# TAB 27

CA012548
Vancouver Registry

# Court of Appeal for British Columbia

BETWEEN:

ROGER IVAN SKIDMORE and
CLAIRE FRANCES GUEST

PLAINTIFFS
(APPELLANTS)

AND:

HAYDN J. BLACKMORE

DEFENDANT
(RESPONDENT)

Before: The Honourable Chief Justice McEachern
The Honourable Mr. Justice Macfarlane
The Honourable Mr. Justice Cumming
The Honourable Mr. Justice Gibbs
The Honourable Mr. Justice Finch

C. F. Guest — In Person

B. M. Caldwell — Counsel for the Respondent

Place and Date of Hearing: Vancouver, British Columbia
January 18, 1995

Place and Date of Judgment: Vancouver, British Columbia
February 16, 1995

Written Reasons by:

The Honourable Mr. Justice Cumming

Concurred in by:

The Honourable Chief Justice McEachern
The Honourable Mr. Justice Macfarlane

The Honourable Mr. Justice Gibbs
The Honourable Mr. Justice Finch

CA012548
Vancouver Registry

# *Court of Appeal for British Columbia*

ROGER IVAN SKIDMORE and
CLAIRE FRANCES GUEST

v.

HAYDN J. BLACKMORE

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CUMMING:

1 The appellants (the plaintiffs) appeal the order of Hutchinson Co. Ct. J. (as he then was) pronounced 14 May 1990, dismissing the plaintiffs' claim for costs (other than disbursements) in a successful action for damages and loss of income.

2 That decision is now reported at (1990), 47 B.C.L.R. (2d) 112 and [1990] 5 W.W.R. 634.

3 This appeal concerns the question of whether a successful self-represented lay litigant may be awarded costs in excess of his or her disbursements.

4 On 20 October 1989, after a trial, Hutchinson Co. Ct. J. awarded the plaintiffs $5,703.65 for damage to their commercial fishing vessel and loss of fishing income.

5 The appellants were self-represented lay litigants throughout the County Court proceedings. The plaintiff Claire Guest was for some years a member of the Law Society of British Columbia, but no longer holds a practising certificate. The respondent (defendant) was represented by counsel.

6 The plaintiffs made two formal offers to settle pursuant to the ***Rules of Court*** before trial. The defendant did not make any payment into court pursuant to the rules. The first offer was for an amount less than the amount actually recovered by the plaintiffs at trial, but it was withdrawn. The second offer was for more than the amount awarded at trial. Thus, Rule 37(23) does not apply in respect of either offer and the plaintiffs seek only party and party costs under Rule 57(9).

**JUDGMENT APPEALED FROM**

7 The learned trial judge reluctantly held that the plaintiffs, as self-represented lay litigants, were not entitled to costs in excess of disbursements.

8 He noted that there is authority for the proposition that costs are awarded to deter the ultimately unsuccessful litigant from prolonging the litigation unnecessarily, as well as to indemnify the successful litigant for his costs. However, he held that he was bound to follow ***Kendall* v. *Hunt No.2*** (1979), 16 B.C.L.R. 295 (C.A.) and ***UFFA Management Ltd.* v. *Accurate Bailiff*** (5 March 1990), Vancouver CA010350 (B.C.C.A.), which state that lay litigants who are not represented at any stage by solicitors or counsel are not entitled to tax legal fees, but are entitled only to tax the disbursements properly laid out in the conduct of the litigation.

**ISSUE ON APPEAL**

9 The plaintiffs submit that the learned trial judge erred in holding that the plaintiffs, as self-represented lay litigants, were not entitled to costs in excess of their disbursements. More specifically, the plaintiffs in their factum, submitted:

(a) the decision of the Court of Appeal in *Kendall*, *supra*, is wrong and should be overruled;

(b) the trial judge erred in holding that *Kendall* is still binding authority in British Columbia with respect to awards of costs to self-represented lay litigants and that he had no discretion to award costs to the appellants;

(c) the trial judge erred in not holding that the penal and deterrent aspect of an award of costs, which was not argued in *Kendall*, must be considered in determining whether or not costs may be awarded to lay litigants;

(d) the trial judge erred in holding that the ***Charter of Rights*** does not apply to ensure the equal treatment of self-represented lay litigants in the courts of this province;

(e) the trial judge should have held

(i) that *Kendall* was decided *per incuriam* and without a consideration of the penal or deterrent aspect of costs in British Columbia, and therefore is not binding authority, or

(ii) that *Kendall* has been diminished by subsequent decisions of the Court of Appeal of British Columbia which have emphasized and extended the penal or deterrent aspects of costs and which are contradictory to the principle of costs as indemnity only expounded in *Kendall*, or

(iii) that *Kendall* is an unwarranted interference with the trial judge's discretion to award costs *arbitrio boni viri*, or

(iv) that the ***Charter*** applies to ensure that self-represented lay litigants receive all benefits and protections of the ***Rules of Court*** accorded to represented litigants and to self-represented lawyer litigants.

**DISCUSSION**

10 The plaintiff Claire Guest appeared on her own behalf and on behalf of the plaintiff Roger Skidmore. She invited this Court to overrule ***Kendall***.

11 Mr. Caldwell, counsel for the defendant, submitted that ***Kendall*** was correctly decided and should be upheld.

12 In ***B.C. (Govt.)* v. *Worthington (Can.) Inc.*** (1988), 29 B.C.L.R. (2d) 145 (C.A.) at 159, Hutcheon J.A., for the majority of a five-judge division, noted that the practice of this Court is that:

> (1) ... a *three-judge division* should not overrule a previous decision of a three-judge division unless the previous decision is manifestly wrong, or should no longer be followed, because, for example, the previous decision failed to consider applicable legislation or binding authorities, or, if followed, would result in a severe injustice;
>
> (2) ... a *five-judge division* of the court may overrule the decision of a three-judge division if the five-judge division decides either that the earlier decision was wrong, or that for any other reason, the earlier decision ought to be overruled.
>
> (Hutcheon J.A.'s emphasis)

13 In ***Worthington***, *supra*, the appeal was first argued before a three-judge division of the court. That division was asked to overrule one of the court's earlier decisions. It found that the argument had sufficient merit and that the issue was of sufficient importance that the appeal should be argued before a five-judge division. So too, in this case, the matter was heard by a division consisting of Macfarlane, Cumming and Finch, JJ.A. at Vancouver on 16 May 1994. Judgment was then reserved. It became apparent that the primary issue requires consideration by a five member court because

the outcome of this appeal will depend upon whether or not ***Kendall***, *supra*, is to be followed. Hence this further hearing. The Law Society of British Columbia was invited to add itself as Intervenor on this appeal, and declined the opportunity to do so. The case for the appellants was very ably presented by Ms. Guest.

**PLAINTIFFS' SUBMISSIONS**

14 Ms. Guest submitted that the reason that costs are awarded includes not only the indemnification of the successful litigant, but also the deterrence of frivolous actions, unmeritorious defences and unnecessary steps in a proceeding and, in appropriate cases, the punishment of a party or counsel for misconduct. She submitted that in ***Kendall*** the court considered only the indemnification function of an award of costs.

15 The plaintiffs submit that ***Kendall*** should be overturned because it was wrongly decided. In any event, in the years since that decision was rendered, the plaintiffs submit that there has been increasing recognition of the role costs can and should play in deterring conduct that unnecessarily adds to the duration and expense of litigation.

16 The plaintiffs point out the logical inconsistency of allowing a cost award to a successful self-represented lawyer but denying costs to a successful self-represented lay litigant. They also submit that s.15 of the ***Charter*** requires that they be treated in the same fashion as a successful self-represented lawyer.

**DEFENDANT'S SUBMISSIONS**

17 Mr. Caldwell submitted that ***Kendall***, *supra*, was correctly decided and should be upheld. He further submitted that if the change in the law advocated by the plaintiffs is to be made it should be made by the legislature.

18 He argued that where there is misconduct the court may award special costs to a self-represented lay litigant by applying the reasoning in ***Fullerton* v. *Matsqui (District)*** (1992), 74 B.C.L.R. (2d) 311 (C.A.). He noted that in the present case there is no evidence of misconduct on the part of the defendant.

19 Mr. Caldwell submitted further that s.15 of the ***Charter*** does not assist the plaintiffs because the ***Charter*** does not apply to private litigants. In any event, there are such significant differences between unrepresented litigants and represented litigants that different treatment of these two groups does not give rise to discrimination prohibited by s.15. With respect to the plaintiffs' argument that the benefit from the various costs provisions of the ***Rules of Court*** are unavailable to self-represented lay litigants, the defendant's position is that special costs available to those litigants in appropriate circumstances ameliorates any such disadvantage.

## ***KENDALL* v. *HUNT***

20 It appears that in ***Kendall***, *supra*, the appellants argued that a self-represented lay litigant was entitled to costs because "costs" in Rule 57 and Appendix B of the ***Rules of Court*** (i.e. under a block tariff system) are a lump sum or block allowance for particular activities undertaken in the conduct of the litigation. The point of the argument was that the "costs" recoverable under the ***Rules*** are different from the

"costs" referred to in the English cases, which state that the only costs that a self-represented lay litigant may recover are his or her disbursements.



21 The Court rejected this argument in three separate concurring judgments. Both Robertson and Craig JJ.A. rejected the appellants' argument on the ground that it was not supported by the wording of Rule 57 and Appendix B. Nemetz C.J.B.C. referred to ***Buckland* v. *Watts***, [1970] 1 Q.B. 27, [1969] 2 All E.R. 985 (C.A.), in which it was held that a successful self-represented lay litigant was entitled to costs only to the extent of his or her disbursements. He noted that after that case was decided the British Parliament passed legislation allowing an award of costs to the successful self-represented lay litigant in certain circumstances. He concluded from this that the decision to allow self-represented lay litigants to recover costs must be made by the legislature.

22 The reasons for judgment in ***Kendall*** indicate that the appellants were not directly challenging the English practice of not awarding a successful self-represented lay litigant costs in excess of disbursements, but were merely arguing that the former English practice should not be followed in this province because of the wording of Rule 57 and Appendix B of the ***Supreme Court Rules***. In ***Kendall***, the court rejected that argument and it was not advanced by the plaintiffs in the present case.

23 The plaintiffs here submitted that the old English practice is incorrect and that, to the extent that ***Kendall*** affirmed it as the law of British Columbia, that decision should be overturned. Thus, it is obvious that the arguments raised on this appeal were not before the court in ***Kendall.*** It is open to us to reconsider the English

authorities that were applied in ***Kendall*** in light of the arguments raised on the present appeal.

24 In ***Kendall***, Craig J.A. (at p.300) quoted Bramwell B. in ***Harold* v. *Smith*** (1860), 5 H.& N. 381 at 385, 157 E.R. 1229 at 1231 to the effect that costs as between party and party are given as an indemnity to the person entitled to them, and are not imposed as a punishment on the party who pays them, nor given as a bonus to the party who receives them.

25 In ***Harold* v. *Smith***, *supra*, the plaintiff brought an action against the defendant to recover monies allegedly owing under a building contract. The defendant initially pleaded that no money was owing. However, six days before trial the defendant paid certain monies into court and obtained leave to amend his pleadings to acknowledge the debt to the extent of the payment into court, but no more. The plaintiff accepted the payment into court as partial satisfaction of the claim, but proceeded to trial where he failed to recover anything more. Bramwell B., with whom Pollock C.B. and Channell B. agreed, held that the plaintiff was not entitled to costs up to the time of the payment in because the plaintiff would have incurred those costs in any event in his attempt to recover the difference between the amount originally claimed and the amount paid in by the defendant. It is in this context that Bramwell B. made the statement that costs are an indemnity to the person entitled to them.

26 The Court's reasoning appears to be that the plaintiff would have incurred these costs even if the defendant had made the payment in at the outset of the litigation;

therefore, the plaintiff did not incur any costs in recovering the money to which he was entitled that he would not otherwise have incurred.

27 With respect, I have difficulty in accepting the reasoning in ***Harold***. The approach there appears not to recognize that the plaintiff had a valid claim against the defendant for the amount that was belatedly paid into court. Secondly, the decision in ***Harold*** provides no incentive to a defendant who is aware that he does owe part of the amount claimed by the plaintiff to pay that money into court sooner rather than later.

28 In any event, the view that costs are awarded solely to indemnify the successful litigant for legal fees and disbursements incurred is now outdated. A review of Rule 37, which deals with offers to settle, reveals that in certain circumstances a party may be entitled to costs, or double costs, or to no costs at all. One of the purposes of the costs provisions in Rule 37 is to encourage conduct that reduces the duration and expense of litigation, and to discourage conduct that has the opposite effect. Thus, although it is true that costs are awarded to indemnify the successful litigant for legal fees and disbursements incurred, it is also true that costs are awarded to encourage or to deter certain types of conduct.

***BUCKLAND* v. *WATTS***

29 In ***Kendall*** Nemetz C.J.B.C. followed ***Buckland* v. *Watts***, *supra*, in which it was held that a self-represented lay litigant was entitled to claim costs only in respect of his out-of-pocket expenses (i.e. disbursements). Leave to appeal ***Buckland*** to the House of Lords was refused. Then, in 1975, the British Parliament passed legislation allowing self-represented lay litigants to claim costs not exceeding two-thirds of

the sum which, in the opinion of the taxing officer, would have been allowed if the litigant had been represented by a solicitor.

30 ***Buckland*** appears to have been decided on the basis of *obiter* comments made in ***London Scottish Benefit Society* v. *Chorley*** (1884), 13 Q.B. 872, [1881-1885] All E.R. 1111 (C.A.). In ***Chorley***, *supra*, the Court held that a self-represented solicitor was entitled to recover costs because he had expended professional legal skill and labour. At the time, the view was that "professional skill and labour are recognized and can be measured by the law; private expenditure of labour and trouble by a layman cannot be measured. (quoted in ***Buckland* v. *Watts*** at All E.R. 986)

31 This comment was adopted in ***Buckland*** in support of the proposition that a self-represented lay litigant was not entitled to costs. There Danckwerts L.J. said:

> . . . it seems to me that the principle is well settled that although a solicitor who acts in person for himself can claim to be remunerated for his professional services so far as they are not rendered unnecessary or impossible — as, for instance, in regard to consultations with himself, and that sort of thing — such costs are recoverable by the solicitor, but in the case of a layman who is not a skilled legal person, he can only recover his out-of-pockets. (at All E.R. 985-986)

32 He stated at 986 that "the matter arises from long origin and goes back a very long way" but cited only ***Chorley*** as authority. ***Chorley***, however, supports only the proposition that a successful self-represented solicitor is entitled to recover costs.

33 It appears that, at the time ***Chorley*** was decided, there was a practice of not awarding costs to self-represented lay litigants. The question of whether a

self-represented solicitor should be entitled to claim costs was decided against that backdrop. In *Chorley*, Bowen L.J. said:

> There is a passage in LORD COKE'S COMMENTARY, 2 Inst., 288, which it is worth while to examine, as it affords a key to the true view of the law of costs. That passage is as follows: 'Here is express mention made but of the costs of his writ, but it extendeth to all the legal cost of the suit, but not to the costs and expenses of his travel and loss of time, and therefore "costages" cometh of the verb "conster", and that again of the verb "constare", for these "costages" must "constare" to the court to be legal costs and expenses.' What does LORD COKE mean by these words? His meaning seems to be that only legal costs which the Court can measure are to be allowed, and that such legal costs are to be treated as expenses necessarily arising from the litigation and necessarily caused by the course which it takes.(quoted by Danckwerts L.J. at All E.R. 986)

Bowen L.J. interpreted this passage from Coke to have meant that a party is entitled only to costs that are "the exact and natural result of his having been forced into litigation". The question of costs for a self-represented lay litigant was not before the court in *Chorley* and the Court of Appeal's comments that a solicitor may be treated differently than a lay litigant because of the difficulty in valuing the time spent by a layman in preparing his case are *obiter*. In my view, the costs that "naturally result from having been forced into litigation" include the costs of preparing and presenting one's own case in court. If this be so, the successful self-represented litigant should be entitled to some indemnification as fair compensation for the time and effort expended.

**SUMMARY OF THE CASE LAW**

34 The Canadian practice regarding the awarding of costs to self-represented lay litigants arose from a 19th century (or perhaps older) English practice of not awarding costs to litigants who had not paid a solicitor to represent them, referred to in *Chorley*.

In ***Chorley***, a self-represented solicitor was found to be entitled to costs. Then, in 1969, the English Court of Appeal in ***Buckland*** held, on the authority of *obiter* comments in ***Chorley***, that a self-represented lay litigant was not entitled to costs. In 1979, two of the judges in ***Kendall*** held, on the basis of the argument before them, that these English cases were not distinguishable. None of the judgments in that case considered the merits of the practice of denying costs to self-represented lay litigants.

35 None of the authorities referred to on this appeal has examined in detail the question of whether self-represented lay litigants should be entitled to costs. It appears that in each case it has simply been assumed that they are not entitled to costs in excess of disbursements. This situation calls for a close examination of that issue.

**COSTS TO SELF-REPRESENTED LAY LITIGANTS?**

36 Under the indemnity approach, a successful self-represented lay litigant would be entitled to the cost of doing what a solicitor would do to prepare and present the case. It may be argued that a self-represented lay litigant will take much more time in preparing the case because he or she does not have the legal training of a solicitor. However, in this province, party and party costs are awarded under a tariff set out in Appendix B of the ***Supreme Court Rules***. Costs are assessed by the Registrar according to how much time ought to have been spent by the solicitor on the litigation. As well, party and party costs are only a portion of the fees and disbursements that the successful litigant may have to pay to his or her solicitor. This, of course, leads to the conclusion that costs are not intended purely as an indemnity. Indeed, they often fall far short of indemnity.

37 A review of the ***Rules*** reveals that party and party costs serve several functions. Rule 57(9) (costs follow the event unless otherwise ordered) discourages frivolous actions and frivolous defences. Rule 37(23) provides that, where a plaintiff has made an offer to settle and obtains a judgment for the amount specified in the offer or a greater amount, the plaintiff is entitled to costs to the date the offer was delivered and to double costs from that date. Rule 37(24) provides that, where a defendant has made an offer to settle and the plaintiff obtains judgment for the amount specified in the offer or a lesser amount, the plaintiff is entitled to costs to the date the offer was delivered, and the defendant is entitled to costs from that date. These Rules are designed to discourage frivolous actions and defences and to encourage the parties to make reasonable offers to settle as early as possible. Thus, party and party costs serve many functions. They partially indemnify the successful litigant, deter frivolous actions and defences, encourage both parties to deliver reasonable offers to settle, and discourage improper or unnecessary steps in the litigation.

38 Under the old English practice, which was implicitly accepted as the law in this province in *Kendall*, the self-represented lay litigant is in the unenviable position of being unable to take advantage of the cost provisions of the ***Rules of Court*** while, at the same time, being liable to pay costs to his or her solicitor-represented opponent if the opponent is entitled to costs. The only justification found in the case law for denying costs to a successful self-represented lay litigant is because of the difficulty in valuing the efforts of that person in preparing the case.

39 This was a larger problem in the United Kingdom, where a successful litigant is usually entitled to full solicitor and client costs. When the British Parliament passed legislation to reverse the effect of ***Buckland***, it resolved this problem by setting costs of a self-represented lay litigant as two-thirds of the amount the taxing officer considered to be reasonable solicitor and client costs.

40 As previously mentioned, in this province costs are assessed under a tariff in Appendix B of the Rules. Thus, the difficulty in valuing the time and effort which a self-represented lay litigant expends in the preparation of his or her case would be avoided by making an order that costs are to be assessed by the Registrar. The Registrar can then determine what those costs ought to be, as is done where the successful litigant is represented by counsel. The concern in the United Kingdom, that a self-represented lay litigant may be over-compensated, does not arise in this province because the tariff provides significantly less than the amount actually payable by a party to his or her solicitor. Also, the tariff is flexible enough to allow the Registrar to find a proper balance between the amount required to indemnify for solicitor's services and those things done by lay litigants. The tariff is flexible in providing for different scales of costs, and for minimum and maximum units. Also, the trial judge has an overall discretion to exercise which may permit a flexible measure.

41 In conclusion, I am of the opinion that ***Kendall*** accepted an English practice that was unsound and unsupported by authority. I am further of the view that there are sound reasons for allowing costs to successful self-represented lay litigants, and no good reason why costs should be denied to such litigants. The question then

becomes: Is this a change that should be made by the legislature or can it properly be made by the court?



### *R.* v. *B.(K.G.)*

42 In ***R.* v. *B.(K.G.)***, [1993] 1 S.C.R. 740, 79 C.C.C. (3d) 257, the Supreme Court of Canada overruled its previous decision in ***Deacon* v. *The King***, [1947] S.C.R. 531, 89 C.C.C. 1. The Court held that in criminal proceedings prior inconsistent statements of witnesses other than the accused could be admitted for the truth of their contents if certain criteria were satisfied. This was a significant departure from the orthodox rule set out in ***Deacon***, *supra*, which provided that prior inconsistent statements by a witness other than an accused were admissible only for the purpose of impeaching the credibility of that witness. Lamer C.J.C., at S.C.R. 775, referred to the statement of Lord Donovan (dissenting in ***Myers* v. *Director of Public Prosecutions***, [1965] A.C. 1001 (H.L.), at 1047, which he had previously affirmed in ***R.* v. *Smith***, [1992] 2 S.C.R. 915, 75 C.C.C. (3d) 257, 94 D.L.R. (4th) 590, that: "the common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds".

Lamer C.J.C. continued at 775-776:

> This duty of the courts to review common law rules has a pragmatic basis: courts are best situated to assess the operation and possible deficiencies of common law rules in practical situations. Finally, if any other authority for the jurisdiction and, in some cases, the <u>responsibility</u> of the courts to reform the common law were needed, the late Chief Justice Laskin wrote, in "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (1975) 53 Can. Bar Rev. 469 at pp. 478-79:
>
> > When everything considered relevant has been weighed and an overruling decision commends itself to a judge, he ought not at that stage to stay his opinion and call upon the legislature to implement it. This is

> particularly true in respect of those areas of the law which are judge-made, and to a degree true in respect of those areas where legislation is involved which is susceptible of a number of meanings. A final court must accept a superintending responsibility for what it or its predecessors have wrought, especially when it knows how little time legislatures today have (and also, perhaps, little inclination) to intrude into fields of law fashioned by the courts alone, although legislatures may, of course, under the prodding of law reform agencies and of other public influences, from time to time do so.
>
> While this court has limited changes to the common law to those which are "slow and incremental" rather than "major and far reaching" (McLachlin J. in *Watkins v. Olafson*, [1989] 2 S.C.R. 750, at p.760), and only "those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society" (Iacobucci J. in *R. v. Salituro*, [1991] 3 S.C.R. 654, at 670), 9 C.R. (4th) 324), it is important to assess the change in the correct frame of reference.
>
> In the context of any particular impugned rule standing on its own, no change could ever satisfy the above criteria. Viewed this way, changing the orthodox rule will mean eliminating the orthodox rule because of its absolute prohibition on the substantive use of prior inconsistent statements. The respondent correctly submits that this change is not slow and incremental.
>
> However, if the change to the orthodox rule is viewed within the larger context of the trend within evidence law towards greater admissibility and a correspondingly increased emphasis on the weight to be accorded admissible evidence, the change is clearly incremental as it renders one particular type of evidence admissible for a certain purpose subject to certain conditions. (Lamer C.J.C.'s emphasis)

43 The practice of denying costs to self-represented lay litigants arose entirely from the common law. The matter of costs is a question essentially within the discretion of the court, it bears directly on matters of practice, and it is something on which this Court is well situated to rule.

44 Although it relates to a different subject matter, what this Court has been asked to do on the present appeal and what the Supreme Court of Canada was asked to do in ***B.(K.G.)*** are remarkably similar. Allowing successful self-represented lay litigants

costs as set out in Appendix B of the ***Supreme Court Rules*** is a significant change in the law, just as allowing prior inconsistent statements to be admitted for the truth of their contents was a significant change in the law. However, when viewed in the larger context of the trend towards awarding costs to encourage or deter certain types of conduct, and not merely to indemnify the successful litigant, the change is incremental because it brings one narrow area of the law of costs into line with the broader trend.



45 Evidence of that trend is found in ***Houweling Nurseries Ltd.* v. *Fisons Western Corp.***, (1988] 37 B.C.L.R. (2d) 2 at 25 (C.A.) where McLachlin J.A. (as then she was), writing for the court, said:

> Costs in our system of litigation serve the purpose, not only of indemnifying the successful litigant to a greater or lesser degree, but of deterring frivolous actions or defences. Parties, in calculating the risks of proceeding with a particular action or defence, should be able to forecast with some degree of precision what penalty they face should they be unsuccessful.

46 Other evidence of the trend that costs serve functions beyond indemnity is found in ***The Coronation Insurance Co.*** v. ***Florence (Guardian ad litem of) 73 B.C.L.R. (2d) 239 where Seaton J.A., in Court of Appeal chambers, expressed the view, in an obiter dictum,*** that unsuccessful litigants who had contracted with their solicitors on a contingent fee basis, and were thus not liable to pay their solicitors, were, nonetheless, entitled to recover the costs that had been awarded to them and were not limited to recovery of their disbursements.

47 In my view the principles in ***B.(K.G.)***, *supra*, apply, and this Court is competent to change the common law on this issue.

**DECISIONS OF THIS COURT**

48 In ***Fullerton* v. *Matsqui (District)***, *supra*, the majority of this Court found that the defendants in that case had presented evidence calculated to mislead the trial judge and jury, and awarded special costs to the plaintiffs. In the course of that judgment, I posited, at 316, that party and party costs are designed to indemnify the successful party, for his or her actual outlays and that an unrepresented party or one represented by an attorney receiving a salary, acting on a contingency fee basis or gratuitously, would not be entitled to recover legal fees, but only disbursements.

49 ***Fullerton*** dealt with special costs. These obiter comments arose out of a reference to ***Kendall*** in the context of an introductory discussion of costs principles. I do not consider that this Court is bound by those comments and should be willing to depart from them given that ***Kendall*** and the authorities on which it relies were reviewed in considerable detail on the present appeal.

50 It was argued that this Court's decision in ***Uffa Management Ltd.***, *supra,* had explicitly affirmed ***Kendall***. It does not appear that the three-judge division hearing that case was asked to reconsider ***Kendall***. Rather, the conclusion reached by Lambert J.A. at 9 was merely that "the arguments that were advanced are not sufficient to distinguish that decision, which is binding on us, and I would not give effect to those arguments".

51 In summary, changes to the ***Rules of Court*** and decisions considering the awarding of costs indicate that costs serve functions other than indemnification. None of those

decisions, however, has dealt with the issue of whether *Kendall* should be affirmed or overturned.



52 There are good reasons for allowing self-represented lay litigants to receive the benefit of recent developments in the law of costs. There is no logical reason for allowing a self-represented solicitor to claim costs under Appendix B of the ***Supreme Court Rules***, while denying the same to a self-represented lay litigant. Because party and party costs are based on a tariff in this province, there is no danger of overcompensating self-represented lay litigants, and it would not be difficult to assess the costs to be paid.

## ALTERNATIVES TO OVERRULING *KENDALL* v. *HUNT*

53 The defendant submitted that this Court should not overrule *Kendall*. Rather, if the circumstances warrant doing so, this Court should only consider extending the principle in *Fullerton*, *supra*, to allow an award of special costs to a self-represented lay litigant in order to penalize a party for misconduct. That submission, however, entirely misses the point of the plaintiffs' appeal. The plaintiffs are requesting party and party costs. They are not alleging misconduct on the part of the defendant, and the defendant, likewise, asserts there was none. In fact, in this respect, the parties are on common ground.

54 In response to the plaintiffs' submission that self-represented lay litigants are denied the benefit of the deterrent aspects of the cost provisions of the ***Rules of Court***, the defendant submitted that self-represented lay litigants who wish to make a formal offer to settle could use a "Calderbank Letter" (see *Calderbank* v. *Calderbank*,

[1975], 3 All E.R. 333 (C.A.); ***Higgs* v. *Fainstein*** (1992), 72 B.C.L.R. (2d) 24 (S.C.)). He submitted that a lay litigant could simply write to the opposing party with a settlement offer and indicate that, if his or her award at trial exceeds the amount of the settlement offer, he or she will seek special costs.

55 This approach is unacceptable. First, in ordinary circumstances, merely refusing a settlement offer is not conduct that should give rise to special costs. Secondly, in ***Higgs***, *supra*, the defendants, who had made a settlement offer through a Calderbank Letter, were awarded only party and party costs, not special costs. Third, this appears to be a tortured approach to the problem. A much simpler approach, and one that fully remedies the arbitrary treatment of self-represented lay litigants, is that ***Kendall*** should not be followed and self-represented lay litigants to whom costs are awarded should have their costs taxed under Appendix B of the ***Supreme Court Rules.***

56 In conclusion, I am of the view that this Court should decline to **follow** ***Kendall* v. *Hunt*** and should award costs to the plaintiffs under Appendix B of the ***Supreme Court Rules,*** to be assessed by the Registrar.

**CHARTER ARGUMENT**

57 The plaintiffs also submit that the learned trial judge erred in holding that the ***Canadian Charter of Rights and Freedoms*** does not apply to the case at bar.

58 In ***McKinney* v. *University of Guelph***, [1990] 3 S.C.R. 229 Mr. Justice LaForest set out the interpretation to be given to s.32 of the ***Charter*** at p.261-62:

> These words give a strong message that the *Charter* is confined to government action.
> This Court has repeatedly drawn attention to the fact that the *Charter* is essentially an instrument for checking the powers of government over the individual .... The exclusion of private activity from the *Charter* was not a result of happenstance. It was a deliberate choice which must be respected.



59 In ***R.W.D.S.U.* v. *Dolphin Delivery***, [1986] 2 S.C.R. 573, the Supreme Court of Canada held that the ***Charter*** applies to the common law, but not to litigation between purely private parties. McIntyre J. stated at 598-99:

> It is my view that s. 32 of the *Charter* specifies the actors to whom the *Charter* will apply. They are the legislative, executive and administrative branches of government. It will apply to those branches of government whether or not their action is invoked in public or private litigation.

He goes on to state at 603:

> Where, however, private party "A" sues private party "B" relying on the common law and where no act of government is relied upon to support the action, the *Charter* will not apply. I should make it clear, however, that this is a distinct issue from the question whether the judiciary ought to apply and develop the principles of the common law in a manner consistent with the fundamental values enshrined in the Constitution. The answer to this question must be in the affirmative.

60 The plaintiffs submit that the ***Charter*** is relevant to the case at bar because, as stated by McIntyre J. in ***Dolphin Delivery*** at S.C.R. 603, the principles of the common law ought to be applied and developed "in a manner consistent with the fundamental values enshrined in the Constitution". The Supreme Court of Canada most recently undertook to consider that principle in ***C.B.C.* v. *Dagenais*** (08 December 1994), Ottawa 23403 (S.C.C.). In that case, the Court considered whether the ***Charter*** was applicable to

a court ordered publication ban issued under a judge's common law or legislated discretionary authority.



61 Lamer C.J., writing for the majority, held that the common law rule regarding publication bans must be reformulated to reflect ***Charter*** principles. While expressly stating, at 19, that it was unnecessary in the circumstances to determine whether the ***Charter*** applies to a court order, Lamer C.J. said at 32:

> The pre-*Charter* common law rule governing publication bans emphasized the right to a fair trial over the free expression interests of those affected by the ban. In my view, the balance this rule strikes is inconsistent with the principles of the *Charter*, and in particular, the equal status given by the *Charter* to s. 2(b) and 11(d). It would be inappropriate for the courts to continue to apply a common law rule that automatically favoured the rights protected by s. 11(d) over those protected by s. 2(b). A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.

He previously said, at 29:

> If legislation <u>requires</u> a judge to order a publication ban, then any objection to that ban should be framed as a *Charter* challenge to the legislation itself. Similarly, if a common law rule <u>requires</u> a judge to order a publication ban or authorizes a judge to order a publication ban that infringes *Charter* rights in a manner not reasonable and demonstrably justified in a free and democratic society, then any objection to that ban should be framed as a *Charter* challenge to the common law rule.
>
> In the case at bar, we are dealing with a common law rule which provides judges with the <u>discretion</u> to order a publication ban in certain circumstances. Discretion cannot be open ended. It cannot be exercised arbitrarily. More to the point, as I stated in *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038, at p. 1078, in the context of legislative conferrals of discretion:
>
> As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no

> force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation of no force or effect, unless it could be justified under s.1.

I would extend this reasoning, and hold that a common law rule conferring discretion cannot confer the power to infringe the Charter. Discretion must be exercised within the boundaries set by the principles of the *Charter*; exceeding these boundaries results in a reversible error of law.



62 This is not a case where legislation, or a rule requires a judge to make an order that infringes *Charter* rights. Thus the *Charter* does not apply.

63 This is a case dealing with a judge made common law rule. The practice recognized in ***Kendall*** may arguably not have been in accord with fundamental principles, as contended by the appellant, but in my opinion the removal of the distinction between self represented litigants and lawyer represented litigants is consonant with the principles underlying the *Charter*.

64 I would allow the appeal.

"THE HONOURABLE MR. JUSTICE CUMMING"

**I AGREE:**

"THE HONOURABLE CHIEF JUSTICE McEACHERN"

"THE HONOURABLE MR. JUSTICE MACFARLANE"

"THE HONOURABLE MR. JUSTICE GIBBS"

"THE HONOURABLE MR. JUSTICE FINCH"

# TAB 28

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Southern Star Developments Ltd. v. Quest University Canada,* 2020 BCCA 364

Date: 20201217
Docket: CA47138



In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

In the Matter of the *Sea to Sky University Act*, S.B.C. 2002, c. 54

In the Matter of A Plan of Compromise and Arrangement of Quest University Canada

Between:

**Southern Star Developments Ltd.**

Appellant

And

**Quest University Canada**

Respondent
(Petitioner)

Before: The Honourable Mr. Justice Harris
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated November 16, 2020 (*Quest University (Re)*, 2020 BCSC 1883, Vancouver Docket S-200586).

| | |
|---|---|
| Counsel for the Appellant (via teleconference): | P.J. Reardon<br>K. Strong |
| Counsel for the Respondent (via teleconference): | J.R. Sandrelli<br>T.R.M. Jeffries<br>V.L. Cross |
| Counsel for Primacorp Ventures Inc. (via teleconference): | G.W. Umbach<br>P.L Rubin |

| | |
|---|---|
| Counsel for PricewaterhouseCoopers Inc., in its capacity as Monitor of Quest University Canada (via teleconference): | V.L. Tickle |
| Counsel for RCM Capital Management Ltd. and SESA-BC Holdings Ltd. (via teleconference): | K.M. Jackson |
| Counsel for Vanchorverve Foundation (via teleconference): | C.D. Brousson |
| Counsel for 1114586 B.C. Ltd. (via teleconference): | K.E. Siddall |
| Place and Date of Hearing: | Vancouver, British Columbia December 7, 2020 |
| Place and Date of Judgment with Written Reasons to Follow: | Vancouver, British Columbia December 7, 2020 |
| Place and date of Written Reasons: | Vancouver, British Columbia December 17, 2020 |

***Summary:***

*Application for leave to appeal an order approving a transaction in CCAA proceedings. Held: Application dismissed, reasons following. Given the high degree of deference shown to discretionary decisions by supervising judges in CCAA proceedings, and the finding that this transaction is the only viable transaction with the potential to protect the interests of stakeholders, the interests of justice do not justify granting leave, even if the appeal raises some issues that would be of interest to the practice.*

**Reasons for Judgment of the Honourable Mr. Justice Harris:**

[1] The appellant, Southern Star Developments Ltd. ("Southern Star"), seeks leave to appeal the order below pursuant to s. 13 of the *Companies' Creditors Arrangement Act,* R.S.C., 1985, c. C-36 [*CCAA*], and that the order be stayed pending the outcome of that appeal.

[2] At the conclusion of the argument, I dismissed the applications for leave and a stay with reasons to follow. These are those reasons.

**Background**

[3] Quest University ("Quest") is a not-for-profit post-secondary educational institution operating in Squamish, B.C. On 16 January 2020, Quest obtained creditor protection under the *CCAA* to enable it to restructure its debts. Quest subsequently sought approval under the *CCAA* for a transaction with Primacorp Ventures Inc. ("Primacorp") as a restructuring solution.

[4] On 16 November 2020, Justice Fitzpatrick, the supervisory judge for the *CCAA* proceedings, approved the transaction with written reasons to follow which were dated 2 December 2020: *Quest University Canada (Re)*, 2020 BCSC 1883 (Chambers). She found that the transaction with Primacorp was "the *only* viable option to avoid the devastating social and economic consequences to [Quest's] stakeholders if a liquidation results": at para. 178(p). She also found the Primacorp transaction to be the best option available to maximize recovery for Quest's creditors and preserve Quest's university operations: at para. 180.

[5] Southern Star, one of Quest's stakeholders, objected to the transaction. The Primacorp proposal required Quest to disclaim certain subleases it had executed in favour of Southern Star, as they were not economical for Quest (the "Subleases"): paras. 91–93, 97–98. The Subleases concern campus residence buildings located on four lots of land ("Lots A–D") that have been sitting largely vacant as a result of the COVID-19 pandemic. Quest and Southern Star had executed an unregistered lease of a fifth lot, "Lot E", in 2017. When the parties executed the documents, the Ground Lease contained a number of incomplete or blank terms, including a legal description, lease term and information about Southern Star's lender: at para. 32. Southern Star objected to the judge vesting off any interest it had in the unregistered Lot E Ground Lease: at para. 35, arguing that the judge did not have the jurisdiction to do so because of s. 32(9)(d) of the *CCAA*.

[6] Fitzpatrick J. concluded the parties did not intend for the Ground Lease to become effective between them until certain conditions were satisfied; namely, that Quest would decide to build a residence building on Lot E and Southern Star would arrange financing to construct the building. At that point, the Ground Lease would come into effect, in conjunction with the registration of a Sublease and the execution and registration of Southern Star's mortgage. Those conditions were never satisfied, and the supervisory judge concluded that no valid and enforceable lease yet existed between the parties in respect of Lot E: at paras. 36–39. Accordingly, Lot E could be vested off to Primacorp because to do so did not conflict with any prohibition in the *CCAA*.

[7] Southern Star also applied to the court, pursuant to s. 32(2) of the *CCAA*, for an order disallowing any disclaimer by Quest of the Subleases for two of the lots (Lots C–D). In evaluating this application, the chambers judge had regard to s. 32(4) of the *CCAA* which provides:

> Factors to be considered
>
> (4) In deciding whether to make the order, the court is to consider, among other things,
>
> > (a) whether the monitor approved the proposed disclaimer or resiliation;

> (b) whether the disclaimer or resiliation would enhance the prospects of a viable compromise or arrangement being made in respect of the company; and
>
> (c) whether the disclaimer or resiliation would likely cause significant financial hardship to a party to the agreement.

[8] Fitzpatrick J. dismissed Southern Star's application. The Disclaimer of the Subleases had been approved by the court-appointed Monitor for the *CCAA* proceedings: at para. 98. She agreed with the Monitor that the Disclaimers would enhance the prospects of Quest making a viable compromise or arrangement: at para. 104. She found that "[m]aintaining two empty Residences with accompanying rent payments is, on its face, not a reasonable business decision in the circumstances", as evidenced by Primacorp's requirement that the Subleases be disclaimed: at para. 102. She also noted that Quest and Primacorp had already made efforts to find a middle ground by withdrawing disclaimers which had initially been filed in relation to the two other lots (Lots A–B): at para. 106. She finally stated that any hardship imposed on Southern Star would be no less if she disapproved the Disclaimers, as Quest would have no funds to pay rent under the Subleases if the sale did not go through: at paras. 111–12.

[9] Fitzpatrick J. also granted a reverse vesting order ("RVO") approving the sale to Primacorp. That form of order was also supported by the Monitor: at para. 122. She found that she had jurisdiction to grant the order under ss. 11 and 36 of the *CCAA.* Section 11 provides:

> General power of court
>
> 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act,* if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Section 36(6) provides:

> Assets may be disposed of free and clear
>
> (6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other

> assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

[10] This type of order was sought especially in light of Southern Star's dissent, as it enabled the transaction to close without creditors' approval, but in a way that preserved overall economic recovery for creditors. The size of Southern Star's claim relative to other creditors created the possibility that Southern Star could effectively veto the restructuring plan if approval was required: at para. 116.

[11] While there is no specific jurisdiction in the *CCAA* to grant RVOs, Fitzpatrick J. canvassed a number of cases in which courts had relied on ss. 11 and 36 to do so: paras. 127–49. While an RVO had only been ordered once previously in a contested proceeding (*Arrangement relatif à Nemaska Lithium inc.*, 2020 QCCA 1488), it had been approved in a number of other proceedings which were not contested. She also relied on case law referring to the broad discretionary authority conferred on courts by the *CCAA*, by which courts are able to be innovative and creative when called upon to approve solutions for which there is no explicit authority in the *CCAA*, as long as they do so in light of its objectives: at paras. 153–55.

[12] The transaction between Quest and Primacorp must close by 24 December 2020, or Primacorp has the right to walk away and Quest loses its funding. Conditions precedent of the transaction are the Disclaimer of the Subleases with Southern Star and the RVO.

## Positions of the Parties

### Appellant (Applicant)

[13] The appellant's grounds of appeal are:

> 1. The chambers judge erred in law in finding she had the jurisdiction under the *CCAA* to approve the transaction which included the transfer of lands legally described as PID 030-469-074, Lot E District Lot 512 Group 1 New Westminster District Plan EPP77026 ("Lot E") free and clear of the leasehold interest of the appellant in Lot E.

> 2. The chambers judge erred in principle in approving the disclaimer of two subleases between the appellant and Quest University Canada ("Quest") pursuant to s. 32 of the *CCAA*.
>
> 3. The chambers judge erred in principle in approving a reverse vesting order specifically designed to deprive the appellant of its right under sections 4 and 6 of the *CCAA* to participate in a plan of arrangement process that effected a fair and equitable compromise of its claims.



[14] Southern Star argues that leave to appeal should be granted. It contends that the interpretation of the disclaimer provisions in the *CCAA* and the approval of an RVO in a contested proceeding is of significance to the practice, especially given lack of appellate authority on this point. It argues that the appeal is important to the action and the parties, as Southern Star's claim and potential loss is substantial. Southern Star also suggests that the appeal would not unduly hinder the restructuring proceedings as it proposes to have the appeal heard on an expedited basis and because the judge's order below permitted Quest and Primacorp to extend their closing date to 31 January 2020.

[15] While acknowledging the deference conferred on supervisory judges in *CCAA* proceedings, Southern Star nonetheless maintains that all three of its grounds of appeal are meritorious. It argues that the judge engaged in improper balancing under s. 32(4) by approving the Disclaimers. It also contends that granting the RVO was not within the judge's discretion under the *CCAA*, as it was "a last minute reverse vesting order expressly targeted at one creditor" and was in any case not necessary under the circumstances. Finally, it contends that the sale of Lot E is expressly prohibited by s. 32(9)(d) of the *CCAA*, which does not permit disclaimers to be issued in the case of "a lease of real property or of an immovable if the company is the lessor."

[16] The Lot E ground of appeal featured prominently in Southern Star's oral submissions. Southern Star argues that the judge below fundamentally misinterpreted the parties' intention as to when the Ground Lease for Lot E would become effective between them. Specifically, it suggests that the blank terms in the lease documents for Lot E were present in all the leases between the parties at the time of their execution, and that the leases contemplated those terms being filled out

at the time of registration, which was flexible under the agreements. However, the leases became effective the moment they were executed. Accordingly, the judge's approval of the sale of Lot E was barred by s. 32(9)(d) of the *CCAA* by virtue of the Ground Lease between Quest and Southern Star attaching to that property.



[17] With respect to the stay, Southern Star argues that the appeal is meritorious, that it would suffer irreparable harm if a stay was not granted because its appeal would be rendered moot by the closing transaction, and that the balance of convenience favours granting the stay. In terms of the latter, Southern Star suggests that the harm to Quest of granting a stay is minimal, again because Quest can extend its closing date with Primacorp, and because the appeal will be sought on an expedited basis. By comparison, Southern Star suggests it will suffer irreparable harm because its claim will far exceed the pool of available funds allocated to unsecured creditors. It argues that this transaction has been approved unfairly at its expense.

**Respondent**

[18] Quest argues that leave to appeal should not be granted and that the RVO and Disclaimers should not be stayed. Quest acknowledges that jurisprudence on RVOs might be of interest to the practice, but contends that this factor is outweighed by the catastrophic effects leave would have on the progress of the *CCAA* proceedings. It further argues that the points on appeal are only of significance to Southern Star, personally, for strategic purposes; namely, to levy a negotiation with Primacorp for rent related to the residence buildings. Quest maintains that Southern Star will be better off financially with the transaction than without it in a liquidation scenario.

[19] Quest also contends that the appeal is frivolous, as the court's broad and flexible authority to make a range of orders in *CCAA* proceedings has recently been confirmed by the Supreme Court in *9354-9186 Québec inc. v. Callidus Capital Corp.*, 2020 SCC 10 at paras. 53–54. Quest points out that, in this case, the judge had been overseeing the *CCAA* proceedings for over ten months. Quest says that the

judge's decisions are well within her discretion and expertise—including vesting off the Lot E lease, approving the disclaimers, and approving the RVO—and are entitled to deference. Finally, Quest argues that it is not in the interests of justice to grant leave to appeal given the devastating impacts that doing so would have on Quest's attempt to restructure, and because Southern Star is only seeking leave to appeal for strategic purposes related to ongoing negotiations with Primacorp.



[20] Quest also argues that the relevant factors do not support staying the RVO and Disclaimers. Southern Star cannot succeed in its appeal. Furthermore, Southern Star will not suffer irreparable harm if the orders are not stayed. Notably, Southern Star will be worse off without the transaction than if it closes, as Quest will be able to continue paying rent on two of the Subleases after the deal closes. By contrast, if a stay is granted, Quest will be unable to survive and/or to offer a Winter 2021 semester to students, faculty and staff. All of Quest's stakeholders, including Southern Star, will be prejudiced if a stay is granted and the deal does not close. The balance of convenience does not favour granting a stay.

## <u>Law & Analysis</u>

### Legal Framework

[21] Leave to appeal is required by the *CCAA* and can be sought from this Court:

> Leave to appeal
>
> 13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.
>
> Court of appeal
>
> 14 (1) An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.

[22] The criteria for leave to appeal were stated by Saunders J.A. in *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 (Chambers), at para. 10:

> [10] The criteria for leave to appeal are well known. As stated *in Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.) they include:
>
> (1) whether the point on appeal is of significance to the practice;
>
> (2) whether the point raised is of significance to the action itself;
>
> (3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and
>
> (4) whether the appeal will unduly hinder the progress of the action.
>
> See also *Chavez v. Sundance Cruises Corp.* (1993), 77 B.C.L.R. (2d) 328 (C.A.).

[23] Even where the four criteria have been met, leave may still be denied where granting it would not be in the interests of justice: *Movassaghi v. Aghtai*, 2010 BCCA 175 at para. 27 (Smith J.A. in Chambers).

[24] Where the order under consideration is discretionary, leave to appeal will generally only be granted where the order is clearly wrong, where a serious injustice would occur if leave were refused, or where discretion was exercised on a wrong principle: see e.g., *Strata Plan LMS 2019 v. Green*, 2001 BCCA 286 (Chambers). A high degree of deference is owed to the discretionary decisions of judges supervising *CCAA* proceedings as they are “steeped in the intricacies of the *CCAA* proceedings they oversee”: *Callidus* at para. 54. In *Callidus*, at para. 54, the Supreme Court quoted with approval the words of Justice Tysoe in *Edgewater Casino Inc., (Re)*, 2009 BCCA 40 at para. 20:

> ... one of the principal functions of the judge supervising the *CCAA* proceeding is to attempt to balance the interests of the various stakeholders during the reorganization process, and it will often be inappropriate to consider an exercise of discretion by the supervising judge in isolation of other exercises of discretion by the judge in endeavoring to balance the various interests. ... *CCAA* proceedings are dynamic in nature and the supervising judge has intimate knowledge of the reorganization process. The nature of the proceedings often requires the supervising judge to make quick decisions in complicated circumstances.

