December 20, 2024

VIA EMAIL and HAND DELIVERED

Raffi A. Balmanoukian
Registrar in Bankruptcy
Supreme Court of Nova Scotia
The Law Courts
1815 Upper Water Street
Halifax, NS B3J 1S7

Dear Mr. Registrar:

Re: In the Matter of the Bankruptcy of Atlantic Sea Cucumber Ltd.
Hfx No. 45461
Estate No. 51 – 2939212
Supplemental Submissions respecting the Validity of Debt and Security

1. We write as counsel to Weihei Taiwei Haiyang Aquatic Food Co. Ltd. ("**WTH**"). The bankrupt company is Atlantic Sea Cucumber Ltd. ("**Atlantic Sea**").

2. Please accept this letter as the supplemental submissions on behalf of WTH following the November 22, 2024, motion to determine the validity of the debt and security claims of Atlantic Golden Age Holdings Inc. ("**AGAH**").

SUPPLEMENTAL SUBMISSIONS

3. At the hearing on November 22, 2024, counsel for Atlantic Sea, in conjunction with the other moving parties, advised with minimal notice that they would be relying on the case of *Re Provost Shoe Shops Limited*, 123 N.S.R. (2d) 302 (NSSC) ("***Provost***"). Upon request, WTH was granted a right of written rebuttal in respect of the applicability of *Provost*.

4. Additionally, this Court requested submissions from the parties on the applicability of the parol evidence rule. In particular, this Court requested the parties consider

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whether it should consider evidence of AGAH and Atlantic Sea's "intent" with respect to the 2018 Loan Agreement, in the event the Court determined the funds advanced should be treated as debt, not equity.

5. Below we address those two topics.

APPLICABILITY OF *PROVOST*

6. *Provost* is a Nova Scotian case, decided in 1993. The central question was the applicability of section 137[1] of the *Bankruptcy and Insolvency Act* (the "**BIA**") in the context of shareholder loans.

7. Upon review, *Provost* offers little support to AGAH's case. Importantly, it predates the equity provision in section 140.1 of the BIA, which is highly relevant to the within motion. Further, *Provost* has also been incorporated into, and supplanted by, more recent case law.

8. Case law in the last decade has provided clearer guidance with respect to the test that should be applied in determining whether a related-party claim should be subordinated to other creditor claims. WTH submits a court's review should be informed and directed by the test outlined in *US Steel* (cited with authority in both the Quebec Court of Appeal and the British Columbia Court of Appeal).[2]

9. *Provost* appears to have been cited only three times in the over three decades since its publication. The most recent reference was in *Syndic de Société de vélo en libre*

[1] We note the section utilized different language as compared to the section today, however on our review there does not appear to be a legal distinction between the old section 137 and the current section.

[2] The test was cited in *Syndic,* 2023 QCCA 368; *Broer v. Multiguide GmbH*, 2023 BCCA 134; and *Eggertson v. Cascade Steel Rolling Mills Inc.,* 2024 BCCA 349.

service, 2023 QCCA 368, (***"Syndic"***) which WTH relied upon heavily within its pre-hearing submissions.[3]

10. In *Syndic*, the Quebec Court of Appeal relied upon *Provost* for the proposition that "the mere fact that a sole shareholder (or group of shareholders) advances funds to its company does not constitute *per se* a contribution to capital."[4] The Court of Appeal then continued its analysis utilizing the two-part test and relevant indicia set out in *US Steel*.[5]

11. The *US Steel* test, and WTH's submissions with respect to its application in this matter, are thoroughly canvassed in the submissions provided to this Court on November 15, 2024. However, in responding to the moving parties' comments on the applicability of *Provost,* WTH submits it is particularly relevant for this Court to consider the highly fact-specific nature of the test.

12. The British Columbia Court of Appeal's 2023 decision in *Broer v Multiguide GmbH (**"Broer"**)*, although not decided in the context of a bankruptcy, provides helpful guidance and a summary of the rationale underlying the fact-specific inquiry:[6]

> 44 […] Indeed, the overriding rationale for considering "the surrounding circumstances" as articulated in *Ghassemvand* is the requirement to consider the substance of the transaction over the form. As Justice Newbury explained:
>
> > [51] Subsequent cases have re-affirmed that **the characterization of advances as loans or as capital contributions requires that the "substance of the transaction" be examined and that all the**

[3] *Provost* was relied upon in *Club de voyages Aventure inc. (Faillite de*), 2000 CanLII 18757 (QCCS) for the proposition that it is not necessary for a transaction to be documented in writing in order for it to be considered a "proper transaction." Although it was not directly mentioned or relied upon, it was also referred to in the appendix of *Installations Doorcorp inc./Doorcorp Installations Inc. (Syndic'd)*, 2010 QCCS 3618.

[4] *Syndic*, at para 67, Tab 4 of the Combined Book of Authorities and Filed Evidence.

[5] *Syndic*, at paras 62 and 63.

[6] *Broer,* 2023 BCCA 134, at paragraphs 44-46, **Tab 1.**

> **surrounding circumstances - not only the words used in documenting the transaction - be considered: see, e.g., *Re U.S. Steel Canada Inc.*** [...]

45 This approach is consistent with other Canadian jurisdictions. In *Elefant v. Genwood Industries Ltd.*, 2018 QCCS 4590, the court summarized the law as follows:

> [7] **In characterizing a claim as either debt or equity, Canadian courts generally take a contextual, intention-based approach that favours a determination of a claim's substance rather than its form**. In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, Mr. Justice Iacobucci stated that the correct approach is to determine the "substance" or "true nature" of the transaction under review.
>
> [8] More recently, in *U.S. Steel Canada Inc., Re*, the Ontario Superior Court held that where a transaction occurs between related, or non-arm's length parties, "there can be no certainty that the language of the agreements reflects the underlying substantive reality of the transaction".

46 In *U.S. Steel Canada Inc., Re*, 2016 ONSC 569 [...] the court described the task of the court in determining the character of an advance of funds as follows:

> [168] In other words, **the task of a court is to determine whether the transaction in substance constituted a contribution to capital notwithstanding the expressed intentions of the parties that the transaction be treated as a loan. <u>It is therefore not appropriate to limit the inquiry into the intentions of the parties to a review of the form of the transaction documentation.</u>** Such an exercise reduces to a "rubber stamping" of the determination of a single party to the transaction, i.e., the sole shareholder, and it does not address the substance of the transaction as it was actually implemented. <u>In such circumstances, the determination of whether a particular claim is to be treated as debt or equity must address not just the expressed intentions of the parties as reflected in the transaction documentation but also the manner in which the transaction was implemented and the economic reality of the surrounding circumstances.</u>
>
> [bold emphasis added, underlined emphasis in *Broer*]

13. The factual circumstances are highly relevant in cases where a court is being asked to review the propriety and character of an advance of funds by a related party.

14. Of course, relevant case law may provide guidance for courts when conducting the analysis. As was correctly represented by the moving parties in the November 22, 2024, motion, the Nova Scotia Court in *Provost* found the shareholder loans were valid and should be treated as standard debt.

15. However, WTH submits that is where the applicability of *Provost* ends. In *Provost*, the relevant facts included:

    (a) In February 1983 each company declared dividends. On the advice of lawyers and tax accountants, those dividends were then immediately reinvested in the businesses by the shareholders. The reinvestments were recorded as shareholder loans.

    (b) At the time of the transaction, the companies were prospering.

    (c) There was no indication of further advances by the shareholders.

    (d) Over the following decade, the loans were repaid irregularly, with no interest.

    (e) In September 1992, approximately a decade later, the companies went bankrupt.

16. The court in *Provost* was asked to determine whether the February 1983 transactions were improper, pursuant to section 137 or 139 of the BIA. It determined that in the circumstances, the debt was valid.

17. WTH submits this does not alter the considerations or result in the present case. As noted in *Syndic,* the mere fact that a sole shareholder (or group of shareholders)

advances funds to its company does not **automatically** constitute a contribution to capital. However, it is clear the surrounding circumstances can establish that fact.[7]

18. Even assuming section 140.1 would not have altered the court's reasoning in *Provost,* the underlying factual circumstances at hand are dramatically different. The *Provost* funds were advanced a decade before the bankruptcy event, while the company was growing and prosperous.

19. Conversely, although AGAH initially advanced funds in 2018 when Atlantic Sea was arguably showing signs of prosperity and growth, the evidence is clear that those 2018-2019 advances were repaid in full as of November 25, 2020.[8]

20. Beginning November 27, 2020, AGAH advanced **new** substantial sums of money, however this time it was not in a time of growth and prosperity. Instead, based upon Atlantic Sea's own evidence, these funds were advanced while the company was no longer profitable. In fact, these funds were utilized by Atlantic Sea to "avoid insolvency" in the face of third-party creditors calling their loans.[9]

21. The factual dealings between Atlantic Sea and AGAH are dramatically different than those in *Provost.*

22. Instead, the transactions between Atlantic Sea and AGAH bear many of the hallmarks of equity, as outlined in *US Steel* and applied in *Syndic.* As such, WTH submits these advances should be recharacterized as equity or as a transaction that is "not proper" pursuant to section 137 of the BIA.

