COURT FILE NUMBER	1801-16809
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE BANKRUPTCY AND INSOLVENCY ACT
	AND IN THE MATTER OF THE PROPOSAL OF COMMERX CORPORATION
DOCUMENT	**SUPPLEMENTAL BENCH BRIEF IN REPLY TO THE APPEAL OF FORTITUDE FINANCIAL INVESTMENTS INC.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855 – 2 Street SW Calgary, Alberta T2P 4K7 Attention: Chris Simard/Keely Cameron Telephone No.: 403-298-4485/403-298-3324 Fax No.: 403-265-7219 Client File No.: 58368.11

Application Scheduled for the 15th day of November, 2019
before The Honourable Madam Justice G.A. Campbell

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I. INTRODUCTION

1. Hardie & Kelly Inc., the Proposal Trustee (the "**Proposal Trustee**") of Commerx Corporation (the "**Company**" or "**Commerx**") disallowed the claim of Fortitude Financial Investments Inc. ("**Fortitude**") pursuant to subsection 135(2) of the *Bankruptcy and Insolvency Act*, RSA 1985 c B-3 (the "**BIA**")[1] on the basis that Fortitude's interest is an equity claim and not a debt claim (the "**Disallowance**"). Fortitude seeks to appeal this Disallowance.

2. It is the Proposal Trustee's respectful submission that the appeal should be denied.

II. BACKGROUND

3. By way of agreement dated January 5, 2016, Commerx entered into a loan agreement with Fortitude, whereby Fortitude lent to Commerx $1 million USD (the "**Loan Agreement**").[2]

4. On December 30, 2016, Mr. Robert Kulhawy, the Chief Executive Officer and President of Commerx, entered into a purchase and sales agreement with Commerx Holdings Ltd. (which is owned by Lotus Innovations Private Equity Fund) (collectively "**Lotus**"), selling his controlling interest in Commerx (51% of the Class A shares) to Lotus in order to bring in necessary working capital (the "**Purchase Agreement**"). [3]

5. At the request of Lotus, on December 30, 2016, Fortitude agreed to convert all principal and accrued interest payable under the Loan Agreement (the "**Fortitude Loan Conversion**") into redeemable non-voting preferred shares as full and final settlement of all amounts outstanding under the Loan Agreement (the "**Settlement Agreement**").[4] Pursuant to the Settlement Agreement, Commerx issued 1,148,381 Class "F" Preferred Shares to Fortitude and Commerx agreed to redeem those shares by June 30, 2017.[5]

6. Contrary to the Purchase Agreement, Lotus failed to provide the full payment required for the shares, failed to pay down the ongoing obligations of the company and failed to provide Commerx with a revolving line of credit.[6]

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[1] *Bankruptcy and Insolvency Act*, RSA 1985 c B-3, section 135(2). **[TAB 1]**
[2] Report of the Trustee on Proposal (Form 40) **[Proposal Report]**, Exhibit E – Loan Agreement. **[Agreed Book of Exhibits TAB 13]**
[3] Affidavit of Robert Kulhawy, filed June 17, 2019 **[Kulhawy Affidavit 1]** at paras 10-13. **[Agreed Book of Exhibits TAB 2]**
[4] Affidavit of Rob Follows, filed October 21, 2019 **[Follows Affidavit]**, Exhibit 8 – Settlement Agreement at para 1. **[Agreed Book of Exhibits TAB 14]**
[5] *Supra*
[6] Kulhawy Affidavit 1 at paras. 12-14. **[Agreed Book of Exhibits TAB 2]**

7. On March 7, 2019, Commerx filed a notice of Intention to Make a Proposal (the "**NOI**") pursuant to the *BIA*. Hardie & Kelly consented to act as the Proposal Trustee.

8. Contrary to the Settlement Agreement, Commerx failed to redeem the Fortitude shares on June 30, 2017. The parties had contemplated that contingency in the Settlement Agreement, and agreed therein that if Commerx failed to redeem the shares on or before the Redemption Date, "the cumulative dividend rate applicable to any such unredeemed shares shall increase from 6.0% per annum to 24.0% per annum until such shares are redeemed".[7]

9. Following a number of extensions granted by the Court, Commerx provided its proposal to the Proposal Trustee on August 16, 2019. On August 22, 2019, the Proposal Trustee provided notice to Commerx, the division office and every know creditor affected by the proposal of the calling of a meeting of creditors on September 6, 2019 to consider the proposal.[8]

10. On the morning of the meeting of creditors, Fortitude filed a proof of claim in Commerx's proposal proceedings asserting an unsecured claim of $2,366,658.79 CAD. [9]

11. Fortitude was advised at the meeting that its claim was disallowed, and the formal Notice of Disallowance was provided to Fortitude's counsel by email on September 11, 2019 and registered mail on September 18, 2019.[10]

12. On October 11, 2019, the Proposal Trustee attended court for the purpose of seeking approval of an amended proposal dated September 6, 2019. Counsel for Fortitude and Mr. Trant both sought adjournments of the application. In granting the adjournment request, the Court found that service of the Proposal Trustee's Notice of Disallowance was effected on September 18, 2019, the date that it was received by registered mail. Accordingly, the deadline to appeal the Disallowance was October 21, 2019. The Court adjourned the application for approval of the amended proposal to Friday, November 15, 2019, and provided that it was to be heard concurrently with Fortitude's appeal of the Disallowance.[11]

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[7] Follows Affidavit, Exhibit 8 – Settlement Agreement at para 5. **[Agreed Book of Exhibits TAB 14]**
[8] Proposal Report at para 1. **[Agreed Book of Exhibits TAB 5]**
[9] Proposal Report at para 11. **[Agreed Book of Exhibits TAB 5]**
[10] *Supra.*
[11] Adjournment Order granted by Madam Justice C. Dario dated October 11, 2019. **[Agreed Book of Exhibits TAB 17]**

III. ISSUE

13. The issue to be determined in this appeal is whether Fortitude's claim is an equity claim such that Fortitude's appeal should be denied.

IV. LAW AND ARGUMENT

Appeal

14. Section 135 of the *BIA* provides that a Trustee shall examine every proof of claim and the grounds therefor and that a disallowance is conclusive unless, an application for an appeal is made within thirty days from the Notice of Disallowance.

15. An appeal of a Trustee's disallowance is not intended to be a trial *de novo,* but a true appeal, unless the circumstances of the case are such that a hearing restricted to the record might result in an injustice.[12]

16. The standard of review that applies to a Trustee's decision to allow or disallow a proof of claim is correctness.[13]

Fortitude's Interest

17. It is Fortitude's position that "at all material times, Fortitude has considered and conducted itself as a lender to Commerx".[14]

18. This position is not supported by the *BIA,* case law or the plain wording of the Settlement Agreement.

BIA

19. The *BIA* defines an equity claim as a claim that is in respect of an equity interest including a claim for, among others:

(a) a dividend or similar payment,

(b) a return of capital,

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[12] *Transglobal Communications Group Inc. (Re),* 2009 ABQB 195 **[Transglobal]** at paras. 44-50. **[TAB 2]**
[13] *Transglobal* at paras. 70-74 **[TAB 2]**
[14] Follows Affidavit, at para 24. **[Agreed Book of Exhibits TAB 19]**

(c) a redemption or retraction obligation,

(d) monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission or, in Quebec, the annulment, of a purchase or sale of an equity interest, or

(e) contribution or indemnity in respect of a claim referred to in any of the paragraphs a to d. [Emphasis added]

20. An equity interest is defined in the *BIA* to mean:

(a) in the case of a corporation other than an income trust, a share in the corporation – or a warrant or option or other right to acquire a share in the corporation – other than one that is derived from a convertible debt, and

(b) in the case of an income trust, a unit in the income trust – or a warrant or option other than the right to acquire a unit in the income trust – other than one that is derived from a convertible debt.

21. As a result of these amendments, it is now absolutely clear that claims for share redemption payments fall within the definition of equity claims.

Case Law

22. Courts have historically distinguished between debt claimants and equity claimants, with debt claimants taking priority over equity claimants. The rationale being that equity claimants are considered to have taken a higher degree of risk in exchange for a potential upside in the profits or value of the company[15].

23. In 2009, both the *BIA* and the *Companies' Creditors Arrangement Act* ("***CCAA***") were amended, to add the definition of "equity claim" and "equity interest" set out above. The provisions under the *CCAA* have received judicial consideration, and the Courts have recognized that the new definitions have expanded the definition of equity claims beyond what may have previously been considered to include shareholders with redemption rights.[16]

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[15] *All Canadian Investment Corp*, 2019 BCSC 1488 [*All Canadian*] at para 60. [**TAB 3**]
[16] *Supra*, at para 49. [**TAB 3**]; *Bul River Mineral Corp, Re*, 2014 BCSC 1732. [**TAB 4**]

24. The right of redemption has been viewed as an example of a situation where equity and debt interests had been blurred.[17] In determining the true nature of the interest in such circumstances, the court is to determine the substance of the relationship.[18]

25. Redemption notices on their own are not to be viewed as creating a debtor/creditor relationship. They are to be considered along with other factors. To assist in determining the substance of a relationship when assessing the status of a preferred shareholder, there are a number of factors to be considered such as:

(a) the specific language contained in the company's articles and transaction documents,

(b) the right of a shareholder to redeem their shares,

(c) whether the shareholder has upside potential in the return of their investment,

(d) whether the shareholder had the right to receive to dividends,

(e) treatment on liquidation, dissolution, or windup, and

(f) whether the shares are treated as equity or debt in the financial statement of the corporation[19].

26. As demonstrated below, application of the above factors supports a finding that Fortitude's interest is an equity interest.

Specific Language in the Company's articles and Transaction documents

27. In the absence of ambiguity, equivocal references, absurdity, contradiction, or significant lack of clarity, contracts are to be interpreted on their face, subjective intent is irrelevant.[20]

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[17] *Royal Bank of Canada v. Central Capital Corp.*, [1996] O.J. (3d) No. 359 at paras. 127-128.**[TAB 5]**
[18] *Supra* at paras. 129-130. **[TAB 5]**
[19] *All Canadian, supra*, at para 85. **[TAB 3]**
[20] *Gainers Inc. v. Pocklington Financial Corporation*, 2000 ABCA 151 at para 9, 15-20. **[TAB 6]**; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 57-60 **[TAB 7]**

28. While the Trustee acknowledges that Fortitude's interest started off as a debt pursuant to the Loan Agreement, the debt was extinguished in accordance with the Settlement Agreement[21].

29. The Settlement Agreement and the schedules referred to within it, constituted the entire agreement as between the parties and superseded "all prior agreements, representations, warranties, statements, promises, information, arrangements and understandings, whether oral or written, express or implied".[22]

30. The Debt Conversion Agreement entered into as part of the Settlement Agreement provides:

> 1. **Extinguishment of Debt.** On and subject to the provisions of this Agreement and concurrently with the execution and delivery of this Agreement, the Corporation shall issue the Conversion Shares to the Creditor in consideration for the extinguishment of the full amount of the Debt, and:
>
> (a) the Creditor hereby accepts such issue of the Conversion Shares in full payment and satisfaction of the Debt; and
>
> (b) the Debt is no longer due and payable or otherwise owing by the Corporation.

31. This language clearly and unambiguously provides for the conversion of the debt to equity.

32. The articles were amended as part of the Settlement Agreement and contain no language that would suggest that the relationship was that of a creditor/debtor, in fact such a relationship would have been contrary to the purpose of the Settlement Agreement.

Right of Shareholder to Redeem their shares

33. The *All Canadian Investment Corp* decision noted that "A right of redemption is particularly compelling as an *indicia* of a creditor relationship where the articles or transaction documents expressly provide that the redemption is for the repayment of a loan."[23]

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[21] Kulhawy Affidavit filed October 30, 2019 **[Kulhawy Affidavit 2]**, Exhibit B – Debt Conversion Agreement (Schedule C to the Settlement Agreement). **[Agreed Book of Exhibits TAB 28]**

[22] Follows Affidavit, Exhibit 8 – Settlement Agreement at para 33. **[Agreed Book of Exhibits TAB 14]**

[23] *All Canadian, supra*, at para 85. **[TAB 3]**

34. No such wording exists in these circumstances, in fact the wording in the Settlement Agreement explicitly provides that the intent was to convert the debt to equity, which is what occurred.

35. Courts have previously found that a right of redemption and failure to redeem is insufficient to convert an equity interest to a debt claim.[24] Even in a case where redeeming shareholders had obtained a judgment to recover unpaid redemption amounts, which is further that Fortitude went, the court has found that such a step was insufficient to convert an equity interest.[25]

Potential Upside

36. In accordance with the Amended Articles, Fortitude was entitled to cumulative dividends at a rate of 6.0% per annum, calculated and accruing daily and compounded annually. Further, in the event that the shares were not redeemed, the cumulative dividend rate increased to 24.0%. This provided for potential upside for Fortitude and a clear remedy in the event that the shares were not redeemed by the Redemption Date.

Right to Receive Dividends

37. Looking at the specific language in the Amended Articles[26], Fortitude as a shareholder of Class "F" Preferred Shares is entitled to receive dividends, which is a strong indicia of an equity relationship.[27]

Treatment on Liquidation, Dissolution or Windup

38. The clear wording in the Amended Articles, addresses the parties intentions in the event of the liquidation, dissolution or winding up of Commerx. The language is clear that it is the intent of the parties that in such circumstances, the holders of Class "F" Preferred Shares would be entitled to receive an amount equivalent to the Class "F" redemption amount per share, plus an amount equal to all accrued and unpaid dividends thereon, pro rata on a per share basis as among all holders of Class "E" Preferred Shares and Class "F" Preferred Shares and prior to

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[24] *All Canadian, supra,* at para 122. **[TAB 3]**
[25] *Bul River Mineral Corp, supra.* **[TAB 4]**
[26] Follows Affidavit, Exhibit 8 – Settlement Agreement Articles of Amendment. **[Agreed Book of Exhibits TAB 29]**
[27] *All Canadian, supra* at para 85. **[TAB 3]**

any payment or distribution to any other holder of any other class of shares of the corporation. This language was similar to the language at issue in the *All Canadian Investment Corporation (Re)* decision which found the preferred shareholders' investment to be an equity interest.

39. The Amended Articles further provide that in the event of the liquidation, dissolution or winding up of Commerx, that "the Class "E" Preferred Shares and the Class "F" Preferred Shares shall not be entitled to share any further in the distribution of the property or assets of the Corporation except to the extent hereinbefore provided".[28]

Treatment of Shares in the Financial Statements of Commerx

40. While some Courts have cautioned as to the weight that should be given to this factor, the Courts have nonetheless considered how the shares were recorded on a company's financial statements.[29]

41. The financial statements of Commerx treated Fortitude's interest in a manner consistent with the agreements that were in place at the time. In Commerx's financial statements for the year ending June 30, 2016, Commerx record a loan payable to Fortitude. Commerx's financial statements for the year ending June 30, 2017 after the Settlement Agreement was entered into, recognized the conversion of Fortitude's debt into equity.[30]

42. Based on the foregoing, it is clear that while Fortitude's interest started as an interest in debt, it voluntarily converted that interest into an equity interest through the Settlement Agreement. In disallowing Fortitude's claim, the Trustee correctly considered the information before it.

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[28] Follows Affidavit, Exhibit 8 – Settlement Agreement Articles of Amendment **[Agreed Book of Exhibits TAB 29]**
[29] *All Canadian, supra* at para 146. **[TAB 3]**
[30] Kulhawy Affidavit 2, Exhibits C-E **[Agreed Book of Exhibits TAB 32-34]**

V. RELIEF SOUGHT

43. The Proposal Trustee respectfully submits that the appeal should be denied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 8th day of November, 2019.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

BENNETT JONES LLP

Per: K Cameron

Chris Simard/Keely Cameron
Counsel for the Proposal Trustee,
Hardie & Kelly Inc.

VI. TABLE OF AUTHORITIES

TAB

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to October 3, 2018

Last amended on May 23, 2018

À jour au 3 octobre 2018

Dernière modification le 23 mai 2018

Published by the Minister of Justice at the following address:
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http://lois-laws.justice.gc.ca

Rights and liabilities of creditor where valuation amended

(3) Where a valuation has been amended pursuant to this section, the creditor

(a) shall forthwith repay any surplus dividend that he may have received in excess of that to which he would have been entitled on the amended valuation; or

(b) is entitled to be paid out of any money for the time being available for dividend any dividend or share of dividend that he may have failed to receive by reason of the amount of the original valuation before that money is made applicable to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before the amendment is filed with the trustee.

R.S., c. B-3, s. 103.

Exclusion for non-compliance

133 Where a secured creditor does not comply with sections 127 to 132, he shall be excluded from any dividend.

R.S., c. B-3, s. 104.

No creditor to receive more than 100 cents in dollar

134 Subject to section 130, a creditor shall in no case receive more than one hundred cents on the dollar and interest as provided by this Act.

R.S., c. B-3, s. 105.

Admission and Disallowance of Proofs of Claim and Proofs of Security

Trustee shall examine proof

135 (1) The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

Determination of provable claims

(1.1) The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

Disallowance by trustee

(2) The trustee may disallow, in whole or in part,

(a) any claim;

Droits et obligations du créancier lorsque l'évaluation est modifiée

(3) Lorsqu'une évaluation a été modifiée conformément au présent article, le créancier, selon le cas :

a) doit rembourser sans retard tout surplus de dividende qu'il peut avoir reçu en sus du montant auquel il aurait eu droit sur l'évaluation modifiée;

b) a droit de recevoir, sur les deniers alors applicables à des dividendes, tout dividende ou part de dividende qu'il peut ne pas avoir reçu à cause du montant de l'évaluation primitive, avant que ces montants soient attribués au paiement d'un dividende futur; il n'a toutefois pas le droit de déranger la distribution d'un dividende déclaré avant que la modification soit déposée chez le syndic.

S.R., ch. B-3, art. 103.

Exclusion pour défaut de se conformer

133 Lorsqu'un créancier garanti ne se conforme pas aux articles 127 à 132, il est exclu de tout dividende.

S.R., ch. B-3, art. 104.

Aucun créancier ne peut recevoir plus de cent cents par dollar

134 Sous réserve de l'article 130, un créancier ne peut dans aucun cas recevoir plus de cent cents par dollar avec l'intérêt prévu par la présente loi.

S.R., ch. B-3, art. 105.

Admission et rejet des preuves de réclamation et de garantie

Examen de la preuve

135 (1) Le syndic examine chaque preuve de réclamation ou de garantie produite, ainsi que leurs motifs, et il peut exiger de nouveaux témoignages à l'appui.

Réclamations éventuelles et non liquidées

(1.1) Le syndic décide si une réclamation éventuelle ou non liquidée est une réclamation prouvable et, le cas échéant, il l'évalue; sous réserve des autres dispositions du présent article, la réclamation est dès lors réputée prouvée pour le montant de l'évaluation.

Rejet par le syndic

(2) Le syndic peut rejeter, en tout ou en partie, toute réclamation, tout droit à un rang prioritaire dans l'ordre de collocation applicable prévu par la présente loi ou toute garantie.

(b) any right to a priority under the applicable order of priority set out in this Act; or

(c) any security.

Notice of determination or disallowance

(3) Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

Determination or disallowance final and conclusive

(4) A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the General Rules.

Expunge or reduce a proof

(5) The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter.

R.S., 1985, c. B-3, s. 135; 1992, c. 1, s. 20, c. 27, s. 53; 1997, c. 12, s. 89.

Scheme of Distribution

Priority of claims

136 (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

(a) in the case of a deceased bankrupt, the reasonable funeral and testamentary expenses incurred by the legal representative or, in the Province of Quebec, the successors or heirs of the deceased bankrupt;

(b) the costs of administration, in the following order,

(i) the expenses and fees of any person acting under a direction made under paragraph 14.03(1)(a),

(ii) the expenses and fees of the trustee, and

(iii) legal costs;

(c) the levy payable under section 147;

Avis de la décision

(3) S'il décide qu'une réclamation est prouvable ou s'il rejette, en tout ou en partie, une réclamation, un droit à un rang prioritaire ou une garantie, le syndic en donne sans délai, de la manière prescrite, un avis motivé, en la forme prescrite, à l'intéressé.

Effet de la décision

(4) La décision et le rejet sont définitifs et péremptoires, à moins que, dans les trente jours suivant la signification de l'avis, ou dans tel autre délai que le tribunal peut accorder, sur demande présentée dans les mêmes trente jours, le destinataire de l'avis n'interjette appel devant le tribunal, conformément aux Règles générales, de la décision du syndic.

Rejet total ou partiel d'une preuve

(5) Le tribunal peut rayer ou réduire une preuve de réclamation ou de garantie à la demande d'un créancier ou du débiteur, si le syndic refuse d'intervenir dans l'affaire.

L.R. (1985), ch. B-3, art. 135; 1992, ch. 1, art. 20, ch. 27, art. 53; 1997, ch. 12, art. 89.

Plan de répartition

Priorité des créances

136 (1) Sous réserve des droits des créanciers garantis, les montants réalisés provenant des biens d'un failli sont distribués d'après l'ordre de priorité de paiement suivant :

a) dans le cas d'un failli décédé, les frais de funérailles et dépenses testamentaires raisonnables, faits par le représentant légal ou, dans la province de Québec, les successibles ou héritiers du failli décédé;

b) les frais d'administration, dans l'ordre suivant :

(i) débours et honoraires de la personne visée à l'alinéa 14.03(1)a),

(ii) débours et honoraires du syndic,

(iii) frais légaux;

TAB 2

Court of Queen's Bench of Alberta

Citation: Transglobal Communications Group Inc. (Re), 2009 ABQB 195

Date: 20090330
Docket: BE03-1071018
Registry: Edmonton

In the Matter of the Proposal of Transglobal Communications Group Inc.

Corrected judgment: A corrigendum was issued on April 2, 2009; the corrections have been made to the text and the corrigendum is appended to this judgment.

Reasons for Judgment
of the
Honourable Mr. Justice K.D. Yamauchi

I. Nature of the Application

[1] This case relates to appeals of two decisions that a proposal trustee made under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"). One involves the proposal trustee's valuation of a creditor's claim. The other involves the proposal trustee's disallowance of a creditor's claim for voting purposes.

II. Facts

A. Stone Sapphire Appeal

[2] Transglobal Communications Group Inc. ("Transglobal") was in the business of selling imported goods to North American retailers. It became embroiled in litigation with an overseas supplier, Stone Sapphire Ltd. ("Stone Sapphire"). Stone Sapphire claimed that Transglobal had failed to pay invoices totalling USD $2,280,828.57. Transglobal defended and counterclaimed for an amount exceeding Stone Sapphire's claim.

[3] On April 12, 2007, Justice Lee granted Stone Sapphire a partial summary judgment, reported at 2007 ABQB 236 ("Summary Judgment"), in the amount of USD $1,533,352.62 in relation to what Justice Lee defined as "undisputed invoices." The undisputed invoices related to items that Transglobal had "ordered, inspected, delivered and sold ... at a profit to its retail customers," Summary Judgment at para. 10. Justice Lee concluded that Transglobal was not entitled legally or equitably to set-off its counterclaim amounts against the amounts that Stone Sapphire claimed in its summary judgment application, Summary Judgment at paras. 62-80.

Finally, he stayed Stone Sapphire's enforcement on the Summary Judgment, provided Transglobal paid into court the full amount of the Summary Judgment to permit litigation on the counterclaim (the "Stay"). Transglobal filed a notice of appeal with respect to the Summary Judgment. The Alberta Court of Appeal has not yet heard that appeal.

[4] Transglobal subsequently applied, unsuccessfully, for other relief, including:

(a) to have the Summary Judgment reopened on fresh evidence ("Rehearing Application"). The fresh evidence included allegations that the plaintiff in this case was not the entity with which Transglobal had contracted and that Stone Sapphire was overcharging Transglobal; and

(b) to amend its counterclaim to include the fresh evidence.

[5] Justice Lee denied Transglobal's application to amend its counterclaim on April 3, 2007. Transglobal did not appeal this decision. It later filed, but did not pursue, another motion seeking the same relief.

[6] On June 27, 2008, Justice Lee rendered his decision in which he dismissed the Rehearing Application, reported at 2008 ABQB 397 (the "Fresh Evidence Judgment"). Transglobal has appealed the Fresh Evidence Judgment, as well.

[7] Before the Court released the Fresh Evidence Judgment, Transglobal's primary lender called in its loans. Transglobal responded on May 20, 2008, by filing a notice of intention to make a proposal pursuant to *BIA* s. 50.4(1). Transglobal named Meyers Norris Penny Limited ("MNP") as the proposal trustee.

[8] Stone Sapphire applied for an order declaring that it was the owner of the monies Transglobal paid into court to obtain the stay. HSBC Bank Canada opposed that application on the basis that it held a security interest in those funds. Justice Topolniski rendered a judgment on September 19, 2008, reported at 2008 ABQB 575, dismissing Stone Sapphire's application (the "Property Order").

[9] Transglobal filed its *BIA* proposal. MNP held an initial meeting of Transglobal's creditors. That meeting was adjourned at the creditors' request to permit them to make inquiries into the value to be assigned to Stone Sapphire's claim for voting purposes.

[10] On October 27, 2008, Stone Sapphire submitted a proof of claim in the amount of $2,005,722.30, $1,710,345.58 of which represented the amount of the Summary Judgment, accrued interest and costs arising from the Summary Judgment.

[11] Apparently, satisfied that it was not bound by the Summary Judgment, the court's dismissal of the Rehearing Application or its dismissal of the application to amend Transglobal's counterclaim, MNP undertook an independent valuation and determined that Stone Sapphire's

claim was worth $1 for voting purposes. It noted that the following issues were relevant to its determination of Stone Sapphire's voting status:

1. With respect to Stone Sapphire's claim to be a secured creditor in the amount of $200,000, the Property Order expressly decided against Stone Sapphire, which arose from Justice Lee's decisions. However, Stone Sapphire appealed the Property Order and, accordingly, the matter is not yet finally resolved.

2. With respect to the unsecured portion of its claim, Stone Sapphire's right to enforce the Summary Judgment was stayed as a result of its payment into court of the Summary Judgment amount. Stone Sapphire's efforts to lift the Stay were unsuccessful. Accordingly, while Stone Sapphire has established a claim (subject to Transglobal's "plausible" counterclaim and Transglobal's appeal), its claim is not presently enforceable.

[12] The adjourned creditors' meeting was reconvened on December 15, 2008. Grant Bazian, a licensed bankruptcy trustee, acted as chair of that meeting. He advised those attending the meeting that MNP had assigned a $1 value to Stone Sapphire's claim, for voting purposes. Supported by MNP's recommendation, the unsecured creditors voted in favour of the proposal.

[13] Stone Sapphire appealed MNP's valuation pursuant to *BIA* s. 135(4), observing that the valuation of its claim at the amount of Summary Judgment award would have allowed it to successfully defeat the proposal. That is because *BIA* s. 115 provides that the votes of creditors are to be calculated by counting one vote for every dollar of every claim of the creditor that is not disallowed.

[14] Transglobal made an application on January 29, 2009, to sanction the proposal. That application was adjourned to allow the hearing of Stone Sapphire's appeal of the Property Order. On March 5, 2009, the Court of Appeal upheld the Property Order.

B. The Kulbabas' Appeal

[15] The second appeal is by Joshua and Julia Kulbaba. Joshua Kulbaba was Transglobal's controller. On April 29, 2008, Transglobal commenced an action against the Kulbabas, claiming that they had stolen approximately $300,000 from it. Transglobal obtained an *ex parte* attachment order from Justice Clark, freezing all of the Kulbabas' worldwide assets.

[16] The Kulbabas filed a defence to the action and a counterclaim against Transglobal and its president, Steven Prescott, for defamation. They also applied to set aside the attachment order. Their motion was heard on July 10, 2008, by Justice Clark, who set aside his attachment order and ordered Mr. Prescott personally to pay the Kulbabas' costs of the application on a solicitor-client basis, which amounted to $95,000. He directed Transglobal to post $75,000 as security for costs and granted the Kulbabas an injunction forbidding Transglobal or anyone associated with it

from further defaming them by suggesting that they were responsible for Transglobal's insolvency.

[17] The Kulbabas submitted a proof of claim to MNP on October 23, 2008. The proof of claim outlined the history of their litigation with Transglobal.

[18] The chair of the creditors' meeting advised the Kulbabas that MNP had disallowed their claim for voting purposes as it was "an unliquidated contingent claim." They now appeal that decision pursuant to *BIA* s. 108(1) and s. 135(4).

C. Schedule of Proceedings

[19] Stone Sapphire appeals MNP's valuation of its claim. Because the result of Stone Sapphire's appeal could determine the fate of Transglobal's proposal, Justice Topolniski ruled on January 29, 2009, that Stone Sapphire's appeal would be heard before the court would consider the MNP's application for court sanction of Transglobal's proposal.

[20] Justice Topolniski further set the following schedule for resolution of the various issues which have arisen:

1. March 20, 2009 - MNP's application for advice and directions as to the process and/or standard of review for MNP's valuations.

2. April 17, 2009 - If the appeals are on the record, review of the materials considered by MNP in making the valuations and determination of the matter on the basis of the ascertained standard of review.

3. April 14-17, 2009 - If the appeals are *de novo*, trial of the issues on the valuations and Transglobal's counterclaim, as filed.

III. Issues

[21] These reasons address the following issues:

(a) Whether the appeals are on the record or *de novo*.

(b) What is the appropriate standard of review?

(c) Whether MNP erred in determining that it was not bound by the court's various judgments in valuing Stone Sapphire's claim.

IV. Preliminary Matter

[22] The wording of the *BIA* as to the respective roles of the trustee and chair of the first meeting of creditors is unclear. *BIA* s. 51(3) says that the official receiver or the official receiver's nominee acts as chair of the first meeting of creditors. As well, that section says that the chair decides any questions or disputes arising at the meeting and any creditor may appeal any such decision to the court.

[23] *BIA* s. 66(1) then says that, "All provisions of this Act ... in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division." *BIA* s. 135 is the section that deals with the allowance or disallowance of proofs of claim. It requires the trustee to examine the proofs of claim, to determine whether a contingent or unliquidated claim is provable and, with respect to any provable claim, to value that claim. *BIA* s. 135(2) permits the trustee to disallow any claim.

[24] *BIA* s. 108(1) says that the chair of any meeting of creditors "has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court."

[25] From the foregoing, one can see that the official receiver (or its nominee) or the trustee has the power to question and, ultimately disallow the creditor's claim, its right to vote or both. These rulings are subject to appeal. In this case, it was MNP who concluded that Stone Sapphire's claim for voting purposes is $1. In the case of the Kulbabas, it was MNP who rejected their claim for voting purposes. The chair at the creditors' meeting was the official receiver's nominee, one of MNP's bankruptcy trustees, and he advised the meeting of MNP's ruling.

[26] Why is this important for the purposes of the following discussion? The *BIA* provides that decisions of the chair of the meeting are subject to appeal to a court, *BIA* ss. 51(3) and 108(1). *BIA* s. 135(3) says that the trustee's decision is "final and conclusive" unless the aggrieved person appeals. Thus, in the case of the chair's ruling, this Court need not provide any deference, whereas in the case of a trustee, this Court should accord some deference, based on this partial privative clause, see ***Stubicar v. Alberta (Office of the Information and Privacy Commissioner)***, 2008 ABCA 357 at para. 22. This Court will address this issue in more detail later in these reasons. For now, it is worthwhile noting that MNP fulfilled its duties under *BIA* s. 135 and the chair of the meeting appeared to accept the trustee's findings when he made his rulings at the first meeting of creditors, rather than undertaking an independent valuation or finding. Thus, for the purposes of this decision, this Court will deal only with the decisions of the trustee pursuant to *BIA* s. 135.

V. Positions of the Parties

A. Stone Sapphire Appeal

[27] MNP argued that the powers of the trustee are administrative or quasi-judicial in nature and, therefore, a "standard of review" analysis under ***Dunsmuir v. New Brunswick***, 2008 SCC 9,

[2008] 1 S.C.R. 190 must be performed in connection with any appeal from a trustee's decision under *BIA* s. 135, citing ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at para. 21, [2003] 1 S.C.R. 226; ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20 at para. 21, [2003] 1 S.C.R. 247; ***Imperial Oil Resources Ltd. v. 826167 Alberta Inc.***, 2007 ABCA 131 at paras. 8-9. MNP submits that while there is judicial authority that an appeal from a trustee's decision on the valuation of a claim should attract the reasonableness standard of review, which suggests the appeal should be on the record, the circumstances of this case merit a *de novo* hearing based on ***Re San Juan Resources Inc.***, 2009 ABQB 55.

[28] MNP maintains that it was not bound by the finality of the Summary Judgment decision in assessing Stone Sapphire's proof of claim. It cites ***Re Van Laun, ex parte Chatterton***, [1907] All E.R. 159 at 160 (C.A.); ***Re Lupkovics, ex parte, The Trustee v. Freville***, [1954] 2 All E.R. 125 at 130 (C.A.); ***Canadian Imperial Bank of Commerce v. 433616 Ontario Inc.***, 1993 CarswellOnt 193 at paras. 12 and 16 in support of that proposition. It acknowledged that ***Re Canadian Asian Centre Developments Inc.***, 2003 BCSC 41 at paras. 29-31, 39 C.B.R. (4th) 35 indicates that a proposal trustee should not go behind a judgment unless there is an allegation of fraud, collusion or miscarriage of justice. As well, it acknowledged that the Fresh Evidence Judgment ruled against the admissibility of the fresh evidence on which, presumably, MNP based its ruling.

[29] MNP takes the position that it was justified in looking behind the Summary Judgment given the extant appeals and the significant amount of evidence that was available for it to consider that was not before Justice Lee when he made the Fresh Evidence Judgment. It argued that if this Court determines that a hearing *de novo* is appropriate, it should allow evidence to be led and argument presented on the merits of Stone Sapphire's claim, rather than restricting the hearing to Transglobal's counterclaim.

[30] Stone Sapphire argued that the ***Dunsmuir*** standard of review analysis does not apply to this case. It argued that, in the absence of exceptional circumstances, an appeal from a trustee's decision is not a hearing *de novo* with new evidence, but a review "on the record" without deference to the trustee. Stone Sapphire contends that no injustice will result if the MNP's decision is restricted to a review of the record that Stone Sapphire placed before MNP. Even if one were to undertake a ***Dunsmuir***-type analysis, the standard of review would be reasonableness and also a pragmatic approach requires this Court to recognize that bankruptcy proceedings call for an expedited process. It does not dismiss the possibility that in extreme or exceptional circumstances, a court could conduct a *de novo* hearing, but argues that this is not one of those cases.

[31] Stone Sapphire notes as well that the new evidence that MNP seeks to introduce formed the basis for Rehearing Judgment and that Justice Lee concluded at para. 77, that even if the evidence were admitted, "it would have little or no impact on the outcome in any event."

[32] Stone Sapphire maintains that the record should consist of:

(a) its proof of claim;

(b) MNP's "Review of Claim by Stone Sapphire Ltd. in the Proposal Proceedings of Transglobal Communications Group Inc." (the "Trustee's Reasons"); and

(c) the judgments referred to in the Trustee's Reasons.

[33] Stone Sapphire argued that MNP, in valuing its claim, improperly considered information which was found inadmissible by Justice Lee. It further argued that MNP had no basis for going behind the Summary Judgment as there were no allegations of fraud or collusion and the identity issue had been expressly considered and rejected, as reflected in the Rehearing Judgment. It argued that, in essence, MNP usurped the role of the Court of Appeal.

B. The Kulbabas' Appeal

[34] The Kulbabas argued that a proposal trustee's decision is not subject to judicial review, as a proposal trustee acts as an officer of the court in a court proceeding, *viz*., Bankruptcy No. 24-1071018. They maintain that appeals from a proposal trustee's decisions are heard on a *de novo* basis, citing ***Re Eskasoni Fisheries Ltd.*** (2000), 187 N.S.R. (2d) 363; 16 C.B.R. (4th) 173 at para. 16 (S.C.); ***Re Dunham***, 2005 NSSC 57, 231 N.S.R. (2d) 235; ***Lloyd's Non-Marine Underwriters v. J.J. Lacey Insurance Ltd.***, 2008 NLTD 9; and ***Johnson v. Erdman***, 2005 SKQB 515.

[35] If this Court determines that a standard of review analysis is required, the Kulbabas argued that the appropriate standard of review is correctness. While they conceded that one could establish that the starting point for reviewing proposal trustees' decisions would be a standard of reasonableness, they argued that a fulsome review of the factors outlined in ***Pushpanathan v. Canada (Minister of Citizenship and Immigration)***, [1988] 1 S.C.R. 982, would lead one to the conclusion that the correctness standard applies in this case, citing ***Re Galaxy Sports Inc.***, 2004 BCCA 284 at para. 39; ***Lloyd's Non-Marine*** at paras. 13-18. They argued that the findings required to assess their claim involve questions of law or mixed fact and law and argue that MNP has no experience in assessing such claims

VI. Analysis

A. Whether the Appeals are on the Record or *De Novo*.

[36] Other than the fact that a disgruntled creditor may appeal a proposal trustee's decisions of disallowances or valuations for voting purposes, the *BIA* is silent as to the process to be followed for appeals. *BIA* s. 135(4) says that the appeal must be in accordance with the *Bankruptcy and Insolvency General Rules*, C.R.C. 1978, c. 368. Rule 11 states that: "Subject to these Rules, every application to the court must be made by motion unless the court orders otherwise. Rule 3 provides that:

> 3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.

Ordinarily, an appeal is on the record, see *e.g.* ***Reform Party of Canada v. Canada (Attorney General)*** (1995), Alta. L.R. (3d) 153 at 185-86 (C.A.).

[37] It is important, at the outset, for this Court to provide a guidepost in its use of the phrase appeal "*de novo*." Courts have described appeals *de novo* in many different ways, including:

(a) new evidence or cross-examination is possible, ***Ross v. McRoberts*** (1999), 237 A.R. 244 (C.A.); ***Taylor v. Alberta (Workers' Compensation Board)***, [2005] A.J. No. 968 (Q.B.); ***Dickey v. Pep Homes Ltd.***, 2006 ABCA 402

(b) new grounds may be raised, ***678667 Alta. Ltd. v. Allendale Bingo Corporation***, [2001] A.J. No. 1303 (Q.B.)

(c) consideration by the reviewing judge afresh in which the court may substitute its opinion, judicially reasoned, for that of the lower court, ***Primrose Drilling Ventures Ltd. v. Carter***, 2008 ABQB 605 at para. 14

(d) an entirely new case is presented, independent of the original case, ***Minister of Human Resources Development v. Landry*** (2005), 31 Admin. L.R. (4th) 13 at para. 10 (F.C.A.)

(e) an appeal heard on the basis of the case originally presented to the tribunal, with the addition of new facts that the tribunal accepted when it revised its decision, ***Landry*** at para. 10

[38] In ***Newterm Ltd. v. St. John's (City)*** (1991), 93 Nfld. & P.E.I.R. 49 at para. 13 (Nfld. S.C.T.D.), the court made the very important statement that:

> The appeal before this Court is a civil proceeding and one must look to the particular statute giving the appeal (de novo) to determine the procedure, powers and jurisdiction to be exercised by the appellate court.

In other words, one cannot ignore the foundational statute on which the appeal is based to determine the type of appeal *de novo* with which one is dealing.

[39] In ***Alberta (Superintendent of Real Estate) v. Harder*** (1980), 28 A.R. 210, Justice Miller heard an appeal by the Superintendent of Real Estate from a decision of an Appeal Board appointed under the *Real Estate Agents Licensing Act*. The Act provided that such an appeal was to be brought by filing an originating notice but did not specify whether the appeal was *de novo*

or on the record. An application for advice and directions previously had been made to Justice Dea, who ordered that the appeal be on the record and that on default of agreement between the parties as to what would constitute the record, *viva voce* evidence would be heard to determine whether the disputed items should properly form part of the record.

[40] When the matter came before Justice Miller, the Superintendent questioned the procedure that had been ordered. Justice Miller noted that the appeal procedure provided for in the Act was by way of originating notice, a process frequently employed when it is unlikely there will be serious factual disputes. He observed that the Act did not use terms such as "on the merits", "rehearing" or "*de novo*." Justice Miller also commented that it would be illogical and unnecessarily expensive to conclude that the parties should be entitled under the Act to two separate and new appeal hearings. He cited the following statement by Clement J.A. from ***Haugen v. Camrose (County)*** (1979), 15 A.R. 451 at 453 (S.C.A.D.):

> ... An appeal court, whether this Division or another tribunal appointed for the purpose, does not conduct a new trial in order to exercise its appellate jurisdiction unless such is prescribed or permitted by the statute granting the right of appeal. An instance of such is found in the provisions of the *Criminal Code* relating to appeals from summary convictions, where formerly the appeal was specifically a trial *de novo* and now may be on the record in the summary conviction court or by a trial *de novo*. Further examples may be found in provincial statutes: *The Right of Entry Act*, R.S.A. 1970, c. 322, provides by s. 21 that an appeal to the district court shall be in the form a new hearing; s. 38 of *The Surface Reclamation Act*, R.S.A. 1970. c. 356, directs that an appeal to the district court shall be heard and determined as a trial *de novo* s. 53 of *The Expropriation Act*, R.S.A. 1970, c. 130, directs that an appeal to the district court shall be in the form of a new hearing. In such cases the scope of appeal is limited to prescribed issues. There are no such provisions here. The right of appeal given by s. 19.2(1) is in stark terms and evidence may well have had to be adduced to show what was in fact before Council when it held the prescribed hearing and then enacted its bylaws; but this would be in order to constitute the record for the purposes of appeal. Such a necessity gives no warrant for the exercise of a trial jurisdiction which would result, presumably, in the trial judge determining on such evidence as might be adduced before him, whether or not the bylaw should be enacted, instead of the body to whose consideration the Legislature left it.

[41] Justice Miller agreed with Justice Dea that the appeal should be on the record. He stated that because the Appeal Board was not bound to make a record of its hearing, the judge hearing the appeal should have the discretion to hear evidence to clarify any issues of fact, ***Harder*** at para. 42, see also ***SKK Investments Ltd. v. Alberta (Social Care Facilities Licensing, Director)*** (1994), 150 A.R. 351 (Q.B.), which followed ***Harder*** in reaching a similar conclusion.

[42] In ***Eskasoni Fisheries*** at paras 17-20, Registrar Hill observed that appellate deference is largely based on the trier having heard the evidence and arguments firsthand. As a trustee's

valuation under the *BIA* does not involve preparation of a record and there is no hearing, he concluded that an appeal must be *de novo* for justice to be done.

[43] Other courts have followed ***Eskasoni Fisheries***, see *e.g.* ***Re MacDonald***, [2002] O.J. No. 2744 at para. 19 (Ont. Sup. Ct. Just.); ***Re Port Chevrolet Oldsmobile Ltd.*** (2002), 49 C.B.R. (4th) 127 (B.C.S.C.), aff'd (2004), 49 C.B.R. (4th) 146 (B.C.C.A.); ***Re Exner***, 2003 BCSC 260, 41 C.B.R. (4th) 49; ***Re Beetown Honey Products Inc.*** (2003), 46 C.B.R. (4th) 195 (Ont. Sup. Ct. Just.); ***Dunham***.

[44] The British Columbia Court of Appeal in ***Galaxy Sports***, declined to follow ***Eskasoni Fisheries***. The ***Galaxy Sports*** court noted at para. 36, that in ***Port Chevrolet Oldsmobile***, "counsel did not challenge the 'trial *de novo*' approach taken in ***Eskasoni***." It ruled at para. 42, that fresh evidence should not be admitted as a matter of course on an appeal and that exceptions must be established by showing that it is in the interests of justice or on some other principled basis. If courts were to permit the parties routinely to adduce fresh evidence on appeal, efficiencies would be lost, creditors who had neglected to file proofs of claim would suffer no practical consequences, and the business conducted at creditors meetings would be co-opted by the courts with attendant expense, delay and formality, ***Galaxy Sports*** at para. 41.

[45] As well, the ***Galaxy Sports*** court at para. 30, observed that Parliament had assigned trustees the authority to value a contingent or unliquidated claim, a function previously undertaken by the court on application by a trustee. It also noted at para. 33, the (partial) privative clause protecting the trustee's decision in that regard and commented that presumably Parliament was of the view that trustees are suited to make the determination "because they possess specialized expertise in the areas of business financing, restructurings and insolvency, and are decision-makers to whom some deference is owed by a reviewing court," see also ***Johnson*** at para. 10.

