

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR
ARRANGEMENT OF SEARS CANADA INC., CORBEIL
ÉLECTRIQUE INC., S.L.H. TRANSPORT INC., INITIUM LOGISTICS
SERVICES INC., INITIUM COMMERCIAL LABS INC., INITIUM
TRADING AND SOURCING CORP., SEARS FLOOR COVERING
CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC.,
6988747 CANADA INC., 10011711 CANADA INC., 1592580
ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA
INC., 168886 CANADA INC., AND 3339611 CANADA INC.**

**BOOK OF AUTHORITIES OF THE LANDLORDS
(MOTION RETURNABLE MAY 7, 2019)**

May 2, 2019

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Creston Moly Corp. v. Sattva Capital Corp.

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**Sattva Capital Corporation (formerly Sattva Capital Inc.),
Appellant and Creston Moly Corporation (formerly Georgia
Ventures Inc.), Respondent and Attorney General of
British Columbia and BCICAC Foundation, Interveners**

McLachlin C.J.C., LeBel, Abella, Rothstein, Moldaver, Karakatsanis, Wagner JJ.

Heard: December 12, 2013
Judgment: August 1, 2014
Docket: 35026

Proceedings: reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 554 W.A.C. 114, 326 B.C.A.C. 114, 2 B.L.R. (5th) 1, 36 B.C.L.R. (5th) 71, 2012 BCCA 329, 2012 CarswellBC 2327, Bennett J.A., Kirkpatrick J.A., Neilson J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2011), 2011 CarswellBC 1124, 2011 BCSC 597, 84 B.L.R. (4th) 102, Armstrong J. (B.C. S.C.); and reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 319 D.L.R. (4th) 219, 2010 BCCA 239, 2010 CarswellBC 1210, 7 B.C.L.R. (5th) 227, Levine J.A., Low J.A., Newbury J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2009), 2009 BCSC 1079, 2009 CarswellBC 2096, Greyell J. (B.C. S.C.)

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Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public

Headnote

Alternative dispute resolution --- Appeal from arbitration awards — Question of law

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at \$0.15 per share — Arbitrator concluded that stock exchange would have probably valued finder's fee at \$0.15 per share under terms of agreement and that SC lost opportunity to sell shares at that value — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Alternative dispute resolution --- Appeal from arbitration awards — Leave to appeal — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at \$0.15 per share — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but on question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of Agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Unless Court places restrictions in order granting leave, order granting leave is "at large" — Appellants may raise issues on appeal that were not set out in leave application — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at \$0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US\$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was \$0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at \$0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US\$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was \$0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Question de droit

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu que la bourse aurait probablement évalué les honoraires d'intermédiation à 15 cents l'unité en vertu des termes de l'entente et que SC avait perdu l'occasion de vendre les actions à ce prix — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente,

et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Demande d'autorisation d'appel — Divers

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale » — Appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Associations d'affaires --- Pouvoirs, droits et responsabilités — Contrats signés par la société — Questions diverses

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million \$US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devaient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

Contrats --- Interprétation — Résolution des ambiguïtés — Caractère raisonnable

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million \$US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le

cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

The dispute concerned which date should be used to determine the price of shares and thus the number of shares to which SC was entitled. The arbitrator ruled in favour of SC, and CM sought leave to appeal from the Supreme Court Leave Court, which dismissed the application on the grounds that it did not involve a question of law, but rather mixed fact and law. The Court of Appeal granted CM leave to appeal, holding that it was a question of law. The Supreme Court dismissed the appeal, but the Court of Appeal reversed this decision and found in favour of CM. SC appealed both this decision and the decision of the Court of Appeal Leave Court to the Supreme Court of Canada.

Held: The appeals were allowed.

Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring): The issue of whether the Court of Appeal Leave Court erred in finding a question of law for the purposes of granting leave to appeal was properly before the Court. While the subject of the appeal was important to the parties, the question was not a question of law within the meaning of s. 31 of the Arbitration Act. Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law. Canadian courts, however, have moved away from this historical approach. The interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding". Questions of law "questions about what the correct legal test is". Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. The fact that the legal system leaves broad scope to tribunals of first instance to resolve issues of limited application supports treating contractual interpretation as a question of mixed fact and law.

The issue whether the proposed appeal was on a question of law was expressly argued before the Leave Courts of both the Supreme Court and Court of Appeal. There was no reason why SC should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to the Supreme Court of Canada. Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) of the Arbitration Act are met and where the leave court does not exercise its residual discretion to nonetheless deny leave. Even if the Court of Appeal Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the Supreme Court Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion. The Court of Appeal Court erred in holding that the Leave Court's comments on the merits of the appeal were binding on it and on the Supreme Court Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case. A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful. This is true even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal. The fact that the Court of Appeal provided its own reasoning as to why it came to the same conclusion as the Leave Court did not vitiate the error.

The arbitrator's decision that the shares should be priced according to the market price definition gave effect to both the market price definition and the "maximum amount" proviso. The arbitrator's interpretation of the agreement, as reconciled the market price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

Le litige portait sur la date devant servir à déterminer le prix des actions et, ainsi, le nombre d'actions auxquelles SC avait droit. L'arbitre a tranché en faveur de SC, et CM a déposé une demande d'autorisation d'appel auprès de la Cour suprême, laquelle a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit. CM a obtenu l'autorisation d'appeler de la Cour d'appel, laquelle a estimé qu'il s'agissait d'une question de droit. La Cour suprême a rejeté l'appel, mais la Cour d'appel a infirmé cette décision et a tranché en faveur de CM. SC a formé un pourvoi à l'encontre de cette décision et de la décision de la formation de la Cour d'appel saisie de la demande d'autorisation d'appel auprès de la Cour suprême du Canada.

Arrêt: Les pourvois ont été accueillis.

Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : C'était à bon droit que la Cour était saisie de la question de savoir si la formation de la Cour d'appel a commis une erreur en concluant à la présence d'une question de droit dans le cadre de la demande d'autorisation d'appel. Bien que la question faisant l'objet du pourvoi était importante, il ne s'agissait pas d'une question de droit au sens de l'art. 31 de l'Arbitration Act. Historiquement, la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit. Les tribunaux canadiens, toutefois, ont abandonné cette approche historique. L'interprétation des contrats a évolué vers une démarche pratique, axée sur le bon sens plutôt que sur des règles de forme en matière d'interprétation. La question prédominante consiste à discerner « l'intention des parties et la portée de l'entente ». Les questions de droit « concernent la détermination du critère juridique applicable ». Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties. En établissant une distinction entre les questions de droit et les questions mixtes de fait et de droit, on vise principalement à restreindre l'intervention de la juridiction d'appel aux affaires qui entraîneraient probablement des répercussions qui ne seraient pas limitées aux parties au litige. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère au tribunal administratif siégeant en première instance étaye la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

La question de savoir si l'appel proposé soulevait une question de droit a été expressément débattue devant les formations de la Cour suprême et de la Cour d'appel saisies de la demande d'autorisation. Rien n'empêchait SC de soulever cette question en appel, même si elle ne l'a pas mentionnée dans la demande d'autorisation d'appel qu'elle a présentée à la Cour suprême du Canada. L'appel d'une sentence arbitrale n'est donc entendu que si les critères de l'art. 31(2) de l'Arbitration Act sont remplis et que le tribunal saisi de la demande d'autorisation ne refuse pas néanmoins l'autorisation en vertu de son pouvoir discrétionnaire résiduel. Même si la formation de la Cour d'appel saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la Cour suprême saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour. La Cour d'appel saisie de l'appel a commis une erreur en concluant que les commentaires sur le bien-fondé de l'appel formulés par la formation de la Cour d'appel saisie de la demande d'autorisation la liaient et liaient également la formation de la Cour suprême saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond; il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli. Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs. Le fait que la Cour d'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur.

La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donnait effet à cette dernière et à la stipulation relative au « plafond ». L'interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

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C.J.A., Local 579 v. Bradco Construction Ltd. (1993), 12 Admin. L.R. (2d) 165, [1993] 2 S.C.R. 316, 106 Nfld. & P.E.I.R. 140, 334 A.P.R. 140, 93 C.L.L.C. 14,033, 153 N.R. 81, 102 D.L.R. (4th) 402, 1993 CarswellNfld 114, 1993 CarswellNfld 132 (S.C.C.) — referred to

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Words and phrases considered:

Contractual interpretation

Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

fee paid in shares

There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both [the respondent and the appellant] would have been aware of this as sophisticated business parties.

surrounding circumstances

While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.

The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract . . . , that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" Whether something was or reasonably

ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

Termes et locutions cités:

circonstances

Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (...). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (...). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (...).

La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (...), c'est-à-dire, les renseignements qui appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances, pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (...). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

honoraires sous forme d'actions

Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et [l'intimée et l'appelante], des parties avisées, en auraient eu connaissance.

interprétation contractuelle

L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), reversing dismissal of appeal from arbitrator's decision; APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), reversing decision to dismiss application for leave to appeal arbitrator's award of damages.

POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), ayant infirmé le rejet d'un appel interjeté à l'encontre d'une sentence arbitrale; POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), ayant

infirmé la décision de rejeter la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts.

Rothstein J. (McLachlin C.J.C. and LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring):

1 When is contractual interpretation to be treated as a question of mixed fact and law and when should it be treated as a question of law? How is the balance between reviewability and finality of commercial arbitration awards under the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, hereinafter the "AA"), to be determined? Can findings made by a court granting leave to appeal with respect to the merits of an appeal bind the court that ultimately decides the appeal? These are three of the issues that arise in this appeal.

I. Facts

2 The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital Corporation (formerly Sattva Capital Inc.). The parties agree that Sattva is entitled to a finder's fee of US\$1.5 million and is entitled to be paid this fee in shares of Creston, cash or a combination thereof. They disagree on which date should be used to price the Creston shares and therefore the number of shares to which Sattva is entitled.

3 Mr. Hai Van Le, a principal of Sattva, introduced Creston to the opportunity to acquire a molybdenum mining property in Mexico. On January 12, 2007, the parties entered into an agreement (the "Agreement") that required Creston to pay Sattva a finder's fee in relation to the acquisition of this property. The relevant provisions of the Agreement are set out in Appendix I.

4 On January 30, 2007, Creston entered into an agreement to purchase the property for US\$30 million. On January 31, 2007, at the request of Creston, trading of Creston's shares on the TSX Venture Exchange ("TSXV") was halted to prevent speculation while Creston completed due diligence in relation to the purchase. On March 26, 2007, Creston announced it intended to complete the purchase and trading resumed the following day.

