COURT OF APPEAL

2012 QCCA 385 (CanLII)

CANADA
PROVINCE OF QUEBEC
REGISTRY OF MONTREAL

No: 500-09-021110-101
(500-17-049671-095)
(500-17-050435-091)
(500-17-045335-083)

DATE: February 29, 2012

CORAM: THE HONOURABLE JACQUES DUFRESNE, J.A.
JACQUES A. LÉGER, J.A.
RICHARD WAGNER, J.A.

No: 500-17-049671-095

NEARCTIC NICKEL MINES INC.
-and-
UNGAVA MINERALS EXPLORATION INC.
APPELANTS - Respondents
v.
CANADIAN ROYALTIES INC.
RESPONDENT - Petitioner
-and-
ATTORNEY GENERAL OF QUEBEC
-and-
CLAUDE-ARMAND SHEPPARD, in his capacity as arbitrator
IMPLEADED PARTIES

No: 500-17-050435-091

NEARCTIC NICKEL MINES INC.
-and-
UNGAVA MINERALS EXPLORATION INC.
APPELANTS - Plaintiffs
v.
CANADIAN ROYALTIES INC.
RESPONDENT - Defendant

-and-
ATTORNEY GENERAL OF QUEBEC
-and-
CLAUDE-ARMAND SHEPPARD, in his capacity as arbitrator
IMPLEADED PARTIES – Impleaded parties

2012 QCCA 385 (CanLII)

No: 500-17-045335-083

NEARCTIC NICKEL MINES INC.
-and-
UNGAVA MINERALS EXPLORATION INC.
APPELANTS - Plaintiffs
v.
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RESPONDENT - Defendant
-and-
ATTORNEY GENERAL OF QUEBEC
IMPLEADED PARTY
-and-
CLAUDE-ARMAND SHEPPARD, in his capacity as arbitrator
IMPLEADED PARTY – Impleaded party

JUDGMENT

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[1] On appeal from a judgment of the Superior Court, District of Montreal, (the Honourable William Fraiberg), rendered on September 22, 2010, which, in Court file 500-17-049671-095, dismisses the Plea of Nearctic Nickel Mines inc. and Ungava Minerals Exploration Inc., maintains Canadian Royalties Inc.'s Motion to Homologate an Arbitration Award and homologates the final arbitral award rendered by Me Claude-Armand Sheppard on April 1, 2009 for all legal purposes and, in Court file 500-17-050435-091, dismisses the Motion in Annulment of an Arbitration Award of Nearctic Nickel Mines Inc. and Ungava Minerals Exploration Inc. and, in Court file 500-17-045335-083, dismisses the Motion to Adjudicate on the Competence of the Arbitrator of Nearctic Nickel Mines Inc. and Ungava Minerals Exploration Inc., the whole with costs against Nearctic Nickel Mines Inc. and Ungava Minerals Exploration Inc., solidarily, in the three actions;

[2] For the reasons of Wagner, J.A., to which Dufresne and Léger, JJ.A concur, **THE COURT:**

[3] **DISMISSES** the appeal, with costs.

JACQUES DUFRESNE, J.A.

JACQUES A. LÉGER, J.A.

RICHARD WAGNER, J.A.

Mtre Patrick Girard
Mtre Guillaume Boudreau-Simard
Stikeman Elliott
For the Appelants

Mtre Dimitrios Maniatis
Mtre Stefan Chripounoff
Langlois, Kronström, Desjardins
For the Respondent

Date of hearing: March 18, 2011

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REASONS OF WAGNER, J.A.

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[4] Does an arbitrator acting under an arbitration agreement have the authority to order injunctive relief or specific performance? To what extent can this arbitrator interpret a contract given the limits provided by art. 946(4) C.C.P.?

[5] These two issues are at the heart of this appeal.

THE FACTS

[6] Ungava Minerals Exploration inc. ("Ungava"), a wholly owned subsidiary of Ungava Nearctic Nickel Mines inc., became the registered owner of the Expo Ungava Mineral Property ("the Property") in 1995.

[7] Located in northern Quebec, the Property contains three deposits known as Mesamax, Expo and Mequillon.

[8] In the year 2000, Ungava was contacted by Canadian Royalties Inc. ("CRI") with a view to negotiate a joint venture agreement to acquire Ungava's interest in the Property.

[9] On January 12, 2001, an agreement was entered into between the parties granting CRI four separate options to purchase up to 80% of the Property. The Agreement provided that CRI could acquire an aggregate 70% interest in the Property by exercising the first three options provided that it invested an aggregate amount of $1.75M within a fixed period of time.

[10] The agreement also provided that once CRI had acquired an 80% interest in the Property, the contract would be replaced by a joint venture to which Ungava was to contribute 20% of costs.

[11] More particularly, CRI could acquire an additional 10% interest in the Property if it met certain conditions described at article 2.1d) of the Agreement which reads as follows:

> "Article 2.1 […] d) if, after completion of the Third instalment, CRI, either solely or together with a Designate, incurs all necessary or advisable expenditures on the Property and completes, or makes arrangements to have completed, a Bankable Feasibility Study on the Property, at no cost to Ungava Exploration or to Ungava Minerals (which study is acceptable by a financing bank or financing entity for the purposes of putting the Property into commercial production on a non-recourse basis), Ungava Exploration shall, within 5 Business Days of acceptance of the Bankable Feasibility Study, transfer an additional 10 % of its right, title and interest in and to the Property to CRI, in order that such 10 % is immediately vested with CRI, or as it may in writing direct"… [our emphasis]

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[12] The evidence established that CRI exercised the first three options and secured a 70% interest in the Property and, thereafter, proceeded with a Bankable Feasibility Study ("BFS") pursuant to Article 2.1d) to acquire a further 10% interest in the same Property.

