Court of Appeal File No. COA-24-OM-0342
Superior Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO

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 14487893 CANADA INC.

Responding Party/
Proposed Respondent

BOOK OF AUTHORITIES OF THE PROPOSED RESPONDENTS
(Motion for Leave to Appeal, Returnable in Writing before a Panel)

Date: December 12, 2024

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TAB 1

DATE: 20010525
DOCKET: M27359

COURT OF APPEAL FOR ONTARIO

RE: **IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36 AND THE BUSINESS CORPORATIONS ACT, R.S.O. 1990, c. B.16**

AND IN THE MATTER OF A PROPOSED PLAN OF ARRANGEMENT WITH RESPECT TO ALGOMA STEEL INC.

ALGOMA STEEL INC. (Applicant/Responding Party)

BEFORE: **OSBORNE A.C.J.O., DOHERTY AND MACPHERSON JJ.A.**

COUNSEL: **John B. Laskin and David Outerbridge**
for the moving party First Mortgage Noteholders

Michael Barrack, Geoff Hall and Sarit Batner
for the responding party Algoma Steel Inc.

John T. Porter, Alan Merskey and Mario Forte
for the DIP Lenders

Ken Rosenberg, Lily Harmer and Marcus Knapp
for the United Steelworkers of America

James H. Grout
for the Monitor

Andrew Hatnay
for the Superintendent of Financial Services

Michael Weinczok
for the Directors of Algoma Steel Inc.

HEARD: **May 18, 2001**

On appeal from the order of Justice James M. Farley dated April 23, 2001.

E N D O R S E M E N T

-

[1] The First Mortgage Noteholders ("the Noteholders") seek leave to appeal, pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("the *CCAA*"), from the order of Farley J. dated April 23, 2001. The Noteholders are a consortium of about a dozen companies and groups which holds first mortgage notes totalling about $550 million issued by the respondent Algoma Steel Inc. ("Algoma").

[2] Farley J.'s order was an initial order made pursuant to s. 11(3) of the *CCAA*, on a motion by Algoma. It was made without notice to the Noteholders. The essence of Farley J.'s order was an authorization to Algoma to obtain additional financing ("the DIP Financing") from its existing bank lenders during the 30 day stay period permitted by s. 11(3) of the *CCAA*. The purpose of the order was to respond, on an urgent and interim basis, to a serious negative cash flow crisis at Algoma. Indeed, without short-term financial assistance designed to serve as a base for restructuring Algoma's current indebtedness, Algoma might well have had to cease operations. The order also gave priorities (which the parties call superpriorities) to the DIP Financing charge and to certain Administration and Directors Charges over the Noteholders' existing security.

[3] In his endorsement, Farley J. said, *inter alia*:

> Algoma qualifies as a corporation with the threshold debt re seeking relief under the CCAA.
>
> . . . . .
>
> The noteholders who are owed in excess of $1/2 billion were not represented today for the very simple reason that none of them were served. The reason for that as I understand it is that there is no set up at the present time of a Creditor's Committee or any equivalent. *I note that there is a comeback clause and I would particularly emphasize that if it is felt appropriate and needed, this clause should be used on a timely basis.*
>
> Order to issue as per my fiat.

[Emphasis added.]

[4] The comeback clause in the underlined passage is reflected in paragraph 48 of Farley J.'s order:

> 48.THIS COURT ORDERS that any interested person may apply to this court to vary or rescind this order or seek other relief upon seven (7) days' notice to the Applicant, the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this court may order.

[5] Once the Noteholders became aware of Farley J.'s order, they decided to challenge it. They did so in two ways: by seeking leave to appeal to this court and by initiating a motion to vary before Farley J. The former proceeded before this court, on a preliminary basis, on May 15 and, on the merits, on May 18. The latter was scheduled to be heard by Farley J. on May 23.

[6] The Noteholders seek leave to appeal Farley J.'s order on three bases, which they frame as Proposed Questions for this court:

> (1)Did the motions judge exceed his jurisdiction in making the initial order by altering existing priorities of and between secured creditors through the granting of superpriorities without the consent of the First Mortgage Noteholders?
>
> (2)Did the motions judge exceed his jurisdiction or otherwise err in law by granting these superpriorities without any notice to the First Mortgage Noteholders or to the trustee under the trust indenture?
>
> (3)Did the motions judge err in law by failing: (a) to treat the First Mortgage Noteholders in an equitable and even-handed manner relative to the Bank Lenders; and (b) to give due regard to the prejudice suffered by the First Mortgage Noteholders as a result of the initial order?

[7] In our view, the motion for leave to appeal is premature. Initial orders, made on a without notice basis, are specifically authorized by s. 11(1) of the *CCAA*. Proceedings under the *CCAA* are often urgent, complex and dynamic. The

Algoma proceedings fit that description. Farley J. was faced with complex facts and a difficult decision potentially implicating the closure of one of the largest companies in Ontario. Moreover, he had to make his decision in a very timely fashion. In these circumstances, he recognized that his initial order might not be acceptable to all interested parties, including some of Algoma's creditors. That is why he included a comeback clause in his order and specifically invited parties to resort to it in his endorsement.

[8] The fact that the *CCAA* provides that an appeal of an initial order is only available with leave indicates that appeals in *CCAA* proceedings should be limited. An appeal court should be cautious about intervening in the *CCAA* process, especially at an early stage. On this point, we are attracted to the reasoning of MacFarlane J.A. (in chambers) in *Re Pacific National Lease Holding Corp.* (1992), 15 C.B.R. 265 at 272 (B.C.C.A.):

> [T]here may be an arguable case for the petitioners to present to a panel of this court on discrete questions of law. But I am of the view that this court should exercise its powers sparingly when it is asked to intervene with respect to questions which arise under the C.C.A.A. The process of management which the Act has assigned to the trial court is an ongoing one. . . .
>
> A colleague has suggested that a judge exercising a supervisory function under the C.C.A.A. is more like a judge hearing a trial, who makes orders in the course of that trial, than a chambers judge who makes interlocutory orders in proceedings for which he has no further responsibility.
>
> . . . In supervising a proceeding under the C.C.A.A. orders are made, and orders are varied as changing circumstances require. Orders depend upon a careful and delicate balancing of a variety of interests and of problems. In that context appellant proceedings may well upset the balance, and delay or frustrate the process under the C.C.A.A. I do not say that leave will never be granted in a C.C.A.A. proceeding. But the effect upon all parties concerned will be an important consideration in deciding whether leave ought to be granted.

[9] Like MacFarlane J.A., we do not say that leave to appeal should never be granted in the midst of *CCAA* proceedings. However, it is premature to grant such leave at this juncture in the Algoma proceedings. Farley J.'s order was only an initial order brought on an urgent basis to deal with seemingly desperate circumstances. Moreover, the order specifically opened the proceedings to all interested parties and invited dissatisfied parties to bring their concerns to the court on a timely basis. The Noteholders availed themselves of this opportunity by initiating a motion to vary which was scheduled to be heard on the very day the initial order expired. In our view, this is precisely how a dynamic *CCAA* proceedings should unfold. Accordingly, it would be unwise to interrupt this normal and desirable process by granting leave to appeal at this juncture. The issues that the Noteholders want to raise can be considered by Farley J., importantly in the context of the entire proceedings with which he is familiar. Moreover, if at a later point in time this court grants leave to appeal, it will then have the benefit of the considered reasons of the motions judge flowing from a complete record and from full argument by all interested parties.

[10] For these reasons, the motion for leave to appeal is dismissed, without prejudice to the right of the Noteholders, or any other interested party, to make a similar motion at a later juncture in the proceedings, and to do so on an expedited basis. Only the United Steelworkers of America requested their costs of the motion. They are entitled to their costs which we would fix at $1000.

"C. A. A. Osborne A.C.J.O."
" D. Doherty J.A."
"J. C. MacPherson J.A."

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TAB 2

COURT OF APPEAL FOR ONTARIO

CITATION: Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corporation, 2013 ONCA 456
DATE: 20130626
DOCKET: M42068 & M42399

MacFarland, Watt and Epstein JJ.A.

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 Sino-Forest Corporation

BETWEEN

The Trustees of the Labourers' Pension Fund of Central and Eastern Canada, the Trustees of the International Union of Operating Engineers Local 793 Pension Plan for Operating Engineers in Ontario, Sjunde Ap-Fonden, David Grant and Robert Wong

Plaintiffs

and

Sino-Forest Corporation, Ernst & Young LLP, BDO Limited (formerly known as BDO McCabe Lo Limited), Allen T.Y. Chan, W. Judson Martin, Kai Kit Poon, David J. Horsley, William E. Ardell, James P. Bowland, James M.E. Hyde, Edmund Mak, Simon Murray, Peter Wang, Garry J. West, Poyry (Beijing) Consulting Company Limited, Credit Suisse Securities (Canada), Inc., TD Securities Inc., Dundee Securities Corporation, RBC Dominion Securities Inc., Scotia Capital Inc., CIBC World Markets Inc., Merrill Lynch Canada Inc., Canaccord Financial Ltd., Maison Placements Canada Inc., Credit Suisse Securities (USA) LLC and Merrill Lynch, Pierce, Fenner & Smith Incorported (successor by merger to Banc of America Securities LLC)

Proceedings under the *Class Proceedings Act, 1992*

Defendants

James C. Orr, Won J. Kim, Megan B. McPhee and Michael C. Spencer, for the moving parties, Invesco Canada Ltd., Northwest & Ethical Investments L.P., and Comité Syndical National de Retraite Bâtirente Inc.

Ken Rosenberg, Massimo Starnino, Jonathan Ptak, Jonathan Bida, Charles M. Wright and A. Dimitri Lascaris, for the *Ad Hoc* Committee of Purchasers of the Applicant's Securities, including the Representative Plaintiffs in the Ontario Class Action

Benjamin Zarnett, Robert Chadwick and Brendan O'Neill, for the respondent *Ad Hoc* Committee of Noteholders

Peter R. Greene, Kathryn L. Knight and Kenneth A. Dekker, for the responding party DBO Limited

Robert W. Staley, Kevin Zych, Derek J. Bell, Raj Sahni and Jonathan Bell, for Sino-Forest Corporation

David Bish, John Fabello and Adam M. Slavens, for the Underwriters

Derrick Tay, Clifton Prophet and Jennifer Stam, for FTI Consulting Canada Inc., in its capacity as Monitor

Peter H. Griffin, Peter J. Osborne and Shara N. Roy, for Ernst & Young LLP

Heard in writing

On appeal from the orders of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated December 10, 2012, with reasons reported at 2012 ONSC 7050, and March 20, 2013, with reasons reported at 2013 ONSC 1078.

ENDORSEMENT

[1] Leave to appeal is denied.

[2] The test for granting leave to appeal in *CCAA* proceedings is well-settled. It is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. In determining

whether leave ought to be granted, this court is required to consider the following four-part inquiry:

- Whether the point on the proposed appeal is of significance to the practice;
- Whether the point is of significance to the action;
- Whether the proposed appeal is *prima facie* meritorious or frivolous; and
- Whether the appeal will unduly hinder the progress of the action.

See *Re Country Style Food Services Inc.* (2002), 158 O.A.C. 30 (C.A.).

[3] In our view the proposed appeals fail to meet this stringent test.

[4] These motions for leave to appeal relate to the supervising judge's approval of a settlement releasing Ernst & Young LLP from any claims arising from its auditing of Sino-Forest Corporation.

[5] The Ernst & Young settlement is part of Sino-Forest's Plan of Compromise and Reorganization ("the Plan") following a bankruptcy triggered by allegations of corporate fraud. The settlement has the support of all parties to the *CCAA* proceedings, including the Monitor, Sino-Forest's creditors and a group of plaintiffs seeking to recover their investment losses in a contemplated, but not yet certified, class action ("the Ontario Plaintiffs").

[6] These motions for leave to appeal are brought by a single group of Sino-Forest investors, collectively known as Invesco, who together held approximately 1.6% of Sino-Forest's outstanding shares at the time of its collapse. Invesco

chose not to participate in any of the *CCAA* proceedings leading to the Ernst & Young settlement. It appeared for the first time at the hearing to sanction the Plan. Invesco objects to the Ernst & Young settlement because it wishes to preserve its right to opt out of any class proceedings and pursue an independent claim against Ernst & Young.

[7] Invesco is represented by Kim Orr LLP, the firm that ranked last in a fight for carriage of the Ontario class action against Sino-Forest and its auditors and underwriters. In January 2012, Perell J. awarded carriage of that action to Koskie Minsky and Siskinds LLP, with the Ontario Plaintiffs as the proposed representative plaintiffs. No appeal was taken from the order of Perell J.

[8] There are two motions for leave to appeal before the court.

- **M42068** – Invesco seeks leave to appeal the supervising judge's order dated December 10, 2012, sanctioning a Plan of Compromise and Reorganization for Sino-Forest (the "Sanction Order")

- **M42399** – Invesco seeks leave to appeal the supervising judge's orders dated March 20, 2013, approving the Ernst & Young settlement and dismissing Invesco's motion for an order to

> represent all prospective class members who oppose the settlement (the "Settlement Order" and the "Representation Dismissal Order").

[9] By order of Simmons J.A. dated May 1, 2013, the motion for leave to appeal the Sanction Order was ordered to be consolidated and heard together with the motion for leave to appeal the Settlement Order and the Representation Dismissal Order.

[10] The motions for leave to appeal are opposed by Sino-Forest, the Monitor, Sino-Forest's auditors and underwriters, the Ontario Plaintiffs, and a group representing Sino-Forest's major creditors.

The Sanction Order

[11] The supervising judge dismissed Invesco's arguments opposing the Sanction Order on the ground that, since the settlement was not part of the Plan at that point, its objections were premature. It could raise those objections when the court considered whether or not to approve the settlement.

[12] Invesco did not move to stay this order and the Plan has since been implemented. This proposed appeal is moot, and in any event, we see no basis to interfere with the supervising judge's decision.

The Settlement Order and the Representation Dismissal Order

[13] In approving the settlement, the supervising judge applied the test set out in *Robertson v. ProQuest Information and Learning Co.*, 2011 ONSC 1647. And because the proposed settlement provided for a release to Ernst & Young, he went on to consider the test prescribed by this court in *ATB Financial v. Metcalfe and Mansfield Alternative Investments II Corp*., 2008 ONCA 587, 92 O.R. (3d) 513, leave to appeal refused, [2008] S.C.C.A. No. 337 (*"ATB Financial*"). He found that the proposed settlement met those requirements. He concluded that the Ernst & Young settlement was fair and reasonable, provided substantial benefits to relevant stakeholders and was consistent with the purpose and spirit of the *CCAA*.

[14] There is no basis on which to interfere with his decision. The issues raised on this proposed appeal are, at their core, the very issues settled by this court in *ATB Financial*.

[15] Having dismissed their objection to the settlement order, it follows that Invesco's motion for a representation order would also be dismissed.

[16] The motions for leave to appeal are dismissed.

[17] Costs are to the responding parties on the motions on a partial indemnity scale fixed in the sum of $1,500 per motion inclusive of disbursements and applicable taxes.

"J. MacFarland J.A."

"David Watt J.A."

"Gloria Epstein J.A."

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TAB 3

COURT OF APPEAL FOR ONTARIO

CITATION: Nortel Networks Corporation (Re), 2013 ONCA 518
DATE: 20130815
DOCKET: M42159

Laskin, Rosenberg and Tulloch JJ.A.

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION and NORTEL NETWORKS TECHNOLOGY CORPORATION

APPLICATION UNDER THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. C-36, AS AMENDED

Alan D'Silva, Ellen M. Snow and Ingrid Minott, for Chartis Insurance Company of Canada

Lyndon A.J. Barnes, for the Boards of Directors of Nortel Networks Corporation and Nortel Networks Limited

Gavin H. Finlayson, for the Canadian Lawyers for The Informal Nortel Noteholder Group

R. Shayne Kukulowicz, for the Canadian Lawyers for the Official Committee of Unsecured Creditors

Barbara Walancik, for the Former Employees of Nortel

Robin B. Schwill, for the Joint Administrators of Nortel Networks UK Limited

Joseph Pasquariello, for the Monitor, Ernest & Young Inc.

Thomas McRae, for Nortel Canadian Continuing Employees

Alan Merskey, for the Applicants

Scott A. Bomhof, for Nortel Networks Inc.

Considered in writing on: June 10, 2013

Application for leave to appeal the order of Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated November 16, 2012, with reasons reported at 2012 ONSC 5653.

ENDORSEMENT

[1] The applicant, Chartis Insurance Company of Canada, seeks leave to appeal the order of the motion judge that it is required to pay the legal fees of Nortel's executives in respect of two proceedings without reference to the ten million dollar retention amount or the directors and officers trust fund.

[2] The motion judge held that Nortel Networks Corporation was subject to a pre-filing obligation to indemnify its directors and officers for their legal fees, but that it was precluded from doing so by the CCAA stay of proceedings. He interpreted the directors' and officers' insurance policy to mean that the retention amount did not apply, because payment was not "permitted". Therefore the insurer, Chartis, was required to indemnify the directors and officers now and not after the $10 million retention amount was depleted. He also interpreted the t ust indenture to mean that the trustee of the $12 million trust account for the benefit of the directors and officers had full discretion as to whether to provide access to the trust funds. He was of the view that to permit Chartis to access those funds would be to improperly elevate Chartis over other unsecured creditors.

[3] Chartis argues that the motion judge erred in finding the indemnification to be a pre-filing claim and therefore subject to the stay. Had he found that the obligation continued after the stay, he would have found that the retention amount applied. Chartis also argues that the motion judge erred in his interpretation of the trust indenture, in that the liability claims should be paid out of the trust.

[4] In our view, the motion judge's finding that the indemnification was a pre-filing claim and that allowing access to the trust would improperly elevate Chartis' priority were findings that were squarely within his expertise and entitled to deference. They involved the interpretation of his own Initial Order. His legal analyses of the directors and officers insurance policy and the trust indenture were not shown to contain any *prima facie* errors. These issues are specific to this case and not of broader interest to the practice or the public.

[5] In a CCAA proceeding, leave to appeal is granted sparingly and only where there are serious and arguable grounds of significant interest to the parties. The applicant has not succeeded in meeting the stringent test for leave to appeal as set out in *Re Timminco Ltd.*, 2012 ONCA 552, at paras. 2-3.

[6] The moving party included an unsealed affidavit in the moving party's Motion Record that was not before the motion judge. Fresh evidence on motions for leave to appeal is not admissible as of right. On a motion for leave from

Divisional Court, it is only admissible with leave of the court and then only for a limited purpose. Weiler J.A. set out the appropriate procedure to follow for tendering fresh evidence on motions for leave to appeal in *Iness v. Canada Mortgage and Housing Corp.* (2002), 62 O.R. (3d) 255 (C.A.), at para. 15:

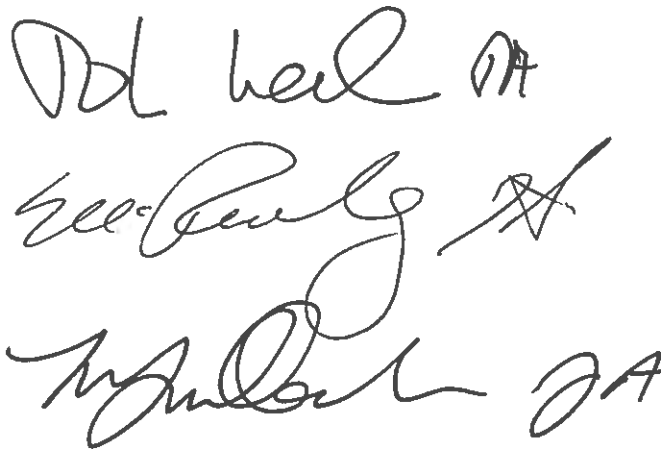
> [T]he party seeking to adduce evidence on the matter of public importance should file a motion to admit evidence on the matter and a supporting affidavit with the application for leave to appeal. Similarly, any response to the affidavit should be filed with the responding materials on the leave motion. The panel hearing the application for leave to appeal would then consider the motion to admit the evidence on the issue of public importance when considering the leave application. Motions to strike affidavits and motions to cross-examine on such affidavit material would properly be made to the chambers judge.

[7] The moving party did not bring a motion for leave to admit the fresh evidence. The respondents did not bring a motion to strike, but the applicants below and the Monitor objected to its admissibility before the panel. The parties have not provided any submissions on the test to be applied on a motion for fresh evidence on an application for leave to appeal in CCAA proceedings. In the circumstances, we think it preferable to deal with the question of the appropriate test for fresh evidence on a motion in which the issue has been fully argued.

[8] Given that there was no motion for leave to admit the fresh evidence, it was not considered.

[9] Leave to appeal is denied.

[10] Costs are awarded to the three groups of responding parties as follows: $3,000 to the applicants below (the Nortel companies) and the Monitor (who filed joint materials), $1,000 to the former directors and officers of Nortel, and $1,000 to Nortel Networks Inc. and the other U.S. Debtors and the Official Committee of Unsecured Creditors (who filed joint materials).



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TAB 4

COURT OF APPEAL FOR ONTARIO

CITATION: Urbancorp Inc. v. 994697 Ontario Inc., 2024 ONCA 26
DATE: 20240115
DOCKET: COA-23-OM-0283

Hourigan, Trotter and Copeland JJ.A.

BETWEEN

Guy Gissin, in his capacity as the Foreign Representative of Urbancorp Inc. and the Israeli Court Appointed Functionary officer of Urbancorp Inc. and Downing Street Financial Inc.*

Plaintiffs
(Moving Party*)

and

994697 Ontario Inc., KJ Equity Inc., Ned Holdings Inc., Peakhill Investments Ltd., Wellesley Residences (2014) Corp. formerly 2000 Jane Street Inc. and Yonge-Abell GP Limited, in its capacity as the general partner of the Yonge-Abell Limited Partnership

Defendants
(Responding Parties)

Jeremy Sacks, for the moving party

Chris E. Reed, for the responding parties

Heard: in writing

Motion for leave to appeal from the order of Justice Michael A. Penny of the Superior Court of Justice, dated September 25, 2023.

By the Court:

[1] Downing Street Financial Inc. (“Downing Street”) seeks leave to appeal from an order dismissing its motion for summary judgment and granting the summary

judgment motion of the responding parties to dismiss an action by Downing Street and other creditors.[1] Downing Street is an assignee of a claim from Fuller Landau Group Inc., the Monitor appointed under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*") of the estates of Edge on Triangle Park Inc. ("Edge")[2], Bosvest Inc. ("Bosvest"), and Urbancorp Cumberland 2 LP. This motion arises out of the long-running *CCAA* proceedings of the Urbancorp group of companies.

[2] For the reasons that follow, Downing Street's motion for leave to appeal is dismissed.

BACKGROUND

[3] The facts are set out in detail in the reasons of the motion judge. We summarize only those facts necessary to explain our decision.

[4] Downing Street's claim relates to a co-tenancy agreement involving a 19-story condominium project owned by Edge in trust for Bosvest and 994697 Ontario Inc. ("InvestorCo"). Bosvest was controlled by Urbancorp and held two thirds beneficial interest in the project. InvestorCo, a corporation owned by members of

[1] Guy Gissin in his capacity as the Foreign Representative of Urbancorp Inc. (the Israeli Court Appointed Functionary Officer) also sought summary judgment against the defendants but has not sought leave to appeal.

[2] On April 29, 2016, Bosvest, Edge, and Edge Residential Inc. filed Notices of Intention to make proposals under section 50.4(1) of the *Bankruptcy and Insolvency Act*. Fuller Landau Group Inc. was appointed *CCAA* monitor by order of Newbould J. on October 6, 2016. On March 1, 2019, Edge was assigned into bankruptcy by the Monitor.

the Jacobs/Kaufman families, owned the remaining one third beneficial interest. InvestorCo and Bosvest were equal shareholders of Edge.

[5] The parties agreed to terminate the co-tenancy agreement and entered into an agreement, which required InvestorCo to release its one third interest in the project and its mortgage securing that interest. In exchange, InvestorCo received a 100% interest in 44 of the condominium units valued at the time at approximately $7 million. Two significant factors motivated Urbancorp to end the co-tenancy with InvestorCo: avoiding possible litigation with the Jacobs/Kaufman family; and a pending $65 million bond issue in Israel to refinance Urbancorp's operations.

[6] A short time after the bond issue closed, substantially all of the Urbancorp companies commenced insolvency proceedings. An order was granted in the *CCAA* proceedings in April 2018, which permitted the Monitor to commence claims and assign them to creditors. As an assignee of the claims, Downing Street alleges that the co-tenancy termination transaction was:

1. void under s. 95(1)(b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*");
2. void under s. 96(1)(b)(i) of the *BIA*; and

3. a fraudulent preference under s. 96(1)(a) of the *BIA* and/or the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29 and the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33.[3]

THE MOTION JUDGE'S DECISION

[7] The motion judge analyzed the various claims by grouping common elements of those claims and drew the following conclusions:

- InvestorCo and Edge were not related persons and dealt at arm's length;
- Edge was not insolvent at the relevant time; and
- Edge did not transfer the condominium units with the intent to defeat creditors.