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[7] *Syndic*, at para 67.

[8] Affidavit of Sam Gao sworn November 5, 2024, and filed in support of this motion (the "**November Gao Affidavit**"), Exhibit I, first line of Transaction Report showing "Balance (CAD)" of -1,300.31.

[9] November Gao Affidavit, at para 33.

PAROL EVIDENCE RULE AND CONTRACTUAL INTERPRETATION

23. As noted above, when determining whether an advance is properly characterized as equity or debt, a court should not be swayed by the written words of a contract, but instead look to all the surrounding circumstances. However, when a court seeks to interpret a contract, the applicable test is separate and distinct.

24. The law regarding contractual interpretation and the applicability of the parole evidence rule was thoroughly canvassed by the Supreme Court of Canada in *Sattva Capital Corp. v Creston Moly Corp.*, (**"Sattva"**):[10]

> 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...** The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract... **While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreemen**t...
>
> 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, ...that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.** Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man"…Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[10] *Sattva*, 2014 SCC 53, at paras 57 - 60, relevant excerpts may be found at **Tab 2.**

> 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**... **To this end, the rule precludes, among other things, evidence of the subjective intentions of the parties**... 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...
>
> 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.
>
> [emphasis added, citations omitted]

25. The clear guidance from the Supreme Court of Canada limits this Court's use of the evidence of surrounding circumstances in its interpretation of the 2018 Loan Agreement.

26. An additional consideration in this case is that the 2018 Loan Agreement includes a clause which explicitly excludes evidence of surrounding circumstances. It provides that the whole agreement between the parties was reduced to writing:

> 21. **ENTIRE AGREEMENT**. This Agreement contains all the terms agreed to by the parties relating to its subject matter, including any attachments or addendums. This Agreement replaces all previous discussions, understandings, and oral agreements. The Borrower and Lender agree to the terms and conditions and shall be bound until the Borrower repays the Borrowed Money in full.

27. Given the above, WTH submits any evidence of surrounding circumstances is of limited use to this Court.

Subjective Intent and Subsequent Conduct are Irrelevant

28. This Court asked the parties to canvass whether it should consider the evidence of AGAH's stated "intent," as indicated by the accountant (Ms. Lu) and Mr. Gao.

29. As a starting point, per *Sattva* at para 59, the **subjective** intent of contracting parties is inadmissible.

30. In *Thornridge Holdings Limited v Ryan*, 2023 NSSC 11, the Nova Scotia Supreme Court applied the prohibition against evidence of subjective intention in the context of an action for debt. Justice Jamieson noted, "[s]urrounding circumstances or the factual matrix is broad, and may include many things, but the case law is clear that it **does not include…the subjective intentions of the parties**."[11]

31. The Court further observed, "[t]he subjective intent of the parties is not a consideration. It is of no value to the interpretive process, where there is no ambiguity alleged, for a party to give evidence as to what the terms of the contract mean to them."[12]

32. This law is in step with the commentary in *Sattva* at para 58*,* that the surrounding circumstances include the "**objective** evidence of the background facts."

33. However, even if the subjective intent was relevant and admissible evidence, **the affidavits of Ms. Lu and Mr. Gao are silent with respect to the intent of the parties when executing the 2018 Loan Agreement**.

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[11] *Thornridge Holdings Limited v Ryan*, 2023 NSSC 11, at para 40, relevant excerpts may be found at **Tab 3.**
[12] *supra*, at para 39.

34. The only affidavit evidence with respect to the "intent" of the parties at the time of contracting is regarding whether the loan was intended to be equity or debt.[13]

35. The affidavit evidence with respect to the terms of the 2018 Loan Agreement is that the document exists, and both Ms. Lu and Mr. Gao flatly assert the agreement "was in the form of a revolving line of credit for ASCL to draw from."[14]

36. WTH acknowledges that both affiants provide evidence about what occurred **after** the execution of the 2018 Loan Agreement. In summary, they both affirm the parties acted as though the 2018 Loan Agreement was a revolving line of credit.

37. However, in the absence of any ambiguity, evidence of subsequent conduct is also irrelevant to the legal exercise of contractual interpretation.

38. Per *Sattva* at para 58*,* evidence of surrounding circumstances "does… have its limits. It should consist only of objective evidence of the background facts **at the time of the execution of the contract, …**that is, knowledge that was or reasonably ought to have been within the knowledge of both parties **at or before the date of contracting."**

39. The Court of Appeal in *Broer* confirmed, "**evidence of subsequent conduct should only be admitted if the contract is found to be ambiguous** after one has considered its text and the factual matrix surrounding the creation of the contract."[15]

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[13] Both affidavits state: "The AGAH Loan was done by separate instrument and is not, in any way, a shareholder loan between related companies. There was no intention […] for AGAH to have or hold equity in ASCL." At paragraph 11 of the Affidavit of Rong Lu and paragraph 27 of the Affidavit of Sam Gao.

[14] Paragraph 10 of the Affidavit of Rong Lu and paragraph 17 of the Affidavit of Sam Gao.

[15] *Broer*, at paras 49 and 50, **Tab 1.**

40. Atlantic Sea and AGAH have not taken the position that the words of the contract are ambiguous. In fact, in its rebuttal submissions on this motion, dated November 20, 2024, AGAH clearly asserts there is no ambiguity in the terms of the contract:[16]

> The 2018 Loan Agreement is a written contract **containing express terms to reflect a revolving line of credit** which had been previously agreed upon between AGAH and ASC from 2015 to the signing of the 2018 Loan Agreement

41. Without any ambiguity, this Court should not look to the subsequent conduct of contracting parties to interpret the contract.

Surrounding Circumstances Cannot Alter the Express Terms of a Contract

42. Even if we assume all evidence of the surrounding circumstances and subsequent conduct of the parties is relevant and admissible, and we assume the available evidence spoke to the intention of the parties at the time of contracting, WTH submits AGAH's position remains baseless.

43. Evidence of surrounding circumstances is only admissible as an interpretive aid, to give fuller meaning to the words of a contract.

44. Atlantic Sea and AGAH have flatly asserted that the true meaning of the contract is almost completely opposite to its text. No amount of "interpretive aid" can establish that a term loan with a specified due date was in fact a revolving line of credit with no set maturity date, or that a clause specifying that the agreement may not be amended except in writing could be amended without written documentation.

[16] Rebuttal submissions of AGAH, dated November 20, 2024, at para 3(b).

45. The only way to adopt the meaning that AGAH and Atlantic Sea propose would be to effectively create a "new agreement." This would offend the parole evidence rule in a manner specifically forbidden by the Supreme Court of Canada in *Sattva*.

46. Given the plain and unambiguous language of the contract, WTH submits no evidence of surrounding circumstances, including evidence of the intention of the parties, can support AGAH and Atlantic Sea's proposed interpretation of the contract.

CONCLUSION

47. WTH relies upon its prior submissions and requests this Court declare the claims by AGAH be subordinated to all third-party creditors.

All of which is respectfully submitted,

Gavin D.F. MacDonald
GDFM/AMK

Tab 1

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Broer v. Multiguide GmbH,*
2023 BCCA 134

Date: 20230324
Dockets: CA48355; CA48360

Docket: CA48355

Between:

Rudolf Broer and Marc Rummeny

Appellants
(Defendants)

And

Multiguide GmbH

Respondent
(Plaintiff)

And

Multiguide Technologies Inc. and RTB Safe Traffic, Inc.

Respondents
(Defendants)

- and -

Docket: CA48360

Between:

Multiguide Technologies Inc. and RTB Safe Traffic, Inc.

Appellants
(Defendants)

And

Multiguide GmbH

Respondent
(Plaintiff)

And

Rudolf Broer and Marc Rummeny

Respondents
(Defendants)

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Justice Dickson
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated May 19, 2022 (*Multiguide GmbH v. Broer*, 2022 BCSC 852, Vancouver Docket S1510213).

Counsel for the Appellants in CA48355, Rudolf Broer and Marc Rummeny:	A. Crabtree F. Ravanbakhsh
Counsel for the Appellants in CA48360, Multiguide Technologies Inc. and RTB Safe Traffic, Inc.:	J.M.S. Woolley
Counsel for the Respondent, Multiguide GmbH:	M-J. Dew
Place and Date of Hearing:	Vancouver, British Columbia March 3, 2023
Place and Date of Judgment with Written Reasons to Follow:	Vancouver, British Columbia March 3, 2023
Place and Date of Written Reasons:	Vancouver, British Columbia March 24, 2023

Written Reasons by:
The Honourable Madam Justice Stromberg-Stein

Concurred in by:
The Honourable Justice Dickson
The Honourable Madam Justice Horsman

Summary:

These appeals stems from the trial judge's order characterizing an advance of €100,000 from a shareholder to a company as a shareholder loan and not an equity investment. The appellants assert the trial judge erred by considering circumstances beyond the time the advance was made, and by finding financial statements drafted subsequent to the advance determinative of the true character of the funds. Held: Appeal dismissed. The trial judge did not err in considering the parties' subsequent conduct and events occurring after the time of the advance. Her reasons disclose a careful consideration of all the relevant circumstances and she did not find the financial statements, in isolation, to be determinative of the issue.

Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein:

Overview

[1] Following the hearing of these appeals, the appeals were dismissed with reasons to follow and the cross appeals were withdrawn. These are the reasons for dismissing the appeals.

[2] Following a 12-day trial, the plaintiff (respondent), Multiguide GmbH ("Multiguide"), was granted judgment for €100,000 against the defendants (appellants), Multiguide Technologies Inc. ("MTI"), RTB Safe Traffic, Inc. ("RTB Canada"), Rudolf Broer and Marc Rummeny, jointly and severally.

[3] The appellants submit the judge erred in principle in finding that €100,000 advanced by Multiguide to MTI was a shareholder loan rather than an equity contribution.

[4] Multiguide has brought cross appeals, to be heard only in the event the appellants are successful on the appeals, in which it seeks relief in the amount of €100,000 under the oppression remedy or as damages for conspiracy, and/or punitive damages of $100,000.

[5] Justice Marchand, in his refusal of the stay application brought by the appellants MTI and RTB Canada (2022 BCCA 298), summarized the parties to the litigation and their roles as follows:

> [5] As I understand it, the key players in this litigation are:
>
> a) Multiguide – a German company ….
>
> b) Roland Kraus – the sole shareholder of Multiguide.
>
> c) RTB GmbH & Co. KG ("RTB Germany") – a limited partnership between Mr. Broer and RTB Rehabilitations Technik Broer Beteiligungs GmbH ("RTB Technik").
>
> d) Mr. Broer – the sole limited partner of RTB Germany and the sole shareholder of RTB Technik ….
>
> e) MTI – a British Columbia company incorporated to carry out the parking meter business in North America ….
>
> f) RTB Canada – a British Columbia company incorporated to manage and carry out MTI's business in Canada ….
>
> g) Mr. Rummeny – an employee of RTB Germany, a[nd] director of MTI ….

[6] An additional individual relevant to these appeals is Robert Ziola, who was an initial shareholder of MTI with expertise in North American markets.

Background

[7] In 2013, Mr. Broer and Mr. Kraus acquired a pay-and-display parking metre ("PDM") business in Germany. In November 2014, they formed MTI to sell and service PDMs in North America.

[8] The original shareholders of MTI, each owning an equal 1/3 interest, were Multiguide, RTB Germany, and Mr. Ziola through a numbered holding company. Multiguide's initial shareholders were RTB Germany (owning 25% of the issued shares) and Mr. Kraus (owning the remaining 75%). The original directors of MTI were Mr. Broer (on behalf of RTB Germany), Mr. Kraus (on behalf of Multiguide), and Mr. Ziola.

[9] In December 2014, Multiguide and RTB Germany each advanced €100,000 in capital to MTI. The subject of these appeals is whether the trial judge committed a

reversible error in finding Multiguide's advance was a shareholder loan rather than an equity investment.

[10] In early 2015, the business relationship between Mr. Broer and Mr. Kraus soured. In mid-March 2015, Mr. Broer requested Mr. Kraus cause Multiguide to make payments on all amounts due and owing to RTB Germany from Multiguide. Pursuant to German law, the request placed Mr. Kraus in the position of having to go to court to declare an inability to pay the invoices (likely causing Multiguide to go into bankruptcy), or face personal liability for the company's debts. At this point, their relationship broke down and Mr. Broer and Mr. Kraus ceased effective communication.

[11] In May 2015, the parties negotiated a settlement agreement to separate the business of Multiguide from RTB Germany. Mr. Kraus became the sole shareholder of Multiguide as of May 4, 2015. He resigned as director, president and CEO of MTI as of August 2, 2015. The settlement agreement did not specifically deal with MTI, or otherwise determine how to separate their Canadian business interests, but it did include that "a provision for MTI shall be made at a shareholders' meeting of MTI".

[12] On August 26, 2015, Multiguide sent MTI demand letters requesting payment for unpaid invoices due and owing to Multiguide in the amount €172,778.10, which MTI disputed (the "Disputed Invoices").

[13] In October 2015, RTB Technik bought Mr. Ziola's shares in MTI for $20,000. As a result, RTB Germany and RTB Technik together held 2/3 of MTI's shares, and Multiguide held the remaining 1/3 as of October 2015. MTI's directors were Mr. Broer and Mr. Rummeny, who was appointed by Mr. Broer.

[14] On December 8, 2015, Multiguide sent a formal demand for repayment of its claimed shareholder loan in the amount of €100,000. The following day, Multiguide filed a notice of civil claim against MTI seeking repayment of the €100,000 and the Disputed Invoices.

[15] In January 2016, RTB Canada—wholly owned by RTB Germany—was incorporated in British Columbia. Mr. Broer and Mr. Rummeny, as directors of MTI, transferred all of MTI's assets to RTB Canada without notice to or consultation with Multiguide. The related written contract (called the Master Services Agreement or "MSA") was executed in 2018. In 2019, a special meeting of MTI shareholders was held and a special resolution passed to ratify the MSA. Multiguide dissented and maintained that the special resolution was invalid.

[16] Multiguide's notice of civil claim was consolidated with a second action seeking declarations that MTI had failed to comply with the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*]. The notice of civil claim was amended to add claims related to oppression and conspiracy.

Trial Judgment

[17] The judge found no concerns with the credibility and reliability of Mr. Kraus and Mr. Rummeny. However, she found that Mr. Broer's evidence raised concerns about both his credibility and reliability:

> [48] Mr. Broer, by his own admission, did not have a detailed understanding of MTI's day to day business dealings. While I accept Mr. Broer's explanation that he was "not an integral part of the daily business", I found his evidence at various times to be unresponsive, vague, and contradicted by the evidence of others. While I do not reject all of his evidence, where there is a conflict between his evidence and that of either Mr. Kraus or Mr. Rummeny, I prefer their evidence: see *McPhail v. Ross*, 2019 BCSC 21 at para. 101.

[18] The judge noted that determining the legal characterization of an advance of funds by a shareholder is a question of fact to be determined by reference to all of the surrounding circumstances: *Glacier Creek Development Corporation v. Pemberton Benchlands Housing Corporation*, 2007 BCSC 286 [*Glacier Creek*] at para. 59.

[19] She found that the underlying facts were not in dispute; Mr. Kraus and Mr. Broer both initially understood their €100,000 contributions to be equity:

> [72] … I accept that at the time the initial contributions were made to MTI, both Mr. Kraus and Mr. Broer believed they were making equity contributions to MTI, based on their experience in Germany. I find they both initially failed to obtain professional advice, nor turn their minds to, whether the initial contributions would, or should, be treated differently in Canada.

[20] The judge observed that shortly after making the initial contribution, no later than March 2015, Mr. Kraus realized that the nature of the initial advances needed to be clarified. The judge described the draft shareholder agreements that circulated between the parties between late 2014 and early 2015 as an attempt to clarify the nature of the initial advances, but accepted that no shareholder agreement was ever executed: at para. 73.

[21] With respect to the advancement of the €100,000, the judge found:

> [74] Notwithstanding there does not appear to have been a substantive discussion of the legal character of the initial contributions at the April 22, 2015 shareholder meeting, the MTI financial statements for 2014 were signed by both Mr. Kraus and Mr. Broer, and clearly characterized the initial contributions as "Loan from shareholders". The 2014 financial statements clearly identify the initial contributions as shareholder loans, and that these financial statements were finalized in April 2015, at a time well before any dispute arose as to the classification of the funds. I find the 2014 financial statements recorded the clear agreement of the shareholders that the initial contributions were properly characterized as shareholder loans. I also note this occurred at a time when Mr. Broer and Mr. Kraus were in significant conflict, and in the process of separating their German business interests, so I do not find it believable that Mr. Broer merely signed whatever was put in front of him.
>
> [75] Likewise, the 2015 and 2016 MTI financial statements, signed by Mr. Broer and Mr. Rummeny, recorded the same. This is compelling evidence that even when Mr. Broer could have corrected the characterization of the initial contributions, he did not take any steps to do so. In all of the circumstances, I find the execution of the financial statements to be determinative, and I find the initial contribution of €100,000 to be a shareholder loan. I do not accept the defendants' argument that this was a "recharacterization" of the initial contribution; rather, I find it was a clarification of the true legal character of the initial contribution after receiving professional advice. Similarly, I do not accept the defendants' argument that Mr. Broer's requests for a capital increase in July 2015 (as set out in paras. [92] - [93]) are determinative in these circumstances because that was the language he

> was used to in Germany, his dominant country of business activities. His use of language he was familiar with is not conclusive.
>
> [76] Upon a consideration of all of the evidence, I find the evidence is clear that the parties quickly reached the agreement that the contribution of €100,000 by Multiguide to MTI was a shareholder loan (the "Shareholder Loan"). Given my finding, there is no need to consider nor determine the various categories of financial contributions that are possible when funding a company.
>
> [Emphasis added.]

