

Hfx No. 45461
Estate No. 51-2939212

Supreme Court of Nova Scotia
In Bankruptcy and Insolvency

**IN THE MATTER OF THE BANKRUPTCY OF ATLANTIC SEA
CUCUMBER LTD.**

POST-HEARING AUTHORITIES OF ATLANTIC GOLDEN AGE HOLDING INC.

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I N D E X

TAB	DOCUMENT	PAGE
1	<i>Sattva Capital Corp. v. Creston Moly Corp.</i> , 2014 SCC 53	
2	<i>Elias et al v. Western Financial Group Inc.</i> , 2017 MBCA 110	

**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*

**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.

**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

**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*

**RÉPERTORIÉ : SATTVA CAPITAL CORP. c. CRESTON
MOLY CORP.**

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1^{er} août.

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

**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 relative 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.

Cases Cited

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

Arrêts mentionnés : *British Columbia Institute of Technology (Student Assn.) c. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122; *King c. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80, 270 Man. R. (2d) 63; *Thorner c. Major*, [2009] UKHL 18, [2009] 3 All E.R. 945; *Prenn c. Simmonds*, [1971] 3 All E.R. 237; *Reardon Smith Line Ltd. c. Hansen-Tangen*, [1976] 3 All E.R. 570; *Jiro Enterprises Ltd. c. Spencer*, 2008 ABCA 87 (CanLII); *QK Investments Inc. c. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84; *Dow Chemical Canada Inc. c. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221; *Canada c. Costco Wholesale Canada Ltd.*, 2012 CAF 160 (CanLII); *WCI Waste Conversion Inc. c. ADI International Inc.*, 2011 PECA 14, 309

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.

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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.

TABLE OF CONTENTS

	Paragraph
I. Facts.....	2
II. Arbitral Award	11
III. Judicial History.....	19
A. <i>British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079</i>	19
B. <i>British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239</i>	21
C. <i>British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597</i>	23
D. <i>British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329</i>	28
IV. Issues	31
V. Analysis	32
A. <i>The Leave Issue Is Properly Before This Court</i>	32
B. <i>The CA Leave Court Erred in Granting Leave Under Section 31(2) of the AA</i>	38
(1) Considerations Relevant to Granting or Denying Leave to Appeal Under the AA	38
(2) The Result Is Important to the Parties	41

TABLE DES MATIÈRES

	Paragraphe
I. Faits	2
II. Sentence arbitrale	11
III. Historique judiciaire	19
A. <i>Cour suprême de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2009 BCSC 1079</i>	19
B. <i>Cour d'appel de la Colombie-Britannique — décision sur la demande d'autorisation d'appel, 2010 BCCA 239</i>	21
C. <i>Cour suprême de la Colombie-Britannique — décision sur l'appel, 2011 BCSC 597</i>	23
D. <i>Cour d'appel de la Colombie-Britannique — décision sur l'appel, 2012 BCCA 329</i>	28
IV. Questions en litige	31
V. Analyse	32
A. <i>Notre Cour est saisie à bon droit de la question de l'autorisation</i>	32
B. <i>La Cour d'appel a commis une erreur en autorisant l'appel en vertu du par. 31(2) de l'AA</i>	38
(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
(2) L'issue est importante pour les parties ...	41

(3) The Question Under Appeal Is Not a Question of Law42	(3) La question soulevée n'est pas une question de droit42
(a) <i>When Is Contractual Interpretation a Question of Law?</i>42	a) <i>Dans quelles circonstances l'interprétation contractuelle est-elle une question de droit?</i>42
(b) <i>The Role and Nature of the "Surrounding Circumstances"</i>56	b) <i>Le rôle et la nature des « circonstances »</i>56
(c) <i>Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule</i>59	c) <i>Tenir compte des circonstances n'est pas contraire à la règle d'exclusion de la preuve extrinsèque</i>59
(d) <i>Application to the Present Case</i>62	d) <i>Application au présent pourvoi</i>62
(4) May Prevent a Miscarriage of Justice68	(4) Le règlement de la question de droit peut permettre d'éviter une erreur judiciaire68
(a) <i>Miscarriage of Justice for the Purposes of Section 31(2)(a) of the AA</i>68	a) <i>L'erreur judiciaire pour l'application de l'al. 31(2)(a) de l'AA</i>68
(b) <i>Application to the Present Case</i>80	b) <i>Application au présent pourvoi</i>80
(5) Residual Discretion to Deny Leave.....85	(5) Le pouvoir discrétionnaire résiduel qui habilite à refuser l'autorisation.....85
(a) <i>Considerations in Exercising Residual Discretion in a Section 31(2)(a) Leave Application</i>85	a) <i>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)</i>85
(b) <i>Application to the Present Case</i>93	b) <i>Application au présent pourvoi</i>93
C. <i>Standard of Review Under the AA</i>102	C. <i>Norme de contrôle applicable aux affaires régies par l'AA</i>102
D. <i>The Arbitrator Reasonably Construed the Agreement as a Whole</i>107	D. <i>L'arbitre a donné une interprétation raisonnable de l'entente considérée dans son ensemble</i>107

E. <i>Appeal Courts Are Not Bound by Comments on the Merits of the Appeal Made by Leave Courts</i>	120
--	-----

VI. Conclusion.....	125
---------------------	-----

APPENDIX I

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

APPENDIX II

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

APPENDIX III

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

The judgment of the Court was delivered by

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

I. Facts

[2] The issues in this case arise out of the obligation of Creston Moly Corporation (formerly Georgia Ventures Inc.) to pay a finder's fee to Sattva Capital

E. <i>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</i>	120
--	-----

VI. Conclusion.....	125
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ANNEXE I

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

ANNEXE II

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

ANNEXE III

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

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 arrondi 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 : 1^o 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 2^o 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 :

- | | |
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| <p>(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?</p> <p>(b) Did the CA Leave Court err in granting leave under s. 31(2) of the AA?</p> <p>(c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the AA?</p> <p>(d) Did the arbitrator reasonably construe the Agreement as a whole?</p> <p>(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?</p> | <p>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?</p> <p>b) La Cour d’appel a-t-elle commis une erreur en autorisant l’appel en vertu du par. 31(2) de l’AA?</p> <p>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?</p> <p>d) L’arbitre a-t-il donné une interprétation raisonnable de l’entente dans son ensemble?</p> <p>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?</p> |
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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.

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* (5^e éd. 2011 et suppl. 2013), p. 173-176; G. R. Hall, *Canadian Contractual Interpretation Law* (2^e 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 *Rear-don 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.); *Rear-don 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 délaissé 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* (2^e 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.

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

[56] I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the *Civil Code of Québec*.

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

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

[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] 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] 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).

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

[67] The conclusion that Creston’s application for leave to appeal raised no question of law would be sufficient to dispose of this appeal. However, as this Court rarely has the opportunity to address appeals of arbitral awards, it is, in my view, useful to explain that, even had the CA Leave Court been correct in finding that construction of s. 3.1 of the Agreement constituted a question of law, it should have nonetheless denied leave to appeal as the

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] 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] 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 habilité à refuser l’autorisationa) *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

discretionnaire 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 du litige. 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 étaient, 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).

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

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

[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] 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) :

[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 : 1^o 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 2^o 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.

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Holly C. Beard
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

ARTHUR ELIAS, JACK ELIAS and	)	
DOUGLAS SIGURDSON as Trustees	)	L. W. Bowles and
of The Elias Family Trust, and ROSSANO	)	K. L. Dixon
D’ASCANIO, PATRIZIA D’ASCANIO	)	for the Appellant
and ALESSANDRA RESCINITI as	)	
Trustees of The D’Ascanio Family Trust	)	S. F. Vincent and
	)	J. A. Baigrie
(Plaintiffs) Respondents	)	for the Respondents
	)	
- and -	)	Appeal heard:
	)	June 12 and 13, 2017
WESTERN FINANCIAL GROUP INC.	)	
	)	Judgment delivered:
(Defendant) Appellant	)	November 15, 2017

On appeal from 2016 MBQB 75

PFUETZNER JA

[1] This appeal raises issues involving contractual interpretation and the application of the doctrine of rectification in the context of a commercial transaction between sophisticated parties with equal bargaining power, both represented by experienced counsel.

