Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

BRIDGING FINANCE INC.,
as agent for SPROTT BRIDGING INCOME FUND LP

Applicant

- and -

THOMAS CANNING (MAIDSTONE) LIMITED
and 692194 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND 243 (1) OF THE *BANKRUPTCY ACT AND INSOLVENCY ACT* R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, C. c. 43, AS AMENDED

BRIEF OF AUTHORITIES OF THE RESPONDENTS, Thomas Canning (Maidstone) Limited and 692194 Ontario Limited

(Motion Returnable September 27, 2017)

September 15, 2017

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TO: Service List

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Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE MR	)	MONDAY, THE 1ST DAY
	)	
JUSTICE NEWBOULD	)	OF MAY, 2017

B E T W E E N:

BRIDGING FINANCE INC.,
as agent for SPROTT BRIDGING INCOME FUND LP

Applicant

- and -

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

ORDER
(Appointment of Monitor)

THIS APPLICATION made by the Applicant for an Order pursuant to section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**"), appointing Richter Advisory Group Inc. ("**Richter**") as monitor (in such capacity, the "**Monitor**") of each of Thomas Canning (Maidstone) Limited ("**Thomas Canning**") and 692194 Ontario Limited (together with Thomas Canning, the "**Debtors**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of Graham Marr sworn April 19, 2017, and the exhibits thereto, and the Report of Richter in its capacity as Court-appointed Interim Receiver (the "**Interim Receiver**") dated April 28, 2017 (the "**IR Report**"), and on hearing the submissions of counsel for the Applicant, counsel for the Debtors and no one appearing for any other person although duly served as appears from the affidavit of service of Paula Hoosain sworn April 21, 2017 and on reading the consent of Richter to act as the Monitor,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby validated and that this Application is properly returnable today and hereby dispenses with further service thereof.

INTERIM RECEIVERSHIP

2. **THIS COURT ORDERS** that the IR Report, and the activities of the Interim Receiver referred to therein, be and are hereby approved.

3. **THIS COURT ORDERS** that Richter is hereby discharged as Interim Receiver of the undertaking, property and assets of the Debtors, provided however that, notwithstanding its discharge herein, (a) Richter shall remain Interim Receiver for the performance of such incidental duties as may be required to complete the administration of the interim receivership herein (the "**Interim Receivership**"), and (b) Richter shall continue to have the benefit of the provisions of the Interim Receivership Order made in this proceeding on April 20, 2017 (the "**Interim Receivership Order**"), including the Interim Receivership Charge (as such term is defined in the Interim Receivership Order) and all approvals, protections and stays of proceedings in favour of Richter in its capacity as Interim Receiver.

4. **THIS COURT ORDERS AND DECLARES** that the Interim Receiver, having not taken possession or the Debtors' current assets, did and does not have the obligations of a receiver under sections 81.4(5) or 81.6(3) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") or under the *Wage Earner Protection Program Act*, S.C. 2005, c. 47, s. 1 ("**WEPPA**").

5. **THIS COURT ORDERS** that Richter is authorized to take down the Interim Receivership Case Website established pursuant to paragraph 23 of the Interim Receivership Order.

6. **THIS COURT ORDERS AND DECLARES** that Richter be and is hereby released and discharged from any and all liability that Richter now has or may hereafter have by reason of, or in any way arising out of, the acts or omissions of Richter while acting in its capacity as Interim Receiver herein, save and except for any gross negligence or wilful misconduct on the Interim Receiver's part. Without limiting the generality of the foregoing, Richter is hereby forever released and discharged from any and all liability relating to matters that were raised, or which could have been raised, in the within Interim Receivership proceedings, save and except for any gross negligence or wilful misconduct on the Interim Receiver's part.

7. **THIS COURT ORDERS** that, notwithstanding its discharge hereby, the Interim Receiver and its legal counsel shall pass their accounts in accordance with paragraph 17 of the Interim Receivership Order at a later date.

APPOINTMENT

8. **THIS COURT ORDERS** that pursuant to section 101 of the CJA, Richter is hereby appointed Monitor of the Debtors and of all of their assets, undertakings and properties (the "**Property**").

MONITOR'S POWERS

9. **THIS COURT ORDERS** that the Monitor is hereby empowered and authorized, but not obligated, to act at once in respect of the Debtors and the Property and, without in any way limiting the generality of the foregoing, the Monitor is hereby expressly empowered and authorized to do any of the following where the Monitor considers it necessary or desirable:

(a) to monitor, make recommendations and approve of all matters concerning the management and operation of the Debtors' business as has been agreed to between the Debtors and the Applicant;

(b) to market the Debtors' business and/or any or all of the Property in accordance with the terms of such refinancing, investment and/or sale process as agreed to among and between the Applicant, the Debtors and the Monitor, provided any resulting sale or sales of all or substantially all of the Property acquired for or used in relation to the business of Thomas Canning shall be subject to prior approval of this Court on motion brought by the Debtors or the Applicant in the Receivership Proceedings;

(c) to engage consultants, appraisers, examiners, advisors, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Monitor's powers and duties, including without limitation those conferred by this Order;

(d) to report to, meet with and discuss with such affected Persons (as defined below) as the Monitor deems appropriate on all matters relating to the Property, and to share information, subject to such terms as to confidentiality as the Monitor deems advisable; and

(e) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

10. **THIS COURT ORDERS AND DECLARES** that:

(a) the Monitor shall not take possession or control, nor shall it be deemed to have taken possession or control, of the Debtors' business or the Property;

(b) the Monitor shall not be and shall not be deemed to be a receiver for purposes of subsection 243(1) of the BIA; and

(c) the appointment of the Monitor shall not be and shall not be deemed to be a change of control of the Debtors.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE MONITOR

11. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, advisors, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Monitor of the existence of any Property in such Person's possession or control and shall grant immediate and continued access to the Property to the Monitor.

12. **THIS COURT ORDERS** that all Persons shall forthwith advise the Monitor of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Monitor or permit the Monitor to make, retain and take away copies thereof and grant to the Monitor unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 12 or in paragraph 13 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Monitor due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

13. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Monitor for the purpose of allowing the Monitor to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Monitor in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Monitor. Further, for the purposes of this paragraph, all Persons shall provide the Monitor with all such assistance in gaining immediate access to the information in the Records as the Monitor may in its discretion require including

providing the Monitor with instructions on the use of any computer or other system and providing the Monitor with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE MONITOR

14. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Monitor except with the written consent of the Monitor or with leave of this Court.

NO INTERFERENCE WITH THE DEBTORS

15. **THIS COURT ORDERS** that no regulatory body shall discontinue, fail to honour, alter, repudiate or terminate or cease to perform any right, renewal right, contract, agreement, certificate, certification, consent, approval, licence or permit in favour of or held by Thomas Canning or Thomas Canning's manufacturing plant without written consent of the Monitor or leave of this Court.

EMPLOYEES

16. **THIS COURT ORDERS** that all employees of the Debtors shall remain the employees of the Debtors until such time as the Debtors' may terminate the employment of such employees. The Monitor shall not be liable for any employee-related liabilities, including: (a) any successor employer liabilities; (b) any obligations of a receiver under sections 81.4(5) or 81.6(3) of the BIA or under WEPPA; or (c) any liability as an employer or sponsor of any workers employed or to be employed by the Debtors through the Temporary Foreign Worker Program or the International Mobility Program.