[8] He rejected Downing Street's argument that InvestorCo controlled Edge and was therefore related to Edge within the meaning of s. 4 of the *BIA*, concluding that deadlocked parties (each shareholder held a 50% interest in Edge) did not control Edge. In any event, he noted that it is a question of fact whether persons not related to one another dealt at arm's length. He concluded that the parties operated at arm's length and the termination agreement and resulting transfer of 44 condominium units to InvestorCo was the product of ordinary commercial

[3] Sections 95 and 96 of the *BIA* apply in the *CCAA* context by virtue of s. 36(1) and (2) of the *CCAA*.

bargaining over several months between sophisticated parties trying to maximize their own commercial self-interest.

[9] Had it been necessary to address the other requirements of s. 95(1)(b), the motion judge would have concluded that the insolvency requirement was not met. He noted that the relevant test is the inability to pay obligations as they come due. The record was inadequate to make any determination of whether, as of July 2015, Edge was unable to pay its liabilities as they came due.

[10] Finally, the motion judge was unable to accept Downing Street's submission that the evidence supported drawing the inference that Edge transferred the 44 condominium units to InvestorCo with the intention to defeat creditors. He concluded that none of the standard badges of fraud were established on the evidence.

THE TEST FOR GRANTING LEAVE IS NOT MET

[11] Downing Street proposes that three questions be answered if leave is granted:

1. Did the motion judge commit an error in principle when finding that Edge was operating at arm's length with respect to the impugned transaction?
2. Did the motion judge commit an error in principle when finding that Edge was solvent at the time of the transfer?
3. Did the motion judge commit an error in principle when finding that the Jacobs/Kaufman family, as owners of Edge, were not attempting to evade creditors?

[12] As a preliminary point, Downing Street submits that because Edge was assigned into bankruptcy by the Monitor, the appeal provisions of the *BIA* apply rather than s. 13 of the *CCAA*. In our view, the commencement of and assignment of the claims in this case were authorized by a *CCAA* judge and that order was "made under" the *CCAA* such that leave to appeal is required under the *CCAA*. The decision of this court in *Urbancorp Inc. v. 994697 Ontario Inc.*, 2023 ONCA 126, involved identical parties and action and analyzed when an order is "made under" the *CCAA*. The issue in that case was whether the *CCAA* leave test applied to an appeal of a motion judge's pleadings order. This court concluded that the *CCAA* applied. Although the specific fact of Edge's subsequent assignment into bankruptcy did not play a part in that judgment, the analysis in that case applies equally to the present case.

[13] Accordingly, the usual test for granting leave under the *CCAA* applies. In determining whether leave should be granted, this court considers whether:

a. the proposed appeal is *prima facie* meritorious or frivolous;

b. the points on the proposed appeal are of significance to the practice;

c. the points on the proposed appeal are of significance to the action; and

d. the proposed appeal will unduly hinder the progress of the action.

Stelco Inc. (Re) (2005), 75 O.R. (3d) 5 (C.A.), at para. 24; *Timminco Limited (Re)*, 2012 ONCA 552, 2 C.B.R. (6th) 332, at para. 2; and *Nortel Networks Corporation*

(Re), 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34 ("*Nortel Networks* 2016"), application for leave to appeal discontinued, [2016] S.C.C.A. No. 301.

[14] While the jurisprudence does not clearly indicate whether the four factors from the test are conjunctive, this court has treated the failure to demonstrate that the proposed appeal is *prima facie* meritorious as fatal: *Timminco Limited (Re)*, at para. 3 and *Nortel Networks Corporation (Re)*, 2013 ONCA 427, at para. 4.

[15] Leave to appeal is also granted sparingly and only where there are "serious and arguable grounds that are of real and significant interest to the parties": *Stelco*, at para. 24; *Timminco Limited (Re)*, at para. 2; and *Nortel Networks* 2016, at para. 34.

[16] We conclude that leave is not warranted. We are not satisfied that the proposed appeal is *prima facie* meritorious, nor that it raises issues of significance to the insolvency practice. While the appeal may be of significance to this action, standing alone, this factor is insufficient to warrant granting leave to appeal in this case: *Nortel Networks* 2016, at para. 95; and *Urbancorp Toronto Management (Re)*, 2022 ONCA 181, 96 C.B.R. (6th) 165, at para. 48.

[17] Section 4(5) of the *BIA* provides that persons who are "related" to each other are deemed not to deal with each other at arm's length. Section 4(2) also provides a definition of "related parties," which depends upon establishing the element of control. In *Re Panfab Corp. Ltd., Duro Lam Limited v. Last et al*., [1971] 2 O.R. 202

(H.C.), Houlden J. (as he then was) recognized, at pp. 204-205, that the concept of control was specifically imported from the *Income Tax Act* into what is now s. 4 of the *BIA*:

> There is no doubt that, when the *Bankruptcy Act* was amended in 1966, ss. 2A and 2B were adopted from s. 139(5) and (6) [am. 1953-54, c. 57, s. 31] of the *Income Tax Act*, R.S.C. 1952, c. 148. At the time the section was included in the *Bankruptcy Act*, it was well established that "control" in the *Income Tax Act* meant *de jure* control and not *de facto* control. Control rests in the ownership of such a number of shares as carries with it the right to a majority of the votes in the election of a board of directors. This proposition was affirmed by the Supreme Court of Canada in *Minister of National Revenue v. Dworkin Furs (Pembroke) Ltd. et al.*, [1967] S.C.R. 223, 60 D.L.R. (2d) 448 *sub nom. M.N.R. v. Aaron's Ladies' Apparel Ltd. et al.*, [1967] C.T.C. 50. [Citations omitted.]

[18] Given that the relevant definitions remain unchanged, we see no compelling reason to depart from the long-accepted view that deadlocked shareholders do not have *de jure* control of a corporation. As found by the motion judge, InvestorCo did not have *de jure* control of Edge.

[19] Further, s. 4(4) of the *BIA* provides that "[i]t is a question of fact whether persons not related to one another were at a particular time dealing with each other at arm's length." Absent palpable and overriding error, the motion judge's finding is entitled to deference: *Montor Business Corporation v. Goldfinger*, 2016 ONCA 406, 351 O.A.C. 241, at para. 66. Here, the motion judge was satisfied on his

review of the record that Edge was operating at arm's length from InvestorCo. We see no palpable and overriding error in his assessment.

[20] Additionally, that factual underpinning means that establishing "control" for the purposes of s. 95(1)(b) or s. 96(1)(b) is dependent on the particular facts of each case. Accordingly, the legal issue as to whether Edge operated at arm's length is not, in our view, one that necessarily transcends the interests of these particular parties to be of significance to the practice at large.

[21] On the basis of the motion judge's factual finding that the parties operated at arm's length, the claims under ss. 95(1)(b) and 96(1)(b) of the *BIA* were properly dismissed, and it was not necessary for the motion judge to consider the insolvency aspect of the test under s. 95(1)(b).

[22] On the issue of the intent to defeat creditors, it was reasonably open to the motion judge to conclude that Edge did not transfer the units with the intent to defraud, defeat, or delay creditors. He reviewed the relevant badges of fraud and found the evidence of fraud wanting. We see no palpable and overriding error in his conclusions, and his finding on this point is also entitled to deference.

[23] We conclude that the stringent *CCAA* leave test is not met. The fact-specific nature of the "arm's length" and "intent to defeat creditors" issues, combined with the deferential approach under the *CCAA* to the motion judge's findings, mitigate against granting leave to appeal.

CONCLUSION

[24] The motion for leave to appeal is dismissed. Downing Street shall pay costs to the responding parties in the amount of $5,000.

Released: January 15, 2024 “C.W.H.”

“C.W. Hourigan J.A.”
“Gary Trotter J.A.”
“J. Copeland J.A.”

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TAB 5

COURT OF APPEAL FOR ONTARIO

CITATION: U.S. Steel Canada Inc. (Re), 2024 ONCA 363
DATE: 20240508
DOCKET: COA-24-OM-0023

Roberts, Trotter and George JJ.A.

BETWEEN

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, C. C-35, as Amended

And in the Matter of a Proposed Plan of Compromise or Arrangement with Respect to U.S. Steel Canada Inc.

Geoff R. Hall and James D. Gage, for the appellant, Stelco Inc.

Crawford G. Smith, David Ionis, Katelyn B. Johnstone, Roger Jaipargas and Xue Yan, for the respondent, DGAP Investments Ltd.

Heard: in writing

REASONS FOR DECISION

Introduction

[1] This motion for leave to appeal arises out of a proceeding under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 ("*CCAA*"). Stelco Inc., the moving party, seeks leave to appeal the December 12, 2023 order of the current *CCAA* supervisory judge ("the motion judge"). This leave motion represents the latest step in what Pepall J.A. has described on a previous motion

as “bitter litigation between [the moving party] and DGAP [Investments Ltd.]” in the context of the *CCAA* proceeding.

[2] DGAP Investments Ltd. (“DGAP”) entered into an agreement to purchase land from LandCo, a land vehicle created during the course of the moving party’s reorganization under the *CCAA*. Some of the land DGAP agreed to purchase from LandCo (the “DGAP Parcel”) was still held by the moving party, although the moving party had agreed to reconvey the land to LandCo under a reconveyance agreement dated June 5, 2018 (the “Reconveyance Agreement”).

[3] The moving party failed to do so and was ordered by McEwen J., the former *CCAA* supervisory judge, to specifically perform its obligation to reconvey the land to LandCo. Until the land is reconveyed, DGAP and LandCo cannot close their transaction. The moving party failed to reconvey the land, and DGAP returned before the motion judge.

[4] The dispute regarding reconveyance appears to relate to the failure of the moving party and LandCo to reach an agreement under art. 4.1(m) of the Reconveyance Agreement, which is a precondition to reconveyance. Article 4.1(m) of the Reconveyance Agreement requires the parties to “enter into such shared facilities and/or reciprocal easement agreements required for the operation of the Planning Act Lands and the balance of the Property”.

[5] The motion judge allowed DGAP's motion in part. He rejected the moving party's proposed easements, as they fell outside art. 4.1(m). He also declined to impose DGAP's proposed form of easement agreement, giving the parties one last opportunity to reach a negotiated agreement. However, the motion judge held that, absent an agreement by a stipulated date, the court "retains the authority to impose terms and conditions to bring about the reconveyance of the DGAP Parcel."

Analysis

[6] It is well established that leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider: (1) whether the proposed appeal is *prima facie* meritorious or frivolous; (2) whether the points on the proposed appeal are of significance to the practice; (3) whether the points on the proposed appeal are of significance to the action; and (4) whether the proposed appeal will unduly hinder the progress of the action: see e.g., *Stelco Inc. (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 24.

[7] Having weighed these factors in this case, we are not persuaded that leave to appeal should be granted.

[8] In considering whether leave should be granted, we apply the test referenced above to the moving party's two proposed grounds of appeal:

1. Whether the motion judge erred in concluding that the Superior Court has the power, in the circumstances of this case, to create and impose the shared facilities and/or reciprocal easement agreements required by s. 4.1(m) of the Reconveyance Agreement notwithstanding the absence of the moving party's consent.

2. Whether the motion judge erred in concluding that s. 4.1(m) of the Reconveyance Agreement precludes the moving party from negotiating terms in the shared facilities and/or reciprocal easement agreements required by s. 4.1(m) of the Reconveyance Agreement.

Whether the proposed appeal is *prima facie* meritorious

[9] The proposed appeal is not *prima facie* meritorious. The motion judge's interpretation of the Reconveyance Agreement is entitled to deference, and the moving party has failed to point to any arguable errors of interpretation.

[10] As for the more contentious legal issue – the issue of a court imposing an agreement on a non-consenting party pursuant to s. 11 of the *CCAA* – the motion judge's decision stands on the prior decision in these proceedings of McEwen J., the former *CCAA* supervisory judge, who ordered specific performance of the Reconveyance Agreement notwithstanding art. 4.1(m) and on this court's decision refusing leave: see *U.S. Steel Canada Inc. et al. v. The United Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union et al.*, 2022 ONSC 6993, 5 C.B.R. (7th) 95, leave to appeal refused, 2023 ONCA 277.

[11] It also stands on the concession that both parties made before this court on a prior motion, namely that "the agreements contemplated by Article 4.1(m) of the

Reconveyance Agreement could be determined by the Commercial List judge if the parties could not reach an agreement": *U.S. Steel Canada Inc. (Re)*, 2023 ONCA 569, at para. 30. The moving party now takes a different position which would thwart the reconveyance of the land.

Whether the points on the proposed appeal are of significance to the practice

[12] The first question, concerning the interpretation of the Reconveyance Agreement, is not of significance to the practice. The second question, whether a court can impose a contract on a non-consenting party, is of potential significance to the *CCAA* community. However, the significance of the issue is attenuated by the unique circumstances of this case, including the previous judicial determinations of the issue and, importantly, the moving party's agreement that the court could do so on a previous motion.

Whether the points on the proposed appeal are of significance to the action

[13] The dispute in question is of significance to both parties, although we do not place great weight on this factor, given that this is usually the case. As this court noted in *Nortel Networks Corporation (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 95, "[t]o perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action."

Whether the proposed appeal will unduly hinder the progress of the action

[14] Although there is not an ongoing restructuring, delay is still a factor that weighs against granting leave in this case. The motion judge described the delays to date, at para. 90, as follows:

> [The moving party's] obligation to reconvey the DGAP Parcel has been extant since 2018. Severance consents were obtained and became final in February 2022. [The moving party] was ordered to specifically perform its obligations to reconvey the DGAP Parcel in December 2022. This has still not been done; [the moving party] is effectively in continuing breach of McEwen J.'s order for specific performance. The time to conclude this transaction is nigh.

Disposition

[15] For these reasons, we dismiss the motion for leave to appeal. The responding party is entitled to its costs in the amount of $5,000, inclusive of all amounts.

"L.B. Roberts J.A."
"Gary Trotter J.A."
"J. George J.A."

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TAB 6

COURT OF APPEAL FOR ONTARIO

CITATION: Laurentian University of Sudbury (Re), 2021 ONCA 199
DATE: 20210331
DOCKET: M52287

Hoy, Pepall and Zarnett JJ.A.

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 Laurentian University of Sudbury

Murray Gold and James Harnum, for the moving party the Ontario Confederation of University Faculty Associations

Susan Philpott and Charles Sinclair, for the moving party the Laurentian University Faculty Association

Miriam Martin, for the moving party the Canadian Union of Public Employees

D.J. Miller, Scott McGrath and Derek Harland, for the responding party Laurentian University of Sudbury

Ashley Taylor, Elizabeth Pillon and Zev Smith, for the responding party Ernst & Young Inc., acting as the Monitor

Heard: in writing

Motion for leave to appeal from the order of Chief Justice Geoffrey B. Morawetz of the Superior Court of Justice, dated February 26, 2021.

REASONS FOR DECISION

[1] Laurentian University of Sudbury (“Laurentian”) is a publicly funded, bilingual and tricultural post-secondary institution, serving domestic and international undergraduate and graduate students. Due to recurring operational deficits, it has encountered a liquidity crisis and is insolvent.

[2] Laurentian sought and obtained protection under the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C.36 (“CCAA”), to permit it to restructure, financially and operationally, in order to emerge as a sustainable university for the benefit of all stakeholders. Among the stated reasons for Laurentian’s CCAA application was what it described as unsustainable “academic costs”, which Laurentian attributes in part to the terms of its collective agreement with its faculty members.

[3] Two unions representing Laurentian employees - the Laurentian University Faculty Association (“LUFA”) and the Canadian Union of Public Employees (“CUPE”) - and the Ontario Confederation of University Faculty Associations (“OCUFA”), an umbrella organization representing faculty associations, seek leave to appeal the decision of the CCAA judge, dated February 26, 2021, which continues a sealing order over two documents that Laurentian filed on its application for CCAA protection.

[4] Having reviewed the written submissions of the parties and the sealed documents, we refuse leave for the reasons that follow.

Background

[5] On February 1, 2021, the CCAA judge made an order (the "Initial Order"), granting Laurentian initial relief under the CCAA.

[6] Four days later, on February 5, 2021, the CCAA judge made an order appointing Dunphy J. as mediator to conduct a confidential mediation among Laurentian's key stakeholders. The mediation is intended to address various issues concerning Laurentian's restructuring, including a new collective agreement with LUFA, which represents 612 Laurentian faculty, accounting for 60% of the university's payroll. LUFA supported the appointment of the mediator.

[7] The Initial Order contained a sealing provision. At the comeback hearing, there was opposition to it. The CCAA judge continued the sealing provision in the Amended and Restated Order, dated February 11, 2021, on an interim basis, pending a supplementary endorsement.

[8] The sealing provision, which was identical in both orders, covers two exhibits (Exhibits "EEE" and "FFF") to the affidavit by Dr. Robert Haché, which was filed in support of Laurentian's request for the Initial Order. Dr. Haché is the President, Vice-Chancellor and CEO of Laurentian.

[9] The sealing provision states that the Exhibits "are herby sealed pending further order of the Court, and shall not form part of the public record". Both the

Initial Order and the Amended and Restated Order provide that any interested party may apply on seven days' notice to vary or amend the order.

[10] The sealed Exhibits consist of two letters. Exhibit "EEE" is a letter from the Ministry of Colleges and Universities ("Ministry") to Laurentian, dated January 21, 2021. Exhibit "FFF" is a letter from Laurentian to the Ministry, dated January 25, 2021. Laurentian has described the letters as containing "information with respect to [Laurentian] and certain of its stakeholders, including various rights or positions that stakeholders or [Laurentian] may take either inside or outside of these CCAA proceedings, the disclosure of which could jeopardize [Laurentian's] efforts to restructure."

[11] None of the moving parties sought to cross-examine Dr. Haché on his affidavit or the communications between Laurentian and the Ministry.

[12] The CCAA judge released his supplementary endorsement on February 26, 2021, continuing the sealing provision. The effect of the sealing provision is that both the broader public and the parties to the CCAA proceeding are prevented from accessing the Exhibits.

[13] The CCAA judge held that the sealing provision was authorized under s. 137(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and by the application of the principles in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002

SCC 41, [2002] 2 S.C.R. 522. According to *Sierra Club*, at para. 53, a confidentiality or sealing order should only be granted when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[14] The CCAA judge summarized the evidence in Dr. Haché's affidavit and noted that he had reviewed the Exhibits in detail. He indicated that the evidence, as contained in Dr. Haché's affidavit, outlines that there has been continuous communication between Laurentian and the Ministry with respect to Laurentian's financial crisis, and that the government is well aware that a real-time solution must be found if Laurentian is to survive. He noted that "the role, if any, that the Ministry will play is at this moment uncertain."

[15] Considering the first branch of the *Sierra Club* test, he concluded that disclosure of the Exhibits, "at this time, could be detrimental to any potential restructuring of [Laurentian]" (emphasis added). Accordingly, "the risk in disclosing the Exhibits is real and substantial and poses a serious risk to the

future viability of [Laurentian].” He also noted that “it is speculative to conclude that the Exhibits contain information that is not helpful to [Laurentian’s] position.”

[16] He found that the commercial interest was that of the entire Laurentian community, including the faculty, students, employees, third-party suppliers and the City of Greater Sudbury and the surrounding area; that it is of paramount importance to these groups that all efforts to restructure Laurentian be explored; and that it is necessary to maintain the confidentiality of the Exhibits in order to do so. He reiterated that “[t]he disclosure of the Exhibits, at this time, could undermine the restructuring efforts being undertaken by [Laurentian]” (emphasis added).

[17] He was not satisfied that there were any reasonable alternatives to a sealing order over the Exhibits. Stakeholders were involved in the mediation and the negotiations could or could shortly be at a sensitive stage. It would not be appropriate to implement any alternative to a confidentiality order. To do so could negatively impact the mediation efforts.

[18] Turning to the second branch of the *Sierra Club* test, the CCAA judge was also satisfied, based on the evidence, that the salutary effects of the sealing provision outweighed its deleterious effects, including the public interest in accessing the Exhibits.

Leave Test

[19] Section 13 of the CCAA provides that any person dissatisfied with an order or a decision made under the CCAA may appeal from the order or decision with leave. Leave to appeal in CCAA proceedings is to be granted sparingly and only where there are serious and arguable grounds that are of real and significant interest to the parties. This cautious approach is a function of several factors.

[20] First, a high degree of deference is owed to discretionary decisions made by judges supervising CCAA proceedings, who are "steeped in the intricacies of the *CCAA* proceedings they oversee". Appellate intervention is justified only where the "supervising judge erred in principle or exercised their discretion unreasonably": *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10, 78 C.B.R. (6th) 1, at paras. 53 to 54.

[21] Second, CCAA proceedings are dynamic. It is often "inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavouring to balance the various interests": *Edgewater Casino Inc. (Re)*, 2009 BCCA 40, 51 C.B.R. (5th) 1, at para 20.

[22] Third, CCAA restructurings can be time sensitive. The existence of, and delay involved in, an appeal can be counterproductive to a successful restructuring.

[23] In addressing whether leave should be granted, the court will consider four factors, specifically whether:

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

(d) whether the proposed appeal will unduly hinder the progress of the action.

See: *Nortel Networks Corp. (Re)*, 2016 ONCA 332, 130 O.R. (3d) 481, at para. 34.

Leave is Not Warranted

[24] As we will explain, we refuse to grant leave because the proposed appeal is not *prima facie* meritorious, granting leave would unduly hinder the progress of the action, and the proposed appeal is not of significance to the action. This is not an appropriate case for this court to explore issues of significance to the practice relating to the granting of sealing orders in the CCAA context.

Leave Not *Prima Facie* Meritorious

[25] The moving parties raise three questions for determination on their proposed appeal, which we paraphrase as follows:

> 1. Did the CCAA judge err in focussing solely on Laurentian's assertion of an important commercial interest without balancing the various competing interests applicable to a sealing order?

> 2. Did the CCAA judge err in granting the sealing provision without a sufficient evidentiary foundation?
>
> 3. Did the CCAA judge err in concluding that the sealing provision was justified as a result of speculative concerns about the impact that disclosure of the Exhibits that were sealed would have on the CCAA restructuring process?

[26] A significant plank of the moving parties' argument is that the sealing provision denies access to the sealed documents to parties to the CCAA process on the ostensible ground that the documents might have an impact on the positions those parties choose to take vis-à-vis the restructuring. They argue that the importance of the documents to the formulation of their positions is the exact reason why they should have access to the documents, not a justification for denying access to them.

[27] We note that one of the moving parties, OCUFA, is not a creditor of Laurentian and is apparently not participating in the court-ordered mediation, the aim of which is a consensual restructuring. It is not clear in what sense OCUFA is a party to the CCAA proceeding or is in any different position than any other member of the public who may be interested in the court-filed materials. Yet the moving parties do not differentiate, in their proposed appeal questions or in the relief they propose to seek, between the entitlements of OCUFA to obtain the documents and those of the other moving parties. In other words, although reference is made to the denial of access to "litigants", the underlying theory of

the moving parties actually starts and stops with the proposition that there should be no sealing order at all.

[28] We are not persuaded that the proposed appeal, challenging what is a discretionary order, is *prima facie* meritorious.

[29] The CCAA judge set out the *Sierra Club* test in his reasons. Contrary to the submissions of the moving parties, he was well aware that *Sierra Club* required him to balance the deleterious effects of the sealing order.

[30] In earlier reasons, the CCAA judge noted that if the restructuring is to be successful, it will have to be largely completed by the end of April 2021. The timeline is exceptionally short. In exercising his discretion, the CCAA judge concluded that the risk to the potential restructuring of Laurentian within this extremely tight timeframe if the Exhibits were disclosed outweighed other relevant interests.

[31] The moving parties were (and are) concerned that they understand the Ontario government's position in relation to the restructuring, yet they did not seek to cross-examine Dr. Haché. The CCAA judge, who reviewed the Exhibits, strove to address that concern, carefully signaling that "the role, if any, that the Ministry will play is at this moment uncertain." Alive to concerns about fairness, he also signaled to the parties that it would be "speculative to conclude that the Exhibits contain information that is not helpful to [Laurentian's] position."

[32] The moving parties have expressed particular concern that the sealing order creates an informational imbalance that may hurt them in the mediation process. Nothing before us suggests that the moving parties who are participating in the court-ordered mediation (which appears to be only LUFA) have been hampered by any informational imbalance. The judicial mediator, who was appointed by the CCAA judge, is a bulwark against unfair treatment in the mediation. Should the judicial mediator have concerns that the moving parties have been hampered in the mediation by an informational imbalance or a perceived informational imbalance, it is open to him to raise them with the CCAA judge within the parameters of the February 5, 2021 order appointing the mediator.

[33] Nor do we see anything in the sealing provision that would prevent a party from making a request to the CCAA judge, at the appropriate time, for relief on appropriate terms. As noted, the sealing provision is expressly subject to "further order of the Court". The CCAA judge in his reasons of February 26 said only that an alternative to the sealing provision was not appropriate "at this time".

[34] In seeking leave, the moving parties have raised questions about how s. 2(d) of the *Charter of Rights and Freedoms* comes into play, as one of the purposes of the mediation is to conclude a new collective agreement with LUFA. But they do not dispute Laurentian's submission that this issue was not argued

below. It is difficult to fault the CCAA judge for not weighing a competing interest that was not asserted before him.

[35] The moving parties also say that the CCAA judge failed to advert to the impact his ruling would have on freedom of expression. We are satisfied he did take that factor into account, as he mentions it in setting out the test and later says that the deleterious effects include “the public interest in accessing the Exhibits.”