[46] In ***Lloyd's Non-Marine***, a creditor alleged that the trustee did not duly investigate a particular claim. The creditor made serious allegations of criminality and unfairness with respect to that claim. Justice Hall referred to ***Eskasoni Fisheries*** and ***Galaxy Sports***, and said at para. 18:

> …efficacy, expedition, concerns over extra expense and delay or increased formality should not be permitted to trump fairness and should certainly not allow the claims determination process to constitute a de facto "good housekeeping seal of approval" upon activities surrounding which there is a serious allegation of criminality. Whether such criminality or unfairness in fact exists is a question to be determined upon the hearing of appropriate evidence. In my view however the Court should not be denied the opportunity to hear such evidence simply because doing so would be disruptive to the efficacy of the claims determination process.

[47] After reviewing the two lines of authority on the issue represented by ***Eskasoni Fisheries*** and ***Galaxy Sports***, Registrar Prowse in ***Re San Juan Resources Inc.***, 2009 ABQB 55, ruled that

an appeal from a trustee's disallowance of a claim should not be heard *de novo* as a matter of right, but may be heard *de novo* where the circumstances of the case are such that a hearing restricted to the record might result in an injustice. On the specific facts before him, in particular the trustee's preference for the opinion of the debtor's oil and gas expert given in pre-proposal litigation as opposed to the opinion of the claimant's expert, he ruled that the case warranted a *de novo* hearing. He said at para. 30:

> The *BIA* needs to be interpreted in a commercially reasonable manner and having regard to the need to proceed in an expedited fashion. The rights which are afforded to litigants in non-insolvency situations are not automatically available to claimants under the *BIA*. This was recognized in the ***Galaxy*** decision, where claimants were precluded from appealing a disallowance *de novo* as of right. However, the ***Galaxy*** and ***Lloyd's Non-Marine*** cases both recognize that there are situations where an appeal *de novo* would be appropriate. For the reasons given above, this is such a situation.

He ordered that the appeals from the disallowances before him should be determined by a summary hearing following the process used for summary trials in Alberta and that the evidence of any expert or other witness could be provided by way of affidavit.

[48] Proceedings under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, have come to be known as "real-time litigation" because, as the Ontario Court of Appeal noted in ***Re Androscoggin Energy LLC***, 2005 CarswellOnt 589; 8 C.B.R. (5th) 11 at para. 1, "Parties depend on the court system to be able to respond, as it has here, despite the inevitable time pressures." Bankruptcy liquidation proceedings have come to be known as "autopsy litigation." Proposal proceedings under the *BIA* are no less real-time litigation than proceedings under the *CCAA*. As Justice Farley, who was the individual who coined the phrase in the first instance, said in ***Re Royal Oak Mines Inc.***, 1999 CarswellOnt 792; 7 C.B.R. (4th) 293 at para. 5 (Ont. Ct. Just. Gen. Div.):

> Frequently those who do not have familiarity with real time litigation have difficulty appreciating that, in order to preserve value for everyone involved, Herculean tasks have to be successfully completed in head spinning short times. All the same everyone is entitled the opportunity to advance their interests.

[49] Like ***Harder*** and ***Haugen***, the *BIA*, which is the foundational statute with which we are dealing, contains no reference to appeals on the merits, rehearing or *de novo*. The proposal provisions of the *BIA* were foundational provisions on which the ***San Juan*** court grounded its reasons. The ***San Juan*** court's reasoning is compelling, as it recognized the concern raised by ***Lloyd's Non-Marine*** court in the case with which it was dealing.

[50] In this case, however, as the ***Galaxy Court*** stated, no one has shown that it is in the interests of justice or some other principled basis on which this Court should direct an appeal *de novo*. Accordingly, the appeals from MNP's decisions will be on the record.

B. What is the Appropriate Standard of Review?

[51] The Supreme Court of Canada has indicated that on a statutory appeal from a decision of an administrative tribunal, courts must follow the same process as on a judicial review, ***Pezim v. British Columbia (Superintendent of Brokers)***, [1994] 2 S.C.R. 557 at para. 1; ***Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.***, [1997] 1 S.C.R. 748 at para. 28; ***Dr. Q v. College of Physicians and Surgeons of British Columbia***, 2003 SCC 19 at para. 21, [2003] 1 S.C.R. 226; ***Law Society of New Brunswick v. Ryan***, 2003 SCC 20 at para. 21, [2003] 1 S.C.R. 247.

[52] ***Dunsmuir v. New Brunswick***, 2008 SCC 9; [2008] 1 S.C.R. 190 is the court's most recent pronouncement on that process. There is a more recent decision emanating from the Supreme Court of Canada which deals with standards of review, but it dealt with a specific tribunal which was addressing a specific issue not applicable to this case, ***Canada (Citizenship and Immigration) v. Khosa***, 2009 SCC 12. However, ***Khosa*** provides further refinement of the ***Dunsmuir*** reasoning, so it deserves some comment in these reasons.

[53] ***Dunsmuir*** reduced the former three standards of review to two standards of review, comprised of the correctness standard and a reasonableness standard. The aim of this revision was to make the system simpler and more workable, ***Dunsmuir*** at para. 45.

[54] The ***Dunsmuir*** court at para. 62, stated that reviewing courts must undertake a two-step analysis to determine the appropriate standard of review. First, the reviewing court must ascertain whether there is satisfactory judicial authority that addresses the degree of deference that reviewing courts will accord the tribunal concerning a particular category of question. If that inquiry proves unsuccessful, the court must proceed to an analysis of the factors that will help it identify the proper standard of review. ***Dunsmuir*** at para. 64, provides reviewing courts with those factors when it said:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by interpretation of enabling legislation; (3) the nature of the question at issue, and; (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all of the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[55] Before going any further in this discussion, this Court must first ascertain whether ***Dunsmuir*** applies to the decisions of bankruptcy or proposal trustee's decisions at all. The ***Galaxy Sports*** court placed an administrative law gloss on its decision without discussing this aspect.

[56] The *Constitution Act, 1867*, s. 91(21) allows the Parliament of Canada to enact laws in relation to "bankruptcy and insolvency." Thus, it enacted the current *BIA*. The *BIA* sets out the structure of administrative officials in the bankruptcy regime. *BIA* s. 5 allows the Governor in Council to appoint a superintendent of bankruptcy who, among other things, supervises the administration of bankrupt (and insolvent, in certain cases) estates and issues bankruptcy trustee licenses, *BIA* s. 5(2) and 5(3). Each province constitutes a bankruptcy district and the Governor in Council is required to appoint one or more official receivers in each bankruptcy district, *BIA* s. 12. The official receivers are "deemed officers of the court," *BIA* s. 12(2). Trustees are, as well, officers of the court, see *e.g.* ***Re Beetown Honey Products Inc.*** (2003), 46 C.B.R. (4th) 195 (Ont. S.C.J.); ***Re Reed*** (1980), 34 C.B.R. (N.S.) 83 at 86 (Ont. C.A.); ***Re Confederation Treasury Services Ltd.*** (1995), 37 C.B.R. (3d) 237 (Ont. Bktcy.); ***Re Page*** (2002), 38 C.B.R. (4th) 241 (Ont. Sup. Ct. Jus.).

[57] What is an "officer of the court"? The court in ***N.A.P.E. v. Newfoundland & Labrador (Minister of Justice)***, 2004 NLSCTD 54 at paras. 114 and 115, provides us with a list of the basic characteristics of an officer of the court, when it said [emphasis original]:

> From the foregoing, it can be determined that an officer of the court has at least the following characteristics:
>
> 1. His duties and functions in the court process are *necessary* to enable the system to function properly;
>
> 2. In the performance of her duties, her role is to *facilitate the functioning of the court system* either directly or by assisting other officers of the court to perform their functions effectively;
>
> 3. In performing his functions he owes a *duty of loyalty and fidelity* to the court as an institution and to the rule of law, a duty which transcends other interests;
>
> 4. In acting as an officer of the court, she is the *personification of the court*; her acts are the acts of the court;
>
> 5. His duties, insofar as they impact on the effective functioning of the court, are subject to the *supervisory control* and *judicial direction* of the court;
>
> 6. Her role includes the duty to *carry out and comply with orders* of the court so as to ensure they are given practical effect;
>
> 7. His failure to comply with judicial directions or orders make him *subject to sanction*, including punishment for *contempt*.

> In essence, then, an officer of the court is a person whose function is so integral to the functioning of an aspect of the court system that the court could not function effectively in that regard without being able to exercise control, by way of court order if necessary, over what is done and how the officer does it.

[58] To this we may add other characteristics that the cases have added to the trustee's role in a bankruptcy situation, which are referred to in Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2008 Annotated Bankruptcy and Insolvency Act* (Toronto: Carswell Thomson, 2007) at C§10:

> (a) the trustee must impartially represent the interests of creditors, ***Re Roy*** (1963), 4 C.B.R. (N.S.) 275 (Que. S.C.);
>
> (b) the trustee should act equitably and, as far as possible, hold an even hand between competing interests of various classes of creditors. In bringing proceedings the trustee should not adopt an adversarial or hostile role, ***Touche Ross Ltd. v. Weldwood of Canada Sales Ltd.*** (1983), 48 C.B.R. (N.S.) 83 (Ont. S.C.);
>
> (c) the trustee should present the relevant facts to the court in a dispassionate, non-adversarial manner, and leave the matter to the court for decision;
>
> (d) the trustee's actions should be measured by the reasonableness of the business approach taken at the time of the action, and not necessarily by whether the actions attain satisfactory results, ***Re Brown*** (2003), 48 C.B.R. (4th) 38 (Alta. Q.B.);
>
> (e) the trustee must realize as much as possible from the estate for the benefit of creditors, ***Re Coffey*** (2004), 2 C.B.R. (5th) 121 (N.L.T.D.).

This Court notes that MNP's counsel, during argument in this case, reinforced the trustee's role and took the dispassionate approach that the cases have suggested.

[59] The fact that the trustee is an officer of the court does not mean that its decisions are not subject to review by the court. The *BIA* makes provision for appeals of trustees' decisions. As well, even official receivers are not immune from curial review, even though the *BIA* makes no provision for appeals of official receivers' decisions. In ***Re Webber*** (1931), 12 C.B.R. 274 at para. 25 (N.S.S.C.), the court said that it "has inherent power to superintend the conduct of officers of the Court and the learned Judge in Chambers therefore had power to inquire by what authority the Official Receiver acted, and to set aside an order made without authority."

[60] But is this "superintending power" a judicial review or an appeal? We will be able to answer this question through the limitations placed on the concept of judicial review. In David Phillip Jones & Anne S. de Villars, "*Principles of Administrative Law*" 4th ed. (Scarborough: Thomson Carswell, 2004) at 6-8, the authors say:

> Judicial review ... is generally limited to the power of the superior courts to determine whether the administrator has acted strictly within the powers which have been statutorily delegated to it. Judicial review concentrates almost completely on jurisdictional questions, and on the application of the *ultra vires* doctrine to the particular fact pattern surrounding the impugned administrative action.
>
> ...
>
> Judicial review of administrative action can occur for the following jurisdictional defects:
>
> (a) substantive *ultra vires* ...;
>
> (b) exercising a discretion for an improper purpose, with malice, in bad faith, or by reference to irrelevant considerations ...;
>
> c) not considering relevant matters;
>
> (d) making serious procedural errors;
>
> (e) making an error in law, in certain circumstances.

Thus, it seems, we are not in the realm of judicial review in this case, as no one is impugning MNP's jurisdiction to make the decisions it did. Arguably, the only "error in law" that MNP made and which could go to its jurisdiction concerns its dealing with the substantive issues involved in both appeals. At this stage, this Court cannot comment on those issues.

[61] Earlier in the reasons, this Court said that ***Galaxy Sports*** added an "administrative law gloss" to its decision. The ***Galaxy Sports*** court did not say specifically that it was conducting a judicial review of the trustee's decision. There is good reason for this; it was not undertaking a judicial review. Rather, it seems that the ***Galaxy Sports*** court used the administrative law gloss to focus on and assist it in examining the issues before it. Registrar Herauf, as he then was, in ***Johnson***, agreed when he applied the ***Galaxy Sports*** approach even in the face of his comment at para. 11, that, "it is not particularly easy to fit a trustee's decision into the continuum of administrative law."

[62] Like the ***Johnson*** court, this Court finds the ***Galaxy Sports*** approach compelling and it "makes sense." This Court will take a similar approach, recognizing the concern that the ***Johnson*** court expressed. As well, we must remember that, even though the ***Galaxy Sports*** court's analysis had an administrative law gloss, it found that the appeal, as sanctioned by the *BIA*, was a true appeal and not a judicial review.

[63] The ***Galaxy Sports*** court held that the standard of review for compliance with a "mandatory" provision, which it equated to a question of law or statutory compliance, such as the decision to allow or disallow a proof of claim, was one of correctness and that a reasonableness

standard applied to trustees' decisions of a factual nature, such as the valuation of a contingent or unliquidated claim.

[64] In determining the standard of review, the ***Galaxy Sports*** court considered Parliament's confidence in the expertise of the trustee as demonstrated by its amendment to the legislation to give the trustee authority to value and allow or disallow claims and the privative clause protecting the trustee's decisions in that regard.

[65] ***Dunsmuir*** at para. 52, found that a privative clause represents a strong indication that Parliament intended that the administrative decision maker should be given greater deference, interference by a reviewing court should be minimized, and that review should be based on the reasonableness standard. The privative clause in the *BIA* is only a partial one, i.e. it says that the trustee's determination is final and conclusive unless a person on whom the notice is served appeals that decision to a court, *BIA* s. 135(4). Nevertheless, this court agrees with the ***Galaxy Sports*** court when it suggests that trustees' decisions in relation to certain issues they face warrant some deference.

[66] Like labour arbitrators in ***Dunsmuir***, this Court recognizes the relative expertise of bankruptcy trustees when they deal with matters, such as the valuation of proofs of claim. Accordingly, like ***Dunsmuir*** at para. 68, this favours the standard of reasonableness when reviewing trustees' decisions in this realm. They are presumed to hold relative expertise in the interpretation of their home legislation as well as related legislation that they might often encounter in the course of their functions.

[67] The ***Dunsmuir*** court considered that the legislative purpose confirmed its view of the regime that the legislature established. The legislation established a time and cost-effective method of resolving disputes and provided an alternative to judicial determination. The provision for timely and binding settlements of disputes implied that a reasonableness review was appropriate.

[68] Similarly, the ***Galaxy Sports*** court commented that the approach it took aligned with the implicit objective of the *BIA* to enable debtors to have their proposals voted on expeditiously. As well, the *BIA* allows creditors to have their rights and claims determined in a business-like manner, "while at the same time providing a meaningful appeal to a court of law on questions that clearly affect legal rights, engage the relative expertise of judges, and set precedents for other cases."

[69] In ***Dunsmuir***, the majority advised at para. 53 that:

> Where the question is one of fact, discretion or policy, deference will usually apply automatically (***Canada (Attorney General) v. Mossop***, [1993] 1 S.C.R. 554, at pp. 599-600; ***Dr. Q***, at para. 29; ***Suresh***, at paras. 29-30). We believe that the same

> standard must apply to the review of questions where the legal and factual issues are intertwined with and cannot be readily separated.

And further at para. 55:

> A consideration of the following factors will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied:
>
> – A privative clause: this is a statutory direction from Parliament or a legislature indicating the need for deference.
>
> – A discrete and special administrative regime in which the decision maker has special expertise (labour relations for instance).
>
> – The nature of the question of law. A question of law that is of "central importance to the legal system ... and outside the ... specialized area of expertise" of the administrative decision maker will always attract a correctness standard (***Toronto (City) v. C.U.P.E.***, [2003] 3 S.C.R. 77, at para. 62). On the other hand, a question of law that does not rise to this level may be compatible with a reasonableness standard where the two above factors so indicate.

[70] The ***Galaxy Sports*** court at para. 38, expressed the view that the trustee's decisions in that case did not involve the balancing of polycentric interests. It characterized the trustee's power to allow or disallow a claim (for which the trustee must give written reasons) under *BIA* s. 135 as a decision more of law than fact and, therefore, a matter on which the court might be assumed to have equal expertise. The court noted that such questions "have important legal consequences, in that a person whose proof of claim is disallowed or rejected may not participate as a creditor in the bankruptcy generally or in the distribution of the bankrupt's estate." This would attract a correctness standard.

[71] When undertaking a review of these factors it becomes clear that Stone Sapphire's appeal raises an extricable legal question, *viz.*, whether the trustee is bound by the Summary Judgment and the Rehearing Judgment in valuing the Stone Sapphire's claim or at least that portion of the claim to which the judgment relates. Accordingly, this question is subject to appeal on a standard of correctness. Once that question has been answered, the trustee's actual valuation of the claim is a matter of fact and discretion and, therefore, subject to appeal on a standard of reasonableness.

[72] Where a court applies a standard of correctness, it shows no deference to the decision of the tribunal. Instead, it undertakes its own analysis and agrees with the tribunal's determination or substitutes its own view of the correct answer.

[73] On an appeal based on the standard of reasonableness, the court recognizes that certain questions may give rise to a number of possible, reasonable conclusions. As indicated the

Dunsmuir court at para. 47, "reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[74] The Kulbabas appeal the disallowance of their claim. The reason given for the disallowance apparently was that it was "an unliquidated contingent claim." Presumably, what MNP meant by this was that the Kulbabas' claim was a contingent or unliquidated claim that was not provable, but it did not say so. *BIA* s. 121(2) states that, "The determination whether a contingent or unliquidated claim is a provable claim and the valuation of such a claim shall be made in accordance with section 135." This provision applies in a proposal as well as a bankruptcy, ***Re F.E.A. Griffiths Corp.*** (1971), 15 C.B.R. (N.S.) 231 (Ont. S.C.). *BIA* s. 135(1.1) requires that the trustee determine whether any contingent or unliquidated claim is provable and, if it is, the trustee is to value the claim. ***Galaxy Sports*** at para. 39, said that this Court should apply a reasonableness standard when considering the trustee's role "in valuing contingent or unliquidated claims." In the case of the Kulbabas, the trustee did not value their claim; it rejected it. Thus, this falls in the "mandatory" category and attracts a correctness standard.

C. Whether MNP was Bound by the Court's Judgment in Valuing the Claim

[75] As mentioned earlier in these reasons, this issue is reviewable on the standard of correctness.

[76] MNP argued that there is authority that a trustee is not bound by a court judgment when assessing a creditor's proof of claim based on that judgment. It cites ***Re Van Laun, ex parte Chatterton***, [1907] All E.R. 159 at 160 (C.A.) and ***Re Lupkovics, ex parte, The Trustee v. Freville***, [1954] 2 All E.R. 125 at 130 in support of that contention. In ***Van Laun***, the court stated:

> The Trustee's right and duty when examining a Proof for the purpose of admitting or rejecting it, is to require some satisfactory evidence that the debt on which the Proof is founded is a real debt. No judgment recovered against the bankrupt, no covenant given by or account stated with him, can deprive the Trustee of this right. He is entitled to go behind such forms to get at the truth, and the estoppel to which the bankrupt may have subjected himself will not prevail against him.

[77] Justice Burnyeat in ***Canadian Asian Centre Developments Inc.***, 2003 BCSC 41 at paras. 29-31 characterized this statement as *obiter dictum*. Justice Burnyeat concluded that a trustee can look behind a judgment only if there is "some good reason to conclude that there should not have been a judgment." He offered fraud or collusion as examples of such a good reason. Justice Burnyeat observed that no appeal had been taken of the judgment involved in the ***Van Laun*** case. He also remarked at para. 35 that, "a judgment of a Court of competent jurisdiction should almost invariably satisfy a Trustee regarding a debt, the security, or a judgment if it can be said that the

Court considered the merits of the entitlement to a creditor to a judgment relating to security claimed."

[78] In this case, MNP's reasons for its valuation of Stone Sapphire's claim are sparse, but those reasons do not refer to any fraud or collusion. MNP's reasons also refer to the fact that it considered the reasons of Justice Lee and Justice Topolniski, but it chose to disregard those judgments. Was this correct? MNP's reasons give this Court no basis on which to determine the correctness or lack of correctness in this decision. It can only surmise that MNP came to this decision because of the extant appeals and the new evidence that Transglobal presented to Justice Lee.

[79] It should be noted that Justice Lee considered the new evidence that Transglobal sought to present and he concluded that "it would have little or no impact on the outcome in any event," Rehearing Judgment para. 77. As well, Justice Lee specifically found that any counterclaim that Transglobal claimed did not provide it with a right of legal or equitable set-off from Stone Sapphire's Summary Judgment.

[80] While this Court acknowledges that the appeals of Justice Lee's judgments are extant, there is "no principle which says that a decision of the trial court or a chambers judge has no effect or is presumed wrong until the Court of Appeal finally at the end of the appeal disposes of it," ***Alberta (Minister of Consumer and Corporate Affairs) v. Bennett*** (1992), 131 A.R. 184 (C.A.).

[81] McEwan J. in ***Re Exner***, 2003 BCSC 260, 41 C.B.R. (4th) 49 expressed the view that the trustee in that case had a duty to scrutinize a certificate of judgment obtained by a creditor. One should not, however, ignore the fact that the court in that case was considering a default judgment.

[82] Thus, MNP was incorrect when it did not give recognition to the judgments of Justice Lee and Justice Topolniski.

VI. Summary

[83] Stone Sapphire's appeal shall be on the record. There will be no *de novo* hearing. The record that this Court will review and that the parties will argue on appeal will be comprised of the proof of claim, the trustee's notice of valuation or disallowance and all of the material that the trustee considered in determining that the claim was not provable or in valuing the claim, including the judgments of Justices Lee and Topolniski. If the parties are unable to agree as to what precisely constitutes the record, they may apply to the court for a determination of that issue.

[84] With respect to the Kulbabas' claim, the parties will, in the first instance, argue whether the Kulbabas' claim is provable. Thereafter, if this Court finds that it is a provable claim, this Court may order MNP to value it, as MNP is required so to do by *BIA* s. 135(1.1).

Heard on the 20th day of March, 2009.
Dated at the City of Edmonton, Alberta this 30th day of March, 2009.

K.D. Yamauchi
J.C.Q.B.A.

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Corrigendum of the Reasons for Judgment
of
The Honourable Mr. Justice K.D. Yamauchi

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has been added to the Appearances on Page 20.

TAB 3

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *All Canadian Investment Corporation (Re)*, 2019 BCSC 1488

Date: 20190904
Docket: S1710393
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 *Business Corporations Act*, S.B.C., c. 57, as amended

And

In the Matter of the *Canada Business Corporations Act*, R.S.C. 1985, C. c-44, as amended

And

In the Matter of a Plan of Compromise and Arrangement of All Canadian Investment Corporation

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Counsel for the Redeeming Shareholders:	J. Whyte
Counsel for the Non-Redeeming Shareholders:	M. Davies
Counsel for the creditors, James Hancock and 1083163 Alberta Ltd.:	V. Tickle
Counsel for the Monitor:	D.B. Hyndeman
Place and Dates of Hearing:	Vancouver, B.C. June 18-20, 2019
Place and Date of Judgment:	Vancouver, B.C. September 4, 2019

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Introduction

[1] The petitioner in this insolvency proceeding, All Canadian Investment Corporation ("ACIC"), seeks to determine competing priority claims amongst its preferred shareholders. Its application is brought under the statute governing this proceeding, the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 [*CCAA*].

[2] ACIC is incorporated pursuant to the *Business Corporations Act*, S.B.C. 2002, c. 57 [*BCA*].

[3] Prior to its insolvency, ACIC carried on business as a registered mortgage investment corporation ("MIC") since 1998. Its business was to loan funds to third party owners of commercial and residential property, mostly to be secured by mortgages, from a pool of funds it received from time to time from individuals and corporations who invested in ACIC by purchasing preferred shares.

[4] Some of ACIC's preferred shareholders delivered redemption notices to the company prior to the commencement of this proceeding in an effort to be paid an amount equal in value to their original share subscription price. Some, but not all of them, are before the Court on this application. I refer to those who are as the "redeeming preferred shareholders", claim to be creditors of ACIC. They assert that all of ACIC's other shareholders, both preferred and common, rank lower in priority since they are equity claimants.

[5] For ease of identification, I collectively refer to to the preferred shareholders who did not deliver redemption notices or did not deliver them prior to the commencement of this proceeding, as the "non-redeeming preferred shareholders".

[6] The core issue on this application is whether the redeeming preferred shareholders are creditors of ACIC as opposed to equity claimants, so as to share rateably in the distribution of proceeds paid under any court-approved plan of arrangement with the company's other creditors, and in priority to the non-redeeming preferred shareholders and ACIC's common shareholders.

[7] The redeeming preferred shareholders' claim is opposed by ACIC, two of its creditors, and the non-redeeming preferred shareholders. The common shareholders did not appear on the application.

[8] ACIC agreed to take the lead in seeking a determination of the priority issue and brought this application seeking declaratory relief.

[9] The priority claim advanced by the redeeming preferred shareholders must be determined before a suitable plan of arrangement, which would include a claims process and plan for distribution of ACIC's assets, can be submitted for court approval.

[10] It will serve no purpose in these reasons to comment on the length of time it has taken to get to this point in the proceeding. It will suffice to say that at this juncture, all stakeholders are anxious to have a plan presented to the court for approval in this liquidating *CCAA*.

[11] The facts set out in these reasons are my findings of fact.

Positions of the Parties

[12] The redeeming preferred shareholders' position on this application is that they were never equity investors. They assert that when the nature of ACIC's business as a MIC is considered, they are properly characterized as lenders from the outset who are debt claimants because their funds were pooled by ACIC and then loaned out to borrowers. They argue that their individual redemption requests should be viewed as akin to demands on a promissory note. In their submissions, they distinguish themselves from the non-redeeming preferred shareholders on the basis of the redemption notices they delivered to ACIC prior to the commencement of this *CCAA* proceeding.

[13] They also advance an alternative position if they are characterized as equity investors when they purchased their preferred shares. They submit that they later became creditors of ACIC. They rely on what they characterize as the purported contractual effect of various communications from ACIC, including its promotional

materials, to potential and existing investors, in an attempt to establish that the nature of their relationship with ACIC changed.The redeeming preferred shareholders acknowledge that ACIC's Articles and various offering memoranda concerning potential subscriptions for preferred shares ("Offering Memoranda") clearly state that ACIC's obligation to honour redemption requests from preferred shareholders is wholly discretionary, resting with ACIC's directors, which throughout was only one, Mr. Donald Bergman. However, they maintain that those communications altered their contractual relationship with ACIC so as to provide for contractually enforceable guaranteed redemption rights that ACIC was obliged to honour at specific points in time. As a result, they say that ACIC can no longer rely on the discretionary provisions in the Articles and the Offering Memoranda and that ACIC contractually bound itself to pay those redemptions as debts. In the result, the redeeming preferred shareholders submit that their relationship with ACIC changed to become creditors.

[14] In the further alternative, those redeeming preferred shareholders whose redemption requests were partially paid before this proceeding was commenced submit that if they were equity claimants at the outset and if ACIC's communications do not constitute an enforceable contractual right to redemption sufficient to change their relationship with ACIC, then the status of their particular claims has changed, such that any redemption amounts owing are debts owed by ACIC.

[15] The redeeming preferred shareholders concede that the right of each of them to recover as a debt claimant depends on ACIC's financial circumstances at the time their individual redemption notices were delivered since a redemption right is unenforceable per s. 79(1) of the *BCA*, if it means that redemption would render ACIC insolvent:

> 79 (1) A company must not make a payment or provide any other consideration to redeem any of its shares if there are reasonable grounds for believing that
>
> (a) the company is insolvent, or
>
> (b) making the payment or providing the consideration would render the company insolvent.

[16] Language mirroring s. 79 is found in the Offering Memoranda.

[17] The redeeming preferred shareholders acknowledge that at this juncture it is not known which redemption notices were delivered to ACIC at a time when reasonable grounds did not exist to believe that either ACIC was insolvent at the time of the request or that honouring the request would cause it to become insolvent.

[18] Consequently, the redeeming preferred shareholders submit that if they succeed in their claim to be creditors, a further, highly specific and lengthy factual inquiry, involving Mr. Bergman's knowledge when each redemption notice was delivered to ACIC, will have to be made to determine whether s. 79 of the *BCA* is engaged.

[19] The non-redeeming preferred shareholders disagree that the redeeming preferred shareholders are debt claimants. Their position is that all preferred shareholders are equity claimants from the outset and that nothing has changed to alter their status.

[20] Included within the non-redeeming preferred shareholders' submissions is the argument that mirroring the common law, the *BCA* establishes a presumption of equality amongst all shareholders. Each share of a class of shares (in this case, preferred shares) "must have attached to it the same special rights or restrictions as are attached to every other share": ss. 59(4); see also ss. 59(3), 61. Rights related to a share attach to the share, and not to the shareholder: Gower's *Principles of Modern Company Law*, 4th ed. (London: Stevens and Sons, 1979), at 403; *Bowater Canadian Ltd. v. R.L. Crain Inc.* (1987), 46 D.L.R. (4th) 161 at 16 (Ont. C.A.). The presumption is even stronger, they argue, in a *CCAA* proceeding given the broad and flexible authority conferred on the supervising judge to determine a fair and efficient resolution of competing claims in circumstances where there are insufficient financial resources to meet all of them: *CCAA*, s. 11.

[21] In addition, and relying on *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at paras. 13-15 and *Bul River Mineral Corporation (Re)*, 2014 BCSC 1732, at paras. 100-101, the non-redeeming preferred shareholders

submit that if the redeeming preferred shareholders' position is correct, the inquiry called for would be unduly protracted and further delay this *CCAA* proceeding, so as to impede any realistic prospect to achieve the statutory objective of an efficient resolution of competing claims.

[22] The non-redeeming preferred shareholders also say that they will be significantly prejudiced because they will recover little to nothing if the redeeming preferred shareholders' claim to be debt claimants prevails.

[23] Some of ACIC's creditors attended the hearing of the application and opposed the redeeming preferred shareholders' claim as well, since there are insufficient assets to pay them out in full if the latter are treated as debt claimants.

[24] ACIC's position on this application is that regardless of any redemption requests, whether paid or unpaid in whole or in part, all preferred shareholders are equity claimants within the meaning of s. 2(1) of the *CCAA*. ACIC seeks a declaration to that effect plus ancillary relief.

[25] For the reasons that follow, I reject the claim advanced by the redeeming preferred shareholders. I have determined that they, along with all of ACIC's preferred shareholders, are equity claimants.

Background Facts

[26] ACIC's shareholders are divided into two groups: common voting shareholders and preferred shareholders. There are currently outstanding four issued common shares and approximately 37,277 preferred shareholders and 15,647 warrants attached to the preferred shares. The preferred shares are stated to be non-voting, "unless otherwise provided for" (and none was).

[27] ACIC issued preferred shares and attached warrants between 1998 and 2015, all in accordance with its articles in force throughout the material time ("Articles").

[28] Draft subscription agreements for the purchase of preferred shares are contained in the various Offering Memoranda issued by ACIC over the years.

[29] Each preferred shareholder acquired units comprised of one preferred share and one warrant (referred to by ACIC by the singular term, "Unit") by signing a subscription agreement. I refer to them collectively as "Subscription Agreements". The subscription price for each Unit was fixed at $1,000. Each warrant granted a preferred shareholder a non-transferable option to acquire additional preferred shares for the same price. The total capital value for all issued Units is approximately $37,277,000.

[30] ACIC's preferred shares contain numerous rights, including a right of redemption (also known as a right of retraction) to receive a return of the purchase price paid for shares, as well as the right to receive dividends so long as an investing subscriber remains a preferred shareholder.

[31] Preferred shareholders were paid dividends from time to time. Between 2005 and 2014, ACIC issued dividends with annual returns ranging between 6.25% and 8%. The return on dividends reduced in 2015 to approximately 2.5%, and to 1% in 2016. ACIC has not issued dividends since 2016.

[32] The redeeming preferred shareholders advise that the earliest redemption requests in issue on the application date back to 2013.

[33] Approximately 540 of ACIC's preferred shareholders, comprising 27,587 preferred shares with a capital value of $27,587,000, issued redemption notices to ACIC before this *CCAA* proceeding was commenced. As mentioned, not all of those who did are before the Court on this application.

[34] Some redeeming preferred shareholders requested redemption of all of their shares prior to the commencement of this *CCAA* proceeding, while others only requested partial redemptions. Some of those who delivered redemption notices were paid in full, others only in part, and some were not paid at all.

[35] According to ACIC, preferred shares to the value of $1,380,500 were redeemed and paid out prior to the initial order in this proceeding, issued by Madam

Justice Adair on November 10, 2017, leaving a balance of unsatisfied share redemptions of $26,207,000.

[36] Sadly, many of ACIC's preferred shareholders are elderly individuals who invested most if not all of their life's savings with ACIC.

[37] Due to defaults on loans it made to certain third parties, ACIC was unable to pay all of the redemption notices it received from preferred shareholders. It sought protection under the *CCAA*.

[38] In addition to the claims asserted by the redeeming preferred shareholders, when ACIC commenced this proceeding on November 8, 2017, it faced approximately $1.785 million in secured claims and $3.96 million in unsecured claims.

[39] It is now evident that this proceeding is in effect a liquidating *CCAA* as there is no reasonable prospect that ACIC's business can be saved. Its primary asset is its loans portfolio. ACIC maintains an office in this province in Salmon Arm, with two staff members. It is also evident that at the moment, ACIC's creditors and shareholders are better off under the *CCAA* as opposed to a bankruptcy under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

[40] Although ACIC has yet to submit a plan of arrangement, the Monitor has been actively engaged in pursuing loan recoveries and operating ACIC's business as per court appointed powers akin to those of a super monitor. Although the Monitor expects to recover a substantial amount of ACIC's loan portfolio, possibly to a maximum of approximately $37.277 million, the Monitor advises that there will be insufficient funds to pay the amounts owed to ACIC's creditors and to return the capital invested by its preferred shareholders.

Overview: Equity vs. Debt Claimants

[41] In a proposed plan of arrangement or compromise submitted for court approval under the *CCAA*, a debtor company may divide its creditors into different

classes. Equity claimants are treated as a single class, unless otherwise ordered: ss. 22(1), 22.1. They rank behind creditors.

[42] Historically, in insolvency matters debt claimants have taken priority to equity claimants. The reasoning behind this approach was explained by Justice Morawetz (as he then was) in *Sino-Forest Corporation (Re)*, 2012 ONSC 4377 at paras. 23-25, aff'd 2012 ONCA 816:

> 23 ... Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise... [citations omitted]
>
> 24 The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential... [citations omitted]
>
> 25 As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement... [citations omitted]

[43] Because of the superior position of debt claimants over equity claimants, it has become necessary for courts to distinguish between the two. The general approach for determining whether a party was a debt or equity claimant was set out in *Canadian Deposit Insurance Corp. v. Canadian Commercial* Bank, [1992] 3 S.C.R. 558 [*CDIC*], which was helpfully summarized by Madam Justice Fitzpatrick in *Bul River* at para. 69:

> ... In [*CDIC*], the issue was whether money advanced to the debtor bank was in the nature of a loan or a capital investment for the purpose of determining whether the creditors advancing the funds ranked *pari passu* with other unsecured creditors in a winding-up proceeding. Mr. Justice Iacobucci stated that the approach was to determine the "substance" or "true nature" of the transaction (563, 588). His oft quoted statements are found at 590-91, the relevant principles of which can be summarized as follows:
>
> a) the fact that a transaction contains both debt and equity features does not, in itself, determine its characterization as either debt or equity;
>
> b) the characterization of a transaction under review requires the determination of the intention of the parties;
>
> c) it does not follow that each and every aspect of a "hybrid" debt and equity transaction must be given the exact same weight when addressing a characterization issue; and

> d) a court should not too easily be distracted by aspects of a transaction which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

[44] The reference to a "hybrid" debt and equity transaction in the above noted excerpt includes preferred shares, which are one form of investment that has proven particularly challenging for courts to categorize. Preferred shares are regarded in the case authorities as hybrid instruments that may contain rights and conditions attributable to both equity and debt: *Royal Bank of Canada v. Central Capital Corp.* [1996] O.J. (3d) No. 359 at para. 127 (C.A.).

[45] The Ontario Court of Appeal said in *Sino-Forest*, at para. 53, that the 2009 amendments to the *CCAA* significantly expanded the definition of equity claims in a manner that "altered" common law. The Court of Appeal determined that the definition extends beyond a holder of an equity interest, and now includes persons that might not otherwise be within its plain meaning (such as advancing claims for contribution or indemnity against the company).

[46] In *Sino-Forest*, shareholders made claims within the *CCAA* proceeding against the company's auditors who in turn sought indemnity from the company. Even though the auditors were never shareholders, their indemnity claim was characterized as an equity claim. I have excerpted what I consider to be guiding language in the Court of Appeal's reasons:

> [1] In 2009, the [*CCAA*] was amended to expressly provide that general creditors are to be paid in full before an equity claim is paid.
>
> [2] This appeal considers the definition of "equity claim" in s. 2(1) of the CCAA. More particularly, the central issue is whether claims by auditors and underwriters against the respondent debtor, Sino-Forest Corporation ("Sino-Forest"), for contribution and indemnity fall within that definition. The claims arise out of proposed shareholder class actions for misrepresentation.
>
> ...
>
> [37] We agree with the supervising judge that the definition of equity claim focuses on the nature of the claim, and not the identity of the claimant. In our view, the appellants' claims for contribution and indemnity are clearly equity claims.
>
> ...
>
> [39] The definition [of equity claim] incorporates two expansive terms.

> [40] First, Parliament employed the phrase "in respect of" twice in defining equity claim: in the opening portion of the definition, it refers to an equity claim as a "claim that is in respect of an equity interest", and in para. (e) it refers to "contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)"...
>
> [41] The Supreme Court of Canada has repeatedly held that the words "in respect of" are "of the widest possible scope", conveying some link or connection between two related subjects. ...
>
> ...
>
> [46] "Equity claim" is not confined by its definition, or by the definition of "claim", to a claim advanced by the holder of an equity interest. Parliament could have, but did not, include language in para. (e) restricting claims for contribution or indemnity to those made by shareholders.
>
> ...
>
> [53] In our view, the definition of "equity claim" is sufficiently clear to alter the pre-existing common law...

[47] Taking the same approach as the Court of Appeal and Mr. Justice Morawitz (as he then was) in the court below (at paras. 86-90) in *Sino-Forest*, Fitzpatrick J. noted in *Bul River*, following a most helpful and thorough discussion of case authorities and the relevant 2009 amendments to the *CCAA*, that in one sense, the amendments codified previous case law concerning equity claims, but also provided for a broader yet more concrete definition of equity claims.

[48] Relying on the reasons of Laskin J.A. in *Central Capital*, Fitzpatrick J. also pointed out that in the context of a *CCAA* proceeding, particularly in light of the 2009 amendments, the mere existence of redemption rights does not equate preferred shareholders as creditors:

> [105] In the same manner, the new equity provisions in the *CCAA* reinforce that it remains an important policy objective that equity claims be subordinated to debt claims. In *Sino-Forest Corporation*, the Court of Appeal focused on the purpose of the 2009 amendments and stated:
>
> > [56] In our view, in enacting s. 6(8) of the *CCAA*, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be

> diminished by the amount of the claims for contribution and indemnity.
>
> [106] This same recognition of the sound policy objectives of insolvency legislation was noted by Laskin J.A. in *Central Capital* (ONCA). He commented at 546 that "[p]ermitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection."
>
> [107] I see no principled basis upon which a different approach should be taken in respect of an equity claimant who has had the foresight, energy or just plain luck to seek and obtain a judgment prior to the filing date.
>
> [Emphasis added.]

[49] Accordingly, while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, they also represent a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims: *Sino-Forest* (ONCA) at paras. 24, 34-60. Parliament has now clearly cast the net widely in terms of the broad definition of equity claims such that claims that might previously escaped such characterization will now by caught by the *CCAA*.

CCAA

Introductory Remarks

[50] The provisions of the *CCAA* greatly assist in the analysis. The expanded definition of equity claim and the definition of equity interest clearly suggest that ACIC's preferred shares, which include rights of redemption and to receive dividends, constitute equity interests and provide strong support for the position taken by ACIC and the non-redeeming shareholders that all preferred shareholders in this *CCAA* proceeding must be treated as equity claimants.

[51] An appropriate starting point in the analysis is with a brief discussion of the key provisions and objectives of the *CCAA*, particulary in light of ACIC's submission that the priority issue is easily resolved in favour of its position on the application from the broad definition of "equity clamant" and "equity interest" in the statute without the need for a detailed analysis of the underlying transaction documents.

Statutory Definition of Equity Claim

[52] As a result of the 2009 amendments to the *CCAA*, an "equity claim" is defined in s. 2(1) and includes redemption claims:

> 2(1)
>
> ...
>
> **equity claim** means a claim that is in respect of an equity interest, including a claim for, among others,
>
> **(a)** a dividend or similar payment,
>
> **(b)** a return of capital,
>
> **(c)** a redemption or retraction obligation,
>
> **(d)** a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
>
> **(e)** contribution or indemnity in respect of a claim referred to in any of paragraphs (a) to (d)...
>
> [Emphasis added.]

[53] An "equity interest" is also defined, and includes a share in the company and a warrant to acquire additional shares:

> **2(1) equity interest** means
>
> **(a)** in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt, and
>
> **(b)** in the case of an income trust, a unit in the income trust — or a warrant or option or another right to acquire a unit in the income trust — other than one that is derived from a convertible debt;

No Statutory Definition of Creditor

[54] Unlike the *BIA*, there is no definition of creditor in the *CCAA*. In the *BIA*, a creditor is defined in s. 2 as "a person having a claim provable as a claim".

[55] The *CCAA* contains a broad definition of "claim" in s. 2, which incorporates the definition in the *BIA*:

> **claim** means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the [*BIA*].

[56] A "provable claim" is defined in s. 2 of the *BIA* as follows:

> **claim provable in bankruptcy, provable claim** or **claim provable** includes any claim or liability provable in proceedings under this Act by a creditor.

[57] Section 121 of the *BIA* speaks to the meaning of a "provable claim". It provides that all debts and liabilities, including those payable at a future date, to which the bankrupt is subject on the date of bankruptcy by reason of an obligation incurred before bankruptcy.

[58] In *Bul River*, Madam Justice Fitzpatrick points out, at para. 39, that the definition of "claim" found in s. 2 of both statutes "represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24.

[59] In the past, the claims and rights of shareholders have not been treated as provable claims and ranked behind creditors of an insolvent corporation in liquidation: *Nelson Financial Group Ltd.*, 2010 ONSC 6229 at para. 25. That remains the case under the current *CCAA*. No plan or arrangement may be sanctioned by the court where equity claimants have priority to creditors. Section 6(8) of the *CCAA* states:

> **Compromises to be sanctioned by court**
>
> **6** …
>
> **Payment — equity claims**
>
> **(8)** No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

[60] The rationale is that equity claimants (commonly thought of as investors) are considered to take a higher degree of risk in a company's economic fortunes than creditors who do not share in any upside in the profits or value of the company and the risk of failure.

[61] The following excerpt from *Nelson Financial* aptly describes the distinction between debt and equity claimants:

> [25] … As noted by Laskin J.A. in *Re Central Capital Corporation*, on the insolvency of a company, the claims of creditors have always ranked ahead

> of the claims of the shareholders for the return of their capital. This principle is premised on the notion that shareholders are understood to be higher risk participants who have chosen to tie their investment to the fortunes of the corporation. In contrast, creditors choose a lower level of exposure, the assumption being that they will rank ahead of shareholders in an insolvency. Put differently, amongst other things, equity investors bear the risk relating to the integrity and character of management.

[62] Creditors' claims, including repayment terms and any rates of interest are typically governed by specific, fixed terms: *Bul River* at paras. 65-66; *Nelson Financial* at para. 25; *Sino-Forest* (ONCA) at para. 30.

[63] Although not a *CCAA* case, the Court of Appeal's discussion of the nature of a debt relationship in *Coast Capital Savings Credit Union v. British Columbia (Attorney General)*, 2011 BCCA 20 provides guidance for the issues in this case, particularly in the absence of a statutory definition. At para. 57, Madam Justice Newbury adopted the following definition, which she noted was also found in numerous Canadian and English authorities:

> A debt is defined to be a sum of money which is certainly, and at all events, payable without regard to the fact whether it be payable now or at a future time.