5 The Agreement provides that Sattva was to be paid a finder's fee equal to the maximum amount that could be paid pursuant to s. 3.3 of Policy 5.1 in the TSXV Policy Manual. Section 3.3 of Policy 5.1 is incorporated by reference into the Agreement at s. 3.1 and is set out in Appendix II of these reasons. The maximum amount pursuant to s. 3.3 of Policy 5.1 in this case is US\$1.5 million.

6 According to the Agreement, by default, the fee would be paid in Creston shares. The fee would only be paid in cash or a combination of shares and cash if Sattva made such an election. Sattva made no such election and was therefore entitled to be paid the fee in shares. The finder's fee was to be paid no later than five working days after the closing of the transaction purchasing the molybdenum mining property.

7 The dispute between the parties concerns which date should be used to determine the price of Creston shares and thus the number of shares to which Sattva is entitled. Sattva argues that the share price is dictated by the Market Price definition at s. 2 of the Agreement, i.e. the price of the shares "as calculated on close of business day before the issuance of the press release announcing the Acquisition". The press release announcing the acquisition was released on March 26, 2007. Prior to the halt in trading on January 31, 2007, the last closing price of Creston shares was \$0.15. On this interpretation, Sattva would receive approximately 11,460,000 shares (based on the finder's fee of US\$1.5 million).

8 Creston claims that the Agreement's "maximum amount" proviso means that Sattva cannot receive cash or shares valued at more than US\$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were

priced at \$0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at \$0.15 per share.

9 The parties entered into arbitration pursuant to the *AA*. The arbitrator found in favour of Sattva. Creston sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *AA*. Leave was denied by the British Columbia Supreme Court (2009 BCSC 1079 (B.C. S.C.) (CanLII) ("SC Leave Court")). Creston successfully appealed this decision and was granted leave to appeal the arbitrator's decision by the British Columbia Court of Appeal (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (B.C. C.A.) ("CA Leave Court")).

10 The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC 597, 84 B.L.R. (4th) 102 (B.C. S.C.) ("SC Appeal Court")) upheld the arbitrator's award. Creston appealed that decision to the British Columbia Court of Appeal (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (B.C. C.A.) ("CA Appeal Court")). That court overturned the SC Appeal Court and found in favour of Creston. Sattva appeals the decisions of the CA Leave Court and CA Appeal Court to this Court.

II. Arbitral Award

11 The arbitrator, Leon Getz, Q.C., found in favour of Sattva, holding that it was entitled to receive its US\$1.5 million finder's fee in shares priced at \$0.15 per share.

12 The arbitrator based his decision on the Market Price definition in the Agreement:

What, then, was the "Market Price" within the meaning of the Agreement? The relevant press release is that issued on March 26 Although there was no closing price on March 25 (the shares being on that date halted), the "last closing price" within the meaning of the definition was the \$0.15 at which the [Creston] shares closed on January 30, the day before trading was halted "pending news" This conclusion requires no stretching of the words of the contractual definition; on the contrary, it falls literally within those words. [para. 22]

13 Both the Agreement and the finder's fee had to be approved by the TSXV. Creston was responsible for securing this approval. The arbitrator found that it was either an implied or an express term of the Agreement that Creston would use its best efforts to secure the TSXV's approval and that Creston did not apply its best efforts to this end.

14 As previously noted, by default, the finder's fee would be paid in shares unless Sattva made an election otherwise. The arbitrator found that Sattva never made such an election. Despite this, Creston represented to the TSXV that the finder's fee was to be paid in cash. The TSXV conditionally approved a finder's fee of US\$1.5 million to be paid in cash. Sattva first learned that the fee had been approved as a cash payment in early June 2007. When Sattva raised this matter with Creston, Creston responded by saying that Sattva had the choice of taking the finder's fee in cash or in shares priced at \$0.70.

15 Sattva maintained that it was entitled to have the finder's fee paid in shares priced at \$0.15. Creston asked its lawyer to contact the TSXV to clarify the minimum share price it would approve for payment of the finder's fee. The TSXV confirmed on June 7, 2007 over the phone and August 9, 2007 via email that the minimum share price that could be used to pay the finder's fee was \$0.70 per share. The arbitrator found that Creston "consistently misrepresented or at the very least failed to disclose fully the nature of the obligation it had undertaken to Sattva" (para. 56(k)) and "that in the absence of an election otherwise, Sattva is entitled under that Agreement to have that fee paid in shares at \$0.15" (para. 56(g)). The arbitrator found that the first time Sattva's position was squarely put before the TSXV was in a letter from Sattva's solicitor on October 9, 2007.

16 The arbitrator found that had Creston used its best efforts, the TSXV could have approved the payment of the finder's fee in shares priced at \$0.15 and such a decision would have been consistent with its policies. He determined that there was "a substantial probability that [TSXV] approval would have been given" (para. 81). He assessed that probability at 85 percent.

17 The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between \$0.40 and \$0.44 per share, netting proceeds of between \$4,583,914 and \$5,156,934. The arbitrator took the average of those two amounts, which came to \$4,870,424, and then assessed damages at 85 percent of that number, which came to \$4,139,860, and rounded it to \$4,140,000 plus costs.

18 After this award was made, Creston made a cash payment of US\$1.5 million (or the equivalent in Canadian dollars) to Sattva. The balance of the damages awarded by the arbitrator was placed in the trust account of Sattva's solicitors.

III. Judicial History

A. British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079 (B.C. S.C.)

19 The SC Leave Court denied leave to appeal because it found the question on appeal was not a question of law as required under s. 31 of the *AA*. In the judge's view, the issue was one of mixed fact and law because the arbitrator relied on the "factual matrix" in coming to his conclusion. Specifically, determining how the finder's fee was to be paid involved examining "the TSX's policies concerning the maximum amount of the finder's fee payable, as well as the discretionary powers granted to the Exchange in determining that amount" (para. 35).

20 The judge found that even had he found a question of law was at issue he would have exercised his discretion against granting leave because of Creston's conduct in misrepresenting the status of the finder's fee to the TSXV and Sattva, and "on the principle that one of the objectives of the [*AA*] is to foster and preserve the integrity of the arbitration system" (para. 41).

B. British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239 (B.C. C.A.)

21 The CA Leave Court reversed the SC Leave Court and granted Creston's application for leave to appeal the arbitral award. It found the SC Leave Court "err[ed] in failing to find that the arbitrator's failure to address the meaning of s. 3.1 of the Agreement (and in particular the 'maximum amount' provision) raised a question of law" (para. 23). The CA Leave Court decided that the construction of s. 3.1 of the Agreement, and in particular the "maximum amount" proviso, was a question of law because it did not involve reference to the facts of what the TSXV was told or what it decided.

22 The CA Leave Court acknowledged that Creston was "less than forthcoming in its dealings with Mr. Le and the [TSXV]" but said that "these facts are not directly relevant to the question of law it advances on the appeal" (para. 27). With respect to the SC leave judge's reference to the preservation of the integrity of the arbitration system, the CA Leave Court said that the parties would have known when they chose to enter arbitration under the *AA* that an appeal on a question of law was possible. Additionally, while the finality of arbitration is an important factor in exercising discretion, when "a question of law arises on a matter of importance and a miscarriage of justice might be perpetrated if an appeal were not available, the integrity of the process requires, at least in the circumstances of this case, that the right of appeal granted by the legislation also be respected" (para. 29).

C. British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597 (B.C. S.C.)

23 Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the appeal, holding the arbitrator's interpretation of the Agreement was correct.

24 Armstrong J. found that the plain and ordinary meaning of the Agreement required that the US \$1.5 million fee be paid in shares priced at \$0.15. He did not find the meaning to be absurd simply because the price of the shares at the date the fee became payable had increased in relation to the price determined according to the Market Price definition. He was of the view that changes in the price of shares over time are inevitable, and that the parties, as sophisticated business persons, would have reasonably understood a fluctuation in share price to be a reality when providing for a fee payable in shares. According to Armstrong J., it is indeed because of market fluctuations that it is necessary to choose a specific date to price the shares in advance of payment. He found that this was done by defining "Market Price" in the Agreement, and that the fee remained US\$1.5 million in \$0.15 shares as determined by the Market Price definition regardless of the price of the shares at the date that the fee was payable.

25 According to Armstrong J., that the price of the shares may be more than the Market Price definition price when they became payable was foreseeable as a "natural consequence of the fee agreement" (para. 62). He was of the view that the risk was borne by Sattva, since the price of the shares could increase, but it could also decrease such that Sattva would have received shares valued at less than the agreed upon fee of US\$1.5 million.

26 Armstrong J. held that the arbitrator's interpretation which gave effect to both the Market Price definition and the "maximum amount" proviso should be preferred to Creston's interpretation of the agreement which ignored the Market Price definition.

27 In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement which contains the "maximum amount" proviso, Armstrong J. noted that the arbitrator explicitly addressed the "maximum amount" proviso at para. 23 of his decision.

D. British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329 (B.C. C.A.)

28 The CA Appeal Court allowed Creston's appeal, ordering that the payment of US\$1.5 million that had been made by Creston to Sattva on account of the arbitrator's award constituted payment in full of the finder's fee. The court reviewed the arbitrator's decision on a standard of correctness.

29 The CA Appeal Court found that both it and the SC Appeal Court were bound by the findings made by the CA Leave Court. There were two findings that were binding: (1) it would be anomalous if the Agreement allowed Sattva to receive US\$1.5 million if it received its fee in cash, but shares valued at approximately \$8 million if Sattva took its fee in shares; and (2) the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement.

30 The Court of Appeal found that it was an absurd result to find that Sattva is entitled to an \$8 million finder's fee in light of the fact that the "maximum amount" proviso in the Agreement limits the finder's fee to US\$1.5 million. The court was of the view that the proviso limiting the fee to US\$1.5 million "when paid" should be given paramount effect (para. 47). In its opinion, giving effect to the Market Price definition could not have been the intention of the parties, nor could it have been in accordance with good business sense.

IV. Issues

31 The following issues arise in this appeal:

- (a) Is the issue of whether the CA Leave Court erred in granting leave under s. 31(2) of the *AA* properly before this Court?

- (b) Did the CA Leave Court err in granting leave under s. 31(2) of the *AA*?
- (c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the *AA*?
- (d) Did the arbitrator reasonably construe the Agreement as a whole?
- (e) Did the CA Appeal Court err in holding that it was bound by comments regarding the merits of the appeal made by the CA Leave Court?

V. Analysis

A. *The Leave Issue Is Properly Before This Court*

32 Sattva argues, in part, that the CA Leave Court erred in granting leave to appeal from the arbitrator's decision. In Sattva's view, the CA Leave Court did not identify a question of law, a requirement to obtain leave pursuant to s. 31(2) of the *AA*. Creston argues that this issue is not properly before this Court. Creston makes two arguments in support of this point.