[13] CRI then took the position that having delivered the BFS, it had met the requirements under Article 2.1d) and was thereby entitled to the remaining 10 % interest in the Property.

[14] Ungava disputed CRI's claim and argued that the BFS was not adequate, that there was no banking's commitment to finance the project and that, as a result, the requirements for exercising the fourth and last option were not satisfied.

[15] Ungava contended that:

a) the BFS had not been accepted by a financing bank or financing entity;

b) it did not contemplate non-recourse financing;

c) it was not a BFS made to put the Property in commercial production;

d) it falsely stated that a nearby airport owned by a third party would be used by CRI under contract.

[16] Faced with Ungava's contestation, CRI called for arbitration.

[17] The Agreement included the following arbitration clause:

> 12.1 All disagreements or disputes arising between CRI, the Designate and each of their successors and assigns on the one part (all of whom shall be referred to as "Party 1 in this Article 12 only), and Ungava Exploration and Ungava Minerals, each of their successors and assigns on the other part (all of whom shall be referred to as "Party 2" in this Article 12 only), which directly or indirectly arise from this Agreement, shall be definitively settled by arbitration in accordance with the *Centre d'arbitrage commercial national et international du Quebec*, thus excluding all recourse to the Courts. Arbitration shall be conducted in accordance with the *Centre d'arbitrage* commercial arbitration regulations in force at the time of the execution of this Agreement, and Party 1 and Party 2 hereto declare themselves to be bound by the said regulations. Excluded are disagreements or disputes which can be decided by the Small Claims Court of Quebec or which could be if the plaintiff reduced the claim to render the claim eligible before the Court. The Small Claims Court of Quebec shall then be fully authorized to settle the disagreement or dispute.

[18] It is not disputed that the above is a "complete arbitration clause" excluding all recourses to the courts of general ordinary jurisdiction.

[19] On September 15 2008, Mtre Claude-Armand Sheppard (the Arbitrator), was appointed by the parties to conduct the arbitration in accordance with articles 940 to 947.4 C.C.P.

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[20] After 25 days of hearing before the Arbitrator, the latter rendered his arbitration award on April 1st 2009 with the following conclusions:

> [9.14] The undersigned declares:
>
> a) By delivering on August 20, 2007, to Nearctic Nickel Mines Inc. (formerly known as Ungava Minerals Corp.) and to Ungava Minerals Exploration (formerly known as Ungava Exploration Inc.) (hereinafter referred to jointly as "Ungava"), a bankable feasibility study ("BFS") dated July 2007, P-3, and prepared by SNC-Lavalin Inc., in conformity with the Agreement, P-1, Canadian Royalties Inc. ("CRI") was entitled at least as of September 6, 2007 to the transfer by Ungava to it, and to the vesting, of an additional 10% of Ungava's right, title and interest in, and to, the Property as defined in Article 1.1q) and more fully described in Schedule "A" of the Agreement, P-1, and in the list, P-1B, and namely:
> *"…a certain mineral permit and mineral claims located in the Province of Quebec, as more particularly described in Schedule "A" to this Agreement, including any replacement or successor permits or claims, and all mining leases and other mining interests derived from any such permit",*
> A copy of Schedule "A" and of Exhibit P-1B being also annexed to the present award for further certainty and to form part hereof.
>
> b) That pursuant to Article 3.1 of the Agreement, P-1, the transfer to CRI and the vesting of this additional 10% right, title and interest in, and to, the Property, a joint venture relationship is deemed conclusively to have been formed between the parties as of September 6, 2007 in accordance with Article 3 of the Agreement, P-1;
>
> c) CRI is entitled to the specific performance of the obligation of Ungava Minerals Exploration Inc. to transfer to it an additional 10% right, title and interest in, and to, the Property in accordance with Article 2.1d) of the Agreement.
>
> [9.15] The undersigned orders Ungava Minerals Exploration Inc. to transfer to CRI an additional 10% right, title and interest in, and to, the Property on or before noon, Wednesday, April 15, 2009;
>
> [9.16] The undersigned orders Nearctic Nickel Mines Inc. and Ungava Minerals Exploration Inc. by noon, Wednesday, April 15, 2009 to do and perform all such acts and things, and execute and deliver all such agreements, assurances, deeds, assignments, conveyance notice, releases, mining transfer applications and other documents and instruments as may be reasonably required to complete the transfer contemplated by the present award;
>
> [9.17] The undersigned declares, in the event Defendants fail to comply with the present award, that the award shall constitute valid title upon which the Ministry of Natural Resources of Quebec, may register an additional 10%, for an aggregate of 80%, right, title and interest in, and to, the Property as defined and described hereinabove, in favour of CRI;

[21] Thereafter, CRI presented a Motion for homologation before the Superior Court of the District of Montreal. After a hearing which lasted for more than two weeks, Fraiberg, J. granted CRI's Motion on September 22, 2010.

[22] On December 8, 2010, leave to appeal was granted by my colleague Morissette, J.A. on two issues: a) whether the Arbitrator exceeded his jurisdiction by rendering conclusions of an injunctive nature; b) whether the Arbitrator rewrote the contract and/or ignored certain of its provisions.

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Was the Arbitrator empowered to issue order of an injunctive nature?

[23] In his award, the Arbitrator issued several orders set forth at paragraph 9.14c) to 9.16 of its decision.

[24] The issue as to whether an arbitrator may issue such orders has prompted long and heated debates since the enactment of the rules governing arbitration into articles 940 and following of the *Code of Civil Procedure.*

[25] Referring to article 946.5 C.C.P., the appellant's contention is that the Arbitrator granted a mandatory injunction, i.e. specific performance, in order to force compliance with the contract. Since the power to render permanent injunctive conclusions of this nature is exclusive to the Superior Court, the award should be annulled for that reason alone.