[64] At para. 23, Newbury J.A. also referred to a definition of debt in a case authority cited by the chambers judge in that case - *A. Valin Petroleums Ltd. v. Imperial Oil Ltd.*, 2007 ABQB 134 at paras. 39-40:

> 39 The word "equity" is not ambiguous. It is a word of ordinary use, particularly in the commercial context....
>
> 40 Debt and equity are distinct concepts. Debt is a claim on the assets of the corporation and is created when money is borrowed. With it arises an obligation on the corporation to repay that money. Corporate equity, however, is comprised of the corporation's total assets unencumbered by debt or other liabilities. It is the "residual economic interest in the corporation's assets, after all outstanding debts have been satisfied." See C. Nicholls, *Corporate Finance and Canadian Law* (Toronto: Carswell, 2000 at page 9).
>
> [Emphasis added.]

[65] Similar definitions, drawn from *Black's Law Dictionary*, *Jowitt's Dictionary of the English Language*, and *The Shorter Oxford Dictionary*, are referred to by the

Ontario Court of Appeal in *Central Capital* at 508, which again involved a *CCAA* proceeding.

[66] There is some conflict in the case authorities as to whether a claim can be considered a debt claim where it is unenforceable: see, e.g. *Bul River* at para. 40; *Central Capital* at 531-534. However, I do not need to decide that issue in order to determine the status of the redeeming preferred shareholders' claims.

Further Analysis is Required

[67] As I said at the outset of this section, the *CCAA* provides considerable guidance in determining the claim of the redeeming preferred shareholders. I agree with ACIC that the 2009 amendments show Parliament's intention to broaden the scope of equity claimants to include shareholders with redemption claims.

[68] However, redeemable preferred shares are viewed in the case law to be "somewhat different than conventional equity capital": *Central Capital* at para. 128; *Coast Capital* at para. 49. In *Central Capital,* Mr. Justice Laskin, in his reasons (concurring with Madam Justice Weiler in the majority), described preferred shares as "compromise securities" and "financial mongrels" with rights analogous to rights of creditors:

> 127 Preferred shares have been called "compromise securities" and even "financial mongrels: Grover and Ross, *Materials and Corporate Finance* (1975), at p. 49. Invariably the conditions attaching to preferred shares contain attributes of equity and, at least in an economic sense, attributes of debt. Over the years financiers and corporate lawyers have blurred the distinction between equity and debt by endowing preferred shareholders with rights analogous to the rights of creditors. One example is the right of redemption -- the right of the corporation to compel preferred shareholders to sell their shares back to the corporation. Another example, and it is the case before us, is the right of retraction -- the right of shareholders to compel the corporation to buy back their shares on a specific date for a specific price.
>
> 128 I acknowledge, therefore, that redeemable or retractable preferred shares are somewhat different from conventional equity capital. What makes the appeals before us difficult is that although the appellants appear to hold equity, their right of retraction appears to be a basic characteristic of a debtor-creditor relationship: see Grover and Ross, supra, at pp. 47-49; Buckley, Gillen and Yalden, *Corporations: Principles and Policies*, 3d ed. (1995), at pp. 938-40.

[69] The fact that a hybrid instrument contains elements of both equity and debt is not an obstacle to determining its true nature: *CDIC* at 590. In *Central Capital*, Laskin J.A. described the nature of the inquiry in this way:

> 129 If the certificate or instrument contains features of both equity and debt – in other words if it is hybrid in character - then the court must determine the "substance" of the relationship between the holder of the certificate and the company. ...
>
> 130 In determining the substance of the relationship, as in any other case of contract interpretation, the court looks to what the parties intended. In *CDIC v. CCB*, *supra*, Iacobucci J. put this proposition as follows at p. 588:
>
> > As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.

[70] Consequently, the focus of the inquiry is to determine whether in substance the redeeming preferred shareholders' claims are debt or equity. They cannot be both.

Determining the Substance of the Relationship

Overview

[71] The inquiry focuses on the transaction documents at the time the relationship was created. It is, generally speaking, informed by the words chosen by the parties to reflect their intentions in conjunction with the principles underpinning insolvency legislation, which in this case includes the remedial purposes of the *CCAA*. Where the words are insufficient to determine the true nature of the agreement, admissible evidence of surrounding circumstances may be considered: *CDIC* at 588, 590; *Central Capital* at paras. 38, 67, 126, 129-130, 135-136.

[72] Section 2(1) of the *CCAA* is clear that in the context of a *CCAA* proceeding, a redemption claim is not indicative of a debt relationship. As well, redemption rights on their own do not create a debtor-creditor relationship. They are to be considered, along with risk-taking, profit sharing, and the right to participate in the assets of the company on liquidation after creditors are paid, as "hallmarks" of a shareholder relationship and an equity interest. To establish a debt relationship, either or both the company's articles or the transaction documents must make it clear that a shareholder's redemption is repayment of a loan: *Central Capital* at paras. 70, 97, 135-136; *Bul River* at para. 109; *Dexior Financial Inc. (Re)*, 2011 BCSC 348 at paras. 12-13,16.

[73] As Weiler J.A. explained in *Central Capital*, language consistent with a debt obligation upon redemption must be reflected in the transaction documents:

> 97 Looked at another way, after the retraction date and at the time of the reorganization, the common features of a debtor-creditor relationship are not in evidence in Central Capital's articles. The agreements between the parties contain no express provision that the redemption of the shares is in repayment of a loan. The corporation was not obliged to create any fund or debt instrument to ensure that it could redeem the shares on the retraction date. There is no indemnity in the event that the money is not repaid on the retraction date. There is no provision for the payment of any interest after the retraction date in the event that the money is not repaid on the retraction date. There is no provision that after the retraction date and in the event of insolvency, the appellants would have the right to have the company wound up. (See *R v. Imperial General Properties Ltd.*, [1985] 2 S.C.R. 288, 21 D.L.R (4th) 741, for a case where the articles of the company contained this right.) There is no provision that upon a winding-up or insolvency the parties are entitled to rank pari passu with the creditors as was the case in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank, supra*.

[74] In *Central Capital*, the parties' intention was (according to the two concurring reasons in the majority) reflected "mainly" in the share purchase agreements, conditions attaching to the shares, the company's articles, and the manner in which Central Capital recorded the shares in its financial statements. They did not establish a debt obligation on the part of the company: see, e.g., para. 131.

[75] Incidental or secondary aspects of a transaction, such as mechanisms for enforcement, should not distract the inquiry: *CDIC* at paras. 46-54; *Earthfirst Canada Inc. (Re)*, ABQB at para. 5.

Examples

[76] Useful guidance for the inquiry into the true nature or substance of the relationship between preferred shareholders and ACIC can also be drawn from some of the cases cited by the parties in submissions.

[77] In *Bul River*, Fitzpatrick J. rejected the claim of certain preferred shareholders that their equity claims converted into debt claims simply because they had obtained (default) judgment for their redemptions against one of the insolvent companies: paras. 85-98, 103-117.

[78] In *Return on Innovations Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018, it did not matter that a claim by a shareholder seeking recovery of share purchase proceeds in the amount USD $50 million was founded on breach of contract and fraud. The legal basis for the claim was not the "deciding factor". Nor were the "legal tools" used by the claimant, because, Mr. Justice Newbould said, at para. 59, they were being used to recover an equity investment.

[79] In *Nelson Financial*, which was a *CCAA* proceeding, Madam Justice Pepall (as she then was) disagreed that the preferred shareholders were debt claimants. In that case, the company raised money by two different means: from lenders to whom it issued promissory notes with an annual rate of return of 12% and from investors to whom it issued non-voting preferred shares with an annual dividend of 10%. The company's articles provided the company with unilateral redemption rights on payment of the purchase price plus accrued dividends. At least one investor negotiated a right of redemption and two redemption requests were outstanding as of the *CCAA* filing date. The company's financial statements also treated the shareholders as equity investors and distinguished them from its creditors.

[80] After referring to the distinction between debt and equity claimants, Pepall J. discussed the broad scope ascribed to the meaning of an equity claim or interest:

> [26] This treatment also has been held to encompass fraudulent misrepresentation claims advanced by a shareholder seeking to recover his investment: *Re Blue Range Resource Corp.* In that case, Romaine J. held that the alleged loss derived from and was inextricably intertwined with the shareholder interest. ... *National Bank of Canada v. Merit Energy Ltd.* and *Earthfirst Canada Inc.* both treated claims relating to agreements that were collateral to equity claims as equity claims. These cases dealt with separate indemnification agreements and the issuance of flow through shares. The separate agreements and the ensuing claims were treated as part of one integrated transaction in respect of an equity interest. The case law has also recognized the complications and delay that would ensue if *CCAA* proceedings were mired in shareholder claims.

[81] In addition to reviewing the articles of the company and the share certificates, Pepall J. considered the following evidence of surrounding circumstances at para. 31:

(a) investors' right to receive dividends (said to be "a well recognized right of a shareholder");

(b) investors were given the option of investing in promissory notes or preference shares and opted for the latter;

(c) on liquidation, dissolution, or winding up, preferred shareholders ranked ahead of common shareholders; and

(d) shares were treated as equity in the company's financial statements and in its books and records.

[82] In the result, and although she found characteristics of both debt and equity claims in the relationship, she concluded that the substance of the relationship between the preferred shareholders and the company was equity, not debt: paras. 31-32.

[83] In the *CCAA* case of *JED Oil Inc. (Re),* 2010 ABQB 295, the analysis focused on the relationship at the time the shares were issued when considering the true nature of the claims of preferred shareholders for unpaid dividends. Madam Justice Kent rejected the shareholders' claim as creditors of debt claims. There was no language in the share certificates to establish that dividends were declared and

owing on the date the shares were issued. She found that the substance of the relationship at the time the shares were purchased was not creditor-debtor. The shareholders, she said at para. 16, "are risk-takers, not creditors. For them to become creditors from the time they are issued the shares would require more explicit wording than is contained in these shares."

[84] Lastly, in *Dexior Financial*, which involved a *BIA* proceeding, the fact that a redemption notice was issued prior to bankruptcy "does not change the original intention or substance of the claim": para. 16.

Summary

[85] To summarize, courts take into account a number of factors when determining the substance of the relationship when assessing the status of preferred shareholders. Examples include:

(a) The specific language contained in the company's articles and the transaction documents.

(b) The right of a shareholder to redeem their shares. The absence of this right is inconsistent with a creditor relationship. A right of redemption is particularly compelling as an *indicia* of a creditor relationship where the articles or transaction documents expressly provide that the redemption is for the repayment of a loan.

(c) Whether the shareholder had upside potential in the return of their investment, which indicates an equity relationship and also shared in the downside risk of a lower return.

(d) Whether the shareholder had the right to receive dividends, which is a strong *indicia* of an equity relationship.

(e) Treatment on liquidation, dissolution, or winding up.

(f) Whether the shares are treated as equity or debt in the financial statements of the corporation.

[86] The mechanism used to enforce redemption rights is irrelevant. The legal basis for any claim brought to collect on a redemption request is as well.

The Relationship between ACIC and Its Preferred Shareholders

Overview

[87] As mentioned at the outset of these reasons, I reject the redeeming preferred shareholders' claim that they are debt creditors of ACIC. None of ACIC's preferred shareholders are debt claimants. The redeeming preferred shareholders were not lenders *ab initio* as opposed to investors. They are equity claimants and rank together with all other preferred shareholders and are to be treated as such in the same class in this *CCAA* proceeding.

[88] The relationship between ACIC and its preferred shareholders is comprised of the Articles, the various Subscription Agreements, Offering Memoranda, and applicable legislation such as the *BCA*. The inquiry in this particular case is also governed by the *CCAA*. From them those sources, the substance of the relationship between ACIC and its preferred shareholders, including those who have delivered redemption requests, can be readily ascertained.

[89] The Articles, Offering Memoranda, and Subscription Agreements are clear that the relationship between ACIC and its preferred shareholders is an equity relationship. The preferred shareholders are clearly identified as investors who purchased non-voting preferred shares with rights to receive dividends at various rates dependent on ACIC's financial performance and with redemption rights which throughout may or may not be honoured as determined by ACIC's directors in their sole discretion.

[90] There is no language in the Articles suggesting, directly or indirectly, that a share redemption is in respect of a repayment of a debt. There is also no language, direct or indirect, in the Articles suggesting that preferred shareholders are lenders or that their investment is secured by a promissory note or something akin to it. Article 27.1 defines preferred shares as "without par value in the capital of the Company".

[91] Prefered shareholders took the advantages of the potential upside in ACIC's earnings obtained from increasing lending rates as well as the risk of loss of their entire investment.

[92] The risks of the investment are clearly outlined to potential investors. The Offering Memoranda characterized the "investment" as both "risky" and "speculative". Each Offering Memoranda contains a detailed discussion (including warnings) of numerous risk factors associated with an investment with ACIC, including its speculative nature, the absence of a market to transfer or assign shares and warrants, and no guarantee that dividends would be declared or paid. The Offering Memoranda also advise that their contents had not been reviewed by any regulatory authority.

[93] The Offering Memoranda also describe the purchase of preferred shares as a speculative risk that should be considered only by subscribers who are able to withstand the loss of their total investment:

> ***Item 8 Risk Factors***
>
> The purchase of Units involves a number of significant risk factors. **Any or all of these risks, or other as yet unidentified risks, may have a material adverse effect on the Company's business, the value of the Preferred Shares and/or the return to Preferred Shareholders.**
>
> (a) **Investment Risk**
>
> **(i) Speculative Nature of Investment**
>
> **This is a speculative offering. The purchase of Units involves a number of significant risk factors and is suitable only for Subscribers who are aware of the risks inherent in mortgage investments and the real estate industry and who have the ability and willingness to accept the risk of the total loss of their invested capital and who have no immediate need for liquidity.**
>
> [All emphasis in original.]

[94] In some of the Offering Memoranda, ACIC's capital structure is described and shown to be comprised of common and preferred shares and is specifically distinguished from debt.

[95] The Subscription Agreements also contain language making it clear that each subscriber for preferred shares is making an investment, e.g.:

> **2. REPRESENTATIONS, ACKNOWLEDGMENTS AND CONVENANTS**
>
> 2.1. The Subscriber acknowledges represents and covenants that:
>
> ...
>
> (j) the Subscriber is purchasing the Units as principal for investment only and not with the view to the resale or distribution thereof;
>
> [Bold in original]

[96] A subscriber for preferred shares is required to sign a Form 20A per the *Securities Act*, R.S.B.C. 1996 c. 418 confirming, *inter alia*:

> 4. I acknowledge that:
>
> ...
>
> (c) I may lose all of my investment; ...

[97] There is no language in the Subscription Agreements suggesting that a subscriber for preferred shares is a lender or creditor through any other capacity.

[98] I disagree with the redeeming preferred shareholders' submission that a key *indicia* of an equity investor is defined in part by the word "unlimited" in respect of the opportunity to participate in the financial upside of the company if "unlimited" signifies there can be no possible limit on the rate of return.

[99] They rely on a reading of the reasons in *Sino-Forest* (ONSC) at para. 30 and argue that given the exigencies of the mortgage lending market, it was never possible for them to participate in an "unlimited financial upside" of ACIC. They point to what they characterize as a cap on their highest rate of return for dividends and say that in effect, their relationship with ACIC was akin to creditor and debtor.

[100] In my opinion, "unlimited upside" refers to the possibility of enjoying the benefits of ongoing and potentially increasing profits of the company.

[101] For ACIC, the rates of return, and hence its revenues and profits, depended on market conditions and were not fixed to any maximum. Preferred shareholders always retained the opportunity to share in higher rates of return if market conditions changed to allow for higher lending rates. Conversely, they also took the risk of lower rates of return resulting from potential adverse market conditions and

impediments to ACIC's ability to collect on its loan portfolio (both of which have occurred). I agree with the submission of the creditors who appeared on the application that the investment made by the preferred shareholders is akin to an investment in a fluctuating commodity.

[102] I also disagree with the redeeming preferred shareholders that the fact that ACIC pooled investors' funds indicates a debt relationship or establishes the preferred shareholders as lenders. Pooling from investors is the means by which a MIC such as ACIC is able to carry on business to lend funds to third party borrowers.

[103] I will conclude this section with this observation. If the redeeming preferred shareholders' position that the nature of their relationship from the outset is one of creditor is correct, then it would defeat their claim to be contrasted from the non-redeeming preferred shareholders since all of ACIC's preferred shareholders would be debt as opposed to equity claimants and rank alongside ACIC's other creditors.

Redemption Rights Do Not Affect the Outcome

[104] The redeeming preferred shareholders place significant reliance on their redemption rights (to seek the return of their principal investment amount) as *indicia* of a debt relationship.

[105] In this case, when considered in context, the mere presence of redemption rights do not establish a debt relationship. The intention of ACIC and the preferred shareholders expressed in the Articles and the transaction documents does not establish a debt relationship. There is no language in the Articles, the various Offering Memoranda, and the Subscription Agreements that indicates that the redemption is in repayment of a debt. Furthermore, preferred shareholders were advised throughout that their redemption rights were not guaranteed.

[106] The redemption provisions do not state or suggest that subscribers for preferred shares are lenders. Nor do they state or suggest that preferred shares are given as security akin to a promissory note. Unlike a promissory note, which typically contains a promise to pay by a certain date or the happening of a certain event(s), ACIC's obligation to honour redemption requests was always in the sole discretion of

its directors, who may also clarify or establish terms and conditions for redemption should they consent to a request.

[107] The *BCA* requires that all rights attached to shares be set out in a company's articles: ss. 11(h), 12(2)(b), 48. The Articles state that redemption is in the sole discretion of ACIC's directors. As noted in the previous section, the redemption provisions in the Articles are found in article 27.4. According to Mr. Bergman, ACIC's sole director throughout, ACIC's redemption policy remained unchanged since it began issuing preferred shares in 1998.

[108] Article 27.4 specifically deals with redemption requests from preferred shareholders. Mr. Bergman's sole discretion to consent to or reject redemption requests is clear:

> **27.4 Redemption of Preferred Shares**
>
> A Preferred Share will be redeemed by the Company if and only if:
>
> (a) the Company has received written notice from the registered holder of the Preferred Share that he wishes the Company to redeem the Preferred Share;
>
> (b) the Directors, in their sole discretion, consent to the redemption by the Company of the Preferred Share pursuant to terms and conditions set by the Directors in their sole discretion; and
>
> (c) the Preferred Shareholder who requested that his Preferred Share be redeemed, accepts the terms and conditions of redemption set by the Directors.
>
> The Directors will not be obligated to provide any reasons for not consenting to a Preferred Shareholder's request to have his Preferred Shares redeemed by the Company.
>
> [Bold in original.]

[109] Further, and in contrast to *Nelson Financial*, there are no provisions in the Articles or transaction documents obliging ACIC to buy back shares. To the contrary, Article 8.2 provides that if ACIC proposes at its option to redeem some but not all of the shares of any class or series, then it is in the discretion of its directors subject to special rights and restrictions attached to each share. ACIC's directors are given the discretion whether to decide the manner in which the shares to be redeemed are selected and whether the redemption is *pro rata*.

[110] Turning to the Offering Memoranda, those documents contain detailed information concerning the redemption process and restrictions on redemption requests. Mr. Bergman's discretion to consent or refuse to honour redemption requests is a pervasive theme in the various Offering Memoranda.

[111] For example, ACIC's first Offering Memoranda issued in 1998 warns potential subscribers that redemptions are not guaranteed and may never be honoured:

> **Redemption of Preferred Shares:** The Director of the Company has adopted a Policy regarding the redemption of Preferred Shares. A copy of such policy is available from the Company upon request.
>
> **Pursuant to such policy, a Preferred Share will be redeemable by the Company in certain circumstances. Although the Company will use its best commercial efforts to ensure that all requestsfor redemption are fulfilled, depending on such circumstances the Company cannot guarantee that any or all of the Preferred Shares in respect of which requests for redemption are received will be redeemed in any fiscal year. See Item 8 – "Risk Factors" – Limited Redemption Rights.**
>
> ...
>
> The Company will no redeem any Preferred Shares if at the time of such redemption the Company is insolvent or if such redemption will render the Company insolvent, if such redemption will reduce the Company's cash reserves below a level which the Directors determine, in their sole discretion, to be prudent, or if such redemption will cause the Company to breach the requirement that at least 50% of the cost amount of its property must consist of bank deposits or mortgage loans made in respect of residential properties.
>
> [All emphasis in original.]

[112] In addition to the the sole discretion to honour a redemption request vesting with the director, the Offering Memoranda spell out other limitations on redemptions, e.g., adverse financial circumstances including liquidity issues:

> **No Guaranteed Dividends**
>
> The dividends in which the Preferred Shareholders are entitled to participate are **not** cumulative and will not be paid unless such dividends have been declared by the Directors. The Directors have the sole discretion as to whether or not any such dividends are declared. Therefore, there is no guarantee that dividends payable to Preferred Shareholders will be declared.
>
> [All emphasis in original.]

[113] The Offering Memoranda issued in 2001 and 2002 provide another example. They are clear that redemption depends on the consent of the directors in their "sole

discretion" pursuant to "terms and conditions set by the Directors". Subscribers are advised that the "Directors will not be obliged to provide any reasons for not consenting to a Preferred Shareholders' request to have their Preferred Shares redeemed by the Company".

[114] Commencing in 2003, the Offering Memoranda referred to a redemption policy and included a summary making it clear that redemption remained in the discretion of its directors to amend or cancel it, adopt an alternative policy, or refuse to consent to a redemption.

[115] This example is taken from the 2003-2006 and 2015 Offering Memoranda:

> **Redemption of Preferred Shares**: The Company has adopted a policy regarding the redemption of Preferred Shares. A copy of such policy is available from the Company upon request.
>
> **Pursuant to such policy, a Preferred Shareholder will be redeemable by the Company in certain circumstances. Although the Company will use its best commercial efforts to ensure that all requests for redemption are fulfilled, depending on such circumstances the Company cannot guarantee that any or all of the Preferred Shares in respect of which requests for redemption are received will be redeemed in any given fiscal year. ...**
>
> ...
>
> The Company will not redeem any Preferred Shares if at the time of such redemption the Company is insolvent or if such redemption will render the Company insolvent, if such redemption will reduce the Company's cash reserves below a level which the Company's directors (the "**Directors**") determine, in their sole discretion, to be prudent, or if such redemption will cause the Company to breach the requirement that at least 50% of the cost amount of its property must consist of bank deposits or mortgage loans made in respect of residential properties.
>
> Further, in any calendar quarter, the Company will not redeem any more than that number of Preferred Shares which is equal to 2 1/2 % of the outstanding Preferred Shares at the end of the immediately preceding calendar quarter. ...
>
> ...
>
> **The adoption of its policy regarding the redemption of Preferred Shares does not fetter the discretion of the Directors of the Company from time to time to amend or cancel such policy in whole or in part or to adopt an alternative policy with respect to the redemption of Preferred shares, or to refuse to consent to a Requesting Shareholder's request to have their Preferred Shares redeemed by the Company.**
>
> [All emphasis in original.]

[116] Nothing in ACIC's redemption policies removed or otherwise constrained Mr. Bergman's unfettered discretion to consent or refuse to honour redemption requests.

[117] The redemption policy that ACIC adopted (in accordance with s. 27.4 of the Articles) on December 1, 2006 serves as a useful example of its ongoing retention of discretion to honour redemption requests. The policy language is clear that ACIC's new policy did not fetter the discretion of its director from time to time to amend or cancel it in whole or in part or refuse to consent to a redemption request:

> B. Pursuant to Section 27.4 of the Articles of the Company, Preferred Shares are redeemable by the holder provided that:
>
> ...
>
> 2. The Company's Director, in his sole discretion consents to such redemption pursuant to terms and conditions set by the Director in his sole discretion; and
>
> 3. The holder accepts the terms and conditions of redemption set by the Director.
>
> The Director is not required to provide any reasons for not consenting to a request for redemption of Preferred Shares.
>
> ...
>
> 7. The adoption of this Preferred Share Redemption Policy does not fetter the discretion of the Director from time to time to amend or cancel this policy in whole or in part or to adopt an alternative policy with respect to the redemption of Preferred Shares, or to refuse to consent to a Requesting Shareholder's request to have their Preferred Shares redeemed by the Company.

[118] Another redemption policy (undated) in evidence from Mr. Bergman, attached as Exhibit "D" to his affidavit sworn November 7, 2017, is to a similar effect, making it clear that redemptions may not be honoured:

> **Redemption of Preferred Shares:**
>
> The Company has adopted a policy regarding the redemption of Preferred Shares. A copy of such policy is available from the Company upon request. Pursuant to such policy, a Preferred Share will be redeemable by the Company in certain circumstances. **Although the Company will use its best commercial efforts to ensure that all requests for redemption are fulfilled, depending on such circumstances the Company cannot guarantee that any or all of the Preferred Shares in respect of which requests for redemption are received will be redeemed in any given fiscal year.**

...

> The adoption of its policy regarding the redemption of Preferred Shares does not fetter the discretion of the Directors of the Company from time to time to amend or cancel such policy in whole or in part or to adopt an alternative policy with respect to the redemption of Preferred shares, or to refuse to consent to a Requesting Shareholder's request to have their Preferred Shares redeemed by the Company.
>
> **There are times when redemption requests may not be processed in a timely manner and shareholders may have to wait longer than expected to receive their redemption request. The source of funds used to process redemptions may be from new capital raised and/or loans being repaid. There is no guarantee that funds will be available to meet all redemption requests.**
>
> [All emphasis in original.]

Unsatisfied Redemption Requests Are Not Debt

[119] The redeeming preferred shareholders place great importance on the decision of the Court of Appeal in *Re East Chilliwack Agricultural Cooperative* (1989), 74 C.B.R. (N.S.) (B.C.C.A.), to support their claim to be debt claimants when they delivered their redemption notices. The decision in that case has been the subject of adverse comment or distinguished in other case authorities in this province and others. However, it is sufficient for my determination to note that the facts of that case are clearly distinguishable from the instant proceeding.

[120] In that case, farmers who owned shares in an agricultural cooperative gave notice to the co-op of their intention to have their shares redeemed. Thereafter, and before they were paid, the Superintendent of Co-operatives suspended the right of the co-op to redeem its shares due to liquidity issues. Mr. Justice Hutcheon, writing for the majority, determined that they were entitled to be treated as creditors. However, as is noted at the outset of his reasons, the effect of the Superintendent's order was not argued on the appeal. More importantly for the issues raised on the present application, by virtue of the Cooperative's constating documents, the claimant shareholders in *East Chilliwack*, ceased to be shareholders when they served their redemption notices.

[121] As previously discussed, in the case at bar, redeeming preferred shareholders whose redemption requests were not honoured, either in whole or in

part, retained their rights and privileges as shareholders. They continued to receive a share of the profits of ACIC from dividend payments through to 2016. Also unlike *East Chilliwack*, ACIC's obligation to honour the redemption notices and to buy back shares remained discretionary throughout. In the present case, ACIC's obligation to redeem was always premised, at a minimum, on a best efforts basis and dependent on its liquidity.

[122] Thus, the decision in *East Chilliwack* is not authority for a general proposition that unpaid redemption requests are *indicia* of debt. Unsatisfied redemption requests do not of themselves change the substance of the relationship from an equity interest to a debt claim. In *Central Capital*, the preferred shareholders' claim that they were debt claimants on the basis of their unsatisfied rights of redemption was rejected by the majority: paras. 97, 135-136.

[123] In some instances, ACIC made partial payment of a redemption request and indicated in documents provided to certain redeeming preferred shareholders that the remaining unpaid redemption amounts were "o/s", or outstanding. During oral submissions, the possibility was raised that this advice from ACIC might reflect a change in the relationship between those particular redeeming shareholders and the company. In my opinion, it does not. In *Bul River*, the fact that redeeming shareholders had gone one step further and obtained judgment to recover unpaid redemption amounts was insufficient to convert their equity interest to a debt claim.

Winding-Up Provisions Do Not Affect the Result

[124] The redeeming preferred shareholders rely on the decision in *Coast Capital*, which treated similar winding up language in the Articles as *indicia* of a debt relationship, to support their position that they are debt claimants.

[125] I disagree that the reasons in *Coast Capital* support the position articulated by the redeeming preferred shareholders.

[126] At issue in that case was the tax treatment of shares issued by the credit union labelled "non-equity shares". The case involved statutory interpretation of provisions in the *Corporation Capital Tax Act*, R.S.B.C. 1996, c. 73, the *Financial*

Institutions Act, R.S.B.C. 1966, c. 141 [*FIA*], and the *Credit Union Incorporation Act*, R.S.B.C. 1996, c. 82, as well as the certain provisions of the rules promulgated by Coast Capital respecting the impugned shares (described as "non-equity" shares). Disimilar to the case at bar, the *FIA* defines a non-equity share (in s. 1(1)) issued by a credit union as one evidencing indebtedness of the credit union to the holder of the share that does not represent an equity interest in the credit union.

[127] The outcome in *Coast Capital* turned on its own facts, which are significantly different and thus distinguishable from the case at bar. For example, and unlike the case at bar, the shares in issue in *Coast Capital* were restricted to a 6% non-cumulative dividend in addition to the amount paid on winding up or dissolution. In addition, the credit union was required to redeem those shares on a fixed date. The Court of Appeal engaged in an analysis of the legal substance of those shares and determined that they reflected a debt interest.

[128] The statutory objectives and considerations in that case also differ from those concerning the *CCAA*. In her reasons in *Coast Capital*, Newbury J.A. observed that the case before the Court of Appeal did not concern bankruptcy of insolvency law: paras. 7, 53-56.

[129] In the case at bar, and unlike *CDIC*, there is no provision in the Articles or Offering Memoranda stating or even suggesting that upon a winding-up or insolvency, ACIC's preferred shareholders, let alone any who have sought redemption, are entitled to rank *pari passu* with its creditors: *CDIC* at 563; *Central Capital* at para. 132.

[130] Section 27.5 of the Articles provides a procedure for distribution of ACIC's assets upon winding up or liquidation. ACIC's assets will be distributed to the Preferred Shareholders in priority to the Common Shareholders as follows:

> Upon the winding up or dissolution or liquidation of the Company, the Company's assets will be distributed to the Preferred Shareholders in priority to the Common Shareholders as follows:
>
> - first to the Preferred Shareholders on a pro rata basis among the Preferred Shareholders until each Preferred Shareholder has received the lesser of: (i) the original subscription price for each Preferred

Share for which the Preferred Shareholder is the registered holder and all dividends that have been declared but for which the Preferred Shareholder has yet to be paid; and (ii) the book value of the Preferred Shares, for which the Preferred Shareholder is the registered holder, as determined in the upcoming year-end audited financial statements; and

- the balance to the Common Shareholders on a pro rata basis among the Common Shareholders, to the exclusion of the Preferred Shareholders.

[131] In *Central Capital*, Weiler J.A. pointed out that winding up and liquidation are other forms of insolvency. Both, she said, are "methods for secured creditors to enforce their claims by seizing the assets in which they hold security interests": para. 99. In the same paragraph, however, she said that in light of s. 173 of the governing statute in that case - the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 - whose provisions are similar to those found in Part 9 of the *BCA*, the interests of preferred shareholders with redemption rights are subordinated to creditors.

[132] Laskin J.A. took a similar view. As is the case in the instant proceeding, he found that even after redemption rights are exercised, preferred shareholders continue to be entitled to dividends until their shares are in fact redeemed. On a liquidation, shareholders rank as equity claimants and not as creditors (even though in that case, and unlike the facts of this case, their redemption rights allowed shareholders to compel the company to redeem so long as it was solvent). Redemption, Laskin J.A. explained, is a return of capital not a repayment of a loan: paras. 134-135.

[133] The same view was taken in *Nelson Financial* at para. 31(c).

No Alteration to Establish a Contractual Right to Compel Redemption Exists

[134] In their alternative argument, the redeeming preferred shareholders submit that if they were equity claimants at the outset, then their contractual relationship with ACIC changed as a result of its later redemption policies and certain communications that ACIC published or delivered to potential and existing

shareholders. They submit that ACIC's redemption policies moved away from a discretionary right held by Mr. Bergman and became an enforceable contractual right held by each preferred shareholder to compel redemption during specific windows of time and upon certain conditions being met.

[135] I disagree. The redeeming preferred shareholders have not established that their contractual relationship with ACIC changed so as to become debt creditors.

[136] The redemption policies that ACIC issued starting in 2006 did not provide an unconditional promise that redemption notices would be honoured. Those policies were clear that ACIC's right to honour a redemption request was always at the discretion of its directors.

[137] The communcations from ACIC also do not alter the contractual relationship. The examples provided by the redeeming preferred shareholders consist, for the most part, of marketing materials, executive summaries, and standard form answers to "FAQs" (frequently asked questions). Many of the impugned communications appear on their face to be intended to induce investment in ACIC through subscriptions of Units.

[138] ACIC's communications do not convey an intention to enter into a binding agreement: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at paras. 47- 48.

[139] As I have found, ACIC's communications with its preferred shareholders concerning redemptions and redemption policies and terms were clearly stated throughout to be subject to the sole discretion of its directors. ACIC continued to make it clear to its preferred shareholders throughout that in addition to its right to refuse to honour a redemption request, it retained the right to alter, amend, or cancel its redemption policy at any time. In some communications, ACIC advised that its ability to honour a redemption request depends on the company's liquidity.

[140] Each preferred shareholder was required to sign a Subscription Agreement in order to purchase Units. They contained language confirming the subscriber's

decision to purchase Units was based solely upon the information contained in the Offering Memoranda and any agreements or documents incorporated in them. There is no room to incorporate into the Subscription Agreements any representations that might have been made and relied upon by the redeeming preferred shareholders either at the time of subscription or afterward.

[141] ACIC's redemption policies and communications cannot purport to change the rights attached to shares, such as redemption rights, as set out in the Articles, which is a foundation document governing the contractual rights of preferred shareholders. The Articles can only be amended by special resolution and in strict compliance with the *BCA*, which did not occur in this case: *BCA*, ss. 2(2)(b), 54(3), 58(2), 61. For example, s. 61 of the *BCA* provides that special rights and restrictions attached to a share are not varied or deleted until a company's articles have been altered to reflect the variation or deletion:

> 61. A right or special right attached to issued shares must not be prejudiced or interfered with under this Act or under the memorandum, notice of articles or articles unless the shareholders holding shares of the class or series of shares to which the right or special right is attached consent by a special separate resolution of those shareholders.

[142] Further, based on the evidence adduced on this application, mass communications sent from or given by ACIC to potential and existing preferred shareholders do not establish a change in the relationship.

[143] In any event, even if it could be said that there was an elimination of unfettered and at will discretion to redeem on the part of ACIC's director, the substance of the relationship between ACIC and its preferred shareholders did not change from equity to debt as a result.

[144] Lastly, it is not an issue on this application whether the redeeming preferred shareholders can look beyond the four corners of their Subscription Agreements, such as to advance a claim for inducement to purchase shares or any delay in requesting a redemption through a representation(s) made by on or behalf of ACIC. The answer to that question also has no bearing on the characterization of the

nature of the redeeming preferred shareholders' status in this *CCAA* insolvency proceeding.

[145] For these reasons, I do not need to consider the redeeming preferred shareholders' submission, based on *Rosas v. Toca*, 2018 BCCA 191, that no consideration is necessary to support the alleged change in their contractual relationship with ACIC.

Treatment in Financial Records

[146] Since surrounding circumstances are referred to by the redeeming preferred shareholders, it is useful to refer to the manner in which ACIC treated its preferred shareholders in its financial records. Reference to treatment in financial records was considered in some of the case authorities I have cited (e.g., *Central Capital*). In considering this evidence, I am mindful of the caution in *CDIC* (at para. 61) that a company's treatment in its financial records is to be accorded limited weight.

[147] ACIC's financial records describe the preferred shares as "Share Capital" and not as debt. There are separate, specific line items for short term and long term debt and debentures, which do not include the monies paid by subscribers for their Units. For example, the 2015 financial statements state that there is "No Long Term Debt". Capital from share subscriptions is described as "Shareholders' equity" in financial statements prepared by ACIC's third party accounting firm, BDO Dunwoody, under a line item entitled, "Liabilities and Shareholders' Equity".

Conclusion

[148] The preferred shareholders' investment in ACIC was in respect of an equity interest. Their claims are not debt claims. They are claims that only a shareholder can make. The redemption rights attached to ACIC's preferred shares are in substance rights to the return of a capital invested in a MIC with significant risks.

[149] ACIC's deteriorating financial position led to its inability to honour the outstanding redemption requests delivered by certain preferred shareholders. It is a

risk that all preferred shareholders were clearly informed of before purchasing their shares.

[150] A declaration shall issue that the claims of all of its preferred shareholders fall within the ambit of equity claims as defined in s. 2 of the *CCAA*.

"Walker J."

The Honourable Mr. Justice Walker

TAB 4

2014 BCSC 1732
British Columbia Supreme Court

Bul River Mineral Corp., Re

2014 CarswellBC 2702, 2014 BCSC 1732, [2014] B.C.W.L.D. 6764, [2014] B.C.W.L.D. 6765, [2014] B.C.W.L.D. 6771, [2014] B.C.W.L.D. 6779, 16 C.B.R. (6th) 173, 245 A.C.W.S. (3d) 333

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

In the Matter of the Business Corporations Act, S.B.C. 2002, c. 57 and the Business Corporations Act, R.S.A. 2000, c. B-9

In the Matter of Bul River Mineral Corporation, Big Bear Metal Mining Corporation, Earth's Vital Extractors Limited, Fort Steele Mineral Corporation, Fort Steele Metals Corporation, Fused Heat Ltd., Gallowai Metal Mining Corporation, Giant Steeples Mineral Corporation, Grand Mineral Corporation, International Feldspar Ltd., Jao Mine Developers Ltd., Kutteni Diamonds Ltd., Stanfield Mining Group of Canada Ltd., Sullibin Mineral Corporation, Sullibin Multi Metal Corporation, Super Feldspars Corporation, White Cat Metal Mining Corporation, Zeus Metal Mining Corporation, Zeus Metals Corporation and Zeus Mineral Corporation, Petitioners

Fitzpatrick J.

Heard: September 3, 5, 2014
Judgment: September 15, 2014
Docket: Vancouver S113459

Counsel: Colin D. Brousson for Petitioners
William C. Kaplan, Q.C., Peter Bychawski for CuVeras, LLC
J. Roger Webber, Q.C. for Eldon Clarence Stafford
Robert M. Curtis, Q.C. for Gordon Preston and Carol Preston
Tevia R.M. Jeffries for Monitor, Deloitte Restructuring Inc.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Torts
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.1 Provable debts
IX.1.g Claims of director, officer or shareholder of bankrupt corporation
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous
Commercial law
I Agency
I.3 Creation of agency
I.3.a General principles
Contracts
XIII Novation
XIII.2 Proof of novation

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — Applicable law was amended to require debt claims to be paid in full, before any equity claims were to be paid out — P claimed that their claim was transferred into debt claim — However, claim was for recovery of own capital instead of return on capital, as was true in case relied upon by P — Other preferred shareholders were in same situation, despite not having judgment — It would be against policy objective to treat these shareholders differently — Treatment of claim as equity claim was not collateral attack on judgment given elsewhere — For S claim, intentions of parties were unclear as principal of owners was dead, and S was incapacitated — Documents between parties had to be examined — S advanced loan to principal personally, and not to his companies — There was no assignment of loan agreement — As no novation occurred, S could not characterize claim as debt claim — No agency relationship was created between parties.

Commercial law --- Agency — Creation of agency — General principles

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — No agency relationship was created between parties.

Contracts --- Novation — Proof of novation

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — For S claim, intentions of parties were unclear as principal of owners was dead, and S was incapacitated — Documents between parties had to be examined — S advanced loan to principal personally, and not to his companies — There was no assignment of loan agreement — As no novation occurred, S could not characterize claim as debt claim — No agency relationship was created between parties.

Bankruptcy and insolvency --- Proving claim — Provable debts — Claims of director, officer or shareholder of bankrupt corporation

Petitioners were owners of mining properties in British Columbia — Owners went into bankruptcy and as result, were subject of proceedings under Companies' Creditors Arrangement Act (CCAA) — Owners developed plan of arrangement for their creditors and other interested parties — Owners received indication that their mining project could be viable, due to outside financing from company C — Two claims against petitioners were at issue in hearing — First was claim by creditors P, which C claimed was claim in equity rather than debt — Second claim was by individual creditor S, which owners denied was valid claim — Hearing took place to determine nature of claims — P's claim was found to be in equity — S claim found not to be debt claim — Applicable law was amended to require debt claims to be paid in full, before any equity claims were to be paid out — P claimed that their claim was transferred into debt claim — However, claim was for recovery of own capital instead of return on capital, as was true in case relied upon by P — Other preferred shareholders were in same situation, despite not having judgment — It would be against policy objective to treat these shareholders differently — Treatment of claim as equity claim was not collateral attack on judgment given elsewhere.

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Central Capital Corp., Re (1995), 29 C.B.R. (3d) 33, 1995 CarswellOnt 31, 22 B.L.R. (2d) 210 (Ont. Gen. Div. [Commercial List]) — referred to

Central Capital Corp., Re (1996), 132 D.L.R. (4th) 223, 27 O.R. (3d) 494, (sub nom. *Royal Bank v. Central Capital Corp.)* 88 O.A.C. 161, 1996 CarswellOnt 316, 38 C.B.R. (3d) 1, 26 B.L.R. (2d) 88 (Ont. C.A.) — referred to

Dexior Financial Inc., Re (2011), 75 C.B.R. (5th) 298, 2011 BCSC 348, 2011 CarswellBC 624 (B.C. S.C. [In Chambers]) — considered

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Sino-Forest Corp., Re (2012), 114 O.R. (3d) 304, 98 C.B.R. (5th) 20, 299 O.A.C. 107, 2012 ONCA 816, 2012 CarswellOnt 14701 (Ont. C.A.) — followed

Spidell v. LaHave Equipment Ltd. (2014), 2014 NSSC 255, 2014 CarswellNS 559 (N.S. S.C.) — followed

Ted Leroy Trucking Ltd., Re (2010), (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, 72 C.B.R. (5th) 170, [2011] 2 W.W.R. 383 (S.C.C.) — considered

Timminco Ltd., Re (2014), 14 C.B.R. (6th) 113, 2014 ONSC 3393, 2014 CarswellOnt 9328 (Ont. S.C.J.) — followed
0487826 B.C. Ltd., Re (2012), 97 C.B.R. (5th) 105, 2012 CarswellBC 3079, 2012 BCSC 1501 (B.C. S.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 2 "claim provable in bankruptcy", "provable claim" or "claim provable" — considered

s. 2 "creditor" — considered

s. 54(2)(d) — considered

s. 60(1.7) [en. 1992, c. 27, s. 24(1)] — considered

s. 95 — referred to

s. 101 — referred to

s. 121(1) — considered

s. 135 — considered

Business Corporations Act, S.B.C. 2002, c. 57

s. 193(2) — considered

s. 193(4) — considered

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

Generally — referred to

s. 2(1) "claim" — considered

s. 2(1) "equity claim" — considered

s. 2(1) "equity claim" (a)-(c) — referred to

s. 2(1) "equity interest" (a) — considered

s. 6 — referred to

s. 6(8) — considered

s. 11 — considered

s. 22.1 [en. 2007, c. 36, s. 71] — considered

s. 36.1 [en. 2007, c. 36, s. 78] — referred to

Words and phrases considered:

equity claim

The effect of the amendments was considered by Pepall J. (as she then was) in Nelson Financial Group Ltd., Re, 2010 ONSC 6229 (Ont. S.C.J. [Commercial List]). In that case, the court had no difficulty in finding that the claims of preferred shareholders for declared but unpaid dividends and requests for redemption were equity claims within the above definition. In addition, the approach of the courts in the past in looking at the substance or true nature of the claim was applied in finding that related claims for compensatory damages or amounts due on rescission were caught by the definition of "equity claim": paras. 32-34. As such, all the claims were not provable debts under the CCAA.

HEARING to determine nature of claims brought by creditors, against petitioner owners of mining companies.

***Fitzpatrick J.*:**

Introduction

1 These are longstanding proceedings under the *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (the "*CCAA*"), having been commenced some three and a half years ago in May 2011. Since that time, the petitioners have made slow and steady progress toward the goal of presenting a plan of arrangement to their creditors and certain equity participants.

2 The principal petitioners, being Bul River Mineral Corporation ("Bul River") and Gallowai Metal Mining Corporation ("Gallowai"), are the owners of certain mining properties and related assets in the Kootenay region of British Columbia. As a result of these proceedings, Bul River and Gallowai now have some indication that the mine is viable. This has been accomplished mainly due to the participation of CuVeras, LLC ("CuVeras") who has, since late 2011, provided interim financing which allowed this further development work to continue to this point in time.