33 First, Creston argues that this issue was not advanced in Sattva's application for leave to appeal to this Court. This argument must fail. Unless this Court places restrictions in the order granting leave, the order granting leave is "at large". Accordingly, appellants may raise issues on appeal that were not set out in the leave application. However, the Court may exercise its discretion to refuse to deal with issues that were not addressed in the courts below, if there is prejudice to the respondent, or if for any other reason the Court considers it appropriate not to deal with a question.

34 Here, this Court's order granting leave to appeal from both the CA Leave Court decision and the CA Appeal Court decision contained no restrictions (2013 CanLII 11315). The issue — whether the proposed appeal was on a question of law — was expressly argued before, and was dealt with in the judgments of, the SC Leave Court and the CA Leave Court. There is no reason Sattva should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to this Court.

35 Second, Creston argues that the issue of whether the CA Leave Court identified a question of law is not properly before this Court because Sattva did not contest this decision before all of the lower courts. Specifically, Creston states that Sattva did not argue that the question on appeal was one of mixed fact and law before the SC Appeal Court and that it conceded the issue on appeal was a question of law before the CA Appeal Court. This argument must also fail. At the SC Appeal Court, it was not open to Sattva to reargue the question of whether leave should have been granted. The SC Appeal Court was bound by the CA Leave Court's finding that leave should have been granted, including the determination that a question of law had been identified. Accordingly, Sattva could hardly be expected to reargue before the SC Appeal Court a question that had been determined by the CA Leave Court. There is nothing in the *AA* to indicate that Sattva could have appealed the leave decision made by a panel of the Court of Appeal to another panel of the same court. The fact that Sattva did not reargue the issue before the SC Appeal Court or CA Appeal Court does not prevent it from raising the issue before this Court, particularly since Sattva was also granted leave to appeal the CA Leave Court decision by this Court.

36 While this Court may decline to grant leave where an issue sought to be argued before it was not argued in the courts appealed from, that is not this case. Here, whether leave from the arbitrator's decision had been sought by Creston on a question of law or a question of mixed fact and law had been argued in the lower leave courts.

37 Accordingly, the issue of whether the CA Leave Court erred in finding a question of law for the purposes of granting leave to appeal is properly before this Court.

B. The CA Leave Court Erred in Granting Leave Under Section 31(2) of the AA

(1) Considerations Relevant to Granting or Denying Leave to Appeal Under the AA

38 Appeals from commercial arbitration decisions are narrowly circumscribed under the *AA*. Under s. 31(1), appeals are limited to either questions of law where the parties consent to the appeal or to questions of law where the parties do not consent but where leave to appeal is granted. Section 31(2) of the *AA*, reproduced in its entirety in Appendix III, sets out the requirements for leave:

- (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
 - (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
 - (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
 - (c) the point of law is of general or public importance.

39 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* give the courts judicial discretion to deny leave even where the statutory requirements have been met (*Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (B.C. C.A.) ("*BCIT*"), at paras. 25-26). Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) are met and where the leave court does not exercise its residual discretion to nonetheless deny leave.

40 Although Creston's application to the SC Leave Court sought leave pursuant to s. 31(2)(a), (b) and (c), it appears the arguments before that court and throughout focused on s. 31(2)(a). The SC Leave Court's decision quotes a lengthy passage from *BCIT* that focuses on the requirements of s. 31(2)(a). The SC Leave Court judge noted that both parties conceded the first requirement of s. 31(2)(a): that the issue be of importance to the parties. The CA Leave Court decision expressed concern that denying leave might give rise to a miscarriage of justice — a criterion only found in s. 31(2)(a). Finally, neither the lower courts' leave decisions nor the arguments before this Court reflected arguments about the question of law being important to some class or body of persons of which the applicant is a member (s. 31(2)(b)) or being a point of law of general or public importance (s. 31(2)(c)). Accordingly, the following analysis will focus on s. 31(2)(a).

(2) The Result Is Important to the Parties

41 In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

(3) *The Question Under Appeal Is Not a Question of Law*

(a) When Is Contractual Interpretation a Question of Law?

42 Under s. 31 of the *AA*, the issue upon which leave is sought must be a question of law. For the purpose of identifying the appropriate standard of review or, as is the case here, determining whether the requirements for leave to appeal are met, reviewing courts are regularly required to determine whether an issue decided at first instance is a question of law, fact, or mixed fact and law.

43 Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law (*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 (Man. C.A.), at para. 20, *per* Steel J.A.; K. Lewison, *The Interpretation of Contracts* (5th ed. 2011 & Supp. 2013), at pp. 173-76; and G. R. Hall, *Canadian Contractual Interpretation Law* (2nd ed. 2012), at pp. 125-26). This rule originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Under those circumstances, the interpretation of written documents had to be considered questions of law because only the judge could be assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

44 This historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law (*Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945 (U.K. H.L.), at paras. 58 and 82-83; and Lewison, at pp. 173-77). They do this despite the fact that U.K. courts consider the surrounding circumstances, a concept addressed further below, when interpreting a written contract (*Prenn v. Simmonds*, [1971] 3 All E.R. 237 (U.K. H.L.); and *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.)).

45 In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (Alta. C.A.) (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84 (Man. C.A.), at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221 (Alta. C.A.), at paras. 11-12; and *Costco Wholesale Canada Ltd. v. R.*, 2012 FCA 160, 431 N.R. 78 (F.C.A.), at para. 34. However, some Canadian courts have abandoned the historical approach and now treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. See for example *WCI Waste Conversion Inc. v. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1 (P.E.I. C.A.), at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98 (B.C. C.A.), at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230 (B.C. C.A.), at para. 44; *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.), at paras. 22-23 (majority reasons, *per* Blair J.A.) and paras. 133-35 (*per* Gillese J.A. in dissent, but not on this point); and *King*, at paras. 20-23.

46 The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract — often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at paras. 26 and 31-36.

47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to

determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

49 As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam Inc.* Questions of law "are questions about what the correct legal test is" (*Southam Inc.*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam Inc.*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).

50 With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

51 The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam Inc.* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

52 Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

53 Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

54 However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:

Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" [para. 36]

55 Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

(b) The Role and Nature of the "Surrounding Circumstances"

56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to

contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule

59 It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 54-59, *per* Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at pp. 341-42, *per* Sopinka J.).

60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

61 Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (Ont. C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract.

(d) Application to the Present Case

62 In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement ..." (A.R., vol. 1, at p. 62).

63 As will be explained below, while the requirement to construe a contract as a whole is a question of law that could — if extricable — satisfy the threshold requirement under s. 31 of the *AA*, I do not think this question was properly extricated in this case.

64 I accept that a fundamental principle of contractual interpretation is that a contract must be construed as a whole (McCamus, at pp. 761-62; and Hall, at p. 15). If the arbitrator did not take the "maximum amount" proviso into account, as alleged by Creston, then he did not construe the Agreement as a whole because he ignored a specific and relevant provision of the Agreement. This is a question of law that would be extricable from a finding of mixed fact and law.

65 However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed, the CA Leave Court acknowledges that the arbitrator had considered that proviso, since it notes that he turned his mind to the US\$1.5 million maximum amount, an amount that can only be calculated by referring to the TSXV policy referenced in the "maximum amount" proviso in s. 3.1 of the Agreement. As I read its reasons, rather than being concerned with whether the arbitrator ignored the maximum amount proviso, which is what Creston alleges in this Court, the CA Leave Court decision focused on how the arbitrator construed s. 3.1 of the Agreement, which included the maximum amount proviso (paras. 25-26). For example, the CA Leave Court expressed concern that the arbitrator did not address the "incongruity" in the fact that the value of the fee would vary "hugely" depending on whether it was taken in cash or shares (para. 25).

66 With respect, the CA Leave Court erred in finding that the construction of s. 3.1 of the Agreement constituted a question of law. As explained by Justice Armstrong in the SC Appeal Court decision, construing s. 3.1 and taking account of the proviso required relying on the relevant surrounding circumstances, including the sophistication of the parties, the fluctuation in share prices, and the nature of the risk a party assumes when deciding to accept a fee in shares as opposed to cash. Such an exercise raises a question of mixed fact and law. There being no question of law extricable from the mixed fact and law question of how s. 3.1 and the proviso should be interpreted, the CA Leave Court erred in granting leave to appeal.

67 The conclusion that Creston's application for leave to appeal raised no question of law would be sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have nonetheless denied leave to appeal as the application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

(4) May Prevent a Miscarriage of Justice

(a) Miscarriage of Justice for the Purposes of Section 31(2)(a) of the AA

68 Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal "may prevent a miscarriage of justice" in order for it to grant leave to appeal pursuant to s. 31(2)(a) of the *AA*. The first step in this analysis is defining miscarriage of justice for the purposes of s. 31(2)(a).

69 In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (B.C. C.A.), which required the error of law in question to be a material issue that, if decided differently, would lead to a different result: "... if the point of law were decided differently, the arbitrator would have been led to a different result. In other words, was the alleged error of law material to the decision; does it go to its heart?" (*BCIT*, at para. 28). See also *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712 (S.C.C.), which

discusses the test of whether "some substantial wrong or miscarriage of justice has occurred" in the context of a civil jury trial (para. 43).

70 Having regard to *BCIT* and *Quan*, I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the *AA*, an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

71 According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

72 At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case.

73 *BCIT* sets the threshold for this preliminary assessment of the appeal as "more than an arguable point" (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the "more than an arguable point" standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law, in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.

74 In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262 (Man. C.A.), at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (Alta. C.A.) (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease Inc.*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (Man. C.A.) (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174 (P.E.I. C.A.), at para. 11); and "credible argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270 (Sask. C.A. [In Chambers]), at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

75 Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. As I will later explain, reasonableness will almost always apply to commercial arbitrations conducted pursuant to the *AA*, except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise. Therefore, the leave inquiry will ordinarily ask whether there is any arguable merit to the position that the arbitrator's decision on the question at issue is unreasonable, keeping in mind that the decision-maker is not required to refer to all the arguments, provisions or jurisprudence or to make specific findings on each constituent element, for the decision to be reasonable (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), at para. 16). Of course, the leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal. As such,

this should not be taken as an invitation to engage in extensive arguments or analysis about the standard of review at the leave stage.