[25] Accordingly, leave in *CCAA* proceedings is only granted sparingly: *Edgewater* at paras. 12–14.

**Application**

[26] I dismissed the application for leave to appeal for the following reasons.

[27] Southern Star accepts that with one exception the judge had the jurisdiction to reach the conclusions she did. In substance, the complaint is about the manner in which the judge exercised her discretion. I will deal shortly with the issue of Lot E and the suggestion that the alleged error in relation to that issue entailed that the judge could not approve the transaction.

[28] I accept, for the purpose of this application, that the nature of the order sought to be appealed, at least so far as approval of the RVO is concerned, is unusual in *CCAA* proceedings and is of significance to the practice and to the parties. Additionally, in the recent words of the Alberta Court of Appeal, the disclaimer of contracts under the *CCAA* "is a significant issue in insolvency practice generally" and can significantly impact *CCAA* proceedings: *Bellatrix Exploration Ltd. v. BP Canada Energy Group ULC*, 2020 ABCA 178 at paras. 21–24.

[29] However, I am not persuaded the appeal is meritorious. I consider the prospects that a division of this Court would interfere with the judge's exercise of discretion to be remote. This is especially so in light of the judge's assessment, grounded in months of experience of managing the proceedings, that the consequences of not approving the transaction would be catastrophic. The grounds of appeal advanced by Southern Star raise essentially the same arguments which were dismissed by Fitzpatrick J., with one exception as to the argument for Lot E, which I will address below. I do not think she erred in principle, as alleged by the applicant. I agree with Quest that the orders she made were well within her broad discretion and considerable expertise as a supervisory judge of ten months in the matter, who was alive to the intricacies of the commercial realities confronting the parties.

[30] In arriving at her conclusion, Fitzpatrick J. considered and applied the principles recently set out by the Supreme Court of Canada in *Callidus,* which affirm the broad and flexible discretion of judges under the *CCAA* to make orders that are appropriate in the circumstances. She was also alive to the limits of her discretion; namely, that any order must conform to the objectives and purposes of the *CCAA*: at para. 154. She carefully evaluated each factor under s. 32(4) in making her determination that the Disclaimers were appropriate. With respect to the lease for Lot E, she found that no lease was in effect between Quest and Southern Star, so the prohibition in s. 32(9)(d) was inapplicable: at paras. 37–40. Finally, she recognized that this case presented unique and complex circumstances which made it appropriate to grant the RVO: at paras. 168, 172. While jurisprudential authority for making such an order in a contested proceeding is limited, it is notable that leave to appeal was refused in the one case in which it has been done, and under similar factual circumstances: *Nemaska*, *supra*.

[31] Fitzpatrick J. acknowledged the negative impact to Southern Star arising from the relief she granted, though she questioned the extent of that damage; she gave some credence to the suggestion, as Quest argues in this application, that Southern Star's arguments were made strategically with a view to gaining leverage, while significant other interests hung in the balance: at paras. 46, 164–66. Whether that was so did not, however, drive her conclusions. Ultimately, she accepted that Southern Star would suffer harm but balanced that impact with the "myriad interests held by other stakeholders" and chose the best option for everyone involved, including Southern Star: at paras. 48, 111, 164.

[32] The judge's order reflects precisely the type of intricate, fact-specific, real-time decision making that inheres in judges supervising *CCAA* proceedings, and which forms the basis for the considerable deference their decisions are afforded on review. Respectfully, in my opinion, if a division of this Court were to set aside the order it would be acting contrary to the instruction of the Supreme Court of Canada in *Callidus* that appellate courts should defer to the exercise of discretion by supervising judges in these kinds of proceedings.

[33] Southern Star argued in oral submissions that Fitzpatrick J.'s interpretation of the Lot E Ground Lease was not an exercise of her discretion as a supervisory judge, but rather was a legal error. She wrongly concluded that the parties had only agreed to agree, and not entered into a binding lease agreement that meant that Quest was a lessor for the purposes of s. 32(9)(d) of the *CCAA.* As I understood the argument, the judge had misapprehended the facts in reaching her conclusion. I will not rehearse the details of those alleged misapprehensions here. I do not accept Southern Star's argument, however, that the judge's interpretation of the Ground Lease turned on the existence of blank terms in a document and the impact of certain other documents; rather, I think that she made an assessment of the parties' objective intentions with respect to when the lease would be valid and effective between them. She concluded that would occur when Quest decided to construct a building on Lot E and Southern Star arranged for financing to facilitate that construction. This, it appears to me, was a conclusion open to her on the evidence.

[34] It is well settled now that, as a general rule, a judge's conclusions about matters of contractual interpretation are reviewed on a highly deferential standard. As I see the matter, a division of this Court would have to be persuaded that the judge made palpable and overriding errors in her conclusion. I am not persuaded that Southern Star has advanced anything more at its highest than an arguable, but hardly a strong case, that the judge erred as alleged. The likelihood that, even if this issue stood alone, a division of this Court would interfere with the judge's conclusion, is remote, in my opinion.

[35] Southern Star argues that if the judge erred on the Lot E issue, she could not have approved the transaction. Even if I accepted that the merits threshold had been met by the Lot E issue, and that the appeal raises issues that are, in an abstract sense, of interest to the parties, I would not have granted leave to appeal. These factors are overwhelmed by other elements of the test such as the fourth factor of the test for leave. This factor has traditionally been considered the most important factor in the test for leave to appeal, and that is true of the case at bar: see *Hockin v. Bank of British Columbia* (1989), 37 B.C.L.R. (2d) 139 at para. 20 (Wallace J.A. in

C.A. Chambers). In this case, granting leave to appeal would unduly hinder the progress of the action, with catastrophic effects. As the supervisory judge recognized, time is of the essence in this proceeding: para. 87. The Primacorp transaction, which she viewed to be the only viable option to save Quest and all those interested in it, would collapse if the transaction was not approved.



[36] In my opinion, granting leave would most probably have equally disastrous consequences for the myriad stakeholders affected by Quest's financial circumstances. There is no realistic prospect, in my view, that this Court could reasonably be expected to hear and decide this appeal on a timeframe that would preserve the transaction if the appeal were to be dismissed, as it surely would be given its merits. The fundamental and overarching question ultimately is whether it is in the interests of justice to grant leave. In my opinion, it would defeat the interests of justice and frustrate the purposes of the *CCAA* to grant leave. It is for these reasons, I dismissed the application. As a result, the application for a stay was also dismissed.

[37] I am grateful to counsel for their submissions.

"The Honourable Mr. Justice Harris"

# TAB 29

**Teal Cedar Products Ltd.** *Appellant*

*v.*

**Her Majesty the Queen in Right of the Province of British Columbia** *Respondent*

- and -

**Teal Cedar Products Ltd.** *Appellant*

*v.*

**Her Majesty the Queen in Right of the Province of British Columbia** *Respondent*

**Indexed as: Teal Cedar Products Ltd. *v.* British Columbia**

**2017 SCC 32**

File No.: 36595.

2016: November 1; 2017: June 22.

Present: McLachlin C.J. and Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown and Rowe JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Arbitration — Appeals — Jurisdiction — Standard of review — Commercial arbitration awards — Province reducing forestry company's access to improvements on Crown land used to harvest timber — Parties disagreeing as to amount of compensation owed to forestry company and entering into arbitration — Leave to appeal award sought by parties pursuant to s. 31(2) of the Arbitration Act — Appeal of award dismissed in part but dismissal reversed by Court of Appeal — Whether Court of Appeal erred in construing issues decided by arbitrator as questions of law subject to appellate review — Arbitration Act, R.S.B.C. 1996, c. 55, s. 31.*

*Contracts — Interpretation — Use of factual matrix — Province reducing forestry company's access to improvements on Crown land used to harvest timber — Parties entering into agreement to negotiate compensation owed to forestry company for loss of access*

**Teal Cedar Products Ltd.** *Appelante*

*c.*

**Sa Majesté la Reine du chef de la province de la Colombie-Britannique** *Intimée*

- et -

**Teal Cedar Products Ltd.** *Appelante*

*c.*

**Sa Majesté la Reine du chef de la province de la Colombie-Britannique** *Intimée*

**Répertorié : Teal Cedar Products Ltd. *c.* Colombie-Britannique**

**2017 CSC 32**

N° du greffe : 36595.

2016 : 1er novembre; 2017 : 22 juin.

Présents : La juge en chef McLachlin et les juges Abella, Moldaver, Karakatsanis, Wagner, Gascon, Côté, Brown et Rowe.

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

*Arbitrage — Appels — Compétence — Norme de contrôle — Sentences arbitrales commerciales — Réduction par la province de l'accès d'une entreprise forestière aux améliorations situées sur des terres de la Couronne qui servent à couper du bois — Désaccord des parties sur le montant de l'indemnité due à l'entreprise forestière et recours par celles-ci à l'arbitrage — Parties demandant l'autorisation d'interjeter appel de la sentence en vertu de l'art. 31(2) de l'Arbitration Act — Appel de la sentence rejeté en partie mais rejet infirmé par la Cour d'appel — La Cour d'appel a-t-elle fait erreur en considérant les questions tranchées par l'arbitre comme des questions de droit susceptibles de contrôle en appel? — Arbitration Act, R.S.B.C. 1996, c. 55, art. 31.*

*Contrats — Interprétation — Recours au fondement factuel — Réduction par la province de l'accès d'une entreprise forestière aux améliorations situées sur des terres de la Couronne qui servent à couper du bois — Conclusion par les parties d'une convention en vue de* *to improvements — Agreement precluding payment of interest as part of compensation — Parties disagreeing as to amount of compensation and entering into arbitration — Whether legal question arises from arbitrator's contractual interpretation of forestry company's entitlement to interest.*

*Natural resources — Forests — Permits and licences — Province reducing forestry company's access to improvements on Crown land used to harvest timber — Parties disagreeing as to amount of compensation owed to forestry company and entering into arbitration — Whether arbitrator's conclusion that forestry company's losses may be valued on basis of depreciation replacement cost method was reasonable — Forestry Revitalization Act, S.B.C. 2003, c. 17, s. 6(4).*

T, a forestry company, holds licences to harvest Crown timber in the province of British Columbia. When the province reduced the volume of T's allowable harvest and deleted certain areas from the related Crown land base, the parties were unable to settle how much compensation the province owed to T for reducing the latter's access to certain improvements such as roads and bridges which T used to harvest the timber. Consequently, their dispute was submitted to arbitration in accordance with the *Forestry Revitalization Act* ("*Revitalization Act*"). The arbitrator was seized of an issue of statutory interpretation to determine the proper valuation method for the improvements pursuant to the *Revitalization Act*, which he found to be the depreciation replacement cost method. The arbitrator also ruled on an issue of contractual interpretation, concluding that an agreement reached by the parties prior to arbitration did not exclude interest from the province's payment of compensation to T for the improvements. Finally, on an issue of statutory application, the arbitrator determined that T was not entitled to compensation for the improvements to which it did not lose access. On appeal, the application judge upheld the arbitrator's award except in connection with the statutory application issue, which was remitted to the arbitrator and resulted in an additional award in an amount equal to the value of the improvements. A majority of the Court of Appeal reversed the application judge's decision, finding that the arbitrator had erred on both the statutory interpretation and contractual interpretation issues, as well as in making his subsequent ruling regarding the statutory application issue. On remand for disposition in accordance with *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2

*négocier l'indemnité due à l'entreprise forestière pour la perte de l'accès à des améliorations — Convention écartant le paiement d'intérêts sur l'indemnité — Désaccord des parties sur le montant de l'indemnité et recours par celles-ci à l'arbitrage — Une question de droit découle-t-elle de l'interprétation contractuelle donnée par l'arbitre au droit de l'entreprise forestière de toucher des intérêts?*

*Ressources naturelles — Forêts — Permis et licences — Réduction par la province de l'accès d'une entreprise forestière aux améliorations situées sur des terres de la Couronne qui servent à couper du bois — Désaccord des parties sur le montant de l'indemnité due à l'entreprise forestière et recours par celles-ci à l'arbitrage — La conclusion de l'arbitre selon laquelle il est possible d'évaluer les pertes de l'entreprise forestière selon la méthode du coût de remplacement déprécié était-elle raisonnable? — Forestry Revitalization Act, S.B.C. 2003, c. 17, art. 6(4).*

T, une entreprise forestière, détient des permis de coupe de bois sur des terres de la Couronne dans la province de la Colombie-Britannique. Quand la province a réduit le volume de la coupe autorisée de T et retranché certaines zones du territoire de la Couronne en question, les parties n'ont pas été en mesure de s'entendre sur le montant de l'indemnité que la province devait à T en contrepartie de la réduction de son accès à certaines améliorations, comme des routes et des ponts, qu'utilisait T pour couper le bois. Leur différend a donc été soumis à l'arbitrage conformément à la *Forestry Revitalization Act* (« *Revitalization Act* »). L'arbitre a été saisi d'une question d'interprétation législative pour qu'il choisisse la bonne méthode d'évaluation dans le cas des améliorations en application de la *Revitalization Act* et il a jugé que cette méthode était celle du coût de remplacement déprécié. L'arbitre a également statué sur une question d'interprétation contractuelle, concluant qu'une convention intervenue entre les parties avant l'arbitrage n'excluait pas l'ajout d'intérêts sur le paiement, par la province, d'une indemnité à T pour les améliorations. Enfin, sur une question d'application de la loi, l'arbitre a décidé que T n'avait pas droit à une indemnité pour les améliorations auxquelles elle n'avait pas perdu accès. En appel, le juge saisi de la requête a confirmé la sentence de l'arbitre, sauf relativement à la question de l'application de la loi qui a été renvoyée à l'arbitre et qui a entraîné une sentence additionnelle accordant une somme égale à la valeur des améliorations. Les juges majoritaires de la Cour d'appel ont infirmé la décision du juge saisi de la requête, estimant que l'arbitre avait fait erreur à la fois sur la question d'interprétation législative et celle de l'interprétation

S.C.R. 633, a unanimous Court of Appeal held that its disposition of the appeal was unaltered by *Sattva*, reaffirming its conclusion that the issues ruled upon by the arbitrator are questions of law subject to appellate review, and that the arbitrator was in error regardless of the standard of review applied.

*Held* (Moldaver, Côté, Brown and Rowe JJ. dissenting in part): The appeal is allowed in part.

*Per* McLachlin C.J. and Abella, Karakatsanis, Wagner and Gascon JJ.: The Court of Appeal's decision on remand cannot stand in light of *Sattva*. The process for characterizing a question as one of three principal types — legal, factual, or mixed — is well-established, as confirmed in *Sattva*: legal questions are questions about what the correct legal test is; factual questions are questions about what actually took place between the parties; and mixed questions are questions about whether the facts satisfy the legal test. While the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. Such a legal question, if alleged in the context of a dispute under the *Arbitration Act*, and assuming the other jurisdictional requirements of that Act are met, is open to appellate review. These extricable questions of law are better understood as a covert form of legal question — where a judge's (or arbitrator's) legal test is implicit to their application of the test rather than explicit in their description of the test — than as a fourth and distinct category of questions.

Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent. A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of

contractuelle de même qu'en rendant sa décision subséquente concernant la question de l'application de la loi. Lorsque l'affaire a été renvoyée à la Cour d'appel pour qu'elle la tranche conformément à *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, la Cour d'appel a jugé à l'unanimité que cet arrêt ne changeait rien à sa décision sur l'appel, répétant sa conclusion que les questions tranchées par l'arbitre sont des questions de droit susceptibles de contrôle en appel et que l'arbitre avait erré, peu importe la norme de contrôle appliquée.

*Arrêt* (les juges Moldaver, Côté, Brown et Rowe sont dissidents en partie) : Le pourvoi est accueilli en partie.

*La* juge en chef McLachlin et les juges Abella, Karakatsanis, Wagner et Gascon : La décision rendue par la Cour d'appel à la suite du renvoi ne tient pas eu égard à *Sattva*. La marche à suivre pour qualifier une question selon l'une des trois catégories principales — questions de droit, questions de fait ou questions mixtes — est bien établie, comme le confirme *Sattva* : les questions de droit concernent la détermination du critère juridique applicable; les questions de fait portent sur ce qui s'est réellement passé entre les parties; et les questions mixtes consistent à déterminer si les faits satisfont au critère juridique. Bien que l'application d'un critère juridique à un ensemble de faits soit une question mixte, si, durant cette application, le critère juridique sous-jacent a pu être altéré, une question de droit se pose. Pareille question de droit, si elle est alléguée dans le contexte d'un différend relevant de l'*Arbitration Act*, et en supposant que les autres exigences relatives à la compétence de cette loi sont satisfaites, est susceptible de contrôle en appel. Il est plus juste d'affirmer que ces questions de droit isolables sont une forme cachée de question de droit — où le critère juridique sur lequel se fonde le juge (ou l'arbitre) peut être déduit de son application au lieu d'être énoncé clairement dans sa description — et non une quatrième catégorie, distincte, de questions.

Les tribunaux doivent cependant faire preuve de prudence lorsqu'ils relèvent des questions de droit isolables parce que les questions mixtes, par définition, comportent des aspects de droit. Les motivations pour lesquelles l'avocat qualifie stratégiquement une question mixte de question de droit — par exemple pour pouvoir saisir un tribunal de l'appel d'une sentence arbitrale ou pour faire appliquer une norme de contrôle favorable dans l'appel d'un jugement en matière civile — sont limpides. Une conception étroite des questions de droit isolables s'accorde avec le caractère définitif de l'arbitrage commercial et, de façon plus générale, avec la déférence à l'égard des conclusions de fait. Les tribunaux doivent law), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

se montrer vigilants lorsqu'il s'agit de faire une distinction entre une partie qui allègue que le critère juridique a pu être altéré lors de son application (une question de droit isolable) et une partie qui allègue que le critère juridique, qui n'a pas été altéré, aurait dû, lors de son application, donner lieu à un résultat différent (une question mixte).

The characterization of a question on review as a mixed question rather than as a legal question has vastly different consequences in appeals from arbitration awards and civil litigation judgments. The identification of a mixed question when appealing an arbitration award defeats a court's appellate review jurisdiction under the *Arbitration Act.* In contrast, the identification of a mixed question when appealing a civil litigation judgment merely raises the standard of review.

Le fait de qualifier une question à l'examen de question mixte plutôt que de question de droit entraîne des différences considérables entre les appels interjetés à l'encontre d'une sentence arbitrale et ceux interjetés à l'encontre d'un jugement en matière civile. L'identification d'une question mixte dans le cadre d'un appel interjeté à l'encontre d'une sentence arbitrale fait échec à la compétence du tribunal en appel suivant l'*Arbitration Act*. À l'inverse, l'identification d'une question mixte dans le cadre d'un appel interjeté à l'encontre d'un jugement en matière civile ne fait que mener à l'application d'une norme de contrôle plus rigoureuse.

Given these principles as confirmed in *Sattva*, a question of statutory interpretation is normally characterized as a legal question. In contrast, identifying a question, broadly, as one of contractual interpretation does not necessarily resolve the nature of the question at issue. Contractual interpretation involves factual, legal, and mixed questions, and characterizing the nature of the specific question before the court requires delicate consideration of the narrow issue actually in dispute. In general, contractual interpretation remains a mixed question, not a legal question, as it involves applying contractual law (principles of contract law) to contractual facts (the contract itself and its factual matrix).

Compte tenu de ces principes confirmés dans *Sattva*, la question d'interprétation législative est habituellement qualifiée de question de droit. À l'inverse, le fait de dire qu'une question en est généralement une d'interprétation contractuelle n'établit pas nécessairement la nature de la question en cause. L'interprétation contractuelle met en jeu des questions de fait, des questions de droit et des questions mixtes. Donc, il faut examiner avec délicatesse la question étroite en litige pour qualifier la nature de la question précise posée au tribunal. En général, l'interprétation contractuelle demeure une question mixte et non une question de droit; elle suppose l'application du droit des contrats (principes du droit des contrats) à des faits d'ordre contractuel (le contrat lui-même et son fondement factuel).

In the present case, the statutory interpretation issue, i.e. the issue of selecting a valuation method that complies with the *Revitalization Act*, involves two types of questions: (1) questions about the broad category of methods that are acceptable under the terms of the *Revitalization Act*; and (2) questions about the specific method, within that broad category of acceptable methods, that should ultimately be applied. The former questions — the methods that are acceptable under the *Revitalization Act* — are a matter of statutory interpretation and, accordingly, are questions of law. As a result, the courts have jurisdiction to review the arbitrator's resolution of the issue in so far as that resolution involves identifying a pool of methodologies consistent with the *Revitalization Act*.

En l'espèce, la question d'interprétation législative, — c'est-à-dire la question de choisir une méthode d'évaluation conforme à la *Revitalization Act* — fait entrer en jeu deux types de questions : (1) les questions relatives à la catégorie générale de méthodes qui sont acceptables selon la *Revitalization Act*; et (2) les questions liées à la méthode précise, faisant partie de cette catégorie générale de méthodes acceptables, qui devrait être appliquée en fin de compte. Les premières questions — les méthodes acceptables suivant la *Revitalization Act* — concernent l'interprétation législative et, par conséquent, sont des questions de droit. Ainsi, les tribunaux ont compétence pour contrôler la décision de l'arbitre sur la question dans la mesure où cette décision consistait à cerner un ensemble de méthodes conformes à la *Revitalization Act*.

The latter questions — the preferable method among those that are consistent with the *Revitalization Act* — are inextricably linked to the evidentiary record at the arbitration hearing, where various experts opined on the virtues of conflicting valuation methodologies. They are mixed questions, if not pure questions of fact. Therefore, the courts lack jurisdiction to review the arbitrator's selection of a specific methodology among the pool of methodologies which are consistent with the *Revitalization Act*.

As for the contractual interpretation issue, the courts have no jurisdiction to review the arbitrator's decision in this regard. The arbitrator, after a lengthy and complex hearing, was best situated to weigh the factual matrix in his interpretation of the parties' agreement regarding the payment of interest. The fact that he may have placed significant weight on that evidence in interpreting the agreement does not engage a legal question conferring jurisdiction on the courts under the *Arbitration Act* as it does not alter the underlying test he applied in this case. Further, the arbitrator's interpretation was rooted in the words of the contract, not overwhelmed by them. While the arbitrator may have placed significant weight on the factual matrix when interpreting the meaning of "compensation", there is no arguable merit to the claim that he interpreted that matrix isolated from the contract's words so as to effectively create a new agreement.

Likewise, on the statutory application issue, the courts have no jurisdiction to review the arbitrator's decision in this regard. The question implicated — whether the arbitrator correctly applied the valuation methodology to a licence — is a mixed question. As such, it is beyond the scope of appellate review.

It follows that the courts' jurisdiction is limited to the statutory interpretation issue of identifying a pool of methodologies consistent with the *Revitalization Act.* The decision made on this issue was rendered in an arbitral context pursuant to the *Arbitration Act.* As confirmed in *Sattva*, the standard of review on legal questions arising from the arbitrator's analysis of this statutory interpretation issue is reasonableness, which is almost always the applicable standard when reviewing commercial arbitration awards. This preference for a reasonableness standard dovetails with the key policy objectives of commercial arbitration, namely efficiency and finality. And this preference is not negated here in light of the nature

Les dernières questions — la meilleure méthode parmi celles qui respectent la *Revitalization Act* — sont inextricablement liées au dossier de preuve présenté à l'audience d'arbitrage, où différents experts se sont prononcés sur les vertus de méthodes d'évaluation incompatibles. Ce sont des questions mixtes, voire des questions de fait pures. Par conséquent, les tribunaux n'ont pas compétence pour contrôler la méthode précise choisie par l'arbitre parmi l'ensemble des méthodes conformes à la *Revitalization Act*.

Pour ce qui est de la question de l'interprétation contractuelle, les tribunaux n'ont pas compétence pour contrôler la décision de l'arbitre à ce sujet. L'arbitre — après une audience longue et complexe — était le mieux placé pour soupeser le fondement factuel dans son interprétation de la convention intervenue entre les parties à propos du paiement d'intérêts. La possibilité qu'il ait accordé beaucoup de poids à cette preuve dans son interprétation du contrat en question ne soulève pas une question de droit conférant compétence aux tribunaux suivant l'*Arbitration Act*, car cela n'altère pas le critère sous-jacent qu'il a appliqué en l'espèce. En outre, l'interprétation de l'arbitre reposait sur les termes du contrat et n'était pas supplantée par ceux-ci. Bien qu'il ait peut-être accordé beaucoup d'importance au fondement factuel quand il a interprété le sens d'« indemnité », la prétention selon laquelle l'arbitre n'a pas interprété ce fondement séparément des termes du contrat de manière à créer effectivement une nouvelle convention est dépourvue de fondement défendable.

De même, sur la question de l'application de la loi, les tribunaux n'ont pas compétence pour contrôler la décision de l'arbitre à ce sujet. La question en cause, qui consiste à savoir si l'arbitre a bien appliqué la méthode d'évaluation à un permis, est une question mixte. Elle échappe donc à la portée du contrôle en appel.

Par conséquent, les tribunaux ont uniquement compétence sur la question de l'interprétation de la loi qui consiste à cerner un ensemble de méthodes conformes à la *Revitalization Act.* La décision sur ce point a été rendue dans un contexte arbitral en application de l'*Arbitration Act.* Comme le confirme l'arrêt *Sattva*, la norme de contrôle applicable aux questions de droit découlant de l'analyse de cette question d'interprétation de la loi effectuée par l'arbitre est celle de la décision raisonnable, la norme qui s'applique presque toujours lorsqu'il s'agit de contrôler des sentences arbitrales commerciales. Ce penchant en faveur de la norme de la décision raisonnable concorde avec les principaux objectifs de politique of the question at issue and the arbitrator's presumed expertise.

générale de l'arbitrage commercial, à savoir l'efficacité et le caractère définitif. Et ce penchant n'est pas exclu dans la présente affaire vu la nature de la question en litige et l'expertise présumée de l'arbitre.

It would be an error to claim that all statutory interpretation by an arbitrator demands correctness review simply because it engages a legal question. In contrast, where the decision under review is, for example, a civil litigation judgment, the nature of the question is dispositive of the standard of review, with factual and mixed questions being reviewed for palpable and overriding error and legal questions — including extricable questions of law — being reviewed for correctness. It is therefore critical to bear these distinctions in mind when determining the appropriate standard of review in any given case.

Il serait erroné d'affirmer que toutes les interprétations législatives d'un arbitre commandent l'application de la norme de la décision correcte simplement parce qu'elles font intervenir une question de droit. En revanche, lorsque la décision faisant l'objet du contrôle est, par exemple, un jugement en matière civile, la nature de la question permet d'établir la norme de contrôle applicable, puisque les questions de fait et les questions mixtes sont examinées selon la norme de l'erreur manifeste et déterminante et les questions de droit — y compris les questions de droit isolables — doivent l'être en fonction de la norme de la décision correcte. Il est donc crucial de garder ces distinctions à l'esprit lorsque l'on détermine la norme de contrôle applicable dans un cas donné.

The Court of Appeal erroneously held that the standard of review should be correctness for the statutory interpretation issue. Its decision appears to suggest that questions of law, such as statutory interpretation, necessarily attract a correctness standard of review. In so far as the Court of Appeal intended to make this suggestion, it is incorrect. While the nature of the question (legal, mixed, or fact) is dispositive of the standard of review in the civil litigation context, it is not in the arbitration context.

La Cour d'appel a conclu à tort que la norme de contrôle applicable à la question d'interprétation législative devait être celle de la décision correcte. Sa décision semble suggérer que les questions de droit, comme l'interprétation des lois, appellent toujours la norme de la décision correcte. Dans la mesure où la Cour d'appel a voulu faire cette suggestion, celle-ci est erronée. Si la nature de la question (de droit, mixte ou de fait) permet de déterminer la norme de contrôle applicable dans le contexte d'un litige civil, elle ne permet pas de le faire dans le contexte de l'arbitrage commercial.

With respect to the review step of the analysis, the arbitrator's determination that the depreciation replacement cost method was consistent with the *Revitalization Act* was reasonable. This decision fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and law, and the decision was justified, transparent, intelligible, and defensible. The claim that this method results in a windfall begs the question, i.e. it assumes that compensation equal to the value of all improvements is excessive in the course of explaining that excess. And the basis for claiming that excessive compensation was paid in this case is the assumption that it was inappropriate for the arbitrator to order compensation in excess of T's actual costs, despite the absence of any reference in the *Revitalization Act* limiting T's compensation to its actual costs or expenses. The full "value of improvements made to Crown land" is the language chosen by the legislature as the quantum for the compensation provision. If the provincial legislature had wanted to pay companies less than the "value of improvements made to Crown land", it would not have set the amount

En ce qui concerne l'étape du contrôle de l'analyse, la conclusion de l'arbitre selon laquelle la méthode du coût de remplacement déprécié respectait la *Revitalization Act* était raisonnable. Cette décision appartenait aux issues possibles acceptables pouvant se justifier au regard des faits et du droit, et la décision était justifiée, transparente, intelligible et défendable. La prétention selon laquelle cette méthode donne lieu à un gain fortuit élude la question, en ce qu'on tient ainsi pour acquis qu'une indemnité égale à la valeur de toutes les améliorations est excessive alors qu'on est en train d'expliquer cet excès. Et la prétention voulant qu'une indemnité excessive ait été payée en l'espèce repose sur la supposition selon laquelle il ne convenait pas que l'arbitre ordonne le paiement d'une indemnité supérieure aux frais réels de T, malgré l'absence dans la *Revitalization Act* de toute disposition limitant l'indemnité de T à ses frais ou dépenses réels. La pleine « valeur des améliorations apportées aux terres de la Couronne » est l'expression choisie par le législateur pour désigner le montant de l'indemnité dans la disposition d'indemnisation. Si le législateur of compensation "equal to" it. As a consequence, the arbitrator's reasoning is hardly indefensible, particularly when the wording of the compensation provision so clearly fixes compensation at the specific amount chosen by the arbitrator. In the end, the legislature is entitled to provide forestry companies with statutory compensation that is not quantified on the basis of the nature of their interests in the Crown land at issue and the arbitrator's interpretation of the compensation provision is accordingly entitled to deference.

provincial avait voulu verser aux entreprises une indemnité inférieure à la « valeur des améliorations apportées aux terres de la Couronne », il n'aurait pas prévu une indemnité « égale à » celle-ci. Le raisonnement de l'arbitre n'est donc guère indéfendable, d'autant plus que le libellé de la disposition d'indemnisation fixe clairement l'indemnité au montant précisément établi par l'arbitre. Au bout du compte, le législateur a le droit d'offrir aux entreprises forestières une indemnité prévue par la loi dont le montant n'est pas fonction de la nature de leur intérêt dans la terre de la Couronne en cause et l'interprétation donnée par l'arbitre à la disposition d'indemnisation commande donc la déférence.

*Per* Moldaver, Côté, Brown and Rowe JJ. (dissenting in part): Regardless of the applicable standard of review, the arbitrator's interpretation of s. 6(4) of the *Revitalization Act* cannot stand. The only interpretation of s. 6(4) that withstands scrutiny on either standard of review is that T, as a licence holder, was entitled to receive compensation only for its limited interest in the improvements. In valuing the improvements under s. 6(4), the arbitrator was required to take into account that T, as a licence holder, did not own the improvements, which belonged to the Crown.

*Les* juges Moldaver, Côté, Brown et Rowe (dissidents en partie) : Peu importe la norme de contrôle applicable, l'interprétation que l'arbitre a donnée au par. 6(4) de la *Revitalization Act* ne tient pas. La seule interprétation du par. 6(4) qui résiste à un examen selon l'une ou l'autre norme de contrôle est celle selon laquelle T, en tant que titulaire de permis, n'avait le droit de recevoir une indemnité que pour son intérêt limité dans les améliorations. En évaluant les améliorations en vertu du par. 6(4), l'arbitre devait tenir compte du fait que T, en tant que titulaire de permis, n'était pas propriétaire des améliorations, lesquelles appartenaient à la Couronne.

The plain and ordinary meaning of s. 6(4) is that T is entitled to be compensated on a basis that reflects its limited interest in the improvements as a licence holder. This plain meaning of s. 6(4) is consistent with the purpose of the *Revitalization Act* and its expropriation context. The *Revitalization Act*'s purpose is to reduce the rights of licence holders — specifically, their rights to harvest timber and use the improvements — and to provide licence holders with compensation for these reductions. As a result of the takebacks at issue, reductions were made to T's rights to use the improvements — not ownership rights over such improvements. It runs counter to the purpose of the *Revitalization Act* to award T compensation that exceeds the value of what it lost due to the takebacks.

Le sens ordinaire du par. 6(4) est le suivant : T a le droit d'être indemnisée sur une base reflétant l'intérêt limité qu'elle possède dans les améliorations en tant que titulaire de permis. Ce sens ordinaire du par. 6(4) est compatible avec l'objet de la *Revitalization Act* et son contexte d'expropriation. La *Revitalization Act* vise à réduire les droits des titulaires de permis, plus particulièrement leurs droits de couper du bois et d'utiliser les améliorations, et à indemniser les titulaires de permis pour ces réductions. À la suite des reprises en litige, T a perdu une partie de son droit d'utiliser les améliorations, et non des droits de propriété sur celles-ci. Il va à l'encontre de l'objet de la *Revitalization Act* d'accorder à T une indemnité excédant la valeur de ce qu'elle a perdu en raison des reprises.

The cost savings approach applied by the arbitrator may be an appropriate methodology in the context of privately owned land. But the roads and bridges at issue in this case belonged to the Crown. Given that T did not own the improvements and had only a limited interest in the improvements as a licence holder, it cannot be said that it lost the replacement cost of the improvements when the province made reductions to the land base under its licences, nor can it be said that T would pay the full cost to replace the network of improvements at issue.

L'approche fondée sur les économies de coûts adoptée par l'arbitre peut constituer une méthode adéquate dans le cas des terres privées, mais les routes et les ponts en cause appartenaient à la Couronne. Puisque T n'était pas propriétaire des améliorations et n'avait qu'un intérêt limité dans celles-ci en tant que titulaire de permis, on ne saurait affirmer qu'elle a perdu le coût de remplacement des améliorations lorsque la province a réduit le territoire visé par ses permis, et on ne peut pas non plus dire que T paierait le coût total du remplacement du réseau d'améliorations en cause.

The arbitrator construed s. 6(4) of the *Revitalization Act* too narrowly in concluding that the distinction drawn by this provision between the value of the improvements and the value of the harvesting rights means that the market value of the tenure as a whole cannot be considered when determining the value of the improvements. There is nothing in the language or context of the Act to support this unduly restrictive reading of s. 6(4). On the contrary, it was open to the arbitrator to select any valuation method that could evaluate the value of the improvements to T as a licence holder, as long as the approach valued the improvements as separate and distinct from the harvesting rights.

The market value method was available to the arbitrator under s. 6(4) of the *Revitalization Act*, and yet the arbitrator chose to apply a method that was inconsistent with this provision. This resulted in a substantial windfall for T. The matter of compensation for the improvements relating to the three licences at issue should accordingly be remitted to the arbitrator for reconsideration.

**Cases Cited**

By Gascon J.

**Applied:** *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; **referred to:** *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 78 B.C.A.C. 193; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32; *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770.

L'arbitre a interprété trop restrictivement le par. 6(4) de la *Revitalization Act* en concluant que la distinction établie par cette disposition entre la valeur des améliorations et celle des droits de coupe signifie que la valeur marchande de l'ensemble de la tenure ne peut être prise en compte pour déterminer la valeur des améliorations. Rien dans le texte ou le contexte de la *Revitalization Act* n'appuie cette interprétation trop restrictive du par. 6(4). Au contraire, il était loisible à l'arbitre de choisir une méthode d'évaluation qui permettait de fixer la valeur des améliorations pour T en tant que titulaire d'un permis, pourvu que l'approche choisie serve à évaluer les améliorations comme élément séparé et distinct des droits de coupe.

L'arbitre pouvait utiliser la méthode de la valeur marchande en vertu du par. 6(4) de la *Revitalization Act*. Pourtant, il a choisi de recourir à une méthode incompatible avec cette disposition, ce qui a permis à T de réaliser un gain fortuit substantiel. La question de l'indemnité pour les améliorations concernant les trois permis en litige doit donc être renvoyée à l'arbitre pour nouvel examen.

**Jurisprudence**

Citée par le juge Gascon

**Arrêt appliqué :** *Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633; **arrêts mentionnés :** *Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748; *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235; *Heritage Capital Corp. c. Équitable, Cie de fiducie*, 2016 CSC 19, [2016] 1 R.C.S. 306; *Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135; *Ledcor Construction Ltd. c. Société d'assurance d'indemnisation Northbridge*, 2016 CSC 37, [2016] 2 R.C.S. 23; *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Black Swan Gold Mines Ltd. c. Goldbelt Resources Ltd.* (1996), 78 B.C.A.C. 193; *Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190; *McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895; *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5; *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339; *Régie des transports en commun de la région de Toronto c. Dell Holdings Ltd.*, [1997] 1 R.C.S. 32; *Wilson c. Énergie Atomique du Canada Ltée*, 2016 CSC 29, [2016] 1 R.C.S. 770.

By Moldaver and Côté JJ. (dissenting in part)

*CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27; *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724; *British Columbia (Forests) v. Teal Cedar Products Ltd.*, 2013 SCC 51, [2013] 3 S.C.R. 301; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Diggon-Hibben, Ltd. v. The King*, [1949] S.C.R. 712; *MacMillan Bloedel Ltd. v. British Columbia* (1995), 12 B.C.L.R. (3d) 134.

**Statutes and Regulations Cited**

*Arbitration Act*, R.S.B.C. 1996, c. 55, s. 31.
*Forest Act*, R.S.B.C. 1996, c. 157.
*Forest Planning and Practices Regulation*, B.C. Reg. 14/2004, s. 79(2).
*Forestry Revitalization Act*, S.B.C. 2003, c. 17, ss. 6, 13.

**Authors Cited**

British Columbia. Legislative Assembly. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 13, No. 6, 4th Sess., 37th Parl., March 27, 2003, p. 5682.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983.
Hall, Geoff R. *Canadian Contractual Interpretation Law*, 3rd ed. Toronto: LexisNexis, 2016.
Mullan, David. "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!" (2013), 42 *Adv. Q.* 1.
*Shorter Oxford English Dictionary on Historical Principles*, 6th ed. by Angus Stevenson. Oxford: Oxford University Press, 2007, "compensation".
Todd, Eric C. E. *The Law of Expropriation and Compensation in Canada*, 2nd ed. Scarborough, Ont.: Carswell, 1992.

APPEAL from a judgment of the British Columbia Court of Appeal (Lowry, Chiasson and MacKenzie JJ.A.), 2015 BCCA 263, 70 B.C.L.R. (5th) 320, 373 B.C.A.C. 211, 641 W.A.C. 211, 386 D.L.R. (4th) 40, 115 L.C.R. 1, [2015] B.C.J. No. 1180 (QL), 2015 CarswellBC 1550 (WL Can.), affirming on remand a judgment of the British Columbia Court of Appeal (Finch C.J. and Lowry and MacKenzie JJ.A.), 2013 BCCA 326, 46 B.C.L.R.

Citée par les juges Moldaver et Côté (dissidents en partie)

*CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27; *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724; *Colombie-Britannique (Forêts) c. Teal Cedar Products Ltd.*, 2013 CSC 51, [2013] 3 R.C.S. 301; *Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160; *Diggon-Hibben, Ltd. c. The King*, [1949] R.C.S. 712; *MacMillan Bloedel Ltd. c. British Columbia* (1995), 12 B.C.L.R. (3d) 134.

**Lois et règlements cités**

*Arbitration Act*, R.S.B.C. 1996, c. 55, art. 31.
*Forest Act*, R.S.B.C. 1996, c. 157.
*Forest Planning and Practices Regulation*, B.C. Reg. 14/2004, art. 79(2).
*Forestry Revitalization Act*, S.B.C. 2003, c. 17, art. 6, 13.

**Doctrine et autres documents cités**

Colombie-Britannique. Legislative Assembly. *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 13, No. 6, 4th Sess., 37th Parl., March 27, 2003, p. 5682.
Driedger, Elmer A. *Construction of Statutes*, 2nd ed., Toronto, Butterworths, 1983.
Hall, Geoff R. *Canadian Contractual Interpretation Law*, 3rd ed., Toronto, LexisNexis, 2016.
Mullan, David. « Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen! » (2013), 42 *Adv. Q.* 1.
*Shorter Oxford English Dictionary on Historical Principles*, 6th ed. by Angus Stevenson, Oxford, Oxford University Press, 2007, « *compensation* ».
Todd, Eric C. E. *The Law of Expropriation and Compensation in Canada*, 2nd ed., Scarborough (Ont.), Carswell, 1992.

POURVOI contre un arrêt de la Cour d'appel de la Colombie-Britannique (les juges Lowry, Chiasson et MacKenzie), 2015 BCCA 263, 70 B.C.L.R. (5th) 320, 373 B.C.A.C. 211, 641 W.A.C. 211, 386 D.L.R. (4th) 40, 115 L.C.R. 1, [2015] B.C.J. No. 1180 (QL), 2015 CarswellBC 1550 (WL Can.), qui a confirmé après renvoi un arrêt de la Cour d'appel de la Colombie-Britannique (le juge en chef Finch et les juges Lowry et MacKenzie), 2013 BCCA

(5th) 272, 340 B.C.A.C. 256, 579 W.A.C. 256, 364 D.L.R. (4th) 465, 109 L.C.R. 276, [2013] B.C.J. No. 1480 (QL), 2013 CarswellBC 2059 (WL Can.), setting aside a decision of Bauman C.J., 2012 BCSC 543, [2012] B.C.J. No. 735 (QL), 2012 CarswellBC 1054 (WL Can.), which partially upheld an arbitrator's decision. Appeal allowed in part, Moldaver, Côté, Brown and Rowe JJ. dissenting in part.

*John J. L. Hunter*, *Q.C.*, *Mark S. Oulton* and *K. Michael Stephens*, for the appellant.

*Karen A. Horsman*, *Q.C.*, *Barbara A. Carmichael* and *Micah Weintraub*, for the respondent.

The judgment of McLachlin C.J. and Abella, Karakatsanis, Wagner and Gascon JJ. was delivered by

Gascon J. —

I. Overview

[1] In British Columbia, the scope of appellate intervention in commercial arbitration is narrow in two key ways. First, there is limited jurisdiction for appellate review of arbitration awards because that jurisdiction is statutorily limited to questions of law (*Arbitration Act*, R.S.B.C. 1996, c. 55, s. 31). Second, even where such jurisdiction exists, our Court recently held that a deferential standard of review — reasonableness — "almost always" applies to arbitration awards (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 75, 104 and 106). Together, limited jurisdiction and deferential review advance the central aims of commercial arbitration: efficiency and finality.

[2] The Province of British Columbia ("BC") and a forestry company, Teal Cedar Products Ltd. ("Teal Cedar"), were unable to settle how much compensation BC owed to Teal Cedar for reducing the latter's access to certain improvements on Crown land — such as roads and bridges — which it used to harvest

326, 46 B.C.L.R. (5th) 272, 340 B.C.A.C. 256, 579 W.A.C. 256, 364 D.L.R. (4th) 465, 109 L.C.R. 276, [2013] B.C.J. No. 1480 (QL), 2013 CarswellBC 2059 (WL Can.), lequel avait infirmé une décision du juge en chef Bauman, 2012 BCSC 543, [2012] B.C.J. No. 735 (QL), 2012 CarswellBC 1054 (WL Can.), confirmant en partie une sentence arbitrale. Pourvoi accueilli en partie, les juges Moldaver, Côté, Brown et Rowe sont dissidents en partie.

*John J. L. Hunter*, *c.r.*, *Mark S. Oulton* et *K. Michael Stephens*, pour l'appelante.

*Karen A. Horsman*, *c.r.*, *Barbara A. Carmichael* et *Micah Weintraub*, pour l'intimée.

Version française du jugement de la juge en chef McLachlin et des juges Abella, Karakatsanis, Wagner et Gascon rendu par

Le juge Gascon —

I. Aperçu

[1] En Colombie-Britannique, la portée de l'intervention d'une cour d'appel dans les arbitrages commerciaux est circonscrite par deux facteurs principaux. D'abord, la loi prévoit que le contrôle en appel des sentences arbitrales ne doit porter que sur des questions de droit (*Arbitration Act*, R.S.B.C. 1996, c. 55, art. 31). Ensuite, même lorsqu'une telle compétence existe, notre Cour a récemment conclu qu'une norme de contrôle empreinte de déférence, soit la norme de la décision raisonnable, s'applique « presque toujours » aux sentences arbitrales (*Sattva Capital Corp. c. Creston Moly Corp.*, 2014 CSC 53, [2014] 2 R.C.S. 633, par. 75, 104 et 106). Ensemble, la compétence limitée et le contrôle empreint de déférence contribuent à la réalisation des objectifs fondamentaux de l'arbitrage commercial : l'efficacité et le caractère définitif.

[2] La province de la Colombie-Britannique (« C.-B. ») et Teal Cedar Products Ltd. (« Teal Cedar »), une entreprise forestière, n'ont pas été en mesure de s'entendre sur le montant de l'indemnité que la Colombie-Britannique devait à Teal Cedar en contrepartie de la réduction de son accès à certaines

timber. Consequently, their dispute was submitted to arbitration as required by the applicable legislation, the *Forestry Revitalization Act*, S.B.C. 2003, c. 17 ("*Revitalization Act*"). Teal Cedar, for the most part, won. Three questions arising from the arbitrator's award are the subject of this appeal.

améliorations sur des terres de la Couronne (comme des routes et des ponts) qu'utilisait Teal Cedar pour couper du bois. Leur différend a donc été soumis à l'arbitrage, comme l'exige la loi applicable, la *Forestry Revitalization Act*, S.B.C. 2003, c. 17 (« *Revitalization Act* »). Teal Cedar a eu gain de cause en majeure partie. Trois questions découlant de la sentence de l'arbitre font l'objet du présent pourvoi.

[3] First, there is a question of statutory interpretation: whether the arbitrator erred in selecting a valuation method that was allegedly inconsistent with the section of the *Revitalization Act* providing Teal Cedar with compensation. In my opinion, this is a question of law falling within the scope of appellate review permitted under the *Arbitration Act*. However, the arbitrator, who relied on the plain meaning of the statute prescribing that valuation, reasonably selected a suitable valuation method. Accordingly, I find that his award in this regard cannot be overturned.

[3] La première question porte sur l'interprétation de la loi : l'arbitre a-t-il commis une erreur en choisissant une méthode d'évaluation qui serait incompatible avec l'article de la *Revitalization Act* accordant une indemnité à Teal Cedar? Selon moi, il s'agit d'une question de droit relevant du contrôle en appel autorisé par l'*Arbitration Act*. Cependant, l'arbitre, qui s'est fondé sur le sens ordinaire de la loi prévoyant une telle évaluation, a choisi de manière raisonnable une méthode d'évaluation convenable. En conséquence, j'estime que sa sentence à cet égard ne peut être infirmée.

[4] Second, there is a question of contractual interpretation: whether the arbitrator let the factual matrix overwhelm the words of the contract when he interpreted an amended settlement agreement between the parties in light of the factual matrix of their failed negotiations. This question may be formulated in two ways: (1) whether the arbitrator allocated excessive weight to the factual matrix; or (2) whether the arbitrator's interpretation of the factual matrix was isolated from the words of the contract. The former formulation is a question of mixed fact and law and thus falls outside the scope of appellate review permitted under the *Arbitration Act*. The latter formulation, while it raises a question of law, lacks arguable merit in this case because the arbitrator's interpretation was clearly anchored in the words of the contract, which he interpreted in light of the factual matrix. Without arguable merit, this formulation also fails to confer appellate review jurisdiction under the *Arbitration Act*.