[26] Respondent replies that the Arbitrator did not issue an *"injunction"* within the meaning of article 751 C.C.P. but rather ordered the specific performance of a contractual obligation, which is tantamount to a conveyance of title. Therefore, the Arbitrator did not usurp the exclusive prerogatives of a judge of the Superior Court.

[27] Subsidiarily, respondent suggests that should the Court determine that the Arbitrator has, in fact, issued an injunction according to article 751 C.C.P., he had jurisdiction to issue a permanent mandatory remedy of this kind.

[28] Before addressing the above-mentioned issues, several preliminary comments are in order.

[29] The rules relevant to arbitration in Quebec were enacted principally in 1986, as part of a major reform of Quebec arbitration law, pursuant to the *Act to amend the Civil Code and the Code of Civil Procedure in arbitration*[1]. Articles 946.4 and 946.5 C.C.P. were part of this reform. The purpose of the reform was to ensure that the execution of the parties' intention to resort to arbitration would be as efficient and fair as possible.

[30] As for article 751 C.C.P. pertaining to injunctions, its history is more longstanding. The first Quebec *Code of Civil Procedure*, adopted in 1867, did not contain provisions about injunction. Therefore, it seems that this remedy was not available to Quebec Courts. Its jurisdiction derives from Common law principles applied by the equity courts. This meant that injunction could not be imported into Quebec law[2].

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1 S.Q. 1986, c. 73.

2 See Alain Prujiner, « Origines historiques de l'injonction en droit québécois », (1979) 20 *C. de D.* 249; Denis Ferland and Bernard Cliche, « Injonction », in Denis Ferland and Benoît Emery (dir.), *Précis de procédure civile du Québec*, 4th ed., Cowansville, Yvon Blais, 2003, p. 429, at pages 429-431.

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[31] On March 9, 1878, the *Act to provide for the issue of the Writ of Injunction in certain cases, and to regulate the procedure in relation thereto*[3] came into force and provided a basis for injunctions to be granted, albeit restricted to specific cases. The statute was consolidated in 1888 at which point the injunction was formally introduced in the *Code of Civil Procedure*, despite the provisions essentially being to the same effect as those of the 1878 enactment. The scope of injunctive relief is extended by the *Act respecting the Code of Civil Procedure of the Province of Quebec*[4] adopted on January 9, 1897.

[32] Injunction as we know it today appears for the first time in the major reform brought about in the 1965 Quebec *Code of Civil Procedure*[5] and has not been subject to significant changes since then, except for amendments which took place in 1983 bearing on interlocutory injunctions.

[33] Previously, Quebec courts adopted a position similar to that of courts in the Common law jurisdiction, which seldom grant specific performance, as pecuniary damages are understood to be the default remedy. This situation changed when article 1590 C.C.Q. placed specific performance at the top of the list of available remedies and article 1601 C.C.Q. consecrated the right to specific performance. There is no doubt today that this remedy should no longer be considered to be exceptional[6].

[34] More specifically, the trend towards a more liberal approach to specific performance began with decisions rendered by both the Superior Court and the Court of Appeal in the case of *Propriétés Cité Concordia*[7].

[35] There remains however cases where specific performance is not appropriate. For instance, specific performance should not be ordered where the act to be accomplished is so complex that proof of its non-performance following judgment could not be clearly made.

[36] The expansion of specific performance stems mainly from three factors. The first is the rejection of the Common law approach according to which damage awards are the main default remedy, specific performance being resorted to only where monetary awards are not appropriate. Secondly, Quebec courts are gradually moving away from distinguishing between obligations to do and not to do in matters of specific performance. Finally, it is increasingly accepted that the obligations of a corporate entity can usually be enforced through specific performance.

[37] In Quebec law, specific performance of obligations is now the general rule while pecuniary damages have become the exception[8]. Specific performance can be obtained

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3 S.Q. 1878, c. 14.

4 S.Q. 1897, c. 48.

5 *Code of Civil Procedure*, S.Q. 1965, c. 80.

6 See Rosalie Jukier, « The Emergence of Specific Performance as a Major Remedy in Quebec Law », (1987) 47 *R. du B.* 47, 59.

7 *Propriétés Cité Concordia Ltée v. Banque Royale du Canada*, [1981] C.S. 812; *Banque Royale du Canada v. Propriétés Cité Concordia Ltée*, [1983] R.D.J. 524 (C.A.).

8 *A.V.I. Financial Corp. (1985) inc. v. Novergaz inc.*, J.E. 97-1882 (Sup. Ct); *Varnet Software Corp. v. Varnet U.K. Ltd.*, [1994] R.J.Q. 2755, 2758 (C.A.).

through an injunction or a simple order. Therefore, it is reasonable to consider that some orders of specific performance are injunctions pursuant to article 751 C.C.P. but not all orders of an injunctive nature are encompassed within the scope of article 751 C.C.P.

[38] In the case at bar, are the orders issued by the Arbitrator equivalent to an injunction within the meaning of article 751 C.C.P.?

Injunction and specific performance in arbitration proceedings

[39] According to article 940.4 C.C.P., the parties can seek an interlocutory injunction from the Superior Court during the arbitration process. This might be construed, at first glance, as an indication that consensual tribunals such as arbitrators cannot issue orders of an injunctive nature during the arbitration process. As for the power of the arbitrator to issue such orders at the end of the process, it may be limited and its scope will depend upon the circumstances of each case[9].

[40] Appellant's position that all orders of specific performance are outside the jurisdiction of Quebec arbitrators rests mainly on the authority of two cases.