Introduction

[2] The plaintiffs were owners of a successful insurance brokerage, Hayhurst Elias Dudek Inc. (HED). In 2006, the defendant began a process of buying out the plaintiffs by purchasing shares in HED in multiple tranches. After the initial share purchase was completed in 2006, the parties entered into a unanimous shareholders agreement (the USA) to govern their future relationship as shareholders. The USA outlined “put” and “call” rights, among other things. By 2009, the defendant owned all the shares in HED. A series of contracts memorialized the agreements reached by the parties in respect of the sale of each tranche of shares to the defendant. The contracts each contained a valuation formula for the tranche of shares that were the subject of that contract. In each of the contracts, the initial purchase price of the shares was calculated using a set formula. The contracts further provided for the shares to be re-valued as of set dates in the future, with any increase in value being paid to the plaintiffs. These purchase price adjustments were referred to by the parties as “bumps”.

[3] In 2010, after the plaintiffs had sold all their shares to the defendant, a dispute arose between the parties as to the calculation of the final bumps. The plaintiffs claimed that they had mistakenly agreed to an incorrect valuation formula in the share purchase agreements that dealt with the sale of shares in 2008 and 2009, as a result of which they were underpaid for their shares. The trial judge agreed with the plaintiffs. He ordered rectification of the 2008 share purchase agreement (the 2008 SPA); found that the defendant had breached both the 2008 SPA and the 2009 share purchase agreement (the 2009 SPA); and awarded damages of \$10,704,227 and pre-judgment and post-judgment interest at the pre-judgment rate.

[4] The defendant appeals the award of damages. The plaintiffs cross

appeal the trial judge's finding that there was no agreement between the parties that the defendant would pay interest at 12 per cent per annum on the award of damages.

[5] For the reasons that follow, I would allow the appeal because the trial judge made two reversible errors. The first was in ordering rectification of the 2008 SPA based on too expansive an approach to the doctrine of rectification which was not available on the facts. The other error was in his construction of the 2008 SPA and the 2009 SPA. As a result, the cross appeal is moot and I would dismiss it.

Background

[6] Prior to the defendant acquiring shares in HED, HED was co-owned by VenGrowth Investment Fund Inc., VenGrowth II Investment Fund Inc. (together, VenGrowth) and the plaintiffs. VenGrowth owned 10% of the issued and outstanding common shares in HED (the shares). The plaintiffs, Arthur Elias (Elias), Jack Elias and Douglas Sigurdson (Sigurdson), as trustees of the Elias Family Trust (the Elias Trust), owned 70.6% of the shares. The plaintiffs, Rossano D'Ascanio (D'Ascanio), Patrizia D'Ascanio and Alessandra Resciniti, as trustees of the D'Ascanio Family Trust (the D'Ascanio Trust), owned 19.4% of the shares.

[7] In 2006, the defendant agreed to acquire 11% of the shares by purchasing all of VenGrowth's 10% interest and purchasing a further 1% interest from the D'Ascanio Trust. This transaction was effected by way of a share purchase agreement (the 2006 SPA). At the same time, HED issued 1,783.705 new shares from treasury to the defendant pursuant to a subscription agreement (the 2006 SA). The defendant paid the sum of

\$3,376,294, being the subscription price for those shares, to HED which HED used to pay down debt.

[8] In 2008, the Elias Trust and the D'Ascanio Trust served the defendant with notice that they intended to exercise their put rights and wished to sell to the defendant shares representing 24% of the issued and outstanding shares in HED. The plaintiffs had Roger Ranieri (Ranieri), the COO of HED, prepare an initial calculation of the purchase price for the shares on their behalf that they sent to the defendant. The calculation was later incorporated, along with other terms, into the 2008 SPA.

[9] In 2009, the defendant advised the plaintiffs that it was in a financial position to purchase the balance of the plaintiffs' shares. Accordingly, the Elias Trust and the D'Ascanio Trust served the defendant with notices that they intended to exercise their put rights and wished to sell to the defendant their remaining shares representing 51% of the issued and outstanding shares in HED. Again, Ranieri prepared an initial purchase price calculation on behalf of the plaintiffs which was incorporated, with other terms, into the 2009 SPA.

[10] Each of the 2006 SPA, the 2008 SPA and the 2009 SPA sets out as a specific dollar amount the purchase price for the shares subject to each respective agreement. Each agreement also incorporated a schedule setting out the valuation formula and calculation upon which the purchase price was based. The schedule included both a written valuation formula and a numerical calculation, the latter of which had been prepared by the plaintiffs. The written valuation formula included in each agreement was, in all essential terms, identical. It also accorded to the formula incorporated into

the USA as Schedule C which the parties intended to apply to the valuation of shares on a future transaction. In fact, the 2009 SPA incorporates, by reference, the formula contained in Schedule C to the USA rather than setting out a written valuation formula. Simplified, the valuation formula is 6.5 times EBITDA (earnings before interest, income taxes, depreciation and amortization), minus debt, plus (or minus) working capital.

[11] Even though the 2006 SPA, the 2008 SPA and the 2009 SPA specified the exact purchase price to be paid on closing for the shares, the valuation formula and calculations are central to this appeal. This is because the same valuation formula and calculations were used to calculate the value of the shares at various times after closing in order to determine the purchase price adjustments (bumps).

[12] Each of the 2006 SA, the 2006 SPA, the 2008 SPA and the 2009 SPA provides the manner by which the bumps would be calculated and, if applicable, paid by the defendant to the plaintiffs. The general concept was that the shares would be re-valued at the bump date using the same formula as was used to determine the initial purchase price. The defendant would pay an amount to the plaintiffs equal to any increase in the value of the shares. Essentially, the parties agreed that the plaintiffs would, over a fixed period of time, benefit from any increase in value of HED due to its earnings increasing, to the exclusion of the defendant.

[13] Since the bumps were meant to reflect increases in the value of HED due to an increase in its earnings, the agreements also incorporated a concept of deducting from the valuation formula any increases in the value of HED derived from equity contributed to HED by a shareholder or other

person. This could occur, for example, if new shares were issued from treasury. The provisions in the agreements that set out the manner in which adjustments to the valuation formula were to be made in respect of equity injections varied slightly. The construction and effect of these provisions was a central issue at trial. The terms of these provisions will be reviewed in detail later on.

[14] The defendant's position is that the equity that was injected into HED in 2006 when it paid \$3,376,294 (the 2006 equity) for treasury shares under the 2006 SA was to be deducted from all future valuations of HED. In fact, this is what occurred. When the plaintiffs exercised their put rights in 2008 and 2009 and provided the defendant with Ranieri's purchase price calculations, those calculations deducted the 2006 equity. The 2008 calculation shows the deduction of the sum of \$3,376,294 as a separate-line item referred to as "Less: Nov 2006 WFG equity injection". The 2009 calculation deducts the 2006 equity as adjusted by the payment of a bump calculated in 2007. Accordingly, the 2009 calculation shows the deduction of the sum of \$6,994,706 as a separate-line item with the notations "Less: WFG equity injections -6,994,706 (2006 Sale and 2007 Bump)". The calculations were ultimately incorporated into the 2008 SPA and the 2009 SPA respectively. The valuation calculations for the subsequent bumps also deducted the 2006 equity. This had the effect of ultimately reducing the amounts received by the plaintiffs under the 2008 SPA and the 2009 SPA.

[15] The plaintiffs' position is that the 2006 equity was deducted by mistake in all of these calculations. The plaintiffs say that the 2006 equity was only to be deducted in calculating the bumps payable to VenGrowth and the D'Ascanio Trust on the shares they sold to the defendant under the 2006

SPA. The plaintiffs say that the rationale for this is that these shareholders sold their shares on the same day that the defendant injected the 2006 equity. Accordingly, they have no interest in the 2006 equity and the bumps payable to these shareholders should be calculated without reference to the 2006 equity. In order to incorporate this concept, section 2.7 of the 2006 SPA reads, in part:

2.7 **Adjustments in respect of equity injections.**
Notwithstanding anything else in this Article 2, it is agreed that in calculating the . . . **Bump Calculations:**

- (a) there shall be excluded from the appropriate part(s) of each Bump Calculation (EBITDA formula, working capital, debt and/or book value components of such calculation, as applicable), any equity contribution or injection made by any shareholder or any other person on or subsequent to the Closing Date including, without limitation (and for greater certainty) the Subscription Price of the Shares subscribed for by the Purchaser pursuant to the Subscription Agreement (which amount is acknowledged to be \$3,376,294, paid to the Corporation), plus any price adjustments to such Subscription Price paid to the Corporation.