[4] La deuxième question en est une d'interprétation contractuelle : l'arbitre a-t-il laissé le fondement factuel supplanter les termes du contrat lorsqu'il a interprété une convention de règlement modifiée intervenue entre les parties eu égard au fondement factuel de l'échec de leurs négociations? Cette question peut être formulée de deux façons : (1) l'arbitre a-t-il accordé trop de poids au fondement factuel; ou (2) l'arbitre a-t-il interprété le fondement factuel séparément des termes du contrat? La première formulation est une question mixte de fait et de droit qui échappe de ce fait à la portée du contrôle en appel autorisé par l'*Arbitration Act*. Bien qu'elle soulève une question de droit, la deuxième formulation est dépourvue de fondement défendable en l'espèce parce que l'interprétation de l'arbitre se fondait clairement sur les termes du contrat qu'il a interprétés à la lumière du fondement factuel. Sans fondement défendable, cette formulation ne confère pas non plus de compétence pour procéder à un contrôle en appel selon l'*Arbitration Act*.

[5] Third, there is a question of statutory application: whether the arbitrator erred in denying compensation to Teal Cedar relating to the improvements

[5] La troisième question a trait à l'application de la loi : l'arbitre a-t-il commis une erreur en refusant que Teal Cedar touche une indemnité

associated with one of its licences because it never lost access to those improvements, in contrast with the other licences where it lost such access. Teal Cedar's licence for that area is referred to in these reasons as the Lillooet Licence. This question involves the application of a specific valuation methodology to the intricate facts before the arbitrator, which qualitatively distinguished the Lillooet Licence from the other licences in dispute. On that basis, I consider that this a question of mixed fact and law outside the scope of appellate review permitted under the *Arbitration Act*.

relativement aux améliorations liées à l'un de ses permis parce qu'elle n'a jamais perdu son accès à ces améliorations, contrairement aux autres permis à l'égard desquels elle a perdu cet accès? Le permis de Teal Cedar visant cette zone est appelé le permis Lillooet dans les présents motifs. Cette question implique l'application d'une méthode d'évaluation précise aux faits complexes présentés à l'arbitre, qui a établi une distinction sur le plan qualitatif entre le permis Lillooet et les autres permis en cause. Pour cette raison, j'estime qu'il s'agit d'une question mixte de fait et de droit qui échappe à la portée du contrôle en appel autorisé par l'*Arbitration Act*.

[6] As the Court of Appeal below reached the opposite conclusion on the first two questions, I would allow the appeal in part. Like the application judge, I would confirm the arbitrator's award on these two questions. However, on the third question, like the Court of Appeal this time, I would restore the arbitrator's original ruling that BC owed Teal Cedar no compensation relating to improvements for the Lillooet Licence.

[6] Puisque la Cour d'appel est parvenue à la conclusion contraire sur les deux premières questions, j'accueillerais le pourvoi en partie. À l'instar du juge saisi de la requête, je suis d'avis de confirmer la sentence de l'arbitre sur ces deux questions. Cependant, en ce qui concerne la troisième question, à l'instar de la Cour d'appel cette fois-ci, je suis d'avis de rétablir la décision initiale de l'arbitre selon laquelle la C.-B. ne devait aucune indemnité à Teal Cedar relativement aux améliorations liées au permis Lillooet.

## II. Context

## II. Contexte

### A. *The Timber Licences and the Revitalization Act*

### A. *Les permis d'exploitation et la Revitalization Act*

[7] In British Columbia, forestry companies hold licences which regulate how those companies may harvest Crown timber. The appellant, Teal Cedar, is one such forestry company. Three of Teal Cedar's licences are relevant to the current dispute, namely: (1) Forest Licence A19201 in the Fraser Timber Supply Area; (2) Tree Farm Licence 46 located on Vancouver Island; and (3) Forest Licence A18699 in the Lillooet Timber Supply Area ("Lillooet Licence"). In general terms, these licences entitle Teal Cedar to harvest timber and to use improvements, such as roads and bridges, to access timber.

[7] En Colombie-Britannique, les entreprises forestières détiennent des permis précisant la manière dont elles peuvent couper du bois sur les terres de la Couronne. L'appelante, Teal Cedar, est l'une de ces entreprises. Le litige actuel concerne trois des permis de Teal Cedar, soit : (1) le permis d'exploitation forestière A19201 dans la zone d'approvisionnement en bois de Fraser; (2) le permis de ferme forestière 46 sur l'île de Vancouver; (3) le permis d'exploitation forestière A18699 dans la zone d'approvisionnement en bois de Lillooet (« permis Lillooet »). De façon générale, ces permis autorisent Teal Cedar à couper du bois et à utiliser les améliorations comme les routes et les ponts pour s'y rendre.

[8] In 2003, the respondent, BC, enacted the *Revitalization Act*. This Act changed forestry companies' rights under their licences by deleting areas from their land base and reducing the volume of their allowable harvest. In particular, Teal Cedar's licences were affected as follows:

(a) The Fraser Timber Supply Area licence's allowable harvest was reduced by 37,500 cubic metres and many of Teal Cedar's chart areas were removed from the associated land base.

(b) The Vancouver Island licence's allowable harvest was reduced by 130,637 cubic metres and many of Teal Cedar's operating areas were removed from the associated land base.

(c) The Lillooet Licence's allowable harvest was reduced by 48,078 cubic metres, but, unlike the other two licences, this licence never lost any areas in its associated land base.

[9] In response to these changes, the *Revitalization Act* provided compensation to forestry companies. The amount of that statutory compensation is at the heart of the dispute between BC and Teal Cedar. The relevant compensation provision is s. 6 and, in particular, subs. (4), which provides forestry companies with "compensation from the government in an amount equal to the value of improvements made to Crown land":

**Compensation**

**6** (1) Each holder of an ungrouped licence is entitled to compensation from the government for a reduction under section 2 (1) of the allowable annual cut of the ungrouped licence, in an amount equal to the value, for the unexpired portion of the term of the licence, of the harvesting rights taken by means of the reduction.

[8] En 2003, l'intimée, la C.-B., a adopté la *Revitalization Act*, qui a modifié les droits que conféraient aux entreprises forestières leurs permis en retranchant des zones de leur territoire et en réduisant le volume de leur coupe autorisée. Tout particulièrement, voici comment ont été touchés les permis de Teal Cedar :

a) Le volume de la coupe autorisée par le permis visant la zone d'approvisionnement en bois de Fraser a été réduit de 37 500 mètres cubes et de nombreuses zones de Teal Cedar ont été retranchées du territoire qui s'y rattache.

b) Le volume de la coupe autorisée par le permis visant l'île de Vancouver a été réduit de 130 637 mètres cubes et de nombreuses zones où Teal Cedar exerçait ses activités ont été retranchées du territoire qui s'y rattache.

c) Le volume de la coupe autorisée par le permis Lillooet a été réduit de 48 078 mètres cubes, mais, contrairement aux deux autres permis, aucune zone du territoire se rattachant à ce permis n'a été perdue à quelque moment que ce soit.

[9] En raison des changements susmentionnés, la *Revitalization Act* a accordé une indemnité aux entreprises forestières. Le montant de cette indemnité prévue par la loi est au cœur du litige opposant la C.-B. à Teal Cedar. La disposition pertinente en la matière est l'art. 6, tout particulièrement le par. (4) selon lequel les entreprises forestières ont droit, [TRADUCTION] « de la part du gouvernement, à une indemnité égale à la valeur des améliorations apportées aux terres de la Couronne » :

[TRADUCTION]

**Indemnité**

**6** (1) Chaque titulaire d'un permis distinct a droit, de la part du gouvernement, à une indemnité pour la réduction, prévue au paragraphe 2 (1), de la coupe annuelle autorisée par le permis distinct; le montant de l'indemnité est égal à la valeur des droits de coupe retirés au moyen de la réduction pour la partie non écoulée de la durée du permis.

(2) Each holder of a timber licence is entitled to compensation from the government in respect of the part, if any, of a reduction in the area of Crown land described in the timber licence that is made under section 2 (2) and that is attributed under section 3 (1) to that licence in an amount equal to the value of the harvesting rights taken by means of the reduction.

(3) Each holder of a licence in a group of licences is entitled to compensation from the government in respect of the part, if any, of a reduction of the allowable annual cut of the licence that is made under section 2 (3) and that is attributed under section 3 (2) to that licence, in an amount equal to the value, for the unexpired portion of the term of the licence, of the harvesting rights taken by means of the reduction.

(4) In addition to the compensation to which the holder of an ungrouped licence, a timber licence or a licence in a group of licences is entitled under subsection (1), (2) or (3), the holder is entitled to compensation from the government in an amount equal to the value of improvements made to Crown land that

(a) are, or have been, authorized by the government,

(b) are not improvements to which section 174 of the *Forest Practices Code of British Columbia Act* applies, and

(c) are not, or have not been, paid for by the government under the *Forest Act* or the former Act as defined in the *Forest Act*.

(4.1) Subsection (4) also applies to a holder of a tree farm licence that is subject to a deletion of Crown land from the tree farm licence area under section 39.1 of the *Forest Act*, if the deletion

(a) is in respect of a reduction of allowable annual cut under section 3 (3) of this Act, and

(b) is made before the date this subsection comes into force.

(5) An entitlement to compensation under this section vests in the holder to which it applies on March 31, 2003.

(2) Chaque titulaire d'un permis d'exploitation a droit, de la part du gouvernement, à une indemnité pour la partie, attribuée en vertu du paragraphe 3 (1) à ce permis, s'il en est, de l'amputation des terres de la Couronne décrites dans le permis de coupe qui est faite en vertu du paragraphe 2 (2); le montant de l'indemnité est égal à la valeur des droits de coupe retirés au moyen de l'amputation.

(3) Chaque titulaire d'un permis faisant partie d'un groupe de permis a droit, de la part du gouvernement, à une indemnité pour la partie, attribuée en vertu du paragraphe 3 (2) à ce permis, s'il en est, de la réduction, en vertu du paragraphe 2 (3), de la coupe annuelle autorisée par le permis; le montant de l'indemnité est égal à la valeur des droits de coupe retirés au moyen de la réduction pour la partie non écoulée de la durée du permis.

(4) Outre l'indemnité à laquelle a droit le titulaire d'un permis distinct, d'un permis d'exploitation ou d'un permis faisant partie d'un groupe de permis en vertu du paragraphe (1), (2) ou (3), le titulaire a droit, de la part du gouvernement, à une indemnité égale à la valeur des améliorations apportées aux terres de la Couronne :

(a) qui sont ou ont été autorisées par le gouvernement,

(b) auxquelles ne s'applique pas l'article 174 du *Forest Practices Code of British Columbia Act*, et

(c) qui ne sont pas ou n'ont pas été payées par le gouvernement conformément à la *Forest Act* ou à l'ancienne loi au sens de la *Forest Act*.

(4.1) Le paragraphe (4) s'applique également au titulaire d'un permis de ferme forestière assujetti au retranchement de terres de la Couronne de l'aire visée par ce permis selon l'article 39.1 de la *Forest Act*, si le retranchement

(a) a trait à une réduction, prévue par le paragraphe 3 (3) de la présente loi, de la coupe annuelle autorisée et

(b) se fait avant la date d'entrée en vigueur du présent paragraphe.

(5) Le droit à une indemnité conféré par le présent article est dévolu au titulaire à qui il revient le 31 mars 2003.

(6) A dispute between the minister and the holder of an ungrouped licence, a timber licence or a licence in a group of licences as to the amount of the compensation to which the holder is entitled under this section must be submitted to arbitration under the *Arbitration Act*.

[10] Conceptually, s. 6 provides for two types of compensation, namely compensation for: (1) reductions to harvesting rights ("Rights Compensation", provided for in subss. (1) to (3)); and (2) the value of improvements made to Crown land ("Improvements Compensation", provided for in s. 6(4)).

[11] The *Revitalization Act* permits the Lieutenant Governor in Council to make regulations concerning, among other things, this compensation provision:

**Regulations**

**13** (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act*.

(2) Without limiting subsection (1), the Lieutenant Governor in Council may make regulations

(a) defining a word or expression not otherwise defined in this Act, and

(b) for the purposes of section 6, prescribing respecting value, including but not limited to

(i) determining value and defining the components that comprise value,

(ii) prescribing methods of evaluation for use in determining value,

(iii) prescribing factors to be taken into account in an evaluation,

(iv) defining the role of evaluators in a determination of value and prescribing qualifications for evaluators that are prerequisite to their participation in the determination of value, and

(v) prescribing requirements for the selection of arbitrators.

(6) Le litige opposant le ministre et le titulaire d'un permis distinct, d'un permis d'exploitation ou d'un permis faisant partie d'un groupe de permis quant au montant de l'indemnité à laquelle a droit le titulaire en vertu du présent article est soumis à l'arbitrage selon l'*Arbitration Act*.

[10] Sur le plan conceptuel, l'art. 6 accorde deux types d'indemnité, à savoir une indemnité pour : (1) la réduction des droits de coupe (« indemnité visant les droits », prévue aux par. 6(1) à (3)); et (2) la valeur des améliorations apportées aux terres de la Couronne (« indemnité visant les améliorations » prévue au par. 6(4)).

[11] La *Revitalization Act* permet au lieutenant-gouverneur en conseil de prendre des règlements concernant entre autres cette disposition d'indemnisation :

[TRADUCTION]

**Règlements**

**13** (1) Le lieutenant-gouverneur en conseil peut prendre les règlements visés à l'article 41 de l'*Interpretation Act*.

(2) Sans limiter la portée du paragraphe précédent, le lieutenant-gouverneur en conseil peut prendre des règlements

(a) définissant un mot ou une expression que la présente loi ne définit pas autrement,

(b) prescrivant entre autres ce qui suit quant à la valeur pour l'application de l'article 6 :

(i) la détermination de la valeur et la définition de ses éléments,

(ii) les méthodes d'évaluation à utiliser pour déterminer la valeur,

(iii) les facteurs à prendre en considération dans une évaluation,

(iv) la définition du rôle joué par les évaluateurs dans la détermination de la valeur et les qualifications qu'ils doivent posséder pour participer à la détermination de la valeur, et

(v) les exigences liées à la sélection des arbitres.

Accordingly, while s. 6(4) of the *Revitalization Act* provides for Improvements Compensation "in an amount equal to the value of improvements made to Crown land", s. 13(2)(b)(ii) anticipates regulations "prescribing methods of evaluation for use in determining" that value. However, neither at the time of the dispute nor at the time of the hearing before this Court had any regulations been passed prescribing those valuation methods.

En conséquence, alors que le par. 6(4) de la *Revitalization Act* accorde une indemnité visant les améliorations « égale à la valeur des améliorations apportées aux terres de la Couronne », le sous-al. 13(2)(b)(ii) anticipe des règlements « prescrivant [. . .] les méthodes d'évaluation à utiliser pour déterminer » cette valeur. Or, aucun règlement prescrivant ces méthodes d'évaluation n'a été pris, que ce soit au moment du litige ou au moment de l'audience devant la Cour.

[12] Lastly, in terms of process, s. 6(6) of the *Revitalization Act* provides that disputes relating to the amount of compensation BC owes to a forestry company must be submitted to arbitration. Again, the *Revitalization Act* permits the Lieutenant Governor in Council to make regulations "prescribing requirements for the selection of arbitrators" (s. 13(2)(b)(v)). As with the anticipated regulations concerning valuation methods, neither at the time of the dispute nor at the time of the hearing before this Court had any regulations been passed prescribing arbitrator selection requirements. Consequently, up until the time of the hearing before this Court, arbitrations regarding compensation under the *Revitalization Act* were presided over by arbitrators chosen by consent of the parties. There was no list of arbitrators limiting party autonomy in this respect.

[12] En dernier lieu, pour ce qui est du processus, le par. 6(6) de la *Revitalization Act* dispose que le litige relatif au montant de l'indemnité que doit la C.-B. à une entreprise forestière doit être soumis à l'arbitrage. Encore une fois, la *Revitalization Act* permet au lieutenant-gouverneur en conseil de prendre des règlements « prescrivant [. . .] les exigences liées à la sélection des arbitres » (sous-al. 13(2)(b)(v)). Tout comme dans le cas des règlements anticipés sur les méthodes d'évaluation, aucun règlement prescrivant les exigences liées à la sélection des arbitres n'a été pris, que ce soit au moment du litige ou au moment de l'audience devant la Cour. Par conséquent, avant l'audience devant la Cour, les arbitrages sur une indemnité visée par la *Revitalization Act* étaient présidés par des arbitres désignés sur consentement des parties. Aucune liste d'arbitres ne restreignait l'autonomie des parties en la matière.

### B. *The Dispute Between Teal Cedar and British Columbia*

### B. *Le litige opposant Teal Cedar à la Colombie-Britannique*

[13] Teal Cedar suffered compensable losses under the *Revitalization Act*. It negotiated the value of those losses with BC and the parties reached a partial settlement. They were able to settle the value of the Rights Compensation owed to Teal Cedar, but they were unable to settle the value of the Improvements Compensation.

[13] Teal Cedar a subi des pertes indemnisables au sens de la *Revitalization Act*. Elle a négocié la valeur de ces pertes avec la C.-B. et les parties sont parvenues à un règlement partiel. Elles sont arrivées à s'entendre sur la valeur de l'indemnité visant les droits due à Teal Cedar, mais elles n'ont pu s'entendre sur la valeur de l'indemnité visant les améliorations.

[14] To confirm their partial settlement and provide guidelines for their ongoing negotiations, the parties executed a Settlement Framework Agreement. That agreement contained a "No Interest Clause", which precluded interest payments to Teal Cedar:

[14] Pour confirmer leur règlement partiel et établir des lignes directrices en vue de la poursuite de leurs négociations, les parties ont signé une convention cadre de règlement. Cette convention contenait une « clause zéro intérêt » qui empêchait de verser des intérêts à Teal Cedar :

No interest shall be payable by [BC] in respect to this or any other compensation that may be due to [Teal Cedar] under the [*Revitalization Act*].

(A.R., vol. I, at p. 225)

[15] Negotiations about the value of the Improvements Compensation were ultimately unsuccessful. Accordingly, 10 months after the Settlement Framework Agreement was first executed, the parties signed an amendment to that agreement ("Amendment"), resulting in a new agreement combining the Settlement Framework Agreement with the Amendment ("Amended Agreement"). The Amended Agreement provided that the parties were unable to agree on the proper amount of compensation, and thus, would submit the valuation of "compensation" to arbitration ("Arbitration Clause"):

[BC] hereby acknowledges that a dispute exists between the Parties and [Teal Cedar] intends to submit the dispute between the Parties as to the amount of the compensation for the Improvements to which it is entitled for arbitration pursuant to Section 6(6) of the [*Revitalization Act*].

(A.R., vol. I, at p. 228)

[16] As there were no regulations prescribing the requirements for arbitrators, the parties were free to choose who would preside over the arbitration. They ultimately selected Thomas Braidwood, Q.C., a former Justice of the British Columbia Court of Appeal.

## III. Judicial History

[17] At the initial arbitration, there were two primary questions of interpretation, which have remained contested up to and including the appeal before this Court. Those questions of interpretation — one statutory and one contractual — are the following:

(a) What valuation methods for Improvements Compensation are consistent with the *Revitalization Act*? ("Valuation Issue")

[TRADUCTION] La [C.-B.] n'est tenue de payer aucun intérêt à l'égard de cette indemnité ou de toute autre indemnité qui pourrait être due à [Teal Cedar] selon la [*Revitalization Act*].

(d.a., vol. I, p. 225)

[15] Les négociations sur la valeur de l'indemnité visant les améliorations n'ont finalement pas abouti. Par conséquent, 10 mois après la conclusion de la convention cadre de règlement, les parties ont signé une modification de cette convention (« Modification »), ce qui a fait naître une nouvelle convention regroupant la convention cadre de règlement et la Modification (« convention modifiée »). La convention modifiée précisait que les parties n'étaient pas parvenues à s'entendre sur le juste montant de l'indemnité et qu'elles soumettraient donc à l'arbitrage l'évaluation de « l'indemnité » (« clause d'arbitrage ») :

[TRADUCTION] [La C.-B.] reconnaît par les présentes qu'il y a un différend entre les parties et [Teal Cedar] compte soumettre à l'arbitrage, selon le paragraphe 6 (6) de la [*Revitalization Act*], le litige quant au montant de l'indemnité visant les améliorations à laquelle elle a droit.

(d.a., vol. I, p. 228)

[16] Puisqu'aucun règlement ne prescrivait les exigences applicables aux arbitres, les parties pouvaient choisir la personne qui présiderait l'arbitrage. Elles ont fini par sélectionner Thomas Braidwood, c.r., un ancien juge de la Cour d'appel de la Colombie-Britannique.

## III. Historique judiciaire

[17] À l'arbitrage initial, deux principales questions d'interprétation se posaient, et elles sont demeurées en litige jusqu'au présent pourvoi. Ces questions d'interprétation — l'une législative et l'autre contractuelle — sont les suivantes :

a) Quelles méthodes d'évaluation de l'indemnité visant les améliorations sont conformes à la *Revitalization Act*? (« question de l'évaluation »)

(b) Does the "compensation" for improvements submitted to arbitration under the Amended Agreement include interest? ("Interest Issue")

[18] In addition, another question emerged concerning Teal Cedar's entitlement to compensation for improvements losses relating to the Lillooet Licence ("Lillooet Issue").

A. *Arbitration Award (Thomas Braidwood, Q.C. — April 27, 2011, Amended June 30, 2011)*

[19] On the Valuation Issue, the arbitrator had to determine the proper valuation method for Improvements Compensation because no regulations prescribing such a method had been passed. During a "lengthy and complex hearing" (as noted by the application judge, at para. 7), he was presented with three "generally recognized valuation approaches" (para. 112):

(a) the "Market Value Method", which the arbitrator rejected because the method is based on determining the market value of the improvements, and BC's own expert conceded that no such market value exists in respect of improvements on Crown land (para. 113);

(b) the "Income Method", which the arbitrator similarly rejected because the method is based on determining the income generated by the improvements, and BC's own expert conceded that no such income exists in respect of improvements on Crown land (para. 113); and

(c) the "Depreciation Replacement Cost Method", which the arbitrator accepted (paras. 93-94). This method, in simplified terms, valuates Improvements Compensation by estimating the notional cost of rebuilding the improvements from scratch (replacement) to their current degraded condition (depreciation). The arbitrator accepted this method in part because it was the only valuation methodology presented which determined

b) L'« indemnité » visant les améliorations soumise à l'arbitrage en vertu de la convention modifiée inclut-elle des intérêts? (« question des intérêts »)

[18] De plus, une autre question a été soulevée en ce qui a trait au droit de Teal Cedar à une indemnité pour les pertes liées aux améliorations se rapportant au permis Lillooet (« question du permis Lillooet »).

A. *Sentence arbitrale (Thomas Braidwood, c.r. — 27 avril 2011, modifiée le 30 juin 2011)*

[19] En ce qui concerne la question de l'évaluation, l'arbitre devait choisir la bonne méthode à employer pour évaluer l'indemnité visant les améliorations parce qu'aucun règlement prescrivant pareille méthode n'avait été pris. Au cours d'une « audience longue et complexe » (comme l'a noté le juge saisi de la requête, au par. 7), on lui a proposé trois [TRADUCTION] « méthodes d'évaluation généralement reconnues » (par. 112) :

a) La « méthode de la valeur marchande », que l'arbitre a rejetée parce qu'elle consiste à déterminer la valeur marchande des améliorations, et le propre expert de la Colombie-Britannique a concédé que les améliorations sur les terres de la Couronne n'avaient aucune valeur marchande (par. 113);

b) La « méthode fondée sur le revenu », que l'arbitre a rejetée elle aussi car elle consiste à déterminer le revenu généré par les améliorations, et le propre expert de la Colombie-Britannique a concédé que les améliorations sur les terres de la Couronne ne génèrent pas de revenu (par. 113);

c) La « méthode du coût de remplacement déprécié », que l'arbitre a retenue (par. 93-94). En termes simples, cette méthode consiste à évaluer l'indemnité visant les améliorations en estimant le coût théorique de la remise des améliorations à leur état actuel de dégradation (dépréciation), à partir de zéro (remplacement). L'arbitre a retenu cette méthode notamment parce que c'était la seule méthode d'évaluation proposée qui servait

Improvements Compensation separately from Rights Compensation, in keeping with their separate treatment in the *Revitalization Act* (para. 94; see *Revitalization Act*, ss. 6(1) to (3) and 6(4)).

[20] On the Interest Issue, the arbitrator held that Teal Cedar was entitled to interest on the Improvements Compensation, despite the No Interest Clause, in light of the factual matrix. Specifically, he found that, at the time of the Settlement Framework Agreement, when the No Interest Clause was drafted, the parties were "hopeful" and in the midst of ongoing negotiations to resolve the Valuation Issue (para. 180). In contrast, at the time of the Amendment, when the Arbitration Clause was drafted, the parties had just endured 10 months of failed negotiations, and had come to terms with the need to resolve the Valuation Issue — including interest — through arbitration (para. 181).

[21] Lastly, on the Lillooet Issue, the arbitrator ruled that Teal Cedar was not entitled to Improvements Compensation for the Lillooet Licence because it "had not lost any opportunity to use the roads" (paras. 169-70). Put differently, the arbitrator opined that BC owed no Improvements Compensation to Teal Cedar for the Lillooet Licence since the latter never lost access to any improvements associated with that licence.

B. *British Columbia Supreme Court (2012 BCSC 543, Bauman C.J.)*

[22] The courts reviewing the Arbitration Award had the additional burden of addressing their jurisdiction to review the award in the first place ("Jurisdiction Issue"). Specifically, the arbitration proceeded under the *Arbitration Act*, which limits appeals to questions of law (s. 31). The courts reviewing the Arbitration Award were consequently confronted with the threshold issue of whether the Valuation, Interest and Lillooet Issues involved questions of law — the sole type of question over which the courts have appellate review jurisdiction in commercial arbitration cases. As additional context, this Court's decision in *Sattva* — where we clarified the

à fixer l'indemnité visant les améliorations séparément de celle visant les droits, ce qui concorde avec le traitement distinct que leur réserve la *Revitalization Act* (par. 94; voir *Revitalization Act*, par. 6(1) à (3) et 6(4)).

[20] Sur la question des intérêts, l'arbitre a jugé que Teal Cedar avait le droit de toucher des intérêts sur l'indemnité visant les améliorations, malgré la clause zéro intérêt, en raison du fondement factuel. Plus précisément, il a conclu qu'à l'époque de la convention cadre de règlement, lorsque cette clause a été rédigée, les parties étaient [TRADUCTION] « optimistes » et au beau milieu de négociations en cours dans le but de résoudre la question de l'évaluation (par. 180). En revanche, à l'époque de la Modification, lorsque la clause d'arbitrage a été rédigée, les parties venaient de vivre 10 mois de négociations avortées et avaient reconnu la nécessité de résoudre la question de l'évaluation, y compris des intérêts, par l'arbitrage (par. 181).

[21] Enfin, pour ce qui est de la question du permis Lillooet, l'arbitre a décidé que Teal Cedar n'avait pas droit à l'indemnité visant les améliorations pour ce permis parce qu'elle [TRADUCTION] « n'avait perdu aucune possibilité d'utiliser les routes » (par. 169-170). Autrement dit, l'arbitre a estimé que la C.-B. ne devait aucune indemnité visant les améliorations à Teal Cedar pour le permis Lillooet parce que cette dernière n'avait jamais perdu son accès aux améliorations relatives à ce permis.

B. *Cour suprême de la Colombie-Britannique (2012 BCSC 543, le juge en chef Bauman)*

[22] Les tribunaux qui ont contrôlé la sentence arbitrale devaient en outre décider d'entrée de jeu s'ils avaient compétence pour le faire (« question de la compétence »). Plus précisément, l'arbitrage s'est déroulé en conformité avec l'*Arbitration Act*, selon laquelle il ne peut être interjeté appel que sur des questions de droit (art. 31). Les tribunaux ayant contrôlé la sentence arbitrale devaient par conséquent trancher la question préliminaire de savoir si l'évaluation, les intérêts et le permis Lillooet constituaient des questions de droit — le seul type de point sur lequel les tribunaux ont compétence pour procéder à un contrôle en appel

general characterization of contract interpretation as a question of mixed fact and law — was not released until after the first decision in this case by the British Columbia Court of Appeal. As a result, the decision of the British Columbia Supreme Court and initial decision of the British Columbia Court of Appeal were issued without this Court's guidance in *Sattva*.

en matière d'arbitrage commercial. Autre élément contextuel, l'arrêt *Sattva* — dans lequel nous avons précisé la qualification générale de l'interprétation des contrats comme question mixte de fait et de droit — n'a été prononcé qu'après la première décision rendue en l'espèce par la Cour d'appel de la Colombie-Britannique. Ainsi, la décision de la Cour suprême de la Colombie-Britannique et la première décision de la Cour d'appel ont été rendues sans que ces cours ne bénéficient des enseignements de notre Cour dans *Sattva*.

[23] On the Jurisdiction Issue, the application judge, Bauman C.J. (now Bauman C.J.B.C.), held that the Valuation Issue subsumed questions of law and questions of mixed fact and law. Specifically, the determination of whether the valuation method chosen was consistent with the *Revitalization Act* was a matter of "statutory construction" (para. 49 (CanLII)) and thus a question of law within his jurisdiction (para. 57). In contrast, he found that the application of that method to quantify the value of the Improvements Compensation involved questions of fact or of mixed fact and law outside his jurisdiction (para. 57). Similarly, he determined that the Interest Issue involved interpreting the Amended Agreement "in the context of the factual matrix" — a question of mixed fact and law outside his jurisdiction (para. 81). Finally, he held that the Lillooet Issue was a "question of law" because the arbitrator's chosen methodology, when applied to the Lillooet Licence (which contains improvements), should have resulted in Improvements Compensation for Teal Cedar (para. 84).

[23] Sur la question de la compétence, le juge saisi de la requête, le juge en chef Bauman, de la Cour suprême (maintenant Juge en chef de la Cour d'appel), a statué que l'évaluation regroupait des questions de droit ainsi que des questions mixtes de fait et de droit. Tout particulièrement, le fait de décider si la méthode d'évaluation retenue était conforme à la *Revitalization Act* constituait une question d'[TRADUCTION] « interprétation législative » (par. 49 (CanLII)) et, par le fait même, une question de droit relevant de sa compétence (par. 57). Par contre, il a conclu que le fait d'utiliser cette méthode pour calculer la valeur de l'indemnité visant les améliorations soulevait des questions de fait ou des questions mixtes de fait et de droit qui outrepassaient sa compétence (par. 57). De même, il a décidé que la question des intérêts supposait que l'on interprète la convention modifiée « eu égard au fondement factuel », une question mixte de fait et de droit outrepassant sa compétence (par. 81). En dernier lieu, il a conclu que la question du permis Lillooet constituait une « question de droit » parce que l'application de la méthode retenue par l'arbitre au permis Lillooet (qui comporte des améliorations) aurait dû entraîner l'octroi d'une indemnité visant les améliorations à Teal Cedar (par. 84).

[24] On the Valuation Issue, Bauman C.J. concluded that the arbitrator's reliance on the Depreciation Replacement Cost Method was not only proper but correct (para. 57). He noted that the arbitrator, "in the absence of any regulatory guidance", had been forced to interpret the plain words of s. 6(4) (para. 46). Further, he opined that the arbitrator had interpreted s. 6(4) "in a manner open to him in light of the applicable rules of statutory interpretation" (para. 50).

[24] En ce qui concerne la question de l'évaluation, le juge en chef Bauman est parvenu à la conclusion que le recours par l'arbitre à la méthode du coût de remplacement déprécié était non seulement approprié, mais fondé (par. 57). Il a souligné [TRADUCTION] « qu'en l'absence de balise règlementaire », l'arbitre avait été contraint d'interpréter les termes clairs du par. 6(4) (par. 46). De plus, il s'est dit d'avis que l'arbitre avait donné à ce paragraphe « une interprétation qui s'offrait à lui compte tenu des règles applicables d'interprétation législative » (par. 50).

[25] Lastly, on the Lillooet Issue, Bauman C.J. remitted the issue of Improvements Compensation to the arbitrator because of "uncertainty" in his reasons (para. 88). Bauman C.J. felt the arbitrator was "not clear" as to why he denied Improvements Compensation for the Lillooet Licence (para. 85). He reasoned that, since the Lillooet Licence had associated improvements and the arbitrator's methodology assumed that all improvements would be fully used (para. 86), then Improvements Compensation was apparently owed in respect of those improvements, just as such compensation was owed in respect of the improvements associated with the other two licences in dispute. On that basis, the application judge remitted the value of compensation for Teal Cedar's losses in respect of the Lillooet Licence to the arbitrator "for reconsideration in light of the valuation methodology he has adopted" (para. 88).

[25] Enfin, pour ce qui est de la question du permis Lillooet, le juge en chef Bauman a renvoyé à l'arbitre la question de l'indemnité visant les améliorations en raison du [TRADUCTION] « caractère incertain » de ses motifs (par. 88). Le juge en chef Bauman a estimé que l'arbitre n'avait pas « indiqué clairement » pourquoi il avait refusé d'accorder une indemnité visant les améliorations pour le permis Lillooet (par. 85). Il a conclu qu'étant donné que des améliorations se rapportaient au permis Lillooet et que la méthode utilisée par l'arbitre tenait pour acquis que toutes les améliorations seraient entièrement utilisées (par. 86), une indemnité visant les améliorations était apparemment due relativement à ces améliorations, tout comme une telle indemnité était due à l'égard des améliorations liées aux deux autres permis en cause. Pour cette raison, le juge saisi de la requête a renvoyé à l'arbitre la question de la valeur de l'indemnité pour les pertes subies par Teal Cedar à l'égard du permis Lillooet « pour qu'il la réexamine à la lumière de la méthode d'évaluation qu'il avait retenue » (par. 88).

### C. *Additional Arbitration Award (Thomas Braidwood, Q.C. — July 3, 2012, amended August 17, 2012)*

### C. *Sentence arbitrale additionnelle (Thomas Braidwood, c.r. — 3 juillet 2012, modifiée le 17 août 2012)*

[26] In view of Bauman C.J.'s ruling on the Lillooet Issue, the arbitrator issued an additional award "to an amount equal to the value of the improvements" relating to the Lillooet Licence (p. 10). He rendered this decision despite his initial holding that Teal Cedar's right to Improvements Compensation was never triggered since it never factually lost its ability to use those improvements.

[26] Vu la décision du juge en chef Bauman sur la question du permis Lillooet, l'arbitre a octroyé une somme additionnelle [TRADUCTION] « égale à la valeur des améliorations » touchant le permis Lillooet (p. 10). Il a rendu cette décision malgré sa conclusion initiale selon laquelle le droit de Teal Cedar à une indemnité visant les améliorations n'avait jamais pris naissance puisqu'elle n'avait jamais, dans les faits, perdu sa faculté d'utiliser ces améliorations.

### D. *British Columbia Court of Appeal Decision #1 (2013 BCCA 326, 364 D.L.R. (4th) 465)*

### D. *Décision n$^o$ 1 de la Cour d'appel de la Colombie-Britannique (2013 BCCA 326, 364 D.L.R. (4th) 465)*

[27] The matter came twice before the British Columbia Court of Appeal. The first time, the Court of Appeal issued two opinions with diametrically opposed conclusions.

[27] L'affaire a été instruite deux fois par la Cour d'appel de la Colombie-Britannique. La première fois, la Cour d'appel a exprimé deux avis dans lesquels elle est parvenue à des conclusions diamétralement opposées.

(1) Majority (MacKenzie J.A., Lowry J.A. concurring)

[28] The majority allowed BC's appeal for the most part. On the Jurisdiction Issue, MacKenzie J.A. held that the Valuation Issue (statutory interpretation) and the Interest Issue (contractual interpretation) were both questions of law and thus fell within the scope of appellate review of an arbitration award (paras. 57 and 114). In addition, while not explicit in this respect, the majority appeared to rule that the Lillooet Issue was within the courts' reviewing jurisdiction because it related to "whether the arbitrator used the correct method of valuation in this case", a question of law (paras. 55-57).

[29] On the Valuation Issue, MacKenzie J.A. found that the arbitrator had erred in law by selecting the Depreciation Replacement Cost Method (paras. 131-33). Specifically, she noted that this method failed to recognize Teal Cedar's actual interest in the improvements (para. 68) by compensating Teal Cedar as if it owned the improvements, whereas Teal Cedar had lost only its right to use the improvements — which, in reality, were owned by the Crown (paras. 68 and 73).

[30] On the Interest Issue, MacKenzie J.A. held that the arbitrator had erred in law by letting the factual matrix overwhelm the words of the contract (paras. 125 and 129). Specifically, she concluded that the arbitrator had erred by interpreting the Amended Agreement as including interest in Teal Cedar's "compensation" submitted to arbitration (para. 136). On my reading, MacKenzie J.A.'s reasoning on this issue (at paras. 105-30) can be interpreted in two ways. Either she found that the arbitrator allocated excessive weight to the factual matrix or that the arbitrator interpreted the factual matrix isolated from the words of the contract.

[31] Lastly, on the Lillooet Issue, MacKenzie J.A. concluded that Bauman C.J. had erred in remitting the issue of compensation for the Lillooet Licence

(1) Juges majoritaires (juge MacKenzie, avec l'accord du juge Lowry)

[28] Les juges majoritaires ont accueilli l'appel de la C.-B. en majeure partie. Sur la question de la compétence, la juge MacKenzie a statué que la question de l'évaluation (interprétation législative) et celle des intérêts (interprétation contractuelle) étaient deux questions de droit et qu'elles relevaient donc du contrôle en appel d'une sentence arbitrale (par. 57 et 114). De plus, bien qu'ils ne se soient pas prononcés expressément à ce sujet, les juges majoritaires semblent avoir conclu que la question du permis Lillooet ressortissait au pouvoir de contrôle des tribunaux parce qu'elle touchait le point de savoir [TRADUCTION] « si l'arbitre a[vait] utilisé la bonne méthode d'évaluation en l'espèce », une question de droit (par. 55-57).

[29] Sur la question de l'évaluation, la juge MacKenzie a conclu que l'arbitre avait commis une erreur de droit en retenant la méthode du coût de remplacement déprécié (par. 131-133). Plus précisément, elle a signalé que cette méthode ne tenait pas compte du véritable intérêt de Teal Cedar dans les améliorations (par. 68) en l'indemnisant comme si elle en était propriétaire, alors qu'elle avait uniquement perdu le droit de se servir des améliorations qui, en fait, appartenaient à la Couronne (par. 68 et 73).

[30] Pour ce qui est de la question des intérêts, la juge MacKenzie a statué que l'arbitre avait commis une erreur de droit en laissant le fondement factuel supplanter les termes du contrat (par. 125 et 129). Tout particulièrement, elle a conclu que l'arbitre avait erré en considérant que la convention modifiée ajoutait des intérêts à l'[TRADUCTION] « indemnité » de Teal Cedar soumise à l'arbitrage (par. 136). D'après moi, le raisonnement de la juge MacKenzie sur ce point (par. 105-130) peut s'interpréter de deux façons. Soit elle a conclu que l'arbitre avait accordé trop de poids au fondement factuel, soit elle a statué que l'arbitre avait interprété le fondement factuel séparément des termes du contrat.

[31] Enfin, sur la question du permis Lillooet, la juge MacKenzie a conclu que le juge en chef Bauman avait fait erreur en renvoyant à l'arbitre

to the arbitrator. MacKenzie J.A. found that the arbitrator had correctly denied Teal Cedar compensation for a licence in respect of which it had suffered no actual loss (paras. 78-79). As a result, she restored the arbitrator's original decision to award Teal Cedar no compensation in respect of the Lillooet Licence (para. 134).

(2) Dissent (Finch C.J.)

[32] For his part, Finch C.J., the dissenting judge, agreed with Bauman C.J. and would have dismissed the appeal in its entirety. On the Valuation Issue, he held that the arbitrator had not erred in law or otherwise (paras. 140-43), and thus he would have maintained the arbitrator's selection of the Depreciation Replacement Cost Method. On the Interest Issue, he agreed with Bauman C.J. that the arbitrator's interpretation of the Amended Agreement in light of the factual matrix was a question of mixed fact and law outside the scope of appellate review of an arbitration award (paras. 144-45). Finally, on the Lillooet Issue, he found that Bauman C.J. had made "no error of law" in remitting the valuation of compensation for the Lillooet Licence to the arbitrator (paras. 146-48).

E. *British Columbia Court of Appeal Decision #2 (Remanded Post-Sattva) (2015 BCCA 263, 386 D.L.R. (4th) 40, Lowry, Chiasson and MacKenzie JJ.A.)*

[33] In 2013, Teal Cedar sought leave to appeal to the Court from the British Columbia Court of Appeal's decision. However, in the intervening period, the Court released *Sattva* in 2014. Consequently, the Court remanded the case to the British Columbia Court of Appeal for disposition in accordance with *Sattva* (file No. 35563, October 23, 2014, [2014] S.C.C. Bull. 1637).

[34] On remand, a unanimous British Columbia Court of Appeal held that MacKenzie J.A.'s pre-*Sattva* disposition of the appeal (concurred in by Lowry J.A.) was unaltered by *Sattva* (para. 60).

l'indemnité relative à ce permis. Selon elle, l'arbitre a refusé à bon droit à Teal Cedar une indemnité pour un permis à l'égard duquel elle n'avait subi aucune perte réelle (par. 78-79). Par conséquent, elle a rétabli la décision initiale de l'arbitre de n'accorder à Teal Cedar aucune indemnité pour le permis Lillooet (par. 134).

(2) Juge dissident (juge en chef Finch)

[32] Pour sa part, le juge en chef Finch, dissident, partageait l'avis du juge en chef Bauman et aurait rejeté l'appel dans sa totalité. En ce qui a trait à la question de l'évaluation, il a statué que l'arbitre n'avait commis aucune erreur de droit ou autre erreur (par. 140-143) et il aurait donc confirmé la décision de l'arbitre de retenir la méthode du coût de remplacement déprécié. Pour ce qui est de la question des intérêts, il a convenu avec le juge en chef Bauman que l'interprétation donnée par l'arbitre à la convention modifiée eu égard au fondement factuel était une question mixte de fait et de droit dépassant la portée du contrôle en appel d'une sentence arbitrale (par. 144-145). Finalement, sur la question du permis Lillooet, il a conclu que le juge en chef Bauman n'avait commis [TRADUCTION] « aucune erreur de droit » en renvoyant à l'arbitre l'évaluation de l'indemnité touchant ce permis (par. 146-148).

E. *Décision nº 2 de la Cour d'appel de la Colombie-Britannique (renvoi après l'arrêt Sattva) (2015 BCCA 263, 386 D.L.R. (4th) 40, les juges Lowry, Chiasson et MacKenzie)*

[33] En 2013, Teal Cedar a demandé l'autorisation d'interjeter appel de la décision de la Cour d'appel de la Colombie-Britannique devant notre Cour. Mais dans l'intervalle, notre Cour a rendu son arrêt *Sattva* en 2014. Par conséquent, notre Cour a renvoyé l'affaire à la Cour d'appel de la Colombie-Britannique pour qu'elle la tranche conformément à *Sattva* (nº du greffe 35563, 23 octobre 2014, [2014] C.S.C. Bull. 1637).

[34] Après le renvoi, la Cour d'appel de la Colombie-Britannique a jugé à l'unanimité que la décision rendue sur l'appel par la juge MacKenzie (avec l'accord du juge Lowry) avant *Sattva* n'avait pas été modifiée par cet arrêt (par. 60).

[35] On the Valuation Issue, the Court of Appeal held that the standard of review was correctness because the arbitrator lacked specialized expertise in forestry statutes (para. 35), the parties were statutorily compelled to resolve their dispute through arbitration (para. 35), and the Valuation Issue was (1) important to compensation statutes generally (para. 35) and (2) a question of law attracting a correctness standard (paras. 36-37). Further, the Court of Appeal ruled that the arbitrator's award was, in this respect, both incorrect (para. 37) and unreasonable (para. 38) because it provided a "substantial publicly financed windfall" (para. 38) divorced from Teal Cedar's "actual financial loss" (para. 39).

[35] Sur la question de l'évaluation, la Cour d'appel a statué que la norme de contrôle applicable était celle de la décision correcte puisque l'arbitre ne possédait pas d'expertise spécialisée dans les lois sur les forêts (par. 35), les parties étaient contraintes par la loi de résoudre leur différend par l'arbitrage (par. 35) et la question de l'évaluation était (1) importante pour les lois sur l'indemnisation en général (par. 35) et (2) une question de droit commandant l'application de la norme de la décision correcte (par. 36-37). Elle a aussi décidé que la sentence de l'arbitre était à la fois incorrecte (par. 37) et déraisonnable (par. 38) sur ce point parce qu'elle permettait à Teal Cedar de tirer un [TRADUCTION] « gain fortuit substantiel à même les fonds publics » (par. 38) qui ne correspondait à sa « véritable perte financière » (par. 39).

[36] On the Interest Issue, the Court of Appeal opined that the arbitrator had made a legal error that gave the courts jurisdiction (para. 46) because he let the factual matrix overwhelm the contract (para. 52), despite its clear wording (para. 59). On my reading, the Court of Appeal's second decision, like its first, supports two interpretations of what it means for the factual matrix to "overwhelm" a contract: (1) weighing that matrix excessively; or (2) considering that matrix in isolation from the words of the contract.

[36] Sur la question des intérêts, la Cour d'appel s'est dite d'avis que l'arbitre avait commis une erreur de droit conférant compétence au tribunal (par. 46), car il avait laissé le fondement factuel supplanter le contrat (par. 52) en dépit de son libellé clair (par. 59). D'après moi, la seconde décision de la Cour d'appel, tout comme sa première, étaye deux interprétations de ce qu'il faut entendre par un fondement factuel « supplantant » un contrat : (1) accorder trop de poids à ce fondement; ou (2) examiner ce fondement séparément des termes du contrat.

[37] The decision of the Court of Appeal on remand was silent in respect of the Lillooet Issue.

[37] La décision que la Cour d'appel a rendue à la suite du renvoi était muette sur la question du permis Lillooet.

## IV. Issues

## IV. Questions en litige

[38] In the end, this appeal involves two key interpretation issues, one statutory and one contractual, namely whether the arbitrator erred in law by: (1) interpreting the Depreciation Replacement Cost Method as being consistent with the *Revitalization Act* (the Valuation Issue); and (2) interpreting the Amended Agreement as including interest in BC's Improvements Compensation payment to Teal Cedar (the Interest Issue). This appeal also involves a statutory application issue, namely whether the arbitrator erred in law by denying Improvements Compensation to Teal Cedar when he applied his chosen methodology to the Lillooet Licence (the Lillooet Issue).

[38] En dernière analyse, le présent pourvoi porte sur deux principales questions d'interprétation, l'une législative et l'autre contractuelle, à savoir si l'arbitre a commis une erreur de droit en (1) considérant que la méthode du coût de remplacement déprécié était conforme à la *Revitalization Act* (la question de l'évaluation); et (2) en estimant que la convention modifiée ajoutait des intérêts à l'indemnité visant les améliorations versée par la C.-B. à Teal Cedar (la question des intérêts). Le présent pourvoi porte également sur une question d'application de la loi : l'arbitre a-t-il commis une erreur de droit en refusant à Teal Cedar une indemnité

Whether the courts have jurisdiction to review these issues, and if so, the applicable standard of review, are also in dispute.

visant les améliorations lorsqu'il a appliqué la méthode qu'il a retenue au permis Lillooet (la question du permis Lillooet)? Les points de savoir si les tribunaux ont compétence pour examiner ces questions et, dans l'affirmative, quelle est la norme de contrôle applicable sont eux aussi en litige.