76 In *BCIT*, Saunders J.A. considered the stage of s. 31(2)(a) of the *AA* at which an examination of the merits of the appeal should occur. At the behest of one of the parties, she considered examining the merits under the miscarriage of justice criterion. However, she decided that a consideration of the merits was best done at the residual discretion stage. Her reasons indicate that this decision was motivated by the desire to take a consistent approach across s. 31(2)(a), (b) and (c):

Where, then, if anywhere, does consideration of the merits of the the appeal belong? Mr. Roberts for the Student Association contends that any consideration of the merits of the appeal belongs in the determination of whether a miscarriage of justice may occur; that is, under the second criterion. I do not agree. In my view, the apparent merit or lack of merit of an appeal is part of the exercise of the residual discretion, and applies equally to all three subsections, (a) through (c). Just as an appeal woefully lacking in merit should not attract leave under (b) (of importance to a class of people including the applicant) or (c) (of general or public importance), so too it should not attract leave under (a). Consideration of the merits, for consistency in the section as a whole, should be made as part of the exercise of residual discretion. [para. 29]

77 I acknowledge the consistency rationale. However, in my respectful opinion, the desire for a consistent approach to s. 31(2)(a), (b) and (c) cannot override the text of the legislation. Unlike s. 31(2)(b) and (c), s. 31(2)(a) requires an assessment to determine whether allowing leave to appeal "may prevent a miscarriage of justice". It is my opinion that a preliminary assessment of the question of law is an implicit component in a determination of whether allowing leave "may prevent a miscarriage of justice".

78 However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

79 In sum, in order to establish that "the intervention of the court and the determination of the point of law may prevent a miscarriage of justice" for the purposes of s. 31(2)(a) of the *AA*, an applicant must demonstrate that the point of law on appeal is material to the final result and has arguable merit.

(b) Application to the Present Case

80 The CA Leave Court found that the arbitrator may have erred in law by not interpreting the Agreement as a whole, specifically in ignoring the "maximum amount" proviso. Accepting that this is a question of law for these purposes only, a determination of the question would be material because it could change the ultimate result arrived at by the arbitrator. The arbitrator awarded \$4.14 million in damages on the basis that there was an 85 percent chance the TSXV would approve a finder's fee paid in \$0.15 shares. If Creston's argument is correct and the \$0.15 share price is foreclosed by the "maximum amount" proviso, damages would be reduced to US\$1.5 million, a significant reduction from the arbitrator's award of damages.

81 As s. 31(2)(a) of the *AA* is the relevant provision in this case, a preliminary assessment of the question of law will be conducted in order to determine if a miscarriage of justice could have occurred had Creston been denied leave to appeal. Creston argues that the fact that the arbitrator's conclusion results in Sattva receiving shares valued at considerably more than the US\$1.5 million maximum dictated by the "maximum amount" proviso is evidence of the arbitrator's failure to consider that proviso.

82 However, the arbitrator did refer to s. 3.1, the "maximum amount" proviso, at two points in his decision: paras. 18 and 23(a). For example, at para. 23 he stated:

In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:

(a) Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange — section 3.1. It is common ground that the quantum of this fee is US\$1,500,000.

(b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.

(c) The Market Price, as defined in the Agreement, was \$0.15.

[Emphasis added.]

83 Although the arbitrator provided no express indication that he considered how the "maximum amount" proviso interacted with the Market Price definition, such consideration is implicit in his decision. The only place in the contract that specifies that the amount of the fee is calculated as US\$1.5 million is the "maximum amount" proviso's reference to s. 3.3 of the TSXV Policy 5.1. The arbitrator acknowledged that the quantum of the fee is US\$1.5 million and awarded Sattva US\$1.5 million in shares priced at \$0.15. Contrary to Creston's argument that the arbitrator failed to consider the proviso in construing the Agreement, it is apparent on a preliminary examination of the question that the arbitrator did in fact consider the "maximum amount" proviso.

84 Accordingly, even had the CA Leave Court properly identified a question of law, leave to appeal should have been denied. The requirement that there be arguable merit that the arbitrator's decision was unreasonable is not met and the miscarriage of justice threshold was not satisfied.

(5) Residual Discretion to Deny Leave

(a) Considerations in Exercising Residual Discretion in a Section 31(2)(a) Leave Application

85 The B.C. courts have found that the words "may grant leave" in s. 31(2) of the *AA* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met (*BCIT*, at paras. 9 and 26). In *BCIT*, Saunders J.A. sets out a non-exhaustive list of considerations that would be applicable to the exercise of discretion (para. 31):

1. "the apparent merits of the appeal";
2. "the degree of significance of the issue to the parties, to third parties and to the community at large";
3. "the circumstances surrounding the dispute and adjudication including the urgency of a final answer";
4. "other temporal considerations including the opportunity for either party to address the result through other avenues";
5. "the conduct of the parties";
6. "the stage of the process at which the appealed decision was made";

7. "respect for the forum of arbitration, chosen by the parties as their means of resolving disputes"; and

8. "recognition that arbitration is often intended to provide a speedy and final dispute mechanism, tailor-made for the issues which may face the parties to the arbitration agreement".

86 I agree with Justice Saunders that it is not appropriate to create what she refers to as an "immutable checklist" of factors to consider in exercising discretion under s. 31(2) (*BCIT*, at para. 32). However, I am unable to agree that all the listed considerations are applicable at this stage of the analysis.

87 In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.), at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.), at para. 52). This would include the urgent need for a final answer.

88 With respect to the other listed considerations and addressed in turn below, it is my opinion that they have already been considered elsewhere in the s. 31(2)(a) analysis or are more appropriately considered elsewhere under s. 31(2). Once considered, these matters should not be assessed again under the court's residual discretion.

89 As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the "importance of the result of the arbitration to the parties" criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the *AA* sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

90 As for the stage of the process at which the decision sought to be appealed was made, it is not a consideration relevant to the exercise of the court's residual discretion to deny leave under s. 31(2)(a). This factor seeks to address the concern that granting leave to appeal an interlocutory decision may be premature and result in unnecessary fragmentation and delay of the legal process (*D. J. M. Brown and J. M. Evans*, with the assistance of C. E. Deacon, *Judicial Review of Administrative Action in Canada* (loose-leaf), at pp. 3-67 to 3-76). However, any such concern will have been previously addressed by the leave court in its analysis of whether a miscarriage of justice may arise; more specifically, whether the interlocutory issue has the potential to affect the final result. As such, the above-mentioned concerns should not be considered anew.

91 In sum, a non-exhaustive list of discretionary factors to consider in a leave application under s. 31(2)(a) of the *AA* would include:

- conduct of the parties;
- existence of alternative remedies;
- undue delay; and
- the urgent need for a final answer.

92 These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should exercise such discretion with caution. Having found an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

(b) Application to the Present Case

93 The SC Leave Court judge denied leave on the basis that there was no question of law. Even had he found a question of law, the SC Leave Court judge stated that he would have exercised his residual discretion to deny leave for two reasons: first, because of Creston's conduct in misrepresenting the status of the finder's fee issue to the TSXV and Sattva; and second, "on the principle that one of the objectives of the [AA] is to foster and preserve the integrity of the arbitration system" (para. 41). The CA Leave Court overruled the SC Leave Court on both of these discretionary grounds.

94 For the reasons discussed above, fostering and preserving the integrity of the arbitral system should not be a discrete discretionary consideration under s. 31(2)(a). While the scheme of s. 31(2) recognizes this objective, the exercise of discretion must pertain to the facts and circumstances of a particular case. This general objective is not a discretionary matter for the purposes of denying leave.

95 However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. c. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509 (S.C.C.), at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651 (S.C.C.), at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), at para. 117).

96 Here, the SC Leave Court relied upon a well-accepted consideration in deciding to deny discretionary relief: the misconduct of Creston. The CA Leave Court overturned this decision on the grounds that Creston's conduct was "not directly relevant to the question of law" advanced on appeal (at para. 27).

97 The CA Leave Court did not explain why misconduct need be directly relevant to a question of law for the purpose of denying leave. I see nothing in s. 31(2) of the AA that would limit a leave judge's exercise of discretion in the manner suggested by the CA Leave Court. My reading of the jurisprudence does not support the view that misconduct must be directly relevant to the question to be decided by the court.

98 In *Homex Realty & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 (S.C.C.), at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to avoid the burden associated with the subdivision of the lands" that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority

for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

99 Here, the arbitrator found as a fact that Creston misled the TSXV and Sattva regarding "the nature of the obligation it had undertaken to Sattva by representing that the finder's fee was payable in cash" (para. 56(k)). While this conduct is not tied to the question of law found by the CA Leave Court, it is tied to the arbitration proceeding convened to determine which share price should be used to pay Sattva's finder's fee. The SC Leave Court was entitled to rely upon such conduct as a basis for denying leave pursuant to its residual discretion.

100 In the result, in my respectful opinion, even if the CA Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the SC Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion.

101 Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal — that is how much the Agreement requires Creston to pay Sattva — and that the courts below differed significantly in their interpretation of the Agreement, it would be unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

C. Standard of Review Under the AA

102 I now turn to consideration of the decisions of the appeal courts. It is first necessary to determine the standard of review of the arbitrator's decision in respect of the question on which the CA Leave Court granted leave: whether the arbitrator construed the finder's fee provision in light of the Agreement as a whole, particularly, whether the finder's fee provision was interpreted having regard for the "maximum amount" proviso.

103 At the outset, it is important to note that the *Administrative Tribunals Act*, S.B.C. 2004, c. 45, which sets out standards of review of the decisions of many statutory tribunals in British Columbia (see ss. 58 and 59), does not apply in the case of arbitrations under the *AA*.

104 Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), and the cases that followed it is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

105 Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

106 *Dunsmuir* and the post-*Dunsmuir* jurisprudence confirm that it will often be possible to determine the standard of review by focusing on the nature of the question at issue (see for example *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 44). In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*A.T.A.*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.

D. The Arbitrator Reasonably Construed the Agreement as a Whole

107 For largely the reasons outlined by Justice Armstrong in paras. 57-75 of the SC Appeal Court decision, in my respectful opinion, in determining that Sattva is entitled to be paid its finder's fee in shares priced at \$0.15 per share, the arbitrator reasonably construed the Agreement as a whole. Although Justice Armstrong conducted a correctness review of the arbitrator's decision, his reasons amply demonstrate the reasonableness of that decision. The following analysis is largely based upon his reasoning.

108 The question that the arbitrator had to decide was which date should be used to determine the price of the shares used to pay the finder's fee: the date specified in the Market Price definition in the Agreement or the date the finder's fee was to be paid?

109 The arbitrator concluded that the price determined by the Market Price definition prevailed, i.e. \$0.15 per share. In his view, this conclusion followed from the words of the Agreement and was "clear and beyond argument" (para. 23). Apparently, because he considered this issue clear, he did not offer extensive reasons in support of his conclusion.