[16] The plaintiffs argue that the same rationale does not apply to the 2008 SPA and the 2009 SPA which were entered into subsequent to the 2006 transactions. After the 2006 transactions, the plaintiffs owned 75% of the shares and, thus, effectively had an interest in 75% of HED's net assets which, at this point, included the 2006 equity initially funded by the defendant which had been put to use in the business. As a result, the plaintiffs say there was no rationale to deduct the 2006 equity from any calculations involving the plaintiffs' 75% shareholding. To do so unfairly resulted in them being deprived of their 75% interest in the 2006 equity and

the earnings on that 2006 equity.

[17] Another way of stating the plaintiffs' concern is that, each time they sold shares in 2008 and 2009, the shares were undervalued. This occurred when the initial purchase prices were calculated and when the subsequent revaluations were done to determine the bump payments on those shares. As previously noted, the valuation formula for HED set out in the 2008 SPA and the 2009 SPA is 6.5 times EBITDA, minus debt, plus (or minus) working capital. Each time they prepared the HED valuation calculations, the plaintiffs deducted the 2006 equity.

[18] The formula also contained a method of determining the purchase price payable to each of the vendors in respect of their shares. The price per share for each vendor was calculated by dividing the HED valuation by the total number of issued and outstanding shares. The unfairness alleged by the plaintiffs arises because the 2006 equity of \$3,376,294 (as adjusted) was *deducted* from the HED valuation, yet in determining the value or price for each of the vendors' shares, the HED valuation was divided by the *total* number of issued and outstanding shares, *including* the 1,783.705 shares issued to the defendant under the 2006 SA in exchange for its payment of the 2006 equity.

[19] In support of their position, the plaintiffs point to a provision in Article 9 of the USA dealing with the valuation of HED shares on a future purchase and sale. Section 9.06(b) makes no mention of deducting the 2006 equity and states (in part):

9.06 **Adjustments for Equity Injections.** Notwithstanding anything else in this Article 9, it is agreed that in calculating the . . . **Bump Calculations:**

- (b) there shall be excluded from the appropriate part(s) of each Bump Calculation (EBITDA formula, working capital, debt and/or book value components of such calculation, as applicable), any equity contribution or injection made by any shareholder or any other person on or subsequent to the Closing Date of the purchase and sale of the . . . Shares in respect of which the adjustment is to be made.

[20] However, in contrast to the plaintiffs' assertion that the 2006 equity was not to be deducted in valuations relating to any later share sales, the 2008 SPA contained a provision which specifically directed that the 2006 equity be deducted in calculating the bumps on the tranche of shares sold under the 2008 SPA. The relevant section of the 2008 SPA states (in part):

2.6 Adjustments in respect of equity injections.

Notwithstanding anything else in this Article 2, it is agreed that in calculating the [bumps]:

- (a) there shall be excluded from the appropriate part(s) of each [bump] Calculation (EBITDA formula, working capital, debt and/or book value components of such calculation, as applicable), any equity contribution or injection made by any shareholder or any other person on or subsequent to the Closing Date including, without limitation (and for greater certainty) the Subscription Price of the Shares subscribed for by the Purchaser pursuant to the Share Subscription Agreement (which amount is acknowledged to be \$3,376,294, paid to the Corporation), plus any price adjustments to such Subscription Price paid to the Corporation.

[21] The 2009 SPA dealt with the deduction of equity injections in more general terms in section 2.9 as follows (in part):

2.9 Adjustments in respect of equity injections.

Notwithstanding anything else in this Article 2, it is agreed that in calculating the [bumps]:

- (a) there shall be excluded from the appropriate part(s) of each [bump] Calculation (EBITDA formula, working capital, debt and/or book value components of such calculation, as applicable), any equity contribution or injection made by any shareholder or any other person on or subsequent to the Closing Date.

[22] In summary, the 2006 SPA and the 2008 SPA specifically refer to the deduction of the 2006 equity in calculating bumps payable on the shares dealt with under those contracts. In addition, those contracts provide for the deduction of any other equity injected into HED between the closing date of the sale of that tranche of shares (in the 2008 SPA, the term “Closing Date” is defined as May 30, 2008) and the payment of the bump. The 2009 SPA does not refer to the 2006 equity but only refers to the deduction of equity injected into HED between the closing date of the sale of that tranche of shares (defined as October 1, 2009) and the payment of the bump on those shares.

[23] The 2008 SPA, the 2009 SPA, the valuation formula, the valuation calculations and the bump calculations were reviewed by numerous people, including the parties and their advisors, accountants and lawyers. Moreover, the valuation calculations were prepared on behalf of the plaintiffs and presented by them to the defendant. During the negotiation of the 2009 SPA, the plaintiffs harboured concerns about the deduction of the 2006 equity but remained silent. The plaintiffs did not voice any concerns regarding their valuation calculations to the defendants until 2010, when the final bump payments were calculated. It was only then, months after the

plaintiffs had sold their final tranche of shares, that they emerged from the weeds, claiming that there had been a mistake.

[24] However, the question of whether the arrangements made by the parties were, on a macro level, fair to the plaintiffs is not the issue on this appeal. The issue is whether the defendant should bear legal responsibility for the plaintiffs having repeatedly agreed to a formula that the plaintiffs themselves proposed but which they now say undervalued their shares.

The Trial Judge's Decision

[25] In lengthy reasons, the trial judge made several important findings of fact.

[26] Sigurdson, the lawyer who advised the plaintiffs throughout these transactions, said he made a mistake when he copied the equity injection clause at section 2.7 of the 2006 SPA directly into the 2008 SPA as section 2.6(a). Sigurdson felt that he should have used an equity injection clause in the 2008 SPA based instead on section 9.06(b) of the USA which makes no reference at all to the 2006 equity. Sigurdson also admitted to having given incorrect advice to his clients. In 2008, the plaintiffs believed that section 2.6(a) of the 2008 SPA followed the wording of section 9.06(b) of the USA based on Sigurdson's advice to them.

[27] Both Elias and D'Ascanio reviewed the 2008 SPA before signing it and assumed that the equity injection clause (section 2.6(a)) was appropriate based on Sigurdson's advice. Elias reviewed the calculations attached to the 2008 SPA, was aware of the deduction of the 2006 equity and assumed it to be correct.

[28] The trial judge accepted the evidence of Elias, Sigurdson and D'Ascanio. The trial judge put little weight on the evidence of Ranieri or that of the defendant's witnesses, Scott Tannas (Tannas) and Thomas Dutton (Dutton), who testified that they always intended for the 2006 equity to be deducted under the 2008 SPA and the 2009 SPA.

[29] In August of 2009, Elias exchanged emails with Ranieri, D'Ascanio and Sigurdson in which he raised the issue of whether it was correct for the 2006 equity to be deducted from the valuations of HED that were being calculated by Ranieri for the purposes of the purchase price under the 2009 SPA and the 2009 bumps under the other agreements. Ranieri replied, "I believe it is provided for otherwise we wouldn't be doing it. Don't think this is a door to be opened at this time." Sigurdson confirmed this and added:

[E]ssentially [the defendant] does not want to pay on the Bump payments based upon money they have injected as equity (they will pay on earnings increase, but not on cash increase where they were the source of the cash). Specifically, section 9.06 of the USA is below (and similar clauses are found in each subscription and purchase agreement) (and the reference to equity injection by a shareholder is really just a reference to [the defendant]).

[30] The plaintiffs proceeded to negotiate and finalize the 2009 SPA fully knowing that the 2006 equity was being deducted from the valuations of HED, as had been done with all prior valuations. Indeed, one of the schedules to the 2009 SPA was a calculation of the estimated bump payable under that agreement as of December 31, 2009. The calculation showed the deduction of the 2006 equity as adjusted by the 2007 and 2008 bumps on the subscription shares.

[31] The trial judge analyzed the plaintiffs' claim by focussing first on the USA. In construing section 9.06(b) of the USA (adjustments for equity injections), the trial judge considered the terms of the 2006 SPA and the 2006 SA which had been signed a few days prior to the USA. The trial judge compared the wording of section 2.7(a) of the 2006 SPA, section 3.2(a) of the 2006 SA and section 9.06(b) of the USA and concluded (at para 188):

While I find there to be a significant distinction in the [equity injection adjustment] clause of the USA as compared to the [equity injection adjustment] clauses in the [2006] SPA and [2006] SA, I cannot say that the meaning of each of those three [equity injection adjustment] clauses is clear and unambiguous. I therefore find that consideration of the circumstances surrounding the preparation and execution of the USA is warranted.