Positions of the Parties

[22] The parties do not dispute that the judge was correct in noting that whether an advancement of funds by a shareholder to a company is a loan or an investment of capital is a question of fact to be determined by reference to all of the surrounding circumstances. The parties disagree on what "surrounding circumstances" the judge was entitled to consider and, more generally, about the timeframe that should inform a court's analysis when considering how to properly characterize an advancement of funds.

[23] The appellants contend the trial judge erred in principle by considering circumstances beyond the time of the advance, and by finding that the company's financial statements, in the absence of other evidence, were determinative of the true nature of the advance.

[24] They rely on *Ghassemvand v. Premium Weatherstripping Inc.*, 2017 BCCA 309 [*Ghassemvand*], as authority for the proposition that the trial judge was required to determine the nature of the advance by reference to all the circumstances at the time of the advance, in December 2014. The appellants say the evidence at trial was unequivocal that Multiguide and RTB Germany's mutual intention at this time was to each make an equity contribution of €100,000. This, they say, ought to have been determinative, and any lack of clarity arose only *after* the funds had been advanced by the shareholders and received by MTI as equity. The appellants submit the trial judge allowed evidence of the parties' conduct subsequent to December 2014 to overwhelm evidence of their unambiguous shared intention at the time of the advance, contrary to *Wade v. Duck,* 2018 BCCA 176

[*Wade*] and *Shewchuk v. Blackmont Capital Inc.*, 2016 ONCA 912 [*Shewchuk*]. The appellants contend in the absence of a written contract, evidence of the parties' agreement must be drawn from the testimony of witnesses regarding what happened at the time of the advance and the contemporaneous documents.

Standard of Review

[25] Whether an advance to a corporation is a loan or capital contribution is a question of fact, or mixed law and fact, and as such is "reviewable on the standard of 'palpable and overriding error' unless it is clear that the lower court made an extricable error of law, such as an error with respect to the legal 'test' or standard to be applied": *Ghassemvand* at paras. 31, 35.

[26] If the inferences drawn by the trial judge are reasonably supported by the evidence, a reviewing court cannot reweigh the evidence by substituting for it an equally, or even more, persuasive inference of its own: *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at para. 74, cited in *Ghassemvand* at para. 32.

[27] I note that the parties disagree on the proper classification of the issue on appeal. The appellants say the judge made an extricable error of law reviewable on a standard of correctness. I do not have to address that issue as, in my view, it makes no difference in this case.

Discussion

[28] It is helpful to set out the evidence of the timeline relevant to the €100,000 contribution.

[29] On December 9, 2014, Mr. Kraus arranged a wire transfer from Multiguide to MTI, identifying the transfer as "Initial equity capital Multiguide GmbH". This contribution was initially reported in Multiguide's ledger as "Participation in Stock Corporations". That same day, Mr. Kraus wrote an email to RTB Germany's corporate controller with the subject line: "Equity contribution for MTI".

[30] Both Mr. Broer and Mr. Kraus gave evidence, and the trial judge accepted, that they initially understood that their respective €100,000 contribution was equity, as German law required a minimum equity contribution to start a company: at para. 50. In contrast, Mr. Ziola, who was from British Columbia, gave evidence he understood the advances were shareholder loans and would be paid back from the profits of the business: at para. 59.

[31] Mr. Kraus testified that as of March 2015 it was unclear how the funds were characterized. On March 3, 2015, MTI's external accountant sought clarification from MTI on whether he should consider the advances from Multiguide and RTB Germany as loans or capital when preparing MTI's financial statements. Mr. Kraus responded: "I thought this was an equity input, but according to our lawyer this may be a loan. I think this is something we need to clarify in our shareholder meeting in April. Can this wait until then??": at para. 54. MTI's external accountant responded that same day writing: "No worries, I will treat this amount as loan as for Dec. 31, 2014 financial statement, and we can rectified thereafter. And I will show as loan to respective loan acct of Multiguide and RTB": at para. 54. On March 20, 2015, Mr. Kraus sent the directors of MTI the 2014 financial statements. These draft financial statements recorded "Loan from Shareholders $238,318.17" under Liabilities and Capital as at December 31, 2014: at para. 55.

[32] On April 22, 2015, the annual general meeting for MTI was held in Vancouver, BC. The AGM was attended by Mr. Kraus, Mr. Ziola and Mr. Rummeny, who attended on Mr. Broer's behalf. On the agenda, the shareholders were to approve and sign the financial statement for 2014, and discuss and finalize the shareholders agreement. At trial, the parties disagreed whether there was a discussion at the AGM relating to the characterization on the 2014 financial statements of the initial contribution as a shareholder loan: at para. 58.

[33] On April 24, 2015, Mr. Kraus sent an email to Multiguide's accountant confirming the €100,000 contribution was a shareholder loan, and requesting he take that into account when preparing Multiguide's 2014 financial statements.

[34] The judge found that the evidence was clear that Mr. Broer and Mr. Kraus both signed the 2014 MTI financial statements which characterized the initial start-up capital as “Loan from shareholders.” The judge found Mr. Broer and Mr. Rummeny both signed the MTI 2015 and 2016 financial statements which continued to characterize the advances as shareholder loans: at paras. 61–62.

[35] On July 2 and 10, 2015, Mr. Broer wrote to Mr. Ziola requesting additional capital contributions to MTI. The July 2, 2015 demand was addressed to Mr. Ziola solely and read as follows:

> Dear Mr. Ziola,
>
> After inspecting the “financial statement” and after further examination of the current financial situation of MTI, I would like to tell you the following:
>
> To guarantee a continued existence of MTI, I am asking you for a capital increase of 140,000.00$, same as all other shareholders have done previously.
>
> This action is urgent required to pay outstanding invoices and to provide MTI a professional administration that you have not delivered.
>
> If you will not agree with the capital increase, I find myself constrained to think of RTB providing PDM deliveries and services to MTI in the future,
>
> Yours sincerely,
>
> Rudolf Broer

[36] Mr. Ziola did not agree to the request, but made alternative suggestions to improve MTI’s financial circumstance. On July 10, 2015, Mr. Broer wrote to Mr. Ziola and Mr. Kraus to again request additional capital: at para. 93.

[37] In August 2015, Mr. Kraus resigned as director, president and CEO of MTI.

[38] Following up on an inquiry from Mr. Broer, MTI’s financial controller wrote, in an email dated November 6, 2015, that MTI’s only shareholder loan was the €200,000 advance from Mr. Broer and Mr. Kraus.

[39] On December 8, 2015, Multiguide made a formal demand for repayment of its shareholder loan.

[40] As stated above, there is no dispute that whether an advancement of funds by a shareholder to a company is a loan or an investment of capital is a question of fact to be determined by reference to all of the surrounding circumstances: *Glacier Creek* at para. 59. This proposition was confirmed in *Ghassemvand*, the leading authority from this Court on the proper characterization of an advance of capital as equity or shareholder loan.

[41] In *Ghassemvand*, the plaintiff respondent was one of the founding shareholders of a company to which he had advanced funds at the company's inception. An external accountant had advised that the advances should be treated as loans for tax purposes. The plaintiff and all other shareholders agreed, and for four years the company's financial records and other documents reflected the advances as shareholder loans payable on demand. At the time the company was founded, the shareholders had executed a shoddily drafted shareholder agreement which provided, in part, that shareholders would not be required to make loans to the company. The external accountant had never seen the shareholder agreement, but upon seeing it, concluded based on that provision that the advances could only have been equity investments. The accountant proceeded to revise the company's records accordingly.

[42] The trial judge agreed with the accountant's opinion that any shareholder loan had to be supported by a shareholder agreement, and ruled that notwithstanding the references to demand loans in the company's records, the plaintiff's cash advances must have been equity contributions. On appeal, the majority of this Court found the trial judge had erred in law by finding the shareholders' agreement was definitive of the true character of the loans and could operate to retroactively re-characterize the funds. Instead, the judge ought to have considered all of the surrounding circumstances to determine the substance of the advances.