## V. Analysis

[39] According to the application judge, other than there being a "question" or "point" of law in dispute (see ss. 31(1)(b) and 31(2)), the requirements for leave under the *Arbitration Act* were met in this case on the Valuation Issue (para. 43). Those findings are not challenged before this Court, though I note that the application judge was silent with respect to these requirements on the Interest Issue, which he resolved on the basis of that issue not raising a question of law (para. 81). Similarly, once the statutory preconditions are met, granting leave to appeal an award under the *Arbitration Act* is a matter of judicial discretion: ". . . the court may grant leave . . ." (*Arbitration Act*, s. 31(2)). The application judge's exercise of discretion in this regard is also not contested before us. As a result, per *Sattva* (paras. 38, 102 and 107), a three-step analysis for appellate review of the arbitration award below remains, namely:

(a) Jurisdiction: Whether the appellate court has jurisdiction to review the alleged error.

(b) Standard of review: If so, whether the standard for the review is reasonableness or correctness.

(c) Review: Whether the arbitration award withstands scrutiny under that standard of review (i.e. whether the award is reasonable or correct).

[40] My analysis will proceed on the basis of this logical framework.

## V. Analyse

[39] Selon le juge saisi de la requête, outre la présence d'une [TRADUCTION] « question » ou d'un « point » de droit en litige (voir l'al. 31(1)(b) et le par. 31(2)), les conditions d'autorisation établies par l'*Arbitration Act* étaient remplies en l'espèce pour ce qui est de la question de l'évaluation (par. 43). Ces conclusions ne sont pas contestées devant notre Cour, mais je note que le juge saisi de la requête ne s'est pas prononcé sur l'application de ces conditions à la question des intérêts, qu'il a tranchée en affirmant qu'elle ne soulève pas une question de droit (par. 81). De même, une fois que les conditions préalables établies par la loi sont remplies, le fait d'accorder l'autorisation d'interjeter appel d'une sentence en vertu de l'*Arbitration Act* relève du pouvoir discrétionnaire du tribunal : [TRADUCTION] « . . . le tribunal peut accorder l'autorisation . . . » (*Arbitration Act*, par. 31(2)). L'exercice du pouvoir discrétionnaire du juge saisi de la requête à cet égard n'est pas contesté non plus. Par conséquent, conformément à l'arrêt *Sattva* (par. 38, 102 et 107), il reste à effectuer une analyse en trois étapes pour contrôler en appel la sentence arbitrale, soit :

a) Compétence : La cour d'appel a-t-elle compétence pour examiner l'erreur reprochée?

b) Norme de contrôle : Dans l'affirmative, la norme applicable à ce contrôle est-elle celle de la décision raisonnable ou celle de la décision correcte?

c) Contrôle : La sentence arbitrale résiste-t-elle à l'examen selon cette norme de contrôle (en d'autres termes, la sentence était-elle raisonnable ou correcte)?

[40] Mon analyse reposera sur ce cadre logique.

A. *Jurisdiction*

(1) Jurisdiction to Review Commercial Arbitration Awards

[41] The scope of jurisdiction in respect of a commercial arbitration award, such as the one at issue, is now well-established in the jurisprudence (*Sattva*, at para. 104). Here, as in *Sattva*, the arbitration was conducted under the *Arbitration Act*, which limits a reviewing court's jurisdiction to questions of law:

**31** (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if

(a) all of the parties to the arbitration consent, or

(b) the court grants leave to appeal.

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

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

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

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

[42] Unlike privative clauses which merely "signa[l]" deference in the context of judicial review of administrative tribunal decisions, statutory limitations on the scope of appellate review of arbitration awards are "absolute" (*Sattva*, at para. 104). In consequence, a finding that the questions on appeal — the Valuation, Interest and Lillooet Issues — are not questions of law would wholly dispose of the issue of the courts' jurisdiction to review those questions.

A. *Compétence*

(1) Pouvoir de contrôler les sentences arbitrales commerciales

[41] La portée de la compétence susceptible d'être exercée à l'égard d'une sentence arbitrale commerciale comme celle en cause est désormais bien établie dans la jurisprudence (*Sattva*, par. 104). Tout comme dans *Sattva*, l'arbitrage en l'espèce s'est déroulé conformément à l'*Arbitration Act*, qui restreint la compétence de la cour de révision aux questions de droit :

[TRADUCTION]

**31** (1) Une partie à un arbitrage ne portant pas sur un différend de droit de la famille peut interjeter appel au tribunal sur toute question de droit découlant de la sentence si, selon le cas :

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

(b) le tribunal accorde l'autorisation.

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

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

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

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

[42] Contrairement aux clauses privatives qui « signale[nt] » tout simplement que la déférence est de mise dans le contrôle judiciaire des décisions des tribunaux administratifs, les limites fixées par la loi à la portée du contrôle en appel des sentences arbitrales sont « absolue[s] » (*Sattva*, par. 104). En conséquence, la conclusion selon laquelle les points soulevés — l'évaluation, les intérêts et le permis — ne sont pas des questions de droit règlerait entièrement la question du pouvoir des tribunaux d'examiner ces points.

[43] The process for characterizing a question as one of three principal types — legal, factual, or mixed — is also well-established in the jurisprudence (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35). In particular, it is not disputed that legal questions are questions "about what the correct legal test is" (*Sattva*, at para. 49, quoting *Southam*, at para. 35); factual questions are questions "about what actually took place between the parties" (*Southam*, at para. 35; *Sattva*, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (*Southam*, at para. 35; *Sattva*, at para. 49, quoting *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

[43] La marche à suivre pour qualifier une question selon l'une des trois catégories principales — questions de droit, questions de fait ou questions mixtes — est aussi bien établie dans la jurisprudence (*Canada (Directeur des enquêtes et recherches) c. Southam Inc.*, [1997] 1 R.C.S. 748, par. 35). En particulier, personne ne conteste que les questions de droit « concernent la détermination du critère juridique applicable » (*Sattva*, par. 49, citant *Southam*, par. 35); les questions de fait « portent sur ce qui s'est réellement passé entre les parties » (*Southam*, par. 35; *Sattva*, par. 58); et les questions mixtes « consistent à déterminer si les fait satisfont au critère juridique » ou, en d'autres termes, supposent « l'application d'une norme juridique à un ensemble de faits » (*Southam*, par. 35; *Sattva*, par. 49, citant *Housen c. Nikolaisen*, 2002 CSC 33, [2002] 2 R.C.S. 235).

[44] That said, while the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. For example, if a party alleges that a judge (or arbitrator) while applying a legal test failed to consider a required element of that test, that party alleges that the judge (or arbitrator), in effect, deleted that element from the test and thus altered the legal test. As the Court explained in *Southam*, at para. 39:

> . . . if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Such an allegation ultimately challenges whether the judge (or arbitrator) relied on the correct legal test, thus raising a question of law (*Sattva*, at para. 53; *Housen*, at paras. 31 and 34-35). Accordingly, such a legal question, if alleged in the context of a dispute under the *Arbitration Act*, and assuming the other jurisdictional requirements of that Act are met, is open to appellate review. These "extricable questions of

[44] Cela dit, bien que l'application d'un critère juridique à un ensemble de faits soit une question mixte, si, durant cette application, le critère juridique sous-jacent a pu être altéré, une question de droit se pose. Par exemple, si une partie allègue que le juge (ou l'arbitre), en appliquant un critère juridique, a négligé un élément essentiel de ce critère, cette partie allègue que le juge (ou l'arbitre) a en fait retranché cet élément du critère et l'a altéré du même coup. Comme l'a expliqué la Cour dans *Southam*, par. 39 :

> . . . si un décideur dit que, en vertu du critère applicable, il lui faut tenir compte de A, B, C et D, mais que, dans les faits, il ne prend en considération que A, B et C, alors le résultat est le même que s'il avait appliqué une règle de droit lui dictant de ne tenir compte que de A, B et C. Si le bon critère lui commandait de tenir compte aussi de D, il a en fait appliqué la mauvaise règle de droit et commis, de ce fait, une erreur de droit.

Une telle allégation soulève en définitive la question de savoir si le juge (ou l'arbitre) s'est fondé sur le bon critère juridique, ce qui constitue une question de droit (*Sattva*, par. 53; *Housen*, par. 31 et 34-35). En conséquence, pareille question de droit, si elle est alléguée dans le contexte d'un différend relevant de l'*Arbitration Act*, et en supposant que les autres exigences relatives à la compétence de cette loi sont law" are better understood as a covert form of legal question — where a judge's (or arbitrator's) legal test is implicit to their application of the test rather than explicit in their description of the test — than as a fourth and distinct category of questions.

satisfaites, est susceptible de contrôle en appel. Il est plus juste d'affirmer que ces « questions de droit isolables » sont une forme cachée de question de droit — où le critère juridique sur lequel se fonde le juge (ou l'arbitre) peut être déduit de son application au lieu d'être énoncé clairement dans sa description — et non une quatrième catégorie, distincte, de questions.

[45] Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent (*Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

[45] Les tribunaux doivent cependant faire preuve de prudence lorsqu'ils relèvent des questions de droit isolables parce que les questions mixtes, par définition, comportent des aspects de droit. Les motivations pour lesquelles l'avocat qualifie stratégiquement une question mixte de question de droit — par exemple pour pouvoir saisir un tribunal de l'appel d'une sentence arbitrale ou pour faire appliquer une norme de contrôle favorable dans l'appel d'un jugement en matière civile — sont limpides (*Sattva*, par. 54; *Southam*, par. 36). Une conception étroite des questions de droit isolables s'accorde avec le caractère définitif de l'arbitrage commercial et, de façon plus générale, avec la déférence à l'égard des conclusions de fait. Les tribunaux doivent se montrer vigilants lorsqu'il s'agit de faire une distinction entre une partie qui allègue que le critère juridique a pu être altéré lors de son application (une question de droit isolable; *Sattva*, par. 53) et une partie qui allègue que le critère juridique, qui n'a pas été altéré, aurait dû, lors de son application, donner lieu à un résultat différent (une question mixte).

[46] From this standpoint, the characterization of a question on review as a mixed question rather than as a legal question has vastly different consequences in appeals from arbitration awards and civil litigation judgments. The identification of a mixed question when appealing an arbitration award defeats a court's appellate review jurisdiction (*Arbitration Act*, s. 31; *Sattva*, at para. 104). In contrast, the identification of a mixed question when appealing a civil litigation judgment merely raises the standard of review (*Housen*, at para. 36).

[46] Vu sous cet angle, le fait de qualifier une question à l'examen de question mixte plutôt que de question de droit entraîne des différences considérables entre les appels interjetés à l'encontre d'une sentence arbitrale et ceux interjetés à l'encontre d'un jugement en matière civile. L'identification d'une question mixte dans le cadre d'un appel interjeté à l'encontre d'une sentence arbitrale fait échec à la compétence du tribunal de procéder à un contrôle en appel (*Arbitration Act*, art. 31; *Sattva*, par. 104). À l'inverse, l'identification d'une question mixte dans le cadre d'un appel interjeté à l'encontre d'un jugement en matière civile ne fait que mener à l'application d'une norme de contrôle plus rigoureuse (*Housen*, par. 36).

[47] Given these principles, a question of statutory interpretation is normally characterized as a legal question. In contrast, identifying a question, broadly, as one of contractual interpretation does not necessarily resolve the nature of the question at issue. Contractual interpretation involves factual, legal, and mixed questions. In consequence, characterizing the nature of the specific question before the court requires delicate consideration of the narrow issue actually in dispute. In general, though, as the Court recently explained in *Sattva*, contractual interpretation remains a mixed question, not a legal question, as it involves applying contractual law (principles of contract law) to contractual facts (the contract itself and its factual matrix) (para. 50).

[47] Compte tenu de ces principes, une question d'interprétation législative est habituellement qualifiée de question de droit. À l'inverse, le fait de dire qu'une question en est généralement une d'interprétation contractuelle n'établit pas nécessairement la nature de la question en cause. L'interprétation contractuelle met en jeu des questions de fait, des questions de droit et des questions mixtes. Donc, il faut examiner avec délicatesse la question étroite en litige pour qualifier la nature de la question précise posée au tribunal. En général toutefois, comme l'a récemment expliqué la Cour dans *Sattva*, l'interprétation contractuelle demeure une question mixte et non une question de droit puisqu'elle suppose l'application du droit des contrats (principes du droit des contrats) à des faits d'ordre contractuel (le contrat lui-même et son fondement factuel) (par. 50).

(2) <u>Jurisdiction in the Instant Case</u>

(2) <u>Compétence en l'espèce</u>

[48] On that basis, jurisdiction in this case can be readily ascertained. First, I will explain the courts' partial jurisdiction over the Valuation Issue. Second, I will explain the courts' lack of jurisdiction over the Interest and Lillooet Issues.

[48] Cela étant, il est facile de déterminer la compétence en l'espèce. Tout d'abord, j'expliquerai pourquoi les tribunaux ont compétence en partie sur la question de l'évaluation. Ensuite, j'expliquerai pourquoi les tribunaux n'ont pas compétence sur les questions des intérêts et du permis Lillooet.

(a) *Jurisdiction Over the Valuation Issue*

a) *Compétence sur la question de l'évaluation*

[49] As held by Bauman C.J. (at para. 57) and Finch C.J., dissenting (at paras. 140 and 143), the Valuation Issue — i.e. the issue of selecting a valuation method that complies with the *Revitalization Act* — involves a chain of issues, some raising legal questions and others raising mixed questions. Specifically, two types of questions are engaged by the Valuation Issue: (1) questions about the broad category of methods that are acceptable under the terms of the *Revitalization Act*; and (2) questions about the specific method, within that broad category of acceptable methods, that should ultimately be applied.

[49] Comme l'ont conclu le juge en chef Bauman (par. 57) et le juge en chef Finch, dissident (par. 140 et 143), la question de l'évaluation — c'est-à-dire la question de choisir une méthode d'évaluation conforme à la *Revitalization Act* — fait intervenir une série de points, dont certains soulèvent des questions de droit tandis que d'autres soulèvent des questions mixtes. Plus précisément, la question de l'évaluation fait entrer en jeu deux types de questions : (1) les questions relatives à la catégorie générale de méthodes qui sont acceptables selon la *Revitalization Act*; et (2) les questions liées à la méthode précise, faisant partie de cette catégorie générale de méthodes acceptables, qui devrait être appliquée en fin de compte.

[50] The former questions — the methods that are acceptable under the *Revitalization Act* — are a matter of statutory interpretation and, accordingly,

[50] Les premières questions — les méthodes acceptables suivant la *Revitalization Act* — concernent l'interprétation législative et, par conséquent, sont

are questions of law (*Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, [2016] 1 S.C.R. 306, at para. 23, citing *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135, at para. 33). As a result, the courts have jurisdiction to review the arbitrator's resolution of the Valuation Issue in so far as that resolution involves identifying a pool of methodologies consistent with the *Revitalization Act*.

[51] The latter questions — the preferable method among those that are consistent with the *Revitalization Act* — are inextricably linked to the evidentiary record at the arbitration hearing, where various experts opined on the virtues of conflicting valuation methodologies. They are mixed questions, if not pure questions of fact. Therefore, the courts lack jurisdiction to review the arbitrator's selection of a specific methodology among the pool of methodologies which are consistent with the *Revitalization Act*.

[52] The majority of the Court of Appeal in its first decision appears to have merged the two types of questions above and held that both were questions of law (para. 57). This is an error because selection among various technical methodologies which all comply with the compensation provision is undeniably linked to the complex evidentiary record before the arbitrator and engages at the very least mixed questions. The decision of the Court of Appeal on remand does not independently analyze jurisdiction, but it does describe the interpretation of the compensation provision as a question of law (para. 37). In so far as that decision recognizes that the courts' jurisdiction is limited to determining methods that are consistent with the compensation provision and does not extend to choosing among those methods, it properly construes the courts' jurisdiction over the Valuation Issue here.

(b) *Jurisdiction Over the Interest Issue*

[53] In contrast, as Bauman C.J. and Finch C.J., dissenting, both found, I conclude that the courts

des questions de droit (*Heritage Capital Corp. c. Équitable, Cie de fiducie*, 2016 CSC 19, [2016] 1 R.C.S. 306, par. 23, citant *Compagnie des chemins de fer nationaux du Canada c. Canada (Procureur général)*, 2014 CSC 40, [2014] 2 R.C.S. 135, par. 33). Ainsi, les tribunaux ont compétence pour contrôler la décision de l'arbitre sur la question de l'évaluation dans la mesure où cette décision consistait à cerner un ensemble de méthodes conformes à la *Revitalization Act*.

[51] Les dernières questions — la meilleure méthode parmi celles qui respectent la *Revitalization Act* — sont inextricablement liées au dossier de preuve présenté à l'audience d'arbitrage, où différents experts se sont prononcés sur les vertus de méthodes d'évaluation incompatibles. Ce sont des questions mixtes, voire des questions de fait pures. Par conséquent, les tribunaux n'ont pas compétence pour contrôler la méthode précise choisie par l'arbitre parmi l'ensemble des méthodes conformes à la *Revitalization Act*.

[52] Les juges majoritaires de la Cour d'appel dans sa première décision semblent avoir fusionné les deux types de questions susmentionnées et conclu que les deux étaient des questions de droit (par. 57). Il s'agit d'une erreur puisque choisir parmi plusieurs méthodes techniques qui sont toutes conformes à la disposition d'indemnisation est indéniablement lié au dossier de preuve complexe dont disposait l'arbitre et fait entrer en jeu à tout le moins des questions mixtes. Dans sa décision faisant suite au renvoi, la Cour d'appel n'analyse pas séparément la compétence, mais elle indique effectivement que l'interprétation de la disposition d'indemnisation est une question de droit (par. 37). Dans la mesure où la Cour d'appel y reconnaît que les tribunaux ont uniquement compétence pour décider des méthodes qui sont conformes à la disposition d'indemnisation et qu'ils ne peuvent faire un choix parmi ces méthodes, la Cour d'appel interprète bien la compétence des tribunaux sur la question de l'évaluation en l'espèce.

b) *Compétence sur la question des intérêts*

[53] En revanche, à l'instar du juge en chef Bauman et du juge en chef Finch, dissident, je

have no jurisdiction to review the arbitrator's resolution of the Interest Issue.

[54] In this case, the arbitrator interpreted the Amended Agreement — including its No Interest Clause, which originated in the Settlement Framework Agreement and was unchanged by the Amendment — in light of the factual matrix. That was the correct legal test (*Sattva*, at para. 50).

[55] Still, BC argues that the arbitrator let the factual matrix overwhelm the words of the contract, which raises an extricable question of law. In my view, this "overwhelming" principle is subject to two formulations, neither of which confers appellate review jurisdiction in this case, albeit for different reasons.

[56] The first formulation of this "overwhelming" principle is that the factual matrix overwhelms the words of a contract when it is weighed excessively. This formulation fails to confer appellate review jurisdiction here because it is a mixed question.

[57] The goal of contractual interpretation is ascertaining "the objective intentions of the parties", an "inherently fact specific" exercise (*Sattva*, at para. 55). In interpreting the parties' intentions, the arbitrator weighed the factual matrix with the words of the Amended Agreement. He was alive to BC's submission that the No Interest Clause, in isolation, precluded interest payments (paras. 178-79). Indeed, the arbitrator, on a preliminary basis, accepted this submission (para. 179). But he ultimately held that "[t]he context applying here" revealed a different objective intent, namely to suspend interest only for the duration of negotiations (paras. 180-81). Specifically, the arbitrator assessed the evolving circumstances between the execution of the Settlement Framework Agreement (when the parties were "hopeful" the dispute would be resolved by negotiation and inserted the No Interest Clause in respect of compensation owed) and the execution of the Amended Agreement (when the parties knew negotiations had failed and

conclus que les tribunaux n'ont pas compétence pour contrôler la décision de l'arbitre sur la question des intérêts.

[54] En l'espèce, l'arbitre a interprété la convention modifiée — y compris sa clause zéro intérêt, qui prend sa source dans la convention cadre de règlement et est demeurée telle quelle à la suite de la Modification — à la lumière du fondement factuel. Il s'agit là du bon critère juridique (*Sattva*, par. 50).

[55] Malgré cela, la C.-B. soutient que l'arbitre a laissé le fondement factuel supplanter les termes du contrat, ce qui soulève une question de droit isolable. À mon avis, ce principe de la « supplantation » se prête à deux formulations et aucune d'entre elles ne confère compétence pour procéder à un contrôle en appel dans le cas présent, quoique pour des raisons différentes.

[56] La première formulation de ce principe de la « supplantation » est la suivante : le fondement factuel supplante les termes d'un contrat lorsqu'on lui accorde trop de poids. Cette formulation ne confère pas compétence pour procéder à un contrôle en appel dans le cas présent parce qu'il s'agit d'une question mixte.

[57] L'objectif de l'interprétation contractuelle est de déterminer « l'intention objective des parties », une opération, « de par sa nature même, axé[e] sur les faits » (*Sattva*, par. 55). Lorsqu'il a interprété les intentions des parties, l'arbitre a soupesé le fondement factuel et les termes employés dans la convention modifiée. Il était sensible à l'observation de la C.-B. selon laquelle la clause zéro intérêt, prise isolément, interdisait le paiement d'intérêts (par. 178-179). En effet, l'arbitre a retenu a priori cette observation (par. 179). Par contre, il a conclu en dernière analyse que [TRADUCTION] « [l]e contexte qui s'applique en l'espèce » dévoilait une autre intention objective, à savoir suspendre les intérêts uniquement pour la durée des négociations (par. 180-181). Plus précisément, l'arbitre a apprécié l'évolution de la situation entre la signature de la convention cadre de règlement (lorsque les parties avaient « espoir » que le différend soit réglé par la négociation et qu'elles ont inséré la clause zéro intérêt relativement à

submitted the value of "compensation" to arbitration). He held that the parties, by submitting "compensation" to arbitration, had intended compensation, interest included, to be within his jurisdiction (para. 181).

l'indemnité due) et la signature de la convention modifiée (lorsque les parties savaient que les négociations avaient avorté et qu'elles ont soumis la question de la valeur de l'« indemnité » à l'arbitrage). Il a conclu que les parties, en soumettant l'« indemnité » à l'arbitrage, voulaient en fait que l'indemnité, y compris les intérêts, relève de sa compétence (par. 181).

[58] The arbitrator, after a lengthy and complex hearing, was best situated to weigh the factual matrix in his interpretation of the Amended Agreement. The fact that he may have placed significant weight on that evidence in interpreting the agreement does not engage a legal question conferring jurisdiction on the courts under the *Arbitration Act* as it does not alter the underlying test he applied in this case.

[58] L'arbitre — après une audience longue et complexe — était le mieux placé pour soupeser le fondement factuel dans son interprétation de la convention modifiée. La possibilité qu'il ait accordé beaucoup de poids à cette preuve dans son interprétation de la convention ne fait pas intervenir une question de droit conférant compétence aux tribunaux suivant l'*Arbitration Act*, car cela n'altère pas le critère sous-jacent qu'il a appliqué en l'espèce.

[59] In the Court of Appeal's first decision, the majority at times appears to follow the first formulation of the "overwhelming" principle, and seems to imply that the arbitrator erred in law by placing excessive emphasis on the factual matrix (para. 125), even though that matrix had never been manifested in an "express provision" in the contract (para. 127). If this is the approach the majority chose, it improperly conflates questions of law (needed at the leave stage for jurisdiction) and errors of law (considered at the merits stage, once jurisdiction has been established). The identification of an alleged legal error should be based on the arbitrator's application of the wrong test, not on the fact that one would have applied the appropriate legal test differently. Otherwise, it does not raise a legal question conferring jurisdiction on the courts to review the arbitration award (*Sattva*, at paras. 63-66); rather, it skips the jurisdiction stage and immediately proceeds with a review of the arbitrator's analysis of a mixed question.

[59] Dans la première décision de la Cour d'appel, les juges majoritaires semblent parfois faire leur la première formulation du principe de « supplantation » et semblent laisser sous-entendre que l'arbitre a commis une erreur de droit en accordant une trop grande importance au fondement factuel (par. 125), même si ce fondement ne s'était jamais traduit en une [TRADUCTION] « disposition expresse » dans le contrat (par. 127). Si c'est là l'approche qu'ont retenue les juges majoritaires, elle confond à tort les questions de droit (nécessaires à l'étape de l'autorisation d'appel pour établir la compétence) et les erreurs de droit (prises en compte à l'étape de l'examen au fond, une fois que la compétence a été établie). La conclusion qu'il existerait une erreur de droit doit reposer sur l'application, par l'arbitre, du mauvais critère, et non sur le fait qu'on aurait appliqué différemment le bon critère juridique. Sinon, cela ne soulève pas une question de droit qui accorde aux tribunaux le pouvoir de contrôler la sentence arbitrale (*Sattva*, par. 63-66); au contraire, on saute ainsi l'étape de l'établissement de la compétence pour procéder immédiatement au contrôle de l'analyse d'une question mixte effectuée par l'arbitre.

[60] Likewise, it is improper to claim that a court should have jurisdiction to review the arbitrator's contractual analysis merely on the basis that it was allegedly incorrect. Indeed, it would even be improper

[60] De même, il est inexact d'affirmer qu'un tribunal devrait avoir compétence pour contrôler l'analyse contractuelle de l'arbitre du seul fait que cette analyse serait incorrecte. En effet, un tribunal aurait

to claim jurisdiction to review an arbitrator's analysis merely on the basis that it was unreasonable. A court looking at the Amended Agreement could have held that the No Interest Clause precluded interest payments and that the Arbitration Clause incorporated that preclusion when it submitted "compensation" (without interest) to arbitration. But to immediately launch into the merits of the arbitrator's contractual analysis — whether it is incorrect or unreasonable — is to put the cart before the horse. His analysis must first be characterized as raising a legal question. And only on the basis of that characterization may his analysis then be reviewed.

même tort de se déclarer compétent pour contrôler l'analyse d'un arbitre du seul fait que cette analyse était déraisonnable. Par exemple, le tribunal qui aurait examiné la convention modifiée aurait pu conclure que la clause zéro intérêt interdisait le paiement d'intérêts et que la clause d'arbitrage prévoyait cette interdiction lorsque la question de l'« indemnité » (sans intérêt) a été soumise à l'arbitrage. Mais se pencher immédiatement sur le bien-fondé de l'analyse contractuelle de l'arbitre — qu'elle soit incorrecte ou déraisonnable — revient à mettre la charrue devant les bœufs. Il faut d'abord décider que son analyse soulève une question de droit. Et c'est seulement sur la base de cette décision que son analyse peut ensuite être contrôlée.

[61] Here, the relevant legal principle required the arbitrator to interpret the Amended Agreement "in light of the factual matrix" (*Sattva*, at para. 50). That is precisely what he did. It cannot be found that the arbitrator changed this legal principle simply because someone else might have applied it differently in this case.

[61] En l'espèce, le principe juridique applicable exigeait de l'arbitre qu'il interprète la convention modifiée « à la lumière du fondement factuel » (*Sattva*, par. 50). C'est précisément ce qu'il a fait. On ne saurait conclure que l'arbitre a modifié ce principe juridique simplement parce que quelqu'un d'autre aurait pu l'appliquer différemment en l'espèce.

[62] The second formulation of the "overwhelming" principle is that the factual matrix overwhelms the words of a contract when it is interpreted in isolation from the words of the contract, effectively creating a new agreement between the parties. This formulation of the "overwhelming" principle raises a legal question, but it lacks arguable merit here. As a result, it also fails to confer appellate review jurisdiction in this case.

[62] La seconde formulation du principe de la « supplantation » est la suivante : le fondement factuel supplante les termes d'un contrat lorsqu'on l'interprète séparément de ses termes, créant dans les faits une nouvelle convention entre les parties. Cette formulation du principe en cause soulève une question de droit, mais elle est dépourvue de fondement défendable en l'espèce. Ainsi, elle ne confère pas non plus compétence pour procéder à un contrôle en appel dans l'affaire qui nous occupe.

[63] In *Sattva*, this Court accepted that, in rare circumstances, the application of an incorrect principle or the failure to apply a principle could give rise to an extricable question of law (paras. 53 and 62-64; see also *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 21, citing *Housen*, at para. 36). As the Court recognized in *Sattva*, the use of the factual matrix in contractual interpretation is limited by the legal principle that contractual interpretation must remain grounded in the text of the contract so as to avoid effectively creating a new agreement between the parties (para. 57; see also *Hayes Forest*

[63] Dans *Sattva*, notre Cour a accepté que, dans de rares cas, l'application d'un mauvais principe ou l'omission d'appliquer un principe peut soulever une question de droit isolable (par. 53 et 62-64; voir aussi *Ledcor Construction Ltd. c. Société d'assurance d'indemnisation Northbridge*, 2016 CSC 37, [2016] 2 R.C.S. 23, par. 21, citant *Housen*, par. 36). Comme l'a reconnu la Cour dans *Sattva*, le principe juridique selon lequel l'interprétation d'un contrat doit toujours s'appuyer sur le texte de celui-ci limite le recours au fondement factuel dans son interprétation afin d'éviter de créer dans les faits une nouvelle convention entre les parties (par. 57; voir

*Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Black Swan Gold Mines Ltd. v. Goldbelt Resources Ltd.* (1996), 78 B.C.A.C. 193; G. R. Hall, *Canadian Contractual Interpretation Law* (3rd ed. 2016), at p. 33).

[64] Whether the arbitrator failed to apply the foregoing principle raises a legal question. That said, merely raising a legal question does not exhaust the requirements for jurisdiction under s. 31 of the *Arbitration Act*. To grant leave on such a question of law, the court must be satisfied that the ground of appeal has "arguable merit" (*Sattva*, at para. 74; *Arbitration Act*, s. 31(2)(a)). In my view, if the Court of Appeal on remand had properly conducted a "preliminary examination of the question of law" in light of the reasonableness standard to be applied (*Sattva*, at paras. 74-75 and 106), it would have concluded that there is no arguable merit to this alleged legal error. The arbitrator's interpretation was rooted in the words of the contract, not overwhelmed by them. While the arbitrator may have placed significant weight on the factual matrix when interpreting the meaning of "compensation", there is no arguable merit to the claim that he interpreted that matrix isolated from the contract's words so as to effectively create a new agreement (*Sattva*, at para. 57; Hall, at pp. 33-34).

[65] Again, contractual interpretation is a fact-specific exercise. It follows that a question of law premised on the failure to apply the principle that the factual matrix must not be interpreted in isolation from the words of the contract will be very difficult to extricate in practice. On closer examination, it will often amount to nothing more than a complaint about how much weight was allocated to the factual matrix — in effect, a disagreement about *how* the decision-maker interpreted the words of a contract in light of the factual matrix (*Sattva*, at paras. 50 and 65). In short, the supposed question of law will often reveal itself to be a question about whether the decision-maker applied the principle properly — a

aussi *Hayes Forest Services Ltd. c. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230; *Glaswegian Enterprises Inc. c. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62; *Black Swan Gold Mines Ltd. c. Goldbelt Resources Ltd.* (1996), 78 B.C.A.C. 193; G. R. Hall, *Canadian Contractual Interpretation Law* (3e éd. 2016), p. 33).

[64] Le point de savoir si l'arbitre n'a pas appliqué le principe susmentionné constitue une question de droit. Cela dit, le simple fait de soulever une question de cette nature n'évacue pas toutes les conditions de compétence établies à l'art. 31 de l'*Arbitration Act*. Pour accorder l'autorisation d'appel sur la base d'une telle question de droit, le tribunal doit être convaincu que le moyen d'appel a un « fondement défendable » (*Sattva*, par. 74; *Arbitration Act*, al. 31(2)(a)). À mon avis, si la Cour d'appel, à la suite du renvoi, avait procédé comme il se doit à un « examen préliminaire de la question de droit » en fonction de la norme de la décision raisonnable à appliquer (*Sattva*, par. 74-75 et 106), elle aurait conclu que cette erreur de droit reprochée est dénuée de fondement défendable. L'interprétation de l'arbitre reposait sur les termes du contrat et n'était pas supplantée par ceux-ci. Bien qu'il ait peut-être accordé beaucoup d'importance au fondement factuel quand il a interprété le sens d'« indemnité », la prétention selon laquelle il a interprété ce fondement séparément des termes du contrat de manière à créer effectivement une nouvelle convention est dénuée de fondement défendable (*Sattva*, par. 57; Hall, p. 33-34).

[65] Je le répète, l'interprétation contractuelle est tributaire des faits. Ainsi, il sera très difficile de dégager en pratique une question de droit fondée sur le défaut d'appliquer le principe interdisant d'interpréter le fondement factuel séparément des termes du contrat. Un examen plus attentif montrera que ce n'est souvent rien de plus qu'une plainte au sujet du poids accordé au fondement factuel — en fait, un désaccord sur l'*interprétation* donnée par le décideur aux termes d'un contrat à la lumière du fondement factuel (*Sattva*, par. 50 et 65). Bref, la supposée question de droit se révèle fréquemment une question de savoir si le décideur a appliqué le principe comme il se doit — une question mixte

mixed question — and not about whether the decision-maker applied the proper principle. To extricate a question of law based on the alleged error of having overwhelmed the contract, a reviewing court must be satisfied that the decision-maker interpreted the factual matrix isolated from the words of the contract; an approach which could effectively create a new agreement. There is no arguable merit to the claim that the arbitrator's analysis here adopted such a flawed approach.

— et non de savoir si le décideur a appliqué le bon principe. Pour dégager une question de droit fondée sur la prétendue erreur d'avoir supplanté le contrat, la cour de révision doit être convaincue que le décideur a interprété le fondement factuel séparément des termes du contrat, une approche qui peut effectivement déboucher sur la création d'une nouvelle convention. La prétention selon laquelle l'arbitre a adopté une approche ainsi viciée dans son analyse est dépourvue de fondement défendable en l'espèce.

[66] Accordingly, on either formulation of the "overwhelming" principle, the majority of the Court of Appeal (in its first decision) and the unanimous Court of Appeal (in its second decision) erred in finding that the courts had jurisdiction to review the Interest Issue.

[66] En somme, peu importe la formulation du principe de « supplantation » que l'on adopte, les juges majoritaires de la Cour d'appel (dans sa première décision) et la Cour d'appel à l'unanimité (dans sa seconde décision) ont conclu à tort que les tribunaux avaient compétence pour examiner la question des intérêts.

(c) *Jurisdiction Over the Lillooet Issue*

c) *Compétence sur la question du permis Lillooet*

[67] The courts similarly lack jurisdiction over the Lillooet Issue because it does not raise a question of law. The majority of the Court of Appeal did not explicitly discuss jurisdiction over the Lillooet Issue, but found that the arbitrator had correctly denied Teal Cedar compensation for the Lillooet Licence. In contrast, the application judge reasoned that he had jurisdiction over the Lillooet Issue. I disagree with both the application judge's finding of jurisdiction and his decision to remit the issue to the arbitrator for reconsideration.

[67] Les tribunaux n'ont pas non plus compétence sur la question du permis Lillooet parce que celle-ci ne soulève pas une question de droit. Les juges majoritaires de la Cour d'appel n'ont pas abordé explicitement la compétence sur la question du permis Lillooet, mais ils ont conclu que l'arbitre avait eu raison de refuser à Teal Cedar une indemnité pour le permis Lillooet. Le juge saisi de la requête a pour sa part déterminé qu'il avait compétence sur la question du permis Lillooet. Je suis en désaccord tant avec sa déclaration de compétence qu'avec sa décision de renvoyer la question à l'arbitre pour nouvel examen.

[68] Bauman C.J. held that the arbitrator's application of his chosen methodology to the Lillooet Licence raised a pure question of law (para. 84):

[68] Le juge en chef Bauman a statué que l'application par l'arbitre de la méthode qu'il avait retenue au permis Lillooet soulevait une pure question de droit (par. 84) :

> Teal argues that as there were improvements associated with the lost volumes in the Lillooet [Timber Supply Area], in light of the methodology adopted by the Arbitrator, it is an error on a pure question of law to deny Teal any compensation for the improvements. I agree that this raises a question of law . . . .

> [TRADUCTION] Teal soutient que, comme des améliorations se rapportaient aux volumes perdus dans la zone d'approvisionnement en bois de Lillooet, eu égard à la méthode retenue par l'arbitre, c'est commettre une erreur sur une pure question de droit que de refuser à Teal une indemnité pour les améliorations. Je conviens que cela soulève une question de droit . . .

[69] In my respectful view, this approach improperly conflates jurisdiction with review. The alleged presence of an error in applying the methodology (review) does not necessarily translate into a question of law (jurisdiction). Rather, the question implicated — whether the arbitrator correctly applied the valuation methodology to the Lillooet Licence — is a mixed question. As such, it is beyond the scope of appellate review. A deeper consideration of the arbitrator's reasoning reveals how the nature of the question raised here by the Lillooet Issue is mixed rather than legal.

[70] In his initial award, the arbitrator denied Teal Cedar Improvements Compensation for the Lillooet Licence based on its unique factual attributes. He found that Teal Cedar lost no areas associated with that licence, and accordingly, suffered no loss of value in respect of improvements linked to that licence, all of which it was still free to use. In the arbitrator's view, this distinguished the Lillooet Licence from the other two licences, where BC deleted areas, and therefore denied Teal Cedar access to certain improvements associated with those other licences.

[71] In effect, the arbitrator reasoned that the Depreciation Replacement Cost Method, when applied, involves a preliminary assessment of some loss of access to improvements, in fact, before determining the value associated with that loss, in law. Consequently, the parties' dispute in respect of Improvements Compensation for the Lillooet Licence relates to the arbitrator's application of his chosen valuation methodology, a mixed question beyond the courts' jurisdiction.

[72] Indeed, the arbitrator's basis for denying Improvements Compensation for the Lillooet Licence — that BC never took any areas, and thus never took any improvements, relating to that licence — is a factual inquiry best left to the expertise of the arbitrator whose greater proximity to the complex facts in this case leaves him best-situated to adjudicate this matter.

[69] À mon humble avis, cette approche confond à tort la compétence et le contrôle. La présence alléguée d'une erreur dans l'application de la méthode (contrôle) ne se traduit pas nécessairement par une question de droit (compétence). La question en cause, qui consiste à savoir si l'arbitre a bien appliqué la méthode d'évaluation au permis Lillooet, est plutôt une question mixte. Elle échappe donc à la portée du contrôle en appel. Un examen plus approfondi du raisonnement de l'arbitre révèle en quoi la nature de la question soulevée en l'espèce par le permis Lillooet est mixte plutôt que juridique.

[70] Dans sa sentence initiale, l'arbitre a refusé à Teal Cedar l'indemnité visant les améliorations pour le permis Lillooet en raison de ses caractéristiques factuelles uniques. Il a conclu que Teal Cedar n'avait perdu aucune zone se rattachant à ce permis et qu'elle n'avait par conséquent subi aucune perte de valeur relativement aux améliorations liées à ce permis, améliorations qu'il lui était encore loisible d'utiliser en totalité. Selon l'arbitre, cela distinguait le permis Lillooet des deux autres permis, à l'égard desquels la C.-B. avait retranché des zones, empêchant ainsi Teal Cedar d'avoir accès à certaines améliorations se rapportant à ces autres permis.

[71] En réalité, l'arbitre a estimé que l'application de la méthode du coût de remplacement déprécié impliquait une évaluation préliminaire d'une certaine perte d'accès aux améliorations, en fait, avant de déterminer, en droit, la valeur liée à cette perte. Par conséquent, le différend des parties quant à l'indemnité visant les améliorations pour le permis Lillooet porte sur l'application par l'arbitre de la méthode d'évaluation qu'il a retenue, une question mixte qui échappe à la compétence des tribunaux.

[72] D'ailleurs, la raison pour laquelle l'arbitre a refusé d'accorder l'indemnité visant les améliorations pour le permis Lillooet, à savoir que la C.-B. n'a jamais pris de zones, et n'a donc jamais pris d'améliorations, se rapportant à ce permis, participe de l'examen des faits qu'il vaut mieux laisser à l'expertise de l'arbitre dont la proximité plus étroite avec les faits complexes de la présente affaire fait en sorte qu'il est mieux placé pour trancher cette question.

[73] Having explained why the courts' jurisdiction is limited to the Valuation Issue, I will now consider the two remaining steps in the framework for review of commercial arbitration awards — the standard of review and the review itself — for that issue alone.

[73] Ayant expliqué pourquoi les tribunaux ont uniquement compétence sur la question de l'évaluation, je me pencherai maintenant sur les deux étapes restantes du cadre de contrôle des sentences arbitrales commerciales — la norme de contrôle et le contrôle lui-même — pour cette question seulement.

B. *Standard of Review*

(1) Standard of Review for Commercial Arbitration Awards

[74] In an arbitral context like this one, where the decision under review is an award under the *Arbitration Act*, *Sattva* establishes that the standard of review is "almost always" reasonableness (para. 75). This preference for a reasonableness standard dovetails with the key policy objectives of commercial arbitration, namely efficiency and finality. In *Sattva*, Rothstein J. emphasizes that in "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" (para. 106). He suggests that this may arise only in rare circumstances, such as where a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise is at issue (paras. 75 and 106).

[75] It follows that the nature of the question under review — i.e. legal, factual, or mixed — may inform whether one of those circumstances is present, but it is not dispositive, in itself, of the applicable standard of review. For instance, it would be an error to claim that all statutory interpretation by an arbitrator demands correctness review simply because it engages a legal question. While statutory interpretation is a legal question (*Heritage*, at para. 23, citing *Canadian National Railway*, at para. 33), the mere presence of a legal question does not, on its own,

B. *Norme de contrôle*

(1) Norme de contrôle des sentences arbitrales commerciales

[74] Dans un contexte arbitral comme celui qui nous occupe, où la décision faisant l'objet du contrôle est une sentence rendue sur la base de l'*Arbitration Act*, l'arrêt *Sattva* établit que la norme de contrôle applicable est « presque toujours » celle de la décision raisonnable (par. 75), laquelle concorde avec les principaux objectifs de politique générale de l'arbitrage commercial, à savoir l'efficacité et le caractère définitif. Dans *Sattva*, le juge Rothstein souligne qu'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 » (par. 106). Il indique que cette norme ne s'applique que dans de rares circonstances, comme lorsqu'une question constitutionnelle ou une question de droit qui revêt une importance capitale pour le système juridique dans son ensemble et qui est étrangère au domaine d'expertise de l'arbitre est en cause (par. 75 et 106).

[75] La nature de la question à l'examen — c'est-à-dire de droit, de fait ou mixte — peut donc indiquer si l'une de ces circonstances est présente, mais elle ne permet pas, à elle seule, d'établir la norme de contrôle applicable. Par exemple, il serait erroné d'affirmer que toutes les interprétations législatives d'un arbitre commandent l'application de la norme de la décision correcte simplement parce qu'elles font intervenir une question de droit. Bien que l'interprétation législative soit une question de droit (*Heritage*, par. 23, citant *Compagnie des chemins de*

preclude the application of a reasonableness review in a commercial arbitration context. *Sattva* is clear in this regard.

*fer nationaux du Canada*, par. 33), la simple présence d'une question de droit n'empêche pas, à elle seule, d'appliquer la norme de la décision raisonnable dans un contexte d'arbitrage commercial. L'arrêt *Sattva* est clair à ce sujet.

[76] In contrast, where the decision under review is, for example, a civil litigation judgment, the nature of the question is dispositive of the standard of review, with factual and mixed questions being reviewed for palpable and overriding error (*Housen*, at paras. 10 and 36) and legal questions — including extricable questions of law — being reviewed for correctness (*Housen*, at paras. 8 and 36). It is therefore critical to bear these distinctions in mind when determining the appropriate standard of review in any given case.

[76] En revanche, lorsque la décision faisant l'objet du contrôle est, par exemple, un jugement en matière civile, la nature de la question permet d'établir la norme de contrôle applicable, puisque les questions de fait et les questions mixtes sont examinées selon la norme de l'erreur manifeste et déterminante (*Housen*, par. 10 et 36) et les questions de droit — y compris les questions de droit isolables — doivent l'être en fonction de la norme de la décision correcte (*Housen*, par. 8 et 36). Il est donc crucial de garder ces distinctions à l'esprit lorsque l'on détermine la norme de contrôle applicable dans un cas donné.

(2) Standard of Review for the Valuation Issue

(2) Norme de contrôle applicable à la question de l'évaluation

[77] The decisions below, other than that of the Court of Appeal on remand, largely avoid the question of the standard of review. Bauman C.J. held that the arbitrator had "correctly answered" the Valuation Issue, suggesting a correctness standard of review (para. 57). Similarly, the majority employed correctness language in their reasoning (para. 57). In dissent, Finch C.J. simply noted the absence of errors in Bauman C.J.'s Valuation Issue analysis, making the appropriate standard of review immaterial to his holding (para. 143). To be fair, these decisions predated *Sattva* and lacked this Court's guidance on standard of review in a commercial arbitration context such as this one.

[77] Les décisions des juridictions inférieures, mis à part celle rendue par la Cour d'appel à la suite du renvoi, éludent en grande partie la question de la norme de contrôle. Le juge en chef Bauman a conclu que l'arbitre [TRADUCTION] « a[vait] correctement répondu » à la question de l'évaluation, laissant ainsi supposer qu'il a appliqué la norme de la décision correcte (par. 57). De même, les juges majoritaires emploient le terme « correct » dans leur raisonnement (par. 57). Le juge en chef Finch, dissident, n'a fait que souligner l'absence d'erreurs dans l'analyse de la question de l'évaluation à laquelle s'était livré le juge en chef Bauman, ce qui rend la norme de contrôle sans importance pour sa conclusion (par. 143). En toute justice, ces décisions précèdent l'arrêt *Sattva* et leurs auteurs ne bénéficiaient pas alors des directives de notre Cour sur la norme de contrôle applicable dans un contexte d'arbitrage commercial comme celui qui nous occupe.

[78] However, on remand, the Court of Appeal had the benefit of *Sattva*, and its decision was specifically directed toward reconsidering the majority's decision in light of *Sattva*. In my view, the Court of Appeal erroneously held that the standard of review should be correctness for the Valuation Issue (paras. 35-37).

[78] Toutefois, à la suite du renvoi, la Cour d'appel avait connaissance de l'arrêt *Sattva* et sa décision avait expressément pour objet de revoir la décision des juges majoritaires à la lumière de cet arrêt. À mon sens, la Cour d'appel a conclu à tort que la norme de contrôle applicable à la question de

Its decision appears to suggest that questions of law, such as statutory interpretation, necessarily attract a correctness standard of review (paras. 36-37). In so far as the Court of Appeal intended to make this suggestion, it is incorrect. As stated before, while the nature of the question (legal, mixed, or fact) is dispositive of the standard of review in the civil litigation context (*Housen*, at paras. 8, 10 and 36), it is not in the commercial arbitration context (*Sattva*, at paras. 75 and 106).

l'évaluation devait être celle de la décision correcte (par. 35-37). Sa décision semble suggérer que les questions de droit, comme l'interprétation des lois, appellent toujours la norme de la décision correcte (par. 36-37). Dans la mesure où la Cour d'appel a voulu faire cette suggestion, celle-ci est erronée. Comme je l'ai déjà mentionné, si la nature de la question (de droit, mixte ou de fait) permet de déterminer la norme de contrôle applicable dans le contexte d'un litige civil (*Housen*, par. 8, 10 et 36), elle ne permet pas de le faire dans le contexte de l'arbitrage commercial (*Sattva*, par. 75 et 106).

[79] Rather, the standard of review on the legal questions arising from the arbitrator's analysis of the Valuation Issue is reasonableness. As discussed, under *Sattva*, reasonableness review is almost always applied in commercial arbitration (para. 75). That preference is not negated here in light of the nature of the question at issue and the arbitrator's presumed expertise.