3 Some years ago, Bul River and Gallowai completed a claims process to identify not only trade creditors but also claims of its common and preferred shareholders. Now that Bul River and Gallowai, with the assistance and sponsorship of CuVeras, are on the cusp of preparing a plan of arrangement for consideration by the stakeholders, those claims have become of central importance.

4 Some of the claims that were advanced through the claims process were not critically considered by either the petitioners or the court-appointed monitor, Deloitte Restructuring Inc. (the "Monitor"). However, at this late date, the characterization of certain claims and the validity of certain claims have been put in issue and will have a profound impact on the manner in which these restructuring proceedings go forward.

5 At present, the general intention is that the restructuring will take place along the lines of a Letter of Agreement between the petitioners and CuVeras dated May 23, 2014. By that agreement, a newly formed British Columbia entity ("Newco") will be created and the shares in Newco will be distributed to CuVeras and other related parties and also to non-voting preferred shareholders. Trade creditors will also participate in Newco. This Letter of Agreement is the product of some history, sometimes contentious, between the petitioners and CuVeras which was discussed in the court's earlier reasons: *Bul River Mineral Corp, Re*, 2014 BCSC 645 (B.C. S.C.).

6 One of the claims is that advanced by Gordon and Carol Preston (the "Preston Claim"), which CuVeras contends is an equity claim as opposed to a debt claim. Another claim is that advanced by Eldon Stafford (the "Stafford Claim"), which CuVeras contends is not a valid claim against Bul River or Gallowai. The substance of the issue before the court therefore is two-fold: (a) the proper categorization of the Preston Claim and (b) whether the Stafford Claim is a valid claim against the petitioners.

7 As will become apparent from the discussion below, the resolution of these issues will significantly impact how any restructuring plan can be crafted and will also impact all stakeholders in terms of how the Newco shares will be distributed between the various stakeholders. There is some urgency in resolving these last issues before the restructuring can proceed. All involved, including the Monitor, state that it is necessary for the petitioners to exit this *CCAA* proceeding as quickly as possible. At this time, a plan of arrangement sponsored by CuVeras is the only option available to the petitioners so as to avoid a liquidation and bankruptcy.

Background

8 The petitioners are also known as the Stanfield Mining Group (the "Group"). The Group carried on the business of developing a mining property situated near the Bull River just outside of Fernie, British Columbia. It is effectively controlled by the estate of Ross Stanfield ("Stanfield") which holds 100% and 99.9% of the voting common shares in the parent companies, Zeus Mineral Corporation and Fort Steele Mineral Corporation, respectively. As stated above, the two principal companies involved in the development and operation of the mine within the Group are Bul River and Gallowai.

9 The mine, known as the Gallowai Bul River Mine, is not currently in production. There has been significant underground development to this point such that the petitioners and CuVeras consider that with a relatively modest further investment the mine could be placed into production.

10 Bul River and Gallowai were incorporated in the 1980s. Commencing in the mid-1990s, Stanfield began raising funds for the development of the mine. The marketing program focused on "sophisticated investors" which are, through securities regulation statutes, defined as persons with a net worth in excess of $1 million willing to invest a minimum of $100,000 in a given venture. The persons targeted by Stanfield's marketing campaign were farmers in Alberta, particularly around Edmonton, Red Deer and Medicine Hat, as well as farmers from the area around Regina, Saskatchewan.

11 Until 2010, Stanfield engaged in a sophisticated marketing program to sell redeemable preferred non-voting shares to these investors. Over that period of time, approximately $229 million was invested in consideration of which preferred shares in Bul River and Gallowai were issued.

12 The marketing program involved repeated representations as to the ore content of the mine. Stanfield continually referred to the mine as an "elephant" mine, meaning that the mineral resources were enormous. Over the years, the program included visits to the mine site and presentations to potential investors by Stanfield. Those presentations referred to the history of the mine and the future prospects of the mine, including development plans and the levels of ore content (copper, gold and platinum). The presentations also involved discussion as to when production would commence and typically production was forecast to commence within a foreseeable period of time, be it one or two years from the date of the meeting.

13 The same representations were also made in written materials, including a report from Phillip De Souza ("De Souza"), a professional engineer.

14 Some potential investors executed subscription agreements for shares during those visits to the mine or immediately thereafter. Some returned to the mine for subsequent tours and subsequent purchases. In some instances, Stanfield recruited current investors to further market the preferred shares to other investors.

15 These representations by Stanfield were made in the face of contemporaneous reports which questioned the value of the resources announced by the Group. These included papers published by the British Columbia Ministry of Energy and Mines in 2000 in which it was reported that they were unable to confirm the gold grades reported by the Group. In 2006, a professional conduct hearing in Alberta was held arising from charges that De Souza's report was "deficient and misleading". The panel issued reasons which were published in January 2008 in which it concluded that De Souza's conduct constituted unskilled practice and unprofessional conduct.

16 Eventually, Stanfield's activities caught the attention of various provincial securities regulators. In May 2010, the British Columbia Securities Commission (the "Commission") issued a Notice of Hearing against Stanfield, Bul River and Gallowai seeking to order them to produce an independently prepared technical report fully compliant with NI 43-101 (Standards of Disclosure for Mineral Projects) that would include an estimate of the mineral resources available at the mine.

17 Ross Stanfield died on August 3, 2010.

18 By the fall of 2010, in addition to being faced with the Commission proceedings, certain preferred shareholders had taken legal action against the Group in light of the failure to comply with redemption obligations arising in respect of the preferred shares. Stanfield's grandson, George Hewison, is the sole beneficiary of Stanfield's estate. He stepped in to continue the work of the Group as best he could. In late 2010 or early 2011, undertakings were given to the securities regulators in British Columbia and Alberta by which the petitioners agreed not to issue any new securities without their consent.

19 The evidence would later establish that the representations made by Stanfield regarding the mine resources were false. A technical report was later prepared by Rosco Postle and Associates Inc. ("RPA") in March 2011 that provided some review of the available mineral resources at the mine. Both the RPA report and a later report prepared by Snowden Mining Industry

Consultants in March 2013 would indicate that while there is valuable ore in the mine, the quantity of the resources is markedly less than what was indicated in the representations made to investors.

20 On May 26, 2011, the Group sought and obtained creditor protection pursuant to the *CCAA* and an Initial Order was granted at that time.

21 At the time of the *CCAA* filing, the Class A common voting shares in Bul River and Gallowai were held by the Stanfield estate. Other Class B and Class E common non-voting shares were held by investors.

22 As of the date of filing, the petitioners had no secured creditors. The petition referenced debt obligations of $904,000 to trade suppliers and two unsecured judgments totalling $386,135. Various preferred non-voting shares were held by investors in Classes C, D and F. The petition materials indicated that amounts owing for "redeemable shares" (i.e., the preferred shares) were approximately $137,718,557. The holders of both common and preferred shares comprise some 3,500 individual investors.

23 The subscription agreements for the preferred shares provided that the shares were redeemable at the end of five years from the date of the subscription together with a "preferred cumulative annual dividend" of 12.75%. There is no evidence of any significant redemption of the preferred shares. Rather, as redemption dates arose, preferred shareholders were approached to execute extension agreements extending their redemption rights from a given date to a date defined by the commencement of production from the mine. Many preferred shareholders signed those extension agreements, some did not. For those who did not, some of them demanded redemption of their shares. For the most part, those investors were told that there was no money to redeem the shares.

24 Accordingly, the largest liability faced by the petitioners is that arising from the preferred shares. The preferred shareholders appear to have certain claims arising from their holdings. Firstly, they have a claim for payment of the redemption amount plus the accumulated dividend. Secondly, they may have a claim for misrepresentation against the Group, giving rise to potential remedies of rescission of their subscription agreements, damages, or both.

The Claims Process

25 In August 2011, the Group prepared a list of creditors (the "Creditor List") in support of seeking a claims process order. The list actually included not only trade claims but also shareholder claims. Not surprisingly, the purpose of the claims process was to assist the Group in developing its restructuring plan.

26 On August 19, 2011, the court approved a Claims Process Order, which authorized the petitioners to conduct a claims process for the determination of any and all claims against them (the "Claims Process"). The Claims Process Order defined "claims" that were to be determined in the Claims Process as follows:

> ... indebtedness, liability or obligation (including an equity obligations arising from the ownership of equity shares) ...
>
> ... all obligations of or ownership interests in the Petitioners or any of them arising from or relating to the holding of a Share.

27 Under the Claims Process Order, all "Known Creditors" (defined in the Claims Process Order as all creditors shown on the books and records of the petitioners as having a claim in excess of $250), including holders of shares, were to receive a claims package from the petitioners that included an instruction letter, a Notice of Dispute, a Proof of Claim, and a copy of the Claims Process Order (the "Claims Package"). The Claims Process was also advertised in certain publications. The Creditor List indicating such Known Creditors was posted on the Monitor's website, as was noted in the Claims Package, such that both creditors and shareholders were able to view it. The process of determining claims was as follows:

> a) all creditors and shareholders were given the opportunity to review the Creditor List;
>
> b) in the event a creditor or shareholder agreed with the "Claim Particulars" listed in the Creditor List (which included the number and class of shares), the creditor or shareholder did not need to file a Proof of Claim with the petitioners.

> In that event, the Claim Particulars in the Creditor List would be deemed to be the creditor or shareholder's proven claim for voting and distribution purposes under any restructuring plan subsequently filed by the petitioners;
>
> c) in the event a creditor or shareholder objected to the Claim Particulars in the Creditor List, or wished to advance another claim, the creditor or shareholder had to, on or before October 17, 2011 (the "Claims Bar Date"), deliver to the petitioners, with a copy to the Monitor, a notice of such objection in the form of a Notice of Dispute, together with a Proof of Claim and supporting documentation;
>
> d) in the event a Notice of Dispute was not submitted on or before the Claims Bar Date, the creditor or shareholder was deemed to have accepted the amount owing and all other Claim Particulars set out in the Creditor List, and was forever barred from advancing any other claim against the petitioners or participating in any plan subsequently filed by the petitioners;
>
> e) where a Notice of Dispute and/or Proof of Claim was filed by a creditor or shareholder, the petitioners were deemed to have accepted it unless they delivered to the creditor or shareholder a Notice of Disallowance on or before October 31, 2011 (later extended to November 15, 2011); and
>
> f) in the event of the petitioners delivering a Notice of Disallowance, a creditor or shareholder had 21 days to seek a determination from the court of the validity and value of and particulars of the claim by filing and serving the petitioners and the Monitor with application materials. A creditor or shareholder who failed to file and serve such materials by the deadline was deemed to have accepted the particulars of its claim set out in the Notice of Disallowance.

28 The Claims Process Order did not contemplate the appointment of a claims officer or the participation of the Monitor in the process of assessing the validity of the Proofs of Claim and/or Notices of Dispute submitted to the petitioners through the Claims Process. Nor did the Claims Process allow any independent review of claims submitted by other creditors of the petitioners or by CuVeras as the interim financier.

(i) Jurisdiction of the Court

29 Before turning to claims process orders specifically, it is important to keep in mind the broad remedial objectives of the *CCAA* to facilitate a restructuring rather than a liquidation of assets: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60 (S.C.C.) [hereinafter Century Services] at paras. 15-18, 56. As the Supreme Court of Canada has noted, it is now well recognized that a supervising judge of a *CCAA* proceeding has a "broad and flexible authority" or statutory jurisdiction to makes such orders as are necessary to achieve those objectives: *Century Services* at paras. 19, 57-66.

30 The discretionary authority of the court is confirmed by s. 11 of the *CCAA* which provides that the court may make any order that it considers "appropriate in the circumstances". As Madam Justice Deschamps observed in *Century Services*, whether an order will be appropriate is driven by the policy objectives of the *CCAA*:

> [70] The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. 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.

31 Claims process orders are an important step in most restructuring proceedings. In *Timminco Ltd., Re*, 2014 ONSC 3393 (Ont. S.C.J.), Mr. Justice Morawetz reviewed the "first principles" relating to claims process orders and their purpose within *CCAA* proceedings:

> [41] It is also necessary to return to first principles with respect to claims-bar orders. The CCAA is intended to facilitate a compromise or arrangement between a debtor company and its creditors and shareholders. For a debtor company engaged in restructuring under the CCAA, which may include a liquidation of its assets, it is of fundamental importance to determine the quantum of liabilities to which the debtor and, in certain circumstances, third parties are subject. It is this desire for certainty that led to the development of the practice by which debtors apply to court for orders which establish a deadline for filing claims.
>
> [42] Adherence to the claims-bar date becomes even more important when distributions are being made (in this case, to secured creditors), or when a plan is being presented to creditors and a creditors' meeting is called to consider the plan of compromise. These objectives are recognized by s. 12 of the CCAA, in particular the references to "voting" and "distribution".
>
> [43] In such circumstances, stakeholders are entitled to know the implications of their actions. The claims-bar order can assist in this process. By establishing a claims-bar date, the debtor can determine the universe of claims and the potential distribution to creditors, and creditors are in a position to make an informed choice as to the alternatives presented to them. If distributions are being made or a plan is presented to creditors and voted upon, stakeholders should be able to place a degree of reliance in the claims bar process.

32 The overall objective of achieving certainty within the restructuring proceedings - for both debtor and creditor - is what drives this process. In this vein, counsel makes an effort to draft a claims process order to achieve these objectives. A claims bar date is typically set. The process is typically designed with some idea of the issues that either have arisen or might arise in the restructuring. My comments in *0487826 B.C. Ltd., Re*, 2012 BCSC 1501 (B.C. S.C.) [hereinafter Steels Products] are apposite:

> [38] Similar issues often arise in *CCAA* proceedings where counsel and the Court must be mindful of issues that may arise in relation to the determination of claims in that proceeding. There are no set rules, but care must be taken in the drafting of the claims process order to ensure that the process by which claims are determined is fair and reasonable to all stakeholders, including those who will be directly affected by the acceptance of other claims. In *Winalta Inc. (Re)*, 2011 ABQB 399, Madam Justice Topolniski stated that "[p]ublic confidence in the insolvency system is dependent on it being fair, just and accessible".
>
> [39] Many *CCAA* proceedings provide for an independently run claims process (for example, by the monitor), the cost of which again would be borne by the general body of creditors: see for example, *Pine Valley Mining Corp. (Re)*, 2008 BCSC 356. To this extent, the statutory procedure under the *BIA* and the claims process under the *CCAA* will have similar features, which is understandable since the overriding intention under both is to conduct a proper claims process: see *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60at paras. 24 and 47.

33 Nevertheless, issues can and do arise that no one is able to foresee at the time of the claims process order. In that event, the court retains its discretion to address the application of the claims process order: *Timminco* at para. 38. In that case, the claims process order specifically allowed the court to order a further claims bar date. No such provision is found in the Claims Process Order but I do not consider that its absence is sufficient to oust the statutory jurisdiction of the court in appropriate circumstances.

34 This, of course, is a different issue in that by the failure of the petitioners to deliver a Notice of Disallowance in respect of the claims in issue, they were deemed to have been accepted by the petitioners. This is not a case where a creditor is seeking to avoid the consequences of not filing materials by the time of the Claims Bar Date. Nevertheless, in my view, the court still retains the statutory jurisdiction to consider the validity of claims that might otherwise, by the Claims Process Order, be deemed to have been accepted.

35 The Prestons and Mr. Stafford do not suggest that the court lacks the jurisdiction to reconsider the issues that arise in relation to their claims. The Prestons do, however, contend that it is not appropriate that any reconsideration take place at this time.

(ii) Review of the Claims

36 The stated purpose of the *CCAA* is to facilitate compromises and arrangements between companies and their creditors (see also s. 6 of the *CCAA*). In accordance with that fundamental objective or purpose, it is axiomatic that it is necessary to determine what are the true claims of the creditors as might be compromised or arranged.

37 A "creditor" is not defined in the *CCAA*, unlike the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*") where it is defined as meaning "a person having a claim provable as a claim" under that *Act* (s. 2). Both the *CCAA* and the *BIA* define "claim" by reference to liabilities "provable" under the *BIA*. Specifically, s. 2(1) of the *CCAA* defines "claim" as meaning:

> any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*.

Section 2 of the *BIA* defines a "claim provable in bankruptcy" as "any claim or liability provable in proceedings under this Act by a creditor".

38 Section 121(1) of the *BIA* addresses which claims are "provable claims":

> 121(1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable in proceedings under this Act.

39 In substance, this same statutory definition is applied in the *CCAA* and represents a point of convergence consistent with the harmonization of certain aspects of insolvency law under both the *CCAA* and *BIA*: *Century Services* at para. 24. In addition, as noted by CuVeras, this definition is essentially used in the Claims Process Order by its definition of "Claim".

40 Various authorities establish that a "provable debt" must be due either at law, or in equity, by the bankrupt to the person seeking to prove a claim and must be recoverable by legal process: *Excelsior Electric Dairy Machinery Ltd., Re* (1922), 2 C.B.R. 599, [1923] 3 D.L.R. 1176 (Ont. S.C.); *Farm Credit Corp. v. Holowach (Trustee of)* (1988), 68 C.B.R. (N.S.) 255, 51 D.L.R. (4th) 501 (Alta. C.A.), leave to appeal to S.C.C. refused, (1989), 73 C.B.R. (N.S.) xxvii (note), 60 D.L.R. (4th) vii (note) (S.C.C.); *Central Capital Corp., Re* (1995), 29 C.B.R. (3d) 33, [1995] O.J. No. 19 (Ont. Gen. Div. [Commercial List]) ("*Central Capital*"), aff'd (1996), 27 O.R. (3d) 494, 38 C.B.R. (3d) 1 (Ont. C.A.) ("*Central Capital* (ONCA)"); *Negus v. Oakley's General Contracting* (1996), 40 C.B.R. (3d) 270, 152 N.S.R. (2d) 172 (N.S. S.C.).

41 In a *CCAA* proceeding, a claims process order is the means by which the "claims" of the creditors are determined. By reason of that process, the debtor is able to determine the nature and extent of its debts and liabilities so as to enable it to formulate a plan of arrangement. There are no rules as to when a claims process may be implemented although it is usually early in the process in anticipation of a plan and distributions to creditors. In that respect, a debtor company will be seeking some certainty regarding the determination of claims for that purpose.

42 In *Timminco*, the Court, prior to citing relevant authorities at para. 52, outlined many of the factors that might be considered by the court in relation to deciding whether to allow claims to be advanced after the claims bar date:

> [51] Counsel to Mr. Walsh submit that courts have historically considered the following factors in determining whether to exercise their discretion to consider claims after the claims-bar date: (a) was the delay caused by inadvertence and, if so, did the claimant act in good faith? (b) what is the effect of permitting the claim in terms of the existence and impact of any relevant prejudice caused by the delay[?] (c) if relevant prejudice is found, can it be alleviated by attaching appropriate

conditions to an order permitting late filing? and (d) if relevant prejudice is found which cannot be alleviated, are there any other considerations which may nonetheless warrant an order permitting late filing?

43 As I have stated above, the broad jurisdiction of the court under s. 11 of the *CCAA* allows the court to make such orders as are "appropriate". While the above factors have been considered in the past, there is no finite list that detracts from a consideration of all relevant circumstances. Nevertheless, the general considerations of delay and prejudice typically arise, just as they do in this case.

44 I return to the factual circumstances relating to the Claims Process and the Claims Process Order. The petitioners were themselves responsible for reviewing the Proofs of Claim and/or Notices of Dispute submitted in the Claims Process. The principal individual involved in the review was Mr. Hewison who did so with the assistance of counsel. It is apparent that the only factors considered in his review included whether a claim related to a trade debt or whether it related to an equity interest in the petitioners.

45 The Prestons argue that the Claims Process was well known to everyone and that its purpose was to establish the amount and nature of all claims. This is clearly self-evident, but back in late 2011, it was the case that the course of the restructuring proceedings was anything but certain. In fact, the ability of the petitioners to continue the proceedings was tenuous and they were scrambling to find interim financing which they eventually secured with CuVeras in November 2011. By that time, the Claims Process was essentially completed. Even so, understandably, the parties were concerned to proceed as quickly as possible to obtain further technical reports on the proven or inferred mine resources in order to determine whether a viable mine even existed. They did receive those later reports, which included a further RPA report and the Snowden report. In these circumstances, Mr. Hewison did not undertake any substantive review of the claims.

46 The Prestons further say that, since they faithfully complied with the Claims Process Order, it would be patently unfair to now revisit the characterization of their claim. While they raise the matter of the three year plus delay, no elements of prejudice have been alleged. In my view, the delay, while relevant, will have little effect on the ability of the parties to address the substance of the matter. Nor have any rights been extinguished or compromised by reason of any delay. Accordingly, the objective of certainty has less force in this case where the plan of arrangement has yet to be formulated and the claimants have yet to consider that plan and vote on it. I note that similar considerations were at play in *Timminco* where it was apparent that no plan would ever be put to the creditors.

47 Finally, the Prestons argue that the Claims Process Order constituted the sole form of adjudication of the validity and nature of the claims submitted. It is true, of course, that the petitioners had an opportunity to consider these claims.

48 As discussed below, the petitioners did not forward any Notice of Disallowance in respect of the Proofs of Claim later filed by the Prestons and Mr. Stafford. Mr. Hewison considered that the Stafford Claim should be categorized as an "investment" in the mine. Further, with respect to the Preston Claim, he was not aware of the significance of the distinction between an equity claim and a debt claim. In retrospect, and now knowing what type of plan of arrangement is possible, Mr. Hewison recognizes that this was in error. It appears that a combination of factors - including Mr. Hewison's lack of familiarity with the past transactions, inadequate record keeping, lack of resources and distraction in terms of larger issues more relevant to the survival of the mine - all contributed to a less rigorous review and analysis of these claims.

49 It is the case, however, that the petitioners were acting in good faith, albeit without a full appreciation of the issues arising in respect of these claims and the also the consequences of their inaction.

50 More importantly, aside from the petitioners, other stakeholders have a significant interest in whether a claim is valid or not and that any claim be properly characterized. Based on the anticipated form of the restructuring plan, the inclusion of the Stafford Claim and characterization of the Preston Claim will impact the recovery of these stakeholders. These other creditors or stakeholders of the petitioners did not have any opportunity up to this point in time to review the claims. I would again note that the Claims Process Order did not contemplate any review of the claims by these other stakeholders, such as was the case in *Steels Products* (see paras. 13-15).

51 Nor has the Monitor participated in any review of these claims. I do not say this as any criticism of the Monitor as the Claims Process Order did not expressly provide for any such independent review. Nor does the Claims Process Order contemplate that any other independent review of the claims be completed which might have highlighted the issues. The Monitor did report on the Claims Process from time to time (particularly, its report from June 2012 and January 2013), however, no such issues were identified. As such, the Monitor did not conduct a critical review of the claims, similar to what a trustee in bankruptcy might have done under s. 135 of the *BIA*.

52 In these circumstances, and in retrospect, the Claims Process lacked procedural safeguards that might have avoided this problem: *Steels Products* at paras. 38-39.

53 In these circumstances, I disagree with the Prestons that the Claims Process Order constitutes an adjudication of these issues by which CuVeras or any other stakeholder is estopped in bringing these issues forward. It is clear that to this point, no such adjudication has occurred.

54 As I have indicated above, a Claims Process Order is intended to be a fair, reasonable and transparent method of determining and resolving claims against the estate. In certain circumstances, these objectives fail to be achieved through no fault of the participants. That does not preclude the court from considering the issues on their merits so as to achieve the fundamental objective under the *CCAA* to facilitate a restructuring based on valid claims. This would also include a consideration of the proper characterization of the Preston's claim: *Steels Products* at para. 42.

55 Simply put, if the Claims Process results in a claim being advanced which is not truly a debt of the petitioners or results in a claim being improperly characterized, the fairness and transparency of these proceedings are inevitably compromised such that the objectives of the *CCAA* will not be fulfilled.

56 My comments in *Steels Products* apply equally here:

> [46] In conclusion, an independent review of these claims is necessary in the circumstances. An adequate review of these related party claims has not been made. The consequences of a successful challenge to some or all of these claims would have significant financial repercussions to the Disputing Creditors and other unsecured creditors who have also proved their claims. To deny an independent review at this time would be to deny any creditor the fair, reasonable and transparent process that is expected in insolvency proceedings in determining claims before any distribution of estate assets is made.

57 Even at this late stage in the proceedings, and considering the ongoing supervisory role of the court, I consider that it is appropriate to address the issues relating to both the Preston Claim and the Stafford Claim on their merits. This is particularly so given the significant repercussions to other stakeholders and the lack of any prejudice to the Prestons and Mr. Stafford.

Discussion

(a) The Preston Claim

58 The Preston Claim is advanced as a debt claim in these proceedings, a position that is disputed by CuVeras who contends that in fact, it is an equity claim as defined in the *CCAA*.

(i) The Proof of Claim

59 The Creditor List referenced the Prestons as holding various Class E (2,102) and Class F (2,400) preferred shares.

60 In October 2011, the Prestons, through their counsel, submitted a Proof of Claim and Notice of Dispute.

61 The genesis of the claim was as described in a Statement of Claim filed in the Alberta Court of Queen's Bench against Gallowai on May 27, 2010. The claim was as follows: in October 2004, the Prestons subscribed for 2,400 Class F preferred shares in Gallowai in consideration of the payment to Gallowai of $120,000; Gallowai is alleged to have covenanted to redeem

the preferred shares at the expiry of five years after the allotment date; the Prestons demanded redemption of the shares and the payment of dividends which was to be by way of issuance of Class E shares; Gallowai refused to respond to their demands; and the Prestons claimed the right to redeem the Class F preferred shares for $120,000 plus either dividends in the form of Class E common shares or, alternatively, cash payment of dividends at 12.75% per annum.

62 On November 19, 2010, default judgment was granted in favour of the Prestons for the claimed amount of $120,000 plus the cash dividend interest rate for a total judgment of $214,527.10 including court ordered costs. The Prestons attempted to register their judgment in British Columbia in June 2011 after the court ordered a stay arising under the Initial Order, but nothing turns on that step.

63 The Proof of Claim indicates that the Prestons were advancing both a trade claim for the judgment amount and also a claim for non-voting shares arising from the allegation that they continue to hold the 2,102 Class E shares noted on the Creditor List.

(ii) Historical Approach to Equity Claims

64 Before I turn to the current statutory regime arising from amendments to the *CCAA* and *BIA* in 2009, I will review the authorities which applied before these amendments were enacted.

65 Historically, equity and debt claims have been treated differently in an insolvency proceeding given the fundamental difference in the nature of such claims. That different treatment resulted in the subordination of equity to debt claims. The basis for this judicially developed principle was that equity investors are understood to be higher risk participants. Creditors, on the other hand, have been held by the courts to have chosen a lower level of risk exposure that should generally result in priority over equity investors in an insolvency context.

66 In *Sino-Forest Corp., Re*, 2012 ONCA 816 (Ont. C.A.), affirming 2012 ONSC 4377 (Ont. S.C.J. [Commercial List]), the Court of Appeal commented with approval on the analysis of Morawetz J. in the court below:

> [30] Even before the 2009 amendments to the CCAA codified the treatment of equity claims, the courts subordinated shareholder equity claims to general creditors' claims in an insolvency. As the supervising judge described [at paras. 23-25]:
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> > Essentially, shareholders cannot reasonably expect to maintain a financial interest in an insolvent company where creditor claims are not being paid in full. Simply put, shareholders have no economic interest in an insolvent enterprise.
> >
> > The basis for the differentiation flows from the fundamentally different nature of debt and equity investments. Shareholders have unlimited upside potential when purchasing shares. Creditors have no corresponding upside potential.
> >
> > As a result, courts subordinated equity claims and denied such claims a vote in plans of arrangement [citations omitted].

67 See also *Central Capital* at paras. 41-42; *Central Capital* (ONCA) at 510-11, 519.

68 In light of that key distinction, courts in the past have embarked upon a consideration as to the true characterization of certain claims in an insolvency context. There is considerable authority that in making that determination, the court will consider the true substantive nature or character of the claim, rather than the form of the claim.

69 The leading case is the Supreme Court of Canada's decision in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558 (S.C.C.) ("*CDIC*"). In that case, the issue was whether money advanced to the debtor bank was in the nature of a loan or a capital investment for the purpose of determining whether the creditors advancing the funds ranked *pari passu* with other unsecured creditors in a winding-up proceeding. Mr. Justice Iacobucci stated that the approach was to determine the "substance" or "true nature" of the transaction (563, 588). His oft quoted statements are found at 590-91, the relevant principles of which can be summarized as follows:

a) the fact that a transaction contains both debt and equity features does not, in itself, determine its characterization as either debt or equity;

b) the characterization of a transaction under review requires the determination of the intention of the parties;

c) it does not follow that each and every aspect of a "hybrid" debt and equity transaction must be given the exact same weight when addressing a characterization issue; and

d) a court should not too easily be distracted by aspects of a transaction which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

70 One type of financial instrument that typically has elements of both equity and debt are preferred shares, where arguably rights of redemption and rights to payment of dividends evidence debt characteristics.

71 The issue of the characterization of preferred shareholder claims in an insolvency context was addressed in *Central Capital* (ONCA). In that case, the court had to characterize a claim arising from the right of retraction in respect of certain preferred shares. Although differing in the result, the majority opinions and the dissenting opinion at the appellate court level were consistent in an approach toward determining the *substance* of the claim in terms of whether it was a "provable debt". In dissent, Finlayson J.A. stated:

> ... I do not think that describing the documents as preferred shares is conclusive as to what instrument the parties thought they were creating. In the second place, it is not what the parties call the documents that is determinative of their identity, but rather it is what the facts require the court to call them. The character of the instrument is revealed by the language creating it and the circumstances of its creation.
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> (at 509).
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> . . .
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> Thus, in looking at the substance of the transaction that led to the issuance of the preference shares, it appears to me that the retraction clauses were promises by Central Capital to pay fixed amounts on definite dates to the appellants. They evidenced a debt to the appellants.
>
> (at 512).

Justice Laskin specifically addressed the "substance of the relationship" at 535-36. In addition, Weiler J.A. focused on the "true nature" of the transaction or relationship:

> In order to decide whether the obligation of Central Capital to redeem the preferred shares of the appellants is a claim provable in bankruptcy, it is necessary to characterize the true nature of the transaction. The court must look to the surrounding circumstances to determine whether the true nature of the relationship is that of a shareholder who has equity in the company or whether it is that of a creditor owed a debt or liability by the company: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, 97 D.L.R. (4th) 385. In this case, the decision is not an easy one. Where, as here, the agreements between the parties are reflected in the articles of the corporation, it is necessary to examine them carefully to characterize the true relationship. It is not disputed that if the true nature of the relationship is that of a shareholder-equity relationship after the retraction date and at the time of the reorganization, then the appellants do not have a claim provable in bankruptcy. Consequently, they will not have a claim under the CCAA.
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> (at 519).

72 In *Blue Range Resource Corp., Re*, 2000 ABQB 4 (Alta. Q.B.), Madam Justice Romaine found that a shareholder's claim for alleged share loss, transaction costs and cash share purchase damages was in substance an equity claim or a claim by the shareholder for a return of its investment. See also *EarthFirst Canada Inc., Re*, 2009 ABQB 316 (Alta. Q.B.).

73 In *Return on Innovation Capital Ltd. v. Gandi Innovations Ltd.*, 2011 ONSC 5018 (Ont. S.C.J. [Commercial List]), leave to appeal refused, 2012 ONCA 10 (Ont. C.A.), the Court was characterizing indemnity claims advanced by certain individual directors and officers against the debtor, the Gandi Group. That indemnity claim arose by reason of a claim by TA Associates Inc. against them for damages for claims relating in part to TA's US$50 million equity investment in the Gandi Group. Mr. Justice Newbould at the Ontario Superior Court concluded that TA's claim was an equity claim and that therefore, the indemnity claim was also, in substance, an equity claim.

74 I have also been referred to *Dexior Financial Inc., Re*, 2011 BCSC 348 (B.C. S.C. [In Chambers]). Mr. Justice Masuhara there found the claim to be an equity claim even though the shareholder had given notice of an intention to seek retraction of the shares prior to the filing. Citing *CDIC* and *Central Capital* (ONCA), the Court found that the notice did not change the original intention or substance of the claim.

(iii) The New Statutory Approach

75 In September 2009, Parliament enacted substantial amendments to the *BIA* and *CCAA* in relation to the treatment of claims arising from equity in an insolvency proceeding.

76 One of the principle amendments was the prohibition that the court may not sanction a plan of arrangement unless all debt claims are to be paid in full before payment of any "equity claims". Section 6(8) of the *CCAA* provides:

> (8) No compromise or arrangement that provides for the payment of an equity claim is to be sanctioned by the court unless it provides that all claims that are not equity claims are to be paid in full before the equity claim is to be paid.

77 The definitions of "equity claim" and "equity interest" are found in the *CCAA*, s. 2(1):

> "equity claim" means a claim that is in respect of an equity interest, including a claim for, among others,
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> (a) a dividend or similar payment,
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> (b) a return of capital,
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> (c) a redemption or retraction obligation,
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> (d) a monetary loss resulting from the ownership, purchase or sale of an equity interest or from the rescission, or, in Quebec, the annulment, of a purchase or sale of an equity interest, or
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> (e) contribution or indemnity in respect of a claim referred to in any of paragraphs (*a*) to (*d*);
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> "equity interest" means
>
> (a) in the case of a company other than an income trust, a share in the company — or a warrant or option or another right to acquire a share in the company — other than one that is derived from a convertible debt[.]

78 Section 22.1 further restricts the right of creditors having equity claims from voting on a plan of arrangement:

> 22.1 Despite subsection 22(1), creditors having equity claims are to be in the same class of creditors in relation to those claims unless the court orders otherwise and may not, as members of that class, vote at any meeting unless the court orders otherwise.

79 Substantially these same amendments were made to the *BIA* in respect of proposal proceedings under that *Act* in ss. 2, 54(2)(d) and 60(1.7).

80 The effect of the amendments was considered by Pepall J. (as she then was) in *Nelson Financial Group Ltd., Re*, 2010 ONSC 6229 (Ont. S.C.J. [Commercial List]). In that case, the court had no difficulty in finding that the claims of preferred shareholders for declared but unpaid dividends and requests for redemption were equity claims within the above definition. In addition, the approach of the courts in the past in looking at the substance or true nature of the claim was applied in finding that related claims for compensatory damages or amounts due on rescission were caught by the definition of "equity claim": paras. 32-34. As such, all the claims were not provable debts under the *CCAA*.

81 The court in *Nelson Financial Group* noted that the introduction of section 6(8) in the *CCAA* provided greater certainty in the treatment to be accorded equity claims and lessened the "judicial flexibility" that previously prevailed in characterizing such claims.

82 Accordingly, while the 2009 amendments did represent in part a codification of the previous case law concerning equity claims, it also represented a more concrete definition of "equity claims" and by such definition a broadening and more expansive definition of such claims: *Sino-Forest Corporation* (ONCA) at paras. 24, 34-60. Parliament has now clearly cast the net widely in terms of the broad definition of equity claims such that claims that might have previously escaped such characterization will now be caught by the *CCAA*.

83 The claim of the Prestons is set out in their Statement of Claim. The claim is for the return of their capital investment under the redemption rights of the preferred shares. Their claim also included a claim to unpaid dividends, whether by cash payment or the issuance of other shares, being Class E common shares. It is clear that their claims, as evidenced by the Statement of Claim, fall within the definition of "equity claim" in subparas. (a)-(c).

84 The Prestons do not dispute that their claim, as described and but for one qualification, would fall within the definition. They contend, however, that by reason of their obtaining default judgment against Gallowai, they have transformed their equity claim into a debt claim that is a provable claim in the *CCAA* proceeding.

(iv) The Effect of the Judgment

85 The 2009 amendments have not affected the ability of the court to continue to analyze the *substance* of the claims, albeit in the context of the expanded definition of "equity claim". This is evident from the approach of the court in *Nelson Financial Group* at paras. 28 and 34.

86 In *Sino-Forest Corporation*, the court found that certain Shareholder Claims for damages claimed in a class action lawsuit clearly fell within the definition of "equity claims": ONSC at para. 84. Further, certain Related Indemnity Claims were also advanced against the estate by the auditors who were named in the class action lawsuit. These auditors also faced claims for damages relating to their role in what were said to be misrepresentations in the financial statements that led to the loss of equity by the class members. Again, consistent with the historical approach of the courts, Morawetz J. focused on the "substance" of the claim: para. 85. He stated:

> [79] The plain language in the definition of "equity claim" does not focus on the identity of the claimant. Rather, it focuses on the nature of the claim. In this case, it seems clear that the Shareholder Claims led to the Related Indemnity Claims. Put another way, the inescapable conclusion is that the Related Indemnity Claims are being used to recover an equity investment.
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> [80] The plain language of the CCAA dictates the outcome, namely, that the Shareholder Claims and the Related Indemnity Claims constitute "equity claims" within the meaning of the CCAA. This conclusion is consistent with the trend towards an expansive interpretation of the definition of "equity claims" to achieve the purpose of the CCAA.
>
> . . .

> [82] It would be totally inconsistent to arrive at a conclusion that would enable either the auditors or the Underwriters, through a claim for indemnification, to be treated as creditors when the underlying actions of the shareholders cannot achieve the same status. To hold otherwise would indeed provide an indirect remedy where a direct remedy is not available.

The Court of Appeal upheld this approach: *Sino-Forest Corporation* (ONCA) at paras. 37, 58.

87 I would note in this regard that the Claims Process Order expressly provided:

> THIS COURT ORDERS that the categorization of Claims into Trade Claims, non-voting Shares, and Voting Shares does not in any way set classes or categories for the purposes of priority or voting on a restructuring plan issued by the Creditors and shall not prejudice any party or the Petitioners from applying at a later date to set such classes or priorities in connection with voting on a plan;

88 The Prestons argue that their obtaining of a judgment against Gallowai has resulted in a replacement or transformation of their equity claim with a debt claim.

89 The Prestons place considerable reliance on the decision in *I. Waxman & Sons Ltd., Re* (2008), 89 O.R. (3d) 427, 40 C.B.R. (5th) 307 (Ont. S.C.J. [Commercial List]), which was decided prior to the 2009 amendments to the *CCAA*. In that case, Morris sued I. Waxman & Sons Limited ("IWS") for lost profits, profit diversions and improper distributions for bonuses paid. He obtained judgment against IWS and asserted that claim in the later bankruptcy proceedings.

90 The court began by noting that Morris' claim was not for his share of his current equity in IWS, but was, in substance, a claim related to dividends and diverted profits by way of bonuses. Justice Pepall found that the judgment was a debt claim:

> [24] There is support in the case law for the proposition that equity may become debt. For example, declared dividends are treated as constituting a debt that is provable in bankruptcy. As Laskin J.A. stated in *Central Capital Corp. (Re)*, "It seems to me that these appellants must be either shareholders or creditors. Except for declared dividends, they cannot be both." And later, "Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared, it is a debt on which each shareholder can sue the corporation." Similarly, in that same decision, Weiler J.A. stated, "As I understand it, counsel does not question that when a dividend has been lawfully declared by a corporation, it is a debt of the corporation and each shareholder is entitled to sue the corporation for his [portion]: see *Fraser and Stewart*, supra, at p. 220 for a list of authorities." In *East Chilliwack Fruit Growers Co-operative (Re)*, the B.C. Court of Appeal held that an agricultural co-operative member who had exercised a right of redemption and remained only to be paid was an unsecured creditor with a provable debt. Declared bonuses may also sometimes constitute debt: *Stuart v. Hamilton Jockey Club* [footnotes omitted].
>
> [25] Secondly, the claims advanced by Morris are judgment debts. As stated by Weiler J.A. in *Central Capital*, ". . . in order to be a provable claim within the meaning of s.121 of the BIA, the claim must be one recoverable by legal process: *Farm Credit Corp. v. Holowach (Trustee of)*." Clearly a judgment constitutes a claim recoverable by legal process. By virtue of the judgment, the money award becomes debt and it is properly the subject of a proof of claim in bankruptcy. In this regard, the facts in this case are unlike those in *Re Blue Range Resource Corp. (Re)*, or *National Bank of Canada v. Merit Energy Ltd.* Those cases involved causes of action that had been asserted in court proceedings, but in neither case had judgment been rendered [footnotes omitted].

91 In my view, *Waxman* is of little assistance to the Prestons.

92 Firstly, the facts are distinguishable by reason of the fact that the Preston Claim is for recovery of their capital or equity, rather than simply a return on capital as was the case in *Waxman*. I would note that the Preston default judgment obtained in 2010 does include the dividend interest on the preferred shares. What is somewhat anomalous is that this was claimed in the alternative to the issuance of the Class E common shares. Even so, the Prestons in their Statement of Claim did advance a claim

for 2,102 Class E common shares and continue to do so by their Proof of Claim, all consistent with what the petitioners had ascribed to them in the Creditor List. It is not clear to me how they can advance both claims.

93 Secondly, in para. 24 of *Waxman*, the Court focused on the prevailing authority at the time prior to the amendments by which declared dividends were considered debt as opposed to equity. At present, the 2009 amendments make clear that this type of claim now clearly falls within the definition of "equity claim" in subpara. (a): *CCAA*, s.2(1).

94 With respect to the comments of the Court in *Waxman*, para. 25, I agree with CuVeras that the Court was simply observing that a judgment debt will normally satisfy the requirements of the claim being recoverable by legal process, one of the requirements of a "provable claim", as noted above. These comments do nothing more than note the obvious - that in ordinary circumstances, a judgment is a claim recoverable by legal process. I do not interpret these comments as obviating an analysis of the true nature of a claim, whether represented by a judgment or not.

95 Accordingly, I do not view *Waxman* as standing for the proposition advanced by the Prestons, namely that a judgment transforms an equity claim into a debt claim such that no further analysis or characterization by the court is necessary. This would have applied even before the enactment of the 2009 amendments, but certainly is more evident now given the expansive definition now contained in the *CCAA*.

96 Indeed, the later comments of Justice Pepall in *Nelson Financial Group* suggest that she only decided in *Waxman* that by reason of a judgment, an equity claim *may* become debt:

> [32] The substance of the arrangement between the preferred shareholders and Nelson was a relationship based on equity and not debt. Having said that, as I observed in *I. Waxman & Sons.* there is support in the case law for the proposition that equity may become debt. For instance, in that case, I held that a judgment obtained at the suit of a shareholder constituted debt. An analysis of the nature of the claims is therefore required. If the claims fall within the parameters of section 2 of the *CCAA*, clearly they are to be treated as equity claims and not as debt claims [footnotes omitted].

97 The Court in *Dexior Financial* at para. 16 commented on *Waxman* but those comments were clearly *obiter* as no judgment had been obtained in that case. See also *EarthFirst Canada* at para. 4.

98 At its core, the issue before the court is a narrow one - namely, whether a shareholder, having an equity claim but who obtains a judgment before the filing, has become a debt claimant rather than an equity claimant for the purposes of the insolvency proceeding? In my view, they do not, for the reasons below.

99 In light of the dearth of authority on the issue, I consider that the court must start from first principles.

100 I return to the comments in *Century Services* regarding the remedial purposes of the *CCAA* and the broad and flexible authority of this court to facilitate a restructuring that is fair, reasonable and equitable in accordance with either the express will of Parliament, as specifically dictated in the *CCAA*, or as might be reasonably interpreted as falling within those broad purposes.

101 At its core, the policy objectives of the *CCAA* are a fair and efficient resolution of competing claims in a situation (insolvency) where all obligations or expectations cannot be fulfilled. What is "fair" is a flexible or uncertain concept and needless to say, what is fair will likely be differently interpreted depending on which stakeholder you ask. Nevertheless, Parliament has clearly signalled that the policy objectives continue to be that equity will take a back seat in terms of any recovery where there are outstanding debt claims. This was so before September 2009 and is even more decidedly so now, given the express and expansive statutory treatment of equity claims that now applies.

102 In my view, the characterization of claims by the court continues to have an important role in fulfilling that purpose. I have already outlined the considerable authority from Canadian courts in respect of such claims, both pre- and post-amendments. Particularly, the court continues to have a role in applying these new equity claims provisions by considering the true nature or substance of those claims. In many cases, the matter is now considerably clearer given the definition of "equity claims". What is most important, however, is that form will still not trump substance in the consideration of this issue.