[43] The appellants submit *Ghassemvand* refined the test set out in *Glacier Creek* by confining the court's consideration to only those circumstances at the time of the

advance. In particular, they refer to the following portion of Justice Newbury's reasons:

> [35] Obviously, the central issue before the Court was whether the plaintiff (and, one supposes, the other shareholders) made his advances to PW totalling $180,000 as loans or as capital contributions. Although there are few authorities on the point, the law seems to be clear that this 'characterization' is primarily a question of fact, or perhaps mixed fact and law (insofar as Sattva applies), to be determined by reference to all the circumstances at the time of the advance.
>
> [Emphasis added.]

[44] In my view, *Ghassemvand* did not restrict the test in the manner the appellants claim. Neither the rest of the analysis in *Ghassemvand*, nor other leading authorities on the question, offer support for such a narrowed and time-constrained analysis. Indeed, the overriding rationale for considering "the surrounding circumstances" as articulated in *Ghassemvand* is the requirement to consider the substance of the transaction over the form. As Justice Newbury explained:

> [51] Subsequent cases have re-affirmed that the characterization of advances as loans or as capital contributions requires that the "substance of the transaction" be examined and that all the surrounding circumstances – not only the words used in documenting the transaction – be considered: see, e.g., *Re U.S. Steel Canada Inc*. 2016 ONSC 569 at paras. 167–8; *Re Tudor Sales Ltd.* 2017 BCSC 119 at paras. 34–40; *Ascent One Properties Ltd. v. Liao* 2017 BCSC 1017 at para. 227.

[45] This approach is consistent with other Canadian jurisdictions. In *Elefant v. Genwood Industries Ltd.*, 2018 QCCS 4590, the court summarized the law as follows:

> [7] In characterizing a claim as either debt or equity, Canadian courts generally take a contextual, intention-based approach that favours a determination of a claim's substance rather than its form. In *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, Mr. Justice Iacobucci stated that the correct approach is to determine the "substance" or "true nature" of the transaction under review.
>
> [8] More recently, in *U.S. Steel Canada Inc., Re,* the Ontario Superior Court held that where a transaction occurs between related, or non-arm's length parties, "there can be no certainty that the language of the agreements reflects the underlying substantive reality of the transaction".
>
> [Footnotes omitted.]

[46] In *U.S. Steel Canada Inc., Re*, 2016 ONSC 569, also cited with approval in *Ghassemvand* and *Tudor Sales Ltd., (Re),* 2017 BCSC 119, the court described the task of the court in determining the character of an advance of funds as follows:

> [168] In other words, the task of a court is to determine whether the transaction in substance constituted a contribution to capital notwithstanding the expressed intentions of the parties that the transaction be treated as a loan. It is therefore not appropriate to limit the inquiry into the intentions of the parties to a review of the form of the transaction documentation. Such an exercise reduces to a "rubber stamping" of the determination of a single party to the transaction, i.e., the sole shareholder, and it does not address the substance of the transaction as it was actually implemented. In such circumstances, the determination of whether a particular claim is to be treated as debt or equity must address not just the expressed intentions of the parties as reflected in the transaction documentation but also the manner in which the transaction was implemented and the economic reality of the surrounding circumstances.
>
> [Emphasis added.]

[47] How a court discerns the true substance of a transaction will be a fact-specific inquiry. Depending on the facts of any given case, this may well require the court to consider circumstances beyond those immediately occurring at the time of the advance.

[48] The appellants do not go so far as to say the parties formed any kind of written agreement at the time of the advance, but say the parties' shared intention at that time was unambiguous and therefore consideration of subsequent events was unnecessary and improper.

[49] Generally, evidence of surrounding circumstances will not be permitted to overwhelm the words of an agreement: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 57. In *Wade*, this Court offered clarification on how courts are to consider evidence of subsequent conduct, in particular:

> [28] ... evidence of subsequent conduct should only be admitted if the contract is found to be ambiguous after one has considered its text and the factual matrix surrounding the creation of the contract: *Re Canadian National Railways and Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 252, aff'd [1979] 2 S.C.R. 668 [*Canadian National Railways*]. In that case, Mr. Justice Lambert,

writing for the majority of this Court, explained the circumstances permitting the use of subsequent conduct (at 262):

> In Canada the rule with respect to subsequent conduct is that if, after considering the agreement itself, including the particular words used in their immediate context and in the context of the agreement as a whole, there remain two reasonable alternative interpretations, then certain additional evidence may be both admitted and taken to have legal relevance if that additional evidence will help to determine which of the two reasonable alternative interpretations is the correct one. It certainly makes no difference to the law in this respect if the continuing existence of two reasonable alternative interpretations after an examination of the agreement as a whole is described as doubt or as ambiguity or as uncertainty or as difficulty of construction.

[50] *Wade* cited *Shewchuk* as further confirmation that, "[e]vidence of subsequent conduct should be admitted only if the contract remains ambiguous after considering its text and factual matrix": *Wade* at para. 31.

[51] In this case, the appellants seek to limit the judge's consideration to the events occurring on or about December 9, 2014, when Multiguide advanced the €100,000 to MTI. The judge described this period of time as follows:

> [51] The contemporaneous documents are consistent with a shared understanding that this initial contribution was on account of equity. On December 9, 2014, Mr. Kraus made arrangements for a wire transfer from Multiguide to MTI and identified the transfer as for "initial equity capital Multiguide GmbH". This contribution was initially reported in Multiguide's ledger as "Participation in stock corporations".
>
> [52] On the same day Mr. Kraus wrote to Anja Hagen (RTB Germany's corporate controller), and copied Mr. Broer, with the subject line "Equity contribution for MTI" as follows:
>
> > Hi Anja,
> >
> > May I ask you to make the EUR 100,000 equity contribution into our joint company Multiguide Technologies Inc. on behalf of RTB GmbH & Co. KG? I have paid my share [my part] today. It is therefore no longer necessary that your payment is made in December, you are also welcome to wait until the new year. You can find the banking details on my payment slip (see attachment).
> >
> > I think the start in Canada is going well so far. However, I expect that we'll need to make another equity contribution in early summer (hopefully for the last time then).

> Best regards,
>
> Roland

RTB Germany likewise advanced an initial €100,000 contribution.

[52] As I have noted above, the judge found, at para. 72:

> … I accept that at the time the initial contributions were made to MTI, both Mr. Kraus and Mr. Broer believed they were making equity contributions to MTI, based on their experience in Germany. I find they both initially failed to obtain professional advice, nor turn their minds to, whether the initial contributions would, or should, be treated differently in Canada.

[53] In my view, there is no merit to the appellants' argument that the judge erred by considering the "surrounding circumstances" beyond this period of time. From a contractual interpretation standpoint, in the absence of any written agreement formalizing the parties' intentions, it was appropriate for the judge to consider the parties' subsequent negotiations. This Court in *De Cotiis v. Viam Holdings Ltd.*, 2010 BCCA 368, explained the flexibility a court has in considering evidence of surrounding circumstances, including post-contractual circumstances, when interpreting oral agreements:

> [21] … As G.H.L. Fridman notes in *The Law of Contracts in Canada* (5th ed., 2006) "[i]n the case of a completely oral contract there is greater flexibility in the nature of the evidence that is admissible to prove the contents of the contract and the meaning of the language used by the parties." (At 440.) This flexibility follows intuitively from the recognition that oral contracts must often be construed without the key interpretive tool used to understand written contracts — the words of the agreement.

[54] In *Korker Diversified Holdings Inc. v. Savingsplus Internet Inc.*, 2008 BCSC 136, to which the respondent referred the judge at trial, the court quoted Fridman's same text at para. 35:

> … If there is no single document to which reference can be made in order to decide if a contract exists between the parties, but a series of negotiations, then everything that occurs between the parties relevant to the alleged contract must be considered by the court which is faced with the problem of deciding the issue. From what they have said, done, or written, in combination if necessary, there must be established a bargain or an agreement…

[55] In my view, any agreement about the characterization of the advance, as between the parties, at the time the funds were advanced in December 2014, was sufficiently ambiguous to justify the judge's consideration of the parties' subsequent conduct.

[56] The appellants assert that, on the facts found by the trial judge, any lack of clarity arose only *after* the funds had been advanced by the shareholders and received by MTI as equity. This argument mischaracterizes the judge's findings for a number of reasons.

[57] First, the judge made findings on the understanding Mr. Broer and Mr. Kraus shared at the time of the advance, but did not address the other relevant party, namely Mr. Ziola, whose understanding of the nature of the contribution at the time it was advanced is relevant to whether the relevant parties were *ad idem* on the proper characterization of the loan. Indeed, Mr. Ziola's evidence challenges the notion that all relevant parties were in agreement. Though the judge did not expressly mention Mr. Ziola's understanding at the time of the advance, she did refer to his evidence as part of her chronology, at para. 59, signaling her awareness that Mr. Ziola's understanding from November 2014 through April 2015 was that the advances were made as shareholder loans:

> Mr. Ziola testified that at the AGM he was asked if he would contribute additional funds, and he reminded the parties that the shareholder loans would be paid back, but that he was not going to personally contribute anything further. ...