[79] La norme de contrôle applicable aux questions de droit découlant de l'analyse de la question de l'évaluation effectuée par l'arbitre est plutôt celle de la décision raisonnable. Comme nous l'avons vu, d'après l'arrêt *Sattva*, le contrôle selon la norme de la décision raisonnable s'applique presque toujours en matière d'arbitrage commercial (par. 75). Ce penchant n'est pas exclu en l'espèce vu la nature de la question en litige et l'expertise présumée de l'arbitre.

[80] The question at issue — determining the category of appropriate valuation methodologies under a BC forestry statute — is not a previously recognized exceptional question identified in *Sattva* (paras. 75 and 106). It is clearly not a constitutional question. Similarly, it is neither of central importance to the legal system as a whole (limited, as it is, to a single province and a single industry) nor is it outside the expertise of the arbitrator (whom the parties chose to adjudicate this very dispute and whose expertise is therefore presumed). Further, the relevant portions of the *Dunsmuir* analysis (as per *Sattva*, at para. 106) favour reasonableness review.

[80] La question en litige, qui consiste à déterminer la catégorie de méthodes d'évaluation conformes à une loi forestière de la C.-B., n'est pas une exception déjà reconnue mentionnée dans l'arrêt *Sattva* (par. 75 et 106). Ce n'est manifestement pas une question constitutionnelle. De même, elle ne revêt pas une importance capitale pour le système juridique dans son ensemble (puisqu'elle concerne une seule province et une seule industrie) et n'est pas non plus étrangère au domaine d'expertise de l'arbitre (qui a été choisi par les parties pour trancher ce différend précis et qui est donc présumé posséder l'expertise requise). De plus, les éléments pertinents de l'analyse établie dans *Dunsmuir* (*Sattva*, par. 106) militent en faveur d'un contrôle selon la norme de la décision raisonnable.

[81] For example, specialized expertise supports reasonableness review here. As discussed, the parties selected the arbitrator to adjudicate this exact issue, hence unambiguously affirming their acceptance of his sufficient expertise. Despite this, in its decision on remand, the Court of Appeal held that the arbitrator's lack of expertise regarding forestry statutes favoured a correctness standard of review (para. 35).

[81] Par exemple, l'expertise spécialisée appuie le contrôle selon la norme de la décision raisonnable en l'espèce. Comme nous l'avons vu, les parties ont choisi l'arbitre pour trancher précisément cette question, confirmant ainsi de façon non équivoque leur reconnaissance de son expertise. Malgré cela, dans la décision qu'elle a rendue à la suite du renvoi, la Cour d'appel a conclu que le manque d'expertise de

With respect, that disregards this Court's guidance in *Sattva* that arbitrators chosen by the parties "may be presumed . . . chosen either based on their expertise in the area which is the subject of dispute or . . . otherwise qualified in a manner that is acceptable to the parties" (para. 105). The Court of Appeal's reasoning also disregards the practical reality that, to weigh an arbitrator's actual (as opposed to presumed) expertise in every arbitration would require some sort of preliminary assessment of the arbitrator's level of expertise with a view to establishing the standard of review for every particular hearing — which would be antithetical to the efficiencies meant to be gained through the arbitration process.

l'arbitre en ce qui concerne les lois forestières militait en faveur de la norme de la décision correcte (par. 35). Soit dit en tout respect, cette conclusion ne tient pas compte de la directive donnée par la Cour dans l'arrêt *Sattva*, selon laquelle, quand les parties choisissent leur arbitre, « on peut présumer qu'elles fondent leur choix sur l'expertise de l'arbitre dans le domaine faisant l'objet du litige ou jugent sa compétence acceptable » (par. 105). Le raisonnement de la Cour d'appel fait également abstraction de la réalité concrète selon laquelle l'appréciation de l'expertise réelle (plutôt que présumée) de l'arbitre dans chaque arbitrage nécessiterait une certaine évaluation préliminaire du degré d'expertise de l'arbitre en vue d'établir la norme de contrôle applicable à chaque audience — ce qui ferait obstacle aux gains en efficacité que l'on cherche à réaliser par la procédure d'arbitrage.

[82] Of course, the presumed expertise of a decision-maker remains a "contextual" consideration (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 64). In *Sattva*, the arbitration was voluntary (para. 9), whereas arbitration in this case was statutorily imposed (*Revitalization Act*, s. 6(6)), a point specifically made by the Court of Appeal in its decision on remand (para. 35). But that distinction does not amount to much. The parties in this case still had complete control over the choice of their arbitrator; despite anticipated regulations "prescribing requirements for the selection of arbitrators" (*Revitalization Act*, s. 13(2)(b)(v)), no such regulations had been enacted at the time the arbitration arose. In addition, as noted, the arbitrator here considered the very issue he was mandated to address by both statute and party consent. If an issue were to arise in the course of an arbitration that was beyond the foreseeable scope of an arbitrator's mandate, that could well undermine an arbitrator's presumed expertise. But that is simply not the case before us.

[82] Bien entendu, l'expertise présumée du décideur demeure un élément « contextue[l] » (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9, [2008] 1 R.C.S. 190, par. 64). Dans *Sattva*, l'arbitrage était volontaire (par. 9), alors qu'en l'espèce, l'arbitrage était imposé par la loi (*Revitalization Act*, par. 6(6)), un point que la Cour d'appel a explicitement fait valoir dans la décision qu'elle a rendue à la suite du renvoi (par. 35). Or, cette distinction porte peu à conséquence. Les parties en l'espèce exerçaient toujours un contrôle complet sur le choix de leur arbitre; même si on s'attendait à la prise d'un règlement [TRADUCTION] « prescrivant [. . .] les exigences liées à la sélection des arbitres » (*Revitalization Act*, sous-al. 13(2)(b)(v)), aucun règlement de ce genre n'avait encore été adopté au moment où a eu lieu l'arbitrage. De plus, comme je l'ai souligné, l'arbitre a examiné en l'espèce la question même qu'il était chargé d'étudier en vertu de la loi et sur consentement des parties. Si une question débordant le cadre prévisible du mandat d'un arbitre devait être soulevée au cours d'un arbitrage, cela pourrait fort bien miner l'expertise présumée de l'arbitre, mais ce n'est tout simplement pas le cas en l'espèce.

[83] In closing on this point, I observe that the applicability of a reasonableness standard of review in this case is hardly disputable. We are, after all, in

[83] Pour conclure sur ce point, je ferai remarquer que l'applicabilité de la norme de la décision raisonnable en l'espèce n'est guère contestable. Nous

a commercial arbitration context, in which, from a policy perspective, the deliberate aim is to maximize efficiency and finality. Further, the arbitrator was specifically assigned jurisdiction over the discrete issue of valuation by the *Revitalization Act* (s. 6(6)), an issue in which he, having been chosen by consent of the parties, is expected to have specialized expertise. This merits deferential review.

nous trouvons, après tout, dans un contexte d'arbitrage commercial qui, en principe, vise délibérément à maximiser l'efficacité et le caractère définitif. En outre, l'arbitre s'est expressément vu attribuer une compétence sur la question distincte de l'évaluation par la *Revitalization Act* (par. 6(6)), une question sur laquelle on s'attend à ce qu'il possède une expertise spécialisée, ayant été choisi sur consentement des parties. Cela commande un contrôle empreint de déférence.

C. *Review of the Valuation Issue*

C. *Contrôle de la question de l'évaluation*

[84] Turning to the review step of the analysis, like the application judge and the dissent at the Court of Appeal, I find that the arbitrator's determination that the Depreciation Replacement Cost Method was consistent with the *Revitalization Act* was reasonable. This decision fell within a range of possible, acceptable outcomes which were defensible in respect of the facts and law, and the decision was justified, transparent, intelligible, and defensible (*Dunsmuir*, at para. 47). In my view, the broad and open-ended language of the *Revitalization Act* does not inevitably lead to "a single reasonable interpretation" (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895, at para. 38) such as the market value approach endorsed by my colleagues' reasons (paras. 133-34).

[84] En ce qui concerne maintenant l'étape du contrôle de l'analyse, à l'instar du juge saisi de la requête et du juge dissident en Cour d'appel, j'estime que la conclusion de l'arbitre selon laquelle la méthode du coût de remplacement déprécié respectait la *Revitalization Act* était raisonnable. Cette décision appartenait aux issues possibles acceptables pouvant se justifier au regard des faits et du droit, et la décision était justifiée, transparente, intelligible et défendable (*Dunsmuir*, par. 47). J'estime que le libellé large et non limitatif de la *Revitalization Act* ne mène pas inévitablement à « une seule interprétation raisonnable » (*McLean c. Colombie-Britannique (Securities Commission)*, 2013 CSC 67, [2013] 3 R.C.S. 895, par. 38) telle l'approche fondée sur la valeur marchande qu'ont retenue mes collègues dans leurs motifs (par. 133-134).

(1) Background Observations

(1) Observations générales

[85] Two background observations reinforce the reasonableness of the arbitrator's decision in this case and should be discussed before the arbitrator's specific line of reasoning is explored.

[85] Il convient de formuler deux observations générales renforçant le caractère raisonnable de la décision de l'arbitre en l'espèce avant de se pencher sur son raisonnement précis.

[86] First, the *Revitalization Act* anticipated the Lieutenant Governor in Council passing regulations "prescribing methods of evaluation for use in determining value" (*Revitalization Act*, s. 13(2)(b)(ii)), but no such regulations had been passed at the time of dispute, or even at the time of the hearing before this Court (transcript, at p. 9). In the absence of such regulations, the legislative scheme acknowledges that determining "value" in these circumstances gives rise to a range of reasonable

[86] Tout d'abord, la *Revitalization Act* prévoyait que le lieutenant-gouverneur en conseil prendrait un règlement [TRADUCTION] « prescrivant [. . .] les méthodes d'évaluation à utiliser pour déterminer la valeur » (*Revitalization Act*, sous-al. 13(2)(b)(ii)), mais aucun règlement de ce genre n'avait été pris au moment du litige, ni même au moment de l'audience devant notre Cour (transcription, p. 9). En l'absence d'un tel règlement, le régime législatif reconnaît que la détermination de la « valeur »

interpretations (see *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 18, citing *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 59). Put differently, the anticipated (yet non-promulgated) regulations suggest that determining "value" per the *Revitalization Act* is not an analysis in which "the ordinary tools of statutory interpretation lead to a single reasonable interpretation" (*McLean*, at para. 38). Indeed, if there were only one reasonable interpretation for determining value, the regulatory power provided in s. 13 of the *Revitalization Act* would be superfluous, contrary to established principles of statutory interpretation.

dans ces circonstances donne ouverture à un éventail d'interprétations raisonnables (voir *Catalyst Paper Corp. c. North Cowichan (District)*, 2012 CSC 2, [2012] 1 R.C.S. 5, par. 18, citant *Canada (Citoyenneté et Immigration) c. Khosa*, 2009 CSC 12, [2009] 1 R.C.S. 339, par. 59). Autrement dit, le règlement anticipé (mais non encore promulgué) donne à penser qu'établir la « valeur » conformément à la *Revitalization Act* ne participe pas d'une analyse dans laquelle « les méthodes habituelles d'interprétation législative mènent à une seule interprétation raisonnable » (*McLean*, par. 38). D'ailleurs, s'il n'existait qu'une seule interprétation raisonnable pour déterminer la valeur, le pouvoir de réglementation prévu à l'art. 13 de la *Revitalization Act* serait superflu, contrairement aux principes établis d'interprétation des lois.

[87] Second, the arbitrator's determination of a reasonable valuation method must be assessed in the context of his reasons as a whole. Three "generally recognized valuation approaches" were presented to the arbitrator: Market Value, Income, and Depreciation Replacement Cost (para. 112). The arbitrator specifically explained his rejection of the first two methods on the basis that the value they generated did not correspond to a sensible value in the context of Crown land (which can neither be sold for market value nor generate income), a fact admitted by BC's own expert at the hearing (para. 113). As a result, the reasonableness of the arbitrator's analysis cannot be assessed solely with respect to the reasonableness of the Depreciation Replacement Cost Method in isolation. As the arbitrator recognized, all of the methods from the arbitration hearing had their own flaws (paras. 112-20). This was a reality the arbitrator had to grapple with while negotiating abundant expert evidence juxtaposing those methods. His ultimate choice — the Depreciation Replacement Cost Method — was defensible on the facts and the law.

[87] Ensuite, le choix par l'arbitre d'une méthode d'évaluation raisonnable doit être apprécié eu égard à ses motifs dans leur ensemble. Trois [TRADUCTION] « méthodes d'évaluation généralement reconnues » ont été proposées à l'arbitre : celles de la valeur marchande, du revenu et du coût de remplacement déprécié (par. 112). L'arbitre a expressément expliqué qu'il avait rejeté les deux premières méthodes parce que les valeurs qu'elles donnaient ne correspondaient pas à une valeur raisonnable dans le cas des terres de la Couronne (qui ne peuvent ni être vendues à leur valeur marchande ni générer de revenu), un fait qui a été admis par le propre expert de la C.-B. à l'audience (par. 113). Ainsi, le caractère raisonnable de l'analyse de l'arbitre ne peut être apprécié uniquement en fonction du caractère raisonnable de la méthode du coût de remplacement déprécié prise isolément. Comme l'a reconnu l'arbitre, toutes les méthodes présentées au cours de l'audience d'arbitrage comportaient des lacunes (par. 112-120). C'est une réalité avec laquelle l'arbitre a dû composer en examinant une abondante preuve d'expert juxtaposant ces méthodes. Son choix final — la méthode du coût de remplacement déprécié — était défendable au vu des faits et du droit.

### (2) Arbitrator's Award

### (2) Sentence de l'arbitre

[88] With the above background points addressed, I now turn to the logic of the arbitrator's award, which proceeded as follows:

[88] Les points généraux qui précèdent ayant été abordés, je passe maintenant à la logique de la sentence de l'arbitre, qui a suivi le raisonnement suivant :

(a) The compensation provision entitles Teal Cedar to "compensation . . . in an amount equal to the value of improvements made to Crown land". Accordingly, the arbitrator must select a valuation method for the "value of improvements made to Crown land".

(b) The valuation method need not be coterminous with the value of Teal Cedar's actual financial loss, as BC argues. Rather, the compensation provision expressly tells the arbitrator what the valuation method must be linked to, namely, "the value of improvements made to Crown land".

(c) The Depreciation Replacement Cost Method was accepted by both parties as a reasonable means of valuing improvements made to Crown land.

(d) An interpretation of the *Revitalization Act* as a whole supports the Depreciation Replacement Cost Method because it is the only valuation methodology actually presented to the arbitrator that determines Improvements Compensation separately from Rights Compensation, in keeping with their separate treatment under the *Revitalization Act*.

(e) In any event, interpreting the *Revitalization Act* is impossible with the other main methods proposed at the hearing — the Market Value Method and Income Method — because these methods are inapplicable to Crown land, which cannot be sold and which cannot generate income.

[89] This reasoning is supportable and understandable, and thus reasonable. As found by Bauman C.J. (para. 52) and Finch C.J., dissenting (paras. 141-43), it is logical to link the quantum of Improvements Compensation to "the value of improvements made to Crown land" when that is precisely what is prescribed by the *Revitalization Act*. Indeed, linking the

a) La disposition d'indemnisation donne à Teal Cedar le droit de toucher une [TRADUCTION] « indemnité égale à la valeur des améliorations apportées aux terres de la Couronne ». L'arbitre doit donc choisir une méthode d'évaluation permettant de déterminer la « valeur des améliorations apportées aux terres de la Couronne ».

b) Il n'est pas nécessaire que la méthode d'évaluation coïncide avec la valeur de la perte financière réelle de Teal Cedar, comme le prétend la C.-B. En effet, la disposition d'indemnisation indique expressément à l'arbitre à quoi la méthode d'évaluation doit se rapporter, à savoir « la valeur des améliorations apportées aux terres de la Couronne ».

c) La méthode du coût de remplacement déprécié a été reconnue par les deux parties comme un moyen raisonnable d'évaluer les améliorations apportées aux terres de la Couronne.

d) Une interprétation de la *Revitalization Act* dans son ensemble appuie le choix de la méthode du coût de remplacement déprécié parce qu'il s'agit de la seule méthode d'évaluation proposée à l'arbitre qui permet de fixer l'indemnité visant les améliorations séparément de l'indemnité visant les droits, ce qui est conforme au traitement distinct que leur réserve la *Revitalization Act*.

e) De toute façon, il est impossible d'interpréter la *Revitalization Act* en fonction des autres principales méthodes proposées à l'audience — celle de la valeur marchande et celle fondée sur le revenu — parce que ces méthodes sont inapplicables aux terres de la Couronne, qui ne peuvent ni être vendues ni générer de revenu.

[89] Ce raisonnement est soutenable et compréhensible, et donc raisonnable. Comme l'ont conclu le juge en chef Bauman (par. 52) et le juge en chef Finch, dissident (par. 141-143), il est logique de lier le montant de l'indemnité visant les améliorations à « la valeur des améliorations apportées aux terres de la Couronne » quand c'est précisément ce que

quantum of Improvements Compensation to "the value of improvements made to Crown land" is the stronger plain language interpretation of the *Revitalization Act*.

prescrit la *Revitalization Act*. D'ailleurs, le fait de lier le montant de l'indemnité visant les améliorations à « la valeur des améliorations apportées aux terres de la Couronne » constitue la meilleure interprétation fondée sur le sens ordinaire que l'on puisse donner à la *Revitalization Act*.

(3) BC's Arguments Against the Award

(3) Arguments de la C.-B. contre la sentence

[90] Conversely, BC's attacks on the reasonableness of the arbitrator's reasoning are, in reality, attacks on the correctness of the arbitrator's reasoning. Similarly, the majority — which misidentified the standard of review as correctness — improperly conducted a correctness review of the arbitrator's decision, rather than assessing its reasonableness (para. 68). This tainted their whole analysis of the decision.

[90] Inversement, les attaques de la C.-B. contre le caractère raisonnable du raisonnement de l'arbitre sont en réalité des attaques contre la justesse de ce raisonnement. De même, les juges majoritaires — qui ont fait erreur en considérant que la norme de contrôle applicable était celle de la décision correcte — ont procédé à tort au contrôle de la décision de l'arbitre suivant cette norme, plutôt que d'en apprécier le caractère raisonnable (par. 68), ce qui a entaché toute leur analyse de la décision.

[91] BC's first argument addresses the plain language interpretation of the compensation provision. BC's position is based on a truncated version of the compensation provision, where BC interprets the word "compensation" in isolation and reasons that such compensation must be limited to Teal Cedar's actual financial loss. This was, similarly, the approach taken by the majority of the Court of Appeal in its first decision (paras. 68 and 72-73) and subsequently by the Court of Appeal on remand (para. 38). However, the complete version of the compensation provision sets the value of the compensation at "an amount equal to the value of improvements made to Crown land", as noted by Bauman C.J. (para. 52), and affirmed by Finch C.J., dissenting (paras. 141-43). If that amount exceeds Teal Cedar's actual loss, such reasoning falls far short of indefensible, especially in so far as the arbitrator's chosen methodology is: (1) consistent with common law principles informing the liberal interpretation of remedial expropriation legislation (*Toronto Area Transit Operating Authority v. Dell Holdings Ltd.*, [1997] 1 S.C.R. 32, at pp. 44-46, as noted by Bauman C.J. (paras. 46-48)); and (2) the only methodology of the three presented which reflects the *Revitalization Act*'s deliberate separation of Rights Compensation and Improvements Compensation, also noted by Bauman C.J. (para. 63). Recall that the issue on

[91] Le premier argument de la C.-B. traite de l'interprétation fondée sur le sens ordinaire de la disposition d'indemnisation. La position de la C.-B. repose sur une version tronquée de la disposition d'indemnisation, où la C.-B. interprète isolément le terme « indemnité » et soutient que celle-ci ne doit pas être supérieure à la perte financière réelle de Teal Cedar. Il s'agit également de la démarche retenue par la majorité de la Cour d'appel dans sa première décision (par. 68 et 72-73), puis par la Cour d'appel à la suite du renvoi (par. 38). Or, la version complète de la disposition d'indemnisation fixe la valeur de l'indemnité à [TRADUCTION] « [un montant] éga[l] à la valeur des améliorations apportées aux terres de la Couronne », comme l'a souligné le juge en chef Bauman (par. 52) et l'a confirmé le juge en chef Finch, dissident (par. 141-143). Si ce montant excède la perte réelle de Teal Cedar, un tel raisonnement est très loin d'être indéfendable, surtout dans la mesure où la méthode choisie par l'arbitre : (1) est conforme aux principes de common law qui sous-tendent l'interprétation libérale des lois réparatrices en matière d'expropriation (*Régie des transports en commun de la région de Toronto c. Dell Holdings Ltd.*, [1997] 1 R.C.S. 32, p. 44-46, dont a fait état le juge en chef Bauman (par. 46-48)); et (2) constitue la seule méthode parmi les trois proposées qui reflète la distinction entre l'indemnité visant les droits

review is not whether the arbitrator's interpretation was correct, but rather whether that interpretation — which is supported by the plain language of the provision — was reasonable.

[92] My colleagues suggest that the "obvious ordinary meaning" of the compensation provision limits compensation to Teal Cedar's "limited interest in the improvements as a licence holder" (para. 112). I respectfully disagree that this is the only reasonable interpretation of the provision at issue. Admittedly, the provision mentions that this compensation is paid to licence holders. But it makes no mention of limiting compensation in accordance with the nature of a licence holder's technical legal interest. Rather, it sets compensation equal to the "value of improvements made to Crown land", the interpretation ultimately adopted by the arbitrator.

[93] BC's second argument addresses the purpose of the compensation provision. BC claims that the purpose of the compensation provision — i.e. paying back companies for the improvements they made and to which they were subsequently denied access — precludes a "windfall" payment to companies equal to the notional "value of [all] improvements made to Crown land". The majority of the Court of Appeal in its first decision (at para. 73) and subsequently the Court of Appeal on remand (at para. 38) similarly felt that "[t]he Legislature could not have intended" such a "publicly financed windfall" in compensation. Likewise, my colleagues label this "gross overcompensation" effectively on the basis that it exceeded the market value of the improvements (para. 134-36). But characterizing the payment resulting from the Depreciation Replacement Cost Method as a windfall begs the question, i.e. it assumes that compensation equal to the "value of [all] improvements" is excessive in the course of explaining that excess. To result in a windfall, the method would have to provide excessive compensation to forestry companies. And BC's basis for claiming that excessive compensation was paid in

et l'indemnité visant les améliorations prévue délibérément par la *Revitalization Act*, dont a également fait état le juge en chef Bauman (par. 63). Rappelons que la question à l'examen n'est pas de savoir si l'interprétation de l'arbitre était correcte, mais plutôt de savoir si cette interprétation — étayée par le sens ordinaire de la disposition — était raisonnable.

[92] Mes collègues suggèrent que le « sens ordinaire [. . .] évident » de la disposition d'indemnisation fait en sorte que l'indemnité ne doit pas dépasser l'« intérêt limité [de Teal Cedar] dans les améliorations en tant que titulaire de permis » (par. 112). Soit dit en tout respect, je ne suis pas d'accord qu'il s'agit là de la seule interprétation raisonnable de la disposition en cause. Certes, la disposition indique que cette indemnité est versée aux titulaires de permis, mais elle ne parle pas de la limiter en fonction de la nature de l'intérêt légal technique que possède un titulaire de permis. Elle fixe plutôt l'indemnité à un montant égal à la « valeur des améliorations apportées aux terres de la Couronne », soit l'interprétation retenue en fin de compte par l'arbitre.

[93] Le deuxième argument de la C.-B. porte sur l'objet de la disposition d'indemnisation. La C.-B. soutient que cet objet — c.-à-d. de rembourser les entreprises des améliorations qu'elles ont effectuées et auxquelles elles se sont vu par la suite refuser l'accès — empêche les entreprises de réaliser un [TRADUCTION] « gain fortuit » égal à la « valeur [nominale] de [toutes] les améliorations apportées aux terres de la Couronne ». La majorité de la Cour d'appel dans sa première décision (par. 73), puis la Cour d'appel à la suite du renvoi (par. 38) partageaient l'avis que [TRADUCTION] « [l]e législateur ne pouvait avoir souhaité » un tel « gain fortuit financé à même les fonds publics » en guise d'indemnité. Dans le même ordre d'idées, mes collègues qualifient en fait cette indemnité de « nettement excessive » au motif qu'elle excède la valeur marchande des améliorations (par. 134-136). Or, le fait de qualifier le paiement résultant de la méthode du coût de remplacement déprécié de gain fortuit élude la question, en ce qu'on tient ainsi pour acquis qu'une indemnité égale à la « valeur de [toutes] les améliorations » est excessive alors qu'on est en train d'expliquer cet excès. Pour donner lieu à un gain fortuit, il faudrait

this case is the assumption that it was inappropriate for the arbitrator to order compensation in excess of Teal Cedar's actual costs, despite the absence of any reference in the *Revitalization Act* limiting Teal Cedar's compensation to its actual costs or expenses.

que la méthode accorde une indemnité excessive aux entreprises forestières. Mais la C.-B. appuie sa prétention voulant qu'une indemnité excessive ait été payée en l'espèce sur la supposition selon laquelle il ne convenait pas que l'arbitre ordonne le paiement d'une indemnité supérieure aux frais réels de Teal Cedar, et ce, malgré l'absence dans la *Revitalization Act* de toute disposition limitant l'indemnité de Teal Cedar à ses frais ou dépenses réels.

[94] The full "value of improvements made to Crown land" is the language chosen by the legislature as the quantum for the compensation provision. If the BC legislature had wanted to pay companies less than the "value of improvements made to Crown land", it would not have set the amount of compensation "equal to" it. As a consequence, the arbitrator's reasoning is hardly indefensible, particularly when the wording of the compensation provision so clearly fixes compensation at the specific amount chosen by the arbitrator. Further, it is hardly indefensible to select a valuation method in excess of the actual costs incurred by forestry companies in improving their Crown land when the commercial value of those improvements — which are necessary instruments in Teal Cedar's complex and profitable timber operations — presumably exceeds the initial costs required to install the improvements in the first place. Indeed, one could argue that the notional cost of constructing the improvements attached to certain licences was built in to the cost of procuring the licence, hence justifying compensation when access to those improvements was restricted.

[94] La pleine « valeur des améliorations apportées aux terres de la Couronne » est l'expression choisie par le législateur pour désigner le montant de l'indemnité dans la disposition d'indemnisation. Si le législateur de la C.-B. avait voulu verser aux entreprises une indemnité inférieure à la « valeur des améliorations apportées aux terres de la Couronne », il n'aurait pas prévu une indemnité « égale à » celle-ci. Le raisonnement de l'arbitre n'est donc guère indéfendable, d'autant plus que le libellé de la disposition d'indemnisation fixe clairement l'indemnité au montant précisément établi par l'arbitre. En outre, il n'est guère indéfendable de choisir une méthode d'évaluation qui donne une indemnité excédant les frais réellement engagés par les entreprises forestières pour apporter des améliorations à leurs terres de la Couronne lorsque la valeur commerciale de ces améliorations — qui sont des instruments nécessaires aux activités forestières complexes et lucratives de Teal Cedar — excède vraisemblablement les coûts initiaux qui ont dû être supportés pour les installer au départ. En effet, on pourrait soutenir que le coût théorique de construction des améliorations se rapportant à certains permis était incorporé dans le coût d'obtention du permis, ce qui justifierait une indemnité lorsque l'accès à ces améliorations a été restreint.

[95] As such, the desire to limit Teal Cedar's compensation to its actual loss or damage or to what it lost through BC's takebacks is more complex than one might think, further justifying deference to the arbitrator's view of the abundant expert evidence before him. For example, my colleagues hold that the compensation should reflect how Teal Cedar only lost its right to use the improvements, not the improvements themselves (para. 123). But the arbitrator was clearly alive to this concern when he noted

[95] Ainsi, le désir de restreindre l'indemnité de Teal Cedar à la perte ou aux dommages qu'elle a réellement subis par suite des reprises de la C.-B. est plus complexe qu'on ne le croit, ce qui justifie d'autant plus que l'on fasse preuve de déférence envers l'opinion que s'est fait l'arbitre devant l'abondante preuve d'expert dont il disposait. Par exemple, mes collègues concluent que l'indemnité doit tenir compte du fait que Teal Cedar a seulement perdu son droit d'utiliser les améliorations, et non

that the amount of compensation he ultimately determined was lower than Teal Cedar's actual historical costs expended on improvements (para. 140), and when he deducted from his final compensation figure spur roads which, as a matter of fact, are useless after their initial use (para. 166). Similarly, my colleagues state that Teal Cedar was already compensated "for future construction costs through deductions from stumpage fees" (para. 126). But, as the arbitrator explained with reference to the record before him, stumpage (1) ultimately affects the value of the harvesting rights, compensation for which the parties settled on (para. 127); (2) was not even considered in the recognized valuation methodology he ultimately adopted (para. 127); and (3) cannot negate Improvements Compensation since the compensation provision presupposes compensation not captured by other avenues, such as reduced stumpage fees (para. 156).

[96] In reality, BC's "windfall" complaint is not that Teal Cedar received more compensation than the *Revitalization Act* requires in law, but rather, that Teal Cedar received more compensation than it allegedly deserved in fact. But the arbitrator's role in interpreting the *Revitalization Act* is not to assess the amount of compensation morally owed to Teal Cedar; it is to assess the amount of compensation prescribed by the *Revitalization Act*.

[97] BC's third argument is based on discussion of the *Revitalization Act* in Hansard, where the former Minister of Forests described how the compensation provision intended to compensate forestry companies for the fact that they had actual financial costs associated with their improvements: "They have built roads; they have built bridges. They deserve to be compensated for those costs if they are precluded from utilizing that infrastructure to harvest areas that are going to be redistributed elsewhere" (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 13, No. 6, 4th Sess.,

les améliorations elles-mêmes (par. 123). Or, l'arbitre était clairement sensible à cette préoccupation quand il a fait remarquer que le montant de l'indemnité qu'il a fixé en définitive était inférieur aux frais réels engagés auparavant par Teal Cedar pour les améliorations (par. 140), et quand il a soustrait du montant final de l'indemnité les chemins de desserte qui, en fait, ne servent à rien après leur utilisation initiale (par. 166). De même, mes collègues affirment que Teal Cedar avait déjà été indemnisée « des coûts de construction futurs au moyen de déductions sur les droits de souche » (par. 126). Mais comme l'a expliqué l'arbitre en prenant appui sur le dossier qui lui a été présenté, les droits de souche (1) influent en définitive sur la valeur des droits de coupe, une indemnité sur laquelle les parties se sont entendues (par. 127); (2) n'ont même pas été pris en considération dans la méthode d'évaluation reconnue qu'il a fini par choisir (par. 127); et (3) ne peuvent servir à exclure une indemnité visant les améliorations puisque la disposition d'indemnisation sous-entend l'existence d'une indemnité non couverte par d'autres solutions telles qu'une réduction des droits de souche (par. 156).

[96] En réalité, la contestation de la C.-B. relative au « gain fortuit » ne tient pas au fait que Teal Cedar a reçu une indemnité plus élevée que ce que la *Revitalization Act* exige en droit, mais plutôt au fait que Teal Cedar a reçu une indemnité plus élevée que ce qu'elle aurait mérité en fait. Or, le rôle de l'arbitre dans l'interprétation de la *Revitalization Act* n'est pas d'évaluer le montant d'indemnité moralement dû à Teal Cedar; il doit évaluer le montant d'indemnité prescrit par la *Revitalization Act*.

[97] Le troisième argument de la C.-B. repose sur un examen de la *Revitalization Act* consigné dans le Hansard, où l'ancien ministre des Forêts a expliqué en quoi la disposition d'indemnisation visait à indemniser les entreprises forestières du fait qu'elles avaient supporté des coûts financiers réels relativement à leurs améliorations : [TRADUCTION] « Elles ont construit des routes; elles ont construit des ponts. Elles méritent d'être indemnisées de ces coûts si elles ne peuvent pas utiliser ces infrastructures pour exploiter des zones qui seront redistribuées ailleurs » (Colombie-Britannique, *Official Report*

37th Parl., March 27, 2003, at p. 5682 (Hon. M. de Jong)). But Hansard only goes so far. The words of a statute carry paramount importance in its interpretation. And the final wording of the compensation provision specifies that "compensation" will equal the "value of improvements made to Crown land". If the legislative intent was to capture actual costs, the compensation provision could have stated that "compensation" will be equal to, for example, the "expenses incurred by licensees to improve Crown land during their licence" or to the "actual costs paid by licensees to improve Crown land during their licence". Indeed, assuming that the legislative intent is actually to compensate companies for the full value of improvements on the Crown land to which their licences relate, I am hard-pressed to think of clearer phrasing to convey that intent than the current language of the compensation provision.

[98] BC's final argument addresses the nature of Teal Cedar's interest in the Crown land on which the improvements are located. BC argues that, by paying Teal Cedar for the full value of the improvements, the arbitrator presumed that Teal Cedar owned the assets and lost them under the *Revitalization Act*, whereas Teal Cedar lost only its right to use the assets. This argument ultimately fails to show the unreasonableness of the arbitrator's analysis for the same reason as the other attacks discussed above. Simply put, Teal Cedar was paid "an amount equal to the value of improvements" because that is what the compensation provision instructs. When the *Revitalization Act* was enacted, BC was no doubt well aware of the nature of forestry companies' interests in the improvements. Still, BC chose the language of the compensation provision, making no express link between those interests and the amount of compensation owed. As Bauman C.J. observed, Teal Cedar's interest in the improvements is "wholly irrelevant" because its compensation, and the amount thereof, is a statutory creation under the compensation provision (para. 52). In the end, the legislature is entitled

*of Debates of the Legislative Assembly (Hansard)*, vol. 13, n$^{o}$ 6, 4$^{e}$ sess., 37$^{e}$ lég., 27 mars 2003, p. 5682 (l'hon. M. de Jong)). Or, le Hansard ne va pas plus loin. Les termes d'une loi sont d'une importance primordiale pour son interprétation. Et la dernière phrase de la disposition d'indemnisation précise que l'« indemnité » sera égale à la « valeur des améliorations apportées aux terres de la Couronne ». Si le législateur avait voulu prendre en compte les coûts réels, la disposition d'indemnisation aurait pu disposer que l'« indemnité » sera égale, par exemple, aux [TRADUCTION] « dépenses engagées par les titulaires de permis pour apporter des améliorations aux terres de la Couronne pendant la période visée par leur permis » ou aux « coûts réellement supportés par les titulaires de permis pour apporter des améliorations aux terres de la Couronne pendant la période visée par leur permis ». Du reste, à supposer que le législateur souhaitait vraiment indemniser les entreprises de la pleine valeur des améliorations apportées aux terres de la Couronne auxquelles se rapportent leurs permis, j'ai peine à imaginer une formulation plus claire pour exprimer cette intention que le libellé actuel de la disposition d'indemnisation.

[98] Le dernier argument de la C.-B. touche la nature de l'intérêt de Teal Cedar dans les terres de la Couronne où se trouvent les améliorations. La C.-B. soutient qu'en remboursant Teal Cedar de la pleine valeur des améliorations, l'arbitre a présumé que Teal Cedar était propriétaire des actifs et qu'elle les a perdus par application de la *Revitalization Act*, alors que Teal Cedar a perdu uniquement le droit de se servir des actifs. En fin de compte, cet argument n'établit pas le caractère déraisonnable de l'analyse de l'arbitre pour le même motif que celui énoncé à l'égard des autres attaques exposées précédemment. En termes simples, Teal Cedar a touché [TRADUCTION] « [une somme] égale à la valeur des améliorations » parce que c'est ce que prévoit la disposition d'indemnisation. Quand la *Revitalization Act* a été adoptée, la C.-B. était sans aucun doute bien consciente de la nature des intérêts des entreprises forestières sur les améliorations, ce qui ne l'a pas empêchée de choisir le libellé de la disposition d'indemnisation en n'établissant aucun lien explicite entre ces intérêts et le montant d'indemnité dû. Comme l'a fait remarquer le juge en chef Bauman, l'intérêt de Teal Cedar sur

to provide forestry companies with statutory compensation that is not quantified on the basis of the nature of their interests in the Crown land at issue. Put differently, it is hardly indefensible to rely on the plain language of the *Revitalization Act* for purposes of quantifying compensation, even if extra-statutory references to the nature of Teal Cedar's interest may not align with the quantum of compensation flowing from that plain language.

les améliorations n'est [TRADUCTION] « absolument pas pertinent » parce que son indemnité, et le montant de celle-ci, tirent leur origine de la disposition d'indemnisation (par. 52). Au bout du compte, le législateur a le droit d'offrir aux entreprises forestières une indemnité prévue par la loi dont le montant n'est pas fonction de la nature de leur intérêt dans la terre de la Couronne en cause. Autrement dit, il n'est guère indéfendable de s'appuyer sur le sens ordinaire de la *Revitalization Act* pour fixer le montant de l'indemnité même si des allusions non prévues par la loi à la nature de l'intérêt de Teal Cedar peuvent ne pas concorder avec le montant d'indemnité découlant de ce sens ordinaire.

[99] In short, BC's attacks on the arbitrator's reasoning are collateral attacks on the correctness of the arbitrator's reasonable plain language and contextual interpretation of the compensation provision. The decisions of the majority of the Court of Appeal and of the Court of Appeal on remand similarly focused on assessing correctness rather than reasonableness. My colleagues' emphasis on Teal Cedar's "limited interest" in the improvements is also more akin to "disguised correctness" review (*Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29, [2016] 1 S.C.R. 770, at para. 27, citing D. Mullan, "Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen!" (2013), 42 *Adv. Q.* 1, at pp. 76-81) than the reasonableness review required. In the end, these approaches fail to show how the arbitrator's decision is unjustifiable, non-transparent, unintelligible, or indefensible. In my assessment, the arbitrator's decision cannot be overturned on a reasonableness review.

[99] Bref, les attaques de la C.-B. contre le raisonnement de l'arbitre constituent des attaques indirectes contre la justesse de l'interprétation fondée sur le sens ordinaire et le contexte que l'arbitre a donnée à la disposition d'indemnisation. Dans la décision des juges majoritaires de la Cour d'appel et celle rendue par la Cour d'appel à la suite du renvoi, ce tribunal a retenu la même démarche axée sur l'appréciation du caractère correct plutôt que sur celle du caractère raisonnable. En outre, l'accent que mes collègues mettent sur l'« intérêt limité » de Teal Cedar dans les améliorations s'apparente davantage à un contrôle « [déguisé] » selon la norme de la décision correcte (*Wilson c. Énergie Atomique du Canada Ltée*, 2016 CSC 29, [2016] 1 R.C.S. 770, par. 27, citant D. Mullan, « Unresolved Issues on Standard of Review in Canadian Judicial Review of Administrative Action — The Top Fifteen! » (2013), 42 *Adv. Q.* 1, p. 76-81) qu'au contrôle selon la norme de la décision raisonnable qui s'impose ici. Au bout du compte, ces approches ne démontrent pas en quoi la décision de l'arbitre est injustifiable, non transparente, inintelligible ou indéfendable. La décision de l'arbitre ne peut être infirmée sur la base d'un contrôle selon la norme de la décision raisonnable.

## VI. Conclusion

[100] To sum up, I would allow the appeal in part, with costs throughout to Teal Cedar, who was substantially successful on appeal.

## VI. Conclusion

[100] En résumé, je suis d'avis d'accueillir le pourvoi en partie avec dépens dans toutes les cours en faveur de Teal Cedar, qui a eu gain de cause en majeure partie en appel.

[101] As Bauman C.J. (at para. 57) and Finch C.J., dissenting (at paras. 141-43), rightly held, the arbitrator reasonably relied on the Depreciation Replacement Cost Method of valuation. I would therefore overturn the Court of Appeal's holding to the contrary on remand (para. 38) and restore the arbitrator's initial valuation, as subsequently amended, predicated on that methodology.

[101] Comme le juge en chef Bauman (par. 57) et le juge en chef Finch, dissident (par. 141-143), l'ont conclu à bon droit, l'arbitre s'est raisonnablement appuyé sur la méthode d'évaluation fondée sur le coût de remplacement déprécié. Je suis donc d'avis d'infirmer la conclusion contraire que la Cour d'appel a tirée à la suite du renvoi (par. 38) et de rétablir l'évaluation initiale de l'arbitre qui repose sur cette méthode.

[102] Further, Bauman C.J. (at para. 81) and Finch C.J., dissenting (at paras. 144-45), correctly ruled that the British Columbia Supreme Court lacked jurisdiction to review the arbitrator's resolution of the Interest Issue. Consequently, I would also overturn the Court of Appeal's holding to the contrary on remand (para. 58) and restore the arbitrator's initial ruling that BC must pay interest on top of the Improvements Compensation it owes to Teal Cedar.

[102] De plus, le juge en chef Bauman (par. 81) et le juge en chef Finch, dissident (par. 144-145), ont statué à juste titre que la Cour suprême de la Colombie-Britannique n'avait pas compétence pour contrôler la décision de l'arbitre sur la question des intérêts. Par conséquent, je suis également d'avis d'infirmer la conclusion contraire que la Cour d'appel a tirée à la suite du renvoi (par. 58) et de rétablir la décision initiale de l'arbitre selon laquelle la C.-B. doit payer des intérêts en sus de l'indemnité visant les améliorations qu'elle doit à Teal Cedar.

[103] However, Bauman C.J. improperly remitted the Lillooet Issue to the arbitrator for reconsideration (para. 88), since the British Columbia Supreme Court lacked jurisdiction over this issue. Accordingly, albeit for different reasons than the Court of Appeal, I would restore the arbitrator's initial ruling denying compensation to Teal Cedar for improvements losses pertaining to the Lillooet Licence.

[103] Cependant, le juge en chef Bauman a renvoyé à tort la question du permis Lillooet à l'arbitre pour nouvel examen (par. 88), car la Cour suprême de la Colombie-Britannique n'avait pas compétence sur cette question. Par conséquent, quoique pour d'autres motifs que ceux de la Cour d'appel, je suis d'avis de rétablir la décision initiale de l'arbitre de refuser d'accorder à Teal Cedar une indemnité pour les pertes liées aux améliorations touchant le permis Lillooet.

The reasons of Moldaver, Côté, Brown and Rowe JJ. were delivered by

Version française des motifs des juges Moldaver, Côté, Brown et Rowe rendus par

MOLDAVER AND CÔTÉ JJ. (dissenting in part) —

LES JUGES MOLDAVER ET CÔTÉ (dissidents en partie) —

## I. Introduction

## I. Introduction

[104] This appeal concerns the compensation payable to a private forestry company, Teal Cedar Products Ltd. ("Teal"), for reductions made by British Columbia ("Province") to three of its forest tenures. Two questions are at issue in this case: one relates to the contractual interpretation of an amended settlement agreement made between the

[104] Le présent pourvoi porte sur l'indemnité payable à une entreprise forestière privée, Teal Cedar Products Ltd. (« Teal »), pour les réductions apportées par la Colombie-Britannique (« Province ») à trois de ses tenures forestières. Deux questions sont en litige en l'espèce : la première a trait à l'interprétation contractuelle d'une

Province and Teal, and the other regards the statutory interpretation of s. 6(4) of the *Forestry Revitalization Act*, S.B.C. 2003, c. 17 ("*FRA*").

[105] We agree with our colleague Gascon J. that the question of contractual interpretation is not reviewable under s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55. We would allow the appeal on this issue.

[106] Where we disagree, however, is with respect to the question of statutory interpretation. In our view, regardless of the applicable standard of review, the arbitrator's interpretation of s. 6(4) of the *FRA* cannot stand. As we will explain, the only interpretation of s. 6(4) that withstands scrutiny on either standard of review is that Teal, as a licence holder, was entitled to receive compensation only for its limited interest in the improvements. In valuing the improvements under s. 6(4), the arbitrator was required to take into account that Teal, as a licence holder, did not own the improvements, which belonged to the Crown. The arbitrator did not do that. Rather, he selected a valuation method — the cost savings approach — which failed to consider that Teal had only a limited interest in the improvements as a licence holder and was therefore not entitled to compensation on that basis under s. 6(4).

[107] We would therefore dismiss the appeal in part on the statutory interpretation issue and remit to the arbitrator the matter of compensation for the improvements relating to the three licences held by Teal.

II. Standard of Review

[108] We find it unnecessary to decide whether the standard of review applicable to the arbitrator's interpretation of s. 6(4) of the *FRA* is correctness or reasonableness. As we will explain, on either standard, the arbitrator's interpretation cannot stand.

convention de règlement modifiée conclue entre la Province et Teal, et la seconde concerne l'interprétation législative du par. 6(4) de la *Forestry Revitalization Act*, S.B.C. 2003, c. 17 (« *FRA* »).

[105] Nous convenons avec notre collègue le juge Gascon que la question de l'interprétation contractuelle n'est pas susceptible de contrôle au titre de l'art. 31 de l'*Arbitration Act*, R.S.B.C. 1996, c. 55. Nous sommes d'avis d'accueillir le pourvoi sur ce point.

[106] Nous divergeons cependant d'opinion sur la question de l'interprétation législative. À notre avis, peu importe la norme de contrôle applicable, l'interprétation que l'arbitre a donnée au par. 6(4) de la *FRA* ne tient pas. Comme nous l'expliquerons, la seule interprétation du par. 6(4) qui résiste à un examen selon l'une ou l'autre norme de contrôle est celle selon laquelle Teal, en tant que titulaire de permis, n'avait le droit de recevoir une indemnité que pour son intérêt limité dans les améliorations. En évaluant les améliorations en vertu du par. 6(4), l'arbitre devait tenir compte du fait que Teal, en tant que titulaire de permis, n'était pas propriétaire des améliorations, lesquelles appartenaient à la Couronne. Il ne l'a pas fait. Il a plutôt retenu une méthode d'évaluation — soit l'approche fondée sur les économies de coûts — qui ne tenait pas compte du fait que Teal n'avait qu'un intérêt limité dans les améliorations en tant que titulaire de permis et que, par conséquent, elle n'avait pas droit à une indemnité à ce titre en vertu du par. 6(4).

[107] Nous sommes donc d'avis de rejeter en partie le pourvoi sur la question de l'interprétation législative et de renvoyer à l'arbitre la question de l'indemnité payable pour les améliorations se rapportant aux trois permis détenus par Teal.

II. Norme de contrôle

[108] Nous n'estimons pas nécessaire de décider si la norme de contrôle applicable à l'interprétation que l'arbitre a donnée au par. 6(4) de la *FRA* est celle de la décision correcte ou celle de la décision raisonnable. Comme nous l'expliquerons, quelle que soit la norme de contrôle applicable, l'interprétation de l'arbitre ne tient pas.

III. Analysis

(1) Section 6 of the *FRA*

[109] The Minister of Forests grants permission to private forestry companies like Teal to harvest timber on Crown land by issuing licences under the *Forest Act*, R.S.B.C. 1996, c. 157. Under these licences, private forestry companies have rights to harvest timber in certain areas and use the improvements in those areas. Three such licences are at issue in this appeal: Tree Farm Licence 46, the Fraser Licence and the Lillooet Licence. Following the enactment of the *FRA*, the Province was permitted to reduce the land base and allowable annual cut of timber under these licences. As a result of the Province's takebacks, Teal's rights to harvest timber and use the improvements were reduced.

[110] Section 6 of the *FRA* provides for compensation to licence holders for these reductions. Section 6(3) entitles the licence holder to compensation "in an amount equal to the value . . . of the harvesting rights taken by means of the reduction". The licence holder is also entitled to receive compensation for the "value of improvements made to Crown land" under s. 6(4). This provision reads as follows:

> (4) In addition to the compensation to which the holder of an ungrouped licence, a timber licence or a licence in a group of licences is entitled under subsection (1), (2) or (3), <u>the holder is entitled to compensation from the government in an amount equal to the value of improvements made to Crown land</u> that
>
> (a) are, or have been, authorized by the government,
>
> (b) are not improvements to which section 174 of the *Forest Practices Code of British Columbia Act* applies, and
>
> (c) are not, or have not been, paid for by the government under the *Forest Act* or the former Act as defined in the *Forest Act*.