103 As was noted by counsel for CuVeras, the obtaining of a judgment does not necessarily mean that it will be recognized as a debt for the purpose of an insolvency proceeding. There are many provisions of the *BIA* and *CCAA* which allow for the challenge of certain pre-filing transactions or events that may be the basis for supposed rights in the proceeding. For example, the payment of a dividend and redemption of shares may be attacked (*BIA*, s. 101). Another example is that either the granting of a judgment against the debtor or payment of monies such as redemption amounts that resulted in a preference being obtained may be challenged (*BIA*, s. 95). Both of these provisions apply in a *CCAA* proceeding: *CCAA*, s 36.1.

104 These types of provisions reflect the policy choices of Parliament in terms of allowing for the recovery of assets transferred away from the debtor even before the filing so that those assets are brought back into the estate for the benefit of the entire stakeholder group to be distributed in accordance with the legislation. Similarly, some established rights may be challenged in certain circumstances (such as by way of the preference provisions).

105 In the same manner, the new equity provisions in the *CCAA* reinforce that it remains an important policy objective that equity claims be subordinated to debt claims. In *Sino-Forest Corporation*, the Court of Appeal focused on the purpose of the 2009 amendments and stated:

> [56] In our view, in enacting s. 6(8) of the CCAA, Parliament intended that a monetary loss suffered by a shareholder (or other holder of an equity interest) in respect of his or her equity interest not diminish the assets of the debtor available to general creditors in a restructuring. If a shareholder sues auditors and underwriters in respect of his or her loss, in addition to the debtor, and the auditors or underwriters assert claims of contribution or indemnity against the debtor, the assets of the debtor available to general creditors would be diminished by the amount of the claims for contribution and indemnity.

106 This same recognition of the sound policy objectives of insolvency legislation was noted by Laskin J.A. in *Central Capital* (ONCA). He commented at 546 that "[p]ermitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection."

107 I see no principled basis upon which a different approach should be taken in respect of an equity claimant who has had the foresight, energy or just plain luck to seek and obtain a judgment prior to the filing date.

108 Some arguments were advanced by CuVeras and the Prestons as to the timing of the judgment. Indeed, the Preston judgment was obtained well in advance of the filing, by some six months. The Prestons cite *Blue Range* at para. 38 in respect of the importance of timing. However, the timing issue there was the filing of the insolvency proceeding, not the granting of a judgment. I agree that the filing of the proceeding is a significant crystallizing event, however, what is important in this case is the ability of the court to analyze the true nature of the claim. Further, whether a judgment is obtained on the eve of the filing or even years before, I consider that it is a distinction without a difference in terms of the court's role in ensuring that a proper characterizing of the claim has taken place in accordance with the *CCAA*.

109 The fact remains that there are thousands of other preferred shareholders holding shares in Bul River and Gallowai whose claims are in essence the same - namely, for a return of their capital and the promised return on that capital (and perhaps other damage claims). The evidence indicates that many of them had also made demand for a return of their preferred share investments and their return on capital well before the filing date. Those claims are clearly equity claims. From the perspective of the policy objective of treating similar claims in a similar fashion (i.e., fairness), it makes little sense to me that a similarly situated preferred shareholder without a judgment should be treated differently than one who does.

110 Nor does it accord with the policy objectives particularly identified in s. 6(8) of the *CCAA* that by the simple mechanism of obtaining a judgment an equity claimant should be elevated to a debt claimant which would inevitably diminish the recovery of other "true" debt claimants.

111 The Prestons argue that this will open the floodgates to an endless analysis of claims reduced to judgments resulting in increased cost and inefficiencies in these types of proceedings. I see no merit in this submission given that this decision relates

to only equity claims and by no stretch of the imagination has the previous litigation on the point overwhelmed the court system across Canada. In any event, if that is the will of Parliament, then there is little ability in this court to take a different approach.

112 The courts have not been hesitant in preventing claimants from recharacterizing their claims such that an equity claim is indirectly advanced where no direct claim could be made: *Sino-Forest Corporation*, ONSC at para. 84 (although the Court of Appeal preferred to express the same sentiment in terms of the purpose of the *CCAA*). In *Return on Innovation*, Newbould J. stated, consistent with the "substance over form" approach that the court's decision will not be driven by the form of the legal action:

> [59] The Claimants assert that the claim for US $50 million by TA Associates cannot be an equity claim because it is based on breaches of contract, torts and equity. I do not see that as being the deciding factor. TA Associates seeks the return of its US $50 million equity investment because of various wrongdoings alleged against the Claimants and the fact that the claim is based on these causes of action does not make it any less a claim in equity. The legal tools that are used [are] not the important thing. It is the fact that they are being used to recover an equity investment that is important.

113 Similarly, in addition to the "legal tools" not being determinative, neither are the legal *forms* of recovery determinative, such as the obtaining of a judgment.

114 In summary, the *CCAA* policy objectives in relation to equity claims are clear. In my view, those objectives are best achieved by the continued approach of the court, both pre- and post-*CCAA* amendments, to consider the substance or true nature of the claim. This accords with the ongoing supervisory jurisdiction of the court to exercise its statutory discretion to achieve the purposes of the *CCAA*. In particular, the court's fundamental role is to facilitate a restructuring that is fair and reasonable to all stakeholders in accordance with the now very clearly stated objective of allowing recovery to debt claimants before any recovery of equity claims. Section 6(8) reflects that the court has no ability to proceed otherwise.

115 Within those broad objectives, in my view, it is of no importance that prior to the court filing, a claimant with an equity claim has obtained a judgment. That judgment still, in substance, reflects a recovery of that equity claim and therefore, the claim comes within the broad and expansive definition in the *CCAA*. Accordingly, for the purposes of the *CCAA*, that claim or judgment must still, of necessity, bear that characterization in terms of any recovery sought within this proceeding. I conclude that any contrary interpretation, such as advanced by the Prestons, would result in the clear policy objectives under the *CCAA* being defeated.

116 Nor I do not accept that, as argued by the Prestons, applying this characterization amounts to a collateral attack or an "undoing" of the judgment from the Alberta court. As noted by CuVeras, the obtaining of a judgment by a creditor does not mean that insolvency laws do not apply to it. Judgments are affected by insolvency proceedings all the time. Recoveries of judgments are stayed by such proceedings and as stated above, they can be attacked as fraudulent preferences. All that results from my conclusions is that notwithstanding the granting of the judgment, within these *CCAA* proceedings, the judgment is to be characterized in accordance with the true nature of the underlying claim, which is an equity claim.

117 For the above reasons, I conclude that the Preston Claim is an equity claim within the meaning of the *CCAA*.

(b) The Stafford Claim

118 The Stafford Claim is advanced as a debt claim in these proceedings. That position is disputed by CuVeras who contends that, in fact, it is a claim owed by Stanfield personally and not by either Bul River or Gallowai such that it cannot be advanced in this *CCAA* proceeding.

(i) The Proof of Claim

119 The Creditor List referenced Mr. Stafford as holding Class B common shares (3,340), Class D preferred shares (4,200) and Class E preferred shares (17,548). He therefore received a Claims Package from the petitioners.

120 Mr. Stafford took no issue with the shareholdings alleged to be held by him in accordance with the Creditor List. However, on October 14, 2011, a Notice of Dispute and Proof of Claim were submitted on behalf of Mr. Stafford. This was done by Carol Morrison, who was exercising a power of attorney for Mr. Stafford by reason of his mental and physical incapacity that occurred at least as early as November 2010.

121 The Notice of Dispute refers to "claim not listed" as the "reason for dispute". The Proof of Claim submitted by Mr. Stafford notes the "type of claim" as "other — loan and accrued interest 50% Bul River Mineral Corp. and 50% Gallowai Metal Mining Corp." The Stafford Claim submitted is for outstanding principal and interest under a loan in the total amount of $2,587,174.

122 The supporting documentation submitted for Mr. Stafford includes a copy of a loan agreement between Stanfield in his personal capacity, as borrower, and Mr. Stafford, as lender, dated June 12, 1990, 21 years before the CCAA filing (the "Stafford Loan Agreement"). The Stafford Loan Agreement references a loan in the principal amount of $150,000, accruing interest in the amount of 20% per annum "on the Principal", calculated yearly and not in advance.

123 Pursuant to the terms of the Stafford Loan Agreement, Stanfield borrowed these funds for the purpose of "investing the funds in the costs of the ongoing research and development of a Process" with "Process" being defined as a "new improved method or process for extracting precious metals from ore". Paragraphs 6 and 8 of the Stafford Loan Agreement provided for a bonus payable to Mr. Stafford equal to the amount of the Principal, if the "Process" proved successful (as declared by an independent metallurgical consultant). As CuVeras submits, on its face, this was not a loan directly related to the mine or the petitioners.

(ii) Dealings in Respect of the Stafford Loan Agreement

124 For obvious reasons, the death of Ross Stanfield and the incapacity of Mr. Stafford result in a situation where no individual is in a position to shed light on the intentions of the parties in relation to this loan. Mr. Hewison is similarly unable to provide any evidence about the loan, save for referring to such documents as have been found in relation to this loan. Those documents do provide some indication as to the how Stanfield, Bul River and Gallowai addressed this loan up to the time of the *CCAA* filing.

125 There are two resolutions of the directors of Bul River, dated October 1994 and February 1996 respectively, that are essentially the same. Both refer to the "need of major amounts of additional financing" and authorize Stanfield to negotiate, on behalf of Bul River, potential sources of debt or equity financing, to settle the terms of the financing, and to sign, seal and deliver any agreements necessary to secure funding required by the company. I agree that these resolutions on their face clearly do not authorize Stanfield to act as an agent for Bul River. They merely authorize him to act directly in the name of the company with the company as principal in respect to those transactions. These resolutions also do not reference any loan by Mr. Stafford to Stanfield made years before in June 1990.

126 Bul River also appears to have prepared a schedule of loan payments as of December 31, 2006. That schedule shows payment of interest to Mr. Stafford by Stanfield personally from June 1995 to September 1998 totalling approximately $183,000. In 1999 and 2000, Gallowai appears to have made interest payments of $40,000 and from that time forward, some person (unidentified) made interest payments of $25,000 for 2001 and 2002. From 2004 to 2006, it appears that Bul River made interest payments of $22,500 and principal payments of $26,000 to Mr. Stafford. Mr. Stafford's own calculations show further payments of interest from 2007 to 2009 totalling $58,000.

127 Accordingly, in respect of his $150,000 loan, as of 2009, Mr. Stafford had received $328,100 in interest payments and $26,000 in principal payments for a total recovery of $354,100.

128 Leaving aside the interest and principal payments referred to above, the involvement of Bul River and Gallowai in respect of the Stafford Loan Agreement arose, from a corporate perspective, in 2003. At that time, various resolutions were passed by the directors of Bul River. Mr. Stafford places great reliance on these resolutions and as will become apparent from the discussion below, the issue largely turns on the legal effect of these resolutions. As such, I will describe the resolutions in some detail.

129 The first resolution is dated May 13, 2003. It provides:

> WHEREAS:
>
> A. Loans, loan repayments and principal and interest payments which were property for the benefit of, or were the responsibility of, the Company have for some years been done, as a matter of convenience, in the name of the Company's President, [Stanfield] - and as a result debit and credit entries have improperly been posted to Stanfield's Shareholder Loan Account.
>
> B. Stanfield has requested that the situation described above be corrected...
>
> C. The Companies' accountant has examined the financial records and has verified that the said situation has occurred with respect to the Company as well as Gallowai...
>
> D. Management has proposed, based on professional advice, that for convenience and simplicity the various Loan Accounts involving Stanfield, the Company and the Other Companies be consolidated in the books of the Company.
>
> . . .
>
> NOW THEREFORE, IT IS RESOLVED:
>
> 1. THAT the Loan Accounts and payments referred to above be recognized as solely the responsibility of the Company and it be confirmed that Stanfield was, in being named in the transactions, acting solely on behalf of the Company and that he had no personal, legal or beneficial interest in, or any liabilities as a result of, any of the transactions.
>
> 2. THAT the Agreement dated this May 13, 2003 between the Company, Stanfield and the Other Companies be approved and that Stanfield or any other officer or director of the Company be authorized to sign and deliver it on behalf of the Company.
>
> 3. THAT the Company assume the obligations of the Other Companies to Stanfield pursuant to the shareholder account in their records, to be offset by inter-company accounts whereby each of the Other Companies will be indebted to the Company for the amount of shareholders accounts assumed by the Company.

130 The second resolution of Bul River is dated October 20, 2003 and relates to the May 2003 resolution. The resolution references that Stanfield is having difficulty providing full documentary verification and back-up for his expenditures for which he was requesting reimbursement. In addition, the preamble to the resolution states in part:

> D. Acceptance of liability to Stanfield at this date poses some special problems due to the fact that some of the disbursements that he has requested to be reimbursed for precede the last date that the financial statements of the company were audited — and such statements did not include the expenditures.

Concern was expressed whether or not the acceptance of these responsibilities would be acceptable to Bul River's auditors. The resolution authorizes the engagement of the auditors for the purpose of conducting a special audit of the expenditures made by Stanfield. There is no evidence as to the result of that special audit or if it even took place.

131 The third resolution of Bul River is dated November 30, 2003 and is of particular significance. It reads as follows:

> WHEREAS:
>
> A. Ross Stanfield ...has submitted various claims for recognition of corporate liabilities to third parties ... as shareholder's loans for transactions undertaken as agent on behalf of the Company, Gallowai ... to finance the exploration of the British Columbia properties owned by the Companies ("Properties").

B. Stanfield and the Companies signed an Agreement dated May 13, 2003 recognizing the fact that Stanfield has acted as agent on behalf of the Companies since 1972 and had personally undertaken a variety of transactions as agent for the Companies to finance the exploration of the Properties.

C. Stanfield has submitted the following claims pursuant to the Agreement for the Director's consideration and approval.

1. Exploration Loans

These loans were negotiated between 1983 and 2002 personally by Stanfield, as the agent of the Company, and all funds were advanced to the Companies as shareholders loans from him. Payments were made on the loans with his own personal funds or shareholdings. The Directors were provided with a summary of individual loans and accrued interest for review. Files have been prepared for corporate record keeping purposes that include the documentation and amortization schedules supporting each loan.

Balances as at December 31, 2002

Loan principal	$1,886,413
Accrued interest	$6,281,004

. . .

NOW THEREFORE, the undersigned acting as a group excluding ... [Stanfield], RESOLVE:

1. THAT the loans, accrued interest and share subscriptions detailed in paragraph C.1 above, negotiated by Stanfield as agent on behalf of the Companies, be accepted as liabilities of the Companies.

. . .

3. THAT the resolution passed by the full Board dated May 13, 2003 that the Company accept all of the above described liabilities on behalf of the other Companies — to be offset by inter-company accounts whereby each of the other Companies will be indebted to the Company for the amounts assumed by the Company — be further approved and ratified.

132 It should be noted that the agreement between Stanfield and Bul River (and perhaps others) dated May 13, 2003 has not been located. Nor have any similar resolutions from the directors of Gallowai been found.

133 In addition, no one has been able to locate a copy of the summary of the loans as of December 2002 referred to in paragraph C.1 of the November 2003 resolution. Mr. Hewison refers in his evidence to a spreadsheet in the name of Bul River referencing "Mine Development Loans" for the year ended December 2003 which indicates a loan from Mr. Stafford of $150,000 with accrued interest of $899,236.39. The total interest figure for all loans is slightly different (lower) than the interest amount referenced in the November 2003 resolution which was as of December 31, 2002. In any event, CuVeras does not dispute that Mr. Stafford would likely have been on the list referred to in the November 2003 resolution.

134 No audited financial statements have been produced pre-2003, as might have been amended arising from the special audit authorized in October 2003.

135 Also in evidence are various letters from Bul River to Mr. Stafford concerning these loans.

136 On April 23, 2007, a letter was sent to Mr. Stafford's accountant enclosing various amended 2006 T5 (Statement of Investment Income) forms or slips that were apparently issued to Mr. Stafford by Gallowai and Bul River, each as to 50%

of interest paid or payable pursuant to the Stafford Loan Agreement. The letter indicates that as of 2006, the amount of such interest was just over $1.5 million (which included the $150,000 bonus amount supposedly due pursuant to the Stafford Loan Agreement).

137 On March 6, 2008, Mr. Stafford received correspondence from Bul River's controller concerning the 2006 T5s slips from Bul River and Gallowai. Later letters from the controller dated April 2, 2008, February 12, 2009 and January 19, 2010 refer to T5 slips being issued by Bul River and Gallowai for 2007, 2008 and 2009 relating to accrued interest on the Stafford Loan Agreement. Finally, T5 slips for 2010 appear to have been issued by Bul River and Gallowai for that taxation year.

138 There is no evidence that Mr. Stafford knew anything about the 2003 resolutions by Bul River. It does appear to be the case that he began receiving interest payments from Gallowai in 1999 and these would continue together with the payment of some principal by either Gallowai or Bul River to 2009. Bul River would also later send Mr. Stafford, commencing in 2007 and continuing to 2010, certain details or statements relating to the loan and the T5 slips.

(iii) Legal Basis for the Stafford Claim

139 For the reasons set out below, CuVeras submits that the Stafford Claim is not a debt claim against Bul River and Gallowai and ought to be expunged from the Creditor List. CuVeras argues that Mr. Stafford cannot satisfy the onus placed upon him to prove his claim against those petitioners.

140 At the outset, it is clear that Mr. Stafford advanced his loan to Stanfield personally, and not to either Bul River or Gallowai. The 2003 resolutions confirm that such was the case and, indeed, the amounts were noted in the books of Bul River and Gallowai as shareholder loans owing to Stanfield personally in that respect.

141 CuVeras made substantial arguments on the later involvement of Bul River and Gallowai in terms of whether those petitioners became the principal obligants under the Stafford Loan Agreement. These arguments related to whether or not there had been a valid assignment of the Stafford Loan Agreement from Stanfield to Bul River and Gallowai. While Mr. Stafford agreed with these submissions, it is helpful to set out these issues and arguments in order to put in focus the later arguments of Mr. Stafford (which are contested by CuVeras).

142 I agree that there is no basis upon which Mr. Stafford can contend that Stanfield assigned the Stafford Loan Agreement to Bul River and Gallowai. There is no evidence that Gallowai agreed to anything, since the resolutions were only that of Bul River's directors.

143 Even assuming that the November 2003 resolution was intended to effect a valid assignment of the obligations under the Stafford Loan Agreement from Stanfield to Bul River and Gallowai, it is of no legal effect in that it purports to assign the burden of Stanfield's obligations to Bul River and Gallowai. It is trite law that neither the common law nor equity has ever permitted a debtor to unilaterally assign the burdens or obligations (as opposed to the benefits) of a contract to a third party without the consent of the creditor. Rather, in that case a novation is required: *Mills v. Triple Five Corp.* [1992 CarswellAlta 172 (Alta. Master)], 1992 CanLII 6204 at paras. 13-14, (1992), 136 A.R. 67 (Alta. Master).

144 Novation involves the substitution of a new contract or obligation for an old one which is thereby extinguished: *Royal Bank v. Netupsky*, 1999 BCCA 561 (B.C. C.A.). In *Netupsky* at paras. 11-13, the court set out the essential elements that must be established to satisfy the test to establish novation:

1. the new debtor must assume complete liability for the debt;

2. the creditor must accept the new debtor as a principal debtor, and not merely as an agent or guarantor; and

3. the creditor must accept the new contract in full satisfaction and substitution for the old contract.

145 Mr. Stafford bears the burden of proving novation which the Court in *Netupsky* described as a "heavy onus". Further, while the courts may look at the surrounding circumstances, including the conduct of the parties, they will not infer that a novation has occurred in the face of ambiguous evidence as to the parties' intention to effect a new agreement with the substituted party.

146 As is noted by CuVeras, it is somewhat ironic to suppose that Mr. Stafford might have advanced this issue since he is the creditor and as noted in *Netupsky*, it is usually the "unwilling creditor" who is objecting to any suggestion of a novation. In any event, in this case there is no evidence to suggest that:

> a) Mr. Stafford had any knowledge of the 2003 resolutions or was in any other way even advised by Stanfield, Bul River or Gallowai that it was intended that Bul River and Gallowai would assume the obligations under the Stafford Loan Agreement in place of Stanfield; and
>
> b) Stanfield, Bul River, Gallowai and Mr. Stafford reached a consensus with respect to the terms upon which any purported new or substituted agreement would operate.

147 Accordingly, it is clear, as agreed by CuVeras and Mr. Stafford, that novation did not occur such that Bul River and Gallowai assumed the obligations of Stanfield under the Stafford Loan Agreement with the consensus of Mr. Stafford. In addition, no privity of contract arose simply by reason of later payments to Mr. Stafford or issuance of T5 slips by Bul River and Gallowai. That Mr. Stafford was not directly involved in any such new contractual arrangements and that he only later "assumed" that Bul River and Gallowai were involved is made evident by his own loan summary attached to his Proof of Claim:

> Commencing in 2006, T5 slips were issued by Bul River Mineral Corporation and Gallowai Metal Mining Corporation (50% each). Assumption is therefore that $^{1}/_{2}$ of Grand Total is receivable from each.
>
> [Emphasis added].

148 Nor is there any suggestion that Bul River or Gallowai provided a guarantee of the Stafford Loan Agreement to Mr. Stafford. Finally, Mr. Stafford does not argue that Bul River and Gallowai are somehow estopped from denying that they are debtors of Mr. Stafford, particularly by reason of the interest and principal payments made by them and the T5 slips prepared by them which were then forwarded to Mr. Stafford.

149 Having confirmed the agreement of CuVeras and Mr. Stafford on the above issues, I turn to Mr. Stafford's position, which is solely rooted in agency:

> The corporate minutes of Bul River Mineral Corporation confirm that the actions of Ross Hale Stanfield were as agent for the company and associated companies and confirmed by resolution to accept liability of agreements signed by Stanfield as legitimate debts of a company and acted on it accordingly[.]

150 Essentially, Mr. Stafford's argument is that Stanfield was retroactively appointed as the agent of Bul River and Gallowai by reason of the November 2003 resolution such that he had the express or implied authority to bind Bul River and Gallowai at the time of the loan. He relies in particular on s. 193(2) and (4) of the *Business Corporations Act*, S.B.C. 2002, c. 57:

> 193 (2) A contract that, if made between individuals, would, by law, be required to be in writing and signed by the parties to be charged, may be made for a company in writing signed by a person acting under the express or implied authority of the company and may, in the same manner, be varied or discharged.
>
> . . .
>
> (4) A contract made according to this section is effectual in law and binds the company and all other parties to it.

151 It seems to be common ground that Stanfield was not acting as the agent of Bul River and Gallowai in 1990 when the loan was made. The Stafford Loan Agreement does not reference Stanfield acting as an agent and the Proof of Claim does not

allege an agency relationship at the time of the Stafford Loan Agreement. Nor was Stanfield acting as the agent of Bul River and Gallowai during the ensuing 13 years when the loan was being administered. The allegation is that changes only occurred in 2003 when Stanfield decided he wanted to be reimbursed by Bul River and Gallowai for certain loans he had earlier made.

152 I was referred to only one authority on the agency issue by CuVeras, being *Spidell v. LaHave Equipment Ltd.*, 2014 NSSC 255 (N.S. S.C.).

153 In *Spidell*, LaHave Equipment Ltd. was a dealer for Case Canada Limited. The plaintiff Spidell purchased a Case Canada excavator from LeHave which was financed by Case Credit Limited. Spidell alleged that employees of LaHave made representations to him about the performance of the equipment. Spidell believed LaHave was a representative or agent or dealer for Case Canada. Spidell did not make the required payments to Case Credit and the equipment was repossessed. Spidell sued LaHave claiming damages for alleged misrepresentations. LaHave defended the action but subsequently went into bankruptcy. Only then did Spidell amend his pleading to add Case Credit and Case Canada as defendants, claiming LaHave was their agent. The issue on the summary trial was whether LaHave was in fact the agent of the Case companies.

154 Mr. Justice Coughlan reviewed the law of agency, as follows:

> [21] In *Halsbury's Laws of Canada First Edition*, "Agency" paragraph HAY-2 the three essential ingredients of an agency relationship are:
>
> 1. The consent of both the principal and the agent.
>
> 2. Authority given to the agent by the principal, allowing the former to affect the latter's legal position.
>
> 3. The principal's control of the agent's actions.
>
> And at Agency paragraph HAY -11 the manner in which an agency relationship may be created are set out:
>
> "1. the express or implied consent of principal and agent,
>
> 2. by implication of law from the conduct or situation of the parties or from the necessities of the case,
>
> 3. by subsequent ratification by the principal of the agent's act done on the principal's behalf, whether the person doing the act was an agent exceeding his authority or was a person having no authority to act for the principal at all,
>
> 4. by estoppel, or
>
> 5. by operation of the principles of law."
>
> [Emphasis added].

155 Mr. Stafford relies in particular on the creation of agency by ratification as referred to above. Justice Coughlan said this about agency by ratification:

> [25] The conditions for an agency by ratification to be established were set out in *Halsbury's Laws of Canada*, *supra*, at Agency HAY-22 as follows:
>
> "**Three Conditions**. Actions by a principal after the agent has purported to act on the principal's behalf may amount to creation of agency by ratification. For this to occur, three conditions must be satisfied. First, the agent whose act is sought to be ratified must have purported to act for the principal; second, at the time the act was done the agent must have had a competent principal; and third, at the time of the ratification the principal must be legally capable of doing the act himself.["]

156 The key consideration from the above quote is the first requirement. In this case, there is no evidence that Stanfield "purported to act" for Bul River and Gallowai as principals in 1990 when he entered into the Stafford Loan Agreement. In fact, the evidence is to the contrary in that he acted in his personal capacity and not as agent.

157 I agree with CuVeras that agency by ratification assumes that there exists a relationship (even though perhaps mistaken) between the principal and agent at the time of the transaction which must later be ratified. One example is as noted in the *Halsbury's* quote above, namely where the agent exceeded his or his authority but later the unauthorized transaction is ratified or adopted by the principal. That is not what occurred in this case. Ratification of an agent's actions in that case cannot occur when no agency relationship existed in the first place. The second example of ratification described in *Halsbury's* (where the person had no authority to act but their actions were later ratified) still requires that the actions be done by the agent "on the principal's behalf" in purported furtherance of an agency relationship.

158 Accordingly, the concept of ratification by Bul River and Gallowai of Stanfield's actions concerning the Stafford Loan Agreement as their agent has no application in this case.

159 What occurred in this case is that many years later, in 2003, Stanfield, Bul River and Gallowai agreed that the companies would take over responsibility for payment of the Stafford Loan Agreement in place of Stanfield. But those arrangements were only between Bul River, Gallowai and Stanfield and not Mr. Stafford.

160 Accordingly, we start from the proposition that there was no agency relationship between Stanfield and Bul River and Gallowai in 1990. The only parties to the Stafford Loan Agreement are Stanfield and Mr. Stafford.

161 The only evidence suggesting any link between Mr. Stafford and Bul River and Gallowai arise from the fact that, commencing in April 2007, Mr. Stafford began to receive T5 slips from them. Payments were also made by Bul River and Gallowai commencing in 1999. Mr. Stafford argues that by reason of such actions, Bul River and Gallowai treated the Stafford Loan Agreement as their debt since they could not have issued T5 slips for someone else's debt. The 2003 resolutions are, of course, an internal document of Bul River but do indicate that Bul River at least intended to accept the Stafford Loan Agreement as its obligation. The basis upon which Bul River was able to accept this obligation on behalf of Gallowai is unclear and not substantiated.

162 Mr. Stafford argues that these events confirm that Bul River and Gallowai had assumed the obligations of Stanfield. But this argument brings us back to the legal bases for any liability on the part of Bul River and Gallowai that CuVeras raised and I discussed above (assignment, novation, guarantee and estoppel) and which arguments Mr. Stafford agreed did not apply.

163 I agree with the submissions of CuVeras that these later actions of Bul River and Gallowai evidence an intention on the part of Bul River (and perhaps Gallowai) to take over or assume payment of the obligations of Stanfield under the Stafford Loan Agreement. In that sense, and without a novation, in substance these arrangements amount to Bul River and Gallowai agreeing to indemnify Stanfield in respect of his obligations to pay the Stafford Loan Agreement amounts and nothing more.

164 I conclude that Mr. Stafford has not met the onus of proving that the amounts under the Stafford Loan Agreement are obligations or "provable debts" of Bul River and Gallowai.

165 Both CuVeras and Mr. Stafford made submissions concerning the issue as to whether the Stafford Loan Agreement provided for compound interest or not. In light of my conclusions above, it is not necessary to address that issue.

Conclusion

166 In accordance with the above reasons, the Court declares that:

a) the Preston Claim is an equity claim for the purposes of this *CCAA* proceeding; and

b) the Stafford Claim is not a debt claim as against Bul River and Gallowai. It follows that the Creditor List should be amended accordingly and that Mr. Stafford is not entitled to vote on or receive any distribution under any plan of arrangement as may subsequently be filed by those petitioners.

167 If any party is seeking costs, then written submissions should be delivered to the court and the party against whom costs are sought within 30 days of delivery of these reasons. Any response shall be delivered within 15 days and any reply to that response shall be delivered with seven days of that date.

One claim found to be in equity; second claim found not to be in debt.

TAB 5

1996 CarswellOnt 316
Ontario Court of Appeal

Central Capital Corp., Re

1996 CarswellOnt 316, [1996] O.J. No. 359, 132 D.L.R. (4th) 223, 26 B.L.R. (2d) 88, 27 O.R. (3d) 494, 38 C.B.R. (3d) 1, 61 A.C.W.S. (3d) 18, 88 O.A.C. 161

Re CENTRAL CAPITAL CORPORATION; Re Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Re appeal from disallowance of claims of JAMES W. McCUTCHEON, CENTRAL GUARANTEE TRUST COMPANY, as trustee for Registered Retirement Savings Plan of JAMES W. McCUTCHEON and CONSOLIDATED S.Y.H. CORPORATION by PEAT MARWICK THORNE INC., Administrator of certain assets of CENTRAL CAPITAL CORPORATION

ROYAL BANK OF CANADA, BANCA COMMERCIALE ITALIANA OF CANADA, CREDIT LYONNAIS CANADA, DAI-ICHI KANGYO BANK (CANADA), PRUDENTIAL ASSURANCE COMPANY LIMITED, PRUDENTIAL GLOBAL FUNDING, INC., SANWA BANK CANADA, BANK OF TOKYO CANADA, TORONTO-DOMINION BANK, WESTDEUTSCHE LANDESBANK GIROZENTRALE, BACOB SAVINGS BANK s.c., BANCA NAZIONALE DEL LAVORO OF CANADA, BANCO DI ROMA (LONDON), COMMERZBANK INTERNATIONAL S.A., CREDIT COMMERCIAL DE FRANCE, CREDIT COMMUNAL DE BELGIQUE S.A., CREDIT SUISSE (LUXEMBOURG) S.A., DG BANK LUXEMBOURG S.A., KREDIETBANK NV (BELGIUM), NIPPON TRUST BANK LIMITED, OLFRN INVESTMENT (PANAMA) INC., PAUL REVERE LIFE INSURANCE, RBC FINANCE B.V., SCOR REINSURANCE COMPANY OF CANADA, SOCIÉTÉ GÉNÉRALE, BANK OF TOKYO, LTD., CHIBA BANK LTD., DAI-ICHI KANGYO BANK, LTD. (ATLANTA), HOKURIKU BANK LTD., JOROKU BANK LTD., KYOWA SAITAMA BANK (CHICAGO), LAURENTIAN BANK OF CANADA, LAURENTIAN GROUP CORPORATION AND IMPERIAL LIFE ASSURANCE COMPANY OF CANADA, LONG-TERM CREDIT BANK OF JAPAN, LTD., MARITIME LIFE ASSURANCE COMPANY, MITSUBISHI TRUST AND BANKING CORPORATION, SANWA BANK, LIMITED (LONDON), SHOKO CHUKIN BANK (NEW YORK) and TOHO BANK, LTD. v. CENTRAL CAPITAL CORPORATION

Finlayson, Weiler and Laskin JJ.A.

Heard: August 17, 1995
Judgment: February 7, 1996
Docket: Docs. CA C21479, C21477

Counsel: *Bryan Finlay, Q.C.*, and *John M. Buhlman*, for James W. McCutcheon and Central Guaranty Trust.
James H. Grout and *Anne Sonnen*, for Consolidated S.Y.H. Corporation.
Terence J. O'Sullivan and *Paul G. Macdonald*, for unsecured creditors of Central Capital Corporation.
Neil C. Saxe, for Peat Marwick Thorne Inc.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IX Proving claim
IX.1 Provable debts
IX.1.g Claims of director, officer or shareholder of bankrupt corporation
Bankruptcy and insolvency

XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.d Effect of arrangement
XIX.3.d.i General principles

Headnote

Corporations — Arrangements and compromises — Companies' Creditors Arrangement Act — Claims — Preferred shares having right of retraction — Company unable to redeem shares because of insolvency — Preferred shareholders claiming that right constituted debt and claim provable — Administrator denying claims and decision upheld on appeal — Preferred shareholders having no claim under plan of arrangement — Further appeal dismissed — Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

An order was made declaring that the *Companies' Creditors Arrangement Act* applied to CCC and staying all proceedings against CCC. Under the reorganization, the most valuable assets of CCC were transferred to a new company. CCC's creditors were entitled to receive shares and debentures in the new company to reflect some of their outstanding debt. The balance of the debt and equity claimants, including the shareholders of CCC, received common shares in CCC, which now lacked its most valuable assets.

Some of the preferred shares had a right of retraction. The preferred shareholders argued that the right of retraction constituted a future contingent liability of CCC and was, therefore, a debt provable in bankruptcy. Even though CCC was prohibited by its insolvency from making payments to redeem the shares, it was not relieved of its obligation to redeem. The administrator denied their claims, and the preferred shareholders appealed. Their appeals were dismissed upon a finding that the preferred shares remained shares until they were redeemed; therefore, the preferred shareholders were not creditors and had no claims provable. The preferred shareholders appealed.

Held:

The appeals were dismissed.

Per Finlayson J.A. (dissenting)

The preferred shares were the equivalent of vendor shares because they were received in exchange for the transfer of assets to CCC. By deferring the realization of the purchase price of their assets to the agreed dates, the preferred shareholders extended credit to CCC. In return for extending credit, the preferred shareholders agreed to receive dividends calculated in advance, but payable when declared by the board of directors. Therefore the substance of the transaction created a debt owed to the preferred shareholders. The fact that the preferred shareholders had rights as shareholders in CCC up to the time when the retraction clauses were exercisable did not affect their right to enforce payment of the retraction price when it became due. There was no reason why the preferred shareholders should not be treated as both shareholders and creditors.

Per Weiler J.A.

The trial judge was correct in determining that the relationship between the shareholders and CCC was a shareholder relationship. The shareholders continued to be shareholders after the retraction date and remained shareholders at the time of CCC's reorganization. The preferred shares were part of CCC's capital and were always shown as shareholders' equity on CCC's books.

Under s. 36 of the *Canada Business Corporations Act*, a corporation's ability to redeem its redeemable shares is subject to its articles and a solvency requirement. CCC's articles provided for the redemption of all preferred shares on or after the retraction date; however, they stated that the redemption could be carried out only if not "contrary to law." Because CCC could not comply with the solvency requirements of s. 36 on the retraction date, any redemption would be "contrary to law." Therefore, CCC's obligation to redeem its shares was not absolute.

Although there was a right to receive payment, the effect of the solvency provision meant that there was no right to enforce payment. Therefore, the promise to pay the amount owing on the shares in the retraction provision was not one that could be proved as a claim. The retraction amounts did not constitute a debt or liability within the meaning of s. 121 of the *Bankruptcy and Insolvency Act*.

Per Laskin J.A. (concurring)

The relationship between the preferred shareholders and CCC had the characteristics of both debt and equity; however, in substance the preferred shareholders were shareholders and not creditors of CCC. Neither the existence nor the exercise of the retraction rights turned them into creditors. The preferred shareholders agreed to take preferred shares instead of another type of

instrument, such as a bond or debenture, which clearly would have made them creditors. There was no evidence to support the preferred shareholders' contention that by taking the preferred shares they were extending credit to CCC by deferring payment of the purchase price. Further, the shares were recorded in the financial statements of CCC as "capital stock". The amount CCC might be required to pay upon the preferred shareholders' exercise of their retraction rights was not recorded as debt.

Under s. 36(2) of the *Canada Business Corporations Act*, an insolvent corporation is prohibited from redeeming shares. Further, the share conditions attached to the preferred shareholders' shares provided that they could not be redeemed if to do so would be "contrary to applicable law", that being s. 36(2) in this case. To find that the preferred shareholders had provable claims would defeat the purpose of s. 36(2).

Table of Authorities

Cases considered:

By Finlayson J.A. (dissenting)

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 5 Alta. L.R. (3d) 193, 16 C.B.R. (3d) 154, 97 D.L.R. (4th) 385, 7 B.L.R. (2d) 113, [1992] 3 S.C.R. 558, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 143 N.R. 321, 131 A.R. 321, 25 W.A.C. 321 — *considered*

East Chilliwack Agricultural Co-op., Re (1989), 42 B.L.R. 236, 74 C.B.R. (N.S.) 1, 58 D.L.R. (4th) 11 (B.C. C.A.) — *considered*

Exchange Banking Co., Re; Flitcroft's Case (1882), 21 Ch. D. 519 (C.A.) — *referred to*

Fairhall v. Butler, [1928] S.C.R. 369, [1928] 3 D.L.R. 161 — *referred to*

By Weiler J.A.

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 5 Alta. L.R. (3d) 193, 16 C.B.R. (3d) 154, 97 D.L.R. (4th) 385, 7 B.L.R. (2d) 113, [1992] 3 S.C.R. 558, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 143 N.R. 321, 131 A.R. 321, 25 W.A.C. 321 — *distinguished*

East Chilliwack Agricultural Co-op., Re (1989), 42 B.L.R. 236, 74 C.B.R. (N.S.) 1, 58 D.L.R. (4th) 11 (B.C. C.A.) — *distinguished*

Farm Credit Corp. v. Holowach (Trustee of), 86 A.R. 304, 59 Alta. L.R. (2d) 279, [1988] 5 W.W.R. 87, 68 C.B.R. (N.S.) 255, 51 D.L.R. (4th) 501 (C.A.), leave to appeal to S.C.C. refused 100 A.R. 395 (note), 66 Alta. L.R. (2d) xlviii (note), [1989] 4 W.W.R. lxx (note), 73 C.B.R. (N.S.) xxviii (note), 60 D.L.R. (4th) vii (note), 102 N.R. 236 (note) — *considered*

Imperial General Properties Ltd. v. R., (sub nom. *R. v. Imperial General Properties Ltd.)* [1985] 2 S.C.R. 228, 85 D.T.C. 5500, [1985] 2 C.T.C. 299, 31 B.L.R. 77, (sub nom. *Imperial General Properties Ltd. v. Minister of National Revenue)* 62 N.R. 137, (sub nom. *R. v. International General Properties Ltd.)* 21 D.L.R. (4th) 741 — *referred to*

McClurg v. Minister of National Revenue, [1991] 1 C.T.C. 169, 119 N.R. 101, 50 B.L.R. 161, (sub nom. *R. v. McClurg)* 91 D.T.C. 5001, [1991] 2 W.W.R. 244, (sub nom. *McClurg v. Canada)* 76 D.L.R. (4th) 217, [1990] 3 S.C.R. 1020 — *referred to*

Nelson v. Rentown Enterprises Inc., 16 Alta. L.R. (3d) 212, 109 D.L.R. (4th) 608, [1994] 4 W.W.R. 579 (C.A.), affirming (1992), 5 Alta. L.R. (3d) 149, 96 D.L.R. (4th) 586, [1993] 2 W.W.R. 71, 7 B.L.R. (2d) 319, 134 A.R. 257 (Q.B.) — *referred to*

Porto Rico Power Co., Re (1946), 27 C.B.R. 75, 1946 CarswellQue 19, [1946] S.C.R. 178, [1946] 2 D.L.R. 81 (S.C.C.) — *considered*

Reference re Debt Adjustment Act, 1937 (Alberta), 24 C.B.R. 129, [1943] 1 W.W.R. 378, [1943] A.C. 356, [1943] 1 All E.R. 240, [1940] 2 D.L.R. 1 (P.C.) — *referred to*

Vachon v. Canada (Employment & Immigration Commission), [1985] 2 S.C.R. 417, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, (sub nom. *Vachon v. Canada Employment)* 63 N.R. 81 — *referred to*

By Laskin J.A. (concurring)

Canada Deposit Insurance Corp. v. Canadian Commercial Bank, 5 Alta. L.R. (3d) 193, 16 C.B.R. (3d) 154, 97 D.L.R. (4th) 385, 7 B.L.R. (2d) 113, [1992] 3 S.C.R. 558, (sub nom. *Canada Deposit Insurance Corp. v. Canadian Commercial Bank (No. 3))* 143 N.R. 321, 131 A.R. 321, 25 W.A.C. 321 — *distinguished*

East Chilliwack Agricultural Co-op., Re (1989), 42 B.L.R. 236, 74 C.B.R. (N.S.) 1, 58 D.L.R. (4th) 11 (B.C. C.A.) — *distinguished*

Farm Credit Corp. v. Holowach (Trustee of), 86 A.R. 304, 59 Alta. L.R. (2d) 279, [1988] 5 W.W.R. 87, 68 C.B.R. (N.S.) 255, 51 D.L.R. (4th) 501 (C.A.) [leave to appeal to S.C.C. refused 100 A.R. 395 (note), 66 Alta. L.R. (2d) xlviii (note), [1989] 4 W.W.R. lxx (note), 73 C.B.R. (N.S.) xxviii (note), 60 D.L.R. (4th) vii (note), 102 N.R. 236 (note)] — *referred to*

Laronge Realty Ltd. v. Golconda Investments Ltd. (1986), 7 B.C.L.R. (2d) 90, 63 C.B.R. (N.S.) 76 (C.A.) — *referred to*

Meade (Debtor), Re; Ex parte Humber v. Palmer (Trustee), [1951] 2 All E.R. 168, [1951] Ch. 774 (D.C.) — *referred to*

Mountain State Steel Foundries, Inc. v. Commissioner, 284 F.2d. 737, 60-2 U.S. Tax Cas. (CCH) P 9797, 6 A.F.T.R. 2d (P-H) P 5910 (4th Cir. 1960) — *referred to*

National Bank für Deutschland v. Blucher, (sub nom. *Blucher v. Canada (Custodian)*) [1927] S.C.R. 420, [1927] 3 D.L.R. 40 — *distinguished*

Nelson v. Rentown Enterprises Inc. (1992), 5 Alta. L.R. (3d) 149, 96 D.L.R. (4th) 586, [1993] 2 W.W.R. 71, 7 B.L.R. (2d) 319, 134 A.R. 257 (Q.B.), affirmed 16 Alta. L.R. (3d) 212, 109 D.L.R. (4th) 608, [1994] 4 W.W.R. 579 (C.A.) — *referred to*

Patricia Appliance Shops Ltd., Re (1922), 2 C.B.R. 466, 52 O.L.R. 215, [1923] 3 D.L.R. 1160 (S.C.) — *referred to*

Robinson v. Wangemann, 75 F.2d 756 (5th Cir. Tex. 1935) — *considered*

Trevor v. Whitworth (1887), 12 App. Cas. 409, [1886-90] All E.R. Rep. 46 (H.L.) — *considered*

Wolff v. Heidritter Lumber Co., 112 N.J. Eq. 34, 163 A. 140 (Ch. 1932) — *referred to*

Statutes considered:

Assignments and Preferences Act, R.S.O. 1990, c. A.33.

Bankruptcy Act, R.S.C. 1970, c. B-3 [R.S.C. 1985, c. B-3] —

s. 95(1) [R.S.C. 1985, c. B-3, s. 121(1)]

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 —

s. 2 "claim provable in bankruptcy"

s. 2 "corporation"

s. 2 "creditor"

s. 95

s. 96

s. 101

s. 121

s. 121(1)

Canada Business Corporations Act, R.S.C. 1985, c. C-44 —

s. 2 "liability"

s. 25(3)

s. 34

s. 34(2)

s. 35

s. 36

s. 36(1)

s. 36(2)

s. 39

s. 40

s. 40(1)

s. 40(3)

s. 42

s. 173

s. 191

s. 191(7)

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

s. 12(1)

s. 20

Cooperative Association Act, R.S.B.C. 1979, c. 66.

Fraudulent Conveyances Act, R.S.O. 1990, c. F.29.