110 In *N.L.N.U.*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

"Reasonable" means here that the reasons do in fact or in principle support the conclusion reached. That is, even if the reasons in fact given do not seem wholly adequate to support the decision, the court must first seek to supplement them before it seeks to subvert them. For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc, then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective. [Emphasis added by Abella J.; para. 12.]

(Quotation from D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 304.)

Accordingly, Justice Armstrong's explanation of the interaction between the Market Price definition and the "maximum amount" proviso can be considered a supplement to the arbitrator's reasons.

111 The two provisions at issue here are the Market Price definition and the "maximum amount" proviso:

2. DEFINITIONS

"**Market Price**" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX,

Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

And:

3. FINDER'S FEE

3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

[Emphasis added.]

112 Section 3.1 entitles Sattva to be paid a finder's fee in shares based on the "Market Price". Section 2 of the Agreement states that Market Price for companies listed on the TSXV should be "calculated on close of business day before the issuance of the press release announcing the Acquisition". In this case, shares priced on the basis of the Market Price definition would be \$0.15 per share. The words "provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations" in s. 3.1 of the Agreement constitute the "maximum amount" proviso. This proviso limits the amount of the finder's fee. The maximum finder's fee in this case is US\$1.5 million (see s. 3.3 of the TSXV Policy 5.1 in Appendix II).

113 While the "maximum amount" proviso limits the amount of the finder's fee, it does not affect the Market Price definition. As Justice Armstrong explained, the Market Price definition acts to fix the date at which one medium of payment (US\$) is transferred into another (shares):

The medium for payment of the finder's fee is clearly established by the fee agreement. The market value of those shares at the time that the parties entered into the fee agreement was unknown. The respondent analogizes between payment of the \$1.5 million US finder's fee in shares and a hypothetical agreement permitting payment of \$1.5 million US in Canadian dollars. Both agreements would contemplate a fee paid in different currencies. The exchange rate of the US and Canadian dollar would be fixed to a particulate date, as is the value of the shares by way of the Market Price in the fee agreement. That exchange rate would determine the number of Canadian dollars paid in order to satisfy the \$1.5 million US fee, as the Market Price does for the number of shares paid in relation to the fee. The Canadian dollar is the form of the fee payment, as are the shares. Whether the Canadian dollar increased or decreased in value after the date on which the exchange rate is based is irrelevant. The amount of the fee paid remains \$1.5 million US, payable in the number of Canadian dollars (or shares) equal to the amount of the fee based on the value of that currency on the date that the value is determined.

(SC Appeal Court decision, at para. 71)

114 Justice Armstrong explained that Creston's position requires the Market Price definition to be ignored and for the shares to be priced based on the valuation done in anticipation of a private placement.

115 However, nothing in the Agreement expresses or implies that compliance with the "maximum amount" proviso should be reassessed at a date closer to the payment of the finder's fee. Nor is the basis for the new valuation, in this case a private placement, mentioned or implied in the Agreement. To accept Creston's interpretation would be to ignore the words of the Agreement which provide that the "finder's fee is to be paid in shares of the Company based on Market Price".

116 The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both the Market Price definition and the "maximum amount" proviso. The arbitrator's interpretation of the Agreement, as explained by Justice Armstrong, achieves this goal by reconciling the Market Price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

117 As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

118 By accepting payment in shares, Sattva was accepting that it was subject to the volatility of the market. If Creston's share price had fallen, Sattva would still have been bound by the share price determined according to the Market Price definition resulting in it receiving a fee paid in shares with a market value of less than the maximum amount of US\$1.5 million. It would make little sense to accept the risk of the share price decreasing without the possibility of benefitting from the share price increasing. As Justice Armstrong stated:

It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.

(SC Appeal Court decision, at para. 70)

119 For these reasons, the arbitrator did not ignore the "maximum amount" proviso. The arbitrator's reasoning, as explained by Justice Armstrong, meets the reasonableness threshold of justifiability, transparency and intelligibility (*Dunsmuir*, at para. 47).

E. Appeal Courts Are Not Bound by Comments on the Merits of the Appeal Made by Leave Courts

120 The CA Appeal Court held that it and the SC Appeal Court were bound by the findings made by the CA Leave Court regarding not simply the decision to grant leave to appeal, but also the merits of the appeal. In other words, it found that the SC Appeal Court erred in law by ignoring the findings of the CA Leave Court regarding the merits of the appeal.

121 The CA Appeal Court noted two specific findings regarding the merits of the appeal that it held were binding on it and the SC Appeal Court: (1) it would be anomalous if the Agreement allowed Sattva to receive US\$1.5 million if it received its fee in cash, but allowed it to receive shares valued at approximately \$8 million if Sattva received its fee in shares; and (2) that the arbitrator ignored this anomaly and did not address s. 3.1 of the Agreement:

The [SC Appeal Court] judge found the arbitrator had expressly addressed the maximum amount payable under paragraph 3.1 of the Agreement and that he was correct.

This finding is contrary to the remarks of Madam Justice Newbury in the earlier appeal that, if Sattva took its fee in shares valued at \$0.15, it would receive a fee having a value at the time the fee became payable of over \$8 million. If the fee were taken in cash, the amount payable would be \$1.5 million US. Newbury J.A. specifically held that the arbitrator did not note this anomaly and did not address the meaning of paragraph 3.1 of the Agreement.

The [SC Appeal Court] judge was bound to accept those findings. Similarly, absent a five-judge division in this appeal, we must also accept those findings. [paras. 42-44]

122 With respect, the CA Appeal Court erred in holding that the CA Leave Court's comments on the merits of the appeal were binding on it and on the SC Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case (*Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3 (S.C.C.), at para. 88). A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful (*Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310 (B.C. C.A.), at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii (note) (S.C.C.)). This is true even where the determination of whether to grant leave involves, as in this case, a preliminary consideration of the question of law at issue. A grant of leave cannot bind or limit the powers of the court hearing the actual appeal (*Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566 (Ont. C.A.), at para. 32).

123 Creston concedes this point but argues that the CA Appeal Court's finding that it was bound by the CA Leave Court was inconsequential because the CA Appeal Court came to the same conclusion on the merits as the CA Leave Court based on separate and independent reasoning.

124 The fact that the CA Appeal Court provided its own reasoning as to why it came to the same conclusion as the CA Leave Court does not vitiate the error. Once the CA Appeal Court treated the CA Leave Court's reasons on the merits as binding, it could hardly have come to any other decision. As counsel for Sattva pointed out, treating the leave decision as binding would render an appeal futile.

VI. Conclusion

125 The CA Leave Court erred in granting leave to appeal in this case. In any event, the arbitrator's decision was reasonable. The appeal from the judgments of the Court of Appeal for British Columbia dated May 14, 2010 and August 7, 2012 is allowed with costs throughout and the arbitrator's award is reinstated.

Appeals allowed.

Pourvois accueillis.

Appendix I

Relevant Provisions of the Sattva-Creston Finder's Fee Agreement

(a) "Market Price" definition:

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies

listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

(b) Finder's fee provision (which contains the "maximum amount" proviso):

3. FINDER'S FEE

3.1 ... the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

Appendix II

Section 3.3 of TSX Venture Exchange Policy 5.1: Loans, Bonuses, Finder's Fees and Commissions

3.3 Finder's Fee Limitations

The finder's fee limitations apply if the benefit to the Issuer is an asset purchase or sale, joint venture agreement, or if the benefit to the Issuer is not a specific financing. The consideration should be stated both in dollars and as a percentage of the value of the benefit received. Unless there are unusual circumstances, the finder's fee should not exceed the following percentages:

Benefit	Finder's Fee
On the first \$300,000	Up to 10%
From \$300,000 to \$1,000,000	Up to 7.5%
From \$1,000,000 and over	Up to 5%

As the dollar value of the benefit increases, the fee or commission, as a percentage of that dollar value should generally decrease.

Appendix III

Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as it read on January 12, 2007) (now the Arbitration Act)

Appeal to the court

31

(1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

- (a) all of the parties to the arbitration consent, or
- (b) the court grants leave to appeal.

(2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

(a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,

(b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

(3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

TAB 2

2016 ONCA 912
Ontario Court of Appeal

Shewchuk v. Blackmont Capital Inc.

2016 CarswellOnt 18794, 2016 ONCA 912, [2016] O.J. No. 6190,
272 A.C.W.S. (3d) 753, 35 C.C.E.L. (4th) 1, 404 D.L.R. (4th) 512

**Robert B. Shewchuk (Plaintiff / Appellant) and
Blackmont Capital Inc. (Defendant / Respondent)**

George R. Strathy C.J.O., K.M. Weiler, David Watt JJ.A.

Heard: September 9, 2016
Judgment: December 2, 2016
Docket: CA C60982

Proceedings: affirming *Shewchuk v. Blackmont Capital Inc.* (2015), 27 C.C.E.L. (4th) 196, 2015 CarswellOnt 12601, 2015 ONSC 5079, S.A.Q. Akhtar J. (Ont. S.C.J.); additional reasons at *Shewchuk v. Blackmont Capital Inc.* (2015), 27 C.C.E.L. (4th) 252, 2015 CarswellOnt 19635, 2015 ONSC 7861, S.A.Q. Akhtar J. (Ont. S.C.J.)

Counsel: Joseph Groia, Kevin Richard, for Appellant
Nigel Campbell, Doug McLeod, for Respondent

Subject: Civil Practice and Procedure; Contracts; Public; Restitution; Employment

Headnote

Labour and employment law --- Employment law — Interpretation of employment contract — Miscellaneous

Plaintiff stockbroker worked as investment advisor for defendant company in its retail group — Defendant entered into agreement with plaintiff — Plaintiff claimed agreement entitled him to certain compensation for any deal sourced by him, including those involving capital markets, while defendant alleged agreement involved retail group and had no application to capital markets transactions — Plaintiff brought action, which was dismissed — Trial judge found parties' agreement was ambiguous and considered factual circumstances surrounding contract to interpret it and resolve ambiguity, including consideration of parties' conduct after formation of contract — Plaintiff appealed — Appeal dismissed — As contract was ambiguous, trial judge properly considered parties' subsequent conduct to assess their evidence about intended scope of contract — Plaintiff identified no palpable and overriding error in trial judge's factual findings about parties' subsequent conduct or extricable error of law in his interpretation of contract — Evidence was overwhelmingly consistent with interpretation of agreement as being inapplicable to capital markets transactions and with trial judge's conclusion that factual matrix of contract pointed to agreement with retail group, not capital markets.