PIPEDA

17. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Monitor may disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such

information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Monitor, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Monitor, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

18. **THIS COURT ORDERS** that nothing herein contained shall require the Monitor to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"). The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation.

LIMITATION ON THE MONITOR'S LIABILITY

19. **THIS COURT ORDERS** that the Monitor shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the any protections afforded the Monitor herein or by any applicable legislation.

MONITOR'S ACCOUNTS

20. **THIS COURT ORDERS** that the Monitor and counsel to the Monitor shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Monitor and counsel to the Monitor shall be entitled to and are hereby granted a charge (the

"**Monitor's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Monitor's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to the Interim Receiver's Charge (as defined in the Interim Receivership Order), with which it shall rank *pari passu*. The Monitor's Charge shall rank in priority to the Interim Receiver's Borrowings Charge (as defined in the Interim Receivership Order).

21. **THIS COURT ORDERS** that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

CASH MANAGEMENT

22. **THIS COURT ORDERS** that the Debtors shall be required to continue to comply with cash management arrangements as set out and required under letter credit agreement dated July 3, 2015, as amended, between Thomas Canning, the Applicant and others, and the blocked account agreement dated June 29, 2015 entered into between Bank of Montreal, the Applicant and Thomas Canning.

GENERAL

23. **THIS COURT ORDERS** that the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

24. **THIS COURT ORDERS** that nothing in this Order shall prevent the Monitor from acting as a BIA section 243(1) receiver or a trustee in bankruptcy of the Debtors.

25. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Monitor and/or the Debtors and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the

Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Monitor and its agents in carrying out the terms of this Order.

26. **THIS COURT ORDERS** that the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Monitor is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

27. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Debtors and the Monitor and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

MAY 01 2017

PER / PAR:

BRIDGING FINANCE INC., as agent for SPROTT BRIDGING INCOME FUND LP
Applicant

And **THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED**

Respondents

Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT TORONTO

ORDER
(APPOINTMENT OF MONITOR)

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Lawyers for the Applicant

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Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 21ST DAY
	)	
JUSTICE CONWAY	)	OF JUNE, 2017

BETWEEN:

BRIDGING FINANCE INC.,
as agent for SPROTT BRIDGING INCOME FUND LP

Applicant

- and -

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

ORDER
(Appointment of Receiver)

THIS APPLICATION made by the Applicant for an Order pursuant to subsection 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**"), and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**"), appointing Richter Advisory Group Inc. ("**Richter**") as receiver (in such capacity, the "**Receiver**") without security, of all of the assets, undertakings and properties of each of Thomas Canning (Maidstone) Limited ("**Thomas Canning**") and 692194 Ontario Limited (together with Thomas Canning, the "**Debtors**") acquired for, or used in relation to a business carried on by the Debtors, was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report of Richter in its capacities as Court-appointed Monitor (the "**Monitor**") and Interim Receiver dated June 15, 2017, and on hearing the submissions of counsel for the Applicant, counsel for the Debtors, counsel for the Monitor and no one appearing for any other person although duly served as appears from the affidavits of service of Kyle Plunkett and Daphne Porter sworn June 16, 2017 and on reading the consent of Richter to act as the Receiver,

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Return of Application and the Return Application Record is hereby validated and that this Application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT OF RECEIVER

2. **THIS COURT ORDERS** that pursuant to subsection 243(1) of the BIA and section 101 of the CJA, Richter is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors including all proceeds thereof (the "**Property**").

RECEIVER'S POWERS

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Debtors and the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;

(g) to settle, extend or compromise any indebtedness owing to the Debtors;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

(i) to undertake environmental or workers' health and safety assessments of the Property and operations of the Debtors;

(j) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(k) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $1,000,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

(m) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(n) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(o) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have;

(s) to exercise any and all rights of the Debtors under any certificate, certification, consent, approval, licence or permit in favour of or held by the Debtors or Thomas Canning's manufacturing plant, including those granted by any governmental or regulatory body; and

(t) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations,

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of their current and former directors, officers, employees, agents, advisors, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request. Without limiting the forgoing, 2190330 Ontario Ltd. shall grant the Receiver such access to the Property of the Debtors located on the real property of the legal description PT LT 290, CON STR MAIDSTONE AS IN R1425228, LAKESHORE, PIN 75016-0085 (LT), as the Receiver may require for the continued operation

and/or removal of such Property, or as the Receiver may require to give any purchaser of such Property the same access.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

NO PROCEEDINGS AGAINST THE RECEIVER

7. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

8. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

9. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

10. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, certificate, certification, consent, approval, licence or permit in favour of or held by the Debtors or Thomas Canning's manufacturing plant without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

11. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including

without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtors' current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

12. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

13. **THIS COURT ORDERS** that all employees of the Debtors are hereby terminated. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA or any liability as an employer or sponsor of any workers employed or to be employed by the Debtors through the Temporary Foreign Worker Program or the International Mobility Program, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

14. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver may disclose personal information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

15. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

16. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

17. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA. For greater certainty, the Receiver's Charge shall rank in priority to the Interim Receiver's Charge and the Interim Receiver's Borrowings Charge (as such terms are defined in the Interim Receivership Order made in this proceeding on April 20, 2017) and to the Monitor's Charge (as defined in the Monitor Order made in this proceeding on May 1, 2017).

18. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

19. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the normal rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

20. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may consider necessary or desirable, provided that the outstanding principal amount does not exceed $600,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA. For greater certainty, the Receiver's Borrowings Charge shall rank in priority to the Interim Receiver's Charge, the Interim Receiver's Borrowings Charge and the Monitor's Charge.

21. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

22. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as **Schedule "A"** hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

23. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

PAYMENTS AND DISTRIBUTION

24. **THE COURT ORDERS** that the Receiver is hereby authorized, upon the closing of the sale transaction approved by this Court pursuant to the Approval and Vesting Order dated June 21, 2017, to:

(a) repay the principal amount, and all interest that has accrued thereon, borrowed by the Interim Receiver in accordance with the Interim Receivership Order and secured by the Interim Receiver's Borrowings Charge; and

(b) distribute the net sale proceeds to the Applicant, subject to a $1,200,000 reserve, the entitlements and priority of claims to which reserve (including those claims set out in the Affidavit of William Thomas sworn June 20, 2017 and/or the Affidavit of James Clark sworn June 20, 2017) shall be subject to further Order of this Court.

JOINT ADMINISTRATION

25. **THIS COURT ORDERS** and directs that the receiverships and estates of the Debtors be jointly administered.

SERVICE AND NOTICE

26. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/eservice-commercial/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further orders that a Case Website shall be established in accordance with the Protocol with the following URL 'http://www.richter.ca/Folder/Insolvency-Cases/T/Thomas-Canning-Limited'.

27. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any

other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtors' creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

28. **THIS COURT ORDERS** that the Applicant, the Receiver and their respective counsel are at liberty to serve or distribute this Order, any other materials and orders as may be reasonably required in these proceedings, including any notices, or other correspondence, by forwarding true copies thereof by electronic message to the Debtors' creditors or other interested parties and their advisors. For greater certainty, any such distribution or service shall be deemed to be in satisfaction of a legal or juridical obligation, and notice requirements within the meaning of clause 3(c) of the *Electronic Commerce Protection Regulations*, Reg. 81000-2-175 (SOR/DORS).

GENERAL

29. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

30. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.

31. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

32. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

33. **THIS COURT ORDERS** that the Applicant shall have its costs of this Application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from each of the Debtors' estates with such priority and at such time as this Court may determine.

34. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

C. Irwin
Registrar

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUN 2 2 2017

PER / PAR:

SCHEDULE "A"

RECEIVER CERTIFICATE

CERTIFICATE NO. ____

AMOUNT $ _____

1. **THIS IS TO CERTIFY** that Richter Advisory Group Inc., the receiver (the "**Receiver**") of the assets, undertakings and properties of each of Thomas Canning (Maidstone) Limited and 692194 Ontario Limited (together, the "**Debtors**") acquired for, or used in relation to a business carried on by the Debtors, including all proceeds thereof (collectively, the "**Property**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "**Court**") dated the 21st day of June, 2017 (the "**Order**") made in an action having Court file number CV-17-11773-00CL, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the ____ day of each month] after the date hereof at a notional rate per annum equal to the rate of ____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act* (Canada), and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver

to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the ____ day of _____, 2017.

RICHTER ADVISORY GROUP INC., solely in its capacity as Receiver of the Thomas Canning (Maidstone) Limited and 692194 Ontario Limited, and not in its corporate or personal capacity

Per: _____

Name:

Title:

BRIDGING FINANCE INC., as agent for SPROTT BRIDGING INCOME FUND LP
Applicant

And **THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED**

Respondents

Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT TORONTO

ORDER
(APPOINTMENT OF RECEIVER)

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, Ontario M5J 2T9

Sam Babe - LSUC No. 49498B
Kyle B. Plunkett - LSUC No. 61044N
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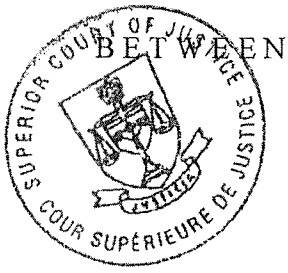
Lawyers for the Applicant

3

Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE	)	WEDNESDAY, THE 21ST DAY
	)	
JUSTICE CONWAY	)	OF JUNE, 2017



BETWEEN:

BRIDGING FINANCE INC.,
as agent for SPROTT BRIDGING INCOME FUND LP

Applicant

- and -

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

APPROVAL AND VESTING ORDER

THIS MOTION, made by Bridging Finance Inc. for an order approving the sale transaction (the "**Transaction**") contemplated by an asset purchase agreement dated June 15, 2017 (the "**Sale Agreement**") and made between 2581150 Ontario Inc. (the "**Purchaser**") and Richter Advisory Group Inc. ("**Richter**") in its capacity as the Court-appointed receiver (the "**Receiver**") of the undertakings, properties and assets of each of Thomas Canning (Maidstone) Limited ("**Thomas Canning**") and 692194 Ontario Limited (together with Thomas Canning, the "**Debtors**"), as appended to the Report of Richter in its capacity as Interim Receiver and Monitor

in these proceedings dated June 15, 2017 (the "**Report**"), and vesting in the Purchaser the Debtors' right, title and interest in and to the assets described in the Sale Agreement (the "**Purchased Assets**"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the Report and on hearing the submissions of counsel for the Receiver, counsel for the Debtors, counsel for Bridging, counsel for the Ontario Farm Products Marketing Commission and no one appearing for any other person on the service list, although properly served as appears from the affidavits of Kyle Plunkett and Daphne Porter sworn June 16, 2017, filed:

1. **THIS COURT ORDERS AND DECLARES** that the Sale Agreement and the Transaction are hereby approved, and the execution of the Sale Agreement by the Receiver is hereby authorized and approved, with such minor amendments as the Receiver may deem necessary. The Receiver is hereby authorized and directed to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the Transaction and for the conveyance of the Purchased Assets to the Purchaser.

2. **THIS COURT ORDERS AND DECLARES** that upon the delivery of a Receiver's certificate to the Purchaser substantially in the form attached as **Schedule A** hereto (the "**Receiver's Certificate**"), all of the Debtors' right, title and interest in and to the Purchased Assets described in the Sale Agreement, including, without limitation, those listed on **Schedule B** hereto, shall vest absolutely in the Purchaser, free and clear of and from any and all security interests (whether contractual, statutory, or otherwise), hypothecs, mortgages, trusts or deemed trusts (whether contractual, statutory, or otherwise), liens, executions, levies, charges, or other financial or monetary claims, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise (collectively, the "**Claims**") including, without limiting the generality of the foregoing: (i) any encumbrances or charges created by the Orders of the Honourable Justice Newbould dated April 20, 2017 and May 1, 2017 in this proceeding; (ii) all charges, security interests or claims evidenced by registrations pursuant to the *Personal Property Security Act* (Ontario) or any other personal property

registry system; and (iii) those Claims listed on **Schedule C** hereto (all of which are collectively referred to as the "**Encumbrances**", which term shall not include the permitted encumbrances, easements and restrictive covenants listed on **Schedule D**) and, for greater certainty, this Court orders that all of the Encumbrances affecting or relating to the Purchased Assets are hereby expunged and discharged as against the Purchased Assets.

3. **THIS COURT ORDERS** that the Purchaser shall be entitled to take delivery of those Purchased Assets comprised of the 50 acres of organic tomatoes being grown under contract by 959699 Ontario Inc. o/a DeNijs Organic Farms, in the normal course and upon release of the funds held in escrow for payment of the same, regardless of the assignability or status of Thomas Canning's Ontario Farm Products Marketing Commission procurement license #1944-18.

4. **THIS COURT ORDERS** that upon the registration in the Land Registry Office for the Land Titles Division of Windsor of an Application for Vesting Order in the form prescribed by the *Land Titles Act*, the Land Registrar is hereby directed to enter the Purchaser as the owner of the subject real property identified in Schedule B hereto (the "**Real Property**") in fee simple, and is hereby directed to delete and expunge from title to the Real Property all of the Claims listed in **Schedule C** hereto.

5. **THIS COURT ORDERS** that for the purposes of determining the nature and priority of Claims, the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets, and that from and after the delivery of the Receiver's Certificate all Claims and Encumbrances shall attach to the net proceeds from the sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.

6. **THIS COURT ORDERS AND DIRECTS** the Receiver to file with the Court a copy of the Receiver's Certificate, forthwith after delivery thereof.

7. **THIS COURT ORDERS AND DECLARES** that the assumption of the Bridging Indebtedness, as such term is defined in the Sale Agreement, by the Purchaser pursuant to the Sale Agreement shall be effective as at the date of the Receiver's discharge in these proceedings.

8. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver is authorized and permitted to disclose and transfer to the Purchaser all human resources and payroll information in the Debtors' records pertaining to the Debtors' past and current employees. The Purchaser shall maintain and protect the privacy of such information and shall be entitled to use the personal information provided to it in a manner which is in all material respects identical to the prior use of such information by the Debtors.

9. **THIS COURT ORDERS** that, notwithstanding:

   (a) the pendency of these proceedings;

   (b) any applications for a bankruptcy order now or hereafter issued pursuant to the *Bankruptcy and Insolvency Act* (Canada) in respect of the Debtors and any bankruptcy order issued pursuant to any such applications; and

   (c) any assignment in bankruptcy made in respect of the Debtors;

   the vesting of the Purchased Assets in the Purchaser pursuant to this Order shall be binding on any trustee in bankruptcy that may be appointed in respect of the Debtors and shall not be void or voidable by creditors of the Debtors, nor shall it constitute nor be deemed to be a settlement, fraudulent preference, assignment, fraudulent conveyance, transfer at undervalue, or other reviewable transaction under the *Bankruptcy and Insolvency Act* (Canada) or any other applicable federal or provincial legislation, nor shall it constitute oppressive or unfairly prejudicial conduct pursuant to any applicable federal or provincial legislation.

10. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to

give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies ~~including, without limitation, the Ontario Farm Products Marketing Commission and the Canadian Food Inspection Agency,~~ are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO:

JUN 2 1 2017

PER / PAR:

SCHEDULE A
FORM OF RECEIVER'S CERTIFICATE

Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

BRIDGING FINANCE INC.,
as agent for SPROTT BRIDGING INCOME FUND LP

Applicant

- and -

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED

Respondents

RECEIVER'S CERTIFICATE

RECITALS

A. Pursuant to an Order of the Honourable [redacted] of the Ontario Superior Court of Justice (the "**Court**") dated June 21, 2017, Richter Advisory Group Inc. was appointed as the receiver (the "**Receiver**") of the undertakings, properties and assets of Thomas Canning (Maidstone) Limited and 692194 Ontario Limited (collectively, the "**Debtors**").

B. Pursuant to an Order of the Court dated June 21, 2017, the Court approved the asset purchase agreement made as of June 15, 2017 (the "**Sale Agreement**") between the Receiver and 2581150 Ontario Inc. (the "**Purchaser**") and provided for the vesting in the Purchaser of the Debtors' right, title and interest in and to the Purchased Assets, which vesting is to be effective with respect to the Purchased Assets upon the delivery by the Receiver to the Purchaser of a certificate confirming (i) the payment by the Purchaser of the Purchase Price for the Purchased Assets; (ii) that the conditions to Closing as set out in Article 5 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and (iii) the Transaction has been completed to the satisfaction of the Receiver.

C. Unless otherwise indicated herein, terms with initial capitals have the meanings set out in the Sale Agreement.

THE RECEIVER CERTIFIES the following:

1. The Purchaser has paid and the Receiver has received the Purchase Price for the Purchased Assets payable on the Closing Date pursuant to the Sale Agreement;

2. The conditions to Closing as set out in section Article 5 of the Sale Agreement have been satisfied or waived by the Receiver and the Purchaser; and

3. The Transaction has been completed to the satisfaction of the Receiver.

4. This Certificate was delivered by the Receiver at _____ on [redacted], 2017.

RICHTER ADVISORY GROUP INC., in its capacity as Receiver of the undertakings, propertied and assets of THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED, and not in its personal capacity

Per: _____
Name:
Title:

SCHEDULE B
PURCHASED ASSETS

All of the properties, assets and undertakings of the Debtors (collectively, the "**Purchased Assets**") including but not limited to:

(a) all accounts receivable, bills receivable, trade accounts, book debts and insurance claims Related to the Business, including recoverable deposits, including any unpaid interest on such items and any security or collateral for such items;

(b) all books, records, files and papers Related to the Business or the Purchased Assets including, but not limited to, drawings, manuals and data related to equipment, computer hardware and software and phone systems, computer system passwords, combinations and keys to locks and other safety and storage systems, sales and purchases correspondence, trade association files, lists of present and former customers and suppliers, security and alarm system records, personnel, employment and other records, and all copies and recordings of the foregoing;

(c) all rights and interests of the Debtors to and in all pending and/or executory contracts, agreements, licences (including, without limitation, all software licences), leases and arrangements;

(d) the goodwill related to the business carried on by the Debtors (the "**Business**"), including all right, title and interest of the Debtors in, to and in respect of all elements which contribute to the goodwill related to the Business, including goodwill represented by customer and supplier lists and the logos of the Debtors;

(e) the intellectual property including, without limitation:

(i) all business and trade names, corporate names, brand names and slogans Related to the Business including "Thomas' Utopia Brand";

(ii) all inventions, patents, patent rights, patent applications (including all reissues, divisions, continuations, continuations-in-part and extensions of any patent or patent application), industrial designs and applications for registration of industrial designs and associated rights related to the Business;

(iii) all copyrights and trade-marks (whether used with goods or services and including the goodwill attaching to such trade-marks), registrations and applications for trade-marks and copyrights (and all future income from such trade-marks and copyrights) related to the Business;

(iv) all rights and interests in and to processes, lab journals, notebooks, data, trade secrets, designs, know-how, product formulae and information, manufacturing, engineering and other drawings and manuals, technology, blue prints, research and development reports, agency agreements, technical information, technical assistance, engineering data, design and engineering specifications, and similar

materials recording or evidencing expertise or information Related to the Business;

(v) all other intellectual and industrial property rights throughout the world related to the Business;

(vi) all rights of the Debtors in all confidentiality, non-compete, non-solicitation and intellectual property assignment agreements;

(vii) all licences of the intellectual property listed in items (i) to (vi) above;

(viii) all future income and proceeds from any of the intellectual property and licences listed in items (i) to (vi) above and the licenses listed in item (vii) above;

(ix) all rights to damages and profits by reason of the infringement of any of the intellectual property listed in items (i) to (vii) above;

(x) all phone numbers; and,

(xi) all websites, including www.thomasutopiabrand and www.thomascanning.com;

(f) all inventories of stock-in-trade and merchandise including seedlings, crops, materials, supplies, finished goods, repair and service parts related to the Business (collectively, the "**Inventory**") including, without limitation, those in possession of suppliers, customers and other third parties (including, without limitation, the 50 acres of organic tomatoes being grown under contract by 959699 Ontario Inc. o/a DeNijs Organic Farms);

(g) all licences, permits, filings, authorizations, registrations, certificates of approval, approvals, grants, quotas, commitments, rights, privileges or indicia of authority related to the Business or necessary for the conduct of the Business;

(h) all machinery, equipment, furniture, fixtures, computer systems and equipment and other chattels related to the Business;

(i) all rights and interests of the Debtors to and in all customer orders for purchases of Inventory; and

(j) the all real property of the Debtors including, without limitation, the following:

(i) **PIN 75228-0009 (LT)**

PT LT 28-29 CON 9 MAIDSTONE AS IN R305027, PT 2 12R9420; T/W R1042854; S/T MB18413; LAKESHORE; SUBJECT TO AN EASEMENT IN GROSS OVER PT. 1 12R24775 AS IN CE502602

(ii) **PIN 75228-0005 (LT)**

PT LT 27 CON 10 MAIDSTONE AS IN R442677; LAKESHORE

(iii) **PIN 75228-0067 (LT)**

PT LT 27 CON 10; LAKESHORE DESIGNATED AS PT 2 12R20686,

(iv) **PIN 75016-0010 (LT)**

PT LT 289 CON STR MAIDSTONE AS IN R305027 (THIRDLY) EXCEPT PTS 3, 4 R423541; S/T MB18404; LAKESHORE

(v) **PIN 75016-0009 (LT)**

PT LT 289 CON STR MAIDSTONE AS IN R1119864; S/T MB18355; LAKESHORE

(vi) **PIN 75016-0021 (LT)**

PT LT 291 CON STR MAIDSTONE PTS 1, 2 RD138 EXCEPT PT 1 RD273 & PT 1 12R376; S/T R389219; LAKESHORE

(vii) **PIN 75016-0019 (LT)**

PT LT 289-290 CON STR MAIDSTONE AS IN R645962, R463774 & R305027 (FIRSTLY) EXCEPT PT 1 12R2096 & PTS 9, 10 R423541; S/T MB18409, MB18414, R902964; LAKESHORE

SCHEDULE C
CLAIMS TO BE DELETED AND EXPUNGED FROM TITLE TO REAL PROPERTY

PIN 75228-0009 (LT)

1. Instrument Number R233025 registered on January 5, 1961 being an Assignment of Lease

2. Instrument Number CE665518 registered on July 3, 2015 being a Charge in the principal amount of $21,365,650.00 in favour of Bridging Finance Inc.