[32] The trial judge, quoting from *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, instructed himself "to consider only the 'objective evidence of the background facts at the time of the execution of the contract,' which consists of 'knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting'" (at para 189).

[33] The trial judge proceeded to consider, in detail, a series of emails between the parties' lawyers (Sigurdson on behalf of the plaintiffs and Jody Langan for the defendant) and the defendant's financial advisor (Craig Eckart) in the days leading up to the execution of the USA in which they exchanged and discussed drafts of the USA. In particular, the trial judge considered email discussions regarding prior versions of what became section 9.06(b) in the USA. The trial judge concluded (at para 198):

[B]oth Eckart and Langhan clearly demonstrate in their emails that the wording of the [equity injection adjustment] clause in the USA was to be different from the [equity injection adjustment] clauses in the [2006] SPA and the [2006] SA in that the deduction would apply only to new equity injected between the time of future share purchases and the time of the associated bumps on those purchases.

[34] The trial judge then considered the testimony of people involved in the transactions (including Tannas, Dutton, Ranieri, Elias and D'Ascanio) as to their subjective understanding of the meaning of equity injection adjustment clauses in the 2006 SPA, the 2006 SA and the USA. He rejected the evidence of Tannas, Dutton and Ranieri and accepted that of Elias and D'Ascanio. He concluded (at para 207):

I accept the plaintiffs' interpretation of s. 9.06(b) of the USA in finding that the deduction of the adjusted subscription price was to apply only to new equity injected between the time of future share purchases and the time of the associated bumps on those purchases.

[35] As will become clear, the trial judge's construction of section 9.06(b) of the USA had two aspects. First, as noted in his comments above, he found that section 9.06(b) provides that equity injected into HED between the date of a future share sale and the calculation of a bump on those shares will be deducted in calculating the bump. Second, the trial judge found that the section included a corollary of sorts: it *prohibits* the deduction of any other equity injected into HED on the calculation of future share sales or bumps (in particular, the 2006 equity) and, in effect, it prohibits the parties from agreeing to new terms for any future sale of shares by way of separately negotiated share purchase agreements.

[36] In analyzing whether the plaintiffs had made out a case for rectification of the 2008 SPA on the basis of mistake, the trial judge considered the defendant's argument that the 2008 SPA and 2009 SPA (both of which, to the knowledge of the plaintiffs, provided for deduction of the 2006 equity) were new, stand-alone agreements that had been extensively negotiated.

[37] The trial judge concluded (at paras 223-24):

[T]he plaintiffs offered their shares for sale pursuant to the provisions of the USA, and I find that the parties intended those provisions to apply. In fact, for whatever reason, the [equity injection adjustment] clause in the 2009 SPA conformed with the [equity injection adjustment] clause in the USA. However, the valuation calculations did not follow those provisions and deducted the adjusted subscription price, as had been done pursuant to the 2008 SPA. I find that the deduction constituted a breach of the [equity injection adjustment] clause in the 2009 SPA.

As with the 2008 SPA, I find that the 2009 SPA was not intended to be a "stand-alone" agreement and that the relevant provisions of the USA were applicable.

[emphasis added]

[38] The USA contains an "entire agreement" clause in section 12.04; the 2008 SPA contains one in section 1.4; and the 2009 SPA contains one in section 1.4. These clauses essentially state the parties' intention that the written document executed by them will constitute the entire agreement between the parties and that extrinsic, parol evidence outside of the written document is irrelevant. Although the 2008 SPA made specific reference to the continuing existence of the USA, the USA was not carved out of the "entire agreement" clause in the 2009 SPA.

[39] The trial judge reviewed the law on the equitable doctrine of rectification, including *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd*, 2002 SCC 19; *Shafron v KRG Insurance Brokers (Western) Inc*, 2009 SCC 6; and *McLean v McLean*, 2013 ONCA 788. The trial judge did not have the benefit of *Canada (Attorney General) v Fairmont Hotels Inc*, 2016 SCC 56 (*Fairmont*), which was released after he had rendered his decision.

[40] He stated the law with reference to *McLean* (at para 231):

In *McLean*, the court described rectification as being an equitable remedy dependent on the trial judge's exercise of discretion. It set out the following three conditions that must be established for the equitable remedy of rectification to be granted (at para. 45):

. (1) that the parties had a common continuing intention prior to the making of the document alleged to be deficient; (2) that that intention remained unchanged or existed at the time when the document sought to be rectified was signed; and (3) by mistake, the parties signed a document that did not accurately reflect their common intention

[41] The trial judge recited the direction in *McLean* that, in determining if a common continuing intention exists, the Court must consider the totality of the evidence, including “the testimony of a party as to what he or she understood the terms to be. The weight of this testimonial evidence will vary depending on the documentary and other evidence available” (at para 233).

[42] The trial judge found that, prior to making the USA, the parties had a common continuing intention to deduct the 2006 equity only with respect to the 2006 SA and the 2006 SPA. He also found that the common intention

remained unchanged leading up to, and at the time of, the signing of the 2008 SPA.

[43] In coming to his conclusion, the trial judge considered and weighed the following evidence (see para 235): the evidence of Tannas, Dutton and the plaintiffs' witnesses regarding their subjective understanding of the issue of the deduction of the 2006 equity in the 2008 SPA and the 2009 SPA (the trial judge gave little weight to the evidence of Tannas and Dutton); the exchange of emails immediately preceding the completion of the final draft of the USA in 2006; the put notices in 2008 and 2009 referred to the USA; and the evidence of Sigurdson that the "incorrect" equity injection adjustment clause was inserted into the 2008 SPA by "mistake".

[44] Accordingly, the trial judge concluded that the plaintiffs had met their case on a balance of probabilities that "rectification of the 2008 SPA is justified" (at para 236) and he ordered that the equity injection adjustment clause, section 2.6(a) of the 2008 SPA, be rectified by deleting the specific reference to the 2006 equity.

[45] As previously noted, the trial judge found that the deduction of the 2006 equity in the valuation calculations performed under the 2009 SPA was a breach of the 2009 SPA. Similarly, he concluded that the valuation calculations performed under the 2008 SPA were in breach of the rectified 2008 SPA (see para 240).

[46] The trial judge ordered damages to the plaintiffs of \$10,704,227 based on the opinion of the plaintiffs' expert as to their losses (see para 252). The plaintiffs had claimed losses of \$10,704,221, being \$6 less than awarded by the trial judge. There are two components to this sum. The plaintiffs'

expert had assessed the damages arising from the deduction of the 2006 equity under the 2008 SPA and the 2009 SPA as \$5,804,644. The balance of the damages (\$4,899,577) assessed by the plaintiffs' expert related to the timing of the inclusion in HED's working capital of the bumps paid to HED on the treasury shares issued to the defendant in 2006. This claim will be explained further later in these reasons.

[47] The trial judge dismissed the plaintiffs' claim that there was an agreement with the defendant that the defendant would pay interest at 12 per cent per annum on any amount found to be owing (at para 254).

The Issues and the Positions of the Parties

[48] There are four primary issues raised by the appeal and one issue raised by the cross appeal. These issues and the positions of the parties are set out below:

1. Did the trial judge err in his interpretation of the USA?

[49] The defendant submits that the trial judge made errors of law in his approach to interpreting the USA. The defendant argues that the trial judge made the following errors: he erred in finding that section 9.06(b) of the USA was ambiguous as he failed to consider the entire agreement or the surrounding circumstances in making this determination; and he erred in considering parol evidence of negotiations as part of the surrounding circumstances.

[50] According to the defendant, these errors led the trial judge to an interpretation of section 9.06(b) of the USA that is contrary to the plain meaning of the words of that section. The defendant says that section

9.06(b) of the USA does not address whether the 2006 equity should be deducted on future share sales or bumps. All that section 9.06(b) deals with is to direct that *future* equity injections that occur between the date of a future share sale and a subsequent bump on those shares must be deducted in calculating the bump. It does not say that other deductions are impermissible.

[51] The plaintiffs argue that the trial judge did not make an error in law; his interpretation of the USA is a question of mixed fact and law and the applicable standard of review is palpable and overriding error. The plaintiffs say that the trial judge properly stated and applied the law regarding surrounding circumstances in contractual interpretation. After finding section 9.06(b) of the USA to be ambiguous, the trial judge properly considered the evidence of the exchanges between the parties and counsel leading up to the execution of the USA. The plaintiffs' position is that the trial judge made no reversible error in his interpretation of the USA.