[36] The second and third questions raised by the moving parties ask the court to revisit an issue raised before the CCAA judge. He described the essence of the submissions made to him by those opposing the sealing order as there being no evidence that the sealing order was necessary to protect a valid commercial interest.

[37] The CCAA judge was satisfied that there was a sufficient evidentiary basis. He based his conclusion that disclosing the Exhibits posed a serious risk to the restructuring on his review of the Exhibits and Dr. Haché’s evidence. The moving parties are correct that Dr. Haché did not opine in his affidavit that disclosure of the Exhibits posed a serious risk to the viability of the restructuring. But Dr. Haché’s evidence describes something of the dynamics at play and is clear as to Laurentian’s dire position and the timeframe within which the restructuring must be completed, if it is to be successful. It provided the foundation on which the

Monitor, an officer of the court, supported Laurentian's position that disclosure posed a serious risk, and the CCAA judge, who has extensive experience in CCAA restructurings, concluded that disclosure posed a serious risk. The CCAA judge exercised his judgment, based on an evidentiary record.

[38] The fact the proposed appeal is not *prima facie* meritorious weighs significantly against granting leave.

Appeal Would Hinder Progress of the Action

[39] As we have said, this restructuring is on an exceptionally short timeline. We are told that the mediation is ongoing, with sessions occurring daily. There is urgency to being able to reach a successful restructuring by the end of April, in light of Laurentian's financial position and the need for certainty regarding the next academic year. There is too great a risk that an appeal would be a distraction from restructuring efforts and thus would unduly hinder the progress of the action, which also weighs significantly against granting leave.

No Significance to the Action

[40] Given the involvement of a court-appointed mediator and that it is open to the CCAA judge to revisit the sealing provision and possibly revoke it or limit its impact by allowing the parties to the CCAA proceeding to access the sealed documents, the significance of the proposed appeal to the action is insufficient to justify leave.

Significance to the Practice

[41] The facts of this case highlight some novel and interesting questions about the application of the *Sierra Club* test in the CCAA context.These include questions about granting sealing orders over information filed in support of the application for protection under the CCAA, the granting of sealing orders where interests under s. 2(d) of the *Charter* are arguably at play, and about the application of sealing orders to parties and stakeholders involved in the restructuring efforts. However, given our view of the merits of the proposed appeal and the other factors, this is not the appropriate case in which to explore these issues.

Disposition

[42] Leave to appeal is refused. In the circumstances, there shall be no order as to costs.

"Alexandra Hoy J.A.
"S.E. Pepall J.A."
"B. Zarnett J.A."

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TAB 7

COURT OF APPEAL FOR ONTARIO

CITATION: Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015 ONCA 570
DATE: 20150807
DOCKET: C58636

Doherty, Gillese and Lauwers JJ.A.

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 Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings G.P.

BETWEEN

Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

Applicants

and

The Toronto-Dominion Bank, in its capacity as agent for the secured lenders holding first lien security and the Bank of New York Mellon, in its capacity as agent for secured lenders holding second lien security

Respondents

Mark Bailey and Deborah McPhail, for the appellant Superintendent of Financial Services

Jane Dietrich, for the respondents Grant Forest Products Inc., Grant Alberta Inc., Grant Forest Products Sales Inc., and Grant U.S. Holdings GP

John Marshall and Roger Jaipargas, for the respondent West Face Capital Inc.

Alex Cobb, for the respondent Mercer (Canada) Limited

David Byers and Dan Murdoch, for the respondent Ernst & Young Inc.

Andrew J. Hatnay, James Harnum and Adrian Scotchmer, for the intervener the court-appointed Representative Counsel to non-union active employees and retirees of U.S. Steel Canada Inc. in its CCAA proceedings

Heard: February 3, 2015

On appeal from the order of Justice Colin Campbell of the Superior Court of Justice, dated September 20, 2013, with reasons reported at 2013 ONSC 5933, 6 C.B.R. (6th) 1.

Gillese J.A.:

OVERVIEW

[1] The debtor companies in this case obtained protection under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**") and entered into a liquidation process. After selling their assets and paying out the first lien lenders in full, there were insufficient funds to satisfy the claims of the second lien lenders and the claims asserted on behalf of two of the debtor companies' pension plans. A contest ensued between one of the secured creditors and the pension claimants.

[2] The CCAA judge ordered the remaining debtor companies into bankruptcy, thereby resolving the contest in favour of the secured creditor.

[3] Ontario's Superintendent of Financial Services (the "**Superintendent**") appeals.

[4] During the CCAA proceeding, the Superintendent made wind up orders in respect of the two pension plans. He contends that a deemed trust arose on

wind up of each plan (the "**wind up deemed trust**"). He says that those wind up deemed trusts, which encompass all unpaid contributions, took priority over the claims of the secured creditors because the remaining funds are the proceeds of sale of the debtor companies' accounts and inventory.

[5] The basis for the Superintendent's position is a combination of ss. 57(3) and (4) of the *Pension Benefits Act*, R.S.O. 1990, c. P.8 ("**PBA**") and s. 30(7) of the *Personal Property Security Act*, R.S.O. 1990, c. P.10 ("**PPSA**").

[6] Sections 57(3) and (4) of the PBA read as follows:

> 57 (3) An employer who is required to pay contributions to a pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to the employer contributions due and not paid into the pension fund.
>
> 57 (4) Where a pension plan is wound up in whole or in part, an employer who is required to pay contributions to the pension fund shall be deemed to hold in trust for the beneficiaries of the pension plan an amount of money equal to employer contributions accrued to the date of the wind up but not yet due under the plan or regulations.

[7] The priority of the PBA deemed trusts is established by s. 30(7) of the PPSA. Section 30(7) reverses the first-in-time principle for certain assets and gives the beneficiaries of the deemed trusts priority over an account or inventory and its proceeds. Section 30(7) states:

> 30 (7) A security interest in an account or inventory and its proceeds is subordinate to the interest of a person

> who is the beneficiary of a deemed trust arising under the *Employment Standards Act* or under the *Pension Benefits Act*.

[8] The Superintendent contends that the decision below is wrong because, among other things, he says that it is inconsistent with the Supreme Court of Canada's recent decision in *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6, [2013] 1 S.C.R. 271.

[9] For the reasons that follow, I would dismiss the appeal.

THE CAST OF CHARACTERS

[10] Grant Forest Products Inc. ("**GFPI**") and certain of its subsidiaries carried on an oriented strand board manufacturing business from facilities in Ontario, Alberta and the United States. At the beginning of these proceedings, GFPI and its subsidiaries were the third largest such manufacturer in North America.

[11] GFPI and related companies (the "**Applicants**") brought an application for protection from creditors under the CCAA (the **CCAA Proceeding**"). Following the sale of certain assets, the CCAA Proceeding was terminated in relation to some of the Applicants. GFPI, Grant Forest Products Sales Inc. and Grant Alberta Inc. are the "**Remaining Applicants**" in the CCAA Proceeding.

[12] Mercer (Canada) Ltd. is the administrator of the two pension plans in question in the CCAA Proceeding (the "**Administrator**"). Mercer replaced PricewaterhouseCoopers Inc. as administrator in August 2013.

[13] Stonecrest Capital Inc. was appointed the chief restructuring organization (the "**CRO**") by court order dated June 25, 2009.

[14] Ernst & Young Inc. was appointed the monitor (the "**Monitor**") by court order dated June 25, 2009.

[15] The "**First Lien Lenders**" are the first-ranking secured creditors in the CCAA Proceeding. Following the sale of assets during the CCAA Proceeding, distributions were made and the First Lien Lenders were paid in full.

[16] The "**Second Lien Lenders**" are secured creditors ranking behind the First Lien Lenders, and are collectively owed approximately $150 million.

[17] The Bank of New York Mellon served as agent for the Second Lien Lenders in these proceedings (the "**Second Lien Lenders' Agent**").

[18] The Superintendent is the regulator of pension plans under the PBA and the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c. 28. He is also the administrator of the pension benefits guarantee fund under the PBA, which partially insures pension benefits in certain circumstances.

[19] West Face Long Term Opportunities Limited Partnership, West Face Long Term Opportunities (USA) Limited Partnership, West Face Long Term Opportunities Master Fund L.P. and West Face Long Term Opportunities Global Master L.P. (collectively, "**West Face**"), are parties to the **Second Lien Credit Agreement** with the Remaining Applicants. The Second Lien Lenders (including

West Face) are currently the highest ranking secured creditors. West Face is owed approximately $31 million.

[20] Shortly after the oral hearing of this appeal, the court-appointed representative counsel to non-union active and retired employees of United States Steel Canada Inc. ("**USSC**") in USSC's unrelated proceedings under the CCAA (the "**Intervener**") sought leave to intervene. The Intervener wished to have the opportunity to make submissions on the issues raised in this appeal from the perspective of retirees and pension beneficiaries. Approximately 6,000 affected employees and retirees of USSC are subject to the representation order.

[21] By endorsement dated March 19, 2015, this court granted the Intervener leave to intervene as a friend of the court: *Re Grant Forest Products Inc.*, 2015 ONCA 192. Under the terms of that endorsement, the Intervener was limited to addressing only those issues already raised on the appeal and to the existing record.

BACKGROUND IN BRIEF

Sale of the Applicants' Assets

[22] On March 19, 2009, GE Canada Leasing Services Company applied for a bankruptcy order against GFPI under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"). In response, the Applicants sought protection under the CCAA through the CCAA Proceeding.

[23] The court gave that protection by order dated June 25, 2009 (the "**Initial Order**"). The Initial Order also stayed the bankruptcy application against GFPI and approved a marketing process designed to locate potential investors to purchase, as a going concern, the Applicants' business and operations. Consequently, the CCAA Proceeding proceeded as a liquidation, rather than as a restructuring.

[24] In the CCAA Proceeding, no order was made authorizing a debtor-in-possession financing or other "super priority" lending arrangement.

[25] GFPI's assets were sold in a number of transactions that closed between May 26, 2010 and November 7, 2012.

[26] GFPI and certain of its subsidiaries sold the large majority of their core operating assets to Georgia Pacific LLC and certain of its affiliates ("**Georgia Pacific**"). The sale to Georgia Pacific was court approved on March 30, 2010, and closed on May 26, 2010. On sale, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. – Englehart Plan, which was the pension plan associated with the assets it had purchased.

[27] Other than the assets sold to Georgia Pacific, GFPI's only other significant operating asset was a 50% interest in a mill in Alberta. The sale of that interest was approved by court order on January 5, 2011, and closed on February 17,

2011. Additional assets were sold over the following two years, with the final sale closing on November 7, 2012.

[28] Each sale was court approved and subject to the standard provision that all encumbrances and claims which applied to the assets prior to the sale applied to the sale proceeds with the same priority.

[29] The court made distribution orders that resulted in the First Lien Lenders being paid in full in January of 2012.

[30] A distribution of $6 million was made to the Second Lien Lenders. Approximately $150 million remains owing to those lenders under the Second Lien Credit Agreement. Of that amount, West Face is owed approximately $31 million.

[31] As of February 1, 2013, GFPI held cash of approximately US$2.1 million and the Monitor held cash of approximately $6.6 million and US$0.3 million (the "**Remaining Funds**").

The Pension Plans

[32] GFPI was the employer, sponsor and administrator of four pension plans. The two plans of significance in this appeal are (1) the Pension Plan for Salaried Employees of GFPI – Timmins Plant (the "**Salaried Plan**") and (2) the Pension Plan for Executive Employees of GFPI (the "**Executive Plan**") (together, the "**Plans**").

[33] Both of the Plans are defined benefit pension plans under the PBA.

[34] The Initial Order provided that the Applicants were "entitled but not required" to pay "all outstanding and future … pension contributions … incurred in the ordinary course of business".

[35] On August 26, 2011, the "Timmins Pension Plan Order" was made. This order authorized GFPI to take steps to initiate the wind up of the Salaried Plan and to work with the Superintendent to appoint a replacement plan administrator for the Salaried Plan. This order also directed the Monitor to hold back approximately $191,000 from any distribution to creditors. The holdback was thought to be sufficient to satisfy the anticipated wind up deficit of the Salaried Plan. The Timmins Pension Plan Order expressly provided that nothing in it "affects or determines the priority or security of the claims" against the holdback.

[36] A similar order was made in respect of the Executive Plan on September 21, 2011. However, the hold back amount in respect of the Executive Plan was $2,185,000.

[37] The Administrator recommended that the Plans be wound up and on February 27, 2012, the Superintendent ordered the Plans wound up (the "**Superintendent's Wind Up Orders**"). Under those orders, the effective date of wind up for the Executive Plan is June 10, 2010, and for the Salaried Plan it is March 31, 2011.

[38] As will become apparent, it is significant that the Plans were ordered to be wound up after the CCAA Proceeding commenced.

The Pension Motion

[39] GFPI continued to make all required contributions to the Plans (both current service and special payments) until June 2012. However, on June 8, 2012, the Remaining Applicants brought a motion seeking an order declaring that none of GFPI, the CRO or the Monitor were required to make further contributions to the Plans (the "**Pension Motion**"). The grounds for the motion included that there was uncertainty relating to the priority of amounts owing in respect of the wind up deficits in the Plans and it was possible that *Indalex*, which was then before the Supreme Court, might have an impact on that matter.

[40] When the wind up reports showed that the estimated deficits in the Plans had increased, by order dated June 25, 2012, the hold back for the Salaried Plan was increased from approximately $191,000 to $726,372 and for the Executive Plan from approximately $2.185 million to $2,384,688 (collectively, the "**Reserve Funds**").

[41] The Pension Motion was originally returnable on June 25, 2012. However, it was adjourned several times.

[42] On the first return date, acting on his own motion, the CCAA judge adjourned the Pension Motion and directed that further notice be given to the

Second Lien Lenders. By endorsement dated June 25, 2012, a term of the adjournment was that no further payments were to be made to the Plans.[1]

[43] It should be noted that several weeks prior, on March 19, 2012, counsel for the Second Lien Lenders' Agent sent an email to all those on the Service List saying that it no longer represented the Agent and asking to be removed from the Service List.

[44] On August 8, 2012, the Remaining Applicants served a notice of return of the Pension Motion for August 27, 2012.

[45] On August 27, 2012, again on his own motion and over the objections of the pension claimants, the CCAA judge adjourned the Pension Motion to a date to be determined at a comeback hearing to be held prior to the end of September 2012. He also directed the Monitor to provide additional communication to the Second Lien Lenders and to seek their positions on the Pension Motion.

[46] By letter dated August 31, 2012, the Monitor advised the Second Lien Lenders' Agent that the Pension Motion had been adjourned at the hearing on August 27 and requested a conference call with, among others, the various Second Lien Lenders, to determine what positions they would take on the Pension Motion.

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[1] Although the wording of the endorsement is somewhat unclear, it appears that all parties proceeded on that basis. The relevant part of the endorsement states: "I am satisfied that GFPI, CRO and the monitor hold funds that may otherwise be due under the pension plans pending notice to second lien creditors ..."

[47] The conference call took place on September 5, 2012. West Face did not participate in it. The two Second Lien Lenders that did attend on the call indicated that they supported the Pension Motion.

[48] On September 17, 2012, the Pension Motion was scheduled to be heard on October 22, 2012.

[49] On September 21, 2012, the Monitor sent the Second Lien Lenders' Agent a letter advising that the Pension Motion would be heard on October 22, 2012. In the letter, the Monitor also indicated that any Second Lien Lender that wished to make its position on the Pension Motion known should contact the Monitor.

[50] When West Face became aware that the Second Lien Lenders' Agent would not be able to obtain timely instructions in respect of the Pension Motion, it retained its own counsel to respond to the Pension Motion.

[51] By letter dated October 12, 2012, West Face advised the Monitor that it would support the Pension Motion.

[52] West Face served a notice of appearance in the CCAA Proceeding on October 19, 2012. It sought an adjournment of the October 22, 2012 hearing date but the Administrator opposed the adjournment request.

The Bankruptcy Motion

[53] By notice of motion dated October 21, 2012, West Face then brought a motion returnable on October 22, 2012, seeking to be substituted for GE Canada

Leasing Services Company in the outstanding bankruptcy application issued against GFPI. Alternatively, it sought to have the court lift the stay of proceedings in the CCAA Proceeding and permit it to petition the Remaining Applicants into bankruptcy (the "**Bankruptcy Motion**").

[54] On October 22, 2012, it was submitted[2] that the Bankruptcy Motion should be adjourned but that the Pension Motion should be argued. The CCAA judge adjourned both motions (together, the "**Motions")**, however, citing the close relationship between the two. The adjournment continued the terms of the adjournment of the Pension Motion on June 25, 2012.

The Motions are Heard

[55] The first round of oral submissions on the Motions was heard on November 27, 2012. The CCAA judge reserved his decision.

[56] The Supreme Court released its decision in *Indalex on* February 1, 2013.

[57] On February 6, 2013, the CCAA judge identified certain additional issues to be dealt with on the Motions and directed the parties to make written submissions on them.

[58] A further oral hearing on the Motions took place on July 23, 2013.

[2] The record is unclear as to which party or parties made this submission.

The Transition Order

[59] The CCAA judge dealt with the Motions by order dated September 20, 2013 (the "**Transition Order**"). Among other things, in the Transition Order, the court ordered that:

> 1. none of the funds held by GFPI or the Monitor are subject to a deemed trust pursuant to ss. 57(3) and (4) of the PBA;
>
> 2. none of GFPI, the CRO or the Monitor shall make any further payments to the Plans; and
>
> 3. GFPI and each of the other Remaining Applicants are adjudged bankrupt and ordered into bankruptcy.

[60] In short, the Transition Order resolved the priority contest between the pensioners and West Face in favour of West Face.

The Appeal

[61] The Superintendent then sought and obtained leave to appeal to this court.

THE DECISION BELOW

[62] In his reasons for decision, the CCAA judge observed that through the CCAA Proceeding, the Applicants' assets had been sold in a way that provided the maximum benefit to the widest group of stakeholders. Moreover, some of the

assets were sold on a going concern basis, which provided continued employment and benefits for many. The alternative to the CCAA Proceeding was a bankruptcy proceeding, which might well have resulted in a greater loss of employment and a lower level of recovery for secured creditors.

[63] The CCAA judge then found that the Remaining Funds were not subject to wind up deemed trusts.

[64] The Superintendent and the Administrator had submitted that, notwithstanding the Initial Order, the wind up deemed trusts should prevail over other creditors' claims.

[65] In rejecting this submission, the CCAA judge stated that a wind up deemed trust will prevail when wind up occurs before insolvency but not when a wind up is ordered after the Initial Order is granted. He said that this approach provides predictability and certainty for the stakeholders of the insolvent company and enables secured creditors to decide whether they are willing to pursue a plan of compromise or immediately apply for a bankruptcy order.

[66] The CCAA judge relied on the Supreme Court's decision in *Indalex* for the proposition that provincial statutory provisions in the pension area prevail prior to insolvency but once the federal statute is involved, the insolvency regime applies.

[67] The CCAA judge also rejected the argument that the CCAA court, in authorizing the wind up of the Plans, had given the wind up deemed trusts

priority in the insolvency regime. He noted that the orders authorizing the wind ups explicitly state that they do not affect or determine the priority or security of the claims against those funds, and the orders say nothing in respect of the deemed trust issue.

[68] The CCAA judge opined that, on the basis of this analysis, a lifting of the stay was not necessary to defeat the wind up deemed trusts said to have arisen after the Initial Order.

[69] The CCAA judge then observed that the issue of whether to terminate a CCAA proceeding and permit a petition in bankruptcy to proceed is a discretionary matter. In the absence of provisions in a plan of compromise under the CCAA or a specific court order, any creditor is at liberty to request that the CCAA proceedings be terminated if its position might better be advanced under the BIA. The question was whether it was fair and reasonable, bearing in mind the interests of all creditors, that the interests of the creditor seeking preference under the BIA should be allowed to proceed.

[70] The CCAA judge found that there was no evidence of a lack of good faith on the part of West Face in seeking to lift the stay, beyond the allegations relating to delay. He went on to reject the argument based on West Face's alleged delay in bringing the Bankruptcy Motion, saying that no party had been prejudiced by the delay.

[71] West Face argued that its interests should prevail because otherwise a wind up deemed trust that did not exist at the time of the Initial Order would *de facto* be given priority and that would be contrary to the priorities established under the BIA. The CCAA judge accepted this submission. He said that in *Indalex*, the Supreme Court limited the wind up deemed trust to obligations arising prior to insolvency and to deny West Face the relief it sought would be at odds with that reasoning.

[72] Accordingly, the CCAA judge concluded, the monies held by the Monitor should not be applied to the Plans.

A SUMMARY OF THE PARTIES' POSITIONS ON APPEAL

The Superintendent

[73] The Superintendent submits that the CCAA judge erred in concluding that no wind up deemed trusts arose during the CCAA Proceeding. He contends that where a pension plan is wound up after an initial order is made under the CCAA, but before distribution is complete, unpaid contributions to the pension plan constitute a wind up deemed trust under the PBA. In this case, he says, the wind up deemed trusts arose during the CCAA Proceeding and took priority over other creditors' claims. Those deemed trusts were not rendered inoperative by the doctrine of federal paramountcy because there was no debtor-in-possession loan or charge.

[74] The Superintendent further submits that because of the procedural history of this matter, the CCAA judge should have required payment of the full wind up deficits prior to lifting the stay to permit the bankruptcy application. He says that the CCAA judge adjourned the Pension Motion to provide further notice to the Second Lien Lenders when additional notice was not required because the Second Lien Lenders had received sufficient notice. Further, he contends, the adjournments were prejudicial to the pension claimants because if the CCAA judge had considered the Pension Motion in a timely manner, there would have been no basis on which to relieve against pension plan contributions.

[75] The Superintendent also submits that the CCAA judge erred in concluding that it was necessary for the pension claimants to have opposed the Initial Order and the sale and vesting orders made during the CCAA Proceeding in order to assert the wind up deemed trusts.

The Administrator

[76] The Administrator supports the Superintendent and adopts his submissions. It offers the following additional reasons in support of the appeal.

[77] First, the Administrator says that the CCAA judge erred by failing to answer the question posed by the Pension Motion, namely, whether GFPI should be relieved from making further payments into the Plans. It submits that the test GFPI had to meet to obtain such relief is: could GFPI make the required

payments without jeopardizing the restructuring? Instead of answering that question, the Administrator says that the CCAA judge asked and answered this question: can a wind up deemed trust be created during the pendency of a stay of proceedings? The Administrator contends that the CCAA judge erred in recasting the Pension Motion in this way because the creation of a wind up deemed trust and the obligation to make special payments are two separate concepts. It submits that the existence of a deemed trust has no bearing on whether a CCAA court should grant a debtor relief from the obligation to make special pension payments.

[78] Second, the Administrator submits, contrary to the CCAA judge's finding, where a wind up deemed trust arises before, and has an effective date before, the date of a court-approved distribution to creditors, the priority of that deemed trust must be considered before a distribution is approved.

[79] Third, the Administrator submits that the wind up deemed trust is not rendered inoperative in a CCAA proceeding unless the operation of the wind up deemed trust conflicts with a specific provision in the CCAA or an order issued under the CCAA. The Administrator says that, in the present case, there is no CCAA provision or order that conflicts with the wind up deemed trust. Therefore, those trusts operate and have priority pursuant to s. 30(7) of the PPSA.

[80] Fourth, the Administrator submits that because bankruptcy is not the inevitable result of a liquidating CCAA proceeding, the CCAA judge had to consider the totality of the circumstances, including West Face's lengthy delay in bringing the Bankruptcy Motion, when ordering GFPI into bankruptcy. It says that West Face did not satisfy its onus to have the stay lifted but, even if it did, the Bankruptcy Motion should have been granted on condition that the outstanding amounts owed to the Plans were paid prior to the bankruptcy taking effect.

[81] Finally, the Administrator says that the CCAA judge erred by requiring the Superintendent and it to challenge all orders made in the CCAA Proceeding had they wished to assert the priority of the wind up deemed trusts.

The Remaining Applicants

[82] The Remaining Applicants take no position on the issues raised by the Superintendent. However, if the appeal is successful, they ask that the court affirm that paras. 1-6 of the Transition Order remain operative. Those paragraphs can be found in Schedule A to these reasons.

West Face

[83] West Face maintains that the core issue to be decided on this appeal is whether it was necessary or appropriate for the pension claims to be paid as a "pre-condition" to ordering GFPI into bankruptcy. It says that if this court accepts

that the CCAA judge made no error in ordering GFPI into bankruptcy, without first requiring payment of the pension claims, the issues raised by the Superintendent are moot.

[84] West Face further submits that the doctrine of federal paramountcy puts an end to the wind up deemed trust claims. Bankruptcy proceedings are the appropriate forum to resolve wind up deemed trust claims at the close of CCAA proceedings. It would have been improper for the CCAA judge to order payment of the wind up deemed trust deficits before putting GFPI into bankruptcy, as such an order would have usurped Parliament's bankruptcy regime.

The Monitor

[85] Because the Bankruptcy Motion was primarily a priority dispute between two creditor groups, the Monitor took no position on that motion and it takes no position on that issue in this appeal.