[41] In *Placements Raoul Grenier*[10]*,* the Superior Court stated:

> [41] Si le législateur a prévu que l'une des parties pouvait, avant ou pendant la procédure arbitrale, s'adresser à un juge ou au tribunal pour obtenir des mesures provisionnelles, prenant soin également de réserver les matières relevant de la compétence exclusive de la Cour supérieure, l'on peut difficilement conclure qu'un tribunal d'arbitrage conventionnel dispose au mérite d'un tel pouvoir qu'il ne peut lui-même exercer « pendant la procédure arbitrale ».
>
> [42] C'est précisément parce que le tribunal d'arbitrage ne dispose pas de ce pouvoir que le législateur a expressément prévu, avant ou pendant la procédure arbitrale, la possibilité pour l'une des parties de s'adresser à un juge ou au tribunal.
>
> [43] En conséquence, ces trois conclusions rédigées sous forme d'ordonnance de la nature d'une injonction, quoiqu'en définitive ne font qu'ordonner aux parties de respecter leurs engagements ne peuvent être homologuées. Aussi, le Tribunal estime que l'article 946.5 C.C.P. l'autorise à les exclure du jugement d'homologation étant donné que la question de la juridiction des tribunaux doit être considérée comme une question d'ordre public.
>
> [Emphasis added]

[42] This judgment was upheld by this Court, which considered the orders issued in the arbitration award to be equivalent to those mentioned at article 751 C.C.P.

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9 *136945 Canada Inc. c. Aliments Vogel Ltée*., J.E. 87-209 (C.S.); *Gaudreault c. Verreault*, J.E. 96-1990 (C.S.).

10 *Placements Raoul Grenier Inc. v. Cooperative forestière Laterrière*, J.E. 2002-1183 (Sup. Ct).

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[43] As underlined by Fraiberg, J., this conclusion is consistent with that of the Supreme Court in *Société de la Place des Arts de Montréal*[11] in which Justice Gonthier held as follows:

> 14 [...] In deciding whether to grant the Union's application, Normand J. was called upon to consider both the availability of injunctive relief as a matter of law and the advisability of granting such an intrusive remedy in the circumstances of the case. These considerations are within the exclusive power of the Superior Court (subject always to appellate review).

[44] The Superior Court had determined that conventional arbitrators do not have the power to issue orders of an injunctive nature. One of the reasons for that decision is that if interlocutory injunctions are outside the jurisdiction of arbitrators, a fortiori, so should the orders of an injunctive nature in the arbitration award.

[45] Article 940.2 C.C.P. is also relevant as it determines specific matters which are subject to the exclusive jurisdiction of the Superior Court. It provides as follows:

> 940.2. Except in the case of article 940.1 or matters under the exclusive jurisdiction of the Superior Court, the court or judge referred to in this Title is the court or judge having jurisdiction to decide the matter in dispute submitted to the arbitrators.

[46] However, the Supreme Court of Canada declared in *The Labour Relations Board and the Construction Industry Panel of Nova Scotia*[12] that the issuance of orders of specific performance should not be approached in the same way the Superior Court considers an injunction. Therefore, the two remedies are to be distinguished.

[47] In *Association des pompiers de Montréal inc.*[13], this Court was called to decide whether an arbitrator whose jurisdiction is governed by the *Labor Code* can legally issue an order to force reintegration of an employee or whether such an order was within the exclusive jurisdiction of the Superior Court. My colleague Morrissette J. stated the following:

> [51] Ne reste donc à résoudre pour nos fins actuelles que la question de savoir si un arbitre du travail régi par le *Code du travail* rend une décision *ultra vires* en prononçant une ordonnance comme celle qui est en cause ici parce que cette ordonnance est une injonction du ressort exclusif de la Cour supérieure.
>
> [60] [...] Il en serait ainsi parce que la législature provinciale n'aurait pas compétence, constitutionnellement parlant, pour investir les arbitres d'un tel pouvoir, celui-ci étant de la nature d'une injonction et donc du ressort exclusif des cours supérieures canadiennes. Cette proposition procède d'un formalisme désincarné (« toute ordonnance de faire ou de ne pas faire est une injonction et inversement ») que condamne la juge Wilson dans l'arrêt *Sobeys*, lorsqu'elle observe qu'il faut se garder dans ce domaine « de sacrifier le fond à la forme ».

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11 *A.I.E.S.T., Stage Local 56 v. Société de la Place des Arts de Montréal*, [2004] 1 S.C.R. 43, 2004 SCC 2.

12 *Tomko v. Labour Relations Board (N.S.) et al.,* [1977] 1 S.C.R. 112, 122-123.

13 *Association des pompiers de Montréal inc. c. Ville de Montréal*, J.E. 2011-699, 2011 QCCA 631.

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> La proposition ne mérite donc pas qu'on s'y arrête plus longuement en 2011 car, après les arrêts *Tomko* et *Sobeys*, elle ne peut être que fausse.

[48] This Court has previously recognized that various tribunals can issue orders to perform or restrain from doing acts, which are not construed as injunctions submitted to the exclusive jurisdiction of the Superior Court[14]. In *Québec (Procureur Général) v. Progress Brand Clothing Inc*., Bélanger J. stated the following:

> Je suis d'avis que l'ordonnance de faire ou de ne pas faire que peut contenir la décision ne constitue pas une injonction du type de celle que la Cour supérieure a compétence exclusive d'émettre : ce n'est pas non plus parce que sa contravention est pénalisée au niveau d'un outrage au Tribunal, suivant une procédure intentée en Cour supérieure, que ladite ordonnance est transformée en injonction. Sans doute que l'injonction, qui nous vient de la *Common Law*, rend celui qui la transgresse coupable d'outrage au Tribunal, mais cela ne veut pas dire que la pénalisation par outrage au Tribunal l'identifie nécessairement à une injonction. Bien des Tribunaux supérieurs et inférieurs peuvent sanctionner de simples ordres et des entraves au cours normal de leurs fonctions par l'outrage au Tribunal, sans qu'il s'agisse de l'injonction dont l'émission est exclusive à la Cour supérieure.