Law of Property Act, R.S.A. 1980, c. L-8.

Appeals from judgment reported at (1995), 29 C.B.R. (3d) 33, 22 B.L.R. (2d) 210 (Ont. Gen. Div. [Commercial List]) dismissing appeals from denial of claims by administrator under *Companies' Creditors Arrangement Act* plan of reorganization.

Finlayson J.A. **(dissenting):**

1 The appellant James W. McCutcheon and Central Guarantee Trust Company as Trustee for the Registered Retirement Savings Plan of James W. McCutcheon (hereinafter sometimes referred to collectively as "McCutcheon") and the appellant Consolidated S.Y.H. Corporation ("SYH") appeal from the order of The Honourable Madam Justice Feldman of the Ontario Court (General Division) dated January 9, 1995 [reported at 29 C.B.R. (3d) 33]. Feldman J. dismissed appeals from decisions dated January 20, 1993 and February 16, 1993 of the respondent Peat Marwick Thorne Inc., in its capacity as Interim Receiver, Manager and Administrator ("Administrator") of certain assets of Central Capital Corporation ("Central Capital"). The Administrator disallowed Proofs of Claim submitted by the appellants with respect to a Plan of Arrangement under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). Leave to appeal the order of Feldman J. was granted on March 17, 1995 by The Honourable Mr. Justice Houlden.

Overview of the Proceedings

2 These appeals arise out of the insolvency of Central Capital which in and prior to December 1991 defaulted under its obligations to various unsecured lenders, note holders and subordinated debt holders. In early December of 1991, Central Capital advised its creditors that, pending implementation of new financial arrangements, it had decided to discontinue payment of all interest and principal due under outstanding loans, with the exception of indebtedness due under secured notes issued to The Royal Trust Company. In an Agreed Statement of Facts, which was prepared by the parties for the purposes of appeals from the

disallowances of the Administrator, it was agreed that at all material times since in or prior to December 1991, Central Capital was insolvent. It had a total unsecured debt of $1,577,359,000 and, among other things:

(a) it was unable to pay its liabilities as they became due; and

(b) the realizable value of its assets was less than the aggregate of its liabilities.

3 By Notice of Application issued June 12, 1992, thirty-nine of the creditors commenced an application pursuant to the *CCAA* for an order declaring the following: that Central Capital was a debtor company to which the *CCAA* applied; that Peat Marwick Thorne Inc. be appointed Administrator of the property, assets and undertaking of Central Capital; that a stay of proceedings against Central Capital, except with leave of the court, be granted and; that the applicants be authorized and permitted to file a plan of compromise or arrangement under the *CCAA*.

4 By order of Houlden J. made June 15, 1992, Central Capital was declared to be a company to which the *CCAA* applied and all proceedings against Central Capital were stayed. By further order of Houlden J. made July 9, 1992, it was provided, among other things, that:

(a) Peat Marwick Thorne Inc. was appointed Administrator, Interim Receiver and Manager of such of the undertaking, property and assets of Central Capital as necessary for the pur pose of effecting the transaction described in the order pursuant to which specified significant assets of Central Capital would be transferred to a newly incorporated company called Canadian Insurance Group Limited ("CIGL");

(b) the Administrator was authorized to enter into and carry out a Subscription and Escrow Agreement with creditors of Central Capital pursuant to which creditors of Central Capital would be entitled to elect to exchange a portion of the indebtedness owing to them by Central Capital for shares and debentures to be issued by CIGL;

(c) the Administrator was authorized and directed to supervise the calling for claims of creditors of Central Capital who elected to exchange a portion of the indebtedness from Central Capital for shares and debentures to be issued by CIGL as aforesaid; and

(d) Central Capital was authorized and permitted to file with the court a formal plan of compromise or arrangement with Central Capital's secured and unsecured creditors and shareholders in accordance with the *CCAA* and the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*"), which would provide for the restructuring and reorganization of the debt and equity of Central Capital in the manner set out in the said order.

5 According to the Agreed Statement of Facts, the order of Houlden J. was made without prejudice to the rights of the appellants to assert claims as creditors in the CIGL transaction. Pursuant to the terms of the July 9, 1992 order, all claims of creditors of Central Capital who wished to participate in CIGL were required to be submitted to the Administrator by September 8, 1992, or such other date fixed by the court. The Administrator received claims from various persons who wished to participate, including the claims submitted by the appellants herein.

6 The Administrator disallowed the claims of McCutcheon and SYH by Notices of Disallowance dated January 20, 1993 and February 16, 1993 in which various reasons were cited as to why the appellants did not qualify as creditors. The effect of this disallowance was that McCutcheon and SYH could participate only as shareholders in the plan of compromise and arrangement under the *CCAA* to be put forward by Central Capital. In dismissing the appeals from this disallowance, Feldman J. found that the appellants were not creditors because they did not have a claim provable under the *Bankruptcy Act* (Canada), R.S.C. 1985, c. B-3 ("*Bankruptcy Act*").

Issue

7 The Agreed Statements of Facts set out the issue in the appeal in the following language:

> Do the appellants, or any of them, have claims provable against CCC [Central Capital] within the meaning of the *Bankruptcy Act (Canada)*, as amended as of the date of the Restated Subscription and Escrow Agreement? If the appellants, or any of them, have provable claims, then the proof of claim of any appellant that has a claim provable is to be allowed as filed and the appeal from the disallowance allowed, and the appellants, or any of them, whose claim is allowed, are to participate in the Plan of Arrangement of Central Capital as a senior creditor.

8 The determination of this issue was deferred by Houlden J.'s order of October 27th, 1992. He ordered therein that preferred shareholders who had filed claims against Central Capital as creditors were not permitted to vote at the meeting of creditors called to consider the Plan of Arrangement "... but such is without prejudice to the rights of those claimants to prosecute their claims as filed". The last paragraph in the order ended:

> For greater certainty, the validity of any claim filed by a preferred shareholder shall not be affected by the terms of this paragraph.

Overview of the Restructuring of Central Capital

9 The order of Houlden J. of July 9, 1992 directed the restructuring of Central Capital under the *aegis* of the court. The order, and others that would follow, contemplated that the restructuring would take place in two stages. The first stage involved the transfer to the Administrator of certain major assets of Central Capital to a company to be incorporated called Central Insurance Group Limited (CIGL). This company is frequently referred to in the documentation and the reasons of Feldman J. as "Newco". CIGL was then to be owned by those Central Capital creditors who chose to participate in the reorganization by accepting a reduction in their debts due from Central Capital and exchanging this reduced indebtedness for debentures in CIGL. Subscription for debentures by this means additionally entitled the creditors to subscribe for shares in CIGL. Our understanding from counsel is that the assets transferred to CIGL included the assets acquired by Central Capital from the appellant in purchase agreements described later in these reasons.

10 The court approved a Subscription and Escrow Agreement setting out this arrangement. In order to participate, the creditors were required to file with the Administrator of Proof of Claim in the prescribed form along with other documents confirming the creditor's intention to reduce its claim against Central Capital and to subscribe for debentures and shares of CIGL. Claims were to be based on Central Capital's indebtedness to creditors as of June 15, 1992, the date of the court-ordered stay of proceedings. This transaction was completed on October 1, 1992 and resulted in CIGL being owned by the creditors of Central Capital in exchange for a reduction in Central Capital's unsecured debt in the amount of $603,000,000.

11 The second stage of the restructuring involved a Plan of Arrangement under the *CCAA*. That plan as put forward by Central Capital recognized four classes of creditors, only one of which, namely that of "Senior Creditors", could apply to the appellants. The Plan of Arrangement, as amended, provided that Central Capital would issue to Senior Creditors *pro rata* on the basis of their senior claims of secured promissory notes in the aggregate principal amount of $20,000,000 of secured debt, which were to be known as first secured notes. A similar arrangement was made for the issuance of $1,000,000 of second secured promissory notes to subordinated creditors. Senior and subordinated creditors included any creditor whose claim had been allowed under the CIGL claims procedure in the first stage, to the extent of that creditor's reduced claim.

12 The Plan of Arrangement also called for the creation of a new class of shares in Central Capital to be called the Central New Common Shares. Central Capital would issue to the above Senior and Subordinated Creditors ninety percent of the new share capital of Central Capital in extinguishment of the balance of their debt. The Central Capital shareholders of all classes would have their existing shares converted into the remaining ten percent of the Central New Common Shares. All of the existing preferred and common shares would be cancelled upon implementation of the plan.

13 The amended Plan of Arrangement was ultimately voted on and approved by all four classes of creditors of Central Capital. On December 18, 1992, Houlden J. sanctioned this plan of arrangement under the *CCAA*. He authorized and directed Central Capital to apply for Articles of Reorganization pursuant to s. 191 of the *CBCA*, so as to authorize the creation of the

Central New Common Shares for implementation of the amended Plan of Arrangement. He also lifted the stays of proceedings affecting Central Capital and its ability to carry on business as of January 1, 1993.

14 The effect of the amended Plan of Arrangement after approval was that all remaining debts and obligations owed by Central Capital to its creditors on or before June 15, 1992 were extinguished and all outstanding and unissued shares of any kind in Central Capital were cancelled and replaced by Central New Common Shares. Central Capital was then free to carry on business. It was no longer insolvent.

Facts as They Relate to the Claim of McCutcheon

15 By a Share Purchase Agreement dated June 15, 1987 between Central Capital and Gormley Investments Limited ("Gormley") and Heathley Investments Limited ("Heathley"), Central Capital agreed to purchase all Class "B" Voting Shares of Canadian General Securities Limited ("CGS") that were owned by Gormley and Heathley. James W. McCutcheon and his brother, who were the sole shareholders of Gormley, represented to Central Capital that CGS owned substantially all of the shares of Canadian Insurance Sales Limited, which in turn owned substantially all of the shares in a number of operating insurance, credit and trust companies. The consideration for the purchase of the CGS shares was $575 per share. The vendors were to be paid $400 per share in cash on closing and were to receive seven Series B Senior Preferred Shares of Central Capital. These shares contained a retraction clause entitling the holder to retract each preferred share on July 1, 1992 for $25. Failing issuance of the shares by Central Capital, the vendors were to receive an additional $175 for each CGS share. The Share Purchase Agreement and later the Articles of Central Capital further provided that the holders of Series B Senior Preferred Shares were entitled to receive dividends as and when declared by the directors of Central Capital out of monies of the corporation properly applicable to the payment of dividends and in the amount of $1.90625 per share per annum (being 7 5/8% per annum on the stated capital of $25 per share) payable in equal quarterly payments. No dividends were in fact declared.

16 The Certificate of Amendment for Central Capital dated July 30, 1987, and the Articles of Amendment setting out the provisions attaching to the Series B Senior Preferred Shares contain all the terms and conditions governing the said shares. I am setting out below a description of those that are relevant to this appeal.

17 Pursuant to Article 4.1 of the Senior Series B Provisions, each holder of Series B Senior Preferred Shares was entitled, subject to and upon compliance with the provisions of Article 4, to require Central Capital to redeem all or any part of the Series B Senior Preferred Shares registered in the name of that holder on July 1, 1992 at a price equal to $25 per share, plus all accrued and unpaid dividends thereon, calculated to but excluding the Retraction Date.

18 Article 4.2 of the Senior Series B Provisions sets out the procedure for retraction of the shares. Article 4.3 of the Senior Series B Provisions provides that if the redemption by Central Capital of all of the Series B Senior Preferred Shares required to be redeemed on the Retraction Date would be contrary to applicable law or the rights, privileges, restrictions and conditions attaching to any shares of Central Capital ranking prior to Series B Senior Preferred Shares, then Central Capital shall redeem only the maximum number of Series B Senior Preferred Shares which it determined was permissible to redeem at that time. Article 4.3 provides the mechanism for a *pro rata* redemption from each holder of the tendered Series B Senior Preferred Shares and redemption of the tendered Series B Senior Preferred Shares by Central Capital at further dates.

19 Article 4.4(a) provides that subject to Section 4.4(b), the election of any holder to require Central Capital to redeem any Series B Senior Preferred Shares shall be irrevocable upon receipt by the transfer agent of the Certificates for the shares to be redeemed and the signification of election of the holder of the Series B Senior Preferred Shares.

20 Article 4.4(b) of the Senior Series B Provisions provides that if the retraction price is not paid by Central Capital, Central Capital shall forthwith notify each holder of the Series B Senior Preferred Shares who has not received payment for his deposited shares of the holder's right to require Central Capital to return all (but not less than all) of the holder's deposited Share Certificates and the holder's rights under Article 4.3 outlined above.

21 Article 4.5 of the Senior Series B Provisions provides that the inability of Central Capital to effect a redemption shall not affect or limit the obligation of Central Capital to pay any dividends accrued or accruing on the Series B Senior Preferred Shares from time to time not redeemed and remaining outstanding.

22 Article 7 of the Series Senior B Provisions provides that in the event of the liquidation, dissolution or winding-up of Central Capital, whether voluntary or involuntary, or any other distribution of assets of Central Capital among its shareholders for the purposes of winding up its affairs, the holders of the Series B Senior Preferred Shares shall be entitled to receive, from the assets of Central Capital, $25 per Series B Senior Preferred Shares, plus all accrued and unpaid dividends thereon, to be paid prior to payment to junior ranking shareholders. Upon payment of such amounts, the holders of the Series B Senior Preferred Shares shall not be entitled to share in any further distribution of assets of Central Capital.

23 A Notice of Retraction Privilege was sent by Central Capital to the holders of Series B Senior Preferred Shares with a cover letter dated April 23, 1992. The letter stated, among other things, that Central Capital would not redeem any shares because the redemption of such shares would be contrary to applicable law in the context of Central Capital's then current financial situation. McCutcheon and Central Guaranty Trust deposited for redemption 406,800 and 26,000 Series B Senior Preferred Shares, respectively, in accordance with the Senior Series B Provisions and the Notice of Retraction Privilege. The shares were deposited on May 28, 1992, with Montreal Trust Company of Canada, pursuant to the Notice of Retraction Privilege. The shares were properly tendered for redemption in the manner and within the time required by Central Capital's Articles of Amendment.

24 Central Capital did not pay the redemption price on July 1, 1992 and on July 20, 1992 it notified each holder of Series B Senior Preferred Shares of its right to require Central Capital to return all of the holder's deposited Share Certificates as required by Article 4.4(b) of the Senior Series B Provisions. McCutcheon and Central Guaranty Trust did not exercise that right.

25 Pursuant to the terms of Houlden J.'s order of July 9, 1992 directing the restructuring of Central Capital, McCutcheon submitted to the Administrator, as a creditor of Central Capital, Proofs of Claim dated September 3, 1992 and September 4, 1992, respectively. McCutcheon claimed the amount of $10,913,593.69 in respect of his Series B Senior Preferred Shares tendered for redemption. Central Guaranty Trust claimed the amount of $697,526.68 in respect of its tendered 26,000 Series B Senior Preferred Shares. McCutcheon also executed and submitted the Restated Subscription and Escrow Agreement and other documents electing to participate in CIGL. These claims were completed and submitted in the prescribed form and within the time required by Houlden J.'s order.

26 As was previously noted, these claims were disallowed by the Administrator. The substance of the Administrator's reasons for disallowance was that the ability of Central Capital to redeem these preference shares is restricted by the provisions of the *CBCA* and it would be contrary to applicable law to redeem the shares in the context of Central Capital's financial position. The relevant provision of the *CBCA* provides:

> **Redemption of shares.**
>
> *36.* (1) Notwithstanding subsection 34(2) or 35(3), but subject to subsection (2) and to its articles, a corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding the redemption price thereof stated in the articles or calculated according to a formula stated in the articles.
>
> **Limitation.**
>
> (2) A corporation shall not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that
>
> (*a*) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
>
> (*b*) the realizable value of the corporation's assets would after the payment be less than the aggregate of
>
> (i) its liabilities, and

(ii) the amount that would be required to pay the holders of shares that have a right to be paid, on a redemption or in a liquidation, rateably with or prior to the holders of the shares to be purchased or redeemed.

Evidently, the Administrator equated redemption by the corporation with the right of retraction by the preferred shareholder. It agreed with Central Capital's position that once it became insolvent in December of 1991, Central Capital no longer had the ability to redeem the shares tendered for retraction and thus McCutcheon was restricted to exercising what rights it might have as a shareholder.

Facts as They Relate to the Claim of SYH

27 Pursuant to an Agreement of Purchase and Sale made as of June 30, 1989, as amended, Scottish & York Holdings Limited (the predecessor to SYH) sold to Central Capital the shares of Central Canada Insurance Services Limited, Eaton Insurance Company, Scottish & York Insurance Co. Limited and Victoria Insurance Company of Canada (collectively the "Insurance Companies"), except for certain preference shares held by the directors of those corporations. In consideration of this transfer, Central Capital issued to Scottish & York Holdings Limited 60,116,000 Series A Junior Preferred Shares and 9,618,560 Series B Junior Preferred Shares.

28 The Articles of Central Capital provided that it would pay on each dividend payment date prior to the fifth anniversary of this issue, as and when declared by the directors out of the assets of the corporation properly applicable to the payment of dividends, a dividend of $.08 for each outstanding Series A Junior Preferred Share. The dividend was payable quarterly by the issuance of .02 Series Junior Preferred Shares for every outstanding Series A Junior Preferred Share. No dividends were in fact declared.

29 The Articles also provided that Central Capital was obligated to retract the Series A Junior Preferred Shares and Series B Junior Preferred Shares, at the option of the holders of those shares, on the fifth anniversary of their issuance. The retraction price was $1.00 per share plus all accrued and unpaid dividends. Payment of the retraction price of these shares by Central Capital was subject to the provisions of the *CBCA*, which governs the affairs of Central Capital. For the purposes of this appeal, I believe that we can treat the balance of the provisions relating to these preferred shares as being the same as those governing the McCutcheon Series B Senior Preferred Shares.

30 Given that the operative date for proving claims against Central Capital was June 15, 1992, the retraction date governing the preferred shares of SYH was some two years removed. Notwithstanding, on September 8, 1992 SYH executed and delivered to the Administrator a Proof of Claim, a Counterpart of the Restated Subscription and Escrow Agreement, an initial Share Subscription and an Instrument of Claims Reduction Form, all in the prescribed form and within the time required. The claim was that SYH was holding or entitled to hold the following shares of Central Capital:

(a) 60,116,000 Junior Preferred Series A shares;

(b) 9,618,560 Junior Preferred Series B shares;

(c) 4,611,095 Junior Preferred Series B shares accrued to June 15th, 1992 but not yet issued to SYH;

for a total of 74,345,655 shares, each having a retraction value of $1.00. However, because of some adjustments in favour of Central Capital to the purchase price of the shares sold by SYH to Central Capital under the June 30, 1989 Agreement of Purchase and Sale, the net claim as of June 15, 1992 was reduced from $74,345,655 to $72,388,836.

31 By Notice of Disallowance dated January 20, 1993, the Administrator disallowed the claim by SYH to subscribe for debentures and common shares to be issued by CIGL. The reasons for the disallowance are similar to those provided for disallowing the claims of McCutcheon. The Administrator found that SYH's right to require Central Capital to retract the Series A and B Junior Preferred Shares only arose on the expiry of the fifth anniversary of their issuance and that Central Capital was precluded from retracting those shares by virtue of its insolvency and the provisions of the *CBCA*. Hence SYH, like McCutcheon, was limited to exercising what other rights it might have as a shareholder.

Analysis

32 Although the factual groundwork is necessary for putting in perspective the sole issue before the court, the final question confronting us is a narrow one. Did the retraction clauses in the appellants' shares create a debt owed by Central Canada as of June 15, 1992 within the meaning of the *Bankruptcy Act*? I think that they did.

33 It is agreed that the operative section of the *Bankruptcy Act* is s. 121(1). It reads as follows:

> *121.*(1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation in curred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

There was no bankruptcy in this case and thus the relevant date was agreed to be June 15, 1992. The obligations of Central Capital to the appellants were incurred before that date, and so the only question becomes whether the obligations created a debt between the appellants and Central Capital.

34 What then is a debt? All the parties turn to *Black's Law Dictionary*, quoting different editions. The following is from the Sixth Edition (1990), at p. 403:

> **Debt.**
>
> A sum of money due by certain and express agreement. A specified sum of money owing to one person from another, including not only the obligation of debtor to pay but right of creditor to receive and enforce payment. ...
>
> A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future.

35 The above is consistent with what is defined as a debt by *Jowitt's Dictionary of English Law*, 2nd ed. (1977), at p. 562:

> A debt exists when a certain sum of money is owing from one person (the debtor) to another (the creditor). Hence "debt" is properly opposed to unliquidated damages; to liability, when used in the sense of an inchoate or contingent debt; and to certain obligations not enforceable by ordinary process. "Debt" denotes not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment.

And finally, *The Shorter Oxford Dictionary*, 3rd ed. (1973), at p. 497:

> **Debt**
>
> *1.* That which is owed or due; anything (as money, goods or service) which one person is under obligation to pay or render to another.
>
> *2.* A liability to pay or render something; the being under such liability.

36 I have no difficulty in finding that the claims of the appellants in the case under appeal fall within all of the above definitions. As will be discussed herein, concern was expressed in this case over whether or not the appellants as creditors were entitled to "receive and enforce payment" on the "debt" because of the insolvency of Central Capital on June 15, 1992. I will deal with the specific arguments relating to the effect of insolvency on this particular indebtedness in due course, but for the moment I am content to observe that the above definitions contemplate only that the creditor's right to recover is the reciprocal of the debtor's obligation to pay. For every debtor there must be a creditor. There may be cases where it is difficult to identify the person who in law may receive and enforce payment, but this is not such a one.

37 With great respect to the judge of first instance and to the submissions of counsel for the unsecured creditors, I believe that the fundamental error that has been made in these proceedings arises from the conception that the preferred shares in question

can either be debt instruments or equity participation instruments, but they cannot have the attributes of both. Feldman J. had this to say at p. 48 of her judgment:

> Although the right of retraction at the option of the preferred shareholder may be less common than the usual right of the company to redeem at its option, that right is one of the incidents or provisions attaching to the preferred shares, but does not change the nature of those shares from equity to debt. The parties have characterized the transaction as a share transaction. The court would require strong evidence that they did not intend that characterization in order to hold that they rather intended a loan.
>
> In my view, this case turns on whether the right of retraction itself creates a debt on the date the company becomes obligated to redeem even if it cannot actually redeem by payment on that date, or a contingent future debt on the same analysis, not on whether the preferred shares themselves with the right of retraction are actually debt documents.
>
> Because the preferred shares remain in place as shares until the actual redemption, the appellants are not creditors and have no claim provable under the *Bankruptcy Act* (Canada), and the appeals are therefore dismissed.

38 As I read these reasons, the learned judge is in effect stating that these instruments are preferred shares in the corporation because the parties have so described them. In the first place, I do not think that describing the documents as preferred shares is conclusive as to what instrument the parties thought they were creating. In the second place, it is not what the parties call the documents that is determinative of their identity, but rather it is what the facts require the court to call them. The character of the instrument is revealed by the language creating it and the circumstances of its creation. Although these instrument may "remain in place as shares" until they are actually redeemed, they also contain a specific promise to pay at a specified date. This is the language of debt. I cannot accept the proposition that a corporate share certificate cannot create a corporate debt in addition to the certificate holder's rights as a shareholder.

39 The rules relating to the competing rights of shareholders and creditors of an insolvent corporation have become so regulated by governmental action that one can readily lose sight of the common law basis for making a distinction. To understand the difference in treatment, we must re-examine what a share of a corporation represents. Initially, a share is issued by the corporation to raise share capital. The price of the share is money or the promise of money. Accordingly, an individual share is one of a number of separate but integral parts of the authorized capital of a corporation. Even though it is the shareholders who contribute to the capital of the corporation, the capital remains the property of the corporation. The shareholders, however, as owners of the shares of capital, effectively control the corporation. They have the responsibility of managing its affairs through their control over the board of directors and in popular terminology are considered to be the owners of the corporation. However, the corporation is a separate entity in law, and if in the course of carrying out its business it incurs debts to third parties, those debts are those of the corporation. A corporation is an intangible and its capital therefore represents its substance to third parties having business dealings with the corporation. A preferred share is simply a share of a class of issued shares which contains a preference over other classes of shares, whether preferred or common: see Sutherland, *Fraser and Stewart on Company Law of Canada*, 6th ed. (1993), at pp. 157 and 195 for further discussion.

40 The rights of shareholders are conveniently summarized by R.M. Bryden in his chapter, "The Law of Dividends", contained in Ziegel ed., *Studies in Canadian Company Law* (1967), at p. 270:

> The purchaser of a share in a business corporation acquires three basic rights: he is entitled to vote at shareholders' meetings; he is entitled to share in the profits of the company when these are declared as dividends in respect of the shares of the class of which his share forms a part, and he is entitled, upon the winding-up of the corporation, to participate in the distribution of the assets of the company that remain after creditors are paid. A fourth right which should be noted is the right to transfer ownership in his share, whereby the owner for the time being may realize upon the increase in value of the company's assets, or its favourable prospects, by selling his share at a price reflecting the buyer's estimation of the value of the rights he will acquire. Unless the shareholder chooses to sell his share, he can realize a return upon his investment only through receipt of dividends or by the return of his capital upon an authorized reduction of capital or winding up.

41 Shareholders are variously characterized as entrepreneurs, investors or risktakers and as such they have the opportunities of benefitting from the successes of the corporation and suffering from its failures. While the corporation is an operating entity, the shareholders receive their rewards, if they are any, through the payment of dividends declared from time to time by the board of directors. While the source of these dividends is not restricted to surplus funds, the result of the payment of the dividend must not result in a return of capital to the shareholders. The classic justification for this rule was stated by Sir George Jessel, Master of the Rolls in *Re Exchange Banking Co.; Flitcroft's Case* (1882), 21 Ch. D. 519 (C.A.), at 533-4:

> The creditor has no debtor but that impalpable thing the corporation, which has no property except the assets of the business. The creditor ... gives credit to that capital, gives credit to the company on the faith of the representation that the capital shall be applied only for the purposes of the business, and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders. ...

42 Creditors, on the other hand, do not have an ownership or equity interest in the corporation. They are third parties who have loaned money or otherwise advanced credit to the corporation. They look to the company for payment in accordance with the terms of the contract creating the indebtedness. They are also restricted in their recovery to the amounts stipulated in the terms of indebtedness. They are entitled to payment regardless of the financial circumstances of the debtor corporation and accordingly are not restricted to receiving payment of the debt from surplus. They can be paid out of assets or through the creation of further indebtedness. It is immaterial how the corporation records this indebtedness in its internal books. In some circumstances the indebtedness could properly reflect the acquisition of property from a creditor as a capital asset. This does not, however, convert the creditor into an investor. The vendor of the property remains a creditor and retains priority over shareholders in the event of a bankruptcy or insolvency.

43 In my view, the reasons under appeal do not reflect a sensitivity to the circumstances which gave rise to the issuance of the preference shares. The shares were not issued by Central Capital to the general public in order to raise capital and do not represent an investment by the public in the capital of the corporation. They were issued to specific persons as payment for the acquisition of specified assets. While the corporation was authorized by its Articles of Incorporation to issue preferred shares generally, the shares issued to the appellants were structured to meet the requirements of the appellants as vendors of the controlling interest in the operating companies that Central Capital was acquiring. In my view, these preference shares are the equivalent of vendor shares in that the appellants received them in exchange for the transfer of assets to Central Capital.

44 In the case of McCutcheon, the retraction provision in the preferred shares represented only partial payment of an agreed value for the assets, but in the case of SYH, they represented the full value. In both cases, the agreed value as reflected in the retraction price was guaranteed by Central Capital to be retractable at a fixed price at a predetermined date. By postponing the obligation to pay the purchase price in this way, Central Capital was using the retraction provisions of the preference shares as a vehicle for the financing of its expanding asset base. The appellants, for their part, deferred the realization of the purchase price of their assets to the agreed dates and thereby extended credit to the corporation. In return for extending credit for some or all of the selling price, the appellants agreed to receive dividends calculated in advance but payable as and when declared by the board of directors.

45 Thus, in looking at the substance of the transaction that led to the issuance of the preference shares, it appears to me that the retraction clauses were promises by Central Capital to pay fixed amounts on definite dates to the appellants. They evidenced a debt to the appellants. The fact that the appellants as holders of the preference shares had rights as shareholders in the corporation up to the time when the retraction clauses were exercisable did not affect their right to enforce payment of the retraction price when it became due.

46 The validity of an analysis directed to the substance of the transaction is supported by *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558, a judgment of the Supreme Court of Canada delivered by Iacobucci J. The case involved a number of corporations constituting a support group which entered into an arrangement to provide emergency financial assistance to Canadian Commercial Bank ("CCB"). On the ultimate failure of the bank, the issue arose as to whether

the monies advanced to CCB under this support arrangement were in the nature of a loan or in the nature of a capital investment. I find instructive to our situation Iacobucci J.'s observation at pp. 590-1:

> As I see it, the fact that the transaction contains both debt and equity features does not, in itself, pose an insurmountable obstacle to characterizing the advance of $255 million. Instead of trying to pigeonhole the entire agreement between the Participants and CCB in one of two categories, I see nothing wrong in recognizing the arrangement for what it is, namely, one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a debtor-creditor relationship. Financial and capital markets have been most creative in the variety of investments and securities that have been fashioned to meet the needs and interests of those who participate in those markets. It is not because an agreement has certain equity features that a court must either ignore these features as if they did not exist or characterize the transaction on the whole as an investment. There is an alternative. It is permissible, and often required, or desirable, for debt and equity to co-exist in a given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing a characterization issue. Again, it is not because there are equity features that it is necessarily an investment in capital. This is particularly true when, as here, the equity features are nothing more than supplemen tary to and not definitive of the essence of the transaction. When a court is searching for the *substance* of a particular transaction, it should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement. [Emphasis in original.]

47 I have no difficulty in finding that the appellants' preferred shares with their retraction clauses are of "a hybrid nature, combining elements of both debt and equity". As to the equity component, the appellants are shareholders prior to exercising their retraction rights in that they have the right to vote in certain circumstances and have a right to receive dividends when and if they are declared by the board of directors. The debt component is more significant however. The shares were not issued to investors, but to vendors of property. The vendors were entitled to receive a fixed sum at a specified time in payment therefor. Pending payment, the vendors were entitled to receive dividends which were the equivalent of interest on the unpaid balance.

48 I can think of no reason why the holders of these preferred shares should not be treated as both shareholders and creditors. It does not concern me that these appellants act as shareholders before their retraction rights are exercisable. Nor do I see any hardship to other creditors of Central Capital arising from the ability of these appellants to claim as creditors in the restructuring of the company given that the appellants are unpaid with respect to substantial assets sold to the corporation and now transferred on the restructuring to GIGL.

49 Much was made in argument of the fact that the retraction amounts could not be paid on the retraction dates. In the case of McCutcheon, the corporation was insolvent and subject to court administration on the due date of July 1, 1992. In the case of SYH, the retraction date did not arrive before the reorganization was complete.

50 The narrow issue of the effect of insolvency on a debt has been dealt with by the British Columbia Court of Appeal in *Re East Chilliwack Agricultural Co-op.* (1989), 74 C.B.R. (N.S.) 1. In this case, the appellants were one-time members of three co-operative associations. The rules of the co-operatives permitted a member to withdraw upon written notice to the board of directors to that effect. The member was entitled to elect to have his shares redeemed either in equal instalments over five years or in one payment with interest at the end of five years. In April of 1987, the superintendent of co-operatives, under the authority of the *Cooperative Association Act*, R.S.B.C. 1979, c. 66, suspended the co-operatives' right to redeem their shares until their financial situation was no longer impaired. The three co-operatives subsequently went bankrupt and a two-fold issue came before the bankruptcy court: (1) whether those members whose notices of withdrawal had been accepted by the board of directors but who had not yet received the value of the shares were entitled to rank as unsecured creditors, and (2) whether those who had delivered notices that had not been accepted were to be treated as unsecured creditors. The court of first instance found that the members were shareholders and answered both questions in the negative. That judge was reversed on appeal with the majority of the court deciding that the answer to both questions was yes. Hutcheon J.A. for the majority stated at p. 13:

> I shall use Mr. Neels [a co-operative member] as my example. According to R. 3.06 he ceased to be a shareholder in May 1983. In May 1984 the Agricultural Co-operative owed him the first of five payments, or $686.40. I know of no principle of law that would support the proposition that Neels could not sue for that amount if the Agricultural Co-operative failed

> to pay in May 1984. Of course, the superintendent of co-operatives has power under s. 15(2) to suspend payments if, in his opinion, the financial position of the co-operative was impaired. Subject to that power, the position of Neels and the Agricultural Co-operative would be that of ordinary creditor and debtor. In my opinion, the order made by the judge cannot be sustained on the first ground.

From this case, I extract the proposition that the fact of an insolvency, whether declared or not, does not change the nature of the relationship between debtor and creditor. It continues notwithstanding the inability of the debtor to pay or the creditor to collect.

51 It appears to me, with deference, that the issue of the effect of Central Capital's insolvency on the character of the retraction payments is something of a red herring. The contest in this appeal is between those who are conceded to be unsecured creditors and those whose claim to such status is contested. In both cases, any right to payment was suspended by Central Capital's announcement in December of 1991 that it was insolvent and that it had suspended all payments of principal and interest to unsecured creditors. This course of action was not freely chosen but was required by law. Any payments to creditors after the date of insolvency would be voidable at the instance of creditors on the basis that they were fraudulent preferences. In addition to ss. 95 and 96 of the *Bankruptcy Act* dealing with fraudulent preferences generally, there is provincial legislation in the form of the *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, and the *Assignments and Preferences Act*, R.S.O. 1990, c. A.33, that would be applicable. Counsel for the unsecured creditors maintains that the right to redeem shares, including preference shares was postponed by s. 36(2) of the *CBCA, supra*. I am not certain that s. 36(2) applies to the retraction provisions of the appellants' preference shares as opposed to the redemption privileges of Central Capital, but in my opinion the point is irrelevant to this appeal. Once Central Capital acknowledged its insolvency, it could neither redeem its shares nor honour its retraction obligations. The whole purpose for the creditors applying to the court for a stay of Central Capital's obligations, including those of the acknowledged unsecured creditors, was to arrange for a scheme of payments to all creditors that could not be subject to attack as preferences. There is no suggestion on the evidence before us that the claims of unsecured creditors accepted by the Administrator were claims that had crystallized prior to the insolvency of Central Capital. Nor is it suggested that any creditors were rejected because some or all of their claims were not payable until after the date of the insolvency. The fact of insolvency, by itself, does not provide a rational basis for distinguishing the claims of the appellants from those of other unsecured creditors.

52 Much also was made of the provision in the Articles authorizing the shares in question, which states that if the obligation to redeem "would be contrary to applicable law", then Central Capital "shall redeem only the maximum number of [shares] it is then permitted to redeem". Counsel for the unsecured creditors submits that the reference to "applicable law" is to s. 36 of the *CBCA*. The reference certainly embraces the *CBCA*, but it is not restricted by its terms to that statute. For example, "applicable law" would also capture s. 101 of the *Bankruptcy Act*, which provides for penalties against directors and shareholders where insolvent companies redeem shares or pay dividends.

53 There was no evidence led as to why this provision was placed in the Articles and the share certificates. It appears to be a standard clause in all the preference shares issued by the corporation and not just those that were adapted to the appellants' situations where specific retraction clauses were drafted to satisfy the particular asset acquisitions. For my part, I have difficulty in understanding how a consideration of this provision assists the process of determining the underlying character of the retraction obligations. The statement is so self-evident that it is almost banal. I can only assume that the statement was included in the share provisions of a corporation marketing its securities world-wide so as to inform purchasers that legal restrictions in this jurisdiction apply to the company's right to redeem shares.

54 In summary then regarding the insolvency argument, these various statutes prohibit payments of any kind to shareholders by an insolvent company. As I understand it, counsel does not question that when a dividend has been lawfully declared by a corporation, it is a debt of the corporation and each shareholder is entitled to sue the corporation for his proportion: see *Fraser and Stewart, supra*, at p. 220 for a list of authorities. However, once a company is insolvent it cannot make payments to shareholders or creditors so long as it continues to be insolvent. On the other hand, nowhere in the *CBCA* or else where will we find authority for the proposition that once a corporation is insolvent, it is no longer obliged to pay its debts. The obligation is postponed until the insolvency is corrected or the corporation makes an accommodation with its creditors and obtains a release with or without the assistance of the various statutes dealing with insolvency.

55 The existence of provisions prohibiting payment to shareholders and creditors on insolvency does not in anyway assist the determination of whether the retraction obligations at issue in this appeal constitute a debt or a return of capital at the time they are payable. Speaking of the obligation to honour the retraction in terms of the corporation redeeming its shares also introduces the wrong emphasis. The corporation is not redeeming the shares at its option as contemplated by most redemptions. It is being forced to redeem them because of a prior contractual obligation for which the preferred shareholder gave good consideration. It is for this reason that I question whether s. 36 of the *CBCA* is the appropriate reference point. This is not the type of payment which concerned Jessel M.R. in *Flitcroft's Case, supra*.

56 At the risk of over simplifying this case, it appears to me that many of the arguments made against the appellants' claims to be creditors of Central Capital are impermissible in the context of the Agreed Statement of Facts. The issue in appeal is frozen in time by the stipulation that the court is to determine if these retraction clauses created a debt within the meaning of the *Bankruptcy Act* on June 15, 1992. The arguments against the appellants' claims also ignore that debts under s. 121(1) of the *Bankruptcy Act* need not be payable at the date of the bankruptcy (or June 15, 1992 in our scenario). They need only come beneath the broad umbrella of "debts and liabilities, present and future, to which [Central Capital] is subject" on June 15, 1992. The fact that the debts could not be paid after June 15, 1992, does not mean that they were not provable claims pursuant to s. 121 of the *Bankruptcy Act*. Moreover, assuming the retraction clauses created a debt payable on a future date, neither the order of Houlden J. nor the restrictions in the Articles creating the shares themselves purported to extinguish that debt.

57 There is nothing in either the Articles of Central Capital or in the law that excuses the obligation to pay the retraction amounts. Rather, discharge of the obligation is simply postponed until the cessation of the disabling event of insolvency. Article 4.3 of the Senior Series B Provisions provides the mechanism for future redemption of tendered shares that are not redeemed because such redemption would be contrary to law. Article 4.5 provides that the inability to effect a redemption does not affect the obligation to pay dividends accrued or accruing on the unredeemed shares.

58 So far as SYH is concerned, the retraction price was not payable until the fifth anniversary of the June 1989 sale of assets. Therefore, no issue of the effect of insolvency arose in 1992. The orders of Houlden J. of June 15 and July 9, 1992 changed the rules of the game. If this appellant is a creditor, it does not have to wait until the retraction date. It can claim as a creditor now. It did and the claim was disallowed. However, if this court holds that the claim should have been allowed, then in accordance with the narrow issue put to us, SYH is entitled to be accepted as a full creditor in the entire reorganization of Central Capital.

59 An additional factor raised by counsel during argument was that Article 7, *supra*, provides that in the event of the liquidation, dissolution or winding-up of Central Capital, whether voluntary or involuntary, or any other distribution of assets among its shareholders for the purpose of winding up its affairs, the holders of these preferred shares are entitled to recover "from the assets of Central Capital" the retraction price plus all accrued and unpaid dividends thereon. Such amount is to be paid prior to payment to junior ranking shareholders. The Article further provides that "[u]pon payment of such amounts, the holders of [the preferred shares] shall not be entitled to share in any further distribution of assets of [Central Capital]". Because it is trite law that shareholders are entitled to recover from assets only after all ordinary creditors have been paid in full, counsel for the unsecured creditors submits that the fact that the clause contemplates priorities between shareholders on a winding up or a liquidation of assets is clear evidence that they were shareholders only.

60 I have two responses to this submission. The first is the obvious, that we are not dealing with this contemplated event. We are dealing with a reorganization in which the parties have put a single question to the court: are the appellants creditors? Consideration of issues of priority or the valuation of claims have been taken away by the narrow scope of the agreed question. If the answer to the question posed is yes, then in accordance with the Agreed Statement of Facts, the appellants are entitled to have their claims as creditors allowed under the Subscription and Escrow Agreement and to participate in the Amended Plan of Arrangement as Senior Creditors. If the answer is no, they are to be treated as the Administrator has treated them: they are not creditors at all and are restricted to receiving Central New Common Shares under the Amended Plan of Arrangement.

61 My second response is that counsel for the unsecured creditors misses the significance of the clause. He assumes that there will be a deficiency in all circumstances leading up to a liquidation, dissolution or winding up that will necessitate a *pro rata*

distribution, first to creditors and then to shareholders of all classes. However, the clause does not say that those with retraction rights are not creditors. It says that the retraction amounts are to be paid out of assets, not suplus. Once the retraction amounts have been paid in full, the appellants are not entitled to share in any further distribution. This contemplates a surplus after all creditors, including the appellants, have been paid in full. Accordingly, far from classifying the appellants as shareholders, the clause provides that they are not entitled to be treated as shareholders under a winding up or liquidation but only as creditors.

62 Finally, with respect to SYH's claims, it was submitted that these claims were so contingent as to be virtually non-existent. The claims anticipate a retraction date that as of June 15, 1992 was some two years into the future. Upon approval of the Amended Plan of Arrangement of December 18, 1992, the shares of SYH were cancelled and replaced by a new issue of shares, the Central New Common Shares. Counsel relied upon the finding of Feldman J. that there was then no discernable basis upon which the retraction could occur. Once again, with respect, this conclusion misses the point. Following the final order of Houlden J. approving the Amended Plan of Arrangement, all the shares *and* all the debts of Central Capital disappeared. There was thereafter no discernable basis upon which any event contemplated by any debt or share instruments could occur. We are only concerned with the status of shareholders and creditors as of June 15, 1992.

63 Based on the reasons set out above, I have concluded that the retraction amounts do fall within the definition of debts and liabilities, present or future, to which Central Capital was subject on June 15, 1992. This does not apply to undeclared dividends however, because until a dividend is declared no action on behalf of a shareholder lies to enforce its payment: see *Fairhall v. Butler*, [1928] S.C.R. 369 at 374. If undeclared dividends have been claimed by any of the appellants they should be disallowed. In all other respects the claims should be allowed.

64 Accordingly, I would allow the appeals, set aside the order of Feldman J. and order that the appellants have provable claims that are to be allowed by the Administrator. The record does not disclose what order if any Feldman J. made as to costs. Certainly the appellants are entitled to their costs of this appeal. If the parties are unable to agree with respect to any other disposition of costs, I would suggest that they submit their positions to the court in writing.

***Weiler J.A.*:**

65 I have had the benefit of reading the reasons of Finlayson J.A. and for the reasons which follow I respectfully disagree with his conclusion that the appellants are entitled to prove a claim pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

66 Section 12(1) of the *CCAA* requires that persons wishing to participate in a reorganization have claims which would be provable in bankruptcy. Section 121(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, states that "[a]ll debts and liabilities, present or future ... shall be deemed to be claims provable in proceedings under this Act."

67 In order to decide whether the obligation of Central Capital to redeem the preferred shares of the appellants is a claim provable in bankruptcy, it is necessary to characterize the true nature of the transaction. The court must look to the surrounding circumstances to determine whether the true nature of the relationship is that of a shareholder who has equity in the company or whether it is that of a creditor owed a debt or liability by the company: *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558. In this case, the decision is not an easy one. Where, as here the agreements between the parties are reflected in the articles of the corporation, it is necessary to examine them carefully to characterize the true relationship. It is not disputed that if the true nature of the relationship is that of a shareholder-equity relationship after the retraction date and at the time of the reorganization, then the appellants do not have a claim provable in bankruptcy. Consequently, they will not have a claim under the *CCAA*.

68 As I see it, three main questions need to be addressed:

(1) Was Feldman J. correct in characterizing the relationship between Central Capital and the companies owned by James McCutcheon ("McCutcheon"), and between Central Capital and Scottish and York Holdings Limited (the predecessor of S.Y.H., hereinafter referred to as "SYH"), as a shareholder relationship?

(2) Did the nature of the relationship change after the retraction date for redeeming the shares of McCutcheon or, in the case of SYH, at the time of the reorganization?

(3) If the nature of the relationship is not a shareholder-equity relationship, are the appellants entitled to prove a claim under the *CCAA*.?