Contracts --- Construction and interpretation — Resolving ambiguities — Conduct of parties

Plaintiff stockbroker worked as investment advisor for defendant company in its retail group — Defendant entered into agreement with plaintiff — Plaintiff claimed agreement entitled him to certain compensation for any deal sourced by him, including those involving capital markets, while defendant alleged agreement involved retail group and had no application to capital markets transactions — Plaintiff brought action, which was dismissed — Trial judge found parties' agreement was ambiguous and considered factual circumstances surrounding contract to interpret it and resolve ambiguity, including consideration of parties' conduct after formation of contract — Plaintiff appealed — Appeal dismissed — Trial judge's interpretation

of contract could not be reviewed on correctness standard absent any extricable error of law — Evidence of subsequent conduct should be admitted only if contract remains ambiguous after considering its text and its factual matrix — As contract was ambiguous, trial judge properly considered parties' subsequent conduct to assess their evidence about intended scope of contract — Trial judge properly used evidence of parties' subsequent conduct to resolve any residual ambiguity in agreement, except for his reference to subsequent conduct forming part of factual matrix — Subsequent conduct must be distinguished from factual matrix, which only encompasses circumstances at time contract was made — Plaintiff identified no palpable and overriding error in trial judge's factual findings about parties' subsequent conduct or extricable error of law in his interpretation of contract — Evidence was overwhelmingly consistent with interpretation of agreement as being inapplicable to capital markets transactions and with trial judge's conclusion that factual matrix of contract pointed to agreement with retail group, not capital markets.

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George R. Strathy C.J.O.:

A. INTRODUCTION

1 The trial judge found that the parties' contract was ambiguous. He considered the factual circumstances surrounding the contract to interpret it and to resolve the ambiguity. The main question on this appeal is whether he erred in also considering the parties' *subsequent* conduct — that is, their conduct after the formation of the contract.

2 For the reasons that follow, I would dismiss the appeal. Because the contract was ambiguous, the trial judge properly considered the parties' subsequent conduct to assess their evidence about the intended scope of their contract. The appellant has not identified either a palpable and overriding error in the trial judge's factual findings about the parties' subsequent conduct or an extricable error of law in his interpretation of the contract.

B. THE FACTS

The parties

3 The appellant, a successful stockbroker, was employed by the respondent¹ as an investment advisor ("IA") in its Calgary office. He was a member of the respondent's Retail Group brokers, whose clients were primarily individual investors. The respondent also had a Capital Markets group, based in Toronto, which procured financing for banks, public companies, and other institutional clients.

The IA Compensation Plan

4 Each IA, like the appellant, had a Compensation Plan, which set out their commission scale. As a top-producing IA, the appellant was compensated at the highest level: 52 percent of the fees the respondent earned from a retail transaction.

5 The IA Compensation Plan identified several "Special Payout Items," including "Capital Markets Referrals." If an IA referred business to the Capital Markets group, he or she could earn a referral fee of "up to 15% of the net revenue" generated by the transaction. The amount of the fee was discretionary and was determined by executives of the Retail Group and Capital Markets, depending on the "value added" of the IA's relationship with the client, having regard to any pre-existing relationship between the respondent and the client.

6 The appellant and other IAs were dissatisfied with their compensation for transactions they referred to Capital Markets. The appellant, who was particularly vocal, initiated discussions for a new contract for

himself, making it clear that he would leave the company if his concerns were not resolved to his satisfaction. His negotiations with the Calgary branch manager of the Retail Group culminated in the execution of a letter agreement dated April 11, 2006 (the "April 11 Agreement").

The April 11 Agreement

7 The April 11 Agreement was, in essence, an amendment to the IA Compensation Plan. It had two financial components. First, it granted the appellant 100,000 deferred stock units in the respondent's parent corporation, each of which entitled him to acquire one share. This was in addition to the stock units to which he was entitled as an IA upon meeting his investment targets in a given year. Second, it provided for compensation in addition to what he received under the IA Compensation Plan. Paragraph 3 of the April 11 Agreement provided as follows:

3. With respect to the broker warrants² attributable to you for the transactions listed in Schedule "A" attached hereto and for all transactions (whether you are paid in the form of broker warrants, cash or fully paid shares) that are sourced directly by you following March 1, 2006, Blackmont shall pay to you an additional 10% over and above that which is payable under [the IA Agreement] (the "Finder's Fee").

8 Schedule A to the agreement listed thirteen "Qualified options eligible for [a] 10% Finders Fee" and six "non-qualified options." It provided that "[a] Finders Fee of 10% will apply to . . . new positions garnered which could come in the form of traditional Broker B-Warrants, free trading shares, restricted shares or cash. These new positions will be added to Schedule A as they arise." The qualified options listed in Schedule A were related to Retail Group transactions.

9 The April 11 Agreement was expressed to be in full and final satisfaction of all compensation-related disputes between the appellant and the respondent. Paragraphs 2 and 10 provided that the IA Agreement would continue to govern the relationship:

2. Except as outlined further below, payouts on broker warrants will be subject to Blackmont's standard [IA Compensation Plan] (the "Broker Warrant Payments").

...

10. Other than as specifically stated above, all other terms of your employment remain unchanged and shall continue to be subject to [the IA Agreement] in existence at the relevant time.

10 The April 11 Agreement was expressed to be confidential and would be terminated if the appellant breached confidentiality, in which case his compensation would revert to the standard IA Compensation Plan. The appellant acknowledged that the confidentiality provision meant that he could not disclose the existence of the April 11 Agreement to Capital Markets personnel.

The disputed transactions

11 In his statement of claim, the appellant asserted, among other things, that he was entitled to a 52 percent commission under the IA Compensation Plan, as well as a further 10 percent commission under the April 11 Agreement, on four Capital Markets transactions in which the respondent was a member of the underwriting syndicate or a participant in the financing. He claimed to have directly sourced these transactions for the respondent through his connections with the clients.

12 The central issue at trial was whether the April 11 Agreement applied to Capital Markets transactions, as the appellant asserts.

The subsequent conduct

13 I will discuss the parties' subsequent conduct in more detail below. Briefly, however, the trial judge heard evidence of what the respondent characterized as ongoing attempts by the appellant to negotiate compensation for deals he introduced to Capital Markets. The respondent argued that this conduct was inconsistent with the appellant's assertion that the April 11 Agreement applied to Capital Markets transactions.

C. THE TRIAL JUDGE'S REASONS

14 The trial judge identified the primary issue as whether the disputed transactions fell within the scope of the April 11 Agreement. This depended on whether the April 11 Agreement was applicable only to retail transactions or whether it also applied to transactions involving Capital Markets. Each party argued that, properly interpreted, the agreement was unambiguous in its favour. The trial judge found that the agreement was ambiguous. The ambiguity could only be resolved, he said, by looking at the surrounding circumstances, including the parties' conduct after the formation of the April 11 Agreement.

15 In response to the respondent's submission that the parties' conduct *subsequent* to the making of the contract could only be considered in the event of ambiguity, the trial judge expressed the view, at para. 82, that "if subsequent conduct demonstrates the mutual and objective intentions of the words in the contract, it is as valuable as any conduct pre-existing the making of the contract."

16 The judge referred to *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), noting the role of the surrounding circumstances in determining the intentions of the parties at the time of formation of the contract. He proceeded to consider the events leading up to the execution of the April 11 Agreement, including:

- the Retail Group's historical grievances concerning remuneration of IAs who introduced transactions to Capital Markets;
- the fact that Capital Markets personnel were not involved in the negotiation and execution of the April 11 Agreement; and
- the fact that the April 11 Agreement was to be kept confidential by the appellant and not disclosed to Capital Markets.

17 He also noted the unlikelihood that the appellant would be entitled to a fixed commission on "bought deals,"³ as the appellant would bear none of the risk of these deals. And he noted the absence of any express provision in the April 11 Agreement that would supersede the Capital Markets Referrals provision in the IA Agreement.

18 The trial judge also considered events occurring *after* the execution of the April 11 Agreement, including:

- a proposal made by the appellant on November 5, 2006, for the division of compensation and a 15 percent Finder's Fee on deals he brought to Capital Markets;
- a meeting in November, 2006, in which the appellant attempted to negotiate an agreement with Capital Markets;
- the appellant's attempts to negotiate fees on particular Capital Markets transactions — fees that differed from and were less favourable to him than the fees he claimed were payable under the April 11 Agreement; and

- other attempts by the appellant and his associate, Mr. Harris Watson, to negotiate an agreement with Capital Markets for a share of revenues from transactions arising out of the appellant's relationship with clients.

19 The trial judge found that this course of conduct supported the inference that the April 11 Agreement was not intended to apply to transactions involving Capital Markets. He found it significant that in the course of these negotiations, the appellant did not take the position that he was entitled to share in the fruits of Capital Markets transactions by virtue of the April 11 Agreement.

20 He also found it significant that Capital Markets representatives were not involved in the negotiation of the April 11 Agreement; it was not signed by representatives of Capital Markets; and there were no terms dealing with transactions that included participation by Capital Markets. The appellant was expressly forbidden from even mentioning the existence of the agreement to Capital Markets. According to the trial judge, it would be unreasonable to expect that Capital Markets would agree to share the fees that it earned without any knowledge of or participation in the formation of the agreement.

21 The trial judge found that the IA Compensation Plan permitted the appellant to make agreements with Capital Markets on joint ventures in which he would participate. He had done so after the execution of the April 11 Agreement without ever suggesting that he was entitled to a share in the revenues from them as of right pursuant to the agreement.

22 In the course of analyzing the parties' conduct after they signed the April 11 Agreement, the trial judge made adverse credibility findings against the appellant and Mr. Watson, who each testified that the agreement was intended to apply to Capital Markets transactions and fully resolve the appellant's compensation dispute with the respondent.

23 The trial judge concluded that the April 11 Agreement was intended to heal the rifts between the appellant and the respondent, but that it did not override the IA Compensation Plan. Rather, the April 11 Agreement coexisted with the IA Compensation Plan.

D. THE PARTIES' SUBMISSIONS

24 I will discuss the parties' submissions on appeal in the Analysis section below. They focus on three principal questions.

25 *First: The Standard of Review.* The appellant submits that, notwithstanding the Supreme Court of Canada's decision in *Sattva*, the trial judge's interpretation of the April 11 Agreement is reviewable on a correctness standard, because this is a case in which the factual matrix of the contract is relatively unimportant in the interpretive exercise. The respondent says that *Sattva* applies and that the trial judge's decision is reviewable on a standard of palpable and overriding error.

26 *Second: Ambiguity.* The appellant submits the contract was unambiguous. He argues that Paragraph 3 of the April 11 Agreement, when read together with Paragraphs 2 and 10, clearly superseded the Capital Markets Referrals provision of the IA Compensation Plan. Its result was to guarantee the appellant a referral fee of 10 percent over and above what would have been payable under the IA Compensation Plan for transactions he referred to Capital Markets. The respondent says the trial judge did not err by concluding that the contract was ambiguous. Although at trial each party argued that the contract was unambiguous, the trial judge correctly noted their respective arguments advanced different and incompatible interpretations.

