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[75] The same view was taken by Constantine Partasides in a commentary on the impact of a judgment of Sweden's Supreme Court[41] that reversed a lower court judgment that had annulled an arbitration award for breach of an implicit duty to maintain confidentiality:

> In doing so, Sweden's Supreme Court has satisfied the most pressing need of all on the question of confidentiality: the need for clarity. It decided, unequivocally that, as a matter of Swedish law a duty of confidentiality is not to be implied into an arbitration agreement. In Sweden, if the parties want confidentiality they must contract for it expressly.
>
> Sweden thus takes its place amongst a growing number of important jurisdictions that have rejected the notion of an implied duty of confidentiality and the questions it raises. In the words of Hans Bagner, a leading Swedish practitioner whose commentary on the *Bulbank* decision also appears in this edition:
>
> > The myth about the duty of confidentiality in arbitration, fatally wounded in 1995 by the Australian High Court, has now been laid to rest, at least in Sweden.
>
> Most notably, it joins Australia, whose High Court refused to imply an obligation of confidentiality in the landmark judgment alluded to by Mr Bagner, *Esso Australia Resources Limited & Others v. The Honourable Sidney James Plowman (the Minister for Energy and Minerals) & Others*. It joins the United States, where a US Federal District Court declined to give any recognition to a principle of confidentiality in international arbitration in *United States v. Panhandle Eastern Corp. et al.*
>
> Steadily, the world seems to be shrinking for those that view the implicitness of confidentiality in arbitration to be self-evident and self-sufficient. What was once referred to as the "occasionally unwarranted assumption of confidentiality" will soon – in the present trend continues – be more accurately referred to as an oft-unwarranted assumption.[42]
>
> [References omitted]

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40 [1995] H.C.A. 19, 183 C.L.R. 10.

41 *Bulgarian Foreign Trade Bank Ltd. v. A.I. Trade Finance Inc*., (2001) XXVI Yearbook Commercial Arbitration 291.

42 Constantine Partasides, « Bulbank – The Final Act », (2000) 12 *Mealey's Int Arb Rep* 44, 47.

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[76] More recently, the Judicial Committee of the Privy Council seemed to retreat from the position on confidentiality adopted by the English Court of Appeal in the *Ali Shipping* case,[43] witness the following observation of Lord Hobhouse in *Associated Electric and Gas Insurance Services Ltd v. European Reinsurance Company of Zurich*:

> [20] […] However, Potter LJ, [of the English Court of Appeal], who delivered the leading judgment [in *Ali Shipping*], […] affirming the privacy of arbitration proceedings, went on to characterise a duty of confidentiality as an implied term […] and then to formulate exceptions to which it would be subject […]. Their Lordships have reservations about the desirability or merit of adopting this approach. It runs the risk of failing to distinguish between different types of confidentiality which attach to different types of document or to documents which have been obtained in different ways and elides privacy and confidentiality. […] Generalisations and the formulation of detailed implied terms are not appropriate. But in any event, the *Ali Shipping* case provides no assistance for either argument of Aegis. […][44]

[77] The uncertain status of implicit confidentiality in the international arbitration process in the absence of a specific agreement is reflected in doctrinal sources as well. For example, in 1996 the United Nations Commission on Trade Law issued this cautionary warning:

> 31. It is widely viewed that confidentiality is one of the advantageous and helpful features of arbitration. Nevertheless, there is no uniform answer in national laws as to the extent to which the participants in an arbitration are under the duty to observe the confidentiality of information relating to the case. Moreover, parties that have agreed on arbitration rules or other provisions that do not expressly address the issue of confidentiality cannot assume that all jurisdictions would recognize an implied commitment to confidentiality. Furthermore, the participants in an arbitration might not have the same understanding as regards the extent of confidentiality that is expected. Therefore, the arbitral tribunal might wish to discuss that with the parties and, if considered appropriate, record any agreed principles on the duty of confidentiality.[45]
>
> [Emphasis added]

[78] Various authors have signalled the difficulty in determining the extent of such an obligation. For example, Christoph Müller has said this:

> Le caractère privé de l'arbitrage n'implique pas nécessairement et par rapport à tous les documents et informations un (même) devoir de confidentialité. La

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43 *Supra*, note 39.
44 [2003] 1 W.L.R. 1041, [2003] UKPC 11.
45 UNCITRAL, 29th session, Doc. U.N. A/51/17 (1996).

> bonne foi n'offre pas non plus une base conceptuelle utile à la définition de la confidentialité. Savoir si une divulgation doit être considérée comme une violation du principe de la bonne foi dépend de l'étendue du devoir de confidentialité que ce principe impose, ce qui ne fait que repousser la difficulté.[46]
>
> [Reference omitted]

[79] Michael Young and Simon Chapman also point out the difficulty of the kind of universal rule for which the appellants contend:

> By attempting to formulate a universal rule of confidentiality applied as a matter of law, we run the risk of *forcing* parties to arbitrate in confidence. […] Since it has clearly proved difficult (if not impossible) to draft a confidentiality rule of sufficient clarity that can be applied equally in all circumstances, the better view might be to leave the issue of confidentiality to be determined at the discretion of the parties. This approach not only has the benefit of simplicity, but it would also allow the parties to decide the extent to which an obligation of confidentiality – whether qualified or absolute – should apply in their particular circumstances.[47]

[80] In my view, allowing the parties to frame in advance whatever confidentiality agreement suits them rather than attempting to imply the existence of one after the fact is entirely consistent with the extensive freedom of contract the legislature gives parties to arbitration, as the noted Quebec authority on arbitration, Prof. John E.C. Brierley, said when writing about the new legislative regime at the time of its adoption:

> Le principe que les stipulations des parties constituent la source première du droit régissant l'arbitrage prévu par leur convention est pleinement accepté dans la loi nouvelle. Les dispositions impératives de la loi sont limitées, qu'il s'agisse d'un arbitrage entièrement soumis au droit québécois ou de la reconnaissance et exécution au Québec d'une sentence arbitrale rendue hors du Québec. L'autonomie des parties ou de l'arbitrage lui-même doit, bien sûr, s'incliner devant les dispositions d'ordre public du droit québécois, mais l'idée de l'autonomie des parties et des arbitres reçoit une expression maximale dans la nouvelle législation.[48]

[81] Messrs. Rhéaume, Ponce and Riopel not having stipulated any obligation of confidentiality in their agreement, or submitted their arbitration to a governing law that

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[46] Christoph Müller, *La confidentialité en arbitrage commercial international : un trompe-l'œil ?*, (2005) 23 ASA Bulletin 216, 225.

[47] Michael Young et Simon Chapman, *Confidentiality in International Arbitration – Does the exception prove the rule? Where now for the implied duty of confidentiality under English law?* (2009) 27 ASA Bulletin 26, 32-33.

[48] John E.C. Brierley, *Une loi nouvelle pour le Québec en matière d'arbitrage*, (1987) 47 R. du B. 259, 263-264.

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contemplated an obligation of confidentiality, I see no basis on which to read one into it. I would therefore also reject this ground of appeal.

IV
CONCLUSION

[82] I would dismiss the appeal with costs.

ALLAN R. HILTON, J.A.

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