[58] Second, the judge found that Mr. Kraus and Mr. Broer, at the time of the advance, initially understood the contribution to have been an equity contribution, as appeared to be required by German corporate law. The judge does not find that the contribution *was* therefore an equity contribution as of December 9, 2014. It is not the case that the judge determined the parties had agreed that the capital advanced was equity, and then subsequently re-characterized the advance. Indeed, the judge states this in her reasons:

> [75] … I do not accept the defendants' argument that this was a "recharacterization" of the initial contribution; rather, I find it was a clarification

> of the true legal character of the initial contribution after receiving professional advice. ...

[59] The absence of a re-characterization of the funds distinguishes this case from *Ghassemvand*. There, the parties had collectively conducted themselves for four years as though certain advances were shareholder loans before agreeing to a retroactive reclassification of those advances as capital contributions. Unlike *Ghassemvand*, there was no initial classification necessitating formal documentation of reclassification. The judge determined that it was merely a period of uncertainty. This finding was eminently reasonable on the facts of this case and the evidence before her.

[60] Beyond contractual interpretation, finding Mr. Kraus and Mr. Broer's understanding at the time of the advance determinative of the issue would be a failure to consider "all of the circumstances" per *Ghassemvand*. Below, the appellants argued that the description of loans on the books of the company may be entitled to little weight having regard to the whole of the evidence, and that the manner in which the transaction is described is not conclusive. The judge considered this submission, and referred to the guidelines distilled from the jurisprudence in *YG Limited Partnership and YSL Residences (Re)*, 2021 ONSC 4178, which she summarized as follows:

> [71] … neither the "intention of the parties" (as between non-arm's length parties) nor the formal characterization is conclusive as to the true nature of the transaction; the manner in which the transaction was implemented, and the surrounding economic circumstances, must be examined to determine the true nature of the transaction; and whether the parties had a subjective intent to repay principle or interest on the alleged loan and whether that expectation was reasonable. ...

[61] The appellants' claim hinges on the judge's findings concerning the parties' understanding of the advance on December 9, 2014. The authorities expressly caution against finding such evidence determinative. On the appellants' own submissions at trial, it would have been an error for the judge to have found the understanding of the parties on that date conclusive.

[62] The appellants submit the judge erred by finding the financial statements were determinative. The judge was alive to the clear line of authority from this Court urging courts not to find the words used in documenting the transaction determinative: *Ghassemvand* at para. 51. She did not examine the characterization of the funds in the 2014, 2015 and 2016 financial statements in isolation from other evidence. Her reasons disclose a careful consideration of the parties' interactions, and factors beyond just the financial statements. Her conclusion was clearly informed by her findings concerning issues with Mr. Broer's credibility and reliability. She considered the entire spectrum of interactions occurring between December 2014 and the date at which the respondent Multiguide requested payment of the outstanding €100,000. Indeed, the judge's conclusions reflect she considered all of the circumstances and all of the evidence in reaching her conclusion that the contribution of €100,000 by Multiguide to MTI was a shareholder loan.

Disposition

[63] It is my view the judge did not err in finding that €100,000 advanced by Multiguide to MTI was a shareholder loan and not an equity contribution.

[64] I would dismiss the appeals.

[65] It is not necessary to address the cross appeals and the cross appeals are withdrawn.

[66] The respondent Multiguide is entitled to the costs of these appeals. With respect to the cross appeals, the parties will bear their own costs.

"The Honourable Madam Justice Stromberg-Stein"

I agree:

"The Honourable Justice Dickson"

I agree:

"The Honourable Madam Justice Horsman"

Tab 2

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

v.

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

and

Attorney General of British Columbia and BCICAC Foundation *Interveners*

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

c.

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

et

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

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

2014 SCC 53

File No.: 35026.

2013: December 12; 2014: August 1.

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

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

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1er août.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The historical approach according to which determining the legal rights and obligations of the parties under a written contract was considered a question of law should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract.

It may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law; however, the close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. The goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. Accordingly, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Legal errors made in the course of contractual interpretation include the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. Concluding that C's application for leave to appeal raised no question of law is sufficient to dispose of this appeal; however, the Court found it salutary to continue with its analysis.

In order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a), an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case.

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

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

Il faut rompre avec l'approche historique selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit ressortit à une question de droit. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel de ce dernier.

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

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

At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law by the leave court is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case. The appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit, meaning that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law.

Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the standard of review. The leave court's assessment of the standard of review is only preliminary and does not bind the court which considers the merits of the appeal.

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

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

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

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

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

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

In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise. The question at issue here does not fall into one of those categories and thus the standard of review in this case is reasonableness.

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.

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.

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.

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.

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.

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

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

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

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

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

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

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

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

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I. Facts

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

Version française du jugement de la Cour rendu par

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

I. Faits

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

the importance of the result of the arbitration to the parties justifies the intervention of the court. Justice Saunders explained this criterion in *BCIT* as requiring that the result of the arbitration be "sufficiently important", in terms of principle or money, to the parties to justify the expense and time of court proceedings (para. 27). The parties in this case have agreed that the result of the arbitration is of importance to each of them. In view of the relatively large monetary amount in dispute and in light of the fact that the parties have agreed that the result is important to them, I accept that the importance of the result of the arbitration to the parties justifies the intervention of the court. This requirement of s. 31(2)(a) is satisfied.

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

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

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

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

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

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

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

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

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

assured to be literate and therefore capable of reading the contract (Hall, at p. 126; and Lewison, at pp. 173-74).

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

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

[46] The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract

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

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

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

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

— often referred to as the factual matrix — when interpreting a written contract (Hall, at pp. 13, 21-25 and 127; and J. D. McCamus, *The Law of Contracts* (2nd ed. 2012), at pp. 749-51). The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 26 and 31-36.

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

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

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

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc.*

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

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

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

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

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

v. Manitoba Motor League, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

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

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

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

[51] The purpose of the distinction between questions of law and those of mixed fact and law further

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

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

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

[50] Avec tout le respect que je dois aux tenants de l'opinion contraire, à mon avis, il faut rompre avec l'approche historique. L'interprétation contractuelle soulève des questions mixtes de fait et de droit, car il s'agit d'en appliquer les principes aux termes figurant dans le contrat écrit, à la lumière du fondement factuel.

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

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

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

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

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

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

[52] De même, la Cour dans l'arrêt *Housen* conclut que la retenue à l'égard du juge des faits contribue à réduire le nombre, la durée et le coût des appels tout en favorisant l'autonomie du procès et son intégrité (par. 16-17). Ces principes militent également en faveur de la déférence à l'endroit des décideurs de première instance en matière d'interprétation contractuelle. Les obligations juridiques issues d'un contrat se limitent, dans la plupart des cas, aux intérêts des parties au litige. Le vaste pouvoir de trancher les questions d'application limitée que notre système judiciaire confère aux tribunaux de première instance appuie la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

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

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

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

[55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of

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

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

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

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

contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

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

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

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

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

[56] Abordons le rôle des circonstances dans l'interprétation du contrat et la nature des éléments admis à l'examen. La présente analyse ne traite que de la démarche d'interprétation contractuelle fondée sur la common law; elle ne se veut ni une application ni une modification du droit relatif à l'interprétation contractuelle régi par le *Code civil du Québec*.

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

[57] Bien que les circonstances soient prises en considération dans l'interprétation des termes d'un contrat, elles ne doivent jamais les supplanter (*Hayes Forest Services*, par. 14; Hall, p. 30). Le décideur examine cette preuve dans le but de mieux saisir les intentions réciproques et objectives des parties exprimées dans les mots du contrat. Une disposition contractuelle doit toujours être interprétée sur le fondement de son libellé et de l'ensemble du contrat (Hall, p. 15 et 30-32). Les circonstances sous-tendent l'interprétation du contrat, mais le tribunal ne saurait fonder sur elles une lecture du texte qui s'écarte de ce dernier au point de créer dans les faits une nouvelle entente (*Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc*. (1997), 101 B.C.A.C. 62).

[58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*,

[58] La nature de la preuve susceptible d'appartenir aux « circonstances » variera nécessairement d'une affaire à l'autre. Il y a toutefois certaines limites. Il doit s'agir d'une preuve objective du contexte factuel au moment de la signature du contrat (*King*, par. 66 et 70), c'est-à-dire, les renseignements qui

at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

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

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

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts

appartenaient ou auraient raisonnablement dû appartenir aux connaissances des deux parties à la date de signature ou avant celle-ci. Compte tenu de ces exigences et de la règle d'exclusion de la preuve extrinsèque que nous verrons, on entend par « circonstances », pour reprendre les propos du lord Hoffmann [TRADUCTION] « tout ce qui aurait eu une incidence sur la manière dont une personne raisonnable aurait compris les termes du document » (*Investors Compensation Scheme*, p. 114). La question de savoir si quelque chose appartenait ou aurait dû raisonnablement appartenir aux connaissances communes des parties au moment de la signature du contrat est une question de fait.