27 *Third: Subsequent Conduct.* The appellant submits the trial judge committed a legal error by placing undue weight on the parties' conduct subsequent to the formation of the April 11 Agreement. He says that subsequent conduct is not part of the factual matrix. It is admissible only in the event of ambiguity and it has a limited role to play in the interpretive exercise. The respondent submits that evidence of subsequent conduct was properly admitted in view of the ambiguity of the contract. Although the respondent agrees that such evidence must be approached with some caution, it maintains that the trial judge did not err in using it the way he did.

28 At the end of these reasons, I will briefly mention two additional grounds of appeal raised by the appellant.

E. ANALYSIS

The standard of review

29 I reject the appellant's submission that this court's decision in *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.), remains applicable in light of *Sattva* and that the trial judge's interpretation of the contract can be reviewed on a correctness standard in the absence of an extricable error of law.

30 The Supreme Court made clear in *Sattva*, at para. 55, that a question of contractual interpretation is "inherently fact specific" and that, usually, appellate courts should show deference to first-instance fact finders (at para. 52). A less deferential standard should be applied only if the appellant demonstrates an extricable question of law within what was initially characterized as a question of mixed fact and law (at para. 53). See also *Fontaine v. Canada (Attorney General)*, 2016 ONCA 241, 130 O.R. (3d) 1 (Ont. C.A.), at para. 96; and *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, 54 B.L.R. (5th) 1 (S.C.C.), at para. 21.

31 The appellant's reliance on this court's decision in *Bell Canada* is misplaced. In that case, the majority described the exercise of contract interpretation as "a legal exercise" (at paras. 25, 30). This approach has been expressly overtaken by *Sattva* (at paras. 49, 50, 55).

32 Finally, in *Bell Canada* the majority held, at para. 26, that even where a question of contractual interpretation is one of mixed fact and law, an appellate court must determine whether the question is primarily legal or primarily factual to select the appropriate standard of review. In *Sattva*, however, there is no mention of such a spectrum-based approach to the questions of mixed fact and law raised in contractual interpretation. Instead, as stated above, an appellate court must identify an extricable question of law within what was initially characterized as a question of mixed fact and law before a correctness standard applies.

Ambiguity

33 The appellant submits the trial judge made an extricable error in finding ambiguity in the April 11 Agreement. He says that the language of "all transactions" in Paragraph 3, quoted above, means precisely what it says and necessarily includes both Retail Group and Capital Markets transactions. He relies on *Hobbs v. Esquimalt & Nanaimo Railway* (1899), 29 S.C.R. 450 (S.C.C.), where the Supreme Court of Canada held that a sale of "land" included the transfer of rights to the minerals contained therein. If the vendor had meant to reserve the mineral rights by using the word "land" in the agreement of purchase and sale, he should have said so. Similarly, the appellant asserts that if the respondent wanted to exclude Capital Markets from "all transactions," it should have said so. The effect, he says, is that the discretionary payment for Capital Markets referrals in the IA Agreement is replaced by a fixed 10 percent payment under the April 11 Agreement.

34 Leaving aside the fact that the approach to contractual interpretation in *Hobbs* has been overtaken by a century of jurisprudence, culminating in *Sattva*, the appellant concedes that the trial judge was required to consider the IA Compensation Plan in interpreting the April 11 Agreement, which expressly referred to the plan and confirmed its ongoing application. Paragraphs 2 and 10 of the April 11 Agreement provided that the IA Compensation Plan, which included the discretionary Finder's Fee provision, would continue, except as specifically set out in the April 11 Agreement. The trial judge found at para. 83 that the provision in the April 11 Agreement giving the appellant a 10 percent Finder's Fee on "all transactions" collided "head on" with the Capital Markets referral provision of the IA Compensation Plan, which made the IA's payment in the discretion of senior management of the Retail Group and Capital Markets, up to a ceiling of 15 percent.

35 I agree with the trial judge that the foregoing gave rise to an ambiguity, which he was required to resolve through the application of the rules of contract interpretation, having regard to the factual matrix surrounding the April 11 Agreement.

36 There was an additional source of ambiguity not considered by the trial judge. The wording of the April 11 Agreement that "Blackmont shall pay to you an additional 10% *over and above that which is payable* under Blackmont's standard investment advisor compensation plan" does not fit easily with the argument that it was intended to apply to Capital Markets referrals. Compensation for Capital Markets referrals in the IA Compensation Plan was entirely discretionary. It was possible for the appellant to receive no fee for a referral to Capital Markets, which, unlike his compensation for retail transactions, did not entitle the appellant to a fixed or minimum percentage for revenue. The use of the phrase "over and above that which is payable" makes sense in the context of a fixed amount or percentage, but is awkward when applied to a purely discretionary amount.

Subsequent Conduct

37 Having found ambiguity in the contract, the trial judge considered what he described at para. 84 as the "surrounding circumstances of the April 11 Agreement and what happened afterwards in its implementation." He looked at the surrounding circumstances to see whether the parties intended the April 11 Agreement to apply to the disputed transactions involving Capital Markets. He looked to the parties' subsequent conduct, he said at para. 85, to determine "their intentions and understanding of the agreement."

38 I will conduct my analysis of this issue by addressing three questions:

- 1) When is evidence of the subsequent conduct of the parties admissible to interpret their contract?
- 2) How should courts assess the weight or cogency of that evidence?
- 3) Did the trial judge make appropriate use of the evidence of subsequent conduct?

(1) The admissibility of evidence of subsequent conduct

39 In *Sattva*, the Supreme Court held that evidence of the "factual matrix" or "surrounding circumstances" of a contract is admissible to interpret the contract and ought to be considered at the outset of the interpretive exercise. This approach contrasts with the earlier view that such evidence is admissible only if the contract is ambiguous on its face: see *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 (S.C.C.), at paras. 55-56; and *Seven Oaks Inn Partnership v. Directcash Management Inc.*, 2014 SKCA 106, 446 Sask. R. 89 (Sask. C.A.), at para. 13.

40 The issue addressed in this appeal is whether evidence of the contracting parties' conduct subsequent to the execution of their agreement is part of the factual matrix such that it too is admissible at the outset, or whether a finding of ambiguity is a condition precedent to its admissibility.

41 In my view, subsequent conduct must be distinguished from the factual matrix. In *Sattva*, the Supreme Court stated at para. 58 that the factual matrix "consist[s] only of objective evidence of the background facts *at the time of the execution of the contract*, that is, knowledge that was or reasonably ought to have been within the knowledge of both parties *at or before the date of contracting*" (citation omitted and emphasis added). Thus, the scope of the factual matrix is temporally limited to evidence of facts known to the contracting parties contemporaneously with the execution of the contract. It follows that subsequent conduct, or evidence of the behaviour of the parties after the execution of the contract, is not part of the factual matrix: see *Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)*, 2000 NFCA 21, 5 C.L.R. (3d) 55 (Nfld. C.A.), at para. 11; and *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63 (Man. C.A.), at para. 72.

42 There is an additional reason to distinguish subsequent conduct from the factual matrix — a reason rooted in the reliability of the evidence. In *Sattva*, the Supreme Court stated at para. 60 that consideration of the factual matrix enhances the finality and certainty of contractual interpretation. It sheds light on the meaning of a contract's written language by illuminating the facts known to the parties at the date of contracting. By contrast, as I will explain, evidence of subsequent conduct has greater potential to undermine certainty in contractual interpretation and override the meaning of a contract's written language.

43 There are some dangers associated with reliance on evidence of subsequent conduct. One danger, recognized in England where such evidence is inadmissible, is that the parties' behaviour in performing their contract may change over time. Using their subsequent conduct as evidence of their intentions at the time of execution could permit the interpretation of the contract to fluctuate over time. Thus, in *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.*, [1970] A.C. 583 (U.K. H.L.), Lord Reid observed, at p. 603:

I must say that I had thought that it is now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reasons of subsequent events meant something different a month or a year later.

Indeed, in *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.* (1973), [1974] A.C. 235 (U.K. H.L.), at p. 261, Lord Wilberforce described reliance on subsequent conduct as "nothing but the refuge of the desperate."

44 Another danger is that evidence of subsequent conduct may itself be ambiguous. For example, as this court observed in *Canada Square Corp. v. Versafood Services Ltd.* (1981), 34 O.R. (2d) 250 (Ont. C.A.), at p. 261 quoting from the writing of Professor Stephen Waddams, "the fact that a party does not enforce his strict legal rights does not mean that he never had them." As a consequence of the potential ambiguity inherent in subsequent conduct, "some courts have gone so far as to assert that evidence of subsequent conduct will carry little weight unless it is unequivocal": see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 3d ed. (Toronto: LexisNexis, 2016), at p. 105.

45 A third danger is that over-reliance on subsequent conduct may reward self-serving conduct whereby a party deliberately conducts itself in a way that would lend support to its preferred interpretation of the contract.

46 These dangers, together with the circumscription of a contract's factual matrix to facts known at the time of its execution, militate against admitting evidence of subsequent conduct at the outset of the interpretive exercise. Evidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and its factual matrix.

47 This approach is consistent with the weight of authority: see *Adolph Lumber Co. v. Meadow Creek Lumber Co.* (1919), 58 S.C.R. 306 (S.C.C.), at p. 307; *Corporate Properties Ltd. v. Manufacturers Life Insurance Co.* (1989), 70 O.R. (2d) 737 (Ont. C.A.), at p. 745, leave to appeal to S.C.C. refused, [1990] S.C.C.A. No. 48 (S.C.C.); *Arthur Andersen Inc. v. Toronto Dominion Bank* (1994), 17 O.R. (3d) 363 (Ont. C.A.), at p. 372; *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 O.R. (3d) 97 (Ont. C.A.), at p. 108; and Hall, at p. 103. The leading Canadian case is *Canadian National Railway v. Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242 (B.C. C.A.), aff'd, [1979] 2 S.C.R. 668 (S.C.C.), in which Lambert J.A. stated, at p. 262:

In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one.

...

The types of extrinsic evidence that will be admitted, if they meet the test of relevance and are not excluded by other evidentiary tests, include evidence of the facts leading up to the making of the agreement, evidence of the circumstances as they exist at the time the agreement is made and, in Canada, evidence of subsequent conduct of the parties to the agreement.