III. Analyse

(1) Article 6 de la *FRA*

[109] Le ministre des Forêts accorde à des entreprises forestières privées comme Teal l'autorisation de couper du bois sur les terres de la Couronne en leur délivrant des permis en vertu de la *Forest Act*, R.S.B.C. 1996, c. 157. Selon ces permis, les entreprises forestières privées peuvent couper du bois dans certaines zones et utiliser les améliorations qui s'y trouvent. Trois de ces permis sont en cause dans le présent pourvoi : le permis de ferme forestière 46, le permis Fraser et le permis Lillooet. Avec l'adoption de la *FRA*, la Province a pu réduire le territoire et la coupe de bois annuelle autorisée par ces permis. À la suite des reprises effectuées par la Province, les droits de Teal de couper du bois et d'utiliser les améliorations dans ces zones ont été réduits.

[110] L'article 6 de la *FRA* prévoit le versement d'une indemnité aux titulaires de permis pour ces réductions. Selon le par. 6(3), le titulaire de permis a droit à une indemnité [TRADUCTION] « égal[e] à la valeur des droits de coupe retirés au moyen de la réduction ». Le titulaire de permis a également droit à une indemnité équivalant à la « valeur des améliorations apportées aux terres de la Couronne » en vertu du par. 6(4). Voici le texte de cette disposition :

[TRADUCTION]

> (4) Outre l'indemnité à laquelle a droit le titulaire d'un permis distinct, d'un permis d'exploitation ou d'un permis faisant partie d'un groupe de permis en vertu du paragraphe (1), (2) ou (3), <u>le titulaire a droit, de la part du gouvernement, à une indemnité égale à la valeur des améliorations apportées aux terres de la Couronne</u> :
>
> (a) qui sont ou ont été autorisées par le gouvernement,
>
> (b) auxquelles ne s'applique pas l'article 174 du *Forest Practices Code of British Columbia Act*, et
>
> (c) qui ne sont pas ou n'ont pas été payées par le gouvernement conformément à la *Forest Act* ou à l'ancienne loi au sens de la *Forest Act*.

[111] The modern principle of statutory interpretation is well-established:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

(E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87)

[112] This principle requires that statutes "be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur": *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21-22. The plain and ordinary meaning of a statutory provision is the "natural meaning which appears when the provision is simply read through": *Canadian Pacific Air Lines Ltd. v. Canadian Air Line Pilots Assn.*, [1993] 3 S.C.R. 724, at p. 735. In our view, the plain and ordinary meaning of s. 6(4) of the *FRA*, which accords with the purpose and context of the Act, is this: the licence holder is entitled to receive compensation for the improvements on a basis that reflects its limited interest in the improvements as a licence holder.

(2) The Plain and Ordinary Meaning of Section 6(4) of the *FRA*

[113] The meaning of "compensation" is understood to be a payment that makes a person whole for a loss. Compensation is defined by the *Shorter Oxford English Dictionary* (6th ed. 2007) as "amends, recompense; *spec.* money given to compensate loss or injury" (p. 470). Under s. 6(4) of the *FRA*, Teal is entitled to receive compensation *equal to* the value of improvements made to Crown land. If the compensation is to make Teal whole, the value of the improvements must reflect Teal's actual loss.

[111] Le principe moderne d'interprétation des lois est bien établi :

> [TRADUCTION] Aujourd'hui il n'y a qu'un seul principe ou solution : il faut lire les termes d'une loi dans leur contexte global en suivant le sens ordinaire et grammatical qui s'harmonise avec l'économie de la loi, l'objet de la loi et l'intention du législateur.

(E. A. Driedger, *Construction of Statutes* (2e éd. 1983), p. 87)

[112] Selon ce principe, les lois « doivent être interprétées de manière à donner aux mots leur sens ordinaire le plus évident qui s'harmonise avec le contexte et l'objet visé par la loi dans laquelle ils sont employés » : *CanadianOxy Chemicals Ltd. c. Canada (Procureur général)*, [1999] 1 R.C.S. 743, para. 14; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 R.C.S. 27, par. 21-22. Le sens ordinaire d'une disposition législative constitue simplement le « sens naturel qui se dégage de la simple lecture de la disposition » : *Lignes aériennes Canadien Pacifique Ltée c. Assoc. canadienne des pilotes de lignes aériennes*, [1993] 3 R.C.S. 724, p. 735. À notre avis, le sens ordinaire du par. 6(4) de la *FRA* qui s'harmonise avec l'objet et le contexte de la Loi est le suivant : le titulaire de permis a le droit de recevoir une indemnité pour les améliorations, sur la base de son intérêt limité dans les améliorations en tant que titulaire de permis.

(2) Le sens ordinaire du par. 6(4) de la *FRA*

[113] Le sens du terme [TRADUCTION] « indemnité » (*compensation*) réfère à une somme versée en réparation intégrale d'une perte. Le *Shorter Oxford English Dictionary* (6e éd. 2007) définit l'indemnité comme une « réparation ou compensation; *spécialt* argent remis en guise de compensation d'une perte ou d'un préjudice » (p. 470). Selon le par. 6(4) de la *FRA*, Teal a droit à une indemnité *égale à* la valeur des améliorations apportées aux terres de la Couronne. Pour que l'indemnité constitue une réparation intégrale, la valeur des améliorations doit correspondre à la perte réelle de Teal.

[114] The provision further specifies that Teal, as a "holder of . . . a licence", is compensated for the "value of improvements made to Crown land". This language makes plain that the improvements do not belong to Teal. As a licence holder, Teal merely acquires limited rights to *use* the improvements. The ownership rights over the improvements remain vested in the Crown.

[114] Cette disposition précise en outre que Teal, en tant que [TRADUCTION] « titulaire d'un permis », a droit à une indemnité correspondant à la « valeur des améliorations apportées aux terres de la Couronne ». Ce libellé indique clairement que les améliorations n'appartiennent pas à Teal. En tant que titulaire de permis, Teal acquiert seulement un droit restreint d'*utiliser* les améliorations. Les droits de propriété sur les améliorations restent dévolus à la Couronne.

[115] On a plain reading, the provision at issue entitles Teal to compensation for the value of the improvements *to Teal* as a licence holder. If the valuation of the improvements does not take into account the fact that Teal has a limited interest in the improvements — as opposed to an ownership interest — then Teal will not receive "compensation" under s. 6(4); rather, it will receive overcompensation.

[115] Suivant son sens ordinaire, la disposition en litige accorde à Teal le droit de toucher une indemnité correspondant à la valeur des améliorations *pour Teal* en tant que titulaire de permis. Si l'évaluation des améliorations ne tient pas compte du fait que Teal a un intérêt limité dans les améliorations, par opposition à un droit de propriété, Teal recevra non pas une « indemnité » au sens du par. 6(4), mais une indemnité excessive.

### (3) The Purpose and Context of the *FRA*

### (3) L'objet et le contexte de la *FRA*

[116] The plain and ordinary meaning of s. 6(4) is that Teal is entitled to be compensated on a basis that reflects its limited interest in the improvements as a licence holder. This plain meaning of s. 6(4) is consistent with the purpose of the *FRA* and its expropriation context. The *FRA*'s purpose is to reduce the rights of licence holders — specifically, their rights to harvest timber and use the improvements — and to provide licence holders with compensation for these reductions. As a result of the takebacks at issue, reductions were made to Teal's rights to use the improvements — not ownership rights over such improvements. It runs counter to the purpose of the *FRA* to award Teal compensation that exceeds the value of what it lost due to the takebacks.

[116] Le sens ordinaire du par. 6(4) est le suivant : Teal a le droit d'être indemnisée sur une base reflétant l'intérêt limité qu'elle possède dans les améliorations en tant que titulaire de permis. Ce sens ordinaire du par. 6(4) est compatible avec l'objet de la *FRA* et son contexte d'expropriation. La *FRA* vise à réduire les droits des titulaires de permis, plus particulièrement leurs droits de couper du bois et d'utiliser les améliorations, et à indemniser les titulaires de permis pour ces réductions. À la suite des reprises en litige, Teal a perdu une partie de son droit d'utiliser les améliorations, et non des droits de propriété sur celles-ci. Il va à l'encontre de l'objet de la *FRA* d'accorder à Teal une indemnité excédant la valeur de ce qu'elle a perdu en raison des reprises.

[117] As the arbitrator pointed out, the *FRA* is a "species of expropriation legislation" (Arbitration Award, April 27, 2011, at para. 8). A presumption in favour of a payment of full compensation therefore applies to its interpretation: *British Columbia (Forests) v. Teal Cedar Products Ltd.*, 2013 SCC 51, [2013] 3 S.C.R. 301, at para. 37; E. C. E. Todd, *The Law of Expropriation and Compensation in Canada* (2nd ed. 1992), at p. 35. This presumption, however,

[117] Comme l'a souligné l'arbitre, la *FRA* est une [TRADUCTION] « espèce de loi d'expropriation » (sentence arbitrale, 27 avril 2011, par. 8). Une présomption en faveur d'une indemnisation intégrale s'applique donc à son interprétation : *Colombie-Britannique (Forêts) c. Teal Cedar Products Ltd.*, 2013 CSC 51, [2013] 3 R.C.S. 301, par. 37; E. C. E. Todd, *The Law of Expropriation and Compensation in Canada* (2e éd. 1992), p. 35.

does not mean that the owner of an expropriated property interest is awarded compensation in excess of the value of this interest. Rather, full compensation makes the owner "economically whole" for the loss of this interest (*Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at paras. 55-56, citing *Diggon-Hibben, Ltd. v. The King*, [1949] S.C.R. 712).

Cette présomption n'emporte cependant pas octroi, au propriétaire d'une propriété expropriée, d'une indemnité supérieure à la valeur de cet intérêt. L'indemnisation intégrale ne fait que permettre au propriétaire d'obtenir une « réparation intégrale » de la perte de cet intérêt (*Smith c. Alliance Pipeline Ltd.*, 2011 CSC 7, [2011] 1 R.C.S. 160, par. 55-56, citant *Diggon-Hibben, Ltd. c. The King*, [1949] R.C.S. 712).

[118] When the ordinary meaning of s. 6(4) is read together with the object of the *FRA* and its expropriation context, we are satisfied that its meaning is clear and straightforward: an award of compensation under s. 6(4) must not exceed the value of Teal's limited interest in the improvements as a licence holder.

[118] Considérant le sens ordinaire du par. 6(4) à la lumière de l'objet de la *FRA* et de son contexte d'expropriation, nous sommes convaincus que ce sens est clair et simple : l'indemnité accordée au titre du par. 6(4) ne doit pas dépasser la valeur de l'intérêt limité que Teal possède dans les améliorations en tant que titulaire de permis.

(4) The Arbitrator's Valuation Method

(a) *The Cost Savings Approach*

(4) La méthode d'évaluation de l'arbitre

a) *L'approche fondée sur les économies de coûts*

[119] The arbitrator applied a valuation methodology that he referred to as the "cost savings approach" to assess the compensation owed to Teal under s. 6(4). This approach, which was developed as a valuation method for "private timberlands", values compensation for Teal as if Teal was a private owner of the improvements. As such, it fails to take into account the fact that Teal did not own the improvements but had only a limited interest in them as a licence holder.

[119] L'arbitre a utilisé une méthode d'évaluation qu'il a appelée l'[TRADUCTION] « approche fondée sur les économies de coûts » pour fixer l'indemnité due à Teal en application du par. 6(4). Cette approche, qui a été élaborée en tant que méthode d'évaluation pour les « terres à bois privées », sert à évaluer l'indemnité destinée à Teal comme si cette dernière était le propriétaire privé des améliorations. Par conséquent, elle ne tient pas compte du fait que Teal n'était pas propriétaire des améliorations et n'avait qu'un intérêt limité dans celles-ci comme titulaire de permis.

[120] The cost savings method is based on the depreciated replacement cost of the improvements (Arbitration Award, at para. 75), which is the cost of replacing "the entire useful road and improvement network for the take back areas", namely, "all roads and associated improvements that would access harvestable timber within the taking areas" in their current depreciated condition (para. 81). According to the cost savings methodology, Teal is entitled to compensation for this depreciated replacement cost (para. 75). This is because before the reductions, there was an existing network of improvements and

[120] La méthode des économies de coûts repose sur le coût de remplacement déprécié des améliorations (sentence arbitrale, par. 75), qui représente le coût de remplacement de [TRADUCTION] « l'ensemble du réseau utile des routes et des améliorations pour les zones visées par la reprise », à savoir « toutes les routes et les améliorations connexes qui permettent d'avoir accès au bois susceptible d'être coupé à l'intérieur des zones reprises » dans leur état déprécié actuel (par. 81). Selon la méthode des économies de coûts, Teal a droit à une indemnité pour ce coût de remplacement déprécié (par. 75). Il en est ainsi

Teal did not have to pay to construct improvements to access timber for harvesting (para. 93). After the Province's reductions to Teal's land base, Teal would have to expend money to replace the improvements and therefore should be compensated for this cost (para. 93).

parce qu'avant les réductions, il existait déjà un réseau d'améliorations et Teal n'avait pas à payer la construction d'améliorations pour avoir accès au bois en vue de le couper (par. 93). Après les réductions apportées par la Province au territoire de Teal, cette dernière aurait à dépenser de l'argent pour remplacer les améliorations et elle doit donc être indemnisée de ce coût (par. 93).

(b) *The Arbitrator Applied the Cost Savings Approach in Valuing the Improvements in the Lillooet Licence*

b) *L'arbitre a appliqué l'approche fondée sur les économies de coûts lorsqu'il a évalué les améliorations se rapportant au permis Lillooet*

[121] As noted by our colleague Gascon J., the arbitrator also applied the cost savings method to value the improvements associated with the Lillooet Licence. The arbitrator awarded no compensation for these improvements, which is in fact consistent with the cost savings approach (para. 170).

[121] Comme l'a fait remarquer notre collègue le juge Gascon, l'arbitre a également utilisé la méthode des économies de coûts pour évaluer les améliorations se rapportant au permis Lillooet. L'arbitre n'a accordé aucune indemnité pour ces améliorations, ce qui est en fait conforme à l'approche fondée sur les économies de coûts (par. 170).

[122] Unlike the other two licences, the Province did not take back any operating areas from the Lillooet Licence (Arbitration Award, at para. 168). The reduction made to the Lillooet Licence by the Province was limited to reducing the allowable harvest cut by 54.3% (para. 168). Therefore, as the arbitrator found, Teal did not lose any opportunity to use the roads (para. 169) and accordingly did not need to expend money to replace the improvements. As a consequence, under the cost savings approach, Teal was not entitled to receive the depreciated replacement cost of the improvements associated with the Lillooet Licence.

[122] En effet, contrairement aux deux autres permis, la Province n'a repris aucune zone d'exploitation du permis Lillooet (sentence arbitrale, par. 168). La réduction apportée par la Province au permis Lillooet n'a fait que réduire la coupe autorisée de 54,3 % (par. 168). Ainsi, comme l'a conclu l'arbitre, Teal n'a pas perdu la possibilité d'utiliser les routes (par. 169) et n'a donc pas eu à dépenser de l'argent pour remplacer les améliorations. Par conséquent, selon l'approche fondée sur les économies de coûts, Teal n'a pas droit au coût de remplacement déprécié des améliorations se rapportant au permis Lillooet.

(5) <u>The Cost Savings Approach Adopted by the Arbitrator Fails to Account for the Fact That the Improvements Are Not Owned by Teal</u>

(5) <u>L'approche fondée sur les économies de coûts retenue par l'arbitre ne tient pas compte du fait que les améliorations n'appartiennent pas à Teal</u>

[123] In applying the cost savings valuation method to value the improvements associated with all three licences held by Teal, the arbitrator failed to consider that Teal, as a licence holder, had only a limited interest in the improvements. The cost savings approach may be an appropriate methodology in the context of privately owned land. But the

[123] En utilisant la méthode d'évaluation des économies de coûts pour évaluer les améliorations se rapportant aux trois permis dont Teal est titulaire, l'arbitre n'a pas tenu compte du fait que Teal, en qualité de titulaire de permis, n'avait qu'un intérêt limité dans les améliorations. L'approche fondée sur les économies de coûts peut constituer une

roads and bridges at issue in this case belonged to the Crown. Given that Teal did not own the improvements and had only a limited interest in the improvements as a licence holder, it cannot be said that it lost the replacement cost of the improvements when the Province made reductions to the land base under its licences. As stated by the majority of the Court of Appeal in its first decision, "Teal had the right to use the improvements. It therefore lost only the use of the assets, not the assets themselves": 2013 BCCA 326, 46 B.C.L.R. (5th) 272, at para. 73 (emphasis added).

[124] The arbitrator reasoned that the cost savings approach was applicable to the improvements because it accurately determined the "value to the owner", which is one method of assessing "full compensation": Todd, at pp. 110-11. The "value to the owner" approach assesses compensation on the basis of what a prudent owner would pay for its property interest rather than be divested of it (*MacMillan Bloedel Ltd. v. British Columbia* (1995), 12 B.C.L.R. (3d) 134 (C.A.), at paras. 29-32). The application judge, who agreed that the "value to the owner" approach applied by the arbitrator was consistent with "full compensation" likewise found that Teal was entitled to what a prudent owner "would have been willing to give for the improvements rather than be dispossessed of those improvements": 2012 BCSC 543, at para. 67 (CanLII).

[125] We do not agree that the "value to the owner" approach may serve as a basis for entitling Teal to the depreciated replacement cost of the improvements under s. 6(4) of the *FRA*. The "value to the owner" method awards compensation on the basis of the value to Teal of its *interest* in the improvements. Given that Teal did not own the improvements and had only a limited interest in them, Teal would not pay the full cost to replace the network of improvements at issue.

méthode adéquate dans le cas des terres privées, mais les routes et les ponts en cause appartenaient à la Couronne. Puisque Teal n'était pas propriétaire des améliorations et n'avait qu'un intérêt limité dans celles-ci en tant que titulaire de permis, on ne saurait affirmer qu'elle a perdu le coût de remplacement des améliorations lorsque la Province a réduit le territoire visé par ses permis. Comme l'a mentionné la majorité de la Cour d'appel dans sa première décision, [TRADUCTION] « Teal avait le droit d'utiliser les améliorations. Elle a donc perdu uniquement l'usage des biens, et non les biens eux-mêmes » : 2013 BCCA 326, 46 B.C.L.R. (5th) 272, par. 73 (nous soulignons).

[124] L'arbitre a estimé que l'approche fondée sur les économies de coûts s'appliquait aux améliorations parce qu'elle permettait de déterminer avec précision la [TRADUCTION] « valeur pour le propriétaire », laquelle constitue une façon d'établir l'« indemnité intégrale » : Todd, p. 110-111. L'approche fondée sur la « valeur pour le propriétaire » évalue l'indemnité en se fondant sur ce qu'un propriétaire prudent paierait pour conserver son intérêt de propriété plutôt que d'en être privé (*MacMillan Bloedel Ltd. c. British Columbia* (1995), 12 B.C.L.R. (3d) 134 (C.A.), par. 29-32). Le juge saisi de la requête, d'accord pour dire que cette approche utilisée par l'arbitre s'accordait avec l'[TRADUCTION] « indemnisation intégrale », a conclu lui aussi que Teal avait droit à ce qu'un propriétaire prudent « aurait été disposé à payer pour les améliorations au lieu d'en être dépossédé » : 2012 BCSC 543, par. 67 (CanLII).

[125] Nous ne partageons pas l'avis que l'approche fondée sur la « valeur pour le propriétaire » puisse servir de fondement pour permettre à Teal de toucher le coût de remplacement déprécié des améliorations au titre du par. 6(4) de la *FRA*. La méthode de la « valeur pour le propriétaire » emporte octroi d'une indemnité en fonction de la valeur, pour Teal, de son *intérêt* dans les améliorations. Puisque Teal n'était pas propriétaire des améliorations et n'avait qu'un intérêt limité dans celles-ci, Teal ne paierait pas le coût total du remplacement du réseau d'améliorations en cause.

[126] It is also significant that as a licence holder with only limited rights to the improvements, Teal would be compensated by the government for future construction costs through deductions from stumpage fees. As noted by the majority of the Court of Appeal in its first decision, if Teal chose to rebuild the improvements taken under the *FRA*, it would receive compensation for its construction costs through those deductions (para. 74). In assessing what Teal would pay to avoid being divested of its interest in the improvements under the "value to the owner" method, the fact that Teal is reimbursed for future construction costs through deductions from stumpage fees is a relevant consideration. This reimbursement would logically affect the amount Teal was willing to pay to avoid being dispossessed of its interest in the improvements. Furthermore, Teal's rights to use the improvements were conditional on Teal paying to maintain the roads under permit and deactivating them when they were no longer in use (s. 79(2) of the *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004). Given that Teal had only this limited interest in the improvements, it would not pay for the full cost of replacing the improvements at issue to avoid being divested of them.

(6) The Market Value Approach

(a) *The Arbitrator Erred in Narrowly Construing the Scope of Section 6(4) of the FRA to Exclude the Market Value Approach*

[127] In our view, it was not open to the arbitrator to adopt the cost savings approach under s. 6(4) of the *FRA*. In our view, there was, however, an option before the arbitrator that is consistent with this provision.

[128] As our colleague Gascon J. notes, there were three valuation methodologies put before the arbitrator: (1) market value; (2) income and; (3) depreciated replacement cost, which includes the cost savings approach. The arbitrator rejected the first

[126] Il est aussi révélateur qu'à titre de titulaire de permis ne possédant que des droits limités sur les améliorations, Teal serait remboursée par le gouvernement pour les coûts de construction futurs au moyen de déductions sur les droits de souche. Tel que l'a signalé la majorité de la Cour d'appel dans sa première décision, si Teal choisissait de reconstruire les améliorations reprises en application de la *FRA*, elle serait indemnisée de ses coûts de construction par le mécanisme de ces déductions (par. 74). Le fait qu'on rembourse Teal des coûts de construction futurs au moyen de déductions sur les droits de souche est une considération pertinente lorsqu'il s'agit de déterminer ce que paierait Teal pour éviter d'être privée de son intérêt dans les améliorations selon la méthode de la « valeur pour le propriétaire ». Ce remboursement influerait logiquement sur la somme que Teal est disposée à payer pour éviter d'être dépossédée de cet intérêt. Le droit de Teal d'utiliser les améliorations était en outre conditionnel au paiement par cette dernière de l'entretien des routes visées par le permis et à leur mise hors service lorsqu'elles n'étaient plus utilisées (par. 79(2) du *Forest Planning and Practices Regulation*, B.C. Reg. 14/2004). Étant donné que Teal ne disposait que de cet intérêt limité dans les améliorations, elle ne paierait pas le coût total du remplacement des améliorations pour éviter d'en être privée.

(6) L'approche fondée sur la valeur marchande

a) *L'arbitre a commis une erreur en interprétant étroitement la portée du par. 6(4) de la FRA de façon à exclure l'approche fondée sur la valeur marchande*

[127] À notre avis, l'arbitre ne pouvait retenir l'approche fondée sur les économies de coûts en vertu du par. 6(4) de la *FRA*. Selon nous, il disposait toutefois d'une solution compatible avec cette disposition.

[128] Comme le signale notre collègue le juge Gascon, trois méthodes d'évaluation ont été proposées à l'arbitre : (1) la valeur marchande, (2) le revenu et (3) le coût de remplacement déprécié, qui comprend l'approche fondée sur les économies de

two methodologies on the basis that they could not serve to value the improvements independently from the harvesting rights. He noted that the *FRA* draws a distinction between the value of harvesting rights and the value of improvements. In his view,

> [t]o give this distinction meaning, the value of improvements must be determined independent of the considerations that would be at issue in the context of determining either the value (market or value to owner) of the tenure as a whole, or the harvesting rights as an independent matter. [para. 110]

[129] The arbitrator interpreted s. 6(4) of the *FRA* to mean that the value of the improvements had to be calculated separately and independently from the harvesting rights, without reference to the value of the licence or tenure as a whole. The arbitrator found that the market value approach could not value the improvements in this manner. Since there is no market for the sale of improvements, the market value of the improvements must be determined by first considering the market value of the licence or tenure as a whole. The arbitrator accepted that the cost savings approach was the only valuation methodology that could value the improvements separate and apart from the tenure as a whole (para. 94).

[130] In our view, the arbitrator construed s. 6(4) of the *FRA* too narrowly in concluding that the distinction drawn by this provision between the value of the improvements and the value of the harvesting rights means that the market value of the tenure as a whole cannot be considered when determining the value of the improvements. With respect, there is nothing in the language or context of the Act to support this unduly restrictive reading of s. 6(4). On the contrary, it was open to the arbitrator to select *any* valuation method that could evaluate the value of the improvements to Teal as a licence holder, as long as the approach valued the improvements as separate and distinct from the harvesting rights.

coûts. L'arbitre a rejeté les deux premières méthodes au motif qu'elles ne pouvaient servir à évaluer les améliorations indépendamment des droits de coupe. Il a fait remarquer que la *FRA* établit une distinction entre la valeur des droits de coupe et la valeur des améliorations. Selon lui,

> [TRADUCTION] [p]our donner un sens à cette distinction, la valeur des améliorations doit être déterminée indépendamment des considérations qui seraient en cause dans un contexte où il s'agit de déterminer soit la valeur (marchande ou pour le propriétaire) de la tenure dans son ensemble, soit celle des droits de coupe d'une manière indépendante. [par. 110]

[129] L'arbitre a interprété le par. 6(4) de la *FRA* comme signifiant que la valeur des améliorations devait être calculée séparément et indépendamment des droits de coupe, sans égard à la valeur du permis ou de la tenure dans son ensemble. L'arbitre a conclu que l'approche fondée sur la valeur marchande ne permettait pas d'évaluer les améliorations de cette manière. Comme il n'existe pas de marché pour la vente des améliorations, il faut déterminer la valeur marchande des améliorations en examinant d'abord la valeur marchande du permis ou de la tenure dans son ensemble. L'arbitre a convenu que l'approche fondée sur les économies de coûts était la seule méthode d'évaluation qui permettait d'évaluer les améliorations séparément et indépendamment de la tenure dans son ensemble (par. 94).

[130] À notre avis, l'arbitre a interprété trop restrictivement le par. 6(4) de la *FRA* en concluant que la distinction établie par cette disposition entre la valeur des améliorations et celle des droits de coupe signifie que la valeur marchande de l'ensemble de la tenure ne peut être prise en compte pour déterminer la valeur des améliorations. Avec égards, rien dans le texte ou le contexte de la Loi n'appuie cette interprétation trop restrictive du par. 6(4). Au contraire, il était loisible à l'arbitre de choisir *une* méthode d'évaluation qui permettait de fixer la valeur des améliorations pour Teal en tant que titulaire d'un permis, pourvu que l'approche choisie serve à évaluer les améliorations comme élément séparé et distinct des droits de coupe.

(b) *The Market Value Approach Is Consistent With Section 6(4) of the FRA*

[131] Although the market value approach does consider the value of the licence or the tenure as a whole, it can ultimately serve to value the improvements separately and independently from the harvesting rights. The Province's expert witness, Eleanor Joy, explained this methodology as follows:

> . . . it is important to understand that what I was doing was a market value approach. So I looked historically at what people were willing to pay for timber tenures, and then I looked at whatever evidence I could find that would give me some indication of what people believed the roads were as a percentage of that overall amount they were willing to pay for timber tenures.

(A.R., vol. II, at p. 100)

[132] As the arbitrator observed, Ms. Joy drew on market data of sales of licences "to derive an approximate cost per cubic meter for tenures" and then allocated "a percentage of that value to the improvements at issue here" (para. 121). To determine what percentage of the value of the tenure as a whole should be allocated to the improvements, Ms. Joy consulted financial statements of forestry companies which apportioned certain values to the improvements, as well as press releases issued by forestry companies regarding settlements reached with respect to their compensation claims under the *FRA* (Arbitration Award, at para. 122). Ms. Joy therefore calculated the value of improvements on the basis of what forestry companies were willing to pay for tenures and the percentage of that value the companies allocated to the improvements.

[133] The market value approach therefore not only values the improvements separately and independently from the harvesting rights; it also ensures that Teal in this case does not receive more

b) *L'approche fondée sur la valeur marchande est compatible avec le par. 6(4) de la FRA*

[131] Bien que l'approche fondée sur la valeur marchande tienne effectivement compte de la valeur du permis ou de la tenure dans son ensemble, elle peut ultimement servir à évaluer les améliorations séparément et indépendamment des droits de coupe. Le témoin expert de la Province, Eleanor Joy, a expliqué ainsi cette méthode :

> [TRADUCTION] . . . il est important de comprendre que ce que je faisais, c'était une approche fondée sur la valeur marchande. J'ai donc examiné ce que les gens étaient prêts à payer historiquement pour acquérir des tenures forestières, puis j'ai examiné tous les éléments de preuve que j'ai pu trouver qui pouvaient me donner une certaine indication de ce que les gens croyaient que les routes représentaient comme pourcentage de ce montant total qu'ils étaient prêts à payer pour acquérir des tenures forestières.

(d.a., vol. II, p. 100)

[132] Comme l'a fait remarquer l'arbitre, M^me^ Joy s'est servie des données du marché sur les ventes de permis [TRADUCTION] « pour établir un coût approximatif par mètre cube pour les tenures » et a ensuite alloué « un pourcentage de cette valeur aux améliorations en cause en l'espèce » (par. 121). Pour décider quel pourcentage de la valeur de la tenure dans son ensemble devait être alloué aux améliorations, M^me^ Joy a consulté des états financiers d'entreprises forestières qui attribuaient certaines valeurs aux améliorations, ainsi que des communiqués de presse diffusés par des entreprises forestières qui traitaient de règlements intervenus relativement à leurs demandes d'indemnité présentées en vertu de la *FRA* (sentence arbitrale, par. 122). Elle a donc calculé la valeur des améliorations en fonction de ce que les entreprises forestières étaient prêtes à payer pour acquérir des tenures et sur le pourcentage de cette valeur que les entreprises attribuaient aux améliorations.

[133] Non seulement l'approche fondée sur la valeur marchande permet-elle d'évaluer les améliorations séparément et indépendamment des droits de coupe, mais elle fait aussi en sorte que Teal ne

compensation than the value of its interest in the improvements. Forestry companies such as Teal that purchase timber licences do not value improvements as if they were acquiring exclusive ownership of them. Rather, what they are willing to pay for the improvements is based on their projected use of the improvements, as well as on other related considerations, such as the government's reimbursement of construction costs for licence holders. Accordingly, the improvements are worth a fraction of the total value of the licence or tenure. As Ms. Joy explains,

A. . . . I think my argument would be, if somebody was willing to give up their timber tenures for $5.1 million, the roads have to be a fraction of that amount.

Q. Why do they have to be a fraction of that amount?

A. Well, for all sorts of different reasons that we've already covered. When they're going to be used, whether stumpage reimburses, so if people are indifferent between building or using existing roads, the quality of the roads, the type of roads. All of those factors feed into it.

(A.R., vol. II, at p. 107)

[134] In summary, the market value approach put forward by Ms. Joy takes into account that Teal has a limited interest in the improvements. This valuation method was available to the arbitrator under s. 6(4) of the *FRA*, and yet the arbitrator chose to apply a method that was inconsistent with this provision. This resulted in a substantial windfall for Teal: Ms. Joy estimated that the value of the improvements under the market value approach was about $1.5 million, whereas the arbitrator estimated that the value was $9.5 million when applying the cost savings approach (Arbitration Award, at para. 194).

reçoive pas en l'espèce une indemnité supérieure à la valeur de son intérêt dans les améliorations. Les entreprises forestières comme Teal qui achètent des permis d'exploitation forestière n'évaluent pas les améliorations comme si elles en acquéraient la propriété exclusive. Ce qu'elles sont prêtes à payer pour les améliorations tient plutôt à l'usage qu'elles prévoient en faire, ainsi qu'à d'autres considérations connexes comme le remboursement par le gouvernement des coûts de construction assumés par les titulaires de permis. Les améliorations représentent donc une fraction de la valeur totale du permis ou de la tenure. Comme l'explique M[me] Joy :

[TRADUCTION]

R. . . . Je pense que mon argument consisterait à dire que, si quelqu'un est prêt à se départir de sa tenure forestière pour 5,1 millions de dollars, les routes doivent représenter une fraction de cette somme.

Q. Pourquoi doivent-elles représenter une fraction de cette somme?

R. Bien, pour toutes sortes de raisons différentes dont nous avons déjà traitées. Quand elles seront utilisées, si les droits de souche sont remboursés, si le fait de construire des routes ou d'utiliser les routes existantes laisse les gens indifférents, la qualité des routes, le type de routes. Tous ces facteurs entrent en ligne de compte.

(d.a., vol. II, p. 107)

[134] En résumé, l'approche fondée sur la valeur marchande proposée par M[me] Joy tient compte de l'intérêt limité de Teal dans les améliorations. L'arbitre pouvait utiliser cette méthode d'évaluation en vertu du par. 6(4) de la *FRA*. Pourtant, il a choisi de recourir à une méthode incompatible avec cette disposition, ce qui a permis à Teal de réaliser un gain fortuit substantiel : M[me] Joy a estimé que la valeur des améliorations selon l'approche fondée sur la valeur marchande était de 1,5 million de dollars, tandis que l'arbitre a estimé que cette valeur était de 9,5 millions de dollars selon l'approche fondée sur les économies de coûts (sentence arbitrale, par. 194).

[135] To be clear, it was open to the arbitrator to select any valuation method that was consistent with the only reasonable interpretation of s. 6(4) of the *FRA*: namely, that compensation must be awarded to Teal on the basis of its limited interest in the improvements. Contrary to the assertion of our colleague, we are of the view that the market value approach is merely one method that the arbitrator could have applied under s. 6(4) of the *FRA*.

(7) Conclusion

[136] In the end, the complexity of the valuation evidence seems to have had the unfortunate effect of masking the forest for the trees. The only interpretation of s. 6(4) of the *FRA* that withstands scrutiny on either standard of review is that Teal is entitled to compensation for its interest as a licence holder in the improvements. If the compensation awarded to Teal under s. 6(4) does not reflect its limited interest in the improvements, Teal does not receive compensation; rather, it receives gross overcompensation — and at the taxpayer's expense. As the Court of Appeal stated on remand, "[i]t cannot be . . . that a statute that provides for compensation be interpreted to mean it provides for a substantial publicly financed windfall, which would serve no purpose": 2015 BCCA 263, 386 D.L.R. (4th) 40, at para. 38. Indeed, the arbitrator's interpretation leads to the absurd result of having the British Columbia public compensate Teal for a private ownership right to the improvements — even though no such right or interest exists and the improvements at issue are owned by the Crown.

[137] As we have explained, there was a valuation method before the arbitrator that was consistent with s. 6(4) of the *FRA*, yet the arbitrator rejected it based on an interpretation of the provision that does not withstand scrutiny on either standard of review. With respect, we see no defensible basis for this interpretation.

[135] En termes clairs, l'arbitre pouvait choisir une méthode d'évaluation compatible avec la seule interprétation raisonnable du par. 6(4) de la *FRA* : à savoir que Teal doit être indemnisée compte tenu de son intérêt limité dans les améliorations. Contrairement à ce qu'affirme notre collègue, nous sommes d'avis que la méthode de la valeur marchande n'est qu'une des méthodes que l'arbitre aurait pu employer en vertu du par. 6(4) de la *FRA*.

(7) Conclusion

[136] En fin de compte, la complexité de la preuve relative à l'évaluation semble avoir eu l'effet malheureux de dissimuler la forêt derrière les arbres. La seule interprétation du par. 6(4) de la *FRA* qui résiste à un examen selon l'une ou l'autre norme de contrôle est celle selon laquelle Teal a droit à une indemnité pour l'intérêt qu'elle détient en tant que titulaire de permis dans les améliorations. Si l'indemnité accordée à Teal au titre du par. 6(4) ne reflète pas l'intérêt limité qu'elle possède dans les améliorations, elle ne reçoit pas d'indemnité; elle reçoit plutôt une indemnité nettement excessive, et ce, aux frais du contribuable. Comme l'a affirmé la Cour d'appel à la suite du renvoi, [TRADUCTION] « [i]l est impossible [. . .] qu'une loi prévoyant une indemnisation soit interprétée comme signifiant qu'elle procure un gain fortuit substantiel à même les fonds publics qui ne servirait à rien » : 2015 BCCA 263, 386 D.L.R. (4th) 40, par. 38. En effet, l'interprétation de l'arbitre mène au résultat absurde où le public de la Colombie-Britannique indemnise Teal pour un droit de propriété privé sur les améliorations, en dépit du fait qu'aucun droit ou intérêt de cette nature n'existe et que les améliorations en cause appartiennent à la Couronne.

[137] Comme nous l'avons expliqué, l'arbitre disposait d'une méthode d'évaluation compatible avec le par. 6(4) de la *FRA*, mais il l'a rejetée sur la base d'une interprétation de la disposition qui ne résiste pas à un examen selon l'une ou l'autre norme de contrôle. Avec égards, cette interprétation nous paraît dépourvue de fondement.

IV. Disposition

[138] We agree with our colleague Gascon J. that the appeal should be allowed on the contractual interpretation question.

[139] For the reasons stated, we would dismiss the appeal in part on the statutory interpretation issue. We would not, however, restore the arbitrator's decision to award no compensation for the improvements associated with the Lillooet Licence. Although the majority of the Court of Appeal agreed with the arbitrator's valuation of the improvements associated with the Lillooet Licence, we have found that the arbitrator applied an improper interpretation of s. 6(4) of the *FRA* when valuing these improvements. Accordingly, we would remit to the arbitrator the matter of compensation for the improvements relating to all three licences at issue, namely Tree Farm Licence 46, the Fraser Licence and the Lillooet Licence.

*Appeal allowed in part with costs throughout,* Moldaver, Côté, Brown *and* Rowe JJ. *dissenting in part.*

*Solicitors for the appellant: Hunter Litigation Chambers, Vancouver.*

*Solicitor for the respondent: Attorney General of British Columbia, Vancouver.*

IV. Dispositif

[138] Nous convenons avec notre collègue le juge Gascon que le pourvoi doit être accueilli sur la question de l'interprétation contractuelle.

[139] Pour les motifs énoncés ci-dessus, nous sommes d'avis de rejeter le pourvoi en partie sur la question de l'interprétation législative. Nous sommes cependant d'avis de ne pas rétablir la décision de l'arbitre de ne pas accorder d'indemnité pour les améliorations se rapportant au permis Lillooet. Même si les juges majoritaires de la Cour d'appel ont souscrit à l'évaluation que l'arbitre a faite des améliorations se rapportant au permis Lillooet, nous avons conclu que l'arbitre a donné une mauvaise interprétation du par. 6(4) de la *FRA* lorsqu'il a évalué ces améliorations. Nous sommes donc d'avis de renvoyer à l'arbitre la question de l'indemnité pour les améliorations concernant les trois permis en litige, à savoir le permis de ferme forestière 46, le permis Fraser et le permis Lillooet.

*Pourvoi accueilli en partie avec dépens devant toutes les cours, les juges* Moldaver, Côté, Brown *et* Rowe *sont dissidents en partie.*

*Procureurs de l'appelante : Hunter Litigation Chambers, Vancouver.*

*Procureur de l'intimée : Procureur général de la Colombie-Britannique, Vancouver.*

# TAB 30

# In the Court of Appeal of Alberta

**Citation: Wells Fargo Securities Canada Ltd v Sanjel Corporation, 2017 ABCA 120**

**Date:** 20170419
**Docket:** 1701-0039AC
**Registry:** Calgary



**Between:**

**Wells Fargo Securities Canada Ltd.**

Applicant

- and -

**In the matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended**

**And in the matter of the Compromise or Arrangement of Sanjel Corporation, Sanjel Canada Ltd., Terracor Group Ltd., Suretech Group Ltd., Suretech Completions Canada Ltd., Sanjel Energy Services (USA) Inc., Sanjel (USA) Inc., Suretech Completions (USA) Inc., Sanjel Capital (USA) Inc., Terracor (USA) Inc., Terracor Resources (USA) Inc., Terracor Logistics (USA) Inc., Sanjel Middle East Ltd., Sanjel Latin America Limited and Sanjel Energy Services DMCC**

Respondents

---

**Reasons for Decision of**
**The Honourable Madam Justice Marina Paperny**

---

Application for Permission to Appeal

---

**Reasons for Decision of**
**The Honourable Madam Justice Marina Paperny**

---

[1] Wells Fargo Securities Canada Ltd. (Wells Fargo) was the financial advisor for Sanjel Corporation (Sanjel), a corporation currently under *CCAA* protection. Wells Fargo seeks leave to appeal an order granted by the supervising judge dismissing its application for payment of its entire engagement/success fee in priority to other creditors: Sanjel Corporation (Re), 2017 ABQB 69.

[2] Wells Fargo challenges the judge's interpretation of her *CCAA* initial order granted in April 2016. That order provided that the engagement letter between Wells Fargo and Sanjel be approved and Sanjel authorized to continue the engagement of the financial advisors to comply with its obligations. A specific charge in the amount of US$500,000, known as the Financial Advisors' Charge, was granted on Sanjel's property to secure the obligations under the engagement letter. The provision at issue reads as follows:

> 6. … the engagement letter entered into between Wells Fargo Securities Canada, Ltd. ("Wells Fargo Securities") and Sanjel Corp. dated September 22, 2015 (collectively, CS, PJT and Wells Fargo Securities are hereinafter referred to as the "Financial Advisors") (the "Financial Advisors' Engagement Letters") . . . are hereby approved and Sanjel Corp. is authorized and directed to continue the engagement of the Financial Advisors as Assistants thereunder and to comply with all of its obligations thereunder. The Financial Advisors are hereby granted a single charge in the maximum aggregate amount of … US$500,000 (for the benefit of Wells Fargo Securities) (collectively, the "Financial Advisors' Charge") on the Property to secure all obligations under the Financial Advisors Engagement Letters. ...

[3] Relying on this provision, Wells Fargo sought payment of the balance of their financial advisors' fee, in priority to the claim of the secured creditor, the Lending Syndicate. The supervising judge considered the request in light of her initial order. In dismissing the application she noted that the Financial Advisors' Charge in the initial order did not secure the full amount of fees payable under the engagement letters; rather it secured US$500,000. The entirety of the transaction fee was US$2.5 million.

[4] The sale of the assets in the *CCAA* proceeding was insufficient to pay the entirety of the indebtedness to the Lending Syndicate. Accordingly, it was proposed that the outstanding portion of the financial advisors' fee be treated as unsecured. The supervising judge stated at para 19 of her reasons:

> Section 6 must be read in its entirety and in the context of the order as a whole: *(Re) Winalta Inc*, 2011 ABQB 399 at para 96. While the order approves the engagement letters, it only gives a priority charge to a portion of the fees set out in the agreements.



[5] The supervising judge held that the engagement letter was clearly a pre-filing obligation and concluded that it was incorrect to characterize her paragraph 6 as a mandatory injunction as urged by Wells Fargo. She concluded at para 42:

> Paragraph 6 of the initial order, in the context of the remainder of the order and the circumstances that gave rise to it, does not constitute a direction to pay that would require Sanjel to pay Wells Fargo a success fee in priority to the claims of the secured creditor, the Lending Syndicate. The proposition that paragraph 6 creates [a] direction to pay, either implicit or explicit, is not supported by either the language of the initial order nor the requirement that provisions that create in effect a priority for certain creditors must be supported by clear and unambiguous language.

[6] Leave to appeal is required for any order or decision made in *CCAA* proceedings: *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, s 13. The test is whether there are serious and arguable grounds of appeal. This involves assessment of several factors: whether the point on appeal is of significance to the practice; whether the point raised is of significance to the parties and the action; whether the appeal is *prima facie* meritorious (or conversely frivolous); and whether the appeal will unduly hinder the progress of the *CCAA* proceedings.

[7] Despite Wells Fargo's attempt to cast the proposed appeal in a different light, the nub of the issue is straightforward: Did the supervising judge commit a reversible error in interpreting her initial order to mean that only US$500,000 of the financial advisors' fee would become a charge on Sanjel's property, thus taking priority to other creditors?

[8] Wells Fargo submits that an important legal issue namely what constitutes and what is the legal effect of charges granted in an initial stay order arises here. Accordingly, it submits that the proposed point on appeal is of significance to the insolvency practice generally.

[9] I do not agree that the issue engaged involves or requires a consideration of the effect of charges in initial orders granted under the *CCAA* or the template model order. That other charges are provided for in those orders, and in the order here, including those for administrative expenses, and directors and officers, does not change that. The clause at issue is specific to these proceedings and this initial order only. It cannot reasonably be said that the issue has any significance to anyone other than the parties involved.

[10] The second factor as framed in some of the jurisprudence refers to whether the appeal is of significance to the action or to the parties. Rarely would the appeal not have significance to at least one of the parties - the proposed appellant - or it would be unlikely that permission to appeal would be sought. I suggest that this factor could more fairly be characterized as the significance of the proposed appeal to the outcome of the proceedings as a whole. For the purpose of this application, I accept that the appeal is significant to the outcome of the proceedings.

[11] In my view, it is the third factor that is determinative of this application. Is this appeal *prima facie* meritorious? Can it reasonably be said that the supervising judge erred in law in the manner in which she interpreted her own order? A review of the initial order, including paragraph 6, does not reveal any ambiguity. Only a single charge, the Financial Advisors' Charge in the amount of US$500,000, was secured by the terms of the order. The supervising judge considered other relevant provisions of the order, and contrasted them to paragraph 6, including: paragraph 5, which permitted but did not require Sanjel to pay, among others, the financial advisors; paragraph 7, which permitted but did not require Sanjel to pay its reasonable expenses; paragraph 35, which required Sanjel to pay the fees of certain professionals involved in the proceedings (but not the financial advisors); and paragraph 48, which set out the priority of various charges created by the initial order. As the supervising judge said, paragraphs 6 and 48 cannot be read together to give effect to Wells Fargo's interpretation of paragraph 6.

[12] A review of the supervising judge's reasons makes clear that the interpretation urged by Wells Fargo was rejected as being unsustainable having regard to the initial order read as a whole. She found that paragraph 6 did not constitute a direction to pay, nor a priority for that portion of the financial advisors' fee that was not secured by the charge. Her interpretation appears to be the only one available having regard to the terms of the initial order and the purpose for which orders are granted under the *CCAA*. I agree with the respondents that her reasons do not reveal an error of law or a palpable and overriding error of fact or mixed fact and law. The appeal is not *prima facie* meritorious. The application for permission to appeal is dismissed.

Application heard on April 6, 2017

Reasons filed at Calgary, Alberta
this 19th day of April, 2017

Paperny J.A.