[86] However, the Monitor notes that in making the Transition Order, the CCAA judge addressed issues relating to the existence and potential priority of a wind up deemed trust in the CCAA context. Given the relevance of those issues to other insolvency proceedings, the Monitor made the following submissions:

1. the main question giving rise to the Transition Order was whether it was appropriate to lift the stay and order GFPI into bankruptcy;

2. wind up deemed trusts are not created during the pendency of a CCAA proceeding;

3. if wind up deemed trusts did arise during this CCAA Proceeding, because the Superintendent's Wind Up Orders were made after the Initial Order, the earliest date on which those deemed trusts could be effective was February 27, 2012, the date of the Superintendent's Wind Up Orders; and

4. the CCAA judge did not suggest that the pension claimants were obliged to take steps earlier in the CCAA Proceeding to assert the priority of their wind up deemed trust claims. While the CCAA judge did state that the pension claimants were required to obtain an order lifting the stay for a wind up deemed trust to be created, that was because the winding up of a pension plan is outside of the ordinary course of business and the Initial Order permitted payments of pension contributions only in "the ordinary course of business".

The Intervener

[87] The Intervener's position is that:

1. a pension plan does not have to be wound up as of the CCAA filing date for the wind up deemed trust to be effective;

2. the beneficiaries of the wind up deemed trust have priority in CCAA proceedings ahead of all other secured creditors over certain assets;

3. an initial CCAA order does not operate to invalidate the wind up deemed trust regime; and

4. the CCAA judge erred in granting the Bankruptcy Motion, which was brought to defeat the wind up deemed trust priority regime.

THE ISSUES

[88] The parties do not agree on what issues are raised on this appeal. A comparison of the issues as articulated by each of the Superintendent and West Face demonstrates this.

[89] The Superintendent says that the following three issues are to be determined in this appeal:

1. do unpaid contributions related to a pension plan that is wound up after the initial order in a CCAA proceeding constitute a deemed trust under the PBA?

2. if such unpaid contributions constitute a deemed trust under the PBA, what is the priority of the deemed trust where there is no debtor in possession loan?

3. what actions must pension creditors take to assert the deemed trust under the PBA in a CCAA proceeding, both before and after the deemed trust arises?

[90] West Face, on the other hand, says that there is but one issue for determination: did the pension claims have to be paid as a precondition to an order to put GFPI into bankruptcy at the end of the CCAA Proceeding?

[91] In these circumstances, it falls to the court to determine what issues must be addressed in order to resolve this appeal.

[92] To do this, I begin by noting two things. First, in appeals of this sort, the role of this court is to correct errors. Put another way, its overriding task is to determine whether the result below is correct. It is not the role of this court to provide advisory opinions on abstract or hypothetical questions*: Kaska Dena Council v. British Columbia (Attorney General)*, 2008 BCCA 455, 85 B.C.L.R. (4th) 69, at para. 12. Second, an appeal lies from an order or judgment and not from the reasons for decision which underlie that order or judgment: *Grand River Enterprises v. Burnham* (2005), 197 O.A.C. 168 (C.A.), at para. 10.

[93] With these parameters in mind, it appears to me that the question which must be answered to decide this appeal and resolve the dispute between the parties is: did the CCAA judge err in lifting the stay and ordering the Remaining

Applicants into bankruptcy without first requiring that the wind up deemed trusts deficits be paid in priority to the Second Lien Lenders?

[94] To answer that question, I must address the following issues:

1. what standard of review applies to the CCAA judge's decision to lift the CCAA stay of proceedings and order the Remaining Applicants into bankruptcy?
2. did the CCAA judge make a procedural error in his treatment of the Pension Motion? and
3. did the CCAA judge err in principle, or act unreasonably, in lifting the stay and ordering the Remaining Applicants into bankruptcy?

THE STANDARD OF REVIEW

[95] The Superintendent submits that the standard of review of a decision made under the CCAA is correctness with respect to errors of law, and palpable and overriding error with respect to the exercise of discretion or findings of fact. As authority for this submission, the Superintendent relies on *Resurgence Asset Management LLC v. Canadian Airlines Corporation*, 2000 ABCA 149, 261 A.R. 120, at para. 29.

[96] I would not accept this submission for two reasons.

[97] First, in articulating this standard of review, *Resurgence* purported to follow *UTI Energy Corp. v. Fracmaster Ltd.*, 1999 ABCA 178, 244 A.R. 93. However, *UTI* does not set out the standard of review in the terms expressed by *Resurgence*. At para. 3 of *UTI*, the Alberta Court of Appeal states that discretionary decisions made under the CCAA "are owed considerable deference" and appellate courts should intervene only if the CCAA judge "acted unreasonably, erred in principle, or made a manifest error".

[98] Second, the applicable standard of review has been established by two decisions of this court: *Re Air Canada* (2003), 66 O.R. (3d) 257 and *Re Ivaco Inc.* (2006), 83 O.R. (3d) 108. In *Air Canada*, at para. 25, this court states that deference is owed to discretionary decisions of the CCAA judge. In *Ivaco*, at para. 71, this court reiterated that point and added that appellate intervention is justified only if the CCAA judge erred in principle or exercised his or her discretion unreasonably.

[99] The decision to lift the stay and order the Remaining Applicants into bankruptcy was a discretionary decision: *Ivaco*, at para. 70. Therefore, the question becomes, did the CCAA judge err in principle or exercise his discretion unreasonably in so doing?

[100] Before turning to this question, I will consider whether the CCAA judge made a procedural error in the process leading up to the making of the Transition Order.

DID THE CCAA JUDGE MAKE A PROCEDURAL ERROR?

[101] The procedural complaint levied against the CCAA judge is based on his having adjourned the Pension Motion on more than one occasion, on his own motion, so that additional notice could be given to the Second Lien Lenders. The Superintendent says that additional notice was not required because the Second Lien Lenders had been given sufficient notice and the resulting delay in having the Pension Motion heard caused prejudice to the pension claimants.

[102] I would not accept this submission. Considered in context, I do not view the CCAA judge as having acted improperly in adjourning the Pension Motion on his own motion.

[103] It is important to begin this analysis by reminding ourselves of the role played by the CCAA judge in a CCAA proceeding. Paragraphs 57-60 of *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379 are instructive in this regard. From those paragraphs, we see that the role of the CCAA judge is more than to simply decide the motions placed before him or her. The CCAA is skeletal in nature. It gives the CCAA judge broad discretionary powers that are to be exercised in furtherance of the CCAA's purposes. The

CCAA judge must “provide the conditions under which the debtor can attempt to reorganize” (para. 60). This includes supervising the process and advancing it to the point where it can be determined whether reorganization will succeed. In performing these tasks, the CCAA judge “must be cognizant of the various interests at stake in the reorganization, which can extend beyond those of the debtor and creditors” (para. 60).

[104] *Century Services*, it can be seen, makes it clear that the CCAA judge in the present CCAA Proceeding had to “be cognizant” of the interests of the Second Lien Lenders, as well as those of the moving parties and the pension claimants.

[105] It would have been apparent to the CCAA judge that the Pension Motion had the potential to adversely affect the interests of the Second Lien Lenders. At the time that the Pension Motion was brought, the Applicants’ assets had been sold and only limited funds were left for distribution. Those funds were clearly insufficient to meet the claims of both the Second Lien Lenders and the pension claimants. It will be recalled that by means of the motion, GFPI, the CRO and the Monitor sought to be relieved of any obligation to continue making contributions into the Plans. The Pension Motion was vigorously opposed. Had the CCAA judge refused to grant the Pension Motion and contributions continued to be made to the Plans, the Second Lien Lenders would have been prejudiced

because there would have been even fewer funds available to satisfy their claims.

[106] The CCAA judge was also aware that in March 2012 – some three months before the Pension Motion was brought – counsel for the Second Lien Lenders' Agent had given notice that it was to be removed from the service list because it no longer represented the Second Lien Lenders' Agent.

[107] Despite service of the Pension Motion on the Second Lien Lenders' Agent and on the Second Lien Lenders, in these circumstances, it is understandable that the CCAA judge had concerns about the adequacy of notice to the Second Lien Lenders.

[108] That this concern drove the adjournments is apparent from the CCAA judge's direction to the Monitor on August 27, 2012, to provide additional communication to the Second Lien Lenders themselves, not the Agent. (The Monitor followed those directions, holding a conference call directly with the Second Lien Lenders themselves.)

[109] In these circumstances, I do not accept that the adjournments of the Pension Motion amounted to procedural unfairness. Rather, the adjournments are consonant with the Supreme Court's dictates in *Century Services*, described above.

DID THE CCAA JUDGE ERR IN PRINCIPLE OR ACT UNREASONABLY IN LIFTING THE STAY AND ORDERING THE REMAINING APPLICANTS INTO BANKRUPTCY?

[110] In general terms, I see no error in the CCAA judge's exercise of discretion to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

[111] At the time the Motions were heard, GFPI had long since ceased operating, its assets had been sold, and the bulk of the sale proceeds had been distributed. It was a liquidating CCAA with nothing left to liquidate. Nor was there anything left to reorganise or restructure. All that was left was to distribute the Remaining Funds and it was clear that those funds were insufficient to meet the claims of both the Second Lien Lenders and the pension claimants.

[112] In those circumstances, the breadth of the CCAA judge's discretion was sufficient to "construct a bridge" to the BIA – that is, he had the discretion to lift the stay and order the Remaining Applicants into bankruptcy. Although this was not a situation in which creditors had rejected a proposal, the reasoning of the Supreme Court at paras. 78 and 80 of *Century Services* applied:

> … The transition from the CCAA to the BIA may require the partial lifting of a stay of proceedings under the CCAA to allow commencement of the BIA proceedings. However, as Laskin J.A. for the Ontario Court of Appeal noted in a similar competition between secured creditors and the [Superintendent] seeking to enforce a deemed trust, "[t]he two statutes are related" and no "gap" exists between the two statutes that would allow

> the enforcement of property interests at the conclusion of CCAA proceedings that would be lost in bankruptcy (*Ivaco,* at paras. 62-63). [Citation excluded.]
>
> …
>
> [T]he comprehensive and exhaustive mechanism under the *BIA* must control the distribution of the debtor's assets once liquidation is inevitable. Indeed, an orderly transition to liquidation is mandatory under the *BIA* where a proposal is rejected by creditors. The *CCAA* is silent on the transition into liquidation but the breadth of the court's discretion under the Act is sufficient to construct a bridge to liquidation under the *BIA.* The court must do so in a manner that does not subvert the scheme of distribution under the *BIA*. Transition to liquidation requires partially lifting the *CCAA* stay to commence proceedings under the *BIA*. This necessary partial lifting of the stay should not trigger a race to the courthouse in an effort to obtain priority unavailable under the *BIA*. [Emphasis added.]

[113] Consequently, the question for this court is whether the CCAA judge erred in principle, or exercised his discretion unreasonably, by lifting the stay and ordering the Remaining Applicants into bankruptcy.

[114] The various complaints levied against the CCAA judge's exercise of discretion can be summarized as raising the following questions. Did the motion judge err in:

1. failing to properly take into consideration West Face's conduct in bringing the Bankruptcy Motion?

2. failing to recognize, and require payment of, the wind up deemed trusts that arose during the CCAA Proceeding before ordering GFPI into bankruptcy?

3. wrongly considering that the pension claimants had to take certain steps earlier in the CCAA Proceeding in order to successfully assert their claims? and

4. failing to consider the question posed by the Pension Motion, namely, whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans?

1. West Face's Conduct

[115] Two complaints are levied about West Face's conduct. The first is that West Face delayed in bringing the Bankruptcy Motion and the second is that West Face brought that motion to defeat the wind up deemed trust regime.

[116] Even if delay is a relevant consideration when considering West Face's conduct, I do not accept that West Face failed to bring the Bankruptcy Motion in a timely manner. The Pension Motion was brought on June 8, 2012, and originally returnable on June 25, 2012. Although in March 2012, West Face had been served with notice that counsel for the Second Lien Lenders' Agent no longer represented the Agent, the record is not clear on when West Face discovered that the Agent could not obtain timely instructions from the Second

Lien Lenders in respect of the Pension Motion. From the record, it appears that West Face acted promptly upon discovering that fact. West Face retained its own counsel on October 19, 2012, served a notice of appearance that same day and brought the Bankruptcy Motion on October 21, 2012, returnable on October 22, 2012.

[117] In the circumstances, I do not view West Face as having been dilatory in the bringing of the Bankruptcy Motion.

[118] As for the submission that the Bankruptcy Motion was brought to defeat the wind up deemed trust priority regime, assuming that to have been West Face's motivation, it does not disentitle West Face from being granted the relief it sought in the Bankruptcy Motion. A creditor may seek a bankruptcy order under the BIA to alter priorities in its favour: see *Federal Business Development Bank v. Québec*, [1988] 1 S.C.R. 1061, at p. 1072; *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 57 D.L.R. (4th) 623 (B.C.C.A), at pp. 627, 630-31; and *Ivaco*, at para. 76.

2. The Wind up Deemed Trusts

[119] The Superintendent (joined by the Administrator and the Intervener) makes two submissions as to why the CCAA judge erred in failing to order payment of the wind up deemed trusts deficits before ordering the Remaining Applicants into bankruptcy. First, he submits that, unlike bankruptcy where PBA deemed trusts

are inoperative, the wind up deemed trusts in this case were not rendered inoperative because they did not conflict with a provision of the CCAA or an order made under the CCAA (for example, an order establishing a debtor-in-possession charge). Second, he contends that *Indalex* requires that the wind up deemed trusts be given priority in this case.

[120] I would not accept either submission.

Federal Paramountcy

[121] In my view, the first submission misses a crucial point: federal paramountcy in this case is based on the BIA.

[122] As I have explained, at the time that the Motions were heard, it was open to the CCAA judge to order the Remaining Applicants into bankruptcy. Once the CCAA judge exercised his discretion and made that order, the priorities established by the BIA applied to the Remaining Funds and rendered the wind up deemed trust claims inoperative.

[123] Because wind up deemed trusts are created by provincial legislation, their payment could not be ordered when the Motions were heard because payment would have had the effect of frustrating the priorities established by the federal law of bankruptcy. A provincial statute cannot alter priorities within the federal scheme nor can it be used in a manner that subverts the scheme of distribution under the BIA: *Century Services*, at para. 80.

Indalex

[124] As for the second submission, in my view, *Indalex* does not assist in the resolution of the priority dispute in this case.

[125] In *Indalex*, the CCAA court authorized debtor-in-possession ("DIP") financing and granted the DIP charge priority over the claims of all creditors.

[126] There were two pension plans in issue in *Indalex*: the executives' plan and the salaried employees' plan. When the CCAA proceedings began, the executives' plan had not been declared wound up. As s. 57(4) of the PBA provides that the wind up deemed trust comes into existence only when the pension plan is wound up, no wind up deemed trust existed in respect of the executives' plan.

[127] The salaried employees' pension plan was in a different position, however. That plan had been declared wound up prior to the commencement of the CCAA proceeding and the wind up was in process.

[128] A majority of the Supreme Court concluded that the PBA wind up deemed trust for the salaried employees' pension plan continued in the CCAA proceeding, subject to the doctrine of federal paramountcy. However, the CCAA court-ordered priority of the DIP lenders meant that federal and provincial laws gave rise to different, and conflicting, orders of priority. As a result of the

application of the doctrine of federal paramountcy, the DIP charge superseded the deemed trust.

[129] Both the facts and the issues in *Indalex* differ from those of the present case.

[130] There are two critical factual distinctions. First, the wind up deemed trust under consideration in *Indalex* arose before the CCAA proceeding commenced. In this case, neither of the Plans had been declared wound up at the time the Initial Order was made – the Superintendent's Wind Up Orders were made after the CCAA Proceeding commenced.

[131] Second, the BIA played no part in *Indalex.* In this case, however, the BIA was implicated from the beginning of the CCAA Proceeding. Prior to the issuance of the Initial Order, one of the debtor companies' creditors (GE Canada) had issued a bankruptcy application, which was stayed by the Initial Order. Further, and importantly, at the time the priority contest came to be decided in this case, both the Pension Motion and the Bankruptcy Motion were before the CCAA judge and he found that there was no point to continuing the CCAA proceeding.[3]

[132] The issues for resolution in *Indalex* were whether: the deemed trust in s. 57(4) applied to wind up deficiencies; such a deemed trust superseded a DIP

[3] See para. 62 of the reasons, where the CCAA judge states that the usefulness of the CCAA proceeding had come to an end.

charge; the company had fiduciary obligations to the pension plan members when making decisions in the context of insolvency proceedings; and, a constructive trust was properly imposed as a remedy for breach of fiduciary duties.

[133] As I already explained, because of the point in the proceedings at which the Motions were heard, the primary issue for the CCAA judge in this case was whether to lift the CCAA stay and order the Remaining Applicants into bankruptcy.

[134] Given the legal and factual differences between the two cases, I do not find *Indalex* to be of assistance in the resolution of this dispute.

3. Steps by the Pension Claimants

[135] It was submitted that the CCAA judge wrongly required the pension claimants to have taken steps earlier in the CCAA Proceeding, had they wished to assert their wind up deemed trust claims.

[136] I understand this submission to be based largely on paras. 94 and 95 of the CCAA judge's reasons. The relevant parts of those paragraphs read as follows:

> [94] It does seem to me that a commitment to make wind up deficiency payments is not in the ordinary course of business of an insolvent company subject to a CCAA order unless agreed to. Even if the obligation could be said to be in the ordinary course for an

> insolvent company GFPI was not obliged to make the payments … .
>
> [95] This is precisely the reason for the granting of a stay of proceedings that is provided for by the *CCAA.* Anyone seeking to have a payment made that would be regarded as being outside the ordinary course of business must seek to have the stay lifted or if it is to be regarded as an ordinary course of business obligation, persuade the applicant and creditors that it should be made.

[137] I do not read the CCAA judge's reasons as saying that the pension claimants had to have taken certain steps earlier in the CCAA Proceeding in order to assert their claims. Rather, I understand the CCAA judge to be saying the following. A contribution towards a wind up deficit made by an insolvent company subject to a CCAA order is not a payment made in the ordinary course of business. The Initial Order only permitted payments in the ordinary course of business. Thus, if during the CCAA Proceeding the pension claimants wanted payments be made on the wind up deficits, they would have had to have taken steps to accomplish that. These steps include reaching an agreement with the Applicants and secured creditors or seeking to have the stay lifted and an order made compelling the making of the payments.

[138] Understood in this way, I see no error in the CCAA judge's reasoning. I would add that the timing of the relevant events supports this reasoning. When the Initial Order was made, the Plans were on-going – the Superintendent's Wind Up Orders were not made until almost three years later. The Initial Order

permitted, but did not require, GFPI to pay "all outstanding and future … pension contributions … incurred in the ordinary course of business". The nature and magnitude of contributions to ongoing pension plans is different from those made to pension plans in the process of being wound up. Thus, it does not seem to me that payments made on wind up deficits fall within the terms of the Initial Order which permitted the making of pension contributions "incurred in the ordinary course of business".

[139] Accordingly, had the pension creditors sought to have payments made on the wind up deficits, they would have had to have taken steps – such as those suggested by the CCAA judge – to enable and/or compel such payments to be made.

4. The Question Posed by the Pension Motion

[140] I do not accept that the CCAA judge erred by failing to answer the question posed by the Pension Motion. That question, it will be recalled, was whether GFPI, the CRO and the Monitor should be relieved from making further payments into the Plans.

[141] In ordering the Remaining Applicants into bankruptcy, the CCAA judge found that there was no point to continuing the CCAA Proceeding. It was plain and obvious that there were insufficient funds to meet the claims against the Remaining Funds. Accordingly, there was no need for the CCAA judge to

address the question posed by the Pension Motion because distribution of the Remaining Funds had to be in accordance with the BIA priorities scheme.

A CONCLUDING COMMENT

[142] In my view, this case illustrates the value that a CCAA proceeding – rather than a bankruptcy proceeding – offers for pension plan beneficiaries. Three examples demonstrate this.

[143] First, from the outset of the CCAA Proceeding until June 2012, all pension contributions (both ongoing and special payments) continued to be made into the Plans. Had GFPI gone into bankruptcy, those payments would not have been made to the Plans.

[144] Second, on the sale to Georgia Pacific, Georgia Pacific assumed the Pension Plan for Hourly Employees of Grant Forest Products Inc. – Englehart Plan. Had GFPI gone into bankruptcy, it is unlikely in the extreme that the Englehart Plan would have continued as an on-going plan.

[145] Third, the CCAA Proceeding gave GFPI sufficient "breathing space" to enable it to take steps to ensure that the Plans continued to be properly administered. This is best seen from the orders dated August 26, 2011, and September 21, 2011. Through those orders, GFPI was authorized to initiate the Plans' windups and work with the Superintendent in appointing a replacement administrator, and the Monitor was authorized to hold back funds against which

the pension claimants could assert their claims. Co-operation of this sort typically leads to reduced costs of administration with the result that more funds are available to plan beneficiaries.

[146] I hasten to add that these remarks are not intended to suggest a lack of sympathy for the position of pension plan beneficiaries in insolvency proceedings. Rather, it is to recognize that while no panacea, at least there is some prospect of amelioration of that position in a CCAA proceeding.

DISPOSITION

[147] Accordingly, I would dismiss the appeal. Dismissal of the appeal would leave paras. 1-6 of the Transition Order operative, thus nothing more need be said in relation to the Remaining Applicants' submissions.

[148] If the parties are unable to agree on costs, I would permit them to make written submissions to a maximum of three pages in length, within fourteen days of the date of release of these reasons.

Released: August 7, 2015 "DD"

"E.E. Gillese J.A."
"I agree Doherty J.A."
"I agree P. Lauwers J.A."

Schedule A

Paragraphs 1-6 of the Transition Order read as follows:

SERVICE

1. THIS COURT ORDERS that the Motions are properly returnable and hereby dispenses with further service thereof.

CAPITALIZED TERMS

2. THIS COURT ORDERS that all capitalized terms not defined herein shall have the meaning ascribed to them in the Stephen Affidavit.

APPROVAL OF ACTIVITIES

3. THIS COURT ORDERS that the Twenty-Sixth Report, the Twenty-Seventh Report and the Twenty-Ninth Report and the activities of the Monitor as set out therein be and are hereby approved.

EXTENSION OF STAY PERIOD

4. THIS COURT ORDERS that the Stay Period in respect of the Remaining Applicants as defined in the Order of Mr. Justice Newbould made in these proceedings on June 25, 2009 (the "Initial Order"), as previously extended until January 31, 2014, be and is hereby extended until the filing of the Monitor's Discharge Certificate as defined in paragraph 23 hereof or further order of this Court.

5. THIS COURT ORDERS that none of GFPI, Stonecrest Capital Inc. ("SCI") in its capacity as Chief Restructuring Organization (the "CRO"), or the Monitor shall make any further payments to either of the Timmins Salaried Plan or the Executive Plan (collectively, the "Pension Plans") or their respective trustees or to the Pension Administrator.

6. THIS COURT ORDERS and declares that none of GFPI, the CRO or the Monitor shall incur any liability for not making any payments when due to the Pension Plans or their respective trustees or the Pension Administrator.

RETURN TO INDEX

TAB 8

Sattva Capital Corporation (formerly Sattva Capital Inc.) *Appellant*

v.

Creston Moly Corporation (formerly Georgia Ventures Inc.) *Respondent*

and

Attorney General of British Columbia and BCICAC Foundation *Interveners*

Sattva Capital Corporation (anciennement Sattva Capital Inc.) *Appelante*

c.

Creston Moly Corporation (anciennement Georgia Ventures Inc.) *Intimée*

et

Procureur général de la Colombie-Britannique et BCICAC Foundation *Intervenants*

Indexed as: Sattva Capital Corp. *v.* Creston Moly Corp.

2014 SCC 53

File No.: 35026.

2013: December 12; 2014: August 1.

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

Répertorié : Sattva Capital Corp. *c.* Creston Moly Corp.

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1er août.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Rothstein, Moldaver, Karakatsanis et Wagner.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Arbitration — Appeals — Commercial arbitration awards — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price shares for payment of finder's fee and entering into arbitration — Leave to appeal arbitral award sought pursuant to s. 31(2) of the Arbitration Act — Leave to appeal denied but granted on appeal to Court of Appeal — Appeal of award dismissed but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in granting leave to appeal — What is appropriate standard of review to be applied to commercial arbitral decisions made under Arbitration Act — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31(2).

Contracts — Interpretation — Parties entering into agreement providing for payment of finder's fee in shares — Parties disagreeing as to date on which to price the shares for payment of finder's fee and entering into arbitration — Whether arbitrator reasonably construed contract

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Arbitrage — Appels — Sentences arbitrales commerciales — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation et recours à l'arbitrage — Autorisation d'appel de la sentence arbitrale demandée en application de l'art. 31(2) de l'Arbitration Act — Rejet initial de la demande d'autorisation d'appel, qui est accueillie à l'issue d'un appel devant la Cour d'appel — Rejet de l'appel interjeté de la sentence infirmé par la Cour d'appel — La Cour d'appel a-t-elle accordé à tort l'autorisation d'appel? — Quelle est la norme de contrôle applicable aux sentences arbitrales commerciales rendues sous le régime de l'Arbitration Act? — Arbitration Act, R.S.B.C. 1996, ch. 55, art. 31(2).