3. Instrument Number CE665523 registered on July 3, 2015 being a Notice of Assignment of Rents-General in favour of Bridging Finance Inc.

PIN 75228-0005 (LT)

1. Instrument Number CE665518 registered on July 3, 2015 being a Charge in the principal amount of $21,365,650.00 in favour of Bridging Finance Inc.

2. Instrument Number CE665523 registered on July 3, 2015 being a Notice of Assignment of Rents-General in favour of Bridging Finance Inc.

PIN 75228-0067 (LT)

1. Instrument Number CE665518 registered on July 3, 2015 being a Charge in the principal amount of $21,365,650.00 in favour of Bridging Finance Inc.

2. Instrument Number CE665523 registered on July 3, 2015 being a Notice of Assignment of Rents-General in favour of Bridging Finance Inc.

PIN 75016-0010 (LT)

1. Instrument Number CE665518 registered on July 3, 2015 being a Charge in the principal amount of $21,365,650.00 in favour of Bridging Finance Inc.

2. Instrument Number CE665523 registered on July 3, 2015 being a Notice of Assignment of Rents-General in favour of Bridging Finance Inc.

PIN 75016-0009 (LT)

1. Instrument Number CE665518 registered on July 3, 2015 being a Charge in the principal amount of $21,365,650.00 in favour of Bridging Finance Inc.

2. Instrument Number CE665523 registered on July 3, 2015 being a Notice of Assignment of Rents-General in favour of Bridging Finance Inc.

PIN 75016-0021 (LT)

1. Instrument Number R720043Z registered on December 22, 1977 being an Application to Annex Restrictive Covenant

2. Instrument Number CE665518 registered on July 3, 2015 being a Charge in the principal amount of $21,365,650.00 in favour of Bridging Finance Inc.

3. Instrument Number CE665523 registered on July 3, 2015 being a Notice of Assignment of Rents-General in favour of Bridging Finance Inc.

PIN 75016-0019 (LT)

1. Instrument Number R902964 registered on March 8, 1984 being an Agreement for Right-of-Way in favour of Union Gas Limited (expired)

2. Instrument Number CE665518 registered on July 3, 2015 being a Charge in the principal amount of $21,365,650.00 in favour of Bridging Finance Inc.

3. Instrument Number CE665523 registered on July 3, 2015 being a Notice of Assignment of Rents-General in favour of Bridging Finance Inc.

SCHEDULE D
PERMITTED ENCUMBRANCES, EASEMENTS AND RESTRICTIVE COVENANTS RELATED TO THE REAL PROPERTY

(unaffected by the Vesting Order)

PIN 75228-0009 (LT)

1. Instrument Number MB18413 registered on February 1, 1949 being a Transfer of Easement in favour of Bell Telephone Co. of Canada
2. Instrument Number R305027 registered on June 9, 1964 being a Transfer
3. Instrument Number 12R4451 registered on June 23, 1978 being a Reference Plan
4. Instrument Number 12R9420 registered on April 11, 1988 being a Reference Plan
5. Instrument Number R1042854 registered on April 13, 1988 being a Transfer
6. Instrument Number R1073171 registered on January 9, 1989 being a Notice of Claim
7. Instrument Number 12R24775 registered on August 17, 2011 being a Reference Plan
8. Instrument Number CE502602 registered on January 11, 2012 being a Transfer of Easement in favour of Hydro One Networks Inc.

PIN 75228-0005 (LT)

1. Instrument Number R442677 registered on June 19, 1969 being a Transfer

PIN 75228-0067 (LT)

1. Instrument Number 12R20686 registered on August 12, 2003 being a Reference Plan
2. Instrument Number CE52782 registered on January 6, 2004 being a Transfer

PIN 75016-0010 (LT)

1. Instrument Number MB18404 registered on January 21, 1949 being a Transfer of Easement in favour of The Bell Telephone Company of Canada
2. Instrument Number R305027 registered on June 9, 1964 being a Transfer
3. Instrument Number R1073182 registered on January 9, 1989 being a Notice of Claim

PIN 75016-0009 (LT)

1. Instrument Number MB18355 registered on November 23, 1948 a Transfer of Easement in favour of The Bell Telephone Company of Canada

2. Instrument Number R1042301 registered on April 7, 1988 being a Notice of Claim

3. Instrument Number R1119864 registered on February 26, 1990 being a Transfer

PIN 75016-0021 (LT)

1. Instrument Number R38129 registered on July 20, 1967 being a Transfer of Easement in favour of The Bell Telephone Company of Canada

2. Instrument Number RD138 registered on June 27, 1969 being a Reference Plan

3. Instrument Number R720043 registered on December 22, 1977 being a Transfer

PIN 75016-0019 (LT)

1. Instrument Number MB18409 registered on January 21, 1949 being a Transfer of Easement in favour of Bell Telephone Co. of Can.

2. Instrument Number MB18414 registered on February 1, 1949 being a Transfer of Easement in favour of Bell Telephone Co. of Canada

3. Instrument Number R305027 registered on June 9, 1964 being a Transfer

4. Instrument Number R463774 registered on March 10, 1970 being a Transfer

5. Instrument Number R645962 registered on October 16, 1975 being a Transfer

6. Instrument Number 12R7427 registered on January 20, 1984 being a Reference Plan

7. Instrument Number R1073173 registered on January 9, 1989 being a Notice of Claim

8. Instrument Number R1073175 registered on January 9, 1989 being a Notice of Claim

9. Instrument Number R1497830 registered on August 21, 2000 being a Site Plan Agreement

BRIDGING FINANCE INC., as agent for SPROTT BRIDGING INCOME FUND LP
Applicant

and

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED

Respondents

Court File No. CV-17-11773-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
PROCEEDING COMMENCED AT TORONTO

APPROVAL AND VESTING ORDER

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2014 ONSC 6214
Ontario Superior Court of Justice

H.S.C. Aggregates Ltd. v. McCallum

2014 CarswellOnt 15209, 2014 ONSC 6214, 20 C.C.E.L. (4th) 50, 246 A.C.W.S. (3d) 819

H.S.C. Aggregates Ltd. and Harold Sutherland Construction Ltd., Plaintiffs and Calvin McCallum and Construct Michigan Corporation, Defendants

Price J.