**Appearances:**

B. Harrison
A. Maerov
for the Applicant

L. Hiebert
J. Cameron
for the Monitor

K. Bourassa
C. Nyberg
for the Syndicate

# TAB 31

# SUPERIOR COURT
## (Commercial division)
***The Companies' Creditors Arrangement Act***



CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-038474-108

DATE: 15 October 2010

---

**UNDER THE PRESIDENCY OF: THE HONOURABLE ROBERT MONGEON, J.S.C.**

---

IN THE MATTER OF THE PLAN OF ARRANGEMENT AND COMPROMISE OF:

**WHITE BIRCH PAPER HOLDING COMPANY**
**-and-**
**WHITE BIRCH PAPER COMPANY**
**-and-**
**STADACONA GENERAL PARTNER INC.**
**-and-**
**BLACK SPRUCE PAPER INC.**
**-and-**
**F.F. SOUCY GENERAL PARATNER INC.**
**-and-**
**3120772 NOVA SCOTI COMPAPNY**
**-and-**
**ARRIMAGE DE GROS CACOUNA INC.**
**-and-**
**PAPIER MASSON LTÉE**
Petitioners
**-and-**
**ERNST & YOUNG INC.**
Monitor
**-and-**
**STADACONA LIMITED PARTNERSHIP**
**-and-**
**F.F. SOUCY LIMITED PARTNERSHIP**

JM1838

**-and-**
**F.F. SOUCY INC. & PARTNERS, LIMITED PARTNERSHIP**
Mises-en-cause
**-and-**
**SERVICE D'IMPARTITION INDUSTRIEL INC.**
**-and-**
**KSH SOLUTIONS INC.**
**-and-**
**BD WHITE BIRCH INVESTMENT LLC**
Intervenant
**-and-**
**SIXTH AVENUE INVESTMENT CO. LLC**
**DUNE CAPITAL LLC**
**DUNE CAPITAL INTERNATIONAL LTD**
Opposing parties

---

**REASONS FOR JUDGMENT GIVEN ORALLY ON SEPTEMBER 24, 2010**

---



**BACKGROUND**

[1] On 24 February 2010, I issued an Initial Order under the CCAA protecting the assets of the Debtors and Mis-en-cause (the WB Group). Ernst & Young was appointed Monitor.

[2] On the same date, Bear Island Paper Company LLC (Bear Island) filed for protection of Chapter 11 of the US Bankruptcy code before the US Bankruptcy Court for the Eastern District of Virginia.

[3] On April 28, 2010, the US Bankruptcy Court issued an order approving a Sale and Investor Solicitation Process ("SISP") for the sale of substantially all of the WB Group's assets. I issued a similar order on April 29, 2010. No one objected to the issuance of the April 29, 2010 order. No appeal was lodged in either jurisdiction.

[4] The SISP caused several third parties to show some interest in the assets of the WG Group and led to the execution of an Asset Sale Agreement (ASA) between the WB Group and BD White Birch Investment LLC ("BDWB"). The ASA is dated August 10, 2010. Under the ASA, BDWB would acquire all of the assets of the Group and would:

a) assume from the Sellers and become obligated to pay the Assumed Liabilities (as defined in the ASA);

b) pay US$90 million in cash;

c) pay the Reserve Payment Amount (as defined);

d) pay all fees and disbursements necessary or incidental for the closing of the transaction; and

e) deliver the Wind Down Amount (as defined).

the whole for a consideration estimated between $150 and $178 million dollars.

[5] BDWB was to acquire the Assets through a Stalking Horse Bid process. Accordingly, Motions were brought before the US Bankruptcy Court and before this Court for orders approving:

a) the ASA

b) BDWB as the stalking horse bidder

c) The Bidding Procedures

[6] On September 1, 2010, the US Bankruptcy Court issued an order approving the foregoing without modifications.

[7] On September 10, 2010, I issued an order approving the foregoing with some modifications (mainly reducing the Break-Up Fee and Expense Reimbursement clauses from an aggregate total sought of US$5 million, down to an aggregate total not to exceed US$3 million).

[8] My order also modified the various key dates of implementation of the above. The date of September 17 was set as the limit to submit a qualified bid under stalking horse bidding procedures, approved by both Courts and the date of September 21st was set as the auction date. Finally, the approval of the outcome of the process was set for September 24, 2010[1].

[9] No appeal was lodged with respect to my decision of September 10, 2010.

[10] On September 17, 2010, Sixth Avenue Investment Co. LLC ("Sixth Avenue") submitted a qualified bid.

[11] On September 21, 2010, the WB Group and the Monitor commenced the auction for the sale of the assets of the group. The winning bid was the bid of BDWB at US$236,052,825.00.

[12] BDWB's bid consists of:

i) US$90 million in cash allocated to the current assets of the WB Group;

[1] See my Order of September 10, 2010.

ii) $4.5 million of cash allocated to the fixed assets;

iii) $78 million in the form of a credit bid under the First Lien Credit Agreement allocated to the WB Group's Canadian fixed assets which are collateral to the First Lien Debt affecting the WB Group;

iv) miscellaneous additional charges to be assumed by the purchaser.

[13] Sixth Avenue's bid was equivalent to the BDWB winning bid less US$500,000.00, that is to say US$235,552,825.00. The major difference between the two bids being that BDWB used credit bidding to the extent of $78 million whilst Sixth Avenue offered an additional $78 million in cash. For a full description of the components of each bid, see the Monitor's Report of September 23, 2010.

[14] The Sixth Avenue bidder and the BDWB bidder are both former lenders of the WB Group regrouped in new entities.

[15] On April 8, 2005, the WB Group entered into a First Lien Credit Agreement with Credit Suisse AG Cayman Islands and Credit Suisse AG Toronto acting as agents for a number of lenders.

[16] As of February 24, 2010, the WB Group was indebted towards the First Lien Lenders under the First Lien Credit Agreement in the approximate amount of $438 million (including interest). This amount was secured by all of the Sellers' fixed assets. The contemplated sale following the auction includes the WB Group's fixed assets and unencumbered assets.

[17] BDWB is comprised of a group of lenders under the First Lien Credit Agreement and hold, in aggregate approximately 65% of the First Lien Debt. They are also "Majority Lenders" under the First Lien Credit Agreement and, as such, are entitled to make certain decisions with respect to t he First Lien Debt including the right to use the security under the First Lien Credit Agreement as tool for credit bidding.

[18] Sixth Avenue is comprised of a group of First Lien Lenders holding a minority position in the First Lien Debt (approximately 10%). They are not "Majority Lenders" and accordingly, they do not benefit from the same advantages as the BDWB group of First Lien Lenders, with respect to the use of the security on the fixed assets of the WB Group, in a credit bidding process[2].

[2] For a more comprehensive analysis of the relationship of BDWB members and Sixth Avenue members as lenders under the original First Lien Credit Agreement of April 8, 2005, see paragraphs 15 to 19 of BDWB's Intervention.

[19] The bidding process took place in New York on September 21, 2010. Only two bidders were involved: the winning bidder (BDWB) and the losing bidder[3] (Sixth Avenue).

[20] In its Intervention, BDWB has analysed all of the rather complex mechanics allowing it to use the system of credit bidding as well as developing reasons why Sixth Avenue could not benefit from the same privilege. In addition to certain arguments developed in the reasons which follow, I also accept as my own BDWB's submissions developed in section (e), paragraphs [40] to [53] of its Intervention as well as the arguments brought forward in paragraphs [54] to [60] validating BDWB's specific right to credit bid in the present circumstances.

[21] Essentially, BDWB establishes its right to credit bid by referring not only to the September 10 Court Order but also by referring to the debt and security documents themselves, namely the First Lien Credit Agreement, the US First Lien Credit Agreement and under the Canadian Security Agreements whereby the "Majority Lender" may direct the "Agents" to support such credit bid in favour of such "Majority Lenders". Conversely, this position is not available to the "Minority Lenders". This reasoning has not been seriously challenged before me.

[22] The Debtors and Mis-en-cause are now asking me to approve the sale of all and/or substantially all the assets of the WB Group to BDWB. The disgruntled bidder asks me to not only dismiss this application but also to declare it the winning bidder or, alternatively, to order a new auction.

[23] On September 24, 2010, I delivered oral reasons in support of the Debtors' Motion to approve the sale. Here is a transcript of these reasons.

**<u>REASONS</u> (delivered orally on September 24, 2010)**

[24] I am asked by the Petitioners to approve the sale of substantially all the WB Group's assets following a bid process in the form of a "Stalking Horse" bid process which was not only announced in the originating proceedings in this file, I believe back in early 2010, but more specifically as from May/June 2010 when I was asked to authorise the Sale and Investors Solicitation Process (SISP). The SISP order led to the canvassing of proposed bidders, qualified bidders and the eventual submission of a "Stalking Horse" bidder. In this context, a Motion to approve the "Stalking Horse" Bid process to approve the assets sale agreement and to approve a bidding procedure for the sale of substantially all of the assets of the WB Group was submitted and sanctioned by my decision of September 10, 2010.

[25] I note that throughout the implementation of this sale process, all of its various preliminary steps were put in place and approved without any contestation whatsoever

[3] Sometimes referred to as the "bitter bidder" or "disgruntled bidder" See Re: *Abitibi Bowater* [2010] QCCS 1742 (Gascon J.)

by any of the interested stakeholders except for the two construction lien holders KSH[4] and SIII[5] who, for very specific reasons, took a strong position towards the process itself (not that much with the bidding process but with the consequences of this process upon their respective claims.

[26] The various arguments of KSH and SIII against the entire Stalking Horse bid process have now become moot, considering that both BDWB and Sixth Avenue have agreed to honour the construction liens and to assume the value of same (to be later determined).

[27] Today, the Motion of the Debtors is principally contested by a group which was identified as the "Sixth Avenue" bidders and more particularly, identified in paragraph 20 of the Motion now before me. The "Stalking Horse" bidder, of course, is the Black Diamond group identified as "BD White Birch Investment LLC". The Dune Group of companies who are also secured creditors of the WB Group are joining in, supporting the position of Sixth Avenue. Their contestation rests on the argument that the best and highest bid at the auction, which took place in New York on September 21, should not have been identified as the Black Diamond bid. To the contrary, the winning bid should have been, according to the contestants, the "Sixth Avenue" bid which was for a lesser dollar amount ($500,000.00), for a larger cash amount (approximately $78,000,000.00 more cash) and for a different allocation of the purchase price.

[28] Notwithstanding the foregoing, the Monitor, in its report of August 23, supports the "Black Diamond" winning bid and the Monitor recommends to the Court that the sale of the assets of the WB Group be made on that basis.

[29] The main argument of "Sixth Avenue" as averred, sometimes referred to as the "bitter bidder", comes from the fact that the winning bid relied upon the tool of credit bidding to the extent of $78,000,000.00 in arriving at its total offer of $236,052,825.00.

[30] If I take the comments of "Sixth Avenue", the use of credit bidding was not only a surprise, but a rather bad surprise, in that they did not really expect that this would be the way the "Black Diamond" bid would be ultimately constructed. However, the possibility of reverting to credit bidding was something which was always part of the process. I quote from paragraph 7 of the Motion to Approve the Sale of the Assets, which itself quotes paragraph 24 of the SISP Order, stating that:

> **"24. Notwithstanding anything herein to the contrary, including without limitation, the bidding requirements herein, the agent under the White Birch DIP Facility (the "DIP Agent") and the agent to the WB Group's first lien term loan lenders (the First Lien Term Agent"), on behalf of the lenders under White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be deemed Qualified Bidders and any bid**

[4] KSH Solutions Inc.
[5] Service d'Impartition Industriel Inc.

**submitted by such agent on behalf of the respective lenders in respect of all or a portion of the Assets shall be deemed both Phase 1 Qualified Bids and Phase 2 Qualified Bids. The DIP Agent and First Lien Term Agent, on behalf of the lenders under the White Birch DIP Facility and the WB Group's first lien term loan lenders, respectively, shall be permitted in their sole discretion, to credit bid up to the full amount of any allowed secure claims under the White Birch DIP Facility and the first lien term loan agreement, respectively, to the extent permitted under Section 363(k) of the Bankruptcy Code and other applicable law."**



[31] The words "and other applicable law" could, in my view, tolerate the inclusion of similar rules of procedure in the province of Quebec.[6]

[32] The possibility of reverting to credit bidding was also mentioned in the bidding procedure sanctioned by my decision of September 10, 2010 as follows and I now quote from paragraph 13 of the Debtors' Motion:

**13. "Notwithstanding anything herein to the contrary, the applicable agent under the DIP Credit Agreement and the application agent under the**

---

[6] The concept of credit bidding is not foreign to Quebec civil law and procedure. See for example articles 689 and 730 of the Quebec code of Civil Procedure which read as follows:

**689. The purchase price must be paid within five days, at the expiry of which time interest begins to run. Nevertheless, when the immovable is adjudged to the seizing creditor or any hypothecary creditor who has filed an opposition or whose claim is mentioned in the statement certified by the registrar, he may retain the purchase-money to the extent of the claim until the judgment of distribution is served upon him.**

**730. A purchaser who has not paid the purchase price must, within ten days after the judgment of homologation is transmitted to him, pay the sheriff the amounts necessary to satisfy the claims which have priority over his own; if he fails to do so, any interested party may demand the resale of the immovable upon him for false bidding.**
**When the purchaser has fulfilled his obligation, the sheriff must give him a certificate that the purchase price has been paid in full.**

See also Denis Ferland and Benoit Emery, 4ème edition, volume 2 (Éditions Yvon Blais (2003)):

**"La loi prévoit donc que, lorsque l'immeuble est adjugé au saisissant ou à un créancier hypothécaire qui a fait opposition, ou dont la créance est portée à l'état certifié par l'officier de la publicité des droits, l'adjudicataire peut retenir le prix, y compris le prix minimum annoncé dans l'avis de vente (art. 670, al. 1, e), 688.1 C.p.c.), jusqu'à concurrence de sa créance et tant que ne lui a pas été signifié le jugement de distribution prévu à l'article 730 C.p.c. (art. 689, al 2 C.p.c.). Il n'aura alors à payer, dans les cinq jours suivant la signification de ce jugement, que la différence entre le prix d'adjudication et le montant de sa créance pour satisfaire aux créances préférées à la sienne (art. 730, al. 1 C.p.c.). La Cour d'appel a déclaré, à ce sujet, que puisque le deuxième alinéa de l'article 689 C.p.c. est une exception à la règle du paiement lors de la vente par l'adjudicataire du prix minimal d'adjudication (art. 688.1, al. 1 C.p.c.) et à celle du paiement du solde du prix d'adjudication dans les cinq jours suivants (art. 689, al. 1 C.p.c.), il doit être interprété de façon restrictive. Le sens du mot «créance», contenu dans cet article, ne permet alors à l'adjudicataire de retenir que la partie de sa créance qui est colloquée ou susceptible de l'être, tout en tenant compte des priorités établies par la loi."**

See, finally, *Montreal Trust vs Jori Investment Inc*. (J.E. 80-220 (C.S.)), *Eugène Marcoux Inc. v. Côté (1990) R.J.Q. 1221 (C.A.)*

> **First Lien Credit Agreement shall each be entitled to credit bid pursuant to Section 363(k) of the Bankruptcy Code and other applicable law.**



[33] I draw from these excerpts that when the "Stalking Horse" bid process was put in place, those bidders able to benefit from a credit bidding situation could very well revert to the use of this lever or tool in order to arrive at a better bid[7].

[34] Furthermore, many comments were made today with respect to the dollar value of a credit bid versus the dollar value of a cash bid. I think that it is appropriate to conclude that if credit bidding is to take place, it goes without saying that the amount of the credit bid should not exceed, but should be allowed to go as, high as the face value amount of the credit instrument upon which the credit bidder is allowed to rely. The credit bid should not be limited to the fair market value of the corresponding encumbered assets. It would then be just impossible to function otherwise because it would require an evaluation of such encumbered assets, a difficult, complex and costly exercise.

[35] Our Courts have always accepted the dollar value appearing on the face of the instrument as the basis for credit bidding. Rightly or wrongly, this is the situation which prevails.

[36] Many arguments were brought forward, for and against the respective position of the two opposing bidders. At the end of the day, it is my considered opinion that the "Black Diamond" winning bid should prevail and the "Sixth Avenue" bid, the bitter bidder, should fail.

[37] I have dealt briefly with the process. I don't wish to go through every single step of the process but I reiterate that this process was put in place without any opposition whatsoever. It is not enough to appear before a Court and say: "Well, we've got nothing to say now. We may have something to say later" and then, use this argument to reopen the entire process once the result is known and the result turns out to be not as satisfactory as it may have been expected. In other words, silence sometimes may be equivalent to acquiescence. All stakeholders knew what to expect before walking into the auction room.

[38] Once the process is put in place, once the various stakeholders accept the rules, and once the accepted rules call for the possibility of credit bidding, I do not think that,

---

[7] The SISP, the bidding procedure and corresponding orders recognize the principle of credit bidding at the auction and these orders were not the subject of any appeal procedure.
See paragraphs 24, 25 and 26 of BDWB's Intervention.
As for the right to credit bid in a sale by auction under the CCAA, see Re: *Maax Corporation* (QSC. no. 500-11-033561-081, July 10, 2008, , Buffoni J.)
See also Re: *Brainhunter* (OSC Commercial List, no.09-8482-00CL, January 22, 2010)

at the end of the day, the fact that credit bidding was used as a tool, may be raised as an argument to set aside a valid bidding and auction process.

[39] Today, the process is completed and to allow "Sixth Avenue" to come before the Court and say: "My bid is essentially better than the other bid and Court ratify my bid as the highest and best bid as opposed to the winning bid" is the equivalent to a complete eradication of all proceedings and judgments rendered to this date with respect to the Sale of Assets authorized in this file since May/June 2010 and I am not prepared to accept this as a valid argument. Sixth Avenue should have expected that BDWB would want to revert to credit bidding and should have sought a modification of the bidding procedure in due time.

[40] The parties have agreed to go through the bidding process. Once the bidding process is started, then there is no coming back. Or if there is coming back, it is because the process is vitiated by an illegality or non-compliance of proper procedures and not because a bidder has decided to credit bid in accordance with the bidding procedures previously adopted by the Court.

[41] The Court cannot take position today which would have the effect of annihilating the auction which took place last week. The Court has to take the result of this auction and then apply the necessary test to approve or not to approve that result. But this is not what the contestants before me ask me to do. They are asking me to make them win a bid which they have lost.

[42] It should be remembered that "Sixth Avenue" agreed to continue to bid even after the credit bidding tool was used in the bidding process during the auction. If that process was improper, then "Sixth Avenue" should have withdrawn or should have addressed the Court for directions but nothing of the sort was done. The process was allowed to continue and it appears evident that it is only because of the end result which is not satisfactory that we now have a contestation of the results.

[43] The arguments which were put before me with a view to setting aside the winning bid (leaving aside those under Section 36 of the CCAA to which I will come to a minute) have not convinced me to set it aside. The winning bid certainly satisfies a great number of interested parties in this file, including the winning bidders, including the Monitor and several other creditors.

[44] I have adverse representations from two specific groups of creditors who are secured creditors of the White Birch Group prior to the issue of the Initial Order which have, from the beginning, taken strong exceptions to the whole process but nevertheless, they constitute a limited group of stakeholders. I cannot say that they speak for more interests than those of their own. I do not think that these creditors speak necessarily for the mass of unsecured creditors which they allege to be speaking for. I see no benefit to the mass of creditors in accepting their submissions, other than

the fact that the Monitor will dispose of US$500,000.00 less than it will if the winning bid is allowed to stand.

[45] I now wish to address the question of Section 36 CCAA.

[46] In order to approve the sale, the Court must take into account the provisions of Section 36 CCAA and in my respectful view, these conditions are respected.

[47] Section 36 CCAA reads as follows:

> **36. (1) A debtor company in respect of which an order has been made under this Act <u>may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court</u>. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.**
>
> **(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.**
>
> **(3) In deciding whether to grant the authorization, the court is to <u>consider, among other things,</u>**
>
> **(*a*) whether the process leading to the proposed sale or disposition was <u>reasonable in the circumstances</u>;**
>
> **(*b*) whether the <u>monitor approved the proc</u>ess leading to the proposed sale or disposition;**
>
> **(*c*) whether the monitor <u>filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;</u>**
>
> **(*d*) the <u>extent to which the creditors were consulted</u>;**
>
> **(*e*) the effects of the proposed sale or disposition on the creditors and other interested parties; and**
>
> **(*f*) whether the <u>consideration to be received for the assets is reasonable and fair</u>, taking into account their market value.**
>
> **(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that**
>
> **(*a*) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and**

> **(*b*) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.**
>
> **(5) For the purpose of subsection (4), a person who is related to the company includes**
>
> **(*a*) a director or officer of the company;**
>
> **(*b*) a person who has or has had, directly or indirectly, control in fact of the company; and**
>
> **(*c*) a person who is related to a person described in paragraph (*a*) or (*b*).**
>
> **(6) The court may authorize a sale or <u>disposition free and clear of any security, charge or other restriction</u> and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.**
>
> **(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(*a*) and (5)(*a*) if the court had sanctioned the compromise or arrangement.**
>
> **2005, c. 47, s. 131; 2007, c. 36, s. 78.**
>
> **(added underlining)**

[48] The elements which can be found in Section 36 CCAA are, first of all, not limitative and secondly they need not to be all fulfilled in order to grant or not grant an order under this section.

[49] The Court has to look at the transaction as a whole and essentially decide whether or not the sale is appropriate, fair and reasonable. In other words, the Court could grant the process for reasons others than those mentioned in Section 36 CCAA or refuse to grant it for reasons which are not mentioned in Section 36 CCAA.

[50] Nevertheless, I was given two authorities as to what should guide the Court in similar circumstances, I refer firstly to the comments of Madame Justice Sarah Peppall in *Canwest* [2002], CarswellOnt 3509, and she writes at paragraph 13:

> **"The proposed disposition of assets meets the Section 36 CCAA criteria and those set forth in the *Royal Bank v. Soundair Corp.* decision. Indeed, to a large degree, the criteria overlap. The process was reasonable as the Monitor was content with it** (and this is the case here)**. Sufficient efforts were made to attract the best possible bid** (this was done here through the process, I don't have to review this in detail); **the SISP was widely publicized** (I am given

to understand that, in this present instance, the SISP was publicized enough to generate the interest of many interested bidders and then a smaller group of Qualified Bidders which ended up in the choice of one "Stalking Horse" bidder); **ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy** (this was all done in the present case.) **The logical extension of that conclusion is that the AHC Transaction is as well** (and, of course, understand that the words "preferable to a bankruptcy" must be added to this last sentence). **The effect of the proposed sale on other interested parties is very positive.** (It doesn't mean by saying that, that it is positive upon all the creditors and that no creditor will not suffer from the process but given the representations made before me, I have to conclude that the proposed sale is the better solution for the creditors taken as a whole and not taken specifically one by one) **Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors.**



[51] Here, we may have an argument that the sale will not provide significant recoveries for unsecured creditors but the question which needs to be asked is the following: "Is it absolutely necessary to provide interest for all classes of creditors in order to approve or to set aside a "Stalking Horse bid process"?

[52] In my respectful view, it is not necessary. It is, of course, always better to expect that it will happen but unfortunately, in any restructuring venture, some creditors do better than others and sometimes, some creditors do very badly. That is quite unfortunate but it is also true in the bankruptcy alternative. In any event, in similar circumstances, the Court must rely upon the final recommendation of the Monitor which, in the present instance, supports the position of the winning bidder.

[53] In *Nortel Networks*, Mister Justice Morawetz, in the context of a Motion for the Approval of an Assets Sale Agreement, Vesting Order of approval of an intellectual Property Licence Agreement, etc. basically took a similar position (2009, CarswellOnt 4838, at paragraph 35):

**"The duties of the Court in reviewing a proposed sale of assets are as follows:**

> **1) It should consider whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;**
>
> **2) It should consider the interests of all parties;**
>
> **3) It should consider the efficacy and integrity of the process by which offers have been obtained;**

**4) and it should consider whether there has been unfairness in the working out of the process."**

[54] I agree with this statement and it is my belief that the process applied to the present case meets these criteria.

[55] I will make no comment as to the standing of the "bitter bidder". Sixth Avenue mayo have standing as a stakeholder while it may not have any, as a disgruntled bidder.

[56] I am, however, impressed by the comments of my colleague Clément Gascon, j.s.c. in *Abitibi Bowater*, in his decision of May 3rd, 2010 where, in no unclear terms he did not think that as such, a bitter bidder should be allowed a second strike at the proverbial can.

[57] There may be other arguments that could need to be addressed in order to give satisfaction to all the arguments provided to me by counsel. Again, this has been a long day, this has been a very important and very interesting debate but at the end of the whole process, I am satisfied that the integrity of the "Stalking Horse" bid process in this file, as it was put forth and as it was conducted, meets the criteria of the case law and the CCAA. I do not think that it would be in the interest of any of the parties before me today to conclude otherwise. If I were to conclude otherwise, I would certainly not be able to grant the suggestion of "Sixth Avenue", to qualify its bid as the winning bid; I would have to eradicate the entire process and cause a new auction to be held. I am not prepared to do that.

[58] I believe that the price which will be paid by the winning bidder is satisfactory given the whole circumstances of this file. The terms and conditions of the winning bid are also acceptable so as a result, I am prepared to grant the Motion. I do not know whether the Order which you would like me to sign is available and I know that some wording was to be reviewed by some of the parties and attorneys in this room. I don't know if this has been done. Has it been done? Are KSH and SIII satisfied or content with the wording?

**Attorney**:
I believe, Mister Justice, that KSH and SIII have………their satisfaction with the wording. I believe also that Dow Jones, who's present, ……their satisfaction. However, AT&T has communicated that they wish to have some minor adjustments.

**The Court:**
Are you prepared to deal with this now or do you wish to deal with it during the week-end and submit an Order for signature once you will have ironed out the difficulties, unless there is a major difficulty that will require further hearing?

**Attorney:**
I think that the second option you suggested is probably the better one. So, we'd be happy to reach an agreement and then submit it to you and we'll recirculate everyone the wording.

**The Court:**
Very well.

The Motion to Approve the Sale of substantially all of the WB Group assets (no. 87) is **granted,** in accordance with the terms of an Order which will be completed and circulated and which will be submitted to me for signature as of Monday, next at the convenience of the parties;

The Motion of Dow Jones Company Inc. (no. 79) will be continued sine die;

The Amended Contestation of the Motion to Approve the Sale (no. 84) on behalf of "Sixth Avenue" is **dismissed** without costs (I believe that the debate was worth the effort and it will serve no purpose to impose any cost upon the contestant);

Also for the position taken by Dunes, there is no formal Motion before me but Mr. Ferland's position was important to the whole debate but I don't think that costs should be imposed upon his client as well;

The Motion to Stay the Assignment of a Contract from AT&T (no. 86) will be continued sine die;

The Intervention and Memorandum of arguments of BD White Birch Investment LLC is **granted**, without costs.

ROBERT MONGEON, J.S.C.

Counsel and parties present: see attendance list annexed to the Procès-Verbal

Date of hearing: 24 September 2010

# TAB 32

Date: 20081024
Docket: CI 08-01-56696
(Winnipeg Centre)
Indexed as: Winnipeg Motor Express Inc. et al.
Cited as: 2008 MBQB 297



# COURT OF QUEEN'S BENCH OF MANITOBA

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

AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF WINNIPEG MOTOR EXPRESS INC., 4975813 MANITOBA LTD. and 5273634 MANITOBA LTD. ("the applicants")

Counsel:

G. BRUCE TAYLOR and JENNIFER J. BURNELL
for the applicants

HARVEY G. CHAITON
for Heller Financial Canada Holding Company and GE Canada Leasing Services Company

DONALD G. DOUGLAS
for Paccar Financial Services Ltd.

JOHN M. REIMER-EPP
for 7062001 Canada Limited

DOUGLAS G. WARD, Q.C.
for Alterinvest Fund L.P. (BDC)

ROBERT A. DEWAR, Q.C.
for Ramwinn Diesel, Inc.

WILLIAM G. HAIGHT
for Key Equipment Finance Canada Ltd.

DAVID R. M. JACKSON
for Ernst & Young Inc. (the "monitor")

Oral Reasons for Judgment:
Delivered: October 24, 2008

## **SUCHE J.** (Orally)

[1] WME seeks an order approving the sale of certain of its assets to 7062001 Canada Limited. I advised the parties yesterday that I was granting the order as requested and would provide reasons today.

[2] This transaction is the end result, although perhaps not the final step, in these proceedings, which began on May 15, 2008 when I granted an initial order under s. 11 of the ***CCAA***, staying all proceedings against the company, appointing Ernst & Young Inc. as the monitor, and authorizing DIP financing on the amount of $1,000,000.

## **BACKGROUND**

[3] WME is a trucking distribution and storage company headquartered in Winnipeg. As at the date of the initial order, it had terminals in several other cities in Canada and a customer base, diverse both geographically and in nature. Most of its business involved travel to the United States. It operated a fleet of approximately 175 tractors and 243 trailers. It employed 215 employees and over 80 independent contractor owner/operators. It also had outstanding liabilities of approximately $34,000,000. In 2007, WME experienced escalating losses, declining revenues, and increased expenses. It lost approximately $3,400,000 on total revenues of $71,000,000 during the year. This trend accelerated in 2008. The fact that the bulk of WME's business was in the United States, given the rising Canadian dollar, increased cost of fuel, and a downturn in the American economy, was a poisonous mix for WME. By early 2008, senior

management had come to the realization that it was necessary for the company to downsize if it was to survive. Actions by several creditors, most significantly its fuel supplier, brought the issues to a head and precipitated an application under the ***CCAA***.

[4] From the outset of these proceedings the view of WME management was that the company needed to be downsized – or right-sized – for it to continue to carry on business, but that prospect, or at worst a sale as a going concern once that had been achieved, was a realistic goal.

[5] When the order was granted, WME was supported by its major secured creditors, GE and Heller, who together supplied acquisition funding, operating funds, and equipment under leases. At various times some or other of BDC, who has security over WME's fixed assets, the prior vendor, who provided take-back financing, and an assortment of equipment lessors, have also supported the proceedings.

[6] Over the last five months WME, with the assistance of the monitor, has undertaken the very considerable task of consolidating its operations, reducing staff/independent contractors, reducing its fleet, and returning equipment no longer required to lessors from various locations across North America, with what appears to be minimal disruption to service to its customers and while at the same time readying the company for sale and collecting its receivables in more or a less an orderly fashion.

[7] Certain leases – both for premises and equipment – have been repudiated with lessors suffering losses, employees have been terminated, and a significant number of trade creditors have been left without payment. However, WME has continued in business and met all of its ongoing obligations. With the exception of GE, and except otherwise for approximately two months, it has also paid all ongoing equipment lease and financing charges.



## THE MONITOR

[8] Within a week of the initial order, the monitor prepared a Notice of Opportunity to Acquire WME and distributed it to 22 perspective purchasers. This generated interest from nine different parties. By late August, three parties had either expressed interest, made an offer, or sent a letter of intent. At about this point, Mr. Page, the CEO of WME, (and now the sole shareholder of 7062001 Canada Limited) indicated interest in submitting an offer.

[9] The monitor requested that offers be updated and, ultimately, only two formal offers were presented: one from Mr. Page and another from another transport company.

[10] None of the offers – either those that were initially made or the two eventually submitted as formal offers – contemplated any financial return or funds for WME's unsecured creditors or shareholders, and secured creditors would suffer substantial shortfalls in all instances. The sale before me for consideration will result in at least $9,000,000 in unpaid liabilities.

[11] The two offers also required the acceptance of the purchaser as a customer by GE. As both left something to be desired, the monitor requested and was granted an order extending its power to allow it to negotiate the best deal and report back thereafter. Ultimately the other party was unable to obtain GE's consent. The Page offer was improved and all other conditions were either met or waived by it.

[12] The choice before the court, then, is to approve the Page offer (now structured through the corporation 7062001 Canada Limited), or to allow a forced liquidation or bankruptcy.

[13] The monitor has been of the view from the time the first set of offers were received in late August, that a going concern sale was preferable to a forced liquidation because it would provide at least the following benefits:

- an orderly transition of customers;
- offers of employment to some employees;
- enhanced collection of WME's receivables;
- opportunities for certain equipment lessors to continue leasing equipment; and
- a sale of unencumbered equipment.

[14] In terms of the offer that is before the court, the monitor expresses the view that it is fair and reasonable and will provide substantial benefit to the stakeholders. It recommends that the offer be accepted. It is joined in this

recommendation by all secured creditors and even certain of the equipment lessors whose leases will not be assumed. The only party opposing is BDC.

[15] WME is indebted to BDC in the approximate amount of $2,400,000. In addition to a charge on WME's fixed assets, BDC has a charge over receivables but stands second to Heller. The possibility exists that it may receive some return on this. It also likely has first claim to proceeds of sale of some of WME's equipment. These are the only payments it will receive.

[16] The monitor obtained an appraisal of the fixed assets at approximately $430,000 before any liquidation costs. In its recent report, the monitor has expressed the view that $260,000, being the allocation to the equipment owned by WME, in the proposed transaction, represents a reasonable estimate of what would be available in net funds after taking into consideration all costs of liquidation.

[17] BDC argues that this transaction should not be approved, in essence because it works an unfairness or, perhaps in other language, it is not appropriate in all the circumstances because of disadvantage to BDC. Mr. Ward points out that unlike a plan of arrangement, where all creditors with the same type of security are paid the same percentage return, BDC is left with considerably less than the other secured creditors and much less than what it would obtain on a liquidation.

[18] Mr. Ward also raises the fact that as part of the purchase price, some $40,000 will go to pay outstanding pre-order vacation pay, which would otherwise be a liability of Mr. Page as a director of WME.

[19] Finally, and perhaps most importantly, Mr. Ward cites the recent decision of the British Columbia Court of Appeal in ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.***, 2008 BCCA 327, [2008] B.C.J. No. 1587 (QL), where the court found that absent a plan of arrangement or compromise a stay of proceedings should not be ordered.

## ANALYSIS

[20] I turn, then, to the applicable law.

[21] In ***Royal Bank of Canada v. Soundair Corp.,*** (1991) 7 C.B.R. (3d) 1, the Ontario Court of Appeal stated that in considering whether to approve a sale by a court-appointed receiver, the duty of the court was to consider:

(i) whether the receiver had made sufficient effort to get the best price and had not acted improvidently;

(ii) the interests of the parties;

(iii) the efficacy and integrity of the process by which offers were obtained; and

(iv) whether there has been unfairness in the working out of the process.

[22] In ***Canadian Red Cross Society, Re*** (1998), 5 C.B.R. (4th) 299 , Blair J. adopted this same test when considering a proposed transaction in a ***CCAA*** proceeding.

[23] In this case, the actions of the monitor in making sufficient effort to obtain the best price, and the efficacy and integrity of the process by which offers were obtained, are not questioned by any party. The efforts, not only of the monitor but also of WME in locating potential purchasers, the use of confidentiality agreements and sealed reports to protect the integrity of the process, and the monitor's efforts in negotiating the best deal, together, speak of an efficient and very professional approach by the monitor.

[24] The issue of unfairness in the process identified in ***Soundair***, concerns actions of the receiver typically towards a potential purchaser. As long as the receiver has acted reasonably prudently, fairly and not arbitrarily, its recommendation should be accepted.

[25] Last, is the question of the interest of the parties. It is well accepted in ***CCAA*** proceedings that regard should be had to the interests of all of the stakeholders, which may well go beyond the debtor and creditor, and extend to employees, customers, and the like. It is perhaps under this heading that BDC's concern could be considered.

[26] Having said that, BDC has either supported or taken no position on every request made by WME during the course of these proceedings. It has actively supported several extension motions, including when the stated objective of the

monitor in seeking the extension, was to locate a buyer; and the extension which allowed Mr. Page the opportunity to prepare an offer. I note this was done after having received a summary of the earlier three offers or expressions of interest.

[27] Ultimately BDC was in support of the other formal offer submitted but not accepted by GE. That support, I might add, was conditional on BDC not being subject to the DIP financing.

[28] This brief summary is telling, in my view. I take from it that BDC is simply unhappy that it did not get more out of this transaction. That in and of itself is not sufficient objection to say that the interests of the parties have not been served.

[29] It is also the case that the matter of the priority of the DIP financing is yet to be determined, so in theory, BDC may have an opportunity to improve its position.

[30] Considerable time was also spent on the issue of the "optics" of the situation, namely, that Mr. Page, the CEO of WME in the period leading up to and during its financial difficulties, will ultimately be the sole owner of a well capitalized company, while creditors, secured and unsecured, are left with substantial losses. The matter of the unpaid vacation wages, it is argued, adds to this concern.

[31] Having canvassed the matter thoroughly during the hearing of this motion – perhaps the point of leaving no stone unturned – I agree with WME that no benefit accrues to Mr. Page or any of the other directors by inclusion of $40,000

to pay pre-May 15 vacation pay, as part of the purchase price. Directors' liabilities under ***The Employment Standards Code*** only arise when the employer company is not able to pay. Here, the $40,000 would otherwise have been paid by WME on the expiry of the stay and prior to the closing of this transaction.

[32] As to the fact that Mr. Page ends up being the effective owner of the business, in the end, the only viable offer made for the purchase of the assets of WME was his. "Optics" are only a concern if the appearance is a reflection of the substance of a situation. In this instance it is not. Mr. Page himself gave up a considerable claim for vacation pay. WME, with Mr. Page leading the management team, has acted with due diligence and good faith throughout these proceedings.

[33] My conclusion is that the offer is clearly preferable to a forced liquidation or a bankruptcy and it is in the interests of all stakeholders that the transaction proceed.

[34] The last issue concerns the question of the jurisdiction of the court to approve a sale where no Plan of Arrangement has been filed. In ***Cliffs Over Maple Bay***, *supra*, the British Columbia Court of Appeal overturned a lower court decision granting a stay under s. 11 of the ***CCAA*** and authorizing DIP financing.

[35] The business of the company was the development of some land into residential homes and a golf course. Various parts of the property were between

50% and 95% complete. Financial difficulties occurred when delays and cost overruns developed, but the situation became critical when it was discovered that the anticipated water source for the golf course was not available. When the company advised the mortgagees of the property of this, they responded with Notices of Intention to enforce their security. A receiver was appointed, which precipitated an application by the company for a stay under the ***CCAA***. The order was granted.

[36] On appeal, the lenders argued that the ***CCAA*** should not apply to companies whose business is a single land development or is essentially dormant. The court rejected these arguments but found that the real question was whether a stay of proceedings should have been granted at all. Tysoe J.A., writing on behalf of the court, states:

> 26 In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the ***CCAA***, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the ***CCAA***'s fundamental purpose.
>
> 27 The fundamental purpose of the ***CCAA*** is expressed in the long title of the statute:
>
>> "An Act to facilitate compromises and arrangements between companies and their creditors".

[37] While recognizing that the legislation is intended to have wide scope and allows a judge to make orders to effectively maintain the status quo while an

insolvent company attempts to restructure or otherwise organize its affairs, Tysoe J.A. goes on to say:

> 32 Counsel for the Debtor Company has cited two decisions containing comments approving the use of the ***CCAA*** to effect a sale, winding up or liquidation of a company such that its business would not be ongoing following an arrangement with its creditors: namely, ***Re Lehndorff General Partner Ltd.*** (1992), 17 C.B.R. (3d) 24 at para. 7 (Ont. Ct. Jus. - Gen. Div.) and ***Re Anvil Range Mining Corp.*** (2001), 25 C.B.R. (4th) 1 at para. 11 (Ont. Sup. Ct. Jus.), aff'd (2002) 34 C.B.R. (4th) 157 at para. 32 (Ont. C.A.). I agree with these comments if it is intended that the sale, winding up or liquidation is part of the arrangement approved by the creditors and sanctioned by the court. I need not decide the point on this appeal, but I query whether the court should grant a stay under the ***CCAA*** to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan of arrangement intended to be made by the debtor company will simply propose that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.
>
> 33 Counsel for the Debtor Company also relies upon the decision in ***Re Skeena Cellulose Inc.*** (2001), 29 C.B.R. (4th) 157 (BCSC), where a creditor unsuccessfully opposed an extension of the stay of proceedings on the basis that the restructuring plan was wholly dependent upon the debtor company finding a purchaser of its assets. I note that the debtor company in that case was planning to make an arrangement with its creditors. I again query, without deciding, whether the court should continue the stay to allow the debtor company to attempt to fulfil a critical prerequisite to its plan of arrangement without requiring a vote by the creditors. I appreciate that it is frequently necessary for insolvent companies to satisfy certain prerequisites before negotiating a plan of arrangement with its creditors, but some prerequisites may be so fundamental that they should properly be regarded as an element of the debtor company's overall plan of arrangement.

[38] Given that the debtor company proposed only a restructuring and did not intend to propose a plan of arrangement or compromise, Tysoe J.A. was of the view that this was not a proper case for a stay. He concludes:

> 38 … What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The ***CCAA*** was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts

> to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[39] Justice Tysoe's description of the fundamental purpose of the ***CCAA***, is not, in my view, consistent with that of other courts, who have accepted that a sale of assets without a plan of arrangement can be ordered. In ***Re Lehndorff General Partner Ltd.***, Farley J. stated:

> 5 The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. …

[40] In ***Red Cross***, *supra*, this issue was considered by Blair J., who states at para. 45:

> It is very common in CCAA restructurings for the Court to approve the sale and disposition of assets during the process and before the Plan is formally tendered and voted upon. There are many examples where this has occurred, the recent Eaton's restructuring being only one of them. The CCAA is designed to be a flexible instrument, and it is that very flexibility which gives it its efficacy. As Farley J said in *Dylex Ltd.* supra (p. 111), "the history of CCAA law has been an evolution of judicial interpretation". It is not infrequently that judges are told, by those opposing a particular initiative at a particular time, that if they make a particular order that is requested it will be the first time in Canadian jurisprudence (sometimes in global jurisprudence, depending upon the level of the rhetoric) that such an order has made! Nonetheless, the orders are made, if the circumstances are appropriate and the orders can be made within the framework and in the spirit of the CCAA legislation. Mr. Justice Farley has well summarized this approach in the following passage from his decision in *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]), at p. 31, which I adopt:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course *or otherwise deal with their assets* so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors. See the preamble to and sections 4, 5, 7, 8 and 11 of the CCAA (a lengthy list of authorities cited here is omitted).
>
> The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating *or to otherwise deal with its assets* but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.

[41] In the flight away from receiverships resulting from the potential liability of receivers, it seems that ***CCAA*** proceedings are becoming not only vehicle of choice, but a necessary remedy where liquidation or bankruptcy would not be in the interests of a debtor company and creditors. Everyone agrees the ***CCAA*** is intended to be flexible, and must be given a broad and liberal interpretation to achieve its objectives. I consider those objectives to be both more fundamental and broader than the title of the statute, and go beyond the circumstances of a formal plan of arrangement. The world of commercial lending and the complexity of security interests has evolved, and I consider the remedial nature of the ***CCAA*** allows it to deal with such changes.

[42] It also seems to me that a formal plan of arrangement or compromise is, at least theoretically, always a possibility, so to require a debtor company to

utter some magic incantation that it intends to propose a plan of arrangement, as a prerequisite for relief under the CCAA, is overly technical and inconsistent with this remedial objective. The result of such a conclusion may simply be that applicants would make a statement in some *pro forma* or boiler plate language, or go through an exercise for no valid purpose.

[43] However, even if the view expressed by the B.C. Court of Appeal is the correct one, this is an issue which ought to have been raised at the time the initial order was granted or on the comeback hearing. So, even if this were a reason to deny the initial stay, I do not see that it is a reason to reject a sale transaction some five months later.

[44] In conclusion, then, I see no jurisdictional impediment in granting the order sought and I am of the view that the proposed sale is preferable to the alternatives, and clearly in the interests of all stakeholders.

______________________________ J.

# TAB 33

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Wolseley Canada Inc. v. Emco Corporation,***
2007 BCSC 1929

Date: 20070925
Docket: S061645
Registry: Vancouver



Between:

**Wolseley Canada Inc.**

Plaintiff

And:

**Emco Corporation, Gordon Wiltzen, Paul Wesley, Randy Flello, Hazel Duenas, and Gordon Carver**

Defendants

Before: The Honourable Mr. Justice Silverman

## Oral Reasons for Judgment

In Chambers
September 25, 2007

| | |
|---|---|
| Counsel for Plaintiff | F. Verhoeven<br>E.L. Bosma |
| Counsel for Defendants | B. Fraser<br>D. Rideout |
| Place of Trial/Hearing: | Vancouver, B.C. |

[1] **THE COURT:** These are oral reasons.

[2] There are two applications before me. The defendants apply for particulars of the plaintiff's claim under Supreme Court Rule 19. The plaintiff makes an application to amend the statement of claim. Many of the same issues are involved in both applications in the sense that the defendants are not opposed to the plaintiff's application to amend except to the extent that the amendments, the defendants argue, should contain greater particulars than the proposed amendments do contain.

[3] The defendants argue that the statement of claim is so general that it would be unfair and unmanageable to permit the plaintiff to discover the defendants in the broad, wide-ranging way that would arguably flow from the statement of claim as it presently exists and as the claims are presently stated. Not ordering particulars would allow the plaintiff to continue to discoveries effectively by commencing or pursuing a fishing expedition.

[4] The plaintiff opposes the application for particulars on the basis that it does not know the specifics that the defendants seek to have particularized. Those particulars, the plaintiff argues, are peculiarly within the knowledge of the defendants because the defendants took voluminous amounts of information, primarily and perhaps exclusively electronic, and documentation from the plaintiff and the plaintiff needs to complete discovery procedures in order to gain the information that the defendants indicate they require by way of particulars.

[5] The plaintiff argues that if required to provide particulars at this point, the result will effectively be an inability to proceed with much of its anticipated suit. The

result of this application therefore will have a direct effect on the type and extent of lawsuit that will remain after this ruling. If I order particulars, the plaintiff's claim will likely be reduced in its scope and complexity because of the plaintiff's inability to provide the information that is necessary for it to go on. If I do not order particulars, the examinations for discovery will be longer and more complex and used by the plaintiff to seek the information necessary to pursue a wider claim.

[6] Very simply the circumstances that give rise to this suit are these: the plaintiff is a national distributor of construction materials. The corporate defendant is a competitor in the process of expanding its operations in British Columbia. The individual defendants are former employees of the plaintiff who left their employ there and immediately thereafter became employed with the corporate defendant. The statement of claim alleges that those employees left without giving notice, leaving the plaintiff unable to conduct its business properly until a considerable amount of time and effort had been expended in an effort to understand and correct the situation that it had been left in.

[7] The claim also alleges that those employees, before leaving and while leaving, took a great deal of confidential information with them. Five of nine of the plaintiff's former employees fall into this category, including the person who was the plaintiff's regional manager at the time.

[8] There is a reasonable body of circumstantial evidence, including technical analyses of the individual defendants' former computers, indicating suspicious activity before they left, circumstantial evidence which might at trial support the

plaintiff's claims. The plaintiff argues it is clear what happened, but the precise details of what was taken and what use it has been put to and what use, if any, the corporate defendant has put it to, indeed what access they have even had to it, is not something which is completely within the plaintiff's knowledge. That is so, because of the defendants' wrongdoing in taking those materials, the wrongdoing alleged in the statement of claim. It is precisely because of that, that the plaintiff is unable to comply with the application for particulars.



[9] The statement of claim alleges generally breaches of fiduciary duty, duties of loyalty and good faith, vicarious liability of those same duties on the part of the corporate defendant and interference with contractual relations, among other claims. The defendants argue that those allegations are far too general, unbounded and formless, do not identify what is actually in issue, and leave the defendants unable to know precisely the case that they are required to meet.

[10] The defendants refer me to a number of authorities for a variety of general principles, some of which are these: the case of ***Anglo-Canadian Timber Products Ltd. v. British Columbia Electric Co. Ltd.*** (1960), 23 D.L.R. (2d) 656 at 658, 31 W.W.R. 604 (B.C.C.A.), where the court says:

> When pleadings are so vaguely drawn that the opposing party cannot tell what are the facts in issue ... then in such circumstances the particulars serve to define the issue so that the opposite party may know what are the facts in issue. In such instances the party demanding particulars is in effect asking what is the issue which the draftsman intended to raise and it is quite apparent that for such a purpose an examination for discovery is no substitute in that it presupposes the issues have been properly defined.

[11] Also in our Court of Appeal in 1982, Mr. Justice Lambert set out an oft-quoted set of six criteria or rather purposes of particulars in the case of ***Cansulex Ltd. v. Perry***, [1982] B.C.J. No. 369 (QL), 1982 Carswell BC (WLeC) (B.C.C.A.). He itemized these six factors:

> (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved;
>
> (2) to prevent the other side from being taken by surprise at the trial;
>
> (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
>
> (4) to limit the generality of the pleadings;
>
> (5) to limit and decide the issues to be tried, and as to which discovery is required; and
>
> (6) to tie the hands of the party so that he cannot without leave go into any matters not included.