2. *Did the trial judge err in rectifying the 2008 SPA?*

[52] The defendant argues that the trial judge erred in law in applying the law of rectification. The Supreme Court, in *Fairmont* (released after the trial judge's decision), has clarified that the doctrine of rectification is only available to correct an error in recording the terms of an agreement. However, rectification is not available where the "mistake" alleged in a contract is actually a mistaken assumption regarding background facts or where unexpected consequences arise out of the agreement including, but not limited to, income tax consequences.

[53] The defendant points out that, since the plaintiffs candidly

admitted that they understood when they signed the 2008 SPA and the 2009 SPA that the 2006 equity was to be deducted from all valuations of HED, there was no mistake in the written recording of the agreement. Everyone understood and agreed to the terms of the written contracts. The defendant says that rectification is not available on these facts.

[54] The plaintiffs argue that the trial judge made no reversible error in rectifying the 2008 SPA and finding that there was a common continuing intention that the 2006 equity would not be excluded from valuations of HED for share purchases after 2006 and related bumps. They say that deference is owed to the trial judge's credibility findings and his weighing of the evidence.

3. *Did the trial judge err in finding a breach of the 2009 SPA?*

[55] The defendant submits that the trial judge erred in finding that the 2009 SPA required the 2006 equity not to be deducted in the face of the following facts: the 2009 SPA sets out a specific purchase price agreed to by the parties and calculated by deducting the 2006 equity; the 2009 SPA includes the calculations (prepared by the plaintiffs) showing how the purchase price was arrived at and the calculations specifically deduct the 2006 equity; the plaintiffs admit they knew when they signed the 2009 SPA that it provided for the 2006 equity to be deducted; the calculations were incorporated into the 2009 SPA to ensure that the bumps were calculated in the same manner; and the 2009 SPA incorporates a calculation (deducting the 2006 equity) of the estimated final bump using projected year-end numbers.

[56] The defendant argues that the trial judge erred by construing the equity injection adjustment clause (section 2.9) in the 2009 SPA in a manner that was directly in conflict with the other provisions of the 2009 SPA which specifically called for the deduction of the 2006 equity.

[57] The plaintiffs' position is that the trial judge did not make any reviewable error in construing the 2009 SPA and in finding that the defendant had breached it. The trial judge was alive to all of the issues raised by the defendant, including its main argument that the 2008 SPA and 2009 SPA were stand-alone agreements, separate from the USA, and rejected them. They say he made no error in doing so.

4. *Did the trial judge err in assessing the plaintiffs' damages?*

[58] The defendant claims that the trial judge erred in ordering damages in excess of what the plaintiffs' expert had assessed as arising from the deduction of the 2006 equity under the 2008 SPA and the 2009 SPA. The damages sought for this claim were \$5,804,644. The balance of the damages (\$4,899,577) resulted from a new claim (the New Claim) that the plaintiffs included in their final amendment to the statement of claim. The New Claim related solely to the timing of when the bumps paid to HED on the treasury shares that the defendant subscribed for in 2006 would be added to working capital of HED for accounting purposes—i.e., in the fiscal year in which the bump was actually calculated and paid or in the prior fiscal year in respect of which the bump was calculated. For example, would a bump paid in April of 2009 in respect of the 2008 fiscal year be added to working capital for the 2009 year or the 2008 year? The defendant points out that nowhere in the trial judge's lengthy reasons does he address the New Claim, yet he awards at least \$4,899,577 in damages in respect of it. The defendant submits that the trial judge likely forgot to consider the New Claim and inadvertently awarded damages in the amount of the global figure put forward by the plaintiffs' expert.

[59] The plaintiffs argue that the trial judge made no error in his award of damages and states that the plaintiffs' expert and the defendant's expert agreed on the calculations. The plaintiffs concede that, if the defendant is successful in its appeal and this Court were to reverse the trial judge's decision that the 2008 SPA and the 2009 SPA prohibited the deduction of the 2006 equity, the New Claim fails. In other words, the New Claim can only succeed if the plaintiffs are successful on their main claim.

5. *Did the trial judge err in failing to order interest at 12 per cent per annum to the plaintiffs?*

[60] The plaintiffs, in their cross appeal, argue that the trial judge erred in law when he dismissed the plaintiffs' claim for interest by relying on the subjective intent of the defendant, rather than applying an objective reasonable bystander test, to determine if an agreement had been reached.

[61] The defendant argues that the record shows that the trial judge was well aware of the legal issues regarding subjective intent and that the evidence supports his finding that there was no agreement to pay interest at 12 per cent per annum on damages awarded by the court.

Standard of Review

[62] The standard of review applicable in this case depends upon the nature of the question under review.

[63] The standard of review in respect of factual findings and inferences of fact is that of palpable and overriding error (see *Housen v Nikolaisen*, 2002 SCC 33 at paras 22, 24-25).

[64] The application of a legal standard to facts is a question of mixed fact and law and, in a civil matter, will only be interfered with if the judge has made a palpable and overriding error (see *Housen* at para 37).

[65] On the other hand, an error relating to an extricable question of law or the mischaracterization of a legal standard will be reviewed on a standard of correctness. In *Sattva*, Rothstein J stated (at para 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 [v Operating Engineers Training Institute of Manitoba Inc]*, 2011 MBCA 80], 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.

See also *Heritage Capital Corp v Equitable Trust Co*, 2016 SCC 19 at paras 21-22.

[66] I will identify the applicable standard of review when I discuss the issues raised on the appeal. First, however, I will review the relevant law.

The Law—Contractual Interpretation

[67] This appeal raises issues of contractual interpretation relating not only to the USA, but to the 2008 SPA and the 2009 SPA.

[68] It is well settled in Canada that the goal of contractual interpretation is to give effect “to the intention of the parties, to be gathered from the words they have used” (*Consolidated-Bathurst v Mutual Boiler*, [1980] 1 SCR 888 at 899). In *Sattva*, Rothstein J described the process of determining the intention of the parties when he wrote (at paras 47-48):

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.

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.

[69] Courts are required to consider the surrounding circumstances in interpreting a contract regardless of whether the contract may be ambiguous (see *King* at paras 69-70; *Sattva* at para 46; *Fontaine et al v Canada (Attorney General) et al*, 2014 MBCA 93 at para 43; *Directcash Management Inc v Seven Oaks Inn Partnership*, 2014 SKCA 106 at para 13; *Shewchuk v Blackmont Capital Inc*, 2016 ONCA 912 at para 39; and *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 82).

[70] The type of evidence that can be considered as part of the surrounding circumstances was described in *Sattva* (at para 58):

The nature of the evidence that can be relied upon under the rubric of “surrounding circumstances” will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.

[emphasis added]

[71] However, the surrounding circumstances cannot be used to overwhelm the words of the contract. In *Sattva*, Rothstein J wrote (at para 57):

The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract

([Geoff R] Hall, [*Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis, 2016)] 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).

[72] It is also clear that the requirement that surrounding circumstances be considered in the interpretation of contracts does not conflict with the parol evidence rule.

[73] The parol evidence rule has been stated as follows in *Ahone v Holloway*, 1988 CarswellBC 336 (CA), quoting from Professor Corbin's text, *Corbin on Contracts* (1952) at 534, (at para 16):

When the terms of a contract have been embodied in a writing to which both parties have assented as the definite and complete statements thereof, parol evidence of antecedent agreements, negotiations and understandings is not admissible for the purpose of varying or contradicting the contract so embodied.

[emphasis added]

[74] Where a contract contains an “entire agreement” clause, the case for the exclusion of extrinsic evidence is strengthened (see SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters, 2017) at para 326). This is because the parties have specifically turned their minds to whether prior agreements or negotiations should have any effect and have intentionally excluded them.

[75] The parol evidence rule does not exclude evidence that would be included as part of the surrounding circumstances, as explained in *Sattva* (at

para 60):

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

[76] Contracts should not be construed in a manner so as to defeat the reasonable expectations of the parties. In my view, this principle is particularly important in the context of commercial contracts, such as the ones at issue in this appeal, which were the subject of extensive negotiations between sophisticated parties. Parties to such a contract have legitimate expectations that the contract will be enforced and construed in accordance with their reasonable expectations. Indeed, the parties often will have entered into other arrangements with third parties based on an assumption that their reasonable expectations will be fulfilled. As noted in *IFP Technologies* (at para 192):

Whether expectations are reasonable can be informed by the commercial context of a contract: *Mesa [Operating Ltd Partnership v Amoco Canada Resources Ltd*, 1994 CarswellAlta 89 (CA)], *supra* at para 20. Reasonable expectations of contracting parties are to be found in the contract itself rather than the court's abstract perception of what is "fair". [T]he reasonable expectations of the parties operate so as to imply a term limiting one party's ability to perform a contract in a manner which undermines the interests of the other party.