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

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

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

that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

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

(d) *Application to the Present Case*

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

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

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

[65] However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed,

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

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

d) *Application au présent pourvoi*

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

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

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

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

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

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

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

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

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

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

application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

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) May Prevent a Miscarriage of Justice

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

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

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

[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] 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).

[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] 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.

[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.

Tab 3

2023 NSSC 11
Nova Scotia Supreme Court

Thornridge Holdings Limited v. Ryan

2023 CarswellNS 33, 2023 NSSC 11, 2023 A.C.W.S. 444

Thornridge Holdings Limited (Plaintiff) and Michael Gordon Ryan (Defendant)

Darlene Jamieson J.

Heard: November 28, 2022
Judgment: January 11, 2023
Docket: 5097252

Counsel: Christopher W. Madill, Sarah A. Walsh, for Plaintiff
Victor Goldberg, K.C., Matt McEwen, for Defendant

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Evidence; Insolvency

Headnote

Evidence --- Affidavits — Motions to strike
Plaintiff's motion to strike defendant's affidavit was granted in part.
Evidence --- Affidavits — Filing and serving
Defendant was granted leave to file supplemental affidavit.

MOTION by plaintiff to strike affidavit evidence of defendant: MOTION by defendant seeking leave to file supplemental affidavit.

***Darlene Jamieson J.*:**

Introduction

1 On October 7, 2021, Thornridge Holdings Limited ("Thornridge") filed a Notice of Action against Michael Gordon Ryan ("Mr. Ryan") seeking payment of monies it alleges are owing pursuant to a promissory note dated February 26, 2015 (referred to as the "Large Note").

2 Thornridge pleads that, as part of a series of transactions in February 2015, Thornridge agreed to advance the sum of $3,667,819 to Mr. Ryan. According to Thornridge, under the terms of the Large Note, Mr. Ryan was to pay the $3,667,819 to Thornridge on the date and to the extent that Mr. Ryan received any amounts owing to him in respect of the sale of his shares in Envirosystems Incorporated, or any successor thereof pledged as security for the Large Note. Thornridge pleads that in June 2018, the shares of the investors in Envirosystems were exchanged for shares of Terrapure Environmental Ltd., following Terrapure's acquisition of Envirosystems. Thornridge further pleads that on August 17, 2021, investors in Terrapure sold their shares to GFL Environmental Inc. in the course of GFL's acquisition of Terrapure. Thornridge says GFL's acquisition of Terrapure was a "Liquidity Event" triggering repayment under the Large Note.

3 On December 1, 2021, Mr. Ryan filed a Notice of Defence pleading, in part, that Thornridge never requested that he pledge his shares of Envirosystems as security for the Large Note. He pleads that no other shares or property was ever pledged as security, the Large Note remains unsecured. Mr. Ryan further pleads that the Large Note was intended by all parties to be of limited recourse, with his repayment obligations limited to the net proceeds received upon either the sale of the shares of Envirosystems or the shares of successor corporations pledged as security for the loan, up to the face value of the promissory note.

31 As was pointed out in *Toronto Dominion Bank v. Cambridge Leasing Ltd*2006 NBQB 92, where no specific person from the referenced corporate entity is identified as having made the statement or statements (admission), the evidence as presented is very unreliable. This is clearly in keeping with our Civil Procedure Rule 39.02, which states that an "affidavit that includes hearsay permitted under these Rules, a rule of evidence, or legislation *must identify the source of the information and swear to, or affirm, the witness' belief in the truth of the information*."

32 Finally, I note that when an out-of-court statement is offered simply as proof that the statement was made, it is not considered to be hearsay. Such evidence is admissible as long as it has some probative value. In this circumstance, the person indicating that the statement was made is available for cross-examination. The question is one of relevancy. Does the statement have a purpose aside from the truth of its contents? If yes, it may be admissible for that limited purpose. The trier of fact must be cautious concerning the limited relevancy of the statement — its relevance lies in the fact that it was made, not in the fact that its contents are true.

Submissions

33 As stated by the Court of Appeal in *Canadian National Railway v. Teamsters Canada Rail Conference,*2017 NSSC 10, "Submissions do not constitute evidence" (para 49). In *Canadian Imperial Bank of Commerce v. CNH Capital Ltd.* 2013 NSCA 35, the Court of Appeal commented on the prohibition against statements in the nature of a plea or submission:

> [81] *First:* CNH Capital Canada says that the statements are a "submission" or "plea" which must be excluded under *Civil Procedure Rule* 39.04(2):
>
> > 39.04 (2) A judge must strike a part of an affidavit containing either of the following:
> >
> > (a) information that is not admissible, such as an irrelevant statement or a submission or plea;
>
> CNH Capital Canada submits that Rule 39.04(2) codifies Justice Davison's statement in *Waverley (Village) v. Nova Scotia (Acting Minister of Municipal Affairs)* (1993), 123 N.S.R. (2d) 46 (N.S. S.C.):
>
> > [20] It would be helpful to segregate principles which are apparent from consideration of the foregoing authorities and I would enumerate these principles as follows:
> >
> > Affidavits should be confined to facts. There is no place in affidavits for speculation or inadmissible material. An affidavit should not take on the flavour of a plea a summation.
>
> [82] I agree with Justice Davison's statement from *Waverley*. But I disagree that the challenged statements in the affidavits of Messrs. Bayne and Tucci are a "submission" or "plea". What is objectionable under Rule 39.04(2)(a) is a conclusory statement that embodies or assumes a point of law. Whether, how, and the degree to which Ford Credit's identity was important to the Bank are questions of fact, as I have explained earlier (para 63).
>
> [Emphasis added]

34 It is important to note that a witness can describe an event they have experienced. As noted in *Armoyan v. Armoyan* 2013 NSCA 99, solely because a word has a potential legal meaning or use does not automatically mean that an affiant who uses the word does so for a legal purpose (paras. 146 - 147).

Speculation

35 Cases are to be decided on facts, not guess-work. Speculation as to what the facts might be, what another person had in their mind, what could happen, etc., has little, if any, probative value. However, witnesses can give estimates or approximations of distance, time, etc.

Contractual Interpretation and Surrounding Circumstances

36 It is important to remember that the affidavit evidence offered is in the context of a claim pursuant to a legal agreement — a promissory note. The interpretation of certain clauses of the Large Note are in issue. Neither ambiguity nor rectification have been pleaded. Mr. Ryan, in response to some of the admissibility objections of Thornridge, submits that the evidence is evidence of surrounding circumstances admissible in aid of interpretation of the promissory note. I will, therefore, spend some time dealing with interpretation of contracts and admissibility of surrounding circumstances.

37 In the interpretation exercise, the words of the agreement are always the starting point. The Supreme Court of Canada said in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53 that the overriding concern is to determine the objective intent of the parties, through the application of legal principles of interpretation and consistent with the surrounding circumstances:

> 47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)
>
> 48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society (1997)*, [1998] 1 All E.R. 98 (U.K. H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]
> >
> > . . .
>
> 49....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...
>
> [Emphasis added]

38 As the court said in *Sattva* , *supra*, while the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of the agreement:

> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in

> the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc*. (1997), 101 B.C.A.C. 62 (B.C. C.A.)).
>
> 58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [Emphasis added]

39 Contracts are not made in a vacuum. The case law is clear that surrounding circumstances (context or factual matrix) are important in interpreting the words, as such evidence will assist a trier of fact in understanding the objective intention of the parties, as expressed in the words. In short, it is perfectly proper to look at surrounding circumstances to assist in determining what the parties were contracting about. Evidence of the surrounding circumstances is admissible even if there is no ambiguity in the wording of the agreement. However, the subjective intent of the parties is not a consideration. It is of no value to the interpretation process, where there is no ambiguity alleged, for a party to give evidence as to what the terms of the contract mean to them.