Heard: May 22, 2014
Judgment: October 31, 2014
Docket: Owen Sound CV-112-SR

Counsel: Brian D. Barrie for Plaintiffs
Jonathan B. Pitblado for Defendants

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency; Public; Employment

Related Abridgment Classifications

Debtors and creditors

XIII Loans
XIII.3 Miscellaneous

Labour and employment law

II Employment law
II.6 Termination and dismissal
II.6.a Termination of employment by employer
II.6.a.i Constructive dismissal
II.6.a.i.D Miscellaneous

Headnote

Debtors and creditors --- Loans — Miscellaneous

When plaintiff H Ltd. hired defendant M, it agreed to help him buy house where he would be working — M signed agreement to be personally liable to repay majority of funds advanced if he did not continue his employment for at least five years — M left job before five year term had ended, and although he gave H Ltd. post-dated cheques to repay amount advanced to him, bank returned one of cheques NSF, and H Ltd. sued for balance it was owed — M asserted he signed loan agreement as witness for his defendant holding company, shielding him from liability to repay money — Plaintiffs brought motion for summary judgment against defendants — Motion granted — Nature and content of loan agreement, and circumstances in which it was signed, established that M, in signing below name of his holding company, demonstrated that parties intended him to be personally liable for obligations agreement entailed — M authorized holding company to enter into loan agreement as his agent, and to undertake, on his behalf, that he would be personally liable to repay balance of funds advanced to

him if he did not continue his employment for completion of five year term set out in his employment agreement — M was personally liable pursuant to that contractual obligation — M was estopped from denying his personal liability.

Labour and employment law --- Employment law — Termination and dismissal — Termination of employment by employer — Constructive dismissal — Miscellaneous

When plaintiff H Ltd. hired defendant M, it agreed to help him buy house where he would be working — M signed agreement to be personally liable to repay majority of funds advanced if he did not continue his employment for at least five years — M left job before five year term had ended, and although he gave H Ltd. post-dated cheques to repay amount advanced to him, bank returned one of cheques NSF, and H Ltd. sued for balance it was owed — M asserted he signed loan agreement as witness for his defendant holding company, shielding him from liability to repay money — M counterclaimed for damages for wrongful dismissal, and claimed set-off of such damages against amount he might be found to owe — Plaintiffs brought motion for summary judgment against defendants — Motion granted — M was not constructively dismissed, and he was not entitled to any damages that could be set off against amount he had to repay to plaintiffs of funds advanced to him — M's primary motivation for terminating his employment with H Ltd. was that his wife secured employment in another area and he was unable to sustain long distance relationship with her.

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s. 51(1) — considered

s. 52(1) — considered

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R. 20.04(2.2) [en. O. Reg. 438/08] — considered

Words and phrases considered:

agency

Agency is the relationship that exists between two persons when one, the agent, is considered in law to represent the other, the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property.

MOTION by plaintiffs for summary judgment.

***Price J.*:**

Nature of Motion

1 When Harold Sutherland Construction Ltd. ("Sutherland") hired Calvin McCallum ("Mr. McCallum") in 2008, it agreed to help him buy a house in Owen Sound, where he would be working. Mr. McCallum told Sutherland that if it advanced money to him for this purpose, he would agree to repay most of it if he did not remain in the Company's employ for at least five years. Sutherland agreed to advance funds to him on this basis, and Mr. McCallum signed a written agreement to be personally liable to repay the majority of the funds if he did not continue his employment for at least five years ("the Loan Agreement"). He signed the Loan Agreement in the name of his holding company, Construct Michigan Corporation.

2 When Mr. McCallum's wife found employment in Southwestern Ontario, Mr. McCallum left his job to join her, before the five year term of his employment agreement with Sutherland had ended. Although he gave Sutherland post-dated cheques to repay the amount advanced to him, the bank returned one of the cheques N.S.F., and Sutherland sued for the balance it was owed.

3 Mr. McCallum now resists repaying the balance of the money he received. He argues that he signed the Loan Agreement as a witness for his holding company, which shields him from liability to repay the money, even though the agreement says, "If Calvin McCallum (Construct Michigan Corporation) terminates the

contract prior to the five year term, he will be liable to repay $50,000 within 2 years of the contract termination." Additionally, he counterclaims for damages for wrongful dismissal, based on incidents that occurred seven months before he left his employment, and claims a set-off of such damages against the amount he may be found to owe Sutherland or H.S.C.

4 Sutherland and H.S.C. move for summary judgment against Mr. McCallum and his company, asserting that their Statement of Defence does not raise genuine issues for trial. Sutherland seeks judgment for the balance it says Mr. McCallum owes to it pursuant to his Promissory Note. H.S.C. seeks judgment for the unpaid balance of funds that it advanced to Mr. McCallum pursuant to the Loan Agreement.

5 The motion requires the court to consider in what circumstances an individual is liable for the contractual obligations that he undertakes in the name of his solely-owned corporation.

Background Facts

6 On August 4, 2008, Sutherland entered into an agreement in writing with Mr. McCallum, whereby it agreed to employ Mr. McCallum as an Estimator/Construction Supervisor for five years ("the Employment Agreement"). The Employment Agreement provided, in part:

> Employment Agreement, ***between HAROLD SUTHERLAND CONSTRUCTION LTD. ("the company") and Calvin McCallum ("the employee")***.
>
> 1. ***For good consideration, the company employs the employee on the following terms and conditions***.
>
> 2. Salary: The company shall pay the employee a total salary compensation of $104,000.00 per year (for first year of employment). This compensation will be payable in installments, paid on the company's regular bi-weekly pay period schedule, in the amount of $4,000.00 per pay period.
>
> | | | |
> |---|---|---|
> | Increase in Wage: | $3,000.00 | Second Year |
> | | $4,000.00 | Third Year |
> | | $5,000.00 | Fourth Year |
> | | $6,000.00 | Fifth Year |
>
> . . .
>
> 7. Reimbursement of Expenses: From time to time the employee may incur reasonable expenses for furthering the company's business such as travel and similar items. The company shall reimburse the employee for all reasonable business expenses after the employee presents receipts for expenditures.
>
> Truck: Allowance of $700.00 per month
>
> Phone: $200.00 per month (Construct Michigan Corporation has a one (1) year plan left on Telus phone)
>
> Gas Card: To be used for company business only.
>
> ***The employee will cover the cost of moving and legal fees (using the company lawyer) associated with the purchase of a new home in the area.)***
>
> . . .
>
> 10. Termination of Agreement: Without cause, the company may terminate this agreement at any time upon 60 days written notice to the employee. If the company requests, the employee will continue to

perform his/her duties and may be paid his/her regular salary up to the date of termination. ***Without cause, the employee may terminate employment upon 60 days written notice to the company***. The employee may be required to perform his/her duties and will be paid the regular salary to date of termination.

[Emphasis added]

Signed on this 4 day of August, 2008.

Harold Sutherland	*Calvin McCallum*
Harold Sutherland Construction Ltd.	Construct Michigan Corporation
Calvin McCallum	*Harold Sutherland*
Witness *Calvin McCallum*	*Witness*

7 As noted above, Mr. McCallum signed the Employment Agreement above a printed line under which was printed the name of his holding company, Construct Michigan Corporation. He explained that he wanted to sign the Agreement in this way in order to preserve his tax status as an independent contractor. He also signed the Employment Agreement as Witness to the signature of Harold Sutherland, who signed above the name of his company, Harold Sutherland Construction Ltd.

8 On the same day he signed the Employment Agreement, Mr. McCallum signed a further agreement in writing with Sutherland's "Aggregate Division", H.S.C. Aggregates Ltd. This Agreement was also entitled "Employment Agreement" but, in fact, it was a loan agreement ("the Loan Agreement"). The Loan Agreement provided as follows:

Employment Agreement, ***between H.S.C. Aggregates Ltd. and Construct Michigan Corporation***.