69 In addition, the appellants raise the question of whether they have a right to prove a claim for dividends, which have accrued but have not yet been declared payable. The price to be paid by Central Capital to McCutcheon on the retraction date, July 1, 1992, was $25 per share plus *all accrued and unpaid dividends thereon*. The dividends are therefore part of the retraction price. Similar provisions apply to SYH.

70 The reasons of Finlayson J.A. contain a comprehensive statement of the background to the litigation and I will therefore only refer to the facts in a summary fashion.

71 James McCutcheon and his brother sold their shares in Central Guarantee Trust Company to Central Capital Corporation ("Central Capital"), a trust company, for $575 a share. They received $400 per share in cash. The balance of $175 owing on each share was paid through the issue of seven preferred shares in Central Capital, with each share having a par value of $25. Following this transaction, McCutcheon purchased his brother's shares. These preferred shares, known as Senior Series B Preferred Shares, were to be listed on the Toronto Stock Exchange. These shares carried with them a retraction privilege. The shareholder had the right to have his shares redeemed by Central Capital on July 1, 1992, for $25 a share, provided that such redemption would not be "contrary to law in the context of the Corporation's current financial position." McCutcheon chose not to sell his shares.

72 Scottish & York Holdings Limited (the predecessor to SYH) sold its shares in certain insurance companies which it owned to Central Capital. Central Capital paid for these shares by the issue of Series A Junior Preferred Shares. These shares were not listed on a stock exchange. SYH had the right to have its shares redeemed by Central Capital on or after September 1994 at a price of $1 per share, subject to the provisions of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (the "*CBCA*").

73 It should be noted that the right of retraction was not unique to these two classes of shareholders. Even common shareholders had the right to have their shares retracted under certain circumstances.

74 By December 1991, Central Capital was unable to pay its liabilities as they became due and its total liabilities greatly exceeded the value of its assets. As a result, the various banks and subordinated debtholders, collectively referred to as the lenders, had a choice to make. Inasmuch as the definition of a corporation in s. 2 of the *Bankruptcy and Insolvency Act* precludes a creditor from bringing a petition against a trust company, they could either wind up Central Capital under the *Winding-up Act*, R.S.C. 1985, c. W-11, or they could try to restructure Central Capital under the *CCAA*. In a winding up or liquidation, the trustee would sell the company's assets, either piecemeal or as a going concern, to third parties. The proceeds from the sale would then be distributed to those who proved a claim according to set priority rules. In a reorganization, existing fixed amounts owed to Central Capital's creditors would be traded for new claims and ownership interests in the reorganized corporation which would remain a going concern. The lenders chose to reorganize.

75 Two transactions were involved. In the Consolidated Insurance Group Limited transaction, or "CIGL transaction", Central Capital transferred some of its significant assets to a newly incorporated company, CIGL. Thirty-nine creditors of Central Capital then elected to exchange a portion of Central Capital's debt owing to them for equity in this newly incorporated company. In the second transaction, common shares were issued for the remaining assets of Central Capital. The creditors of Central Capital were given 90 per cent of the common shares of the reorganized company. The balance of 10 per cent was allocated to the shareholders of Central Capital. All of the preferred, common and subordinate voting shares in Central Capital were then converted into these "new" common shares. The reorganization was subsequently approved by the creditors and sanctioned by the Court as required by the Act, but this approval was given without prejudice to any claims that McCutcheon and SYH might have.

76 McCutcheon's position was that the right to have his shares retracted accrued before the reorganization, and that his exercise of this right of retraction in May 1992 constituted a present debt or liability entitling him to rank as a creditor in the CIGL transaction and in the reorganized Central Capital. SYH's position was that the right to have its shares retracted in 1994 created a future debt or liability and thus a provable claim. The administrator of Central Capital disallowed both claims. McCutcheon and SYH appealed the administrator's decision to Feldman J. In dismissing their appeals, she held that the appellants were shareholders and that the right of retraction attaching to the shares did not change the nature of the shares from equity into debt.

1. Was Feldman J. correct in characterizing the agreement between Central Capital and the companies owned by McCutcheon, and between Central Capital and SYH, as creating a shareholder relationship between the parties?

77 Feldman J. analyzed the transaction and came to the conclusion that it was an equity transaction.

78 Finlayson J.A. is of the opinion that the nature of this transaction is different and that Feldman J. erred in not showing sensitivity to the fact that she was dealing with the sale of a business by its owners. He is of the opinion that the shares issued by Central Capital are the equivalent to "vendor shares" in that the appellants received them in exchange for the transfer of assets to Central Capital. He does not see the transaction as being either a contribution to capital by McCutcheon and SYH or as a return of capital. Although the transaction has debt and equity features, Finlayson J.A. is of the opinion that the true nature of the transaction is that of a debt owing by Central Capital to McCutcheon and SYH for the shares in their companies.

79 My analysis of the transaction is that when McCutcheon sold his shares in Central Guaranty and took back preferred shares in Central Capital as part payment, he transferred part of his capital investment from a smaller entity to a larger entity. Similarly, SYH transferred its investment in the shares of the insurance companies for shares in the larger entity of Central Capital. Both appellants could look to a larger asset base than before to generate a return on their capital. Until the retraction date, McCutcheon chose to take the risk of continuing his investment in Central Capital, which offered the prospect of a stable, yet relatively high, annual return through the receipt of 7-5/8 per cent dividends. Because the shares traded on the Toronto Stock Exchange, he would have had the option of realizing upon his investment by selling his shares for what they would bring on the open market, but he did not do so. In the case of SYH, although these shares were not required to be publicly listed, the corporation's articles did not restrict their transfer. The corporation's articles indicate that these shares had some preference over other shares with respect to the right to receive dividends and in the distribution of assets after creditors are paid on a liquidation. As preferred shareholders, McCutcheon and SYH did not have a voice in company affairs unless the company failed to pay the dividends it had promised to pay. This is quite typical: see Welling, *Corporate Law in Canada*, 2nd ed. (1991) at p. 604; Ziegel et al, *Cases and Materials on Partnership and Canadian Business Corporations*, 2nd ed. (1989) at p. 1198. Risk taking, profit sharing, transferability of investment, and the right to participate in a share of the assets on a liquidation after the creditors have been paid are the hallmarks of a shareholder: see R.M. Bryden, "The Law of Dividends" contained in Ziegel ed., *Studies in Canadian Company Law* (1967) at p. 270. In my opinion, Feldman J. was correct that the true nature of the relationship between the parties initially was that of an equity transaction.

2. Did the nature of the relationship change after the retraction date for McCutcheon's shares and did the reorganization trigger a right of redemption respecting SYH's shares?

80 Ordinarily, shareholders cannot realize on their investment in a company except by transferring their shares. The retraction privilege attaching to the shares gives the preferred shareholders the option of realizing on their investment other than by transferring their shares to a third party.

81 Feldman J. found that McCutcheon continued to be a shareholder after the retraction date and that he remained a shareholder at the time of the reorganization. She found SYH's claim to be too remote inasmuch as the retraction date not yet arrived at the time of the reorganization.

82 The appellants argue that Feldman J. erred in this conclusion. They submit that although McCutcheon and SYH may have been shareholders initially, this relationship changed. Upon McCutcheon's exercise of his right to have the corporation pay him the retraction price of his shares, he ceased to be a shareholder. When Central Capital failed to pay him, he became

a creditor of the corporation. In the case of SYH, it is submitted that when the lenders opted to reorganize the company, they, in effect, triggered the obligation to redeem SYH's shares.

(a) Nature of the transaction's relationship to the capital structure of the corporation

83 Section 25(3) of the *CBCA* states that shares shall not be issued until the consideration for the shares is fully paid either in cash or with property having a fair market value equivalent to the shares issued. Therefore, by issuing preferred shares with a fixed par value, Central Capital paid McCutcheon for his shares of Central Guaranty and paid SYH for the shares of the insurance companies that Central Capital received. Central Capital could not issue preferred shares *except* as full payment for the shares it received. The preferred shares were part of the capital of Central Capital and the preferred shares were always shown as shareholders' equity on Central Capital's books. The capital of the corporation is representative of the assets available to pay creditors. If, on the date for redemption of McCutcheon's shares, or on the date of reorganization in the case of SYH, the shares are redeemed, the amount paid must be deducted from the stated capital of the corporation s. 39 *CBCA*. Consequently, the total assets that Central Capital will have available to pay the lenders and other creditors outside the corporation will be reduced. A reduction of capital by the redemption of redeemable shares is permitted under the *CBCA* but only where the requirements of s. 36 are met.

(b) Section 36 of the CBCA

84 Section 36 of the *CBCA* makes the ability of a corporation to redeem its redeemable shares subject to (1) its articles and (2) a solvency requirement. For ease of reference s. 36 is reproduced below.

> *36.*(1) Notwithstanding subsection 34(2) or 35(3) [both of which deal with a corporation's acquisition of its own shares in other circumstances], but *subject to subsection (2) and to its articles*, a corporation may purchase or redeem any redeemable shares issued by it at prices not exceeding the redemption price thereof stated in the articles or calculated according to a formula stated in the articles.
>
> (2) A corporation shall not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that
>
> (*a*) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
>
> (*b*) the realizable value of the corporation's assets would after the payment be less than the aggregate of
>
> (i) its liabilities, and
>
> (ii) the amount that would be required to pay the holders of shares that have a right to be paid, on a redemption or in a liquidation, rateably with or prior to the holders of shares to be purchased or redeemed. [Emphasis added.]

85 There is no dispute that Central Capital was unable to redeem McCutcheon's shares on the retraction date. Nor could it redeem SYH's shares on the date of the reorganization. The appellants agree that the effect of s. 36 renders the agreement between themselves and Central Capital unenforceable. It is the position of the appellants, however, that s. 36 does not extinguish a debt or liability which they say has been created. The appellants rely on the decision in *Re East Chilliwack Agricultural Co-op.* (1989), 74 C.B.R. (N.S.) 1 (B.C. C.A.) in support of their position that a debt or liability is created notwithstanding the solvency requirements of s. 36 respecting payment. The appellants' submission does not take into consideration the major differences between the decision in *East Chilliwack* and the present situation relating to the timing, effect of the solvency requirements and the provisions in the articles governing the relationship of the parties.

> 1) In *East Chilliwack*, farmers who owned shares in an agricultural co-operative gave notice to the co-op of their intention to have their shares redeemed. After the notices had been given, the superintendent of co-operatives suspended the right of the co-op to redeem its shares. Here, the request to redeem the shares by McCutcheon and the retraction date occurred after Central Capital had sent out a notice that it would not be able to redeem the shares due to its financial position. SYH

had no right to demand that its shares be retracted until the retraction date, which was some two years after the date of Central Capital's insolvency.

As in the instant case, the issue in *East Chilliwack* was whether the farmers were entitled to rank with the creditors of the co-op. Hutcheon J.A., with Toy J.A. concurring, held that they were entitled to be treated as creditors.

At the outset of his reasons, Hutcheon J.A. noted, at p. 11, that the effect of the superintendent's suspension on the farmers' rights was not argued on appeal and that the court had been asked to determine the status of the farmers without regard to the suspension.

Here, the effect of Central Capital's inability to redeem its shares due to insolvency is very much in issue and cannot be ignored. Although the articles provide for the redemption of all of the shares held by McCutcheon and SYH on or after the retraction date, the articles also state that Central Capital will only redeem so many of its shares as would not be "contrary to law." Pursuant to s. 36(1) of the *CBCA*, a corporation may purchase or redeem redeemable shares, but the corporation is prohibited from doing so if the corporation is unable to pay its liabilities as they become due or if the assets of the corporation are less than the total of its liabilities and the amount required for the redemption. Because Central Capital could not comply with the solvency requirements, redemption would be "contrary to law."

2) In *East Chilliwack, supra*, at p. 13, the rules of the co-op provided that upon the giving of a notice of redemption, the farmer giving it ceased to be a shareholder. Central Capital's articles do not state that a request for redemption of the holder's shares terminates his status as a shareholder. McCutcheon continued to have the right to receive dividends pursuant to Article 4.5 while his shares were not redeemed. In effect, so long as Central Capital was unable to redeem the shares but had profits, McCutcheon continued to be entitled to a share of the profits through the declaration of dividends. If the dividends remained unpaid for eight consecutive quarters then, pursuant to Article 8, McCutcheon had the right to receive notice of, and to attend, each meeting of shareholders at which directors were to be elected and was entitled to vote for the election of two directors. The articles relating to the preferred shares held by SYH contain a similar provision. The result of insolvency as envisaged by the articles was that McCutcheon and SYH would continue as shareholders.

3) In *East Chilliwack, supra*, Hutcheon J.A. held, at p. 13, that, subject to the power of the superintendent of co-operatives, the farmer's position would be that of an ordinary creditor.

Here, the terms attaching to McCutcheon's shares do not give him that right. Instead, he is given the right to continue to receive dividends so long as the company cannot pay him. The articles relating to the shares held by SYH contain a similar provision. In addition, Article 4.3(b), respecting the retraction of the shares, indicates that if the directors have acted in good faith in making a determination that the number of shares the corporation is permitted to redeem is zero, then the *corporation* is not liable in the event this determination proves inaccurate. This would hardly be the position *vis à vis* an ordinary creditor.

4) Article 8 and a similar provision in the articles relating to the shares held by SYH provide that upon a sale of all or a substantial part of the company's undertaking, the preferred shareholders have a right to receive notice of and to be present at the meeting called to consider this sale. The farmers in *East Chilliwack* do not appear to have had any similar right.

5) Article 7 provides that in the event of a liquidation, dissolution or winding-up of the Corporation the preferred shareholders have a right to receive $25 per Series B Senior Preferred Share before the corporation pays any money or distributes assets to shareholders in any class subordinate or junior to the Series B Senior Preferred Shares. Similarly, SYH, as the holder of Series A and B Junior Preferred shares has the right, upon the dissolution or winding up of the corporation, to receive a sum equivalent to the redemption amount for each series junior preferred share. This right is subject to the rights of shares ranking in priority to the shares of these series, but is ahead of the rights of the holders of common shares.

Nothing in the articles concerning the retraction date affects the right of McCutcheon and SYH to participate in Central Capital's liquidation. The participation of the farmer in *East Chilliwack* ceased once he had given notice to redeem. Article 4.4 of Central Capital provides that once the shares have been tendered for retraction this election is irrevocable on the

part of the holder. In the event that payment of the retraction price was not made, however, the holder had the right to have all deposited share certificates returned. Central Capital offered to return McCutcheon's shares to him, but he refused. Because McCutcheon retained all the rights and privileges of a preferred shareholder after the retraction date, the fact that he refused to take back his share certificates cannot alter the true nature of the relationship. The refusal was merely evidence of a dispute concerning what the relationship was. SYH also retained its full status as a shareholder until the date of the reorganization. This was not the situation in *East Chilliwack*.

86 By way of summary, on the date of the reorganization McCutcheon and SYH had not ceased to be preferred shareholders of Central Capital. The rights attaching to their retractable preferred shares entitled them to continue to share in the profits of the company when these were declared as dividends, to vote at shareholders meetings to elect directors so long as dividends remained unpaid for a specified period of time, and, on a winding up of the company, to participate in the distribution of assets that remained after the creditors were paid according to the ranking of the series of their shares. The company's obligation to redeem its shares was not absolute. Instead, the articles provided for what was realistically a "best efforts" buy-back based on solvency and continuation as a shareholder to the extent a buy-back could not take place. In *East Chilliwack*, because the farmer ceased to be a shareholder, the articles do not appear to make any provision for continued participation or for the postponement of payment depending on the solvency of the co-op.

(c) Evidence of a debtor-creditor relationship is lacking in the articles

87 Looked at another way, after the retraction date and at the time of the reorganization, the common features of a debtor-creditor relationship are not in evidence in Central Capital's articles. The agreements between the parties contain no express provisions that the redemption of the shares is in repayment of a loan. The corporation was not obliged to create any fund or debt instrument to ensure that it could redeem the shares on the retraction date. There is no indemnity in the event that the money is not repaid on the retraction date. There is no provision for the payment of any interest after the retraction date in the event that the money is not repaid on the retraction date. There is no provision that after the retraction date and in the event of insolvency, the appellants would have the right to have the company wound up. (See *Imperial General Properties Ltd. v. R.*, (sub nom. *R. v. Imperial General Properties Ltd.)* [1985] 2 S.C.R. 288, for a case where the articles of the company contained this right.) There is no provision that upon a winding up or insolvency the parties are entitled to rank *pari passu* with the creditors as was the case in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank, supra*.

(d) The effect of the reorganization

88 Finlayson J.A. is of the view that it is immaterial that the articles provide, in the event of the liquidation, dissolution or winding-up of the company, that the appellants are only entitled to rank after the creditors but ahead of the junior ranking shareholders. In his view, this provision is irrelevant because we are not dealing with a liquidation but with a reorganization. He finds it significant that, like debtors, the preferred shareholders are not entitled to participate in any surplus once they have been paid. I am of the view that this provision in the articles is significant. It represents a clear indication that the holders of the retractable shares were not to be dealt with on the same footing as ordinary creditors even after the retraction date. Instead, they were to be dealt with as shareholders, albeit an elevated class. Under the *CBCA* all shares carry equal rights. Words used in the articles to differentiate a class of shares are nothing more than authorized deviations from this statutory position of equality: Welling, *supra*, at p. 683.

89 The appellants submit that a winding-up or liquidation is not the same as a reorganization. This is true. Both, however, are methods of dealing with insolvency. Both are methods for secured creditors to enforce their claims by seizing the assets in which they hold security interests. If the value of the corporation as a going concern exceeds the liquidation value of the assets, it is in the interest of all the debt holders that the corporation be preserved as a going concern. The purpose of both a liquidation and a reorganization is to permit the rehabilitation of the insolvent person unfettered by debt: *Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417. By virtue of s. 20 of the *CCAA*, arrangements under the Act mesh with the reorganization provisions of the *CBCA* so as to affect the company's relations with its shareholders. Shareholders have no right to dissent to a reorganization: s. 191(7), *CBCA*. On a reorganization, among other things, the articles may be amended to alter or remove rights and privileges attaching to a class of shares and to create new classes of shares: s. 173, *CBCA*. These statutory

provisions provide a clear indication that, on a reorganization, the interests of all shareholders, including shareholders with a right of redemption, are subordinated to the interests of the creditors. Where the debts exceed the assets of the company, a sound commercial result militates in favour of resolving this problem in a manner that allows creditors to obtain repayment of their debt in the manner which is most advantageous to them.

90 The similarities between a liquidation and a reorganization, together with the express statement in the articles of Central Capital with respect to what is to happen on a winding-up, dictate that the interests of the holders of retractable shares, McCutcheon and SYH, are subordinated to the creditors and they are not entitled to claim under the *CCAA* equally with the creditors. This position is also consistent with the provisions of the *Bankruptcy and Insolvency Act* and the *Winding-up Act*. In the case of an insolvency where the debts to creditors clearly exceed the assets of the company, the policy of federal insolvency legislation appears to be clear that shareholders do not have the right to look to the assets of the corporation until the creditors have been paid.

Dividends

91 Although dividends were payable on the shares of McCutcheon and SYH, no dividends were in fact declared. The appellants contend that the dividends, which have accrued but which were not declared, are a debt or liability because they were stipulated to be part of the retraction price.

92 Article 7 of Central Capital respecting McCutcheon's shares states that in the event of liquidation, dissolution or winding up of the corporation, the shareholders are entitled to receive not only the $25 per Series B preferred share, but "all accrued and unpaid dividends thereon, whether or not declared ... before any amount is paid by the Corporation or any assets of the Corporation are distributed to the holders of any shares ... ranking as to capital junior to the Series B Senior preferred Shares."

93 It is trite law that a dividend may only be declared if a company is solvent. For corporations governed by the *CBCA*, it appears that the common law tests for solvency have all been subsumed or overruled: *McClurg v. Minister of National Revenue*, (sub nom. *R. v. McClurg*) [1991] 2 W.W.R. 244 (S.C.C.) at 259, 260.

94 Section 42 of the *CBCA* provides:

> A corporation shall not declare or pay a dividend if there are reasonable grounds for believing that
>
> (*a*) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
>
> (*b*) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities and stated capital of all classes.

95 Section 42 prevents the corporation from declaring or paying a dividend when it does not meet certain solvency requirements. There was no declaration of a dividend in the present case. Any obligation to pay a dividend as part of the retraction price cannot therefore be enforced when the company is insolvent. Dividends which have accrued but which are unpaid are not considered to be a debt because, on reading the articles as a whole, the provision for payment is not one which is made independant of the ability to pay: see Welling, *supra*, at p. 689, citing *Porto Rico Power Co., Re*, [1946] S.C.R. 178 (S.C.C.), where it was held there was no guarantee of payment and hence the accrued but unpaid dividends were not a debt. Instead, accrued but unpaid dividends are considered to be akin to a return of capital. Making these accrued dividends part of the retraction price does not alter this.

96 By way of analogy to the treatment of dividends, it could be said that until the company has declared it will redeem the shares which are tendered to it the obligation to redeem them is not a debt or liability. The promise to pay in the articles of Central Capital is not made independent of any ability to pay.

97 In the event that I am wrong in my conclusion that the true nature of the relationship is one of equity, I shall now consider the position in the event that a debt has been created.

3. If the nature of the relationship is not an equity relationship are the appellants entitled to be claimants under the CCAA.?

98 The parties agree that the effect of s. 36 renders the agreement to redeem their preferred shares unenforceable. It is the position of the appellants, however, that s. 36 does not extinguish Central Capital's obligation to repay them. Their position is that Central Capital's obligation to repay them is a contingent liability and therefore gives them a claim provable in bankruptcy, bringing them under s. 12(1) of the *CCAA*.

The Meaning of Debt

99 Debt is defined in a very broad manner in *Black's Law Dictionary*, 6th ed. (1990) at p. 403. It is the position of the appellants that this definition of "debt" is broad enough to include McCutcheon's right to have Central Capital redeem his shares. In the case of SYH, it is submitted that the right to redemption constitutes a future liability. It is the appellants' position that Feldman J. erred in holding that to have a provable claim, McCutcheon and Central Capital must be able to obtain a judgment against Central Capital for the retraction price and be entitled to seek payment on the judgment. Finlayson J.A. agrees with the appellant's position.

100 Debt is defined in *Black's Law Dictionary, supra*, as:

> A sum of money due by certain and express agreement. A specified sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment.
>
> A fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future. In a still more general sense, that which is due from one person to another, whether money, goods, or services. In a broad sense, any duty to respond to another in money, labour, or service; it may be even a moral or honorary obligation, unenforceable by legal action. Also, sometimes an aggregate of separate debts, or the total sum of the existing claims against person or company. Thus we speak of the "national debt", the "bonded debt" of a corporation, etc.

101 It will be readily apparent that in *Black's* the term "debt" is defined in two distinct ways. In order to constitute a debt as defined in the first paragraph, the obligation must be enforceable. In the second paragraph debt is defined more broadly as any duty or obligation even if unenforceable by legal action. Feldman J. considered the first portion of the definition in her reasons. If the first portion of the definition applies, no debt is created because the obligation is not enforceable under the *CBCA*. The appellants rely on the second portion of the definition. They also rely on the definition of of the word "liability" in *Black's* which is also defined very broadly.

102 In one sense, support for the position of the appellants is found in s. 40 of the *CBCA*. Section 40 states that a contract with a corporation providing for the purchase of shares of the corporation is specifically enforceable against the corporation except to the extent that the corporation cannot perform the contract without being in breach of ss. 34 or 35. Section 34 contains the solvency requirements concerning the redemption by a company of its own shares other than those carrying a right of redemption. Section 35 deals with shares which have been issued to settle or compromise a debt. In s. 2, "liability" is defined as including "a *debt* of a corporation arising under section 40 ... ."

103 Section 40 does not include any reference to the obligation of a company to repurchase redeemable shares under s. 36. As a result s. 36 is not incorporated by reference into the definition of liability. While it might be suggested that this is a legislative oversight, the omission is also consistent with the position that only the articles of the corporation govern the relationships between the company and the holders of the retractable shares under s. 36. I have already stated my opinion that the articles of Central Capital do not make the obligation to redeem the shares a debt or, for that matter, a liability. Moreover, even if a provision like s. 40 is implied with respect to redeemable preferred shares, it would also be necessary to imply a provision like s. 40(3) which states that in the event of liquidation where the company has not performed its contract to redeem, the other party is entitled to be ranked subordinate to the rights of creditors but in priority to the shareholders. This is a clear expression of legislative intention that on insolvency the claim of those entitled to have their shares redeemed should not be placed on the

same footing with the claims of creditors but should rank subordinate to them: see *Nelson v. Rentown Enterprises Inc.*, [1994] 4 W.W.R. 579 (Alta. C.A.), adopting the reasons of Hunt J. at (1992), 96 D.L.R. (4th) 586 (Alta. Q.B.). Policy reasons would again militate in favour of the result being the same on a reorganization.

Claims in Bankruptcy

104 Even if the broader definitions of a debt or liability in *Black's* are adopted, the appellants still do not have a claim provable in bankruptcy.

105 Persuasive authority already exists to the effect that in order to be a provable claim within the meaning of s. 121 of the *Bankruptcy and Insolvency Act* the claim must be one recoverable by legal process: *Farm Credit Corp. v. Holowach (Trustee of)*, [1988] 5 W.W.R. 87 (Alta. C.A.) at 90, leave to appeal to the Supreme Court of Canada dismissed at [1989] 4 W.W.R. lxx (note).

106 In *Holowach*, the seven members of the court were dealing with a situation in which some persons borrowed money from a mortgagee and mortgaged certain lands as security for repayment of the loan. The mortgagors then made an assignment in bankruptcy. The mortgagee filed a proof of claim for the full amount of the deficiency, that is, the amount of the indebtedness less the value of the land which the mortgagee was permitted to purchase. The Alberta *Law of Property Act*, R.S.A. 1980, c. L-8, precluded deficiency claims against individuals in foreclosure actions, although the effect of the legislation was not to extinguish or satisfy the debt. The mortgagee argued that it had a claim provable in bankruptcy under s. 95(1), now s. 121(1), of the *Bankruptcy and Insolvency Act*. The court rejected this argument, holding that a provable claim must be one recoverable by legal process. In coming to its conclusion, the court relied on *Reference re Debt Adjustment Act, 1937 (Alberta)*, [1943] 1 All E.R. 240 (P.C.), and a number of decisions at the trial level which are collected at p. 91 of the decision.

107 Here, the contract to repurchase the shares, while perfectly valid, is without effect to the extent that there is a conflict between the corporation's promise to redeem the shares and its statutory obligation under s. 36 of the *CBCA* not to reduce its capital where it is insolvent. As was the case in the *Holowach* decision, this statutory overlay renders Central Capital's promise to redeem the appellants' preferred shares unenforceable. Although there is a right to receive payment, the effect of the solvency provision of the *CBCA* means that there is no right to enforce payment. Inasmuch as there is no right to enforce payment, the promise is not one which can be proved as a claim.

108 It could be suggested that the decision in *Holowach* can be distinguished from the instant case on the basis that in *Holowach* the claim is made unenforceable forever by statute whereas under the *CCAA* the claim is unenforceable only so long as the corporation does not meet the solvency requirements of s. 36 of the *CBCA*. I do not believe this is a valid distinction for three reasons. First, the relevant date for determining any contingent liability is not the future but the past, namely, September 8, 1992, the date by which proofs of claim had to be submitted. On that date, Central Capital was insolvent. Second, it is only because the lenders were willing to convert their debt obligations into equity in the reorganization that Central Capital is now solvent. Central Capital is not the same company and its liabilities are not the same. The redeemable shares no longer exist. Third, in order to be profitable, the assets of a company must be managed. Any value in the assets after the insolvency of the company is, in this case, due to the new management and not to the preferred shareholders extending credit to the company by having their claim for redemption postponed.

109 Even if Central Capital's obligation to redeem the shares of the appellants created a debt or liability, the appellants do not have a claim provable within the meaning of s. 121 of the *Bankruptcy and Insolvency Act*.

Conclusion

110 I would dismiss the appeal. For the reasons I have given, the retraction amounts do not constitute a debt or liability within the meaning of s. 121 of the *Bankruptcy and Insolvency Act*. Even if I am wrong in my conclusion and a debt or liability is created, it is not a claim within the meaning of the *CCAA*. This is a case of first impression. For these reasons, I would not award any costs of this appeal.

***Laskin J.A.* (concurring):**

111 I have read the reasons of my colleagues Justice Finlayson and Justice Weiler. Like Justice Weiler, I would affirm the decision of the motions judge, Feldman J., and dismiss these appeals. I prefer, however, to state my own reasons for upholding the position of the unsecured creditors of Central Capital Corporation.

The Issue

112 The application was argued before Madam Justice Feldman on an agreed statement of facts. My colleagues have summarized the relevant facts and important provisions of the documents. Each appellant holds preferred shares of Central Capital and each appellant's shares contain a right of retraction — a right to require Central Capital to redeem the shares on a fixed date and for a fixed price. The retraction date for the appellants James McCutcheon and Central Guarantee Trust Company (collectively McCutcheon) was July 1, 1992, and before that date McCutcheon exercised his right of retraction and tendered his shares for redemption. The retraction date for the appellant S.Y.H. Corporation was September 1994 and although it could not render its shares for redemption, it did file a proof of claim with the Administrator of Central Capital. The Administrator disallowed each appellant's claim and Feldman J. dismissed appeals from the Administrator's decisions.

113 The issue on these appeals is whether McCutcheon and S.Y.H. Corporation "have claims provable against Central Capital Corporation within the meaning of the *Bankruptcy Act (Canada)* as amended as of the date of the Restated Subscription and Escrow Agreement." Under the *Bankruptcy Act*, R.S.C. 1985, c. B-3, s. 2, a claim provable "includes any claim or liability provable in proceedings under this Act by a creditor" and a creditor "means a person having a claim, preferred, secured or unsecured, provable as a claim under this Act." Section 121(1) of the *Bankruptcy Act* further defines claims provable as follows:

> *121.* (1) All debts and liabilities, present or future, to which the bankrupt is subject at the date of the bankruptcy or to which he may become subject before his discharge by reason of any obligation incurred before the date of the bankruptcy shall be deemed to be claims provable in proceedings under this Act.

114 The date of the Restated Subscription and Escrow Agreement is May 1992. [1] By then, and indeed since December 1991, Central Capital had been insolvent and therefore was prohibited by s. 36(2) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, from making any payment to redeem the appellants' shares.

115 On June 15, 1992, Houlden J. provided that Central Capital could be reorganized under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 and he stayed proceedings against it. Houlden J.'s order of July 9, 1992, which approved the restructuring of Central Capital, was made without prejudice to the right of the appellants to assert claims as creditors. Thus the question for this court is whether the appellants' retraction rights created debts of Central Capital in May, 1992. In other words were McCutcheon and S.Y.H. Corporation creditors of Central Capital in May, 1992? If they were creditors, then like the other unsecured creditors of Central Capital, they can elect to take shares in the newly incorporated company, Canadian Insurance Group Limited; if they were not creditors, then they remain shareholders of Central Capital under the restructuring plan.

116 This is a question of characterization. I will address the question first, by considering the "substance" of the relationship between each appellant and the company; and second by considering s. 36(2) of the *Canada Business Corporations Act, supra*. In brief I conclude:

> (1) Although the relationship between each appellant and the company has characteristics of debt and equity, in substance both McCutcheon and S.Y.H. Corporation are shareholders, not creditors of Central Capital. Neither the existence of their retraction rights nor the exercise of those rights converts them into creditors;
>
> (2) Finding that the appellants were creditors of Central Capital would defeat the purpose of s. 36(2) of the statute.

I. The Relationship between the Appellants and Central Capital

117 Preferred shares have been called "compromise securities" and even "financial mongrels": Grover and Ross, *Materials and Corporate Finance* (1975), at p. 49. Invariably the conditions attaching to preferred shares contain attributes of equity and,

at least in an economic sense, attributes of debt. Over the years financiers and corporate lawyers have blurred the distinction between equity and debt by endowing preferred shareholders with rights analogous to the rights of creditors. One example is the right of redemption — the right of the corporation to compel preferred shareholders to sell their shares back to the corporation. Another example, and it is the case before us, is the right of retraction — the right of shareholders to compel the corporation to buy back their shares on a specific date for a specific price.

118 I acknowledge, therefore, that redeemable or retractable preferred shares are somewhat different from conventional equity capital. What makes the appeals before us difficult is that although the appellants appear to hold equity, their right of retraction appears to be a basic characteristic of a debtor-creditor relationship. See Grover and Ross, *supra*, at pp. 47-49; Buckley, Gillen and Yalden, *Corporations: Principles and Policies*, 3rd ed. (1995), at pp. 938-940.

119 If the certificate or instrument contains features of both equity and debt — in other words if it is hybrid in character — then the Court must determine the "substance" of the relationship between the holder of the certificate and the company. This is the lesson of Justice Iacobucci's judgment in *Canada Deposit Insurance Corp. v. Canadian Commercial Bank*, [1992] 3 S.C.R. 558. In that case the Supreme Court of Canada had to determine whether the financial assistance given by several lending institutions to try to rescue the Canadian Commercial Bank was "in the nature of a loan" or "in the nature of a capital investment." Justice Iacobucci discussed his approach to the problem at pp. 590-591 of his judgment:

> As I see it, the fact that the transaction contains both debt and equity features does not, in itself, pose an insurmountable obstacle to characterizing the advance of $255 million. Instead of trying to pigeonhole the entire agreement between the Participants and CCB in one of two categories, I see nothing wrong in recognizing the arrangement for what it is, namely, one of a hybrid nature, combining elements of both debt and equity but which, in substance, reflects a debtor-creditor relationship. Financial and capital markets have been most creative in the variety of investments and securities that have been fashioned to meet the needs and interests of those who participate in those markets. It is not because an agreement has certain equity features that a court must either ignore these features as if they did not exist or characterize the transaction on the whole as an investment. There is an alternative. It is permissible, and often required, or desirable, for debt and equity to co-exist in a given financial transaction without altering the substance of the agreement. Furthermore, it does not follow that each and every aspect of such an agreement must be given the exact same weight when addressing a characterization issue. Again, it is not because there are equity features that it is necessarily an investment in capital. This is particularly true when, as here, the equity features are nothing more than supplementary to and not definitive of the essence of the transaction. When a court is searching for the *substance* of a particular transaction, it should not too easily be distracted by aspects which are, in reality, only incidental or secondary in nature to the main thrust of the agreement.

120 In determining the substance of the relationship, as in any other case of contract interpretation, the court looks to what the parties intended. In *CDIC v. CCB, supra*, Iacobucci J. put this proposition as follows at p. 588:

> As in any case involving contractual interpretation, the characterization issue facing this Court must be decided by determining the intention of the parties to the support agreements. This task, perplexing as it sometimes proves to be, depends primarily on the meaning of the words chosen by the parties to reflect their intention. When the words alone are insufficient to reach a conclusion as to the true nature of the agreement, or when outside support for a particular characterization is required, a consideration of admissible surrounding circumstances may be appropriate.

121 In these appeals what the parties intended is reflected mainly in the share purchase agreements and the conditions attaching to the appellants' shares, but also in the articles of incorporation and in the way Central Capital recorded the appellants' shares in its financial statements. These documents indicate that in substance the appellants are shareholders of Central Capital, not creditors. I rely on the following considerations to support my conclusion:

122 (i) Both appellants agreed to take preferred shares instead of some other instrument — for example, a bond or debenture — that would obviously have made them creditors. The appellant McCutcheon sold shares of one corporation (Canadian General Securities Limited) for cash and for shares of another corporation (Central Capital). Neither the share purchase agreements nor the share conditions support McCutcheon's contention that in taking preferred shares he was extending credit to Central Capital

by deferring payment of the purchase price. He made an investment in the capital of Central Capital, no doubt because of the attractive dividend rate, the income tax advantages of preferred shares and "sweeteners" such as conversion privileges. Unlike Finlayson J.A., I place little weight on what he termed "the unique nature of the transaction". McCutcheon transferred assets to acquire his preferred shares rather than acquiring them with cash. But he nonetheless decided to invest in Central Capital and to take the risk and the profits (through dividends) of his investment.

123 Similarly, S.Y.H. Corporation exchanged its equity investment in four insurance companies for an equity investment in Central Capital. It too chose equity not debt. None of the contractual documents indicates that the appellants' retraction rights were intended to trigger an obligation on the part of Central Capital to repay a loan. Moreover, as Weiler J.A. points out, neither the share purchase agreements nor the share conditions provides for interest if Central Capital fails to honour its retraction obligations.

124 (ii) The senior preferred shares and junior preferred shares that the appellants own were part of the authorized capital of Central Capital before the appellants acquired them.

125 (iii) The appellants' shares were recorded in the financial statements of Central Capital as "capital stock," along with the company's issued and outstanding common shares, class "A" shares and warrants. The amount Central Capital might be obligated to pay the appellants if they exercised their retraction rights was not recorded as debt (even contingent debt) in the company's financial statements.

126 (iv) Both appellants had the right to receive dividends on their shares and McCutcheon had the right to vote his shares for the election of directors of Central Capital if dividends remained unpaid for a specified time. These rights — to receive dividends and to vote — are well recognized rights of shareholders. And these rights continue, even after the retraction dates, until the appellants' shares are redeemed.

127 (v) The preferred share conditions provide that on a liquidation, dissolution or winding up, the holders rank with other shareholders and therefore, implicitly, behind creditors. The appellant McCutcheon, who holds senior preferred shares, would rank behind creditors but ahead of the holders of subordinate classes of shares; the appellant S.Y.H. Corporation, which holds junior preferred shares, would rank behind senior preferred shareholders but ahead of common shareholders.

128 These provisions in the preferred share conditions also state that on payment of the amount owing to them the appellants "shall not be entitled to share in any further distribution of assets of the corporation." Finlayson J.A. interprets this to mean that the appellants "are not entitled to be treated as shareholders under a winding up or a liquidation but only as creditors." I disagree. These are typical preferred share provisions, which limit the recovery of the holders but do not treat them as creditors: *Sutherland et al., Fraser & Stewart Company Law of Canada*, 6th ed. (1993), at p. 198. At least on a liquidation, dissolution or winding up, the preferred share conditions evidence that the appellants would be treated not as creditors but as shareholders. In *CDIC v. CCB, supra*, Iacobucci J. placed considerable weight on a provision in the Participation Agreement stating that each participant "shall rank *pari passu* with the rights of the depositors." No such provision exists in this case. Indeed the share conditions I have referred to state the opposite.

129 Of course, Central Capital was reorganized, not liquidated, dissolved or wound up and the preferred share conditions are silent about what occurs on a reorganization. Still these conditions shed light on what the parties intended on the reorganization. Section 12(1) of the *Companies' Creditors Arrangement Act, supra*, defines claim as "any indebtedness, liability or obligation of any kind that, if unsecured, would be a debt provable in bankruptcy within the meaning of the *Bankruptcy Act*." The question the court has been asked to answer is the same question that would arise on a liquidation. It is illogical to conclude that the appellants could claim only as shareholders on a liquidation and yet can claim as creditors on the reorganization. Whether Central Capital's financial difficulties led to a liquidation or a reorganization, the issue is the same and the analysis and the result should also be the same.

130 The appellants argue, however, that they are shareholders only until they exercise their retraction rights but once they exercise these rights they become creditors. I do not agree with this argument. The share conditions provide that even after

exercising their retraction rights, the appellants continue to be entitled to dividends and to vote until their shares are redeemed. In other words, they continue to enjoy the rights of shareholders. Moreover, if when the appellants exercised their retraction rights the company were insolvent and were to be subsequently liquidated (or dissolved or wound up), the appellants would rank as shareholders on the liquidation. And as I have indicated above the result should be no different on the reorganization.

131 It seems to me that these appellants must be either shareholders or creditors. Except for declared dividends, they cannot be both. Once they are characterized as shareholders, their rights of retraction do not create a debtor-creditor relationship. These rights enable them to call for the repayment of their capital on a specific date (and at an agreed upon price) provided the company is solvent. Ordinarily shareholders have to recoup their investment by selling their shares to third parties. If they have retraction rights, however, they can compel the company (if solvent) to repay their investment at a given time for a given price. But the right of retraction provides for the return of capital not for the repayment of a loan. Certainly the *Canada Business Corporations Act* treats a redemption of shares as a return of capital because s. 39 of the statute requires a company on a redemption to deduct from its stated capital account an amount equal to the value of the shares redeemed. The shares redeemed are then either cancelled or returned to the status of authorized but unissued shares.

132 Putting it differently, a preferred shareholder exercising a right of retraction on the terms that exist here must rank behind the company's creditors. Grover and Ross make this point more generally in their *Materials and Corporate Finance, supra*, at pp. 48-49:

> On the other hand, the company cannot issue "secured" preferred shares in the sense that shares cannot have a right to a return of capital which is equal or superior to the rights of creditors. Preferred shareholders are risk-takers who are required to invest capital in the business and who can look only to what is left after creditors are fully provided for. Thus, in the absence of statutory authorization, the claims of shareholders cannot be secured by a lien on the corporate assets. They rank behind creditors but before com mon shareholders (if specified) on a voluntary or involuntary dissolution of the company.

133 Admittedly there is little authority in Canada on the issue confronting this court. Some of the cases that the respondent relies on — for example, *Re Patricia Appliance Shops Ltd.* (1922), [1923] 3 D.L.R. 1160 (Ont. S.C.), *Laronge Realty Ltd. v. Golconda Investments Ltd.* (1986), 63 C.B.R. (N.S.) 76 (B.C. C.A.), and even *Re Meade (Debtor); Ex parte Humber v. Palmer (Trustee)* [1951], 2 All E.R. 168 (P.C.) — are of limited assistance because the shareholders in those cases did not have retraction rights.

134 Perhaps the closest case — and the appellants rely heavily on it — is the judgment of the British Columbia Court of Appeal in *Re East Chilliwack Agricultural Co-op.* (1989), 74 C.B.R. (N.S.) 1. In that case a majority of the court (Craig J.A. dissenting) held that a withdrawing member of a co-operative association who elected to have his shares redeemed in instalments over a five-year period should be treated on the subsequent bankruptcy of the association as an ordinary creditor rather than as a shareholder. I decline to apply *East Chilliwack* for three reasons. First, because the case was decided in 1989, the British Columbia Court of Appeal did not have the benefit of the Supreme Court of Canada's reasons in *CDIC v. CCB, supra*. In *East Chilliwack* Hutcheon J.A., writing for the majority did not focus on what the parties intended when the member contracted with the co-operative. Instead he only considered the relationship between the member and the co-operative after the member had withdrawn. I do not think his approach is consistent with Justice Iacobucci's judgment in *CDIC v. CCB, supra*.

135 Second, there are important factual differences between *East Chilliwack* and the appeals before us. Justice Weiler has referred to these factual differences in her reasons. The most important of these differences are the following: in *East Chilliwack* the rules of the association provided that a member had to withdraw from the association to trigger the right of redemption, whereas the appellants' share conditions provide that they continue to be shareholders of Central Capital until their shares are redeemed; in *East Chilliwack* the member elected to withdraw and redeem his shares when the association was solvent whereas when the appellant McCutcheon exercised his right of retraction Central Capital was insolvent; and in *East Chilliwack* Hutcheon J.A. expressly stated that he was not considering the effect of the superintendent's power to suspend payments if the financial position of the co-operative was impaired, whereas the effect of the statutory prohibition against Central Capital making payment, found in s. 36(2) of the *Canada Business Corporations Act*, is in issue in these appeals.

136 Third, the decision in *East Chilliwack* is at odds with most of the American case law and I favour the American approach. When a company repurchases shares by instalment and bankruptcy intervenes, the prevailing American position is that the shareholder's claim is deferred to the claims of ordinary creditors. The decision of the Fifth Circuit Court of Appeals in *Robinson v. Wangemann*, 75 F.2d 756 (Tex. 1935) is frequently cited. The facts of that case are virtually identical to the facts in *East Chilliwack*. A company had agreed to repurchase a stockholder's stock by instalments. Although the company was solvent when the agreement was made it went bankrupt before the repurchase was completed. The stockholder sought to prove as an ordinary creditor for the unpaid purchase price. Foster, Circuit Judge, writing for a unanimous court rejected the stockholder's claim at p. 757:

> A transaction by which a corporation acquires its own stock from a stockholder for a sum of money is not really a sale. The corporation does not acquire anything of value equivalent to the depletion of its assets, if the stock is held in the treasury, as in this case. It is simply a method of distributing a proportion of the assets to the stockholder. The assets of a corporation are the common pledge of its creditors, and stockholders are not entitled to receive any part of them unless creditors are paid in full. When such a transaction is had, regardless of the good faith of the parties, it is essential to its validity that there be sufficient surplus to retire the stock, without prejudice to creditors, at the time payment is made out of assets.