Contrats — Interprétation — Conclusion d'une entente entre les parties prévoyant le versement en actions des honoraires d'intermédiation — Désaccord des parties sur la date applicable à l'évaluation du cours de l'action aux fins du versement des honoraires d'intermédiation

as a whole — Whether contractual interpretation is question of law or of mixed fact and law.

S and C entered into an agreement that required C to pay S a finder's fee in relation to the acquisition of a molybdenum mining property by C. The parties agreed that under this agreement, S was entitled to a finder's fee of US$1.5 million and was entitled to be paid this fee in shares of C. However, they disagreed on which date should be used to price the shares and therefore the number of shares to which S was entitled. S argued that the share price was dictated by the date set out in the Market Price definition in the agreement and therefore that it should receive approximately 11,460,000 shares priced at $0.15. C claimed that the agreement's "maximum amount" proviso prevented S from receiving shares valued at more than US$1.5 million on the date the fee was payable, and therefore that S should receive approximately 2,454,000 shares priced at $0.70. The parties entered into arbitration pursuant to the B.C. *Arbitration Act* and the arbitrator found in favour of S. C sought leave to appeal the arbitrator's decision pursuant to s. 31(2) of the *Arbitration Act*, but leave was denied on the basis that the question on appeal was not a question of law. The Court of Appeal reversed the decision and granted C's application for leave to appeal, finding that the arbitrator's failure to address the meaning of the agreement's "maximum amount" proviso raised a question of law. The superior court judge on appeal dismissed C's appeal, holding that the arbitrator's interpretation of the agreement was correct. The Court of Appeal allowed C's appeal, finding that the arbitrator reached an absurd result. S appeals the decisions of the Court of Appeal that granted leave and that allowed the appeal.

Held: The appeal should be allowed and the arbitrator's award reinstated.

Appeals from commercial arbitration decisions are narrowly circumscribed under the *Arbitration Act*. Under s. 31(1), they are limited to questions of law, and leave to appeal is required if the parties do not consent to the appeal. Section 31(2)(a) sets out the requirements for leave at issue in the present case: the court may grant leave if it determines that the result is important to the parties and

et recours à l'arbitrage — L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble? — L'interprétation contractuelle constitue-t-elle une question de droit ou une question mixte de fait et de droit?

S et C ont conclu une entente selon laquelle C devait payer à S des honoraires d'intermédiation relativement à l'acquisition d'une propriété minière de molybdène par C. Les parties reconnaissaient qu'en vertu de l'entente, S a droit à des honoraires d'intermédiation de 1,5 million $US, versés en actions de C. Cependant, elles ne s'entendaient pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que S doit recevoir. S prétendait que la valeur de l'action était dictée par la date établie dans la définition du cours prévue dans l'entente et, par conséquent, qu'elle devait recevoir environ 11 460 000 actions, à raison de 0,15 $ l'unité. C prétendait que la stipulation relative au « plafond », qui figure dans l'entente, empêchait S de recevoir des actions d'une valeur supérieure à 1,5 million $US à la date du versement des honoraires et donc que S devait obtenir environ 2 454 000 actions, à raison de 0,70 $ l'unité. Les parties ont soumis le différend à l'arbitrage conformément à l'*Arbitration Act* de la Colombie-Britannique et l'arbitre a statué en faveur de S. C a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*Arbitration Act*. La demande a été rejetée au motif que la question soulevée n'était pas une question de droit. La Cour d'appel a infirmé la décision et accueilli la demande, présentée par C, en autorisation d'interjeter appel, jugeant que l'omission par l'arbitre d'examiner la signification de la stipulation de l'entente relative au « plafond » soulevait une question de droit. Le juge de la cour supérieure saisi de l'appel a rejeté l'appel de C et conclu que l'interprétation de l'entente par l'arbitre était correcte. La Cour d'appel a accueilli l'appel de C, concluant que l'interprétation de l'arbitre menait à un résultat absurde. S interjette appel des décisions de la Cour d'appel ayant accordé l'autorisation d'appel et ayant accueilli l'appel.

Arrêt : Le pourvoi est accueilli et la sentence arbitrale est rétablie.

L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*Arbitration Act*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit, et l'autorisation d'appel est requise lorsque les parties ne consentent pas à l'appel. L'alinéa 31(2)(a) énonce les critères d'autorisation sur lesquels porte le présent litige, à savoir que le tribunal peut accorder

the determination of the point of law may prevent a miscarriage of justice.

In the case at bar, the Court of Appeal erred in finding that the construction of the finder's fee agreement constituted a question of law. Such an exercise raises a question of mixed fact and law, and therefore, the Court of Appeal erred in granting leave to appeal.

The historical approach according to which determining the legal rights and obligations of the parties under a written contract was considered a question of law 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 of the contract.

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; however, 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. The goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. Accordingly, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. 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. Concluding that C's application for leave to appeal raised no question of law is sufficient to dispose of this appeal; however, the Court found it salutary to continue with its analysis.

In order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a), an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. 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.

l'autorisation s'il estime que, selon le cas, l'issue est importante pour les parties et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire.

En l'espèce, la Cour d'appel a assimilé à tort l'interprétation de l'entente relative aux honoraires d'intermédiation à une question de droit. Un tel exercice soulève une question mixte de fait et de droit, et la Cour d'appel a donc commis une erreur en accueillant la demande d'autorisation d'appel.

Il faut rompre avec l'approche historique selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit ressortit à une question de droit. 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 de ce dernier.

Il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit, mais le rapport étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. Le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Par conséquent, le tribunal doit faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. L'interprétation contractuelle peut occasionner des erreurs de droit, notamment appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent. Conclure que la demande d'autorisation d'appel présentée par C ne soulevait aucune question de droit suffit à trancher le présent pourvoi; toutefois, la Cour juge salutaire de poursuivre l'analyse.

Pour que l'erreur de droit reprochée soit une erreur judiciaire pour l'application de l'al. 31(2)(a), elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat. Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

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 by the leave court is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case. The appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit, meaning that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law.

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 standard of review. 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.

The words "may grant leave" in s. 31(2) of the *Arbitration Act* confer on the court residual discretion to deny leave even where the requirements of s. 31(2) are met. Discretionary factors to consider in a leave application under s. 31(2)(a) include: conduct of the parties, existence of alternative remedies, undue delay and the urgent need for a final answer. These considerations could be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria have been met. However, courts should exercise such discretion with caution.

Appellate review of commercial arbitration awards is different from judicial review of a decision of a statutory tribunal, thus the standard of review framework developed for judicial review in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. As a result, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, le tribunal saisi de la demande d'autorisation doit procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier l'issue du litige. Ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable, à savoir que l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit.

L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet cette norme. Le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire à l'égard de la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel.

Les termes « peut accorder l'autorisation » figurant au par. 31(2) de l'*Arbitration Act* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés. Les facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) comprennent : la conduite des parties, l'existence d'autres recours, un retard indu et le besoin urgent d'obtenir un règlement définitif. Ces facteurs pourraient justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères légaux. Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire.

L'examen en appel des sentences arbitrales commerciales diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif, de sorte que le cadre relatif à la norme de contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Par conséquent, certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences arbitrales commerciales.

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. The question at issue here does not fall into one of those categories and thus the standard of review in this case is reasonableness.

In the present case, the arbitrator reasonably construed the contract as a whole in determining that S is entitled to be paid its finder's fee in shares priced at $0.15. The arbitrator's decision that the shares should be priced according to the Market Price definition gives effect to both that definition and the "maximum amount" proviso and reconciles them in a manner that cannot be said to be unreasonable. The arbitrator's reasoning meets the reasonableness threshold of justifiability, transparency and intelligibility.

A court considering whether leave should be granted is not adjudicating the merits of the case. It decides only whether the matter warrants granting leave, not whether the appeal will be successful, even where the determination of whether to grant leave involves a preliminary consideration of the question of law at issue. For this reason, comments by a leave court regarding the merits cannot bind or limit the powers of the court hearing the actual appeal.

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Referred to: *British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122; *King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Thorner v. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945; *Prenn v. Simmonds*, [1971] 3 All E.R. 237; *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570; *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII); *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221; *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78; *WCI Waste Conversion Inc. v. ADI International Inc.*,

En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur. La question dont nous sommes saisis n'appartient pas à l'une ou l'autre de ces catégories; la norme de la décision raisonnable s'applique donc à la présente affaire.

En l'espèce, l'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble en déterminant que S était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond » en les conciliant d'une manière qui ne peut être considérée comme déraisonnable. Le raisonnement de l'arbitre satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité.

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, même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. C'est pourquoi les remarques sur le bien-fondé de l'affaire formulées par le tribunal saisi de la demande d'autorisation ne sauraient lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs.

Jurisprudence

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2011 PECA 14, 309 Nfld. & P.E.I.R. 1; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69; *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300; *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63; *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712; *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262; *R. v. Fedossenko*, 2013 ABCA 164 (CanLII); *Enns v. Hansey*, 2013 MBCA 23 (CanLII); *R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174; *R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270; *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708; *Immeubles Port Louis Ltée v. Lafontaine (Village)*, [1991] 1 S.C.R. 326; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6; *R. v. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *Pacifica Mortgage Investment Corp. v. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, leave to appeal refused, [2013] 3 S.C.R. viii; *Tamil Co-operative Homes Inc. v. Arulappah* (2000), 49 O.R. (3d) 566.

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Michael A. Feder and *Tammy Shoranick*, for the appellant.

Darrell W. Roberts, *Q.C.*, and *David Mitchell*, for the respondent.

Jonathan Eades and *Micah Weintraub*, for the intervener the Attorney General of British Columbia.

David Wotherspoon and *Gavin R. Cameron*, for the intervener the BCICAC Foundation.

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Michael A. Feder et *Tammy Shoranick*, pour l'appelante.

Darrell W. Roberts, *c.r.*, et *David Mitchell*, pour l'intimée.

Jonathan Eades et *Micah Weintraub*, pour l'intervenant le procureur général de la Colombie-Britannique.

David Wotherspoon et *Gavin R. Cameron*, pour l'intervenante BCICAC Foundation.

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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

Version française du jugement de la Cour rendu par

[1] Le juge Rothstein — Dans quelles circonstances l'interprétation contractuelle est-elle une question mixte de fait et de droit et dans quelles circonstances est-elle une question de droit? Comment établir l'équilibre entre le caractère révisable et l'irrévocabilité des sentences arbitrales commerciales prononcées sous le régime de la *Commercial Arbitration Act*, R.S.B.C. 1996, ch. 55 (maintenant l'*Arbitration Act*, ci-après l'« *AA* »)? Les conclusions relatives au bien-fondé de l'appel tirées par le tribunal qui autorise l'appel peuvent-elles lier celui qui est appelé à trancher l'appel? Voilà trois questions qui sont soulevées dans le présent pourvoi.

I. Faits

[2] Les questions soulevées dans le présent pourvoi découlent de l'obligation de Creston Moly Corporation (anciennement Georgia Ventures Inc.) de

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.

payer des honoraires d'intermédiation à Sattva Capital Corporation (anciennement Sattva Capital Inc.). Les parties reconnaissent que Sattva a droit à des honoraires d'intermédiation de 1,5 million $US, qui peuvent lui être versés en argent, en actions de Creston, ou en argent et en actions. Elles ne s'entendent pas sur la date qui devrait être retenue pour évaluer le cours de l'action et, par conséquent, sur le nombre d'actions que Sattva recevra.

[3] M. Hai Van Le, un directeur de Sattva, a fait part à Creston de la possibilité d'acquérir une propriété minière de molybdène au Mexique. Le 12 janvier 2007, les parties ont conclu une entente (l'« entente »), selon laquelle Creston devait payer à Sattva des honoraires d'intermédiation relativement à l'acquisition de cette propriété. Les dispositions pertinentes de l'entente sont énoncées à l'annexe I.

[4] Le 30 janvier 2007, Creston a conclu une convention d'achat de la propriété, le prix étant fixé à 30 millions $US. Le 31 janvier 2007, Creston a demandé que la négociation de ses actions à la Bourse de croissance TSX (la « Bourse ») soit suspendue afin d'empêcher la spéculation le temps d'achever le contrôle diligent préalable à l'achat. Le 26 mars 2007, Creston a annoncé qu'elle avait l'intention de conclure l'achat, et la négociation à la bourse a repris le lendemain.

[5] Aux termes de l'entente, Sattva doit recevoir des honoraires d'intermédiation correspondant au plafond autorisé par le point 3.3 de la politique 5.1 qui se trouve dans le Guide du financement des sociétés de la Bourse. Le point 3.3 est incorporé par renvoi à l'entente, à l'art. 3.1, et il est reproduit à l'annexe II des présents motifs. Dans le cas qui nous occupe, le plafond autorisé au point 3.3 de la politique 5.1 est de 1,5 million $US.

[6] Aux termes de l'entente, à moins d'indication contraire, les honoraires sont payés sous forme d'actions de Creston. Ils ne seraient versés en argent ou en argent et en actions que si Sattva avait indiqué avoir fait tel choix, ce qu'elle n'a pas fait. Ses honoraires devaient donc lui être versés sous forme d'actions au plus tard cinq jours ouvrables après la conclusion de l'achat de la propriété minière de molybdène.

[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 (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 ("CA Leave Court")).

[10] The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC

[7] Le différend qui oppose les parties porte sur la date à retenir pour fixer le cours de l'action de Creston et, par conséquent, le nombre d'actions auquel Sattva a droit. Cette dernière prétend que la valeur de l'action est dictée par la définition du « cours », à l'art. 2 de l'entente, c.-à-d. la valeur de l'action [TRADUCTION] « le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». Le communiqué de presse a été publié le 26 mars 2007. Avant la suspension de la négociation des actions le 31 janvier 2007, le dernier cours de clôture de l'action de Creston s'établissait à 0,15 $. Suivant cette interprétation, Sattva recevrait environ 11 460 000 actions (selon le calcul effectué en fonction des honoraires d'intermédiation de 1,5 million $US).

[8] Creston prétend que la stipulation relative au « plafond », qui figure dans l'entente, a pour effet de limiter à 1,5 million $US la somme d'argent ou la valeur des actions que peut recevoir Sattva à la date de versement des honoraires. Les actions devaient être cédées au plus tard cinq jours après le 17 mai 2007, date de conclusion de l'achat. À ce moment-là, l'action de Creston valait 0,70 $, selon les calculs effectués par une société bancaire d'investissement en vue d'un placement privé par voie de prise ferme le 17 avril 2007. Suivant cette interprétation, Sattva recevrait environ 2 454 000 actions, soit environ 9 millions d'actions de moins que si chacune valait 0,15 $.

[9] Les parties ont soumis le différend à l'arbitrage conformément à l'*AA*. L'arbitre a statué en faveur de Sattva. Creston a demandé l'autorisation d'interjeter appel de la sentence arbitrale en vertu du par. 31(2) de l'*AA*. La Cour suprême de la Colombie-Britannique a refusé l'autorisation (2009 BCSC 1079 (CanLII) (« formation de la CS saisie de la demande d'autorisation »)). Creston a appelé de cette décision et obtenu l'autorisation de la Cour d'appel de la Colombie-Britannique d'interjeter appel de la sentence arbitrale (2010 BCCA 239, 7 B.C.L.R. (5th) 227 (« formation de la CA saisie de la demande d'autorisation »)).

[10] Le juge de la Cour suprême de la Colombie-Britannique chargé de statuer sur le bien-fondé de

597, 84 B.L.R. (4th) 102 ("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 ("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

l'appel (2011 BCSC 597, 84 B.L.R. (4th) 102 (« formation de la CS saisie de l'appel »)) a confirmé la sentence arbitrale. Creston a interjeté appel de cette décision devant la Cour d'appel de la Colombie-Britannique (2012 BCCA 329, 36 B.C.L.R. (5th) 71 (« formation de la CA saisie de l'appel »)), laquelle a infirmé la décision de la formation de la CS saisie de l'appel et a donné gain de cause à Creston. Sattva interjette appel des décisions des deux formations de la CA, soit celle saisie de la demande d'autorisation et celle saisie de l'appel, devant la Cour.

II. Sentence arbitrale

[11] L'arbitre, Leon Getz, c.r., a donné gain de cause à Sattva, concluant qu'elle était en droit de recevoir des honoraires d'intermédiation de 1,5 million $US en actions, à raison de 0,15 $ l'action.

[12] L'arbitre a fondé sa décision sur la définition du « cours » figurant dans l'entente :

> [TRADUCTION] Qu'était donc le « cours » au sens de l'entente? Le communiqué de presse pertinent est celui qui a été publié le 26 mars [. . .] Il n'y avait pas de cours de clôture le 25 mars (la négociation des actions était suspendue à cette date). Par conséquent, le « dernier cours de clôture », au sens où cette expression est employée dans la définition, était de 0,15 $, soit le cours de clôture des actions de [Creston] le 30 janvier, le jour précédant la suspension des opérations « jusqu'à nouvel ordre » [. . .] Cette conclusion ne nécessite aucune extension de sens des mots employés dans la définition qui figure au contrat. Au contraire, elle concorde littéralement avec la définition. [par. 22]

[13] L'entente et les honoraires d'intermédiation devaient être approuvés par la Bourse. Creston était chargée d'obtenir cette approbation. L'arbitre a conclu qu'il était implicitement ou expressément prévu dans l'entente que Creston ferait de son mieux pour obtenir l'approbation de la Bourse. Selon lui, Creston n'avait pas fait de son mieux pour y arriver.

[14] Comme nous l'avons expliqué, les honoraires d'intermédiation se payaient en actions à moins d'avis contraire de la part de Sattva. L'arbitre a

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.

conclu que Sattva n'avait pas manifesté de choix. Malgré cela, Creston a déclaré à la Bourse que les honoraires d'intermédiation seraient versés en argent. La Bourse a donc approuvé conditionnellement le versement d'une somme de 1,5 million $US en argent. Sattva a appris qu'un versement en argent de ses honoraires avait été approuvé au début du mois de juin 2007. Quand Sattva a abordé ce point avec Creston, cette dernière a répondu que Sattva avait le choix de percevoir ses honoraires en argent ou en actions, à raison de 0,70 $ l'action.

[15] Sattva a soutenu qu'elle avait droit au versement des honoraires d'intermédiation en actions, à raison de 0,15 $ l'action. Creston a demandé à ses avocats de communiquer avec la Bourse afin qu'elle indique la valeur minimale de l'action qu'elle approuverait pour le versement des honoraires d'intermédiation. La Bourse a confirmé, par téléphone le 7 juin 2007 et par courriel le 9 août de la même année, qu'un cours minimal de 0,70 $ l'action s'appliquait aux fins du calcul des honoraires d'intermédiation. Selon l'arbitre, Creston [TRADUCTION] « a constamment fait des déclarations inexactes quant à l'obligation qu'elle avait contractée envers Sattva ou, à tout le moins, omis d'en divulguer complètement la nature » (par. 56(k)) et qu'« à moins que Sattva n'en décide autrement, elle a le droit aux termes de l'entente de percevoir ces honoraires sous forme d'actions, à raison de 0,15 $ l'action » (par. 56(g)). Selon l'arbitre, la position de Sattva a été véritablement présentée à la Bourse pour la première fois dans la lettre de l'avocat de celle-ci datée du 9 octobre 2007.

[16] L'arbitre était d'avis que si Creston avait fait de son mieux, la Bourse aurait pu approuver le versement des honoraires d'intermédiation sous forme d'actions, à 0,15 $ l'action, et qu'une telle décision aurait été conforme à ses politiques. Il a affirmé que [TRADUCTION] « [la Bourse] aurait fort probablement donné son approbation » (par. 81) et il a évalué cette probabilité à 85 p. 100.

[17] Selon l'arbitre, Sattva aurait pu vendre ses actions de Creston après quatre mois à un prix variant entre 0,40 et 0,44 $ l'unité, ce qui aurait représenté un produit net situé dans une fourchette de

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*

[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).

4 583 914 $ à 5 156 934 $. Établissant la moyenne de ces deux sommes d'argent à 4 870 424 $, l'arbitre a ensuite évalué les dommages-intérêts à 85 p. 100 de ce nombre, soit 4 139 860 $, qu'il a ensuite arrondis à la hausse, pour obtenir 4 140 000 $, plus les dépens.

[18] Après le prononcé de cette sentence arbitrale, Creston a versé 1,5 million $US (ou l'équivalent en dollars canadiens) à Sattva. Le solde des dommages-intérêts accordés par l'arbitre a été placé dans le compte en fiducie des avocats de Sattva.

III. Historique judiciaire

A. *Cour suprême de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2009 BCSC 1079*

[19] La Cour suprême de la Colombie-Britannique a rejeté la demande d'autorisation d'appel parce qu'elle était d'avis que la question soulevée n'était pas une question de droit, un critère prévu à l'art. 31 de l'*AA*. Selon le juge, il s'agissait d'une question mixte de fait et de droit puisque l'arbitre avait appuyé sa conclusion sur le [TRADUCTION] « fondement factuel ». Plus précisément, pour déterminer sous quelle forme les honoraires d'intermédiation devaient être versés, il fallait examiner « les politiques de la TSX se rapportant au plafond applicable aux honoraires d'intermédiation, ainsi que les pouvoirs discrétionnaires dont dispose la Bourse pour déterminer le montant des honoraires » (par. 35).

[20] Le juge a conclu que, même s'il avait été d'avis que le litige soulevait une question de droit, il aurait exercé son pouvoir discrétionnaire pour refuser l'autorisation d'appel en raison des déclarations inexactes faites par Creston à propos des honoraires d'intermédiation à la Bourse et à Sattva, et par égard pour le [TRADUCTION] « principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41).

B. *British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239*

[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*

[23] Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the

B. *Cour d'appel de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2010 BCCA 239*

[21] La Cour d'appel a infirmé la décision de la Cour suprême et a accueilli la demande, présentée par Creston, en autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour suprême avait [TRADUCTION] « commis une erreur en ne reconnaissant pas que l'omission par l'arbitre d'examiner la signification de l'art. 3.1 de l'entente (et plus particulièrement de la stipulation relative au "plafond") soulevait une question de droit » (par. 23). La Cour d'appel a conclu que l'interprétation de l'art. 3.1 de l'entente, et plus particulièrement de la stipulation relative au « plafond », constituait une question de droit parce qu'elle ne reposait pas sur les faits de l'affaire, à savoir les renseignements communiqués à la Bourse et la décision de cette dernière.

[22] La Cour d'appel a reconnu que Creston s'était montrée [TRADUCTION] « moins que franche dans ses démarches auprès de M. Le et de [la Bourse] », mais a déclaré que « ces faits n'intéressent pas directement la question de droit qu'elle soulève en appel » (par. 27). Au sujet de la remarque sur la préservation de l'intégrité du système d'arbitrage formulée par la formation de la CS saisie de la demande d'autorisation d'appel, la formation de la CA saisie de la demande d'autorisation a dit que les parties, quand elles ont choisi de soumettre leur différend à l'arbitrage en vertu de l'*AA*, savaient que l'appel d'une question de droit était possible. De plus, bien que l'irrévocabilité de la sentence arbitrale constitue un facteur important dans l'exercice du pouvoir discrétionnaire, lorsqu'« une question de droit importante est soulevée et qu'il y a risque d'erreur judiciaire en cas d'impossibilité d'interjeter appel, l'intégrité du processus exige, du moins dans les circonstances de l'espèce, que le droit d'appel conféré par la loi soit respecté » (par. 29).

C. *Cour suprême de la Colombie-Britannique — décision sur l'appel, 2011 BCSC 597*

[23] Le juge Armstrong a contrôlé la sentence arbitrale selon la norme de la décision correcte. Il

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

a rejeté l'appel et conclu que l'interprétation de l'entente proposée par l'arbitre était correcte.

[24] Le juge Armstrong estimait que, selon le sens ordinaire de l'entente, les honoraires de 1,5 million $US devaient être versés en actions, à raison de 0,15 $ l'unité. Il n'estimait pas une telle interprétation absurde du simple fait que le cours de l'action à la date du versement des honoraires était supérieur à celui déterminé suivant la définition du cours. Selon lui, avec le temps, la fluctuation des cours est inévitable, et dès lors qu'elles ont prévu la possibilité du versement des honoraires en actions, les parties, des entreprises averties, devaient raisonnablement s'attendre à la fluctuation du marché. De l'avis du juge Armstrong, c'est d'ailleurs à cause de cette fluctuation qu'il faut indiquer une date précise qui servira à déterminer la valeur de l'action avant le versement. Il est arrivé à la conclusion que pour ce faire, le « cours » était défini dans l'entente et que le montant des honoraires demeurait 1,5 million $US, à payer sous forme d'actions à raison de 0,15 $ l'unité, cette valeur étant établie suivant la définition du cours, sans égard à la valeur de l'action à la date du versement des honoraires.

[25] Selon le juge Armstrong, il était prévisible que le cours de l'action à la date du versement soit supérieur à celui établi conformément à la définition du cours et il s'agissait là d'une [TRADUCTION] « conséquence naturelle de l'entente relative aux honoraires d'intermédiation » (par. 62). Il était d'avis que le risque était assumé par Sattva, puisque le prix de l'action pouvait certes augmenter, mais il pouvait aussi diminuer, de sorte que Sattva aurait alors reçu un portefeuille d'actions d'une valeur inférieure au montant des honoraires (1,5 million $US) qui avait été convenu.