48 Despite its dangers, evidence of subsequent conduct can be useful in resolving ambiguities. It may help to show the meaning the parties gave to the words of their contract after its execution, and this may support an inference concerning their intentions *at the time they made their agreement*: see *Montreal Trust Co.*, at p. 108; *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 ONCA 396, 239 O.A.C. 137 (Ont. C.A.), at para. 55; *Whiteside v. Celestica International Inc.*, 2014 ONCA 420, 321 O.A.C. 132 (Ont. C.A.), at para. 58; and *Soboczynski v. Beauchamp*, 2015 ONCA 282, 125 O.R. (3d) 241 (Ont. C.A.), at para. 60 leave to appeal to S.C.C. refused, [2015] S.C.C.A. No. 243 (S.C.C.).

49 Canadian courts have never adopted the absolute exclusionary rule prevailing in the United Kingdom: see *Bank of Montreal v. University of Saskatchewan* (1953), 9 W.W.R. (N.S.) 193 (Sask. Q.B.), at p. 199; *Manitoba Development Corp. v. Columbia Forest Products Ltd.* (1973), 43 D.L.R. (3d) 107 (Man. C.A.), at p. 114; *Van Gastel v. Methner*, [1979] O.J. No. 1032 (Ont. H.C.), at para. 13; and *Three Hats Productions Inc. v. RCA Inc.*, 1987 CarswellOnt 3295 (Ont. H.C.), at para. 36.

50 However, the lesson learned in Canada from the British position is that the parties' subsequent conduct is relevant only to inferentially establishing their intentions *at the time they executed their contract*. Like evidence of post-offence conduct in criminal matters, it is a kind of circumstantial evidence that "invokes a retrospectant chain of reasoning"; the trier of fact is invited to infer the parties' prior intentions from their later conduct: see *R. v. Rybak*, 2008 ONCA 354, 90 O.R. (3d) 81 (Ont. C.A.), at para. 142, leave to appeal to S.C.C. refused, (2009), [2008] S.C.C.A. No. 311 (S.C.C.); and *R. v. Vant*, 2015 ONCA 481, 324 C.C.C. (3d) 109 (Ont. C.A.), at para. 121. As Juriansz J. (as he then was) wrote in *Danforth-Woodbine Theatre Ltd. v. Loblaw's Inc.*, [1999] O.J. No. 2059 (Ont. Gen. Div.), at para. 55:

[W]here evidence of the conduct of the parties and their method of performance is admissible, it is not admitted so that the contract may be construed to be consonant with the parties' conduct, but rather, it is admitted because the parties' conduct and method of performance may be of assistance in determining what the signatories intended at the time they entered the contract.

(2) The weight or cogency of evidence of subsequent conduct

51 In *Canadian National Railways*, Lambert J.A. suggested, at p. 262, that, once admitted, the weight or cogency of evidence of post-contractual conduct may depend on the circumstances:

However, to say that these types of evidence become admissible where two reasonable interpretations exist is not to say that the evidence, if tendered, must be given weight . . . In no case is it necessary that weight be given to evidence of subsequent conduct. In some cases it may be most misleading to do so and it is to this danger that allusions are made throughout the recent English cases, particularly *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, and *James Miller & Partners Ltd. v. Whitworth Street Estates (Manchester) Ltd.* In England the risks have been considered sufficiently grave that the possibility of illumination from the use of subsequent conduct has been ruled out. In Canada, they have not, but those risks must be carefully assessed in each individual case before determining to give weight to subsequent conduct. [Citations omitted.]

52 I agree. The inherent dangers of evidence of subsequent conduct mean that when it is admitted it must be used cautiously and its weight will vary from case to case: see *Danforth-Woodbine Theatre*, at para. 55; *Canada Square Corp.*, at pp. 260-261; and *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459, 57 B.C.L.R. (4th) 212 (B.C. C.A.), at para. 27. When ascertaining its cogency, a court should evaluate the extent to which its inherent dangers are mitigated in the circumstances of the case.

53 In the usual course, evidence of subsequent conduct will be more reliable if the acts it considers are the acts of both parties, are intentional, are consistent over time, and are acts of individuals rather than agents of corporations: see *Canadian National Railways*, at p. 262. I agree with Kerans J.A. that "subsequent conduct by individual employees in a large corporation are not always reliable indicators of corporate policy, intention, or understanding": *Mesa Operating Ltd. Partnership v. Amoco Canada Resources Ltd.* (1994), 19 Alta. L.R. (3d) 38 (Alta. C.A.), at para. 52.

54 Evidence of subsequent conduct will have greater weight if it is unequivocal in the sense of being consistent with only one of the two alternative interpretations of the contract that generated the ambiguity triggering its admissibility: *Lewis v. Union of B.C. Performers* (1996), 18 B.C.L.R. (3d) 382 (B.C. C.A.), at para. 14, leave to appeal to S.C.C. refused, [1996] S.C.C.A. No. 182 (S.C.C.); and *Scurry-Rainbow Oil Ltd. v. Kasha*, 1996 ABCA 206, 39 Alta. L.R. (3d) 153 (Alta. C.A.), at para. 44, leave to appeal to S.C.C. refused, (1997), [1996] S.C.C.A. No. 391 (S.C.C.). For instance, in *Chippewas of Mnjikaning First Nation v. Ontario*, 2010 ONCA 47, 265 O.A.C. 247 (Ont. C.A.), at para. 162, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 91 (S.C.C.), this court found that the parties' subsequent conduct was of assistance in determining which of two reasonable interpretations of a contract should be accepted because the conduct in question was "overwhelmingly consistent only with the trial judge's interpretation."

55 Evidence of subsequent conduct may also be given greater weight in proportion to the proximity of the subsequent conduct to the time of the contract's execution: see *Union Natural Gas Co. v. Chatham Gas Co.* (1918), 56 S.C.R. 253 (S.C.C.), at p. 271; and Hall, at pp. 105-106.

56 In summary, evidence of the parties' subsequent conduct is admissible to assist in contractual interpretation only if a court concludes, after considering the contract's written text and its factual matrix, that the contract is ambiguous. The court may then make retrospectant use of the evidence, giving it appropriate weight having regard to the extent to which its inherent dangers are mitigated in the circumstances of the case at hand, to infer the parties' intentions at the time of the contract's execution.

(3) Did the trial judge properly use the evidence of subsequent conduct?

57 With one qualification, it is my view that the trial judge properly used the evidence of the parties' subsequent conduct to resolve any residual ambiguity in the April 11 Agreement. The one qualification

relates to the trial judge's reference to subsequent conduct forming part of the factual matrix. As I have noted, since the factual matrix only encompasses circumstances at the time the contract was made, subsequent conduct does not enter into that part of the analysis.

58 However, the trial judge did not consider the subsequent conduct as part of the factual matrix. He used it to test the appellant's contention that the parties intended the April 11 Agreement to apply to Capital Markets transactions and to test the credibility of the appellant's explanation of his subsequent conduct. He found that the appellant's repeated attempts to negotiate a revenue sharing agreement with Capital Markets after April 11, 2006 were at odds with his contention that the relationship with Capital Markets had been resolved by the April 11 Agreement. He found the appellant's conduct was consistent with the respondent's interpretation of the contract and rejected as incredible the appellant's attempts to explain his conduct.

59 In my view, the trial judge did not err in giving undue weight to evidence of the appellant's subsequent conduct. His considered the evidence to be relevant to the parties intentions at the time of executing the April 11 Agreement. The evidence was primarily about the appellant's actions — the actions of an individual rather than corporate employees. The appellant's repeated attempts to negotiate a new agreement after April 11, 2006 and his repeated failure to refer to the April 11 Agreement in these negotiations were deliberate and consistent over time. His actions after the formation of the April 11 Agreement were unequivocal and were consistent with the conclusion that at the time of execution neither he nor the respondent viewed the agreement as applicable to Capital Markets. To echo the words of this court in *Chippewas of Mnjikanag*, the evidence was overwhelmingly consistent with the interpretation of the Agreement as being inapplicable Capital Markets transactions. It was also consistent with the trial judge's conclusion that the factual matrix of the contract pointed to an agreement with the retail side of the business and not Capital Markets.

Other grounds of appeal

60 The appellant argues that the trial judge failed to give adequate consideration to the defendant's pleading, which did not specifically raise the applicability of the April 11 Agreement to Capital Markets transactions. The issue was, however, raised by the respondent well before trial and was the subject of evidence and full argument at trial. The trial judge did not err in considering this issue.

61 Nor would I give effect to the appellant's argument that the trial judge should not have considered the respondent's "corrected" answers to undertakings. In accordance with settled authority, to which he referred, he was entitled to examine both the original and the "corrected" answers and to determine what weight, if any, to give to one or the other: *Marchand (Litigation Guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97 (Ont. C.A.). Having done so, he concluded that the original answers contained errors that were made in good faith and that the corrected answers more accurately reflected the facts.

62 I would not give effect to the other grounds of appeal, which were not pressed either in the appellant's factum or in oral argument.

F. ORDER

63 For these reasons, I would dismiss the appeal, with costs to the respondent in the agreed amount of \$55,000.00, inclusive of prejudgment interest and all applicable disbursements.

K.M. Weiler J.A.:

I agree.

David Watt J.A.:

I agree.

Appeal dismissed.

Footnotes

- 1 During the material time, the respondent's name was Blackmont Capital Inc., but it is now owned by Richardson GMP. Richardson GMP defended the action at trial and responded to the appeal in this court.
- 2 Broker warrants were a form of compensation provided by clients to the respondent and shared with IAs as part of their compensation. A warrant gave the holder the right to purchase a share of the issuer at a specific price and for a specific time. The warrant could be exercised or "cashed out" within the exercise time.
- 3 A "bought deal" was a financial arrangement where the respondent, as an underwriter of an Initial Public Offering, agreed to finance the offering by purchasing securities from its client before the offering went public. If the offering was a success, and the shares were purchased in the market at or above the price at which the respondent bought them, it stood to make a substantial profit. If the IPO was not a success, the respondent bore the risk of substantial losses.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF SEARS CANADA INC., 9370-2751 QUEBEC INC., 191020 CANADA INC., THE CUT INC., SEARS CONTACT SERVICES INC., INITIUM LOGISTICS SERVICES INC., INITIUM COMMERCE LABS INC., INITIUM TRADING AND SOURCING CORP., SEARS FLOOR COVERING CENTRES INC., 173470 CANADA INC., 2497089 ONTARIO INC., 6988741 CANADA INC., 10011711 CANADA INC., 1592580 ONTARIO LIMITED, 955041 ALBERTA LTD., 4201531 CANADA INC., 168886 CANADA INC., AND 3339611 CANADA INC.

(each, an "Applicant", and collectively, the "Applicants")

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

BOOK OF AUTHORITIES OF LANDLORDS
(Motion Returnable May 7, 2019)

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