137 At the heart of *Robinson v. Wangemann* is the finding that the selling stockholder is not a creditor in the sense of a person who loans money to a corporation, and therefore is not entitled to parity with the general creditors. The principle in *Robinson v. Wangemann* seeks to protect creditors by refusing to permit selling stockholders, who were risk investors, to withdraw their capital on the same terms as general creditors in the event of insolvency. Section 40(3) of the *Canada Business Corporations Act* — a section to which I shall return when considering s. 36(2) of the same statute — codifies the principle in *Robinson v. Wangemann* for share repurchases, though not for share redemptions. See also Blumberg, *The Law of Corporate Groups* (1989), at pp. 205-210 and see *contra Wolff v. Heidritter Lumber Co.*, 163 A. 140 (N.J. Ch. 1932).

138 Quite apart from the instalment purchase price cases, American courts have often grappled with the question whether preferred stockholders can claim as creditors of the corporation. Although there are cases going both ways, most appear to come to the same conclusion as I do. The American cases are collected in Bjor and Solheim, *Fletcher Cyclopedia of the Law of Private Corporations* (1995), revised vol. 11 and in Bjor and Reinholtz, *Fletcher Cyclopedia of the Law of Private Corporations* (1990), revised vol. 15A. In volume 11 the authors of the text indicate — as did the Supreme Court of Canada in *CDIC v. CCB* — that "[w]hether or not the holder of a particular instrument or certificate is to be regarded as a shareholder or a creditor is a question of interpretation, and depends on the terms of the contract as evidenced by the instrument, the articles of incorporation, and the statutes of the state. The nature of the transaction is to be determined by the real substance and effect of the contract rather than by the name given to the obligations or its form ..." (at p. 566).

139 And in volume 15A the authors state at pp. 290 and 292 that even the arrival of a fixed redemption date does not change a preferred stockholder into a creditor:

> Holders of preferred stock of a corporation, in the absence of express provision to the contrary, are stockholders and not creditors of the corporation, except for dividends declared. They have no lien upon, and are not entitled to, any of the assets of the corporation when it becomes insolvent, until all debts are paid. Furthermore, there is authority that the status of a preferred stockholder is not changed to that of creditor, even though a dividend is guaranteed. Indeed it is beyond the power of a corporation to issue a class of stock, the holders of which are entitled to preference over general creditors.
>
> . . . . .
>
> Even where preferred stock has a fixed redemption date, arrival of that date does not change the status of a preferred stockholder to that of a creditor. (pp. 290, 292)

140 I agree with these statements. I therefore conclude first that the appellants, in substance, were shareholders of Central Capital not creditors; and second that neither the existence nor the exercise of their retraction rights turned them into creditors.

II. Provable Claims and Section 36(2) of the Canada Business Corporations Act

141 In May 1992 Central Capital was insolvent. It was unable to pay its liabilities as they became due and the realizable value of its assets was less than the aggregate of its liabilities. Because it was insolvent it was prohibited by s. 36(2) of the *Canada Business Corporations Act* from redeeming the appellants' shares. Section 36(2) of the statute provides:

> (2) A corporation shall not make any payment to purchase or redeem any redeemable shares issued by it if there are reasonable grounds for believing that
>
> (*a*) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
>
> (*b*) the realizable value of the corporation's assets would after the payment be less than the aggregate of
>
> (i) its liabilities, and
>
> (ii) the amount that would be required to pay the holders of shares that have a right to be paid, on a redemption or in a liquidation, rateably with or prior to the holders of the shares to be purchased or redeemed.

142 As well, the appellants' share conditions provide that they are not permitted to redeem their shares if to do so would be "contrary to applicable law," in this case s. 36(2) of the statute.

143 To hold that the appellants have provable claims would defeat the purpose of s. 36(2) of the *Canada Business Corporations Act*. At common law a company could not repurchase its own shares on the open market or in the language of *Trevor v. Whitworth* (1887), 12 App. Cas. 409 (H.L.), a company could not "traffick in its own shares." The obvious reason was to prevent companies from using their assets to destroy the claims of their creditors. Modern corporate statutes, such as the *Canada Business Corporations Act*, modified the rule in *Trevor v. Whitworth* to permit repurchases provided the company's creditors would not be prejudiced. Thus the legislation insisted that the company could not repurchase its own shares unless it satisfied stated solvency tests. And so, s. 34(2) of the *Canada Business Corporations Act* provides:

> (2) A corporation shall not make any payment to purchase or otherwise acquire shares issued by it if there are reasonable grounds for believing that
>
> (*a*) the corporation is, or would after the payment be, unable to pay its liabilities as they become due; or
>
> (*b*) the realizable value of the corporation's assets would after the payment be less than the aggregate of its liabilities and stated capital of all classes.

144 In *Nelson v. Rentown Enterprises Inc.* (1992), 96 D.L.R. (4th) 586 (Alta. Q.B.), affirmed (1994), 109 D.L.R. (4th) 608 (Alta. C.A.), Hunt J. of the Alberta Queen's Bench wrote at p. 589:

> The policy behind the s. 34(2) limitation upon a corporation's power to purchase its own shares seems obvious. It is intended to ensure that one or more shareholders in a corporation do not recoup their investments to the detriment of creditors and other shareholders. It has been observed that:
>
> > Corporate power to purchase its own stock has been frequently abused. Done by corporations conducting faltering businesses, it has been employed to create preferences to the detriment of creditors and of the other stockholders.
>
> *(Mountain State Steel Foundries, Inc. v. C.I.R., supra, at p. 741* [284 F.2d 737 (1960)]*.)*
>
> Modern business statues permit these share purchases to take place provided that the position of creditors and other shareholders is protected, by virtue of the application of the s. 34(2) tests.

145 Redemptions of preferred shares, unlike repurchases, were always permitted at common law as long as they were not made in contemplation of bankruptcy. But the solvency test in s. 36(2) of the *Canada Business Corporations Act* has the same purpose as the solvency test in s. 34(2): to prevent redemptions if they would allow the company to prejudice the claims of

creditors. See Buckley *et al., Corporations: Principles and Policies, supra*, at pp. 968-71. To hold that the appellants' retraction rights gave rise to provable claims in the face of s. 36(2), thereby allowing the appellants to rank equally with the unsecured creditors, would undermine the purpose of the section. If a claim in a bankruptcy or reorganization proceeding is unenforceable under the statute, the claim is not entitled to recognition on a parity with the claims of unsecured creditors: See *Blumberg, supra*, at pp. 205-6; and *Farm Credit Corp. v. Holowach (Trustee of)* (1988), 68 C.B.R. (N.S.) 255 (Alta. C.A.).

146 I draw comfort in this conclusion from s. 40 of the *Canada Business Corporations Act*. Section 40(1) provides that a contract with a corporation for the purchase of its shares is specifically enforceable against the corporation "except to the extent that the corporation cannot perform the contract without thereby being in breach of section 34 ..." Section 40(3) then states:

> (3) Until the corporation has fully performed a contract referred to in subsection (1), the other party retains the status of a claimant entitled to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors but in priority to the shareholders.

147 In other words, the section recognizes that if a company contracts to repurchase its shares but is prohibited from doing so because it is insolvent, the vendor of the shares is not a creditor and on a liquidation ranks subordinate to the rights of creditors. The shareholder cannot be repaid at the expense of the company's creditors. Although s. 40 does not expressly apply to s. 36, I think that the rationale for s. 40(3) applies to redemptions as well as to repurchases. Whether a repurchase or a redemption, the shareholder is not a creditor and is subordinate to the rights of creditors. More simply the shareholder does not have a provable claim.

148 The appellants rely on *National Bank für Deutschland v. Blucher*, (sub nom. *Blucher v. Canada (Custodian)*) [1927] 3 D.L.R. 40 (S.C.C.), but in my view this case does not assist them. In *Blucher* dividends were declared on stock but payment of the dividends was suspended during World War I. The Supreme Court of Canada held at p. 43 that "[t]he right of recovery was in suspense during the war, but the debt nevertheless existed." In that case, however, the dividend was declared before the suspension of payment took place. Moreover, as Justice Finlayson points out in his reasons, courts have always accepted the proposition that when a dividend is declared it is a debt on which each shareholder can sue the corporation.

149 Holding that the appellants do not have provable claims accords with sound corporate policy. On the insolvency of a company the claims of creditors have always ranked ahead of the claims of shareholders for the return of their capital. Case law and statute law protect creditors by preventing companies from using their funds to prejudice creditors' chances of repayment. Creditors rely on these protections in making loans to companies. Permitting preferred shareholders to be turned into creditors by endowing their shares with retraction rights runs contrary to this policy of creditor protection.

150 I would dismiss these appeals. I would not make any cost order. I am grateful to all counsel for their assistance on this interesting and difficult problem.

Appeals dismissed.

Footnotes

1 There is a discrepancy in the materials before this court on the relevant date for establishing a claim provable against Central Capital: S.Y.H. Corporation used May, 1992, the date of the Restated Subscription and Escrow Agreement whereas McCutcheon and the unsecured creditors of Central Capital Corporation used June 15, 1992, the date of the court-ordered stay of proceedings against Central Capital. I have used the May 1992 date but nothing turns on the use of this date as opposed to the June 15, 1992 date.

TAB 6

Gainers Inc. v. Pocklington Financial Corporation, 2000 ABCA 151

Date: 20000523
Docket: 9603-0216-AC

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MADAM JUSTICE FRUMAN
THE HONOURABLE MR. JUSTICE ROOKE

BETWEEN:

GAINERS INC.

Plaintiff/Defendant by Counterclaim
(Appellant)

- and -

POCKLINGTON FINANCIAL CORPORATION,
POCKLINGTON HOLDINGS INC. and
POCKLINGTON FOODS INC.

Defendants/Plaintiffs by Counterclaim
(Respondents)

APPEAL FROM THE JUDGMENT OF
THE HONOURABLE MR. JUSTICE CLARKE
DATED THE 7TH DAY OF DECEMBER, 1995 AND
9TH DAY OF FEBRUARY, 1996
FILED THE 9TH DAY OF APRIL, 1996

MEMORANDUM OF JUDGMENT

COUNSEL:

N. J. Pollock, Q.C.
D. J. Wilson
For the Appellant/Plaintiff

No representation
For the Defendants/Respondents

MEMORANDUM OF JUDGMENT

THE COURT:

[1] The basic issue here is when (if ever) parol evidence may be admitted, and used, to vary a formal written contract.

[2] Gainers was a meat-packing company which used to be effectively controlled by Peter Pocklington. Beneficially, he owned all the shares and he was the sole director of Gainers. It encountered financial difficulties and went through a difficult strike. The provincial government loaned it money, in return for many kinds of security, under a master agreement and some ancillary documents. Later another lender demanded more security. The government consented to that happening, in return for some additional security to the government from other Pocklington companies, and a standstill agreement was signed. Ultimately the loan went into default, the government foreclosed, and became the effective owner of Gainers.

[3] While Mr. Pocklington controlled Gainers, it had numerous financial dealings and agreements with some of his other companies. Gainers has sued several of its former parent and perhaps "related companies" for unpaid debts and for unjust enrichment. The appellant plaintiff accurately summarizes the claims as follows:

> "In this action, Gainers Inc. sued its former parent corporations (Pocklington Foods Inc., Pocklington Holdings Inc. and Pocklington Financial Corporation) for:
>
> (1) a sum owing to [Gainers Inc.] by the Defendants, as a group, as of the date upon which the Defendants ceased to hold any interest in [Gainers Inc.], for the inter-corporate account between [Gainers Inc.] and the parent group. The amount claimed was not disputed - however, a counter-claim and set-off was alleged by the Defendant corporations seeking payment of management fees;
>
> (2) a sum owing as a result of an insurance premium refund paid to the Defendants upon deletion of [Gainers Inc.] from the group insurance coverage. The premium had been paid by [Gainers Inc.];
>
> (3) a sum owing to [Gainers Inc.] as a result of it having paid various expenses which were for the benefit of the Defendants and not [Gainers Inc.]." (abbreviations omitted)

As noted, part of that liability was disputed, part not.

[4] The trial judge found less debt owing than claimed, dismissed the claims for unjust enrichment, and allowed large set-offs of countervailing debts. In the result, Gainers only recovered a fraction of what it sought. The trial judgment is reported at (1995) 179 A.R. 91. As the trial decision is reported, more details here are unnecessary. Gainers appeals.

[5] The suit was tried along with a suit against Mr. Pocklington personally about inducing breach of contract respecting some land, which is the subject of another appeal and another appellate judgment.

[6] This appeal deals with accounting issues only. The defendant respondents are now bankrupt, and the trustee in bankruptcy has not instructed anyone to oppose the appeal. It was argued in writing on behalf of the appellant Gainers, whose counsel filed a long factum. There was no argument for the respondents.

[7] The trial judge admitted large amounts of parol evidence about the understanding, intent, belief, and knowledge, of Mr. Pocklington and his lawyer at various steps in the drama. The trial judge made heavy use of that evidence. Sometimes he found what must be implied terms in the contracts. Sometimes he found additional agreements created by conduct. At other times he used the evidence to redefine a number of the terms in the written contracts. At times he simply seems to have found terms inconsistent with those in the contract, or maybe implied contracts contrary to the written contracts. Sometimes it was not clear under which rubric one would put the terms which he found and enforced.

[8] But there are problems with that. The written contracts were long, elaborate, and formal, as one would expect when large sums and complex corporate structures and security were involved. Patently both sides had legal advice, and the evidence confirms that fact. Even the contracts which were made among Pocklington's own companies, at a time when he controlled them, were formal and obviously drafted by lawyers.

[9] We cannot find ambiguity, equivocal references, absurdity, contradiction, or significant lack of clarity, in the relevant parts of the written agreements. Even if there were ambiguity, we have considerable doubts whether that would open the door to so far-reaching use and effects of parol evidence as one finds in the trial reasons for judgment here. For example, clarifying ambiguity, or covering points not dealt with, is not the same as flat contradiction of the express terms of the contract.

[10] We will take some time to expand here on such topics, because attempts to admit this kind of perversion of parol evidence under the guise of "context" appear to be fairly common in Alberta at the moment. Wrongful admission of such evidence can swell trials on simple issues

about written contracts to weeks of historical investigation. And oral evidence admitted for a very limited purpose sometimes ends by supplanting the words of the contract.

[11] In this case the Management Services Agreements were very important, governing many of the matters which the trial judge ruled upon. Both of them contained the following clauses:

> "6.01 This Agreement constitutes the entire agreement between the Parties hereto with respect to the subject matter hereof and supercedes [sic] all prior negotiations, proposals and agreements, whether oral or written, with respect to the subject matter hereof.
>
> 6.06 No term or provision hereof may be amended except by an instrument in writing signed by the Parties to this Agreement."

[12] The contract expressly says that the management fees were as agreed by the parties, subject to a minimum payment. For at least two relevant fiscal years, only the minimum was paid, with no evidence of any other agreement. After the foreclosure and after the government became the sole shareholder of Gainers, Mr. Pocklington unilaterally pronounced a retroactive increase in fees, which was never agreed to by the government. The retroactive adjustment was accepted by the trial judge, resulting in a substantial reduction in the amount awarded to Gainers at trial.

[13] Though this supposed power of Mr. Pocklington to make debts shrink and swell retroactively was allegedly based upon past practice, close examination of the evidence shows that past practice had not been frequent or recent, it was always done for tax reasons, and it was never done after final financial statements were signed. The adjustments here were large, unprecedented, long after the relevant final financial statements, and without any tax benefit. Clearly they cannot stand.

[14] It seems to us that much of what the trial judge did was to amend the Management Services Agreements by implication, conduct, oral discussions, or oral agreements. The quoted clauses alone would suffice to prevent that.

[15] When the deal is complete in the written contracts, and not subject to an escrow, other evidence (parol evidence) is inadmissible to vary or contradict a clear written contract: ***Chant v. Infinitum Growth Fund*** (1986) 15 O.A.C. 393, 55 O.R. (2d) 366, 369-70 (C.A.); ***Case Threshing Machine Co. v. Mitten*** (1919) 59 S.C.R. 118, 49 D.L.R. 30. More classic cases are cited in 1 ***Chitty on Contracts*** para. 12–094 (28th ed. 1999).

[16] Even earlier promises or representations, otherwise having legal effects, may be wiped out by suitable contractual clauses: ***Case v. Mitten, supra***. There is such a "whole contract" clause here. Such a clause may also bar side oral contracts: ***Steeplejack Services (Can.) v. Access Scaffold etc.*** (1989) 98 A.R. 310, 318 (M.). See further Chitty, ***op. cit. supra***, at para. 12-102.

[17] Similarly, the parties may validly contract, as they did here, that oral modifications of the contract will be ineffective, and that amendments must be written: ***Soc. Gén. (Can.) v. Gulf Can. Res. (#1)*** [1995] 9 W.W.R. 453, 456, 169 A.R. 317 (C.A.).

[18] The power to imply terms is to be used cautiously, and no implied term can be inconsistent with or contrary to the express terms of the contract: ***Sullivan v. Newsome*** (1987) 78 A.R. 297, 303-04 (C.A.); ***Catre Ind. Alta. v. R.*** (1989) 99 A.R. 321, 63 D.L.R. (4th) 74, 85 (C.A.).

[19] Nor can the court find a collateral parol contract inconsistent with the express written contract: ***Catre Ind. v. R., supra; Hawrish v. Bank of Mtl.*** [1969] S.C.R. 15, 66 W.W.R. 673. Collateral contracts are viewed suspiciously and must be proved strictly, along with clear intent to contract: ***Hawrish*** case, ***supra***, at 678 (W.W.R.).

[20] The intent of the parties is to be determined from the words which they put in their written contract; their subjective intent is irrelevant: ***Eli Lily & Co. v. Novopharm*** [1998] 2 S.C.R. 129, 166, 161 D.L.R. (4th) 1, 27. Subjective intent cannot even be used to interpret the written words, if they are clear: ***id.*** at pp. 27-29 (D.L.R.).

[21] The trial judge thought (para. 68, p. 118 A.R.) that he could bypass all those rules by using the so-called "armchair rule". That rule lets the court see what the authors of the contract knew when they wrote it, in order indirectly to assist in resolving any difficulties in what certain words of the contract refer to. For example, a contract may contain unclear references to other people, or to things. The background knowledge may help to decide who or what was referred to. The expression quoted comes from the law of wills, and suggests that often one cannot construe a contract without knowing the facts which the parties knew when they contracted (not later). The rule under discussion is rarely called "the armchair rule" in contracts law, but that expression explains more than such vague or misleading labels as "the factual matrix". See ***Boyes v. Cook*** (1880) 14 Ch.D. 53, 56 (C.A.).

[22] For example, the parties may contract about a piece of land, or an earlier contract, or an existing paper, in vague terms. One then needs to know what they knew, in order to identify the vague reference. See, for example, ***Bank of N.Z. v. Simpson*** [1900] A.C. 182, 187-88 (P.C.(N.S.W.)); ***Charrington & Co. v. Wooder*** [1914] A.C. 71, 82 (H.L.(E.)); ***Indian Molybdenum v. R.*** [1951] 3 D.L.R. 497, 502-03 (S.C.C.). A good explanation of this doctrine is found in ***Reardon Smith Line v. Hansen-Tangen*** [1976] 1 W.L.R. 989, 995 - 97, [1976] 3 All

E.R. 570 (H.L.(E.)). The doctrine lets the court find what a reasonable person would have thought was the aim of the transaction, if that person knew the facts available to the parties.

[23] However, the "armchair rule" does not allow the court to receive direct evidence of intent, still less allow such evidence to contradict the contract, or evade a "whole contract" or "no oral amendment" clause. To use it to create ambiguities is backwards. See the ***Indian Molybdenum*** case, and authorities there cited; ***Reardon Smith v. Hansen-Tangen, supra***; ***Bank of B.C. v. Turbo Resources*** (1983) 46 A.R. 22, 29 - 30, 148 D.L.R. (3d) 598 (C.A.). The evidence admitted here went far beyond anything permitted by the "armchair rule".

[24] If hindsight, implication, unspoken thoughts, and unwritten statements could have so pivotal a role as they appear to have had here, then written contracts would become a mere trap for the credulous. Almost all commercial certainty would evaporate, and commercial litigation become a swearing contest. A suit on a commercial contract, no matter how carefully drafted, would become a long historical investigation of an insoluble mystery. Often who said what to whom by telephone 15 years ago is impossible to unravel. A formal written contract should not rise or fall with such mysteries.

[25] The trial reasons appear to find that Mr. Pocklington, who most of the time was the sole director, used to run his companies autocratically and arbitrarily. The reasons say that he was their sole owner, his interests were their interests, and any retroactive allocations of money among them which he might choose to make were proper and effective. If that proposition were correct, a trial would not even be a swearing contest, but a soliloquy, for only Mr. Pocklington could testify about unwritten agreements which he made with himself.

[26] The spectacle becomes risible. Indeed, a number of fallacies in company law and logic lurk there. We are not aware of any authority which makes the interests of the sole shareholder identical to the interests of the company. If that were so, a shareholder could always plunder the company to the creditors' detriment, and plainly he cannot. Long before laws against oppressing the minority, directors were not allowed to appropriate company property to themselves, even if ratified by the shareholders: Wegenast, ***The Law of Canadian Companies*** 366, 370, 381 (1931). That is classic law, and the rise of further duties and disabilities should not cause us to forget this oldest and most basic rule of minority protection.

[27] What is more, the basic facts are almost the opposite. The owner of the appellant Gainers was not Mr. Pocklington, but another company controlled by him. At all material times, all of these companies had very significant debt, and much of that was secured. Toward the end, it is doubtful that Mr. Pocklington had any real equity in any of these companies. On top of all that, for the last few years, the shares of the appellant Gainers were in effect mortgaged to the government, and held in escrow as part of that mortgage. The interests of a bank are not those of its teller.

[28] Even where the directors are the only shareholders, they cannot treat the company's property as their own, or give it to another of their companies: ***Clarkson Co. v. White*** (1979) 36 N.S.R. (2d) 207, 102 D.L.R. (3d) 403, 413 (C.A.). Members of a group of companies are distinct from each other and from their owners: ***Walker v. Wimborne, infra***.

[29] The interests of the company include the interests of future shareholders: ***820099 Ont. v. Harold E. Ballard*** (1991) 3 Bus. L.R. (2d) 113, 185 (Ont. D.C.). And they include the interests of the company's creditors: ***820099 v. Ballard; Walker v. Wimborne*** (1976) 50 A.L.J.R. 446, 449 (H. C. Aust.); 2 ***Palmer's Company Law*** §8.506. Indeed, if the company's capital is effectively gone, the company's interests largely become those of the creditors: ***Gower's Prs. of Modern Co. Law***. 555 (5th ed. 1992); ***Levy-Russell v. Tecmotiv*** (1994) 13 Bus. L.R. (2d) 1, 189, 54 C.P.R. (3d) 161 (Ont.).

[30] It is apparent that an incorrect use of parol evidence and a misconception of fundamental company law principles underlie almost all of the trial judgment in this suit. The whole approach at trial was misconceived, and the judgment cannot stand.

[31] There are a great many other grounds of appeal. Most or all, including the question of limitations, sound fairly persuasive. But it is not necessary to pursue them further, in view of the conclusion reached. There are few pure fact findings in the trial reasons, and those lead to no particular legal conclusion unless one applies a considerable body of law. The law applied here seems to us erroneous, for the reasons given above.

[32] For an appeal court to try to wade through the record and make its own fact findings would be difficult. We might have considered some kind of a reference to a referee, or ordering assessment of certain amounts by a new trial judge. Even that would be difficult, and the facts here are unusual.

[33] The trustee in bankruptcy has so far not contested this suit or this appeal. Counsel for the appellant Gainers tells us that it is not at all clear that there are enough assets in the respondent companies to yield anything to their secured creditors, let alone to unsecured creditors such as the appellant Gainers. He tells us that if we order a new trial, he is satisfied that the expense and difficulty of a new trial will never be incurred. Either there will be no assets, and no one will bother, or the trustee and the appellant Gainers will readily compromise the suit.

[34] At first blush that sounds like a rudely pragmatic consideration, but reflection shows that it makes some sense. In the first place, bankruptcy is supposed to be run practically by business people. It is not supposed to be a postgraduate seminar in law. In the second place, for the most part this appeal is moot. Directing a reference on part of the case and producing a long detailed appellate retrial of the rest of the case, would result in little practical benefit to the parties. And in the third place, the successful appellant demonstrates various grounds of appeal (flaws in the

trial judgment), some of which in law may entitle it to judgment, and others of which plainly entitle it to a new trial.

[35] The trustee in bankruptcy does not appear, and obviously does not much care what remedy this court awards. Therefore, the wishes of the appellant as to remedy should carry significant weight. Were the court to decline a new trial and instead direct judgment with some kind of partial reference or assessment, it would in effect ignore those proven grounds of appeal which in law lead to a new trial. For example, inadmissible evidence was admitted and given heavy weight. That entitles the appellant to demand a new trial; the appellant cannot be forced to accept fact findings flowing from that error.

[36] We order a new trial. However, the trial judgment in favour of the appellant plaintiff should stand. It is for admitted debts. One of the debts' amounts was admitted also. To it, the respondent defendants merely set up a counterclaim, so the trial judgment is for the balance, i.e. for an amount much less than the admitted debt. There is no cross-appeal. The new trial will decide whether the judgment in favour of the appellant plaintiff should be any larger.

[37] The appellant attacks the reasoning underlying the trial judge's costs award, but in view of the conclusion reached, it will simply fall with the rest of the trial award. The new trial judge will decide who recovers costs in Queen's Bench, and on what basis. By then our decision in the related appeal against Mr. Pocklington personally about inducing breach of contract respecting a piece of land should be available. That renders academic the question of set-off of costs. But we are surprised that someone would suggest setting off costs payable by a company against costs payable not to the company but to its shareholder. As noted above, the two are in no sense the same person.

[38] The appellant had to appeal, did, and won completely. It must recover costs of the appeal in any event, payable upon taxation. Millions of dollars are at stake, and so one must compare those amounts with the much lower floor of column 5. We cannot assume what the result of the new trial will be, but it would be unfair to hold up taxing appellate costs until then. Weighing these conflicting elements in this unusual situation, the appropriate scale is 1.2 times column 5 of new Schedule C. Taxation should, however, await our decision in the related appeal about land.

APPEAL HEARD on May 2, 2000

MEMORANDUM FILED at Edmonton, Alberta,
this 1st day of June, 2000

CÔTÉ J.A.

FRUMAN J.A.

ROOKE J.

TAB 7

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

v.

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

and

Attorney General of British Columbia and BCICAC Foundation *Interveners*

INDEXED AS: SATTVA CAPITAL CORP. *v.* CRESTON MOLY CORP.

2014 SCC 53

File No.: 35026.

2013: December 12; 2014: August 1.

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

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

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

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

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

c.

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

et

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

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

2014 CSC 53

N° du greffe : 35026.

2013 : 12 décembre; 2014 : 1er août.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Cases Cited

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

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

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

Le tribunal chargé de statuer sur une demande d'autorisation ne tranche pas l'affaire sur le fond. Il détermine uniquement s'il est justifié d'accorder l'autorisation, et non si l'appel sera accueilli, même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. C'est pourquoi les remarques sur le bien-fondé de l'affaire formulées par le tribunal saisi de la demande d'autorisation ne sauraient lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs.

Jurisprudence

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

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

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

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

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

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

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

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

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

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

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

I. Facts

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

Version française du jugement de la Cour rendu par

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

I. Faits

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

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

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

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

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

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

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

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

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

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

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

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

[8] Creston claims that the Agreement's "maximum amount" proviso means that Sattva cannot receive cash or shares valued at more than US$1.5 million on the date the fee is payable. The shares were payable no later than five days after May 17, 2007, the closing date of the transaction. At that time, the shares were priced at $0.70 per share. This valuation is based on the price an investment banking firm valued Creston at as part of underwriting a private placement of shares on April 17, 2007. On this interpretation, Sattva would receive approximately 2,454,000 shares, some 9 million fewer shares than if the shares were priced at $0.15 per share.

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

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

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

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

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

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

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

II. Arbitral Award

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

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

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

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

[14] As previously noted, by default, the finder's fee would be paid in shares unless Sattva made an election otherwise. The arbitrator found that

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

II. Sentence arbitrale

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

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

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

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

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

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

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

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

[17] The arbitrator found that Sattva could have sold its Creston shares after a four-month holding period at between $0.40 and $0.44 per share, netting proceeds of between $4,583,914 and $5,156,934.

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

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

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

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

The arbitrator took the average of those two amounts, which came to $4,870,424, and then assessed damages at 85 percent of that number, which came to $4,139,860, and rounded it to $4,140,000 plus costs.

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

III. Judicial History

A. *British Columbia Supreme Court — Leave to Appeal Decision, 2009 BCSC 1079*

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

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

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

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

III. Historique judiciaire

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

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

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

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

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

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

C. *British Columbia Supreme Court — Appeal Decision, 2011 BCSC 597*

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

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

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

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

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

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

appeal, holding the arbitrator's interpretation of the Agreement was correct.

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

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

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

[27] In response to Creston's argument that the arbitrator did not consider s. 3.1 of the Agreement

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

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

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

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

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

which contains the "maximum amount" proviso, Armstrong J. noted that the arbitrator explicitly addressed the "maximum amount" proviso at para. 23 of his decision.

D. *British Columbia Court of Appeal — Appeal Decision, 2012 BCCA 329*

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

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

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

IV. Issues

[31] The following issues arise in this appeal:

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

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

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

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

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

IV. Questions en litige

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

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

(b) Did the CA Leave Court err in granting leave under s. 31(2) of the *AA*?

(c) If leave was properly granted, what is the appropriate standard of review to be applied to commercial arbitral decisions made under the *AA*?

(d) Did the arbitrator reasonably construe the Agreement as a whole?

(e) Did the CA Appeal Court err in holding that it was bound by comments regarding the merits of the appeal made by the CA Leave Court?

V. Analysis

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

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

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

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

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

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

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

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

V. Analyse

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[TRADUCTION]

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

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

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

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

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

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

(2) The Result Is Important to the Parties

[41] In order for leave to be granted from a commercial arbitral award, a threshold requirement must be met: leave must be sought on a question of law. However, before dealing with that issue, it will be convenient to quickly address another requirement of s. 31(2)(a) on which the parties agree: whether

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

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

(2) L'issue est importante pour les parties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(d) *Application to the Present Case*

d) *Application au présent pourvoi*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(4) May Prevent a Miscarriage of Justice

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

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

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

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

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

[69] In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (C.A.), which required the error of law in question to be a material issue that, if decided differently, would lead to a different result: ". . . if the point of law were decided differently, the arbitrator would have been led to a different result. In other words, was the alleged error of law material to the decision; does it go to its heart?" (*BCIT*, at para. 28). See also *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, which discusses the test of whether "some substantial wrong or miscarriage of justice has occurred" in the context of a civil jury trial (para. 43).

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

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

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

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

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

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

[74] In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible

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

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

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

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

argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

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

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

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

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

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

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

[78] However, in an application for leave to appeal pursuant to s. 31(2)(b) or (c), neither of which contain a miscarriage of justice requirement, I agree with Justice Saunders in *BCIT* that a preliminary

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

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

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

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

examination of the merits of the question of law should be assessed at the residual discretion stage of the analysis as considering the merits of the proposed appeal will always be relevant when deciding whether to grant leave to appeal under s. 31.

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

(b) *Application to the Present Case*

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

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

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

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

b) *Application au présent pourvoi*

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

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

evidence of the arbitrator's failure to consider that proviso.

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

> In summary, then, as of March 27, 2007 it was clear and beyond argument that under the Agreement:
>
> (a) Sattva was entitled to a fee equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange – section 3.1. It is common ground that the quantum of this fee is US$1,500,000.
>
> (b) The fee was payable in shares based on the Market Price, as defined in the Agreement, unless Sattva elected to take it in cash or a combination of cash and shares.
>
> (c) The Market Price, as defined in the Agreement, was $0.15. [Emphasis added.]

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

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

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

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

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

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

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

(5) Residual Discretion to Deny Leave

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

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

1. "the apparent merits of the appeal";

2. "the degree of significance of the issue to the parties, to third parties and to the community at large";

3. "the circumstances surrounding the dispute and adjudication including the urgency of a final answer";

4. "other temporal considerations including the opportunity for either party to address the result through other avenues";

5. "the conduct of the parties";

6. "the stage of the process at which the appealed decision was made";

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

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

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

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

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

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

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

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

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

5. « la conduite des parties »;

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

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

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

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

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

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

[89] As discussed above, in s. 31(2)(a), a preliminary assessment of the merits of the question of law at issue in the leave application is to be considered in determining the miscarriage of justice question. The degree of significance of the issue to the parties is covered by the "importance of the result of the arbitration to the parties" criterion in s. 31(2)(a). The degree of significance of the issue to third parties and to the community at large should not be considered under s. 31(2)(a) as the *AA* sets these out as separate grounds for granting leave to appeal under s. 31(2)(b) and (c). Furthermore, respect for the forum of arbitration chosen by the parties is a consideration that animates the legislation itself and

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

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

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

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

can be seen in the high threshold to obtain leave under s. 31(2)(a). Recognition that arbitration is often chosen as a means to obtain a fast and final resolution tailor-made for the issues is already reflected in the urgent need for a final answer.

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

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

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

[92] These considerations could, where applicable, be a sound basis for declining leave to appeal an arbitral award even where the statutory criteria of s. 31(2)(a) have been met. However, courts should

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

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

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

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

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

exercise such discretion with caution. Having found an error of law and, at least with respect to s. 31(2)(a), a potential miscarriage of justice, these discretionary factors must be weighed carefully before an otherwise eligible appeal is rejected on discretionary grounds.

(b) *Application to the Present Case*

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

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

[95] However, conduct of the parties is a valid consideration in the exercise of the court's residual discretion under s. 31(2)(a). A discretionary decision to deny leave is to be reviewed with deference by an appellate court. A discretionary decision should not be interfered with merely because an appellate court would have exercised the discretion differently (*R. v. Bellusci*, 2012 SCC 44, [2012]

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

b) *Application au présent pourvoi*

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

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

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

2 S.C.R. 509, at paras. 18 and 30). An appellate court is only justified in interfering with a lower court judge's exercise of discretion if that judge misdirected himself or if his decision is so clearly wrong as to amount to an injustice (*R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 117).

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

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

[98] In *Homex Realty and Development Co. v. Corporation of the Village of Wyoming*, [1980] 2 S.C.R. 1011, at pp. 1037-38, misconduct by a party not directly relevant to the question at issue before the court resulted in denial of a remedy. The litigation in *Homex* arose out of a disagreement regarding whether the purchaser of lots in a subdivision, Homex, had assumed the obligations of the vendor under a subdivision agreement to provide "all the requirements, financial and otherwise" for the installation of municipal services on a parcel of land that had been subdivided (pp. 1015-16). This Court determined that Homex had not been accorded procedural fairness when the municipality passed a by-law related to the dispute (p. 1032). Nevertheless, discretionary relief to quash the by-law was denied because, among other things, Homex had sought "throughout all these proceedings to

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

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

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

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

avoid the burden associated with the subdivision of the lands" that it owned (p. 1037), even though the Court held that Homex knew this obligation was its responsibility (pp. 1017-19). This conduct was related to the dispute that gave rise to the litigation, but not to the question of whether the by-law was enacted in a procedurally fair manner. Accordingly, I read *Homex* as authority for the proposition that misconduct related to the dispute that gave rise to the proceedings may justify the exercise of discretion to refuse the relief sought, in this case refusing to grant leave to appeal.

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

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

[101] Although the CA Leave Court erred in granting leave, these protracted proceedings have nonetheless now reached this Court. In light of the fact that the true concern between the parties is the merits of the appeal — that is, how much the Agreement requires Creston to pay Sattva — and that the courts below differed significantly in their interpretation of the Agreement, it would be

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

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

[100] Par conséquent, à mon humble avis, même si la formation de la CA saisie de la demande d'autorisation avait défini une question de droit et qu'il avait été satisfait au critère du risque d'erreur judiciaire, elle aurait dû confirmer la décision de la formation de la CS saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour.

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

unsatisfactory not to address the very dispute that has given rise to these proceedings. I will therefore proceed to consider the three remaining questions on appeal as if leave to appeal had been properly granted.

C. *Standard of Review Under the AA*

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

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

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

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

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

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

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

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

Dunsmuir judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

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

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

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

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

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

D. *The Arbitrator Reasonably Construed the Agreement as a Whole*

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

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

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

[110] In *Newfoundland and Labrador Nurses' Union*, Abella J. cites Professor David Dyzenhaus to explain that, when conducting a reasonableness review, it is permissible for reviewing courts to supplement the reasons of the original decision-maker as part of the reasonableness analysis:

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

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

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

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

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

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

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

some respects defective. [Emphasis added by Abella J.; para. 12.]

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

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

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

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

And:

3. FINDER'S FEE

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

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

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

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

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

[TRADUCTION]

2. DÉFINITIONS

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

Et :

3. HONORAIRES D'INTERMÉDIATION

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

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

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

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

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

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

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

amount of the fee based on the value of that currency on the date that the value is determined.

(SC Appeal Court decision, at para. 71)

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

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

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

[117] As Justice Armstrong explained, setting the share price in advance creates a risk that makes selecting payment in shares qualitatively different from choosing payment in cash. There is an inherent risk in accepting a fee paid in shares that is not present when accepting a fee paid in cash. A fee paid in cash has a specific predetermined value. By contrast, when a fee is paid in shares, the price of the shares (or mechanism to determine the price of the shares) is set in advance. However, the price of those shares on the market will change over time. The recipient

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

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

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

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

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

[117] Comme l'explique le juge Armstrong, fixer le cours de l'action en avance engendre un risque qui rend le paiement en actions qualitativement différent du paiement en argent. Le versement des honoraires sous forme d'actions présente un risque inhérent, qui ne se pose pas dans le cas du versement en argent. Les honoraires payés en argent ont une valeur prédéterminée. Par contre, quand les honoraires sont versés en actions, le cours de l'action (ou le mécanisme permettant de le déterminer) est fixé à l'avance. Cependant, le cours de l'action

of a fee paid in shares hopes the share price will rise resulting in shares with a market value greater than the value of the shares at the predetermined price. However, if the share price falls, the recipient will receive shares worth less than the value of the shares at the predetermined price. This risk is well known to those operating in the business sphere and both Creston and Sattva would have been aware of this as sophisticated business parties.

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

> It would be inconsistent with sound commercial principles to insulate the appellant from a rise in share prices that benefitted the respondent at the date that the fee became payable, when such a rise was foreseeable and ought to have been addressed by the appellant, just as it would be inconsistent with sound commercial principles, and the terms of the fee agreement, to increase the number of shares allocated to the respondent had their value decreased relative to the Market Price by the date that the fee became payable. Both parties accepted the possibility of a change in the value of the shares after the Market Price was determined when entering into the fee agreement.
>
> (SC Appeal Court decision, at para. 70)

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

fluctue avec le temps. La personne qui reçoit des honoraires payés en actions espère une augmentation du cours, de sorte que ses actions auront une valeur marchande supérieure à celle qui est établie selon le cours prédéterminé. En revanche, si le cours chute, cette personne reçoit des actions dont la valeur est inférieure à celle des actions selon le cours prédéterminé. Ce risque est bien connu de ceux qui évoluent dans ce milieu, et Creston et Sattva, des parties avisées, en auraient eu connaissance.

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

> [TRADUCTION] Il serait contraire aux principes commerciaux reconnus de protéger l'appelante de la hausse du cours de l'action dont bénéficiait l'intimée à la date de versement des honoraires, alors qu'une telle augmentation était prévisible et aurait dû être soulevée par l'appelante, tout comme il serait contraire aux principes commerciaux reconnus, et aux termes de l'entente relative aux honoraires, d'augmenter le nombre d'actions cédées à l'intimée dans le cas où leur valeur aurait baissé par rapport au cours en vigueur à la date du versement des honoraires. Les deux parties ont reconnu, quand elles ont conclu l'entente relative aux honoraires, la possibilité de fluctuation de la valeur de l'action après la définition du cours.
>
> (Décision de la CS sur l'appel, par. 70)

[119] Pour ces raisons, on ne peut prétendre que l'arbitre n'a pas tenu compte de la stipulation de l'entente relative au « plafond ». Le raisonnement de l'arbitre, que le juge Armstrong explique, satisfait à la norme du caractère raisonnable dont les attributs sont la justification, la transparence et l'intelligibilité (*Dunsmuir*, par. 47).

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

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

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

> The [SC Appeal Court] judge found the arbitrator had expressly addressed the maximum amount payable under paragraph 3.1 of the Agreement and that he was correct.
>
> This finding is contrary to the remarks of Madam Justice Newbury in the earlier appeal that, if Sattva took its fee in shares valued at $0.15, it would receive a fee having a value at the time the fee became payable of over $8 million. If the fee were taken in cash, the amount payable would be $1.5 million US. Newbury J.A. specifically held that the arbitrator did not note this anomaly and did not address the meaning of paragraph 3.1 of the Agreement.
>
> The [SC Appeal Court] judge was bound to accept those findings. Similarly, absent a five-judge division in this appeal, we must also accept those findings. [paras. 42-44]

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

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

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

> [TRADUCTION] Le juge [de la CS saisi de l'appel] a conclu que l'arbitre avait expressément tenu compte du plafond des honoraires payables conformément au paragraphe 3.1 de l'entente et que sa sentence était correcte.
>
> Cette conclusion est contraire aux remarques formulées par la juge Newbury dans l'appel antérieur selon lesquelles, si ses honoraires étaient versés en actions, à raison de 0,15 $ l'unité, Sattva obtiendrait des honoraires d'une valeur, à la date du versement des honoraires, de plus de 8 millions $. Si elle optait pour le versement en argent, elle recevrait un montant de 1,5 million $US. La juge Newbury a statué expressément que l'arbitre n'avait pas soulevé cette anomalie et qu'il n'avait pas tenu compte du sens du paragraphe 3.1 de l'entente.
>
> Le juge [de la CS saisi de l'appel] était tenu d'accepter ces conclusions. De même, à défaut d'une décision d'une formation de cinq juges en l'espèce, nous devons aussi accepter ces conclusions. [par. 42-44]

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

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

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

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

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

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

VI. Conclusion

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

APPENDIX I

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

(a) "Market Price" definition:

2. DEFINITIONS

"Market Price" for companies listed on the TSX Venture Exchange shall have the meaning as set out in the Corporate Finance Manual of the TSX Venture Exchange as calculated on close of business day before the issuance of the press release announcing the Acquisition. For companies listed on the TSX, Market Price means the average closing price of the Company's stock on a recognized exchange five trading days immediately preceding the issuance of the press release announcing the Acquisition.

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

3. FINDER'S FEE

3.1 . . . the Company agrees that on the closing of an Acquisition introduced to Company by the Finder, the Company will pay the Finder a finder's fee (the "Finder's Fee") based on Consideration paid to the vendor equal to the maximum amount payable pursuant to the rules and policies of the TSX Venture Exchange. Such finder's fee

VI. Conclusion

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

ANNEXE I

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

a) Définition du « cours » :

[TRADUCTION]

2. DÉFINITIONS

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

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

[TRADUCTION]

3. HONORAIRES D'INTERMÉDIATION

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

is to be paid in shares of the Company based on Market Price or, at the option of the Finder, any combination of shares and cash, provided the amount does not exceed the maximum amount as set out in the Exchange Policy 5.1, Section 3.3 Finder's Fee Limitations.

APPENDIX II

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

3.3 Finder's Fee Limitations

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

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

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

APPENDIX III

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

Appeal to the court

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

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

ANNEXE II

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

3.3 Plafond des honoraires d'intermédiation

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

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

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

ANNEXE III

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

[TRADUCTION]

Appel devant le tribunal

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

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

(b) the court grants leave to appeal.

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

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

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

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

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

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

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

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

Appeal allowed with costs throughout.

Solicitors for the appellant: McCarthy Tétrault, Vancouver.

Solicitors for the respondent: Miller Thomson, Vancouver.

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

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

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

(b) le tribunal accorde l'autorisation.

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

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

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

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

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

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

(a) confirmer, modifier ou annuler la sentence,

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

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs de l'appelante : McCarthy Tétrault, Vancouver.

Procureurs de l'intimée : Miller Thomson, Vancouver.

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

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