[emphasis added]

[77] Some commentators consider the protection of reasonable expectations to be the fundamental purpose of contract law. As stated in Waddams (at para 337): “[T]he law of contracts exists to protect reasonable expectations.”

[78] Another issue that is raised by this appeal is the law respecting ambiguity of contractual provisions. It must be emphasized that a contractual provision can be difficult to construe without being ambiguous (see *Moore Realty Inc v Manitoba Motor League*, 2003 MBCA 71 at para 25).

[79] True legal ambiguity occurs where a phrase is “reasonably susceptible of more than one meaning” (*Hi-Tech Group Inc v Sears Canada Inc*, 2001 CarswellOnt 9 at para 18 (CA)). Ambiguous wording has also been described as one with a “double or devious meaning, that is to say, one word or one expression or a series of expressions capable on its face or in its application of two or more meanings” (*Moore Realty* at para 25).

[80] A significant consequence of a finding of ambiguity is that parol evidence is admissible to dispel the ambiguity. As previously explained, parol evidence is normally inadmissible for the purposes of contractual interpretation. As stated by Hall (at ch 3.1.5):

“One of the exceptions to the parol evidence rule has always been that where there is ambiguity in the written contract itself, extrinsic evidence may be admitted to clarify the meaning of the ambiguous term.” Ambiguity means something more than the mere existence of competing interpretations, otherwise parol evidence would be admitted in virtually every case. Thus the question of whether there is ambiguity is to be determined by an objective evaluation of whether there are two or more reasonable interpretations. Put another way, where a written contract is

ambiguous in the sense of being reasonably susceptible of having more than one meaning, extrinsic evidence is admissible to determine which meaning is preferable.

[81] The principles of contractual interpretation reviewed above are relevant to the issues raised by the defendant in respect of the trial judge's interpretation of the USA, as well as the 2008 SPA and the 2009 SPA.

The Law—Rectification

[82] The defendant argues that the trial judge erred in his application of the doctrine of rectification.

[83] Traditionally, the equitable remedy of rectification was only available in relatively narrow situations—where the agreement reached by the parties was inaccurately recorded in the written document meant to reflect that agreement. As a result, only documents can be rectified, not the terms of the contract or agreement itself. The traditional doctrine was stated by Denning LJ in *F E Rose Ltd v Wm H Pim Ltd*, [1953] 2 All ER 739 (CA) at 747:

Rectification is concerned with contracts and documents, not with intentions. In order to get rectification, it is necessary to show that the parties were in complete agreement on the terms of their contract, but by an error wrote them down wrongly. And in this regard, in order to ascertain the terms of their contract, you do not look into the inner minds of the parties—into their intentions—any more than you do in the formation of any other contract. You look at their outward acts, i.e., at what they said or wrote to one another in coming to their agreement, and then compare it with the document which they have signed. If you can predicate with certainty what their contract was, and that it is, by a common mistake, wrongly expressed in the document, then you rectify the document. But nothing less will suffice.

[emphasis added]

[84] A more liberal approach to the application of the doctrine of rectification developed, in particular, in jurisprudence of the Ontario Court of Appeal (see *Juliar v Canada (Attorney General)*, 2000 CarswellOnt 3518 (CA); and *Fairmont Hotels Inc v Canada (Attorney General)*, 2015 ONCA 441). In *Juliar*, family members had entered into a corporate reorganization that they intended to be neutral from an income tax perspective. As part of the transaction, the Juliars took back promissory notes from a new corporation. This placed the transaction outside of rollover provisions in the *Income Tax Act*, RSC 1985, c 1 (5th Supp), and resulted in taxation on capital gains. The Juliars sought rectification of the transactions so that they could take back shares instead of promissory notes. The Ontario Court of Appeal granted rectification on the basis of a continuing common intention to avoid taxation. This was done despite the fact that the parties, at the time they entered into the transaction, clearly intended to take back promissory notes instead of shares.

[85] However, the liberal approach to rectification is no longer the law in Canada. In *Fairmont*, the Supreme Court rejected the approach to the doctrine illustrated in *Juliar* and confirmed the traditional application of the doctrine of rectification.

[86] There are several aspects of Brown J's reasons in *Fairmont* that are of particular relevance to the issues raised on this appeal. First, he confirms that "a 'relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts': *Performance Industries*, at para.

31” (at para 13).

[87] Second, Brown J confirms that rectification is not available to amend the agreement itself, stating (at para 13):

In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend *not the instrument* recording their agreement, but *the agreement itself*. More to the point of this appeal, and as this Court said in *Performance Industries* (at para. 31), “[t]he court’s task in a rectification case is . . . to restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other”.

[88] And again, in concluding that *Juliar* was wrongly decided (at para 19):

As I have stressed, rectification is available not to cure a party’s error in judgment in entering into a particular agreement, but an error in the recording of that agreement in a legal instrument. Alternatively put, rectification aligns the instrument with what the parties agreed to do, and not what, with the benefit of hindsight, they should have agreed to.

[89] Brown J characterized the Court of Appeal’s decision in *Juliar* as rectifying not the instrument recording the parties’ antecedent agreement but the agreement itself, where it was entered into as a result of an error in judgment (see para 19).

[90] The characterization of the error that the plaintiffs sought to rectify is a central issue in this case.

[91] Rectification proceedings are not subject to the parol evidence rule. The Court, by necessity, must look to evidence outside of the written

document and the surrounding circumstances to determine whether the document does not accurately record the agreement reached between the parties. As previously noted, parol evidence is not permitted to be used to aid in the construction of a contract. The distinction would seem to arise because the accuracy of the written document is put into question on a rectification application (see GHL Fridman, *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011) at 775-76.

[92] Accordingly, evidence of prior negotiations and declarations of the subjective intent of the parties are relevant and admissible evidence on a rectification application (see *Investors Compensation Scheme Ltd v West Bromwich Building Society*, [1998] 1 All ER 98 at 114 (HL)).

[93] The standard of proof applicable to a rectification application is the standard generally applicable to all civil cases—the balance of probabilities (see *Fairmont* at para 36).

[94] However, one must also consider the quality of evidence by which that standard is discharged. In *Fairmont*, Brown J stated (at para 36):

A party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed. A court will typically require evidence exhibiting a high degree of clarity, persuasiveness and cogency before substituting the terms of a written instrument with those said to form the party's true, if only orally expressed, intended course of action.

[95] All of the relevant evidence must be considered in determining if the burden has been discharged—including whether the written agreement

was the result of negotiations between sophisticated parties who benefitted from professional advice.

[96] The party seeking relief must be ignorant of the discrepancy between the terms agreed to and those stated in the document (see Waddams at para 341; and *Distillery, Etc, Int'l Union v Can Park & Tilford Ltd* (1973), 36 DLR (3d) 632 (BCSC)). As in the case of other equitable remedies, affirmation of the contract with knowledge of the mistake has been held to be a bar to rectification (see Waddams at para 339 (specifically n 91); and *Pepper v Prudential Trust Co* (1963), 41 DLR (2d) 583 (Sask CA), aff'd [1965] SCR 417. In other words, the party seeking equitable relief in the form of rectification must come to the court with clean hands.

[97] In summary, the law of rectification in Canada has returned to its traditional roots. It is not available to assist a party who regrets entering into an ill-advised contract or a contract with unanticipated consequences. Nor should it be utilized in situations that would undermine the reasonable expectations of a party to a contract.

Application to this Case

1. *Did the trial judge err in his interpretation of the USA?*

[98] The first issue raised by the defendant is the trial judge's approach to interpreting the USA. The defendant argues that the trial judge made errors of law in how he dealt with surrounding circumstances and parol evidence, as well as in his finding of ambiguity.

[99] For the reasons that follow, in my view, the trial judge erred in his interpretation of section 9.06(b) of the USA. As I will explain, the

interpretation of section 9.06(b) should be of minimal relevance in this case, as both the 2008 SPA and the 2009 SPA are separate stand-alone agreements. However, the trial judge applied his construction of the equity injection adjustment clause in the USA to construe the equity injection adjustment clauses in the 2008 SPA and the 2009 SPA.