[49] In my view, the analysis of the powers granted to an arbitrator under an arbitration agreement should also be made through a generous and liberal vision which is more in line with the modern interpretation of conventional arbitration as proposed by the Supreme Court of Canada.

[50] In *Desputeaux*[15]*,* the Supreme Court clearly underlined the legislature's will to promote the autonomy of the arbitration process. Mr Justice LeBel, for the Court, aptly stated the following:

> 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

[14] *Québec (Procureur Général) v. Progress Brand Clothing Inc*., [1979] C.A. 326, 331.
[15] *Desputeaux v. Editions Chouette*, [2003] 1 S.C.R. 178, 2003 SCC 17.

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> 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.
>
> 69. [...] Review of the correctness of arbitration decisions jeopardizes the autonomy intended by the legislature, which cannot accommodate judicial review of a type that is equivalent in practice to a virtually full appeal on the law. [....]

[51] The philosophy governing the interpretation of the arbitration process may also be traced to foreign legal sources. For instance, the *Convention on the Recognition and Enforcement of Foreing Arbitral Awards* (New York Convention) of 1958 is a multilateral treaty, which facilitates the enforcement of arbitral awards between contracting parties. It reflects the commercial world's willingness to promote private dispute resolution. In 1985, the United Nations adopted a *Model Law on International Commercial Arbitration*[16] and in June of the same year, Canada became the first country to adopt legislation based on the Convention. The Quebec *Code of Civil Procedure* was amended to reflect it and integrate rules pertaining to both domestic and international commercial arbitrations. Article 940.6 C.C.P. specifically refers to the Model Law as relevant to extra-provincial or international issues in arbitration.

[52] The *Code of Civil Procedure* is silent on the power of arbitrators to order injunctive relief. By contrast, the Ontario *Arbitration Act*[17] explicitly provides at section 31 that arbitrators can issue various orders, such as specific performance and injunctions.

[53] The records of the parliamentary debates surrounding the enactment of article 940.4 C.C.P. suggest that the legislature's intention was not to deprive arbitrators of the power to grant interim measures, but rather to confirm the courts' jurisdiction over that matter. While the arbitrator can clearly grant such remedies when provided for by the parties, questions remain as to the scope of the arbitrator's power when the parties' agreement is silent. It would be hard to believe that arbitrators would need specific authorization from the parties to grant provisional remedies. First, it would seem that the legislature could have explicitly excluded that power if it so desired. Second, section 17 of the UN Model Law specifically allows for such measures. Seeing as this provision is incorporated to Quebec law with regards to inter-provincial or international arbitration, under article 940.6 C.C.P., why should domestic arbitration follow different rules?

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16 *Model Law on International Commercial Arbitration*, UNCITRAL, 1985, UN Doc. A/40/17, Annex 1, 24 ILM 1302.

17 *Arbitration Act*, S.O. 1991, c. 17.

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[54] Once again, one should bear in mind that the revision of the Code of Civil Procedure's provisions on arbitration was completed to harmonize the *Code* with the Model Law. One must also realize that the scope of article 940.4 C.C.P. was never closely reviewed by the Superior Court and never considered by the Court of Appeal.

[55] Determining as a general rule that an arbitrator never possesses the power to grant orders of an injunctive nature also seems incompatible with the terms of article 944.1 C.C.P., which provides that "arbitrators have all for the necessary powers for the exercise of their jurisdiction [...]". Furthermore, following the Supreme Court decision in *Desputeaux c. Chouette*[18], the scope of arbitration agreements must be interpreted liberally and the arbitrator's mandate should include all matter connected to the agreement or the questions in dispute. The arbitration process is understood to constitute a complete system of alternate dispute resolution. In my view, such a system would not be complete if it was unable to ascertain that its decisions be executed through comprehensive orders of specific performance.

[56] In the present case, both parties are sophisticated commercial corporations represented by knowledgeable attorneys. These parties specifically elected to submit any dispute to a conventional arbitration process. It is noteworthy that the parties chose arbitration for the settlement of their legal disputes even if the file also reveals that intensive litigation surrounded both the present arbitration and the preceding ones.

[57] It is somewhat surprising that these same parties would now object to the power of the Arbitrator to issue orders of specific performance whereas they both agreed in advance to confer to the Arbitrator the jurisdiction to determine liability and render a decision, which by nature would be the equivalent of a judgment rendered by the Superior Court.

[58] That being said, I am of the view that the possibility for an arbitrator to issue orders in commercial matters, such as in the present case, must be looked at according to a modern approach, one which recognizes the legislature's plain intent of ensuring that the ultimate goal is achieved, i.e. to settle commercial disputes without referring to courts of ordinary jurisdiction.

[59] Obviously, as in most arbitration proceedings, the cost of litigation, lack of confidentiality and delays were at the center of the parties' concerns when they voluntarily accepted to submit any litigation to arbitration. While it is now well recognized that, save for confidentiality, these benefits are not necessarily satisfied through the arbitration process, one cannot forget that the parties, at the outset of the process, sought to avoid lengthy litigation with all the legal costs involved.

[60] In keeping with this modern and comprehensive approach, this Court recently decided that an order of specific performance within a commercial dispute can legally be issued by an arbitrator and that such order is not necessarily of the same nature as the injunctive relief provided for by article 751 C.C.P. In the case of *Service Bérubé ltée*[19], the Court held that an arbitrator appointed according to the provisions of a commercial agreement could issue orders of specific performance without violating the provisions of article 751 C.C.P. In that case, the arbitrator ordered one of the parties to

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[18] *Desputeaux v. Éditions Chouette (1987) inc.*, *supra*, note 14.