For good consideration, the company agrees to the following terms and conditions:

1. H.S.C. Aggregates Ltd. will gift a maximum of $80,000.00 to Construct Michigan Corporation providing the entire term with Harold Sutherland Construction Ltd. (5 year contract) is honoured. ***If Calvin McCallum (Construct Michigan Corporation) terminates the contract prior to the five year term, he will be liable to repay $50,000.00 within 2 years of the contract termination***. July 20, 2010.

Any additional monies (above the first $80,000.00 required to make up the difference between the purchase price in Owen Sound and the sale of the home in Thamesford) ***will be repaid, interest free, at a rate based on the yearly wage increases commencing in December 2009 and every December, thereafter, for the five year contract term with Harold Sutherland Construction Ltd.***

Harold Sutherland Construction Ltd. will provide the downpayment towards the purchase of the new home in Owen Sound which would be included in the above difference in house costs. ***This downpayment forms part of the gifted $80,000.00 noted above***.

[Emphasis added]

Harold Sutherland	*Calvin McCallum*
H.S.C. Aggregates Ltd.	Construct Michigan Corporation
Calvin McCallum	*Harold Sutherland*
Witness *Calvin McCallum*	*Witness*

Harold Sutherland Construction will cover mortgage costs until Calvin McCallum's House in Thamesford is sold per the Relocation Agreement. *CM HS*

9 Mr. McCallum signed the Loan Agreement above a printed line, immediately followed by the printed name of his solely owned holding company, Construct Michigan Corporation. Harold Sutherland signed the Loan Agreement above another printed line, immediately followed by the printed name of H.S.C. Mr. McCallum and Mr. Sutherland signed again as witnesses of each other's signature.

10 On August 20, 2008, H.S.C. gave Mr. McCallum a cheque for $84,000.00, payable to Construct Michigan Corporation. On the following day, Sutherland gave him a cheque for $2,100.00, also payable to Construct Michigan Corporation.

11 On August 22, 2008, Sutherland gave Mr. McCallum its cheque for $232,035.39, payable to Construct Michigan Corporation. On that day, Mr. McCallum signed a Promissory Note for $232,035.39 ("the Promissory Note"), in the following terms:

> **PROMISSORY NOTE Between Harold Sutherland Construction Ltd. And Calvin McCallum**
>
> $232,035.30 Due: September 12, 2008
> Township of Georgian Bluffs August 22, 2008
>
> I, Calvin McCallum, promise to pay to the order of Harold Sutherland Construction Ltd., the sum of Two Hundred and Thirty-Two Thousand and Thirty-Five Dollars and Thirty Nine Cents ($232,035.39) on September 12, 2008.
>
> *Calvin McCallum* *Harold Sutherland*
> Calvin McCallum Harold Sutherland Construction Ltd.

12 On September 16, 2008, Mr. McCallum gave H.S.C. a cheque for $218,135.39 on behalf of Construct Michigan Corporation, with the handwritten notation "1st repayment". This payment left $13,900.00 of the amount that H.S.C. had advanced to Construct Michigan Corporation still to be repaid pursuant to the Promissory Note.

13 Mr. McCallum worked for Sutherland until July 20, 2010. At that time, his wife secured employment in Thamesford, in south-western Ontario. She asked Mr. McCallum to join her there, which he did, terminating his employment with Sutherland.

14 On January 20, 2011, Mr. McCallum gave Sutherland a cheque for $909.09 in partial re-payment of the amounts he owed under the Loan Agreement and Promissory Note. His bank returned this cheque marked "Not Sufficient Funds" on January 20, 2010. On April 26, 2011, Sutherland and H.S.C. commenced an action against Mr. McCallum and Construct Michigan Corporation.

15 Sutherland and H.S.C. asserted that Mr. McCallum quit his employment, and that, because he did so before the 5 year term set out in his Employment Agreement had elapsed, he is obliged to repay the balance of the funds they paid to him, as follows:

> a) $44,545.46, being the balance owing under the $50,000 Loan Agreement as of December 20, 2010;
>
> b) $3,208.46, being the balance owing of the amount advanced later, secured by the Promissory Note.

16 Mr. McCallum and Construct Michigan Corporation counter-claimed, asserting that Sutherland constructively dismissed Mr. McCallum seven months before he terminated his employment. They based their claim of constructive dismissal on the following events:

> a) Sutherland substituted a small mechanical excavator for a larger one that it had provided to him and the employees working under his supervision previously to enable them perform their work. Mr. McCallum states that this substitution embarrassed him and that the smaller excavator was unsafe.
>
> b) Sutherland assigned another employee, Alvin Gail, to supervise the project on which Mr. McCallum and the employees working with him were engaged. Mr. McCallum states that this further embarrassed him, especially when Mr. Gail went fishing within the view of Mr. McCallum's work crew.

17 Sutherland and H.S.C. have moved for summary judgment for the unpaid balance of $52,363.96 owing to them pursuant to the Loan Agreement and Promissory Note. Sutherland seeks judgment for the balance it says Mr. McCallum owes to it pursuant to his Promissory Note. H.S.C. seeks judgment for the unpaid balance of funds that it advanced to Mr. McCallum and that he was required to repay pursuant to the Loan Agreement. They assert that the Statement of Defence does not raise genuine issues for trial.

Issues

18 The court must determine whether the following claims made by Mr. McCallum and Construct Michigan Corporation in their Statement of Defence raise genuine issues for trial:

> a) Mr. McCallum has no personal liability for the amounts that Construct Michigan Corporation agreed would be repaid to them under the Loan Agreement or secured by the Promissory Note.
>
> b) Sutherland constructively dismissed Mr. McCallum, entitling him to damages to be set-off against the amounts that he may owe Sutherland and H.S.C. under the Loan Agreement and Promissory Note.

The Parties' Positions

19 Sutherland and H.S.C. say that there is no genuine issue for trial as to whether Mr. McCallum and Construct Michigan Corporation owe them the balance of funds that were advanced to them pursuant to the Loan Agreement, or the balance of funds secured by the Promissory Note. They say that Mr. McCallum terminated the Employment Agreement before the end of its five year term. They assert that Mr. McCallum was the directing mind of Construct Michigan Corporation, and acknowledged, on its behalf, that he would be personally liable to repay the balance of the $50,000 advanced to him. They further assert that Mr. McCallum acknowledged, in correspondence and through his re-payments, that he was obliged to repay the unpaid balance of the further loan secured by the Promissory Note which he signed in his personal capacity.

20 Mr. McCallum and Construct Michigan Corporation say that their Statement of Defence raises the following genuine issues for trial:

> a) Whether Mr. McCallum is personally liable to repay the funds advanced to Construct Michigan Corporation, because he merely signed the Loan Agreement as a witness.
>
> b) Whether Mr. McCallum is personally liable to repay the loan secured by the Promissory Note based on his partial re-payments of that loan and correspondence in which he stated that he would repay it.

c) Whether he is entitled to damages caused by Sutherland's constructive dismissal, and to set-off such damages against any amount that he owes to Sutherland and Construct Michigan Corporation.