[100] The fundamental error of the trial judge was in finding that section 9.06(b) is ambiguous. He failed to apply the correct test to determine legal ambiguity. This is an extricable question of law and is reviewed on the basis of correctness. After finding the section to be ambiguous, he relied on parol evidence of contractual negotiations and statements of the parties' subjective intention to give a meaning to the section that extends well beyond the plain meaning of the words used, considered in light of the surrounding circumstances.

[101] The trial judge began the exercise of construction of section 9.06(b) of the USA correctly. He noted that the "USA cannot be considered in isolation" and properly took into account the 2006 SPA and 2006 SA as surrounding circumstances. He also properly took note of the aim and genesis of the USA which "related to the anticipated future purchase of the remaining shares in HED by the defendant" (at para 181).

[102] However, he fell into error when he stated, "I cannot say that the meaning of each of those three [equity injection adjustment] clauses is clear and unambiguous" (at para 188). The trial judge gave no explanation of how the provision is capable of "a double or devious meaning" (*Moore Realty* at para 25). Difficulty in construction, without more, does not give rise to an ambiguity.

[103] In my view, the meaning of section 9.06(b) of the USA is not ambiguous. Rather, its plain meaning is clear. It provides that future equity injections made on or subsequent to the date of closing of a future share sale will be deducted from a subsequent bump on those shares. There is no devious or double meaning. There is no corollary dealing with the 2006 equity. Section 9.06(b) does not address the 2006 equity. Indeed, this was correctly noted by the trial judge when he said, “In the USA, the [equity injection adjustment] clause, which is s. 9.06(b), makes no reference to the deduction of the subscription price paid to the corporation [i.e., the 2006 equity]” (at para 186).

[104] Similarly, he stated (at para 198):

[T]he wording of the [equity injection adjustment] clause in the USA was to be different from the [equity injection adjustment] clauses in the [2006] SPA and the [2006] SA in that the deduction would apply only to new equity injected between the time of future share purchases and the time of the associated bumps on those purchases.

[105] I completely agree with the trial judge’s conclusions on this point.

[106] However, after finding section 9.06(b) ambiguous, the trial judge extensively reviewed the evidence of pre-contractual negotiations and statements of the parties’ subjective intentions that they did not intend to deduct the 2006 equity in future share sales. The trial judge then found that section 9.06(b) had an additional meaning (at para 207):

On a balance of probabilities, I accept the plaintiffs’ interpretation of s. 9.06(b) of the USA in finding that the deduction of the adjusted subscription price was to apply only to new equity injected between the time of future share purchases and the time of the associated bumps on those purchases.

[emphasis added]

[107] In other words, the trial judge interpreted section 9.06(b) of the USA to mean that the deduction of the 2006 equity in any future purchase price calculations or bumps was prohibited. Section 9.06(b) cannot be given that meaning on any reasonable interpretation. Logically, it is an improper leap to conclude that, because the USA expressly provides for deduction of contingent future equity injections in certain circumstances, it must prohibit the deduction of past equity injections in all circumstances.

[108] This is clear when one considers the plain meaning of the words used in section 9.06(b) in light of the USA as a whole. First, section 9.06(b) deals only with the calculation of bumps in the event there is a future equity injection. It says nothing about calculating the purchase price of shares. Second, there are other provisions in Article 9 of the USA dealing with valuation of shares in the event of a future share transaction. Section 9.02(a) of the USA provides in part that:

Whenever a valuation [of shares] is required to be made for the purposes of a purchase and sale between the parties . . . the value . . . and hence the purchase price payable therefor (the “Valuation Price”) . . . shall be determined in accordance with the valuation formula set out on Schedule C hereof.

[109] Schedule C sets out the same formula that was used for all the transactions: essentially 6.5 times EBITDA, minus debt, plus (or minus) working capital.

[110] Section 9.03 provides that the parties will try to reach agreement on each element of the valuation formula and states (in part) that:

Upon the . . . occurrence of an event . . . giving rise to a need to determine the Valuation Price of [shares], the parties to the transaction of purchase and sale . . . shall make a bona fide attempt to agree . . . as to the values of each component of the above-referenced formula (e.g. EBITDA, Working Capital, Book Value, etc.) . . . using the same method of calculation and subject to the same normalization adjustments as were used for the purposes of the [2006 SPA].

[111] The parties intended that valuations of shares for the purposes of future agreements of purchase and sale were to be done using the same formula as was used under the 2006 SPA with the parties agreeing to the values of each element of the formula. This is precisely what occurred in 2008 and 2009 when the plaintiffs offered to sell their shares based on a purchase price calculated in accordance with the formula in Schedule C and with an agreed-upon deduction of the 2006 equity.

[112] It is simply not a sustainable construction, in light of the USA as a whole, to interpret section 9.06(b) to prohibit the deduction of the 2006 equity for the purposes of the valuation of shares and the calculation of bumps on a future sale.

[113] In conclusion, in my view, the trial judge erred in his construction of the USA. The trial judge's initial legal error in misapplying the test for legal ambiguity led him to consider parol evidence of contractual negotiations and subjective intention that was simply not relevant and should not have been considered. The trial judge's construction of section 9.06(b) of the USA is not sustainable in light of the USA as a whole and the admissible surrounding circumstances.

2. *Did the trial judge err in ordering rectification of the 2008 SPA?*

[114] In ordering rectification of the 2008 SPA, the trial judge found that the parties had a common continuing intention that the 2006 equity was not to be deducted in any subsequent share purchases. He based this upon his construction of the USA and the evidence of the plaintiffs' witnesses. As just explained, the trial judge's construction of the USA cannot be sustained. Accordingly, his finding that rectification of the 2008 SPA was justified on the basis that the parties had a common continuing intention that the 2006 equity was not to be deducted was also in error.

[115] However, even if I am wrong in finding that the trial judge misconstrued the USA, his application of the doctrine of rectification is nonetheless not sustainable on the evidence of the witnesses that he accepted. Without the benefit of *Fairmont*, the trial judge applied an incorrect legal test to determine if rectification was available on the facts. Moreover, he made a palpable and overriding error in finding that the parties had a common continuing intention in 2008 not to deduct the 2006 equity.

[116] As explained, on a rectification application, parol evidence of negotiations and subjective intention is relevant and therefore admissible. The trial judge examined parol evidence of the negotiations and subjective intentions of the parties leading up to the execution of the USA. He found that, in 2006, the parties did not intend to deduct the 2006 equity in future share sales. This finding was open to him on the record.

[117] The trial judge also properly found that both Elias and D'Ascanio knowingly agreed to a valuation formula in the 2008 SPA that deducted the 2006 equity. Moreover, it was the plaintiffs who offered to sell their shares

in 2008 to the defendant at a price that was calculated by specifically deducting the 2006 equity.

[118] After making these findings, the trial judge was faced with two facts: in 2006, the parties did not intend to deduct the 2006 equity on future transactions; and, in 2008, the parties agreed to deduct the 2006 equity on the sale of the plaintiffs' 24% interest in HED. In my respectful view, the trial judge made a palpable and overriding error in finding that the parties' intention in 2006, which he found was expressed in the USA, continued unabated in 2008. This finding is incompatible with his finding that the plaintiffs knowingly offered to sell their 24 per cent interest in 2008 using a valuation formula that deducted the 2006 equity. Both intentions could not logically co-exist in 2008. The only reasonable conclusion is that, by 2008, the intentions of the parties, as expressed by them in the 2008 SPA, had changed.

[119] The trial judge erred when he stated that there was an "absence of any evidence excluding the USA" (at para 235). The existence and terms of the 2008 SPA were overwhelming evidence that the parties had struck a new deal. There is nothing in the USA that prevented the parties from agreeing to an arrangement that was not in strict compliance with the USA.

[120] The plaintiffs say that they were improperly advised by Sigurdson as to the terms of the USA and that is why they agreed to deduction of the 2006 equity in 2008. Even so, Sigurdson's involvement in the preparation of the 2008 SPA only began after the plaintiffs had offered to sell their shares using a valuation formula that deducted the 2006 equity and the defendant had accepted that offer.