40 Surrounding circumstances or the factual matrix is broad, and may include many things, but the case law is clear that it does not include evidence of negotiations leading up to the final agreement or the subjective intentions of the parties. Neither Mr. Ryan's subjective intention nor Thornridge's subjective intention in entering the agreement is admissible. Contractual interpretation is an objective endeavor, not a subjective one. As was said by Geoff R. Hall in *Canadian Contractual Interpretation Law*, 3rd ed. (Markham: LexisNexis Canada, 2016) at page 33:

> A further limitation on the scope of the factual matrix is the requirement that it must be assessed objectively. Since contractual interpretation is an objective exercise, the factual matrix consists only of objective facts known to the parties at or before the date of contracting. It also consists only of what is common to both parties, as opposed individualized versions of the factual matrix particular to only one of the contracting parties.
>
> [Emphasis added]

41 Although predating *Sattva* , *supra*, the Ontario Court of appeal in *Kentucky Fried Chicken Canada v. Scott's Food Services Inc.* [1998] O.J. No. 4368 (Ont. C.A.), said:

> 27 Where, as here, the document to be construed is a negotiated commercial document, the court should avoid an interpretation that would result in a commercial absurdity. Rather, the document should be construed in accordance with sound commercial principles and good business sense. Care must be taken, however, to do this objectively rather than from the perspective of one contracting party or the other, since what might make good business sense to one party would not necessarily do so for the other.
>
> [Emphasis added]

42 While also predating *Sattva* , the Manitoba Court of Appeal in *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League* 2003 MBCA 71 discussed the rationale for excluding evidence of negotiations:

> 20 In the well-known decision *Prenn v. Simmonds*, [1971] 3 All E.R. 237 (U.K. H.L.), Lord Wilberforce began by noting the obvious reasons why evidence of negotiations should be excluded (at p. 240):

> There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in cl 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience (although the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words?

21 He continued by commenting on the importance of evidence of the "genesis" and "aim" of the transaction (at p. 241):

> In my opinion, then, evidence of negotiations, or of the parties' intentions, ... ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively the "aim" of the transaction.

23 More recent cases, while recognizing the basic principle that evidence of negotiations is not admissible, have considered evidence of negotiations in reference to the commercial objective and factual matrix. One illustrative example is *Langley LowCost Builders Ltd. v. 474835 B.C. Ltd.*, [2000] 7 W.W.R. 46, 2000 BCCA 365 (B.C. C.A.), which relies on the principles articulated in *Prenn v. Simmonds*, McEachern C.J.B.C. opined (at para. 29):

> [I]t is important to remember that negotiations between the parties are not relevant in determining the meaning of the language used by the parties. This is because parties often change their views and positions during negotiations. The fact that the parties were in negotiations, and the reasons for these negotiations, however, including the commercial objectives of the parties is relevant as a part of the factual matrix, or factual underpinning of the agreement: *Prenn v. Simmonds*, ...

24 When there is no ambiguity, the courts are not often called upon to consider the commercial reality of the transaction in the sense of determining a "sensible commercial result." Iacobucci J. commented on this in *Eli Lilly* (at para. 56):

> When there is no ambiguity in the wording of the document, the notion in *Consolidated-Bathurst* [[1980] 1 S.C.R. 888] that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words.

25 When is a contract or a phrase ambiguous? Difficulty in interpreting a contract is not synonymous with ambiguity (*PaddonHughes Development Co. v. Pancontinental Oil Ltd. (1998)*, [1999] 5 W.W.R. 726 (Alta. C.A.)). An ambiguous phrase has been described as one that is "reasonably susceptible of more than one meaning" (*Hi-Tech Group Inc. v. Sears Canada Inc*. (2001), 52 O.R. (3d) 97 (Ont. C.A.) at para. 18 (C.A.), and 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" (*Eco-Zone Engineering Ltd. v. Grand Falls-Windsor (Town)* (2000), 5 C.L.R. (3d) 55, 2000 NFCA 21 (Nfld. C.A.) at para. 9, quoting *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co. (1968)*, [1969] 1 O.R. 469 at 524 (Ont. H.C.). This cannot be determined until the full text of the contract is considered, in light of the surrounding circumstances at the time of its execution, if necessary.

26 In brief summary then, to determine the intentions of the parties expressed in a written contract, one looks to the text of the contract as a whole. In doing so, meaning is given to all of the words in the text, if possible, and the absence of words may also be considered. If necessary, the text is considered in light of the surrounding circumstances as at the time of execution of the contract. The goal is to determine the objective intentions of the parties in the sense of a reasonable person in the context of those surrounding circumstances and not the subjective intentions of the parties. If, after that analysis, the text in question is ambiguous, extrinsic evidence may be considered.

[Emphasis added]

43 Regarding Thornridge's objections that some of the affidavit evidence violates the parol evidence rule, the court in *Sattva*, *supra*, addressed the relationship between surrounding circumstances and the parol evidence rule as follows:

Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule

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

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

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

44 One of the objections raised by Thornridge is that some of the evidence offered is simply Mr. Ryan's subjective intention. As indicated above, surrounding circumstances do not include a party's subjective intent. It is on rare occasion that the court would consider a party's subjective intention during the interpretation exercise. This is not one of those occasions. As noted above, Mr. Ryan has not pleaded that the Large Note contains an ambiguity. I note there is reference to ambiguity in Mr. Ryan's brief on the merits of the summary judgment motion. However, on the issue of admissibility, it was not raised nor argued. In fact the opposite is the case — he argues that it is not subjective intention that appears in the impugned affidavit but the objective intention of the parties. He says in his brief on admissibility the following:

All the evidence submitted by Mr. Ryan describes circumstances to aid the Court in the interpretation of the Large Note. None of it is intended to vary the wording of the Large Note. It is Mr. Ryan's position that there were clear objective intentions of the parties when forming the Large Note, and he gives evidence of the relevant facts and discussions being had at the time.

... The challenged evidence is not pertaining to Mr. Ryan's purely subjective intentions, but rather to the overall objective intent of the parties while negotiating and contracting at the time of drafting. (pages 10 and 11)

45 Mr. Ryan further says multiple times in his responses to the objections (see Appendix "A") that the evidence in Mr. Ryan's affidavit that is being challenged is not evidence of Mr. Ryan's subjective intention, but descriptions of exhibits or evidence of the objective intention of the parties or the objective factual matrix.

46 He has argued that surrounding circumstances should be considered which, as I have pointed out above, is part of the interpretation exercise. The parties submit they have competing interpretations of the Large Note. Clearly an ambiguity must be something more than simply the existence of competing interpretations. If this were the definition of ambiguity, parol evidence

would be admitted in most cases involving contract interpretation. To admit evidence of subjective interpretation, there must be more than simply an argument about competing definitions. At this preliminary motion on admissibility, without more, I am certainly not in a position to opine as to whether there is an ambiguity in the wording of the Large Note, nor was I asked to do so.

Analysis

47 It is with the above legal principles in mind that I make my findings regarding the admissibility objections of Thornridge. It is important to note that there are two stages in which evidence is evaluated. We are at the initial stage, being the admissibility stage, where evidence is evaluated for its compliance with the rules of admissibility. Even when evidence passes the threshold of admissibility, that is not the end of the exercise. At the hearing on the merits, the trier of fact makes the ultimate decision in the case by weighing the evidence and applying its finding to the relevant rules of substantive law. The standards to be met before evidence is ruled admissible should not be confused with the ultimate standard of proof before facts are found in the ultimate case. Evidence that is admitted is sometimes given little or no weight at the merits hearing or trial. The strength of the evidence and the ultimate use to which it is put is a question of fact, not to be resolved at this initial admissibility stage. In this motion, I am dealing solely with the first stage — the admissibility of certain evidence contained in the affidavit of Mr. Ryan filed on the motion for summary judgment.

48 The next step in the current matter, being a motion for summary judgment, is distinct from the second step of weighing evidence, as for example, would occur in a trial of the action on the merits. Here, the affidavit in issue has been filed on a motion for summary judgement. The Court of Appeal has been clear that a judge hearing a summary judgment motion is not to weigh evidence. In *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.* 2017 NSCA 61, our Court of Appeal cautioned that, in determining whether the evidence is sufficient to support the pleading, the motion judge must not draw inferences or weigh evidence:

> [23] The role of the motions judge on a summary judgment motion is to determine whether the challenged claim discloses a genuine issue of material fact (either pure or mixed with a question of law). The onus is on the moving party to show there is no genuine issue of material fact. If it fails to do so the motion is dismissed. A material fact being one that would affect the result.
>
> [24] The motions judge must determine whether the evidence is sufficient to support the pleading, but he/she cannot draw inferences from the available evidence to resolve disputed facts.
>
> [25] This prohibition on weighing evidence was addressed by Saunders, J.A. in *Coady*. After discussing the law of summary judgment in Nova Scotia, he provides a list of principles, including:
>
> > [87] . . .
> >
> > 10. Summary judgment applications are not the appropriate forum to resolve disputed questions of fact, or mixed law and fact, or the appropriate inferences to be drawn from disputed facts.
> >
> > 11. Neither is a summary judgment application the appropriate forum to weigh the evidence or evaluate credibility.

49 This matter is early in the litigation process and I am considering admissibility objections to affidavit evidence prior to a summary judgment motion. My findings in relation to the affidavit evidence are confined to the context in which they are currently considered.

The Small Note

50 Mr. Ryan says the Small Note executed on February 26, 2015 is relevant. He says it is relevant to determining how much — if anything — he owes on the Large Note. He says it is directly relevant that Thornridge is seeking payment for the amounts Mr. Ryan received from the shares pledged to the Small Note in two separate actions, particularly where this amount has already been repaid to Thornridge in other litigation.