[19] *Services Bérubé ltée c. General Motors du Canada* ltée, J.E. 2011-603, 2011 QCCA 567.

perform an obligation referred to in the Convention. My colleagues Pelletier and Rochon, JJ. A. stated the following:

> [90] Ce n'est certainement pas le type de pouvoir discrétionnaire que les parties entendaient conférer à l'arbitre aux termes de l'article 40 PNACA précité. D'ailleurs, il serait à tout le moins incongru d'affirmer que le mode premier d'exécution des obligations contractuelles ne peut être mis en œuvre que par une mesure aussi exceptionnelle qu'est l'injonction de l'article 751 *C.p.c.*
>
> [91] La facture des procédures relève bien sûr du choix des parties qui s'adressent aux tribunaux. Toutefois, la voie procédurale qu'elles empruntent ne saurait, dans tous les cas, fixer à elle seule et en toutes circonstances, l'identité de la juridiction compétente à se saisir du problème dont elles recherchent la résolution.
>
> [92] Les conclusions qui requièrent le prononcé d'un ordre par un tribunal n'impliquent pas à coup sûr que le cœur du litige porte sur cette question et qu'il s'agit là de la véritable nature du problème divisant les parties.
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> [93] L'injonction proprement dite tire son origine lointaine du droit anglais. Son utilisation a évolué de concert avec les changements sociaux et a été modulée par de nombreuses interventions du législateur. De nos jours, la nature du litige qui, par définition, se résout par le prononcé d'une injonction au sens de l'article 751 *C.p.c*. paraît dépendre de la possibilité réelle qu'existe une résistance rendant nécessaire l'intervention de la force de l'État. La Cour supérieure peut alors décider de faire intervenir cette force pour imposer le respect d'une obligation de nature privée, et ce, sous peine de sanctions à caractère pénal. En partie à tout le moins, le caractère discrétionnaire et exceptionnel de l'injonction proprement dite tient à la présence de cette particularité.
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> [References omitted]

[61] The better view, as suggested in *Service Bérubé ltée*, is that in contractual disputes, all orders of specific performance are not necessarily an "injunction" according to article 751 C.C.P. In the present case, the parties at the outset conferred to the Arbitrator the power to determine the rights of the parties and order the execution of the agreement according to his declaration.

[62] The Arbitrator, according to the mission conferred upon him by the parties, concluded that CRI had the right to purchase the remaining shares in the *share capital* of the company and that Ungava transfers this *share capital* to CRI. In so doing, the Arbitrator's order is similar or equivalent to that of an *Action en passation de titre*. I believe that the orders as drafted by the Arbitrator do not constitute an *injunction* according to the provision of article 751 C.C.P. and could be issued without infringing the jurisdiction of the Superior Court.

[63] In order to appreciate whether an arbitrator issued a particular order which would be tantamount to an injunction, one must look at the commercial agreement, determine the true intention of the parties and decide whether, in light of all the circumstances, the pith and substance of the order truly constitutes an injunction with all of its known penal

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implications or whether it is more of a declaratory nature which serves the purpose of giving full effect to the Arbitrator's determinations of the parties' rights.

[64] Lastly, I might add that when a judge of the Superior Court is called to decide whether an injunction should be issued according to article 751 C.C.P., he or she will determine whether there is any color of right and in cases in which a mandatory injunction is sought, whether the facts admit to it. The Arbitrator is not however concerned with any penal consequences, which is fundamental with respect to an injunction order according to article 751 C.C.P.

[65] The first judge's determinations are well founded in fact and in law. The arbitration award did not usurp the Superior Court's exclusive jurisdiction and the present situation is tantamount to an action to convey title where the award itself is equivalent to the specific performance of the contractual obligations.

[66] Accordingly, this first ground of appeal should be dismissed.

Did the Arbitrator rewrite the agreement?

[67] This brings us to the second legal issue dealing with the ability of the arbitrator to amend the agreement in seeking out the true intention of the parties.

[68] Ungava argues that the trial judge's interpretation of the *Coderre* case rendered by our Court was mistaken and that the Arbitrator rewrote rather that interpreted the agreement. In other words, Ungava contends that the arbitrator did more than search for the true intentions of the parties as he added his own terms to the existing agreement. Hence, the award should be annulled. As mentioned by my colleague Morrissette, J.A., in his judgment on the motion for leave to appeal:

> "In essence, *Coderre* stands for the proposition that arbitrators and *amiables compositeurs* alike are bound by the last paragraph of article 944.10 C.C.P., and therefore by the stipulations of the contract they are called upon to interpret. Neither of them can disregard the unambiguous language of the contract; neither of them can write on behalf of the parties, but without their consent, contractual terms which they, arbitrators or *amiables compositeurs*, would consider fairer or more equitable than those actually written in the contract by the parties. This precept was never in doubt in the case of arbitrators but apparently, until *Coderre*, it remained of uncertain application in respect of *amiables compositeurs*. In other words, one can draw from *Coderre* the inference that the function of an *amiable compositeur*s ought not to be analogised with, say, that of disputes arbitrators governed by sections 74 and following of the *Labour Code*.

[69] In the present case, the Arbitrator was not acting as *amiable compositeur* and according to Ungava, his conclusions could not go beyond the scope provided by the arbitration agreement.

[70] All arbitrators, whether acting as *amiable compositeur* or as conventional arbitrator, are bound to give meaning to the parties' agreement in accordance with its terms. If need be, they are empowered to determine the true intentions of the parties in order to complete such terms. However, the *amiable compositeur* has more leeway when it comes to applying the legal rules governing the dispute.

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[71] Article 945.10 (3) C.C.P. precludes both the *amiable compositeur* and the arbitrator from adding to the existing agreement. Adding or removing terms of the agreement would be tantamount to an excess of jurisdiction.