[26] Le juge Armstrong était d'avis que l'interprétation de l'arbitre, laquelle donnait effet à la définition du cours et à la stipulation relative au « plafond », était préférable à celle de Creston, qui faisait fi de la définition du cours.

[27] En réponse à l'argument de Creston selon lequel l'arbitre n'avait pas examiné l'art. 3.1 de

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*

[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:

l'entente, qui contient la stipulation relative au « plafond », le juge Armstrong a souligné que l'arbitre avait fait expressément référence à cette stipulation au par. 23 de la sentence arbitrale.

D. *Cour d'appel de la Colombie-Britannique — décision sur l'appel, 2012 BCCA 329*

[28] La Cour d'appel a accueilli l'appel de Creston et a statué que la somme de 1,5 million $US versée par Creston en faveur de Sattva en exécution de la sentence arbitrale constituait le paiement intégral des honoraires d'intermédiation. La cour a contrôlé la sentence arbitrale suivant la norme de la décision correcte.

[29] La formation de la CA saisie de l'appel s'estimait liée, de même que la Cour suprême, par deux conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir : 1º il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2º l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente.

[30] Selon la Cour d'appel, conclure que Sattva avait droit à des honoraires d'intermédiation de 8 millions $ menait à un résultat absurde, étant donné la stipulation de l'entente relative au « plafond », qui limite le montant de tels honoraires à 1,5 million $US. La cour était d'avis qu'il faudrait donner l'effet prépondérant à cette stipulation qui limite à 1,5 million $US les honoraires [TRADUCTION] « à la date de leur versement » (par. 47). Elle était d'avis que donner effet à la définition du cours ne saurait avoir été l'intention des parties, et ce n'était pas non plus une décision sensée sur le plan commercial.

IV. Questions en litige

[31] Les questions suivantes sont soulevées dans le présent pourvoi :

(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.

a) La Cour a-t-elle été saisie à bon droit de la question de savoir si la Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

b) La Cour d'appel a-t-elle commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'*AA*?

c) Si l'autorisation a été accordée à bon droit, quelle norme de contrôle convient-il d'appliquer aux sentences arbitrales commerciales rendues sous le régime de l'*AA*?

d) L'arbitre a-t-il donné une interprétation raisonnable de l'entente dans son ensemble?

e) La Cour d'appel a-t-elle commis une erreur en s'estimant liée par les remarques formulées par la formation de la CA saisie de la demande d'autorisation au sujet du bien-fondé de l'appel?

V. Analyse

A. *Notre Cour est saisie à bon droit de la question de l'autorisation*

[32] Sattva prétend notamment que la Cour d'appel a commis une erreur en accordant l'autorisation d'interjeter appel de la sentence arbitrale. Selon elle, la Cour d'appel n'a cerné aucune question de droit, alors que l'autorisation est subordonnée à l'existence d'une telle question, aux termes du par. 31(2) de l'*AA*. Creston soutient que la Cour n'est pas saisie à bon droit de cette question et avance deux arguments à l'appui de sa position.

[33] Premièrement, Creston fait valoir que cette question n'était pas soulevée dans la demande d'autorisation d'appel que Sattva a présentée à la Cour. Cet argument ne saurait tenir. À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale ». Par conséquent, l'appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation. La Cour peut toutefois exercer son pouvoir discrétionnaire et refuser de trancher une question qui n'a pas été abordée par les tribunaux d'instance inférieure, s'il en résulte un préjudice pour l'intimé, ou si, pour toute autre raison, elle juge opportun de ne pas la trancher.

[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.

[34] En l'espèce, l'ordonnance accordant l'autorisation d'interjeter appel des deux décisions de la Cour d'appel, sur la demande d'autorisation d'appel et sur l'appel, ne comportait aucune restriction (2013 CanLII 11315). La question — à savoir si l'appel proposé soulevait une question de droit — a été expressément débattue devant les formations de la CS et de la CA saisies de la demande d'autorisation, qui l'ont tranchée. Rien n'empêche Sattva 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.

[35] Deuxièmement, Creston soutient que la Cour n'a pas été saisie à bon droit de la question de savoir si la formation de la CA saisie de la demande d'autorisation a cerné une question de droit parce que Sattva n'a pas contesté la décision rendue à ce sujet devant tous les tribunaux d'instance inférieure. Plus précisément, aux dires de Creston, Sattva n'aurait pas fait valoir devant la formation de la CS saisie de l'appel que l'appel soulevait une question mixte de fait et de droit et aurait reconnu devant la Cour d'appel que l'appel soulevait une question de droit. Un tel argument ne tient pas. Devant la formation de la CS saisie de l'appel, il n'était pas possible pour Sattva de débattre à nouveau de la question de savoir si l'autorisation aurait dû être accordée. La formation de la CS saisie de l'appel était liée par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation, à savoir que l'autorisation était opportune et qu'une question de droit avait été cernée. Ainsi, Sattva ne pouvait guère plaider devant la formation de la CS saisie de l'appel un point sur lequel la formation de la CA saisie de la demande d'autorisation s'était déjà prononcée. Rien dans l'*AA* n'habilite Sattva à interjeter appel de la décision sur la demande d'autorisation d'appel rendue par une formation de la Cour d'appel à une autre formation de la même cour. Ce n'est pas parce que Sattva n'a pas plaidé à nouveau le point devant la formation de la CS saisie de l'appel ou devant la formation de la CA saisie de l'appel qu'elle ne peut le soulever devant notre Cour, tout particulièrement étant donné que Sattva a obtenu de notre Cour l'autorisation d'appeler de la décision rendue par la formation de la CA saisie de la demande d'autorisation.

[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.

[36] Ainsi, la Cour peut certes refuser l'autorisation si la question que l'on cherche à soulever devant elle n'a pas été plaidée devant les tribunaux d'instance inférieure, mais ce n'est pas le cas en l'espèce. En l'occurrence, les arguments sur le fondement de la demande d'autorisation d'appel de la sentence arbitrale présentée par Creston — à savoir si elle soulevait une question de droit ou une question mixte de fait et de droit — avaient été plaidés devant les formations saisies des demandes d'autorisation.

[37] Par conséquent, la Cour est saisie à bon droit de la question de savoir si la formation de la CA qui a accueilli la demande d'autorisation a conclu à tort que l'appel soulevait une question de droit.

B. *La Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'AA*

(1) Facteurs qui entrent en ligne de compte dans l'analyse de la demande d'autorisation d'appel présentée au titre de l'*AA*

[38] L'appel d'une sentence arbitrale commerciale est étroitement circonscrit par l'*AA*. Aux termes du par. 31(1), il ne peut être interjeté appel que sur une question de droit dans le cas où les parties consentent à l'appel ou, en l'absence de consentement, dans les cas où l'autorisation d'appel est accordée. Le paragraphe 31(2) de l'*AA*, reproduit intégralement à l'annexe III, énonce les critères d'autorisation :

[TRADUCTION]

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

[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 (*British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 ("*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

[39] De l'avis des tribunaux de la C.-B., l'expression [TRADUCTION] « peut accorder l'autorisation » qui figure au par. 31(2) de l'*AA* confère au tribunal un pouvoir discrétionnaire qui l'habilite à refuser l'autorisation même lorsque les critères légaux sont respectés (*British Columbia Institute of Technology (Student Assn.) c. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (« *BCIT* »), par. 25-26). L'appel d'une sentence arbitrale n'est donc entendu que si les critères du par. 31(2) 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.

[40] Bien que Creston ait présenté une demande d'autorisation à la Cour suprême sur le fondement des al. 31(2)(a), (b) et (c), il semble que les arguments invoqués devant elle et au cours des autres instances portaient sur l'al. 31(2)(a). La décision de la Cour suprême sur la demande d'autorisation reprend un long passage tiré de l'affaire *BCIT* axé sur les éléments de l'al. 31(2)(a). La Cour suprême y souligne que les deux parties reconnaissent qu'il est satisfait au premier élément de l'al. 31(2)(a), c'est-à-dire que la question est importante pour les parties. Dans sa décision sur la demande d'autorisation d'appel, la Cour d'appel a dit craindre que refuser l'autorisation ne donne lieu à une erreur judiciaire — un critère prévu seulement à l'al. 31(2)(a). Enfin, ni les décisions sur les demandes d'autorisation des tribunaux d'instance inférieure ni les arguments soulevés devant notre Cour ne traitent des autres critères, à savoir que la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie (al. 31(2)(b)) ou est d'importance publique (al. 31(2)(c)). Par conséquent, l'analyse qui suit porte principalement sur l'al. 31(2)(a).

(2) L'issue est importante pour les parties

[41] L'autorisation d'interjeter appel d'une sentence arbitrale commerciale est subordonnée au respect d'un critère minimal : l'appel doit porter sur une question de droit. Toutefois, avant d'aborder ce sujet, il convient d'examiner sommairement un autre élément requis par l'al. 31(2)(a) et sur lequel

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, 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

s'entendent les parties, à savoir que l'importance de l'issue de l'arbitrage pour les parties doit justifier l'intervention du tribunal. Selon l'explication donnée par la juge Saunders de ce critère dans *BCIT*, il faut que l'issue de l'arbitrage soit [TRADUCTION] « suffisamment importante » aux yeux des parties, pour le principe ou les sommes d'argent en jeu, pour justifier le coût et la longueur d'une instance (par. 27). Les parties en l'espèce ont convenu que l'issue de l'arbitrage revêt de l'importance pour chacune. Étant donné la somme relativement considérable en litige et compte tenu du fait que les parties s'entendent pour dire que l'issue est importante pour elles, je conviens que l'importance de l'issue de l'arbitrage pour les parties justifie l'intervention du tribunal. Cette condition prévue à l'al. 31(2)(a) est remplie.

(3) La question soulevée n'est pas une question de droit

a) *Dans quelles circonstances l'interprétation contractuelle est-elle une question de droit?*

[42] Aux termes de l'art. 31 de l'*AA*, la demande d'autorisation d'appel doit porter sur une question de droit. Pour déterminer la norme de contrôle applicable ou, comme c'est le cas en l'espèce, pour déterminer si les critères d'autorisation sont respectés, le tribunal siégeant en révision est régulièrement appelé à décider si une question tranchée en première instance est une question de droit, une question de fait ou une question mixte de fait et de droit.

[43] Autrefois, la détermination des droits et obligations juridiques des parties à un contrat écrit ressortissait à une question de droit (*King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63, par. 20, la juge Steel; K. Lewison, *The Interpretation of Contracts* (5e éd. 2011 et suppl. 2013), p. 173-176; G. R. Hall, *Canadian Contractual Interpretation Law* (2e éd. 2012), p. 125-126). Cette règle a pris naissance en Angleterre, à une époque où les procès civils devant jury étaient fréquents et l'analphabétisme courant. Dans de telles circonstances, l'interprétation des documents écrits devait être assimilée à une question de droit parce que le juge était le seul dont on

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, 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 (H.L.); and *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, at paras. 11-12; and *Minister of National Revenue v. Costco Wholesale Canada Ltd.*, 2012 FCA 160, 431 N.R. 78, 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, at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, at para. 44; *Bell Canada v. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, 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

pouvait être certain qu'il savait lire et écrire et, par conséquent, qu'il était en mesure de prendre connaissance du contrat (Hall, p. 126; Lewison, p. 173-174).

[44] Cette justification historique ne s'applique plus. Néanmoins, pour les tribunaux du Royaume-Uni, l'interprétation d'un contrat écrit ressortit toujours à une question de droit (*Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945, par. 58 et 82-83; Lewison, p. 173-177), et ce, même s'ils tiennent compte des circonstances — un concept que nous aborderons — dans l'interprétation du contrat écrit (*Prenn c. Simmonds*, [1971] 3 All E.R. 237 (H.L.); *Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.)).

[45] Au Canada, l'approche historique n'a pas perdu tous ses adeptes. Voir par exemple *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII), par. 10; *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84, par. 26; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221, par. 11-12; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII), par. 34. Or, des tribunaux canadiens ont délaissé l'approche historique au profit d'une nouvelle démarche qui conçoit l'interprétation des contrats écrits soit comme une question de droit soit comme une question mixte de fait et de droit. Voir par exemple *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309 Nfld. & P.E.I.R. 1, par. 11; *269893 Alberta Ltd. c. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98, par. 13; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, par. 44; *Bell Canada c. The Plan Group*, 2009 ONCA 548, 96 O.R. (3d) 81, par. 22-23 (les juges majoritaires, sous la plume du juge Blair) et par. 133-135 (la juge Gillese, dissidente, mais pas sur ce point); *King*, par. 20-23.

[46] La tendance à délaisser l'approche historique au Canada semble s'expliquer par deux changements. Le premier est l'adoption d'une méthode d'interprétation contractuelle qui oblige le tribunal à tenir compte des circonstances — que l'on appelle

— 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 and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, 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, at para. 27, *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, 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 *Moore Realty Inc.*

souvent le fondement factuel — dans l'interprétation d'un contrat écrit (Hall, p. 13, 21-25 et 127; J. D. McCamus, *The Law of Contracts* (2e éd. 2012), p. 749-751). Le deuxième découle des explications formulées dans les arrêts *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35, et *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235, par. 26 et 31-36, sur ce qui distingue la question de droit de la question mixte de fait et de droit.

[47] Relativement au premier changement, 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 » (*Jesuit Fathers of Upper Canada c. Cie d'assurance Guardian du Canada*, 2006 CSC 21, [2006] 1 R.C.S. 744, par. 27, le juge LeBel; voir aussi *Tercon Contractors Ltd. c. Colombie-Britannique (Transports et Voirie)*, 2010 CSC 4, [2010] 1 R.C.S. 69, par. 64-65, le juge Cromwell). Pour ce faire, le décideur doit interpréter le contrat dans son ensemble, en donnant aux mots y figurant le sens ordinaire et grammatical qui s'harmonise avec les circonstances dont les parties avaient connaissance au moment de la conclusion du contrat. Par l'examen des circonstances, on reconnaît qu'il peut être difficile de déterminer l'intention contractuelle à partir des seuls mots, car les mots en soi n'ont pas un sens immuable ou absolu :

> [TRADUCTION] Aucun contrat n'est conclu dans l'abstrait : les contrats s'inscrivent toujours dans un contexte. [. . .] Lorsqu'un contrat commercial est en cause, le tribunal devrait certes connaître son objet sur le plan commercial, ce qui présuppose d'autre part une connaissance de l'origine de l'opération, de l'historique, du contexte, du marché dans lequel les parties exercent leurs activités.

(*Reardon Smith Line*, p. 574, le lord Wilberforce)

[48] Le sens des mots est souvent déterminé par un certain nombre de facteurs contextuels, y compris l'objet de l'entente et la nature des rapports créés par celle-ci (voir *Moore Realty Inc. c. Manitoba*

v. Manitoba Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, 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*, [1998] 1 All E.R. 98 (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*. Questions of law "are questions about what the correct legal test is" (*Southam*, 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*, 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

Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, par. 15, la juge Hamilton; voir aussi Hall, p. 22; McCamus, p. 749-750). Pour reprendre les propos du lord Hoffmann dans *Investors Compensation Scheme Ltd. c. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.) :

> [TRADUCTION] Le sens d'un document (ou toute autre déclaration) qui est transmis à la personne raisonnable n'équivaut pas au sens des mots qui le composent. Le sens des mots fait intervenir les dictionnaires et les grammaires; le sens du document représente ce qu'il est raisonnable de croire que les parties, en employant ces mots compte tenu du contexte pertinent, ont voulu exprimer. [p. 115]

[49] Relativement au deuxième changement, l'approche historique de l'interprétation contractuelle ne cadre pas bien avec la définition de la pure question de droit formulée dans les arrêts *Housen* et *Southam*. Les questions de droit « concernent la détermination du critère juridique applicable » (*Southam*, par. 35). Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties — un but axé sur les faits — par l'application des principes juridiques d'interprétation. Il me semble que cela se rapproche plutôt de la question mixte de fait et de droit, définie dans l'arrêt *Housen* comme supposant « l'application d'une norme juridique à un ensemble de faits » (par. 26; voir aussi *Southam*, par. 35). Toutefois, certains tribunaux ont émis des doutes sur l'application directe de cette définition, qui avait été établie à l'égard d'une action intentée pour négligence, à des questions d'interprétation contractuelle et laissent entendre que cette dernière est d'abord et avant tout une affaire de droit (voir par exemple *Bell Canada*, par. 25).

[50] Avec tout le respect que je dois aux tenants de l'opinion contraire, à mon avis, il faut rompre avec l'approche historique. 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.

[51] Cette conclusion est étayée par les raisons qui sous-tendent la distinction établie entre la

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* 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.

question de droit et la question mixte de fait et de droit. En distinguant ces deux catégories, on visait 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. Ainsi, le rôle des cours d'appel, qui consiste à assurer la cohérence du droit, et non à offrir aux parties une nouvelle tribune leur permettant de poursuivre leur litige privé, est préservé. C'est pourquoi la Cour dans l'arrêt *Southam* reconnaît le degré de généralité (ou « la valeur comme précédents ») comme la principale différence entre la question de droit et la question mixte de fait et de droit. Plus la règle est stricte, moins l'intervention de la cour d'appel sera utile :

> Si une cour décidait que le fait d'avoir conduit à une certaine vitesse, sur une route donnée et dans des conditions particulières constituait de la négligence, sa décision aurait peu de valeur comme précédent. Bref, plus le niveau de généralité de la proposition contestée se rapproche de la particularité absolue, plus l'affaire prend le caractère d'une question d'application pure, et s'approche donc d'une question de droit et de fait parfaite. Voir R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), aux pp. 103 à 108. Il va de soi qu'il n'est pas facile de dire avec précision où doit être tracée la ligne de démarcation; quoique, dans la plupart des cas, la situation soit suffisamment claire pour permettre de déterminer si le litige porte sur une proposition générale qui peut être qualifiée de principe de droit ou sur un ensemble très particulier de circonstances qui n'est pas susceptible de présenter beaucoup d'intérêt pour les juges et les avocats dans l'avenir. [par. 37]

[52] De même, la Cour dans l'arrêt *Housen* conclut que la retenue à l'égard du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l'autonomie du procès et son intégrité (par. 16-17). Ces principes militent également en faveur de la déférence à l'endroit des décideurs de première instance en matière d'interprétation contractuelle. 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 aux tribunaux de première instance appuie la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

[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

[53] Néanmoins, il peut se révéler possible de dégager une pure question de droit de ce qui paraît au départ constituer une question mixte de fait et de droit (*Housen*, par. 31 et 34-35). L'interprétation contractuelle peut occasionner des erreurs de droit, notamment [TRADUCTION] « appliquer le mauvais principe ou négliger un élément essentiel d'un critère juridique ou un facteur pertinent » (*King*, par. 21). En outre, il est indubitable que nombre d'autres questions se posant en droit des contrats mettent en jeu des règles de droit substantiel : les critères de formation du contrat, la capacité des parties, l'obligation que soient constatés par écrit certains types de contrat, etc.

[54] Le tribunal doit cependant faire preuve de prudence avant d'isoler une question de droit dans un litige portant sur l'interprétation contractuelle. Compte tenu de l'obligation, prévue au par. 31(2) de l'*AA*, que la demande d'autorisation soulève une question de droit, le demandeur et son représentant chercheront à qualifier de question de droit toute erreur qu'ils invoquent. Toutefois, le législateur a pris des mesures visant à limiter ce genre d'appels, et les tribunaux doivent examiner soigneusement le motif d'appel proposé pour déterminer s'il est bien caractérisé. La mise en garde exprimée dans *Housen* qui appelle à la prudence lorsqu'il s'agit d'isoler une question de droit s'applique dans le cas présent :

> Les cours d'appel doivent cependant faire preuve de prudence avant de juger que le juge de première instance a commis une erreur de droit lorsqu'il a conclu à la négligence, puisqu'il est souvent difficile de départager les questions de droit et les questions de fait. Voilà pourquoi on appelle certaines questions des questions « mixtes de fait et de droit ». Si le principe juridique n'est pas facilement isolable, il s'agit alors d'une « question mixte de fait et de droit » . . . [par. 36]

[55] Certes, cette mise en garde a été formulée dans le contexte d'une action pour négligence, mais elle s'applique également à mon avis à l'interprétation contractuelle. Comme je le mentionne précédemment, le but de l'interprétation contractuelle — déterminer l'intention objective des parties — est, de par sa nature même, axé sur les faits. Le rapport

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.

étroit qui existe entre, d'une part, le choix et l'application des principes d'interprétation contractuelle et, d'autre part, l'interprétation que recevra l'instrument juridique en dernière analyse fait en sorte que rares seront les circonstances dans lesquelles il sera possible d'isoler une question de droit au cours de l'exercice d'interprétation. En l'absence d'une erreur de droit du genre de celles décrites plus haut, aucun droit d'appel de l'interprétation par un arbitre d'un contrat n'est prévu à l'*AA*.

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

b) *Le rôle et la nature des « circonstances »*

[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*.

[56] Abordons le rôle des circonstances dans l'interprétation du contrat et la nature des éléments admis à l'examen. La présente analyse ne traite que de la démarche d'interprétation contractuelle fondée sur la common law; elle ne se veut ni une application ni une modification du droit relatif à l'interprétation contractuelle régi par le *Code civil du 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. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[57] Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (*Hayes Forest Services*, par. 14; Hall, p. 30). 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 (Hall, p. 15 et 30-32). 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 (*Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).

[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*,

[58] 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 (*King*, par. 66 et 70), c'est-à-dire, les renseignements qui

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, 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 (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, 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

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 » (*Investors Compensation Scheme*, p. 114). 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.

c) *Tenir compte des circonstances n'est pas contraire à la règle d'exclusion de la preuve extrinsèque*

[59] Quelques mots sur l'examen des circonstances et la règle d'exclusion de la preuve extrinsèque s'imposent. Cette règle empêche l'admission d'éléments de preuve autres que les termes du contrat écrit qui auraient pour effet de modifier ou de contredire un contrat qui a été entièrement consigné par écrit, ou d'y ajouter de nouvelles clauses ou d'en supprimer (*King*, par. 35; Hall, p. 53). À cette fin, la règle interdit notamment les éléments de preuve concernant les intentions subjectives des parties (Hall, p. 64-65; *Eli Lilly & Co. c. Novopharm Ltd.*, [1998] 2 R.C.S. 129, par. 54-59, le juge Iacobucci). La règle vise, premièrement, à donner un caractère définitif et certain aux obligations contractuelles et, deuxièmement, à empêcher qu'une partie puisse utiliser des éléments de preuve fabriqués ou douteux pour attaquer un contrat écrit (*Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316, p. 341-342, le juge Sopinka).

[60] La règle d'exclusion de la preuve extrinsèque n'interdit pas au tribunal de tenir compte des circonstances entourant le contrat. Cette preuve est compatible avec les objectifs relatifs au caractère définitif et certain puisqu'elle sert d'outil d'interprétation qui vient éclairer le sens des mots du contrat choisis par les parties, et non le changer ou s'y substituer. Les circonstances sont des faits connus

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 (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. I, 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,

ou qui auraient raisonnablement dû l'être des deux parties à la date de signature du contrat ou avant celle-ci; par conséquent, le risque que des éléments d'une fiabilité douteuse soient invoqués ne se pose pas.

[61] Selon une certaine jurisprudence et des auteurs, la règle d'exclusion de la preuve extrinsèque serait un anachronisme ou, à tout le moins, d'application restreinte vu la myriade d'exceptions dont elle est assortie (voir par exemple *Gutierrez c. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), par. 19-20; Hall, p. 53-64). Dans le cadre du présent pourvoi, il suffit de dire que la règle d'exclusion de la preuve extrinsèque ne s'oppose pas à la présentation d'une preuve des circonstances entourant le contrat pour l'interprétation de ce dernier.

d) *Application au présent pourvoi*

[62] En l'espèce, la Cour d'appel a accordé l'autorisation d'appel relativement à la question suivante : [TRADUCTION] « L'arbitre a-t-il commis une erreur de droit en n'interprétant pas l'entente relative aux honoraires d'intermédiation dans son ensemble . . . ? » (d.a., vol. I, p. 62)

[63] Comme nous le verrons, l'obligation d'interpréter le contrat dans son ensemble est une question de droit susceptible, si on pouvait l'isoler, de satisfaire au critère minimal exigé à l'art. 31 de l'*AA*. À mon avis, cette question n'a pas été isolée comme il se doit en l'espèce.

[64] Je reconnais qu'il est un principe fondamental de l'interprétation contractuelle selon lequel le contrat doit être interprété dans son ensemble (McCamus, p. 761-762; Hall, p. 15). Si l'arbitre n'a pas tenu compte de la stipulation relative au « plafond », comme le prétend Creston, il n'a alors pas interprété l'entente dans son ensemble, car il en a négligé une clause précise et pertinente. Voilà une question de droit qui pourrait être isolée de la conclusion mixte de fait et de droit.

[65] Or, il semble que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

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).