[121] There was absolutely no mistake in the recorded terms of the 2008 SPA as required by *Fairmont*. It perfectly reflected the agreement of the parties. What the plaintiffs characterize as a “mistake” is, in reality, their error in judgment in offering to sell their remaining shares on terms that they subsequently regretted.

[122] The application of the principles of rectification, confirmed in *Fairmont*, to the facts found by the trial judge leads only to one conclusion: rectification of the 2008 SPA is not available to the plaintiffs.

[123] The policy reasons for not allowing rectification in these circumstances are clear: rectification cannot be used as a substitute for due diligence by the plaintiffs; the relaxed application of the doctrine undermines the importance of certainty and finality in commercial relations; rectification would undermine the reasonable expectations of the defendant; and the plaintiffs are seeking to rectify the agreement itself, not an error in the recording of the agreement.

[124] In conclusion, the trial judge erred in his application of the doctrine of rectification. There was no evidence to support a conclusion that the parties had agreed not to deduct the 2006 equity but made a mistake in recording the agreement. In fact, all the evidence pointed to the opposite conclusion: that, in 2008, they clearly did agree to deduct the 2006 equity.

3. *Did the trial judge err in finding a breach of the 2009 SPA?*

[125] The third issue raised by the defendant is whether the trial judge erred in finding a breach of the 2009 SPA. This issue raises the question of the proper construction of the 2009 SPA. I will also briefly address the

proper construction of the 2008 SPA.

[126] In his reasons, the trial judge construed the 2009 SPA and the rectified 2008 SPA together. The result of his application of the doctrine of rectification was to make the equity injection adjustment clause of the 2008 SPA (section 2.6(a)) virtually the same as the equity injection adjustment clause of the 2009 SPA (section 2.9(a)). The trial judge stated that “[t]he rectified s. 2.6(a) of the 2008 SPA does not deduct the [2006 equity] from the 2008 and 2009 bump calculations in the 2008 SPA. However, that is precisely what was done. The 2009 bump calculations in the 2009 SPA were also deducted” (at para 238). He then found that the bump calculations were made in breach of the agreements and should not have deducted the 2006 equity (see para 240).

[127] Unfortunately, the trial judge’s reasons do not set out in any detail the analysis leading to his construction of the 2009 SPA. However, reading his reasons as a whole, I conclude that he based his decision on his construction of the wording of section 9.06(b) of the USA (the equity adjustment clause). The equity injection clause in the 2009 SPA contains language nearly identical to that in section 9.06(b) of the USA.

[128] As I have explained, the trial judge erred in concluding that section 9.06(b) of the USA prohibited the deduction of the 2006 equity on future share sales. That section does not address the 2006 equity at all. It only addresses equity injected into HED at a subsequent date at the time or after the shares have been sold but prior to the calculation of any bump on those shares.

[129] Accordingly, in my view, the trial judge similarly erred in

concluding that the 2009 SPA was to be construed so as to prohibit deduction of the 2006 equity.

[130] As previously noted, the goal of contractual interpretation is to give effect to the intention of the parties, to be gathered from the words they have used, reading the contract as a whole and taking into account the surrounding circumstances.

[131] It is clear to me that the trial judge erred in not considering the 2009 SPA as a whole. If he had done so, he would have had to address the following provisions of the 2009 SPA that specifically provide for the deduction of the 2006 equity:

- Section 2.1 sets out an initial purchase price of \$23,155,758. Schedule 2.7, which is incorporated into the 2009 SPA, contains a calculation showing how the purchase price was determined. The 2006 equity is deducted as a separate, identified line item.
- Section 2.2 provides for payment to the plaintiffs on closing of one half of the estimated bumps that would eventually become payable on the shares. Specific dollar amounts are set out for these payments. Schedule 2.7 contains a bump calculation using estimated year-end numbers to show how the estimated bumps were determined. The 2006 equity is deducted as a separate, identified line item.

[132] When one considers the 2009 SPA as a whole, in light of the surrounding circumstances, the only conclusion that can be reached is that

the parties intended for the 2006 equity to be deducted on all valuations of HED for the purposes of both the initial purchase price of the shares and subsequent bumps on those shares. The surrounding circumstances include: the aim and genesis of the 2009 SPA; the extensive negotiations which resulted in a comprehensive share purchase agreement; the sophistication of the parties; and the involvement of professional advisors.

[133] The specificity of the calculations included in the 2009 SPA overwhelmingly points to this conclusion. Arguably, one of the most important provisions of a share purchase agreement is the price. Here, the parties not only fixed the initial purchase price but explicitly showed that it had been calculated by deducting the 2006 equity so that purchase price adjustments (bumps) could be calculated the same way.

[134] Moreover, the other provisions of the 2009 SPA are consistent with this construction. The plaintiffs argue that the contractual language of the valuation calculations (incorporated by reference to Schedule C of the USA) take paramountcy over the mathematical calculations included in Schedule 2.7 to the 2009 SPA. As previously noted, the valuation formula in Schedule C boils down to 6.5 times EBITDA, minus debt, plus (or minus) working capital.

[135] The contractual language in Schedule C, although lengthy, does not specifically address the deduction of the 2006 equity. However, section 2.8 of the 2009 SPA indicates the parties' intention that bump calculations would be "determined by agreement of all of the [plaintiffs] and the [defendant]" and that they would use "the same methodology as set out in Schedule C to the USA". The parties specifically contemplated the

possibility that they may not be able to reach agreement and provided that HED's auditor would resolve any disputes "[i]n the event the [defendant] and the [plaintiffs] are unable to agree as to one or more of the components comprising any of the adjustment calculations".

[136] Accordingly, the parties contemplated that they would use the same valuation methodology as set out in Schedule C to the USA but that they would agree on any specific adjustments to the formula. This is precisely what they did in 2009 when the plaintiffs proposed the deduction of the 2006 equity and the defendant agreed.

[137] The trial judge's construction of the 2009 SPA yields a result that is commercially unreasonable. The parties went to the effort of negotiating a specific initial purchase price in the 2009 SPA that explicitly deducted the 2006 equity. The effect of the trial judge's construction would be, in essence, to automatically add the 2006 equity to the purchase price on the first bump calculation under the 2009 SPA regardless of whether HED's earnings had increased. There is no dispute that the purpose of the bump calculations was to compensate the plaintiffs for any increase in HED's earnings by comparing EBITDA on the bump calculation date to EBITDA on a previous date. However, the trial judge's construction of the 2009 SPA would require the 2006 equity to be added back into the valuation, resulting in an additional bump payment to the plaintiffs on the first bump calculation date in excess of \$3.3 million regardless of whether EBITDA had changed. It is highly unlikely that the parties would have structured the transaction in such a way.

[138] In conclusion, the trial judge erred when he found that the

defendant breached the 2009 SPA by deducting the 2006 equity in calculating the bump payments under the 2009 SPA.

[139] As for the 2008 SPA, in my view, the trial judge erred when he found that the defendant breached the 2008 SPA by deducting the 2006 equity in calculating the bump payments under the 2008 SPA. I come to this conclusion for much the same reasons as my conclusion in respect of the 2009 SPA. In addition, once the trial judge's rectification decision is set aside, the equity injection clause of the 2008 SPA specifically states that the 2006 equity was to be deducted in calculating bumps.

4. Did the trial judge err in assessing the plaintiffs' damages?

[140] Due to my conclusions regarding the trial judge's construction of the 2008 SPA and the 2009 SPA, there is no need to deal with the alleged error in the calculation of damages resulting from the New Claim as it is now moot. However, I will say that the lack of any reference to, or analysis of, the New Claim in the trial judge's reasons is concerning. If I had upheld the trial judge's finding of liability, the issue of his assessment of damages would likely have required intervention by this Court.

5. Did the trial judge err in failing to order interest at 12 per cent per annum?

[141] As I have concluded that the trial judge erred in awarding any damages to the plaintiffs, the plaintiffs' cross appeal on interest is moot.

Conclusion

[142] In closing, I will make one final comment. The importance of

certainty in commercial relations and the protection of the reasonable expectations of parties to commercial contracts cannot be overemphasized. The approach taken by the trial judge to the admission of parol evidence, the interpretation of commercial contracts and the application of the doctrine of rectification had the potential to send the practice of commercial law sideways. It is difficult to imagine what more the defendant in this case could have done to ensure that it knew what its rights and obligations were under the documents it signed.

[143] For the foregoing reasons, I would allow the appeal and dismiss the cross appeal with costs to the defendant throughout.

_____ JA

I agree: _____ JA

I agree: _____ JA