[72] Although the arbitrator or the *amiable compositeur* can modulate the contractual provisions to ensure that they reflect the parties' factual situation and true intentions, he or she cannot create new rights or obligations, nor can he or she decide to eliminate such obligation from the agreement altogether. The arbitrator cannot modify or eliminate the parties' obligations or take into account new circumstances or additional agreements for equitable considerations unless he or she is specifically empowered to do so.

[73] In the *Sobeys*[20] case, our Court mentions that the written terms of the parties' agreement do not always reflect their true intentions. In other words, the express terms of the contract are not necessarily the reflection of the parties' genuine intentions. Despite the widely accepted principle according to which a clear agreement is not to be interpreted, what is clear is not necessarily accurate, in which case, there is ground for interpretation.

[74] In such a case, it may be necessary to go beyond the express terms and search for the parties' true intentions, which must nevertheless be established according to the rule of law.

[75] Articles 1425 and 1426 C.C.Q. establish the precedence of true intentions over written expressions of intent. This does not mean that the terms of the contract can be disregarded, but if the evidence can be made that the written terms do not reflect the parties' true will, the latter will take precedence.

[76] In order to determine the parties' true intention, according to articles 1425 and 1426 C.C.Q., it is necessary to examine not only the written terms of the agreement but also its nature, the circumstances of its conclusion, usage and prior interpretation by the parties. The conduct of the parties, after the agreement is signed, may also be examined to discern their true intention.

[77] In the case of *Syndicat des employés de l'hôpital Régina*[21]*,* this Court discussed the arbitrator's interpretation of a collective agreement. The Court mentioned that the arbitrator has no power to amend the agreement and that an erroneous interpretation of the agreement would also constitute an amendment, seeing as it changes the rights and obligations of the parties.

[78] Intentionally inaccurate interpretation is without question an excess of jurisdiction, as is interpretation devoid of any reasonable foundation. Hence, an arbitrator cannot pretend to determine the true intentions of the parties while, as a matter of fact, modifying their rights by adding to or removing from the agreement obligations which are the result of the meeting of the parties' minds.

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[20] *Sobeys Québec inc. v. Coopérative des consommateurs de Ste-Foy*, [2006] R.J.Q. 100, 2005 QCCA 1172.

[21] *Syndicat des employés de l'hôpital Régina Ltée. (CSN) v. Hôpital Régina Ltée.*, [1980] C.A. 378.

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[79] In the *Coderre*[22] case, the arbitrator was acting as *amiable compositeur*. This Court had to decide whether the award dealt with a dispute not contemplated by or not falling within the terms of the arbitration agreement, or if it contained decisions on matters beyond the scope of the agreement. The Court must then ignore the process and focus only on the result that is the award itself.

[80] In that case, my colleague Bich J. stated the following:

> Je doute tout de même que cette licence interprétative aille jusqu'au point d'autoriser un arbitre amiable compositeur à pratiquer, au nom de la primauté de l'intention des parties et donc de l'esprit de leur contrat, un remodelage qui, en l'absence d'une habilitation conventionnelle claire, consiste à *radier purement et simplement* certaines dispositions essentielles du contrat.

[81] Our Court decided that even the *amiable compositeur* must limit his award to conclusions which fall within the provisions of the parties' agreement. Although the parties could always bypass this principle and give the arbitrator the power to amend the contract, such amendment without authorization would be illegal inasmuch as it violates the provisions of article 944 C.C.P.

[82] In the *Coderre*[23] case, the parties specifically asked the arbitrator to act as *amiable compositeur* and therefore renounced to a strict application of the legal rules. However, the parties did not set aside the application of the agreement. While the arbitration agreement must be looked at in a broad and liberal manner, it cannot be amended to remove or add provisions. This said, it can resort to legal interpretation to determine the true intentions of the parties.

[83] In light of the above, has the arbitrator in the present case rewritten the contract and what is the limit of judicial review of arbitration awards through homologation?

[84] Appellants argue that the judge of first instance chose a narrow approach to his power to review the arbitrator's award. The judge stated the following:

> [55] At the homologation/annulment stage, the Court can and should examine the decisions contained in an award to decide only whether they conform to the agreement, as found by the arbitrator. In this exercise, the Court cannot substitute its judgment for that of the arbitrator as to what the contract means or as to any other matter decided by the arbitrator on the merits.

[85] It bears repeating that the standard of review in similar circumstances is very restrictive and does not authorize review on the merits of the case. The scope of intervention is limited and the judge will determine whether the Arbitrator followed the rules governing interpretation when drafting his award.

[86] In the case at bar, the Arbitrator, when called to interpret clause 2.1d) of the agreement, concluded that CRI never agreed to article 2.1d) requiring the acceptance of a BFS by a financing bank or financing entity for the purpose of providing non-recourse BFS building financing.

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22 *Coderre v. Coderre*, [2008] R.J.Q. 1245, 2008 QCCA 888.

23 *Ibid.*

[87] The Arbitrator noted that there was a singular problem with the interpretation of the Agreement. CRI, on one hand, never agreed to the notion of *acceptance* mentioned in the Agreement whereas Ungava always argued that the inception of the *acceptance* notion was negotiated and included in the final agreement.