En effet, selon la formation de la CA saisie de la demande d'autorisation, l'arbitre a examiné la stipulation, puisqu'elle signale qu'il a envisagé le plafond de 1,5 million $US, un nombre auquel il ne peut être arrivé que s'il a consulté la politique de la Bourse à laquelle renvoie la stipulation relative au « plafond » à l'art. 3.1 de l'entente. À la lumière de ses motifs, j'estime que la formation de la CA saisie de la demande d'autorisation, au lieu de se demander si l'arbitre a négligé la stipulation relative au plafond — ce que Creston prétend devant la Cour —, a axé sa décision sur l'interprétation qu'a donnée l'arbitre de l'art. 3.1 de l'entente, qui contient cette stipulation (par. 25-26). Par exemple, la formation de la CA saisie de la demande d'autorisation s'est dite préoccupée que l'arbitre n'ait pas abordé l'[TRADUCTION] « absurdité » de la variation « considérable » dans la valeur des honoraires selon qu'ils étaient versés en argent ou en actions (par. 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.

[66] Avec tout le respect que je lui dois, j'estime que la formation de la CA saisie de la demande d'autorisation a assimilé à tort l'interprétation de l'art. 3.1 de l'entente à une question de droit. Comme l'explique le juge Armstrong dans la décision de la CS sur l'appel, pour interpréter l'art. 3.1 et tenir compte de la stipulation, il fallait examiner les circonstances pertinentes, y compris le fait que les parties étaient des parties avisées, la fluctuation du cours de l'action et la nature du risque qu'une partie assume quand elle opte pour le versement de ses honoraires en actions plutôt qu'en argent. Un tel exercice soulève une question mixte de fait et de droit. Comme aucune question de droit ne peut être isolée de la question mixte de fait et de droit qui porte sur l'interprétation de l'art. 3.1 et de la stipulation, la Cour d'appel a commis une erreur en accueillant la demande d'autorisation d'appel.

[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

[67] Conclure que la demande d'autorisation d'appel présentée par Creston ne soulevait aucune question de droit suffirait à trancher le présent pourvoi. Toutefois, puisque la Cour a rarement l'occasion de se pencher sur l'appel d'une sentence arbitrale, il est à mon avis utile d'expliquer que même si la formation de la CA saisie de la demande d'autorisation avait conclu à bon droit que l'interprétation de l'art. 3.1 de l'entente constituait une question de

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 (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 *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, 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.

droit, elle devait néanmoins rejeter la demande, car il n'était pas satisfait aux autres volets de l'analyse des demandes d'autorisation que requiert l'al. 31(2)(a) de l'*AA*, qui concernent l'erreur judiciaire et le pouvoir discrétionnaire résiduel.

(4) Le règlement de la question de droit peut permettre d'éviter une erreur judiciaire

a) *L'erreur judiciaire pour l'application de l'al. 31(2)(a) de l'AA*

[68] Une fois qu'il a cerné une question de droit, le tribunal doit être convaincu que le fait de statuer sur cette dernière [TRADUCTION] « peut permettre d'éviter une erreur judiciaire » avant d'accorder l'autorisation d'appel en vertu de l'al. 31(2)(a) de l'*AA*. La première étape de l'analyse consiste donc à définir l'erreur judiciaire pour l'application de cette disposition.

[69] Dans *BCIT*, la juge Saunders traite du critère concernant l'erreur judiciaire prévu à l'al. 31(2)(a). Elle confirme la définition énoncée dans l'affaire *Domtar Inc. c. Belkin Inc*. (1989), 39 B.C.L.R. (2d) 257 (C.A.), selon laquelle l'erreur de droit doit toucher une question importante de sorte qu'une conclusion différente aurait abouti à un résultat différent : [TRADUCTION] « . . . si le point de droit avait été tranché différemment, l'arbitre aurait rendu une décision différente. Autrement dit, l'erreur de droit invoquée a-t-elle eu un effet déterminant sur la décision; touche-t-elle au cœur de la décision? » (*BCIT*, par. 28). Voir également l'arrêt *Quan c. Cusson*, 2009 CSC 62, [2009] 3 R.C.S. 712, où la Cour analyse le critère qui sert à déterminer s'il y a « préjudice grave ou [. . .] erreur judiciaire » dans le contexte des procès civils avec jury (par. 43).

[70] Compte tenu des arrêts *BCIT* et *Quan*, je suis d'avis que, pour que l'erreur de droit reprochée soit une erreur judiciaire au sens où il faut l'entendre pour l'application de l'al. 31(2)(a) de l'*AA*, elle doit se rapporter à une question importante en litige qui, si elle était tranchée différemment, aurait une incidence sur le résultat.

[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, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (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*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible

[71] Suivant cette norme, le règlement d'un point de droit « peut permettre d'éviter une erreur judiciaire » seulement lorsqu'il existe une certaine possibilité que l'appel soit accueilli. Un appel qui est voué à l'échec ne saurait « permettre d'éviter une erreur judiciaire » puisque les possibilités que l'issue d'un tel appel joue sur le résultat final du litige sont nulles.

[72] Ce n'est pas à l'étape de l'autorisation qu'il convient d'examiner exhaustivement le fond du litige et de se prononcer définitivement sur l'absence ou l'existence d'une erreur de droit. Cependant, il faut procéder à un examen préliminaire de la question de droit pour déterminer si l'appel a une chance d'être accueilli et, par conséquent, de modifier le résultat du litige.

[73] Selon l'arrêt *BCIT*, le demandeur doit établir [TRADUCTION] « plus qu'un argument défendable » (par. 30) lors de cet examen préliminaire de l'appel. Pourtant, une fois un argument défendable soulevé, que faudrait-il démontrer de plus pour qu'il soit satisfait à cette norme? Vraisemblablement, le juge saisi de la demande d'autorisation devrait alors examiner les arguments se rapportant à la question de droit soulevée en appel de plus près que ce qui serait indiqué à cette étape pour trouver *plus* qu'un argument défendable. À mon humble avis, exiger un examen plus approfondi du point de droit brouille les rôles respectifs de la formation saisie de la demande d'autorisation et de celle saisie de l'appel.

[74] Selon moi, ce qu'il faut démontrer, pour l'application du par. 31(2), c'est que la question de droit invoquée a un fondement défendable. Ce critère s'applique souvent à l'étape de l'autorisation, pour établir sommairement le bien-fondé de l'appel (voir par exemple *Quick Auto Lease Inc. c. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, par. 5; *R. c. Fedossenko*, 2013 ABCA 164 (CanLII), par. 7). Il est bien connu et a été exprimé de diverses façons : [TRADUCTION] « une possibilité raisonnable d'être accueilli » (*a reasonable prospect of success*) (*Quick Auto Lease*, par. 5; *Enns c. Hansey*, 2013 MBCA 23 (CanLII), par. 2); une « certaine chance de succès » (*some hope of success*) et un « fondement suffisant » (*sufficient merit*) (*R. c. Hubley*, 2009 PECA

argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, 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 (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, 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.

21, 289 Nfld. & P.E.I.R. 174, par. 11); un « argument plausible » (*credible argument*) (*R. c. Will*, 2013 SKCA 4, 405 Sask. R. 270, par. 8). À mon avis, les diverses appellations qui désignent le fondement défendable présentent un élément commun : l'argument soulevé par le demandeur ne peut être rejeté à l'issue d'un examen préliminaire de la question de droit. Pour déterminer s'il faut annuler la sentence arbitrale, un examen approfondi est nécessaire, et c'est au tribunal saisi de l'appel qu'il incombe, une fois l'autorisation accordée.

[75] L'examen visant à décider si la question soulevée dans la demande d'autorisation d'appel a un fondement défendable doit se faire à la lumière de la norme de contrôle applicable à l'analyse du bien-fondé de l'appel. Il faut donc procéder à un examen préliminaire ayant pour objet la norme applicable. Comme nous le verrons, la norme de la décision raisonnable s'appliquera presque toujours aux arbitrages commerciaux régis par l'*AA*, sauf dans les rares circonstances où l'application de la norme de la décision correcte s'imposera, notamment lorsqu'il s'agit d'une question constitutionnelle ou d'une question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d'expertise du décideur administratif. Par conséquent, dans le cadre de l'examen préalable à l'autorisation le tribunal s'interrogera ordinairement quant à savoir si la prétention — selon laquelle la sentence arbitrale sur la question en litige était déraisonnable — a un fondement défendable, compte tenu du fait que le décideur n'est pas tenu de faire référence à tous les arguments, dispositions ou précédents ni de tirer une conclusion précise sur chaque élément constitutif du raisonnement pour que sa décision soit raisonnable (*Newfoundland and Labrador Nurses' Union c. Terre-Neuve-et-Labrador (Conseil du Trésor)*, 2011 CSC 62, [2011] 3 R.C.S. 708, par. 16). Certes, le tribunal saisi de la demande d'autorisation ne procède qu'à un examen préliminaire ayant pour objet la norme de contrôle, qui ne lie pas celui qui se penchera sur le bien-fondé de l'appel. Ainsi, il ne faudrait pas considérer qu'il s'agit d'une invitation à se perdre en analyses ou en arguments poussés à propos de la norme de contrôle à l'étape de la demande d'autorisation.

[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 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

[76] Dans *BCIT*, la juge Saunders s'interroge sur l'étape à laquelle il convient d'examiner le bien-fondé de l'appel dans le cadre de l'analyse requise par l'al. 31(2)(a) de l'*AA*. Contrairement à ce que prétendait une partie, soit que l'évaluation du bien-fondé se rapporte au critère de l'erreur judiciaire, la juge détermine que cet examen se rattache plutôt à l'exercice du pouvoir discrétionnaire. Ses motifs révèlent que sa décision découle de sa volonté d'adopter une approche uniforme à l'égard des al. 31(2)(a), (b) et (c) :

> [TRADUCTION] À quel moment, le cas échéant, faut-il alors examiner le bien-fondé de l'appel? M. Roberts, qui représente l'Association étudiante, prétend qu'il convient de procéder à cet examen lorsqu'on se demande si une erreur judiciaire risque d'être commise, c'est-à-dire, à la deuxième étape. Je ne suis pas d'accord. À mon avis, l'appréciation du bien-fondé ou de l'absence de fondement apparent de l'appel s'inscrit dans l'exercice du pouvoir discrétionnaire résiduel et s'applique également aux trois alinéas, de (*a*) à (*c*). Tout comme un appel manifestement dénué de fondement ne devrait pas être autorisé en vertu de l'al. (*b*) (revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie) ou de l'al. (*c*) (est d'importance publique), un tel appel ne devrait pas non plus être autorisé en vertu de l'al. (*a*). Dans un but d'uniformité à l'égard de l'article entier, l'appréciation du bien-fondé devrait être intégrée à l'exercice du pouvoir discrétionnaire résiduel. [par. 29]

[77] Je reconnais la validité du raisonnement axé sur l'uniformité. Cependant, à mon humble avis, cette volonté d'adopter une démarche semblable au regard des al. 31(2)(a), (b) et (c) ne saurait l'emporter sur le libellé de la disposition. Contrairement aux al. 31(2)(b) et (c), l'al. 31(2)(a) exige que le tribunal détermine si le fait d'autoriser l'appel « peut permettre d'éviter une erreur judiciaire ». J'estime qu'un examen préliminaire de la question de droit s'inscrit implicitement dans l'examen qui vise à déterminer si l'autorisation « peut permettre d'éviter une erreur judiciaire ».

[78] Cependant, lorsqu'il s'agit d'une demande d'autorisation d'appel présentée en vertu des al. 31(2)(b) ou (c) — puisque ces dispositions ne prévoient pas le risque d'erreur judiciaire comme

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

critère —, je souscris aux commentaires formulés par la juge Saunders dans *BCIT* selon lesquels l'examen préliminaire du bien-fondé de la question de droit devrait intervenir à l'étape de l'exercice du pouvoir discrétionnaire résiduel dans l'analyse, puisque l'examen du bien-fondé de l'appel proposé demeure pertinent dans la décision d'accorder ou non l'autorisation d'appel en vertu de l'art. 31.

[79] Bref, afin d'établir que l'intervention du tribunal est justifiée [TRADUCTION] « et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire » pour l'application de l'al. 31(2)(a) de l'*AA*, le demandeur doit prouver que le point de droit en appel aura une incidence sur le résultat final et qu'il est défendable.

b) *Application au présent pourvoi*

[80] La formation de la CA saisie de la demande d'autorisation a conclu à la possibilité d'une erreur de droit par l'arbitre qui n'aurait pas interprété l'entente dans son ensemble et, plus particulièrement, aurait fait fi de la stipulation relative au « plafond ». Admettons cette prétention comme question de droit uniquement pour les besoins de la cause. Le règlement de la question est déterminant parce qu'il pourrait avoir pour effet de modifier la sentence de l'arbitre, lequel a accordé 4,14 millions $ en dommages-intérêts au motif qu'il évaluait à 85 p. 100 la probabilité que la Bourse approuve des honoraires d'intermédiation payés en actions, à raison de 0,15 $ l'unité. Si l'argument invoqué par Creston est correct et que le cours de l'action ne peut s'établir à 0,15 $ en raison de la stipulation relative au « plafond », les dommages-intérêts seraient réduits à 1,5 million $US, une amputation considérable de la somme initiale accordée.

[81] Comme l'al. 31(2)(a) de l'*AA* est la disposition pertinente en l'espèce, il doit être procédé à un examen préliminaire de la question de droit pour déterminer le risque qu'une erreur judiciaire découle du rejet de la demande d'autorisation d'appel présentée par Creston. Cette dernière soutient que le fait que Sattva reçoive un portefeuille d'actions dont la valeur est très supérieure au plafond de 1,5 million $US en exécution de la sentence arbitrale

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.

prouve que l'arbitre n'a pas tenu compte de la stipulation relative au « plafond ».

[82] Or, l'arbitre renvoie effectivement à l'art. 3.1, la stipulation relative au « plafond », à deux reprises dans sa décision, soit aux par. 18 et 23(a). Par exemple, il affirme ce qui suit au par. 23 :

> [TRADUCTION]
>
> Bref, à partir du 27 mars 2007, il était clair et incontestable qu'aux termes de l'entente :
>
> (a) Sattva avait le droit de recevoir des honoraires équivalant au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX – article 3.1. Les parties conviennent que le montant des honoraires s'établit à 1 500 000 $US.
>
> (b) La commission était payable en actions, en fonction du cours, tel qu'il est défini dans l'entente, à moins que Sattva n'opte pour le versement des honoraires en argent ou en argent et en actions.
>
> (c) Le cours de l'action, tel qu'il est défini dans l'entente, s'établissait à 0,15 $. [Je souligne.]

[83] Ainsi, même si l'arbitre n'indique pas expressément avoir examiné le jeu de la stipulation relative au « plafond » et de la définition du cours, cet examen ressort implicitement de sa sentence. La seule clause de l'entente qui prévoit le montant des honoraires, soit 1,5 million $US, est la stipulation relative au « plafond », qui renvoie au point 3.3 de la politique 5.1 de la Bourse. Reconnaissant que le montant des honoraires s'élève à 1,5 million $US, l'arbitre a accordé à Sattva pareille somme, payable en actions, à raison de 0,15 $ l'unité. Contrairement à l'argument avancé par Creston, selon qui l'arbitre aurait négligé la stipulation dans son interprétation de l'entente, il ressort de l'examen préliminaire de la question que l'arbitre a effectivement tenu compte de la stipulation relative au « plafond ».

[84] Par conséquent, même si la Cour d'appel avait cerné à juste titre une question de droit, elle aurait dû rejeter la demande d'autorisation. Il n'était pas satisfait au critère qui exige que le caractère déraisonnable de la sentence arbitrale ait un fondement défendable, ni à celui de l'erreur judiciaire.

(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".

(5) Le pouvoir discrétionnaire résiduel qui habilite à refuser l'autorisation

a) *Éléments à examiner dans l'exercice du pouvoir discrétionnaire résiduel à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a)*

[85] Les tribunaux de la C.-B. ont conclu que les termes [TRADUCTION] « peut accorder l'autorisation » figurant au par. 31(2) de l'*AA* confèrent au tribunal un pouvoir discrétionnaire résiduel qui lui permet de refuser l'autorisation même quand les critères prévus par la disposition sont respectés (*BCIT*, par. 9 et 26). Dans *BCIT*, la juge Saunders énumère des facteurs à considérer dans l'exercice de ce pouvoir discrétionnaire (par. 31) :

1. [TRADUCTION] « le bien-fondé apparent de l'appel »;

2. « l'importance de la question pour les parties, les tiers et la société en général »;

3. « les circonstances qui sont à l'origine du différend et de l'arbitrage, y compris le besoin urgent d'obtenir un règlement définitif »;

4. « d'autres considérations temporelles, y compris la possibilité pour l'une ou l'autre des parties de remédier autrement aux conséquences »;

5. « la conduite des parties »;

6. « l'étape à laquelle la décision qui a été portée en appel avait été prise »;

7. « le respect du choix des parties d'avoir recours à l'arbitrage pour résoudre leurs différends »;

8. « la reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends, spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage ».

[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 v. Lafontaine (Village)*, [1991] 1 S.C.R. 326, at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6, 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

[86] Je conviens avec la juge Saunders pour dire qu'il n'est pas opportun de dresser ce qu'elle appelle une [TRADUCTION] « liste immuable » de facteurs à considérer dans l'exercice du pouvoir discrétionnaire prévu au par. 31(2) (*BCIT*, par. 32). Cependant, je ne peux convenir que tous les facteurs qui figurent sur la liste qu'elle a dressée sont applicables à cette étape de l'analyse.

[87] Dans l'exercice du pouvoir discrétionnaire que lui confère l'al. 31(2)(a) et qui l'habilite à rejeter la demande d'autorisation, le tribunal devrait examiner les motifs traditionnels justifiant le refus d'une réparation discrétionnaire : la conduite des parties, l'existence d'autres recours et tout retard indu (*Immeubles Port Louis Ltée c. Lafontaine (Village)*, [1991] 1 R.C.S. 326, p. 364-367). L'exercice du pouvoir discrétionnaire qui permet de refuser une réparation fait intervenir des considérations relatives à la prépondérance des inconvénients (*Mines Alerte Canada c. Canada (Pêches et Océans)*, 2010 CSC 2, [2010] 1 R.C.S. 6, par. 52). Parmi celles-ci se trouve le besoin urgent d'obtenir un règlement définitif.

[88] Quant aux autres facteurs mentionnés dans la liste et dont je traite successivement ci-après, j'estime qu'ils ont déjà été examinés dans le cadre de l'analyse fondée sur l'al. 31(2)(a) ou qu'il conviendrait mieux de les examiner à un autre volet du critère énoncé au par. 31(2). Une fois examinés, ces facteurs ne devraient pas être réexaminés par le tribunal au moment de l'exercice de son pouvoir discrétionnaire résiduel.

[89] Je le rappelle, dans l'analyse fondée sur l'al. 31(2)(a), il faut procéder à l'examen préliminaire du bien-fondé de la question de droit soulevée dans la demande d'autorisation pour déterminer s'il y a risque d'erreur judiciaire. La question de l'importance pour les parties se règle à l'al. 31(2)(a) : [TRADUCTION] « l'importance de l'issue de l'arbitrage pour les parties ». L'importance de la question pour les tiers et pour la société en général ne doit pas être examinée à l'al. 31(2)(a), car l'*AA* prévoit ces motifs à des dispositions distinctes, soit les al. 31(2)(b) et (c). En outre, le respect du choix des parties d'avoir recours à l'arbitrage sous-tend la loi elle-même, ce dont témoigne le seuil élevé auquel l'autorisation

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

est subordonnée aux termes de l'al. 31(2)(a). La reconnaissance du fait que l'arbitrage constitue souvent un moyen expéditif et définitif de régler les différends et spécialement conçu pour traiter les enjeux susceptibles de toucher les parties à la convention d'arbitrage s'inscrit dans le besoin urgent d'obtenir un règlement définitif.

[90] Quant à l'étape du processus à laquelle la décision dont on veut faire appel a été rendue, ce n'est pas un facteur pertinent pour l'exercice par le tribunal du pouvoir discrétionnaire résiduel conféré par l'al. 31(2)(a) qui lui permet de refuser l'autorisation. Ce facteur a été défini en réponse à des préoccupations selon lesquelles l'autorisation d'appeler d'une décision interlocutoire risque d'être prématurée et d'entraîner des retards indus ainsi qu'une fragmentation inutile du processus judiciaire (D. J. M. Brown et J. M. Evans, avec la collaboration de C. E. Deacon, *Judicial Review of Administrative Action in Canada* (feuilles mobiles), p. 3-67 à 3-76). Or, ces préoccupations auront été dissipées par la formation saisie de la demande d'autorisation lorsqu'elle se sera penchée sur le risque d'erreur judiciaire, et, plus précisément, sur la possibilité que la question interlocutoire ait une incidence sur le résultat final. Ainsi, les préoccupations mentionnées précédemment ne devraient donc pas être réexaminées.

[91] En résumé, une liste non exhaustive des facteurs à prendre en considération dans l'exercice du pouvoir discrétionnaire à l'égard d'une demande d'autorisation présentée en vertu de l'al. 31(2)(a) de l'*AA* comprendrait :

- la conduite des parties;
- l'existence d'autres recours;
- un retard indu;
- le besoin urgent d'obtenir un règlement définitif.

[92] Ces facteurs pourraient, le cas échéant, justifier le rejet de la demande sollicitant l'autorisation d'interjeter appel d'une sentence arbitrale même dans le cas où il est satisfait aux critères prévus à

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. v. Bellusci*, 2012 SCC 44, [2012]

l'al. 31(2)(a). Cependant, les tribunaux devraient faire preuve de prudence dans l'exercice de ce pouvoir discrétionnaire. Après avoir conclu à l'existence d'une erreur de droit et, au moins en ce qui concerne l'al. 31(2)(a), d'un risque d'erreur judiciaire, le tribunal doit soupeser ces facteurs avec soin avant de décider s'il va rejeter ou non pour des motifs discrétionnaires une demande par ailleurs admissible.

b) *Application au présent pourvoi*

[93] Le juge de la CS saisi de la demande d'autorisation a rejeté cette dernière au motif qu'elle ne soulevait aucune question de droit. Il a indiqué que, même s'il avait conclu à l'existence d'une telle question, il aurait refusé l'autorisation en vertu de son pouvoir discrétionnaire résiduel, et ce, pour deux raisons : premièrement, à cause de la conduite de Creston qui a présenté inexactement les faits relatifs aux honoraires d'intermédiation à la Bourse et à Sattva; deuxièmement, [TRADUCTION] « par égard pour le principe selon lequel l'[*AA*] a notamment pour objectif de favoriser et de préserver l'intégrité du système d'arbitrage » (par. 41). La formation de la CA saisie de la demande d'autorisation a écarté la décision de la CS pour ces deux raisons discrétionnaires.

[94] Pour les motifs énoncés précédemment, l'objectif qui vise à favoriser et à préserver l'intégrité du système d'arbitrage ne devrait pas constituer une considération distincte dans l'analyse que requiert l'al. 31(2)(a) préalable à l'exercice du pouvoir discrétionnaire. Bien que le régime instauré par le par. 31(2) reconnaît cet objectif, l'exercice du pouvoir discrétionnaire doit se rapporter aux faits et aux circonstances de l'affaire. Cet objectif général ne fait pas partie des considérations susceptibles de justifier le refus discrétionnaire de l'autorisation.

[95] Toutefois, la conduite des parties est un facteur que le tribunal peut prendre en considération dans l'exercice du pouvoir discrétionnaire résiduel que lui confère l'al. 31(2)(a). La cour d'appel doit faire preuve de déférence lorsqu'elle contrôle la décision discrétionnaire de refuser l'autorisation d'interjeter appel. Elle doit se garder d'intervenir seulement parce qu'elle aurait exercé son pouvoir

2 S.C.R. 509, 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, at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, 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 and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011, 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

discrétionnaire différemment (*R. c. Bellusci*, 2012 CSC 44, [2012] 2 R.C.S. 509, par. 18 et 30). La cour d'appel ne saurait intervenir à l'égard de l'exercice du pouvoir discrétionnaire par le juge de l'instance inférieure que si celui-ci s'est fondé sur des considérations erronées en droit ou si sa décision est erronée au point de créer une injustice (*R. c. Bjelland*, 2009 CSC 38, [2009] 2 R.C.S. 651, par. 15; *R. c. Regan*, 2002 CSC 12, [2002] 1 R.C.S. 297, par. 117).

[96] En l'espèce, la formation de la CS saisie de la demande d'autorisation a fondé sur un facteur reconnu sa décision de refuser la réparation discrétionnaire : l'inconduite de Creston. La formation de la CA saisie de la demande d'autorisation a infirmé cette décision au motif que [TRADUCTION] « ces faits [la conduite de Creston] n'intéressent pas directement la question de droit » soulevée en appel (par. 27).

[97] La formation de la CA saisie de la demande d'autorisation n'a pas expliqué pourquoi l'inconduite doit se rapporter directement à une question de droit pour que l'autorisation soit refusée. Rien dans le par. 31(2) de l'*AA* ne limite l'exercice du pouvoir discrétionnaire du juge saisi de la demande d'autorisation de la façon avancée par la Cour d'appel. Mon interprétation de la jurisprudence ne cadre pas avec le point de vue selon lequel l'inconduite d'une partie doit se rapporter directement à la question devant être tranchée par la cour.