[12] In a case called ***Proconic Electronics Ltd v. Wong***, 67 B.C.L.R. 237 at 241, [1985] B.C.J. No. 2863 (QL) (S.C.), Madam Justice Southin when she was on this court in 1985, said this:

> I think a plaintiff who makes serious allegations of misconduct against someone who stands in a fiduciary relationship to him and who says he cannot give any particulars of those allegations must adduce some evidence even if very little in order to require a defendant to answer. Defendants are not to be called upon to answer a bald allegation of breach of fiduciary duty of which there is no evidence and of which no particulars are given.

[13] And finally my sister Loo in the case of ***Napier Environmental Technologies Inc. v. Vitomir***, 2001 BCSC 1704, [2001] B.C.J. No. 2552 (QL), said this at para. 23:

> While the law protects employer's confidential information and trade secrets, I do not think the law goes so far as to deprive former employees from earning a living based on a former employer's mere speculations. There must be something more. The defendants need to know the case they have to meet, and more importantly, they need to know sooner, rather than later, how they can or cannot earn a living.

[14] The plaintiff does not disagree with the concepts expressed in any of those cases or quotations, but refers me to various authorities which suggest that, when considering all of that, the court must go farther and consider whether or not there are special circumstances in any given case which affect the discretion that is to be employed in this situation.

[15] In a case called ***Central Power Prdoucts v. 238022 B.C. Ltd. et al***., 2003 BCSC 1088, [2003] B.C.J. No. 1672 (QL)**,**, my brother McEwan, having set out much of what I have just referred to as general principles and indeed even some of the quotations I read from, says this commencing at paragraph 20:

> These considerations must, however, in a practical sense, be balanced against considerations that will allow the plaintiff to properly explore its claim, particularly where some of the information it needs to make out its claim may be in the hands of the defendant. In this respect ***Neptune Bulk Terminals (Canada) Ltd. v. Kilborn Engineering Pacific Ltd.*** quoting ***Mexican Northern Power Co. v. S. Pearson & Son Limited O.W.N.*** (1914), 648, per Middleton J., is instructive.

[16] And then Judge McEwan quotes from that:

> Discovery is of necessity limited by the pleadings and by the particulars which may have been given under them. To order particulars at this stage would, I think, unfairly hamper the plaintiff. The plaintiff is entitled to search the conscience and the conduct of the defendant, its agent, to the utmost; and it is better that this should all be done before the final formulation of the particular charges to be investigated at the trial. If the particulars given in the pleadings turn out to be so vague and general as to be insufficient to direct the mind

> of the party to be examined for discovery to the real issues, this may create difficulty when the examination is on foot; but it seems to me to be better that this should be left to work itself out during the progress of the examination than that an attempt should be made unduly to tie the hands of the plaintiff at this stage.

[17] At paragraph 21 Judge McEwen says this:

> When the plaintiff alleges fraud *prima facie* it ought to particularize, but the Courts are careful to avoid making an order which might preclude him from proceeding when there is evidence that the defendants themselves are the sole depositaries of the particulars asked for. The order appealed from is, with respect, futile, because, if it orders discovery, it confines that to those matters of which particulars have already been given and are not wanted, and does not permit the plaintiff to inquire into the matters in respect to which it required the information which would enable it to answer the demand for particulars, and may find it in the sole possession of the defendants who are demanding them.

[18] I find myself viewing this case as similar to the manner in which Judge McEwan viewed the ***Central Power*** situation and consequently I am of the view that particulars should not be and will not be ordered at this time and that discoveries can and should proceed, or at least commence in the manner Judge McEwan said, on the basis of the pleadings as noted.

[19] In that regard, I agree with comments which Judge Ross made in the case of ***Order of the Oblates of Mary Immaculate-B.C. v. Dohm, Jaffer & Jeraj***, 2007 BCSC 734, [2007] B.C.J. No. 1107 (QL), where she said, after coming to a similar conclusion as Judge McEwan and myself, this at her para. 17:

> Considering these principles and having regard to the information that the plaintiff has provided, I have come to the conclusion that, with the material that the plaintiff has disclosed, the defendants have been provided with particulars sufficient to take the matter through discovery. However, it is also my view that the issue of particulars

> ought to be revisited at the conclusion of discovery. Given the concerns identified in ***Cansulex*** together with the purpose of particulars, it may well be that further particulars will be appropriate to focus the issues for trial. However, at this juncture I am of the view that the plaintiff ought to be permitted to explore the case on examination for discovery without the necessity of providing further particulars. Accordingly the defendants are at liberty to renew this application once discoveries have been completed.

[20] I have arrived at the same conclusion, and I dispose of the defendants' application for particulars in the same manner.

[21] With respect to the plaintiff's application to amend, for the same reasons, I am of the view that particulars should not be and therefore will not be ordered at this time. It may be that they will have to be ordered later. I do allow the application to amend. In my view, the proposed amendments do provide some additional particulars, although I recognize that there may be still more available after discoveries. This matter is at a very early stage of the proceedings, so that the amendment will help to some extent to define the issues and because of the early stage, the defendants will not be prejudiced by that.

[22] Costs in the cause.

Silverman J

# TAB 34

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Worldspan Marine Inc. (Re),* 2011 BCSC 1758

Date: 20111221
Docket: S113550
Registry: Vancouver



**In the Matter of the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36, as amended**

And

**In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 and the *Business Corporations Act*, S.B.C. 2002, c. 57**

And

**In the Matter of Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products Ltd.**

Petitioners

Before: The Honourable Mr. Justice Pearlman

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Petitioners Worldspan Marine Inc., Crescent Custom Yachts Inc., Queenship Marine Industries Ltd., 27222 Developments Ltd. and Composite FRP Products | J.R. Sandrelli & J.D. Schultz |
| Counsel for Wolrige Mahon (the "VCO"): | K. Jackson & V. Tickle |
| Counsel for the Respondent, Harry Sargeant III: | K.E. Siddall |
| Counsel for Ontrack Systems Ltd.: | J. Leathley, Q.C. |

| | |
|---|---|
| Counsel for Mohammed Al-Saleh: | D. Rossi |
| Counsel for Offshore Interiors Inc., Paynes Marine Group, Restaurant Design and Sales LLC, Arrow Transportation Systems and CCY Holdings Inc.: | G. Wharton & P. Mooney |
| Counsel for Canada Revenue Agency: | N. Beckie |
| Counsel for Comerica Bank: | J. McLean, Q.C. |
| Counsel for The Monitor: | G. Dabbs |
| Place and Date of Hearing: | Vancouver, B.C. December 16, 2011 |
| Place and Date of Judgment: | Vancouver, B.C. December 21, 2011 |

## INTRODUCTION

[1] On December 16, 2011, on the application of the petitioners, I granted an order confirming and extending the Initial Order and stay pronounced June 6, 2011, and subsequently confirmed and extended to December 16, 2011, by a further 119 days to April 13, 2012. When I made the order, I informed counsel that I would provide written Reasons for Judgment. These are my Reasons.

## POSITIONS OF THE PARTIES

[2] The petitioners apply for the extension of the Initial Order to April 13, 2012 in order to permit them additional time to work toward a plan of arrangement by continuing the marketing of the Vessel “QE014226C010” (the “Vessel”) with Fraser Yachts, to explore potential Debtor In Possession (“DIP”) financing to complete construction of the Vessel pending a sale, and to resolve priorities among *in rem* claims against the Vessel.

[3] The application of the petitioners for an extension of the Initial Order and stay was either supported, or not opposed, by all of the creditors who have participated in these proceedings, other than the respondent, Harry Sargeant III.

[4] The Monitor supports the extension as the best option available to all of the creditors and stakeholders at this time.

[5] These proceedings had their genesis in a dispute between the petitioner Worldspan Marine Inc. and Mr. Sargeant. On February 29, 2008, Worldspan entered into a Vessel Construction Agreement with Mr. Sargeant for the construction of the Vessel, a 144-foot custom motor yacht. A dispute arose between Worldspan and Mr. Sargeant concerning the cost of construction. In January 2010 Mr. Sargeant ceased making payments to Worldspan under the Vessel Construction Agreement.

[6] The petitioners continued construction until April 2010, by which time the total arrears invoiced to Mr. Sargeant totalled approximately $4.9 million. In April or May 2010, the petitioners ceased construction of the Vessel and the petitioner Queenship laid off 97 employees who were then working on the Vessel. The petitioners maintain that Mr. Sargeant's failure to pay monies due to them under the Vessel Construction Agreement resulted in their insolvency, and led to their application for relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, ("*CCAA*") in these proceedings.

[7] Mr. Sargeant contends that the petitioners overcharged him. He claims against the petitioners, and against the as yet unfinished Vessel for the full amount he paid toward its construction, which totals $20,945,924.05.

[8] Mr. Sargeant submits that the petitioners are unable to establish that circumstances exist that make an order extending the Initial Order appropriate, or that they have acted and continue to act in good faith and with due diligence. He says that the petitioners have no prospect of presenting a viable plan of arrangement to their creditors. Mr. Sargeant also contends that the petitioners have shown a lack of good faith by failing to disclose to the Court that the two principals of Worldspan, Mr. Blane, and Mr. Barnett are engaged in a dispute in the United States District Court for the Southern District of Florida where Mr. Barnett is suing Mr. Blane for fraud, breach of fiduciary duty and conversion respecting monies invested in Worldspan.

[9] Mr. Sargeant drew the Court's attention to Exhibit 22 to the complaint filed in the United States District Court by Mr. Barnett, which is a demand letter dated June 29, 2011 from Mr. Barnett's Florida counsel to Mr. Blane stating:

> Your fraudulent actions not only caused monetary damage to Mr. Barnett, but also caused tremendous damage to WorldSpan. More specifically, your taking Mr. Barnett's money for your own use deprived the company of much needed capital. <u>Your harm to WorldSpan is further demonstrated by your conspiracy with the former CEO of WorldSpan, Lee Taubeneck, to overcharge a customer in order to offset the funds you were stealing from Mr. Barnett that should have</u>

> <u>gone to the company.</u> Your deplorable actions directly caused the demise of what could have been a successful and innovative new company" (underlining added)

[10] Mr. Sargeant says, and I accept, that he is the customer referred to in the demand letter. He submits that the allegations contained in the complaint and demand letter lend credence to his claim that Worldspan breached the Vessel Construction Agreement by engaging in dishonest business practices, and over-billed him. Further, Mr. Sargeant says that the petitioner's failure to disclose this dispute between the principals of Worldspan, in addition to demonstrating a lack of good faith, reveals an internal division that diminishes the prospects of Worldspan continuing in business.

[11] As yet, there has been no judicial determination of the allegations made by Mr. Barnett in his complaint against Mr. Blane.

**DISCUSSION AND ANALYSIS**

[12] On an application for an extension of a stay pursuant to s. 11.02(2) of the *CCAA*, the petitioners must establish that they have met the test set out in s. 11.02(3):

> (a) whether circumstances exist that make the order appropriate; and
>
> (b) whether the applicant has acted, and is acting, in good faith and with due diligence.

[13] In considering whether "circumstances exist that make the order appropriate", the court must be satisfied that an extension of the Initial Order and stay will further the purposes of the *CCAA*.

[14] In *Century Services Inc. v. Canada (Attorney General)*, [2010] 3 S.C.R. 379 at para. 70, Deschamps J., for the Court, stated:

> ... Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the

> means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.

[15] A frequently cited statement of the purpose of the *CCAA* is found in *Chef Ready Foods Ltd. v. Hongkong Bank of Canada* (1990), 51 B.C.L.R. (2d) 84, [1990] B.C.J. No. 2384 at p. 3 where the Court of Appeal held:

> The purpose of the C.C.A.A. is to facilitate the making of a compromise or arrangement between an insolvent debtor company and its creditors to the end that the company is able to continue in business. It is available to any company incorporated in Canada with assets or business activities in Canada that is not a bank, a railway company, a telegraph company, an insurance company, a trust company, or a loan company. When a company has recourse to the C.C.A.A. the court is called upon to play a kind of supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure. Obviously time is critical. Equally obviously, if the attempt at compromise or arrangement is to have any prospect of success there must be a means of holding the creditors at bay, hence the powers vested in the court under s. 11.

[16] In *Pacific National Lease Holding Corp. (Re)*, [1992] B.C.J. No. 3070 (S.C.) Brenner J. (as he then was) summarized the applicable principles at para. 26:

> (1) The purpose of the C.C.A.A. is to allow an insolvent company a reasonable period of time to reorganize its affairs and prepare and file a plan for its continued operation subject to the requisite approval of the creditors and the Court.
>
> (2) The C.C.A.A. is intended to serve not only the company's creditors but also a broad constituency which includes the shareholders and the employees.
>
> (3) During the stay period the Act is intended to prevent manoeuvres for positioning amongst the creditors of the company.
>
> (4) The function of the Court during the stay period is to play a supervisory role to preserve the status quo and to move the process along to the point where a compromise or arrangement is approved or it is evident that the attempt is doomed to failure.
>
> (5) The status quo does not mean preservation of the relative pre-debt status of each creditor. Since the companies under C.C.A.A. orders continue to operate and having regard to the broad constituency of interests the Act is intended to serve, preservation of the status quo is not intended to create a rigid freeze of relative pre-stay positions.

> (6) The Court has a broad discretion to apply these principles to the facts of a particular case.

[17] In *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, the Court of Appeal set aside the extension of a stay granted to the debtor property development company. There, the Court held that the *CCAA* was not intended to accommodate a non-consensual stay of creditors' rights while a debtor company attempted to carry out a restructuring plan that did not involve an arrangement or compromise on which the creditors could vote. At para. 26, Tysoe J.A., for the Court said this:

> In my opinion, the ability of the court to grant or continue a stay under s. 11 is not a free standing remedy that the court may grant whenever an insolvent company wishes to undertake a "restructuring", a term with a broad meaning including such things as refinancings, capital injections and asset sales and other downsizing. Rather, s. 11 is ancillary to the fundamental purpose of the *CCAA*, and a stay of proceedings freezing the rights of creditors should only be granted in furtherance of the *CCAA*'s fundamental purpose.

[18] At para. 32, Tysoe J.A. queried whether the court should grant a stay under the *CCAA* to permit a sale, winding up or liquidation without requiring the matter to be voted upon by the creditors if the plan or arrangement intended to be made by the debtor company simply proposed that the net proceeds from the sale, winding up or liquidation be distributed to its creditors.

[19] In *Cliffs Over Maple Bay Investments Ltd.* at para. 38, the court held:

> ... What the Debtor Company was endeavouring to accomplish in this case was to freeze the rights of all of its creditors while it undertook its restructuring plan without giving the creditors an opportunity to vote on the plan. The *CCAA* was not intended, in my view, to accommodate a non-consensual stay of creditors' rights while a debtor company attempts to carry out a restructuring plan that does not involve an arrangement or compromise upon which the creditors may vote.

[20] As counsel for the petitioners submitted, *Cliffs Over Maple Bay Investments Ltd.* was decided before the current s. 36 of the *CCAA* came into force. That section permits the court to authorize the sale of a debtor's assets outside the ordinary course of business without a vote by the creditors.

[21] Nonetheless, *Cliffs Over Maple Bay Investments Ltd.* is authority for the proposition that a stay, or an extension of a stay should only be granted in furtherance of the *CCAA*'s fundamental purpose of facilitating a plan of arrangement between the debtor companies and their creditors.

[22] Other factors to be considered on an application for an extension of a stay include the debtor's progress during the previous stay period toward a restructuring; whether creditors will be prejudiced if the court grants the extension; and the comparative prejudice to the debtor, creditors and other stakeholders in not granting the extension: *Federal Gypsum Co. (Re)*, 2007 NSSC 347, 40 C.B.R. (5th) 80 at paras. 24-29.

[23] The good faith requirement includes observance of reasonable commercial standards of fair dealings in the *CCAA* proceedings , the absence of intent to defraud, and a duty of honesty to the court and to the stakeholders directly affected by the *CCAA* process: *Re San Francisco Gifts Ltd.*, 2005 ABQB 91 at paras. 14-17.

**Whether circumstances exist that make an extension appropriate**

[24] The petitioners seek the extension to April 13, 2012 in order to allow a reasonable period of time to continue their efforts to restructure and to develop a plan of arrangement.

[25] There are particular circumstances which have protracted these proceedings. Those circumstances include the following:

(a) Initially, Mr. Sargeant expressed an interest in funding the completion of the Vessel as a Crescent brand yacht at Worldspan shipyards. On July 22, 2011, on the application of Mr. Sargeant, the Court appointed an independent Vessel Construction Officer to prepare an analysis of the cost of completing the Vessel to Mr. Sargeant's specifications. The Vessel Construction Officer delivered his completion cost analysis on October 31, 2011.

(b) The Vessel was arrested in proceedings in the Federal Court of Canada brought by Offshore Interiors Inc., a creditor and a maritime lien claimant. As a result, The Federal Court, while recognizing the jurisdiction of this Court in the *CCAA* proceedings, has exercised its jurisdiction over the vessel. There are proceedings underway in the Federal Court for the determination of *in rem* claims against the Vessel. Because this Court has jurisdiction in the CCAA proceedings, and the Federal Court exercises its maritime law jurisdiction over the Vessel, there have been applications in both Courts with respect to the marketing of the Vessel.

(c) The Vessel, which is the principal asset of the petitioner Worldspan, is a partially completed custom built super yacht for which there is a limited market.

[26] All of these factors have extended the time reasonably required for the petitioners to proceed with their restructuring, and to prepare a plan of arrangement.

[27] On September 19, 2011, when this court confirmed and extended the Initial Order to December 16, 2011, it also authorized the petitioners to commence marketing the Vessel unless Mr. Sargeant paid $4 million into his solicitor's trust account on or before September 29, 2011.

[28] Mr. Sargeant failed to pay the $4 million into trust with his solicitors, and subsequently made known his intention not to fund the completion of the Vessel by the petitioners.

[29] On October 7, 2011, the Federal Court also made an order authorizing the petitioners to market the Vessel and to retain a leading international yacht broker, Fraser Yachts, to market the Vessel for an initial term of six months, expiring on April 7, 2012. Fraser Yachts has listed the Vessel for sale at $18.9 million, and is endeavouring to find a buyer. Although its efforts have attracted little interest to date, Fraser Yachts have expressed confidence that they will be able to find a buyer for the Vessel during the prime yacht buying season, which runs from February through July. Fraser Yachts and the Monitor have advised that process may take up to 9 months.

[30] On November 10, 2011, this Court, on the application of the petitioners, made an order authorizing and approving the sale of their shipyard located at 27222

Lougheed Highway, with a leaseback of sufficient space to enable the petitioners to complete the construction of the Vessel, should they find a buyer who wishes to have the Vessel completed as a Crescent yacht at its current location. The sale and leaseback of the shipyard has now completed.

[31] Both this Court and the Federal Court have made orders regarding the filing of claims by creditors against the petitioners and the filing of *in rem* claims in the Federal Court against the Vessel.

[32] The determination of the *in rem* claims against the Vessel is proceeding in the Federal Court.

[33] After dismissing the *in rem* claims of various creditors, the Federal Court has determined that the creditors having *in rem* claims against the Vessel are:

| | |
|---|---|
| Sargeant | $20,945.924.05 |
| Capri Insurance Services | $ 45,573.63 |
| Cascade Raider | $ 64,460.02 |
| Arrow Transportation and CCY | $ 50,000.00 |
| Offshore Interiors Inc. | $659,011.85 |
| Continental Hardwood Co. | $ 15,614.99 |
| Paynes Marine Group | $ 35,833.17 |
| Restaurant Design and Sales LLC | $254,383.28 |

[34] The petitioner, Worldspan's, *in rem* claim in the amount of $6,643,082.59 was dismissed by the Federal Court and is currently subject to an appeal to be heard January 9, 2012.

[35] In addition, Comerica Bank has asserted an *in rem* claim against the Vessel for $9,429,913.86, representing the amount it advanced toward the construction of the Vessel. Mr. Mohammed Al-Saleh, a judgment creditor of certain companies controlled by Mr. Sargeant has also asserted an *in rem* claim against the Vessel in the amount of $28,800,000.

[36] The Federal Court will determine the validity of the outstanding *in rem* claims, and the priorities amongst the *in rem* claims against the Vessel.

[37] The petitioners, in addition to seeking a buyer for the Vessel through Fraser Yachts are also currently in discussions with potential DIP lenders for a DIP facility for approximately $10 million that would be used to complete construction of the Vessel in the shipyard they now lease. Fraser Yachts has estimated that the value of the Vessel, if completed as a Crescent brand yacht at the petitioners' facility would be $28.5 million. If the petitioners are able to negotiate a DIP facility, resumption of construction of the Vessel would likely assist their marketing efforts, would permit the petitioners to resume operations, to generate cash flow and to re-hire workers. However, the petitioners anticipate that at least 90 days will be required to obtain a DIP facility, to review the cost of completing the Vessel, to assemble workers and trades, and to bring an application for DIP financing in both this Court and the Federal Court.

[38] An extension of the stay will not materially prejudice any of the creditors or other stakeholders. This case is distinguishable from *Cliffs Over Maple Bay Investments Ltd.*, where the debtor was using the *CCAA* proceedings to freeze creditors' rights in order to prevent them from realizing against the property. Here, the petitioners are simultaneously pursuing both the marketing of the Vessel and efforts to obtain DIP financing that, if successful, would enable them to complete the construction of the Vessel at their rented facility. While they do so, a court supervised process for the sale of the Vessel is underway.

[39] Mr. Sargeant also relies on *Encore Developments Ltd. (Re)*, 2009 BCSC 13, in support of his submission that the Court should refuse to extend the stay. There, two secure creditors applied successfully to set aside an Initial Order and stay granted *ex parte* to the debtor real estate development company. The debtor had obtained the Initial Order on the basis that it had sufficient equity in its real estate projects to fund the completion of the remaining projects. In reality, the debtor company had no equity in the projects, and at the time of the application the debtor

company had no active business that required the protection of a *CCAA* stay. Here, when the petitioners applied for and obtained the Initial Order, they continued to employ a skeleton workforce at their facility. Their principal asset, aside from the shipyard, was the partially constructed Vessel. All parties recognized that the *CCAA* proceedings afforded an opportunity for the completion of the Vessel as a custom Crescent brand yacht, which represented the best way of maximizing the return on the Vessel. On the hearing of this application, all of the creditors, other than Mr. Sargeant share the view that the Vessel should be marketed and sold through and orderly process supervised by this Court and the Federal Court.



[40] I share the view of the Monitor that in the particular circumstances of this case the petitioners cannot finalize a restructuring plan until the Vessel is sold and terms are negotiated for completing the Vessel either at Worldspan's rented facility, or elsewhere. In addition, before the creditors will be in a position to vote on a plan, the amounts and priorities of the creditors' claims, including the *in rem* claims against the Vessel, will need to be determined. The process for determining the *in rem* claims and their priorities is currently underway in the Federal Court.

[41] The Monitor has recommended the Court grant the extension sought by the petitioners. The Monitor has raised one concern, which relates to the petitioners' current inability to fund ongoing operating costs, insurance, and professional fees incurred in the continuation of the *CCAA* proceedings. At this stage, the landlord has deferred rent for the shipyard for six months until May 2012. At present, the petitioners are not conducting any operations which generate cash flow. Since the last come back hearing in September, the petitioners were able to negotiate an arrangement whereby Mr. Sargeant paid for insurance coverage on the Vessel. It remains to be seen whether Mr. Sargeant, Comerica Bank, or some other party will pay the insurance for the Vessel which comes up for renewal in January, 2012.

[42] Since the sale of the shipyard lands and premises, the petitioners have no assets other than the Vessel capable of protecting an Administration Charge. The Monitor has suggested that the petitioners apply to the Federal Court for an

Administration Charge against the Vessel. Whether the petitioners do so is of course a matter for them to determine.

[43] The petitioners will need to make arrangements for the continuing payment of their legal fees and the Monitor's fees and disbursements.

[44] The *CCAA* proceedings cannot be extended indefinitely. However, at this stage, a *CCAA* restructuring still offers the best option for all of the stakeholders. Mr. Sargeant wants the stay lifted so that he may apply for the appointment of Receiver and exercise his remedies against the Vessel. Any application by Mr. Sargeant for the appointment of a Receiver would be resisted by the other creditors who want the Vessel to continue to be marketed under the Court supervised process now underway.

[45] There is still the prospect that through the *CCAA* process the Vessel may be completed by the petitioners either as a result of their finding a buyer who wishes to have the Vessel completed at its present location, or by negotiating DIP financing that enables them to resume construction of the Vessel. Both the marine surveyor engaged by Comerica Bank and Fraser Yachts have opined that finishing construction of the Vessel elsewhere would likely significantly reduce its value.

[46] I am satisfied that there is a reasonable possibility that the petitioners, working with Fraser Yachts, will be able to find a purchaser for the Vessel before April 13, 2012, or that alternatively they will be able to negotiate DIP financing and then proceed with construction. I find there remains a reasonable prospect that the petitioners will be able to present a plan of arrangement to their creditors. I am satisfied that it is their intention to do so. Accordingly, I find that circumstances do exist at this time that make the extension order appropriate.

**Good faith and due diligence**

[47] Since the last extension order granted on September 19, 2011, the petitioners have acted diligently by completing the sale of the shipyard and thereby reducing their overheads; by proceeding with the marketing of the Vessel pursuant to orders

of this Court and the Federal Court; and by embarking upon negotiations for possible DIP financing, all in furtherance of their restructuring.

[48] Notwithstanding the dispute between Mr. Barnett and Mr. Blane, which resulted in the commencement of litigation in the State of Florida at or about the same time this Court made its Initial Order in the *CCAA* proceedings, the petitioners have been able to take significant steps in the restructuring process, including the sale of the shipyard and leaseback of a portion of that facility, and the applications in both this Court and the Federal Court for orders for the marketing of the Vessel. The dispute between Mr. Barnett and his former partner, Mr. Blane has not prevented the petitioners from acting diligently in these proceedings. Nor am I persuaded on the evidence adduced on this application that dispute would preclude the petitioners from carrying on their business of designing and constructing custom yachts, in the event of a successful restructuring.

[49] While the allegations of misconduct, fraud and misappropriation of funds made by Mr. Barnett against Mr. Blane are serious, at this stage they are no more than allegations. They have not yet been adjudicated. The allegations, which are as yet unproven, do not involve dishonesty, bad faith, of fraud by the debtor companies in their dealings with stakeholders in the course of the *CCAA* process.

[50] In my view, the failure of the petitioners to disclose the dispute between Mr. Barnett and Mr. Blane does not constitute bad faith in the *CCAA* proceedings or warrant the exercise of the Court's discretion against an extension of the stay.

[51] This case is distinguishable from *Re San Francisco Gifts Ltd.*, where the debtor company had pleaded guilty to 9 counts of copyright infringement, and had received a large fine for doing so.

[52] In *Re San Francisco Gifts Ltd*., at paras 30 to 32, the Alberta Court of Queen's Bench acknowledged that a debtor company's business practices may be so offensive as to warrant refusal of a stay extension on public policy grounds. However, the court declined to do so where the debtor company was acting in good

faith and with due diligence in working toward presenting a plan of arrangement to its creditors.

[53] The good faith requirement of s. 11.02(3) is concerned primarily with good faith by the debtor in the *CCAA* proceedings. I am satisfied that the petitioners have acted in good faith and with due diligence in these proceedings.

**Conclusion**

[54] The petitioners have met the onus of establishing that circumstances exist that make the extension order appropriate and that they have acted and are acting in good faith and with due diligence. Accordingly, the extension of the Initial Order and stay to April 13, 2012 is granted on the terms pronounced on December 16, 2011.

"PEARLMAN J."

# TAB 35

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11

# s 11. General power of court

Currency

**11.General power of court**

Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

**Amendment History**

1992, c. 27, s. 90; 1996, c. 6, s. 167(1)(d); 1997, c. 12, s. 124; 2005, c. 47, s. 128

**Currency**

Federal English Statutes reflect amendments current to June 21, 2021
Federal English Regulations Current to Gazette Vol. 155:12 (June 9, 2021)

End of Document 

 Copyright © Thomson Reuters Canada Limited or its licensors (excluding individual court documents). All rights reserved. 

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 11.2

s 11.2

Currency

**11.2**
**11.2(1)Interim financing**
On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

**11.2(2)Priority — secured creditors**
The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

**11.2(3)Priority — other orders**
The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

**11.2(4)Factors to be considered**
In deciding whether to make an order, the court is to consider, among other things,

(a) the period during which the company is expected to be subject to proceedings under this Act;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any.

**11.2(5)Additional factor — initial application**
When an application is made under subsection (1) at the same time as an initial application referred to in subsection 11.02(1) or during the period referred to in an order made under that subsection, no order shall be made under subsection (1) unless the court is also satisfied that the terms of the loan are limited to what is reasonably necessary for the continued operations of the debtor company in the ordinary course of business during that period.

**Amendment History**

 

1997, c. 12, s. 124; 2005, c. 47, s. 128; 2007, c. 36, s. 65; 2019, c. 29, s. 138

**Currency**
Federal English Statutes reflect amendments current to June 21, 2021
Federal English Regulations Current to Gazette Vol. 155:12 (June 9, 2021)

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part II — Jurisdiction of Courts (ss. 9-18.5)

R.S.C. 1985, c. C-36, s. 13

# s 13. Leave to appeal

Currency

**13.Leave to appeal**
Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

**Amendment History**
2002, c. 7, s. 134

**Currency**
Federal English Statutes reflect amendments current to June 21, 2021
Federal English Regulations Current to Gazette Vol. 155:12 (June 9, 2021)

**End of Document** 

  

Canada Federal Statutes
Companies' Creditors Arrangement Act
Part III — General (ss. 18.6-43) [Heading added 2005, c. 47, s. 131.]
Obligations and Prohibitions [Heading added 2005, c. 47, s. 131.]

R.S.C. 1985, c. C-36, s. 36

## s 36.

Currency

**36.**

**36(1)Restriction on disposition of business assets**

A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

**36(2)Notice to creditors**

A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

**36(3)Factors to be considered**

In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

**36(4)Additional factors — related persons**

If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

**36(5)Related persons**

For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

**36(6)Assets may be disposed of free and clear**

The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

**36(7)Restriction — employers**

The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(5)(a) and (6)(a) if the court had sanctioned the compromise or arrangement.

**36(8)Restriction — intellectual property**

If, on the day on which an order is made under this Act in respect of the company, the company is a party to an agreement that grants to another party a right to use intellectual property that is included in a sale or disposition authorized under subsection (6), that sale or disposition does not affect that other party's right to use the intellectual property — including the other party's right to enforce an exclusive use — during the term of the agreement, including any period for which the other party extends the agreement as of right, as long as the other party continues to perform its obligations under the agreement in relation to the use of the intellectual property.

**Amendment History**

2005, c. 47, s. 131; 2007, c. 36, s. 78; 2017, c. 26, s. 14; 2018, c. 27, s. 269

**Currency**

Federal English Statutes reflect amendments current to June 21, 2021
Federal English Regulations Current to Gazette Vol. 155:12 (June 9, 2021)

# TAB 36

B.C. Statutes
Law and Equity Act

R.S.B.C. 1996, c. 253, s. 14

# s 14. Mortgagor may require mortgagee to assign

Currency

**14.Mortgagor may require mortgagee to assign**
**14(1)** Despite any stipulation to the contrary, if a mortgagor is entitled to redeem, the mortgagor may require the mortgagee, or the mortgagee's personal representatives or assigns, instead of giving a certificate of payment or reconveying, and on the terms on which the mortgagee would be bound to reconvey, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs and the mortgagee is bound to assign and convey accordingly.

**14(2)** A mortgagee in possession who is required to assign, transfer and convey under subsection (1) does not incur any legal liability that the mortgagee would not have incurred if the mortgagee had executed a release of the mortgage.

**Currency**
British Columbia Current to Gazette Vol. 64:8 (April 20, 2021)

**End of Document** 

  

# TAB 37

**Falconbridge on Mortgages, 5th Ed. § 29:1**

**Falconbridge on Mortgages, 5th Edition** |
Walter M. Traub

**Part VI. Mortgage Actions**

**Chapter 29. Action for Redemption** [*]

---

## § 29:1. The Right to Redeem and the Effect

Legal Topics

The right to redeem is available to all persons who have a legal interest in the equity of a real property, which has been secured to a mortgagee. Redemption is the right of parties entitled to such interest to obtain possession and enjoyment of real property and is a remedy which is available to a mortgagor, or other person, only when that person is out of possession. This means redemption is available only when the mortgagee is in actual or constructive possession of the real property.

A mortgagor who wishes to redeem must pay: (a) the principal debt; (b) the interest on the principal debt; (c) all costs, charges and expenses incurred by the mortgagee in relation to the mortgage debt or mortgage security; (d) the costs of the litigation that the mortgagee has incurred in connection with enforcing the mortgage debt or security; and (e) the mortgagee's costs of the action for redemption. [1]

The right to redeem under the statutory mortgage is not an equitable right but rather a statutory right that arises under statute rather than in the mortgage document itself.[2]

When, by default in payment, according to the terms of a mortgage, the mortgagor has forfeited the legal or contractual right to redeem, the mortgagor still has in equity an equitable right to redeem his or her interest in the real property upon payment of the mortgage debt, which right is commonly known as the "equity of redemption". This equitable right to redeem is an inherent term of every mortgage, which the mortgagor cannot waive or relinquish by any agreement made at the time of, and as part of, the mortgage transaction.[3] This right may, however, be forfeited or terminated in various ways subsequent to the granting of the mortgage.[4]

Conceptually, the equity of redemption arises as an offshoot of the principles underlying a mortgage at common law, which involved a conveyance of the title to the mortgagee, by the mortgagor. When the mortgagor repaid the debt, the land was reconveyed to him or her; if the debt was not repaid within the required time, the mortgagee could treat the land as his or her own. However, under the principles of equity, the debt could be repaid and title reconveyed obtained at any time; this right came to be known as the equity of redemption and is an inherent part of the rights afforded under a statutory mortgage.[4.1]

There is *obiter dicta* to the effect that an equity of redemption constitutes an equitable "estate" in the mortgaged land which constitutes, in equity, an absolute right to redeem subject only to a bar arising on equitable grounds, or by virtue of the passage of the limitation period. This right is one over which the courts have no discretionary power. It is, however, only in an equitable sense that the equity of redemption constitutes an estate in real property. This estate is different from a legal estate in the real property, and as a result there are some differences in its enforcement.[5]

The equitable right to redeem can be only exercised on equitable terms,[6] and therefore might not be enforced if the granting of it would be inequitable. The courts, in applying the maxim “he who seeks equity must do equity”, may impose conditions precedent to the enforcement of a claim for equitable relief[7] or, in applying the maxim “he who comes into equity must come with clean hands”, may consider all the circumstances in order to decide whether it is equitable to grant the relief at all.[8] By contrast, if a person asserts a legal right, rather than an equitable right, a court cannot refuse to give effect to the legal right, and cannot impose terms on the granting of the legal relief.[9]

The basis on which the equity of redemption is founded is the equitable right to “relief against forfeiture”. However, the equity may not be allowed where the mortgagee has not been guilty of misconduct and, where based on the dealings of the parties, the redemption would work injustice against the mortgagee.[10]

Redemption can be barred by a statute of limitations, and also may be refused on the ground of *laches* or staleness of demand, even if the claim is not barred by any statute of limitation.[11] The statutes of limitation, in all Canadian common law provinces, recognize the continued application of equitable principles, including *laches*, in all circumstances.

In *Re Leslie*[12] a mortgagor neglected for 21 years to prosecute a decree for redemption against a mortgagee in possession. Owing to the commencement and continuation of an action for redemption, the right to redeem was not barred by any statute of limitation. A purchaser from the mortgagee was held entitled to an absolute certificate of title under the *Quieting Titles Act* eliminating the right to redeem, as a consequence of the court barring the right to redeem based on laches.

The statute of limitations allows an action for redemption to be brought only within the statutorily specified periods of time. The limitation period for redemption will generally commence from the time of the act which results in possession by the mortgagee. The statutory period of limitation for commencing an action for recovery of possession of land applies if no other time period is specified under the terms of the mortgage, or dictated by statute directly applicable to redemption. A

10-year period of possession by a mortgagee will generally bar a right to redeem for all persons, in most provinces.[13] The limitation period will commence to run if the mortgagee's possession is of the nature and kind generally required to obtain possessory title. The mortgagee must be in open and notorious possession, adverse to that of the mortgagor.[14]

In order to redeem, the party redeeming will be required to pay all arrears of interest, even statute-barred interest. The limitation period for recovery of money is not applicable to payments required to redeem. Because the right to redeem is an equitable right, the requirement to make all payments due under the mortgage overrides the six-year limitation period generally applicable to claims for payment of interest.

The right of the original mortgagor to redeem is lost when the mortgagor transfers title to the real property to a third party, unless the original mortgagor is required to make payment under the mortgage.[15] If the original mortgagor, after transferring the property, is sued on the covenant under the mortgage, the original mortgagor's right of redemption is regained.[16]

The mortgagor's right to redeem is coupled with the right to a reconveyance of the real property.[17]

The following is an example of circumstances where the right to redeem can be refused. The mortgagee bought the equity of redemption at a sheriff's sale, which at the time was believed by all parties to be valid, though it was in fact invalid on technical grounds. For 17 years before the filing of the bill to redeem, sales and resales had been made from time to time of various portions of the property, and buildings on the property had been erected, altered, destroyed and replaced. All of the activity relating to the real property was known by the mortgagor's heir, who, for 10 of the 17 years, was also aware of, or had reason to suspect, the defect in the titles of the parties arising from the original purchase. The bill to redeem was not filed by the heir until a large unsecured claim of the mortgagee against the mortgagor, greatly exceeding the value of the property at the time of the sheriff's sale, had been disallowed, and until the persons interested in resisting the plaintiff's claim and made defendants to the suit numbered nearly 100. The court refused the heir's petition to redeem based on limitations and laches.[18]

Various provisions of the *Mortgages Act*, R.S.O. 1990, c. M.40, affecting persons having the right to redeem, are relevant to an action to redeem. A person making payment to the mortgagee, in satisfaction of the mortgage, has a right to require the mortgage to be assigned, together with any judgment relating to the mortgage, including any judgment on the covenant to pay under the mortgage. This is provided in s. 2(1) of the *Mortgages Act* and applies despite any stipulation to the contrary in the mortgage. As a result, where a mortgagor is entitled to, and does exercise the right to redeem, the mortgagor may require the mortgagee, instead of giving a discharge or reconveying, to assign the mortgage debt and convey the mortgaged property to any third person as the mortgagor directs. The mortgagee is bound to assign and convey according to the direction.

If the mortgagee refuses to assign the mortgage, as required by s. 2(1), a proceeding may be commenced to enforce such assignment, by originating process.[19]

Section 2(3) of the *Mortgages Act* states that the requirement that a mortgagee assign the mortgage and the debt, upon redemption, is not available where the mortgagee has been in possession. The mortgagee who has been in possession remains liable to account to the mortgagor, even if the mortgage is assigned, unless the mortgagor consents. Therefore, assignment cannot be required of the mortgagee in that circumstance.

Any party with a right to redeem has a right to obtain information relating to the mortgaged property. Section 3 of the *Mortgages Act* provides that, despite any stipulation to the contrary, as long as the mortgagor's right to redeem subsists, the mortgagor is entitled, at reasonable times, on request, at his or her own cost and on payment of the mortgagee's costs and expenses in that regard, to inspect and make copies, abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or control of the mortgagee.



## Footnotes

* This chapter has been prepared with the assistance of Alison R. Manzer whose contribution is hereby gratefully acknowledged. We also acknowledge with thanks the assistance of William McCullough in revising and updating the within chapter.

1 Malkowich v. Genik, [1928] 3 W.W.R. 65 (Man. K.B.); Central Financial Corp. v. Skalbania Enterprises Ltd. (1985), 68 B.C.L.R. 96 (B.C. C.A.).

2 Farm Credit Corp. v. Nelson (1993), 102 D.L.R. (4th) 743 (Sask. Q.B.), at p. 296; Merit Mortgage Group Ltd. v. Sicoli (1981), 128 D.L.R. (3d) 291 (Alta. Q.B.); Alie-Kirkpatrick v. Saskatoon (City) (2019), [2020] 3 W.W.R. 629 (Sask. C.A.).

3 See § 3:2.

4 See § 3.9 of the earlier edition of this text, W.B. Rayner and R.H. McLaren, eds., Falconbridge on Mortgages, 4th ed. (Agincourt: Canada Law Book, 1977).

4.1 Crystal Wealth Management System Limited v. JC Food Services Ltd. (2020), 450 D.L.R. (4th) 533, [2020] 12 W.W.R. 72, 12 Alta. L.R. (7th) 213, 21 R.P.R. (6th) 177, 2020 CarswellAlta 1896, 323 A.C.W.S. (3d) 572, 2020 ABCA 369 (Alta. C.A.).

5 See § 3.8 of the earlier edition of this text, W.B. Rayner and R.H. McLaren, eds., Falconbridge on Mortgages, 4th ed. (Agincourt: Canada Law Book, 1977).

6 See, *e.g.*, the doctrine of consolidation of mortgages in §§ 9:1 et seq.

7 Camp-Wee-Gee-Wa for Boys Ltd. v. Clark (1971), 23 D.L.R. (3d) 158 (Ont. H.C.J.).

8 Yorkshire Railway Wagon Co. v. Maclure (1881), 19 Ch. D. 478, at p. 484; Re Maddever; Three Towns Banking Co. v. Maddever (1884), 27 Ch. D. 523 (C.A.); Blake v. Gale (1886), 32 Ch. D. 571 (C.A.).

9 If tender of the mortgage debt, with interest and costs, is made by the mortgagor to the mortgagee on the day fixed for repayment, and the tender is refused, and in consequence the mortgagor sues for redemption, the redemption asked for is not equitable but legal relief. The giving of the relief in that case will not be subject to equitable principles: J.A. Strahan, Law of Mortgages, 2nd ed., pp. 137–8.

10 Skae v. Chapman (1874), 21 Gr. 534. As to laches and acquiescence, see also §§ 30:1 et seq.

11 Martin v. Miles (1883), 5 O.R. 404 (Ch. Div.), at p. 416. The broad proposition stated in this case was not necessary to the decision, which was simply that a tenant under a lease made by the mortgagor after he had mortgaged the lands was a necessary party to a foreclosure action as being a person interested in the equity of redemption. Without reference to this case, the Supreme Court of Canada, in a peculiar set of facts where an agreement, in the form of an agreement for sale of land,

was treated as a mortgage, appears to have affirmed the proposition set out in the text: see Fleming v. Watts, [1944] 4 D.L.R. 353 (S.C.C.).

12 Re Leslie (1893), 23 O.R. 143 (Ch. D.); *cf.*, Eaton v. Dorland (1893), 15 P.R. 138.

13 See §§ 30:1 et seq.

14 See §§ 30:1 et seq.

15 Homeplan Realty Ltd. v. Adair (1982), 13 A.C.W.S. (2d) 227 (Ont. Co. Ct.).

16 Kinnaird v. Trollope (1888), 39 Ch. D. 636, at p. 645.

17 Rudge v. Richens (1873), L.R. 8 C.P. 358.

18 Skae v. Chapman (1874), 21 Gr. 534. This case was followed in Kay v. Wilson (1876), 24 Gr. 212, affd 2 O.A.R. 133, and was referred to with apparent approval in Dougall v. Dougall (1879), 26 Gr. 401, at p. 408.

19 The *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, generally govern the process for taking mortgage actions at Rule 64, and originating process at Rule 14 and Form 14B.

**End of Document**

# TAB 38

PRACTICE MADE PERFECT CLE BC THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA

# Civil Appeal Handbook

**December 31 2020**

**3. Standard of Care [§2.42]**

The Supreme Court of Canada has described the standard of review of a conclusion about the standard of care as follows:[1]

> [I]t is settled law that the determination of whether or not the standard of care was met by the defendant involves the application of a legal standard to a set of facts, a question of mixed fact and law. This question is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law.

Thus, if the trial judge incorrectly states the legal standard, or misinterprets a duty imposed by statute, this can amount to an error of law.[2] Where the trial judge's erroneous finding of negligence can be traced to an error in their characterization of the legal standard, less deference is required, consistent with a "correctness" standard of review.[3] For example, a new trial was ordered where the trial judge erred in law by imposing an excessively high standard of care.[4] The court in *Paur v. Providence Health Care*, 2017 BCCA 161 at para. 49 stated:

> I pause to observe that I approach the first ground as raising an issue of law. The rest raise questions of mixed fact and law, to which a deferential standard of review applies on appeal unless an issue of law may be 'extricated'. As stated in *Housen v. Nikolaisen* 2002 SCC 33 at para. 37, where "some extricable error in principle with the characterization of the standard [of care] or its application" has occurred, it may amount to an error of law, and thus be reviewable on the correctness standard. The extricability of a question of law from one of mixed fact and law often depends on how broadly the issue is framed. If an appellant contends that a court erred in finding that he or she was 'negligent' or failed to take 'reasonable care', for example, there are obviously both legal and factual components to the required analysis. But if it is contended that the court applied a standard of care to a general practitioner that was higher than the standard accepted for specialists in a particular field of medicine, a question of law obviously arises as to the correct test or "legal standard". Such a question does not seem materially different from that arising where it is argued that a lower court applied "too high" a standard: see *Langille v. Marchant* 2014 BCCA 430 at para. 11; *Carlsen v. Southerland* 2006 BCCA 214 at paras. 10, 17. As stated by Iacobucci and Major JJ. for the Court in *St-Jean v. Mercier* 2002 SCC 15, "the standard of care is normative and is a question of law within the normal purview of both the trial and appellate courts." (quoted in *Housen* at para. 33; see also M. Madden, "Conquering the Common Law Hydra: A Probably Correct and Reasonable Overview of Current Standards of Appellate and Judicial Review" (2010) 36:3 *Advocates' Quarterly* 269 at 285.)

On the other hand, where a trial judge has made no error in stating the standard of care, and has applied the correct legal test to the facts, their conclusion that a party failed to meet the standard of care should not be overturned absent palpable and overriding error.[5] Whether conduct departs from the standard of care imposed by law is "a heavily fact dependent question".[6]

[1] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 37; see also *Hussack v. Chilliwack School District No. 33*, 2011 BCCA 258 at para. 49. [2] *Housen*, 2002 SCC 33 at paras. 31 and 36; *Salaam v. Abramovic*, 2010 BCCA 212 at paras. 30–34; *Langille v. Marchant*, 2014 BCCA 430 at para. 11; *Borgfjord v. Boizard*, 2016 BCCA 317 at para. 20, leave to appeal refused 2017 CanLII 5366 (SCC) ("Where an error can be attributed to the application of an incorrect standard, failure to consider a required element of a legal test, or an error in principle, the error is one of law and subject to a standard of correctness."). [3] *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 33 and 36, citing *St-Jean v. Mercier*, 2002 SCC 15 at paras. 48 and 49. See also *Rhône (The) v. Peter A.B. Widener (The)*, 1993 CanLII 163 (SCC) (S.C.R. at 515); and *Moses v. Kim*, 2009 BCCA 82 at para. 31. [4] *Carlsen v. Southerland*, 2006 BCCA 214. [5] *Housen v. Nikolaisen*, 2002 SCC

33 at para. 38; *Meghji v. British Columbia (Minister of Transportation and Highways)*, 2014 BCCA 105 at paras. 45 and 58. [6] *Doern v. Phillips (Estate)* 1997 CanLII 2433 (BC CA) ((1997), 43 B.C.L.R. (3d) 53 (C.A.) at para. 18); *Fortey (Guardian ad litem of) v. Canada (Attorney General)*, 1999 BCCA 314 at para. 49.