[88] The Arbitrator presented the dispute in the following terms:

> [7.3] In addition to claiming that the BFS was inadequate, Ungava based its refusal to consent to the final vesting on the alleged lack of "acceptance" of the BFS by a bank or financing entity.
>
> [7.4] CRI's initial response was that despite the language of the Agreement, P-1, acceptance was not necessary. Subsequently it argued, as a subsidiary position, that, if acceptance was necessary, there had been actual acceptance by the Bank of Montreal ("BMO") and by the Commonwealth Bank of Australia ("CBA").
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> [7.5] We have seen in our review of the written proceedings in Chapter 4 how the parties put forward their respective positions in connection with this issue:
>
> a) CRI's starting point is that "the common intention of the parties" was that mere production of a BFS "that banks or other financing entities would agree is suitable (conforms to customs and usage in the mining industry)" entitles it to final vesting. CRI claims that such "common intention" could be found in the language of the Agreement. In the pre-contractual negotiations, in the "interpretation of the agreement subsequently given to it by Ungava and CRI" and in the "customs and usage in the mining industry."
>
> Subsidiarily, in Claimant's view, if "acceptance" is indeed required, then "the financing being pursued by CRI pursuant to the terms of the agreement between Claimant and the Bank of Montreal and Commonwealth Bank of Australia, Exhibit P-3A, satisfies in all respects the requirements of the Agreement."
>
> b) On the specific point of the purported acceptance, Ungava argues that the Agreement is clear. That the requirement of acceptance cannot be contradicted by oral evidence. It also invokes the "entire agreement" clause of Article 13.9 of the Agreement. Ungava's defense is that CRI'S arrangements with the BMO and the CBA do not constitute "acceptance" and that the condition is only met when a bank or financing entity is committed to provide the required financing and it thus becomes contractually certain that the Property will be put into commercial production. According to Ungava, the two banks have merely "indicated that they are willing in the future to try and arrange a financing based on a future development plan of the Plaintiff in a different feasibility study, not P-3".

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> [7.10] If the undersigned understands properly the starting position of CRI, Claimant argues that notwithstanding the apparent requirement of "acceptance" repeatedly mentioned in the Agreement, P-1, the "common intention of the parties" was totally different and that "acceptance" in any reasonable sense of the term was never intended. According to CRI (and to use the language of Article 1426 C.C.Q.) the circumstances in which the Agreement was negotiated, and "the interpretation which has already been given to (the Agreement) by the parties or which it may have received" must lead to that conclusion, as would the "usage", i.e. customs and practices, of the trade.
>
> [7.13] More specifically in the present case, it boils down to the distinction between permitting oral evidence to prove that the parties did not intend to require that the BFS be accepted by a bank or financing institution and, *le cas échéant*, interpreting what the parties meant by "acceptance".
>
> To determine, in the absence of a definition of the term in the Agreement, what the parties intended by "acceptance", Article 1426 C.C.Q. allows the undersigned to take into account the various factors outlined in that article.
>
> On the other hand, to entitle CRI to adduce evidence that the parties never intended the BFS to be "accepted", there must be a "commencement of proof". Such commencement can be found, *inter alia*, in "an admission or writing of the adverse party" or in "this testimony".

[89] The Arbitrator then reviewed the evidence to determine whether there was a commencement of proof to contradict the agreement. He concluded as follows:

> [7.28] As a question of fact, the undersigned finds that the many documents reviewed hereinabove and emanating from Ungava, constitute a commencement of proof. In the terms of Art. 2865 C.C.Q., these documents give an indication that the alleged fact may have occurred, i.e. that notwithstanding the mention of the need for acceptance of the BFS in the Agreement, P-1, the common intent of the parties was different.

[90] He also concluded that one party sought to insert a "sea change" into the agreement. The 10% vesting requirement found in article 2.1d) was not included in the Letter of Intent of December 12, 2000. The Arbitrator came to the conclusion that the inclusion of this "sea change" was overlooked by CRI as a result of negligence, lack of experience or incompetence.

[91] Ungava claims that the Arbitrator could not, under the pretext of interpretation, modify or vary the agreement and substitute what he perceived to be the true intent of the parties. This argument is not without merit considering that the Arbitrator had to invoke the negligence or incompetence of Respondent's in-house counsel to support a good portion of his interpretation.

[92] As a result, the Arbitrator then considered that the parties were bound by the terms and conditions of the prior Letter of Intent of December 12 and that CRI's representatives did not consent to the additional condition mentioned in the agreement

regarding the 10% vesting in the company. The Arbitrator determined that the common intention was limited to delivery of the BFS and that the conduct of Ungava's representative after closing seemed to reflect that intention.

[93] Hence, I believe that Ungava's arguments must be set aside.

[94] The parties have concluded and executed an agreement, which provides for a BFS to be accepted as part of the acquisition process. This condition forms part of the agreement to which the parties have subscribed voluntarily. The Arbitrator, in order to determine the meaning of the *acceptance* requirement, sought out for the true parties' intentions, i.e. what was foreseen during the negotiations.

[95] The Arbitrator was faced with contradictory evidence as to the true common intention of the parties. He considered that there was a commencement of proof to contradict the agreement, looked at Ungava's conduct after closing, considered Mr Glen Erikson's credibility and concluded that the notion of *acceptance* was not envisioned by the parties as a condition of the agreement.

[96] The Arbitrator's final conclusions may seem surprising and even legally questionable. Another tribunal may have come to a different result. It must be said, however, that the Arbitrator did not overstep his discretion, but merely endeavoured to determine the scope of the agreement when faced with contradictory evidence. Unlike the *Coderre* case in which the arbitrator, for reasons of equity, decided on a compromise on which the parties never agreed before, the Arbitrator in the present case interpreted the agreement while searching, albeit generously, for the true intentions of the parties.

[97] In light of article 944.10 C.C.P. which prohibits the rewriting of the contract but allows for interpretation, I believe that the Arbitrator did not exceed his jurisdiction by determining that the *acceptance* notion was not part of the agreement entered into between the parties with all the consequences that followed. I believe that the judge of first instance, seized with a Motion for homologation, was right in limiting his intervention once he was convinced that the Arbitrator reasoning followed the path of interpretation.

[98] I would therefore dismiss the appeal, with costs.

RICHARD WAGNER, J.A.

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