[98] Dans l'arrêt *Homex Realty and Development Co. c. Corporation of the Village of Wyoming*, [1980] 2 R.C.S. 1011, p. 1037-1038, l'inconduite d'une partie ne se rapportait pas directement à la question en cause devant la Cour, mais cette dernière a néanmoins refusé d'accorder la réparation. Le litige tirait son origine d'un désaccord sur la question de savoir si l'acheteur de lots sur un lotissement, Homex, avait assumé les obligations du vendeur prévues à la convention de lotissement, c'est-à-dire de satisfaire à « toutes les exigences, financières ou autres » relativement à l'installation des services d'utilité publique sur un lotissement (p. 1015-1016). La Cour décide qu'Homex n'a pas bénéficié de l'équité procédurale lorsque la municipalité avait adopté un règlement se rapportant au litige (p. 1032). Néanmoins, la demande visant à obtenir l'annulation discrétionnaire du règlement a été rejetée notamment

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

parce que « [t]out au long de ces procédures, Homex a cherché à éviter les obligations qui se rattachent au lotissement des terrains » qu'elle détenait (p. 1037), même si Homex savait, de l'avis de la Cour, qu'elle devait assumer cette obligation (p. 1017-1019). Cette conduite se rapportait, non pas à la question de savoir si le règlement avait été adopté d'une manière équitable sur le plan de la procédure, mais au désaccord à l'origine dulitige. Par conséquent, je crois que l'arrêt *Homex* étaye la proposition selon laquelle une conduite répréhensible se rapportant au différend à l'origine du litige peut justifier le refus de la réparation discrétionnaire sollicitée, en l'occurrence l'autorisation d'interjeter appel.

[99] En l'espèce, l'arbitre a tiré la conclusion de fait suivante : Creston a induit la Bourse et Sattva en erreur en ce qui concerne [TRADUCTION] « la nature de l'obligation qu'elle avait contractée envers Sattva en affirmant que les honoraires d'intermédiation étaient payables en argent » (par. 56(k)). Bien que cette conduite ne soit pas reliée à la question de droit énoncée par la formation de la CA saisie de la demande d'autorisation, elle est reliée à l'arbitrage visant à déterminer le cours de l'action applicable aux fins du versement des honoraires d'intermédiation de Sattva. La Cour suprême pouvait à bon droit fonder sur une telle conduite sa décision de refuser l'autorisation, en vertu de son pouvoir discrétionnaire.

[100] Par conséquent, à mon humble avis, même si la formation de la CA 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 CS saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour.

[101] S'il est vrai que la formation de la CA saisie de la demande d'autorisation a commis une erreur en autorisant l'appel, ces interminables procédures ne s'en trouvent pas moins à l'heure actuelle devant nous. Puisque, par ailleurs, c'est la question de fond de l'appel — soit celle de savoir combien l'entente exige que Creston paie à Sattva — qui intéresse réellement les parties, et que les tribunaux d'instance

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 *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, 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

inférieure ont considérablement divergé d'opinion quant à l'interprétation qu'il faut donner à l'entente, il serait bien peu satisfaisant que le véritable litige à l'origine de cette instance ne soit pas réglé. Je vais donc examiner les trois autres questions soulevées en appel comme si l'autorisation d'interjeter appel avait été accordée à bon droit.

C. *Norme de contrôle applicable aux affaires régies par l'AA*

[102] Abordons les décisions des tribunaux siégeant en appel. Tout d'abord, il est nécessaire de déterminer la norme applicable au contrôle de la sentence arbitrale en fonction de la question à l'égard de laquelle la formation de la CA saisie de la demande d'autorisation a accordé cette dernière : l'arbitre a-t-il interprété la disposition sur les honoraires d'intermédiation à la lumière de l'entente dans son ensemble? Plus particulièrement, l'a-t-il interprétée en tenant compte de la stipulation relative au « plafond »?

[103] D'entrée de jeu, il convient de souligner que l'*Administrative Tribunals Act*, S.B.C. 2004, ch. 45, laquelle prévoit les normes de contrôle applicables aux décisions rendues par de nombreux tribunaux administratifs de la Colombie-Britannique (art. 58 et 59), ne s'applique pas aux arbitrages régis par l'*AA*.

[104] L'examen en appel des sentences arbitrales commerciales s'inscrit dans un régime, strictement défini et adapté aux objectifs de l'arbitrage commercial, qui diffère du contrôle judiciaire d'une décision rendue par un tribunal administratif. Par exemple, la plupart du temps, les parties décident d'un commun accord de soumettre leur différend à l'arbitrage. Il ne s'agit pas d'un processus imposé par la loi. De plus, contrairement à la procédure devant un tribunal administratif, dans le cas d'un arbitrage les parties à la convention choisissent le nombre d'arbitres et l'identité de chacun. Ces différences révèlent que le cadre relatif au contrôle judiciaire établi dans l'arrêt *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, et les arrêts rendus depuis, ne peut être tout à fait transposé dans le contexte de l'arbitrage commercial. Par exemple, l'*AA* interdit

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 *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, 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 (*Alberta Teachers' Association*, 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.

le contrôle des conclusions de fait tirées par l'arbitre. En matière d'arbitrage commercial, une telle disposition est absolue. Suivant le cadre établi dans *Dunsmuir*, l'existence d'une disposition d'inattaquabilité (aussi appelée clause privative) n'empêche pas le tribunal judiciaire de procéder au contrôle d'une décision administrative, elle signale simplement que la déférence est de mise (*Dunsmuir*, par. 31).

[105] Il demeure que le contrôle judiciaire d'une décision rendue par un tribunal administratif et l'appel d'une sentence arbitrale se ressemblent dans une certaine mesure. Dans les deux cas, le tribunal examine la décision rendue par un décideur administratif. En outre, l'expertise constitue un facteur tant en matière de contrôle judiciaire qu'en matière d'arbitrage commercial : quand les parties choisissent leur propre décideur, on peut présumer qu'elles fondent leur choix sur l'expertise de l'arbitre dans le domaine faisant l'objet du litige ou jugent sa compétence acceptable. Pour ces raisons, j'estime que certains éléments du cadre établi dans l'arrêt *Dunsmuir* aident à déterminer le degré de déférence qu'il convient d'accorder aux sentences rendues en matière d'arbitrage commercial.

[106] La jurisprudence depuis l'arrêt *Dunsmuir* vient confirmer qu'il est souvent possible de déterminer la norme de contrôle applicable suivant la nature de la question en litige (voir par exemple *Alberta (Information and Privacy Commissioner) c. Alberta Teachers' Association*, 2011 CSC 61, [2011] 3 R.C.S. 654, par. 44). En matière d'arbitrage commercial, la possibilité d'interjeter appel étant subordonnée à l'existence d'une question de droit, la norme de contrôle est celle de la décision raisonnable, à moins que la question n'appartienne à celles qui entraînent l'application de la norme de la décision correcte, comme les questions constitutionnelles ou les questions de droit qui revêtent une importance capitale pour le système juridique dans son ensemble et qui sont étrangères au domaine d'expertise du décideur (*Alberta Teachers' Association*, par. 30). La question dont nous sommes saisis, à savoir si l'arbitre a interprété l'entente dans son ensemble, n'appartient pas à l'une ou l'autre de ces catégories. Compte tenu des éléments pertinents de l'analyse établie dans l'arrêt *Dunsmuir*, la norme de la décision raisonnable s'applique en l'espèce.

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 *Newfoundland and Labrador Nurses' Union*, 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

D. *L'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble*

[107] Essentiellement pour les mêmes motifs que ceux exprimés par le juge Armstrong aux par. 57-75 de la décision de la CS sur l'appel, je suis d'avis que l'arbitre, en déterminant que Sattva était en droit de recevoir ses honoraires d'intermédiation en actions, à raison de 0,15 $ l'action, a donné une interprétation raisonnable de l'entente considérée dans son ensemble. Le juge Armstrong a contrôlé la décision de l'arbitre selon la norme de la décision correcte, mais ses motifs démontrent amplement le caractère raisonnable de cette décision. L'analyse qui suit est largement fondée sur son raisonnement.

[108] La question que devait trancher l'arbitre portait sur la date qui doit être retenue pour évaluer le cours de l'action aux fins du versement des honoraires d'intermédiation : la date établie selon la définition du cours qui figure dans l'entente ou la date du versement des honoraires d'intermédiation.

[109] L'arbitre a conclu que la valeur calculée selon la définition du cours l'emportait, soit 0,15 $ l'action. Selon lui, tel constat découlait des termes de l'entente et était [TRADUCTION] « clair et incontestable » (par. 23). Apparemment, comme il estimait que ce point était clair, il ne l'a pas motivé abondamment.

[110] Dans l'arrêt *Newfoundland and Labrador Nurses' Union*, la juge Abella cite le professeur David Dyzenhaus pour expliquer que les tribunaux siégeant en révision peuvent compléter les motifs du décideur de première ligne dans le cadre de l'analyse du caractère raisonnable :

> [TRADUCTION] Le « caractère raisonnable » s'entend ici du fait que les motifs étayent, effectivement ou en principe, la conclusion. Autrement dit, même si les motifs qui ont en fait été donnés ne semblent pas tout à fait convenables pour étayer la décision, la cour de justice doit d'abord chercher à les compléter avant de tenter de les contrecarrer. Car s'il est vrai que parmi les motifs pour lesquels il y a lieu de faire preuve de retenue on compte le fait que c'est le tribunal, et non la cour de justice, qui a été désigné comme décideur de

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.]

première ligne, la connaissance directe qu'a le tribunal du différend, son expertise, etc., il est aussi vrai qu'on doit présumer du bien-fondé de sa décision même si ses motifs sont lacunaires à certains égards. [Soulignement ajouté par la juge Abella; par. 12.]

(Citation de D. Dyzenhaus, « The Politics of Deference : Judicial Review and Democracy », dans M. Taggart, dir., *The Province of Administrative Law* (1997), 279, p. 304)

Par conséquent, on peut supposer que l'explication donnée par le juge Armstrong du jeu de la définition du cours et de la stipulation relative au « plafond » complète les motifs de l'arbitre.

[111] Les deux clauses en cause sont la définition du cours et la stipulation relative au « plafond » :

[TRADUCTION]

2. DÉFINITIONS

« cours », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

Et :

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation. [Je souligne.]

[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).

[112] L'article 3.1 de l'entente permet à Sattva de recevoir ses honoraires d'intermédiation en actions en fonction du « cours ». Aux termes de l'art. 2 de l'entente, le cours des titres des sociétés cotées à la Bourse de croissance TSX est égal au « cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition ». En l'espèce, compte tenu de la définition du cours, l'action vaudrait 0,15 $. Le passage « dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation » tiré de l'art. 3.1 de l'entente constitue la stipulation relative au « plafond ». Cette stipulation limite le montant des honoraires d'intermédiation. Le plafond correspond dans le cas qui nous occupe à 1,5 million $US (voir le point 3.3 de la politique 5.1 de la Bourse à l'annexe 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):

[113] La stipulation relative au « plafond » limite le montant des honoraires d'intermédiation, mais elle ne change rien à la définition du cours. Comme l'explique le juge Armstrong, la définition du cours fixe la date à laquelle un moyen de paiement (dollars américains) est converti en un autre (actions) :

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

[TRADUCTION] Le moyen de paiement des honoraires d'intermédiation est clairement établi par l'entente conclue en ce sens. La valeur marchande de ces actions au moment où les parties ont conclu cette entente était inconnue. L'intimée établit une analogie entre le paiement en actions des honoraires d'intermédiation de 1,5 million $US et une entente hypothétique en vertu de laquelle la somme de 1,5 million $US serait convertie en dollars canadiens. Dans les deux cas, les honoraires seraient payés en devises différentes. Le taux de change d'une à l'autre serait fixé à une date précise, tout comme l'est le cours de l'action dans l'entente relative aux honoraires. Ce taux de change permettrait de calculer la somme à verser en dollars canadiens en règlement des honoraires de 1,5 million $US, tout comme le cours permet de déterminer le nombre d'actions cédées en règlement des honoraires. Le dollar canadien est une forme de paiement, au même titre que l'action. Il importe peu que la valeur du dollar canadien augmente ou diminue après la date fixée pour établir le taux de change. Le

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

montant des honoraires payé est toujours égal à 1,5 million $US. Il est converti en un certain nombre de dollars canadiens (ou d'actions) équivalant au montant des honoraires en fonction de la valeur de la devise à la date à laquelle cette valeur est déterminée.

(Décision de la CS sur l'appel, par. 71)

[114] Comme l'explique le juge Armstrong, accepter la position de Creston revient à ne pas tenir compte de la définition du cours et à fixer le cours de l'action en fonction de l'évaluation faite en prévision d'un placement privé.

[115] Cependant, rien dans l'entente n'indique, expressément ou implicitement, qu'il faille réévaluer avant la date du versement des honoraires d'intermédiation la conformité à la stipulation relative au « plafond ». L'entente ne précise pas non plus — ni expressément, ni implicitement — la base sur laquelle il faudrait procéder à une telle réévaluation — en l'occurrence un placement privé. Accepter l'interprétation de Creston reviendrait à faire fi du libellé de l'entente selon lequel les « honoraires d'intermédiation sont versés en actions de la société en fonction du cours ».

[116] La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donne effet à cette dernière et à la stipulation relative au « plafond ». Comme l'explique le juge Armstrong, l'interprétation par l'arbitre de l'entente atteint cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne peut être considérée comme déraisonnable.

[117] Comme l'explique le juge Armstrong, fixer le cours de l'action en avance engendre un risque qui rend le paiement en actions qualitativement différent du paiement en argent. 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

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).

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 Creston et Sattva, des parties avisées, en auraient eu connaissance.

[118] En acceptant un paiement en actions, Sattva acceptait de se soumettre à la volatilité du marché. Si l'action de Creston avait chuté, Sattva aurait tout de même été liée par la valeur déterminée en application de la définition du cours, de sorte qu'elle aurait reçu des actions d'une valeur marchande inférieure au plafond de 1,5 million $US. Il ne serait guère logique d'accepter le risque d'une baisse du cours de l'action sans avoir la possibilité de bénéficier d'une hausse. Pour reprendre les propos du juge Armstrong :

> [TRADUCTION] Il serait contraire aux principes commerciaux reconnus de protéger l'appelante de la hausse du cours de l'action dont bénéficiait l'intimée à la date de versement des honoraires, alors qu'une telle augmentation était prévisible et aurait dû être soulevée par l'appelante, tout comme il serait contraire aux principes commerciaux reconnus, et aux termes de l'entente relative aux honoraires, d'augmenter le nombre d'actions cédées à l'intimée dans le cas où leur valeur aurait baissé par rapport au cours en vigueur à la date du versement des honoraires. Les deux parties ont reconnu, quand elles ont conclu l'entente relative aux honoraires, la possibilité de fluctuation de la valeur de l'action après la définition du cours.

(Décision de la CS sur l'appel, par. 70)

[119] Pour ces raisons, on ne peut prétendre que l'arbitre n'a pas tenu compte de la stipulation de l'entente relative au « plafond ». Le raisonnement de l'arbitre, que le juge Armstrong explique, satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité (*Dunsmuir*, par. 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]

E. *La formation saisie de l'appel n'est pas liée par les observations formulées par la formation saisie de la demande d'autorisation sur le bien-fondé de l'appel*

[120] La Cour d'appel a conclu qu'elle-même et la formation de la CS saisie de l'appel étaient liées par les conclusions tirées par la formation de la CA saisie de la demande d'autorisation en ce qui a trait non seulement à la décision d'autoriser l'appel, mais aussi au bien-fondé de l'appel. Autrement dit, elle a conclu que la formation de la CS saisie de l'appel avait commis une erreur de droit en faisant fi des conclusions de la formation de la CA saisie de la demande d'autorisation quant au bien-fondé de l'appel.

[121] La formation de la CA saisie de l'appel a mis en relief deux conclusions précises quant au bien-fondé de l'appel qui, à son avis, la liaient elle, et aussi la formation de la CS saisie de l'appel : 1º il serait incongru que l'entente permette à Sattva, si elle opte pour le versement de ses honoraires en argent, de toucher 1,5 million $US alors que, si elle opte pour le versement sous forme d'actions, elle recevra un portefeuille valant environ 8 millions $ et 2º l'arbitre n'a pas tenu compte de cette anomalie et a fait fi de l'art. 3.1 de l'entente :

> [TRADUCTION] Le juge [de la CS saisi de l'appel] a conclu que l'arbitre avait expressément tenu compte du plafond des honoraires payables conformément au paragraphe 3.1 de l'entente et que sa sentence était correcte.
>
> Cette conclusion est contraire aux remarques formulées par la juge Newbury dans l'appel antérieur selon lesquelles, si ses honoraires étaient versés en actions, à raison de 0,15 $ l'unité, Sattva obtiendrait des honoraires d'une valeur, à la date du versement des honoraires, de plus de 8 millions $. Si elle optait pour le versement en argent, elle recevrait un montant de 1,5 million $US. La juge Newbury a statué expressément que l'arbitre n'avait pas soulevé cette anomalie et qu'il n'avait pas tenu compte du sens du paragraphe 3.1 de l'entente.
>
> Le juge [de la CS saisi de l'appel] était tenu d'accepter ces conclusions. De même, à défaut d'une décision d'une formation de cinq juges en l'espèce, nous devons aussi accepter ces conclusions. [par. 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, 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, at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii). 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 (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.

[122] Avec tout le respect que je lui dois, j'estime que la formation de la CA 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 CA saisie de la demande d'autorisation la liaient elle, de même que la formation de la CS saisie de l'appel. Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond (*Banque canadienne de l'Ouest c. Alberta*, 2007 CSC 22, [2007] 2 R.C.S. 3, par. 88). Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli (*Pacifica Mortgage Investment Corp. c. Laus Holdings Ltd.*, 2013 BCCA 95, 333 B.C.A.C. 310, par. 27, autorisation d'appel refusée, [2013] 3 R.C.S. viii). Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause, comme c'est le cas en l'espèce. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs (*Tamil Co-operative Homes Inc. c. Arulappah* (2000), 49 O.R. (3d) 566 (C.A.), par. 32).

[123] Creston concède ce point, mais prétend que la conclusion tirée par la formation de la CA saisie de l'appel selon laquelle elle était liée par les conclusions de celle saisie de la demande d'autorisation était sans conséquence parce que la première est arrivée à la même conclusion que la seconde sur le bien-fondé, à l'issue d'un raisonnement distinct et indépendant.

[124] Le fait que la formation de la CA saisie de l'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur. Dès lors que la formation de la CA saisie de l'appel a accordé un caractère obligatoire aux motifs concernant le bien-fondé de l'appel énoncés par celle saisie de la demande d'autorisation, elle ne pouvait guère arriver à une autre décision. Comme le souligne l'avocat de Sattva, considérer comme impérative la décision relative à la demande d'autorisation rendrait l'appel 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.

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

VI. Conclusion

[125] La formation de la CA saisie de la demande d'autorisation a commis une erreur en accordant l'autorisation d'interjeter appel en l'espèce. Quoi qu'il en soit, la sentence arbitrale était raisonnable. L'appel interjeté à l'encontre des décisions de la Cour d'appel de la Colombie-Britannique datées du 14 mai 2010 et du 7 août 2012 est accueilli avec dépens devant toutes les cours. La sentence arbitrale est rétablie.

ANNEXE I

Dispositions pertinentes de l'entente relative aux honoraires d'intermédiation conclue entre Sattva et Creston

a) Définition du « cours » :

[TRADUCTION]

2. DÉFINITIONS

« cours », pour les sociétés dont les titres sont inscrits à la cote de la Bourse de croissance TSX, a le sens qui lui est attribué dans le Guide du financement des sociétés de la Bourse de croissance TSX, c'est-à-dire qu'il s'entend du cours de clôture des actions le dernier jour ouvrable avant la publication du communiqué de presse annonçant l'acquisition. Pour les sociétés cotées à la Bourse TSX, le cours s'entend du cours de clôture moyen des actions de la société à une bourse reconnue cinq jours de bourse avant la publication du communiqué de presse annonçant l'acquisition.

b) Disposition relative aux honoraires d'intermédiation (laquelle contient la stipulation relative au « plafond ») :

[TRADUCTION]

3. HONORAIRES D'INTERMÉDIATION

3.1 . . . la société convient qu'à la conclusion d'une acquisition qui lui a été présentée par l'intermédiaire, elle verse à l'intermédiaire des honoraires (des « honoraires d'intermédiation »), calculés en fonction de la contrepartie versée au vendeur, dont le montant est égal au plafond payable conformément aux règles et politiques

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

de la Bourse de croissance TSX. Ces honoraires d'intermédiation sont versés en actions de la société en fonction du cours ou, au choix de l'intermédiaire, en actions et en argent, dans la mesure où le montant des honoraires n'excède pas le plafond énoncé au point 3.3 de la politique 5.1 de la Bourse — Plafond des honoraires d'intermédiation.

ANNEXE II

Point 3.3 de la politique 5.1 de la Bourse de croissance TSX : Emprunts, primes, honoraires d'intermédiation et commissions

3.3 Plafond des honoraires d'intermédiation

Les honoraires d'intermédiation sont assujettis à un plafond si l'avantage que retire l'émetteur prend la forme d'un achat ou d'une vente d'actifs ou d'une convention de coentreprise, ou si son avantage n'est pas lié à un financement précis. La contrepartie devrait être exprimée à la fois en valeur monétaire et en pourcentage de la valeur de l'avantage reçu. Sauf dans des circonstances exceptionnelles, les honoraires d'intermédiation ne doivent pas dépasser les pourcentages suivants :

Avantage	Honoraires d'intermédiation
300 000 $ et moins	Jusqu'à 10 %
Entre 300 000 $ et 1 000 000 $	Jusqu'à 7,5 %
1 000 000 $ et plus	Jusqu'à 5 %

De façon générale, les honoraires ou la commission, exprimés en pourcentage de la valeur monétaire de l'avantage, devraient être inversement proportionnels à cette valeur.

ANNEXE III

Commercial Arbitration Act, R.S.B.C. 1996, ch. 55 (dans sa version du 12 janvier 2007) (maintenant l'*Arbitration Act*)

[TRADUCTION]

Appel devant le tribunal

31 (1) Une partie à l'arbitrage peut interjeter appel au tribunal sur toute question de droit découlant de la sentence si, selon le cas :

(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.

Appeal allowed with costs throughout.

Solicitors for the appellant: McCarthy Tétrault, Vancouver.

Solicitors for the respondent: Miller Thomson, Vancouver.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitors for the intervener the BCICAC Foundation: Fasken Martineau DuMoulin, Vancouver.

(a) toutes les parties à l'arbitrage y consentent,

(b) le tribunal accorde l'autorisation.

(2) Relativement à une demande d'autorisation présentée en vertu de l'alinéa (1)(b), le tribunal peut accorder l'autorisation s'il estime que, selon le cas :

(a) l'importance de l'issue de l'arbitrage pour les parties justifie son intervention et que le règlement de la question de droit peut permettre d'éviter une erreur judiciaire,

(b) la question de droit revêt de l'importance pour une catégorie ou un groupe de personnes dont le demandeur fait partie,

(c) la question de droit est d'importance publique.

(3) Si le tribunal accorde l'autorisation en vertu du présent article, il peut assortir des conditions qu'il estime équitables l'ordonnance accordant l'autorisation.

(4) En appel, le tribunal peut, selon le cas :

(a) confirmer, modifier ou annuler la sentence,

(b) renvoyer la sentence à l'arbitre avec l'opinion du tribunal sur la question de droit qui a fait l'objet de l'appel.

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs de l'appelante : McCarthy Tétrault, Vancouver.

Procureurs de l'intimée : Miller Thomson, Vancouver.

Procureur de l'intervenant le procureur général de la Colombie-Britannique : Procureur général de la Colombie-Britannique, Victoria.

Procureurs de l'intervenante BCICAC Foundation : Fasken Martineau DuMoulin, Vancouver.

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TAB 9

SCHEDULE B – RELEVANT STATUTES & REGULATIONS

A – Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36.

Leave to appeal
13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs. R.S., 1985, c. C-36, s. 13; 2002, c. 7, s. 134

Court of appeal
14 (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

Practice
(2) All appeals under section 13 shall be regulated as far as possible according to the practice in other cases of the court appealed to, but no appeal shall be entertained unless, within twenty-one days after the rendering of the order or decision being appealed, or within such further time as the court appealed from, or, in Yukon, a judge of the Supreme Court of Canada, allows, the appellant has taken proceedings therein to perfect his or her appeal, and within that time he or she has made a deposit or given sufficient security according to the practice of the court appealed to that he or she will duly prosecute the appeal and pay such costs as may be awarded to the respondent and comply with any terms as to security or otherwise imposed by the judge giving leave to appeal. R.S., 1985, c. C-36, s. 14; 2002, c. 7, s. 135.

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TAB 10

B - Rules of Civil Procedure, R.R.O. 1990, Reg. 194

RULE 57 - COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer;

(h.1) whether a party unreasonably objected to proceeding by telephone conference or video conference under rule 1.08; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1; O. Reg. 689/20, s. 37.

COSTS OF A MOTION

Contested Motion

57.03 (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

(a) fix the costs of the motion and order them to be paid within 30 days;…"

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 14487893 CANADA INC.

Court of Appeal Fil No. COA-24-OM-0342
Court File No. CV-21-00658423-00CL

COURT OF APPEAL FOR ONTARIO
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

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