Analysis and Evidence

a) Principles applying to motions for summary judgment

21 The Supreme Court of Canada, in *Combined Air Mechanical Services Inc. v. Flesch*, gave guidance as to how the court should apply Rule 20 of the *Rules of Civil Procedure*, governing motions for summary judgment, to promote timely and affordable access to the civil justice system [1] . Karakatsanis J., on behalf of the court, noted that such motions are an opportunity to simplify pre-trial procedures and move the emphasis away from the conventional trial, in favour of proportional procedures tailored to the needs of the particular case. She stated:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. [2]

22 Karakatsanis J. held that the judge hearing a motion for summary judgment must compare the procedures available in such a motion, supplemented, if necessary, by the fact-finding tools provided in Rules 20.04(2.1) and (2.2), with those available at trial, to determine whether the court can make the necessary findings of fact and apply the principles of law to those facts in a proportionate, most expeditious, and least expensive manner to achieve a just result: [3]

> This inquiry into the interest of justice is, by its nature, comparative. Proportionality is assessed in relation to the full trial. It may require the motion judge to assess the relative efficiencies of proceeding by way of summary judgment, as opposed to trial. This would involve a comparison of, among other things, the cost and speed of both procedures. (Although summary judgment may be expensive and time consuming, as in this case, a trial may be even more expensive and slower.) It may also involve a comparison of the evidence that will be available at trial and on the motion as well as the opportunity to fairly evaluate it. (Even if the evidence available on the motion is limited, there may be no reason to think better evidence would be available at trial.) [4]

23 Based on guidelines set out in *Combined Air Mechanical Services Inc. v. Flesch*, I must first determine, without using the fact-finding powers in Rule 20.04(2.1) and (2.2), and based solely on the evidence before me:

> a) Whether there is a genuine issue requiring trial, to fairly and justly adjudicate the dispute; and
>
> b) Whether the motion is a timely, affordable, and proportionate procedure under Rule 20.04(2)(a).

If there is no genuine issue requiring trial, I must grant summary judgment.

24 If there appears to be a genuine issue requiring a trial, I must exercise my discretion to determine whether the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2), provided that their use will not be contrary to the interests of justice, will lead to a fair and just result, and serve the goals of timeliness, affordability, and proportionality, in light of the litigation as a whole. [5] If

a trial is necessary, I should consider undertaking the trial myself in order to save the litigants time and expense. Karakatsanis J. cited the *Osborne Report*, in this regard, which states that involvement of a single judge throughout:

> Saves judicial time since parties will not have to get a different judge up to speed each time an issue arises in the case. It may also have a calming effect on the conduct of litigious parties and counsel, as they will come to predict how the judicial official assigned to the case might rule on a given issue.

b) Sutherland's claim against Mr. McCallum

25 Sutherland's claim against Mr. McCallum is for repayment of the unpaid balance of the $232,035.39 that it advanced to Construct Michigan Corporation on August 22, 2008. Its claim derives from Mr. McCallum's promise to repay the balance of the funds advanced to him, which he confirmed in the Promissory Note that he signed on August 22, 2008, promising to pay Sutherland Two Hundred and Thirty-Two Thousand and Thirty-Five Dollars and Thirty-Nine Cents ($232,035.39) on September 12, 2008. Mr. McCallum acknowledges that he signed the Promissory Note and that Construct Michigan Corporation received the funds. Additionally, he acknowledged at his examination for discovery the partial re-payments made and the balance owing on that date.

26 Mr. McCallum claims damages for Sutherland's alleged constructive dismissal of him in 2009, and seeks to set-off such damages against any amount he may be found to owe Sutherland and H.S.C. For reasons discussed below, I find that Mr. McCallum was not constructively dismissed by Sutherland, and that this claim does not give rise to a genuine issue for trial.

c) H.S.C.'s claim against Mr. McCallum

27 H.S.C. says that Mr. McCallum is personally liable to it for the un-repaid portion of funds that it advanced to Construct Michigan Corporation, having regard to the Loan Agreement between H.S.C. and Construct Michigan Corporation, in which Mr. McCallum, on behalf of Construct Michigan Corporation, acknowledged that he will be liable to repay $50,000 of the $80,000 that H.S.C. advanced to Construct Michigan Corporation if he did not complete the full five years of his employment under the Employment Agreement.

28 There are three bases upon which an individual may be found personally liable for a debt obligation undertaken by his corporation. These are:

> a) He is contractually obligated by, or guaranteed payment of, his corporation's contractual obligation.
>
> b) He authorized his corporation, as his agent, to enter into a contractual obligation on his behalf, by which he was made personally liable to repay the corporation's debt.
>
> c) He made a promise to repay the funds advanced to him, which the parties intended to affect their legal relations, by rendering him legally obliged to repay the funds advanced to Construct Michigan Corporation, and Sutherland and H.S.C., to his knowledge, relied on his promise in a way that benefited him and harmed them, such that it would be unfair to allow him to resile from, or renege on, his promise.

i) Mr. McCallum's liability based on his contractual obligation

29 There has been much debate in the jurisprudence over whether an individual corporate officer who signs a negotiable instrument or agreement that names his corporation as a party attracts personal liability to himself for the obligations the agreement entails. I will review the jurisprudence below. It has developed,

for the most part, in cases involving promissory notes and other negotiable instruments. The reasoning in those cases involves the same issues, and similar policy considerations, as the present case, where the issue is what personal liability, if any, the law imposes on Mr. McCallum based on his signature on his holding company's Loan Agreement with H.S.C.

30 The jurisprudence leads me to conclude that where a corporate officer signs a cheque, promissory note, or agreement, immediately above or below the printed name of a corporation, without specifying that he is signing in a representative capacity on behalf of his corporation, there is sufficient ambiguity to require the court to consider evidence beyond the signature alone, in determining whether the parties intended the officer to be personally liable for the obligations the agreement entails. The court looks for such evidence in the nature or content of the document, or in the circumstances that surrounded the signing of it.

Early jurisprudence and the Bills of Exchange Act

31 Wright J., in *Glatt v. Ritt* [1973 CarswellOnt 429 (Ont. H.C.)], noted that the *Bills of Exchange Act* was enacted to meet the policy objective first enunciated by Lord Chief Baron Eyre, in 1791, in *Gibson v. Minet* The objective was to harmonize the jurisprudence with merchants' need for a debt instrument that could, like the clean bill of lading, expedite and finance trade in an expanding world. Lord Chief Baron Eyre described the rule that the common law developed, which was later codified in the *Bills of Exchange Act*. He stated:

> It is a stringent, well-nigh inflexible, rule designed to give currency to negotiable instruments. It seeks to do so by ***imposing on everyone who signs a negotiable instrument, a direct, unqualified, personal liability, unless there be ambiguity or evident limitation of personal liability on the face of the instrument*** [Emphasis added]. [6]

32 Section 51(1) of the Act currently provides:

> **51.** (1) ***Where a person signs a bill as drawer, endorser or acceptor and adds words to his signature indicating that he has signed for or on behalf of a principal, or in a representative character, he is not personally liable thereon***, but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.
>
> (2) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted. [Emphasis added] [7]

33 Wright J., commenting on the predecessor of the present s. 51(1), stated:

> I find it necessary, in the wake of the cases, to consider ***when the statutory rule must be applied and when extrinsic evidence may be considered***. In this consideration, ***I am of opinion that the basic policy which I have been discussing must be the guiding light. Wherever the negotiability of a bill or note is in question, there can be properly no relaxation of the stringent rule***.
>
> [Emphasis added]

34 Wright J. then focused on actions against corporations arising from signatures of officers on negotiable instruments:

> When we consider whether a corporation is bound by a bill of exchange or promissory note not under seal, ***there is no question that extrinsic evidence of authority can be given. Indeed, in most cases, it may have to be given, if the company denies liability***. (citations omitted)

Jurisprudence applying s. 51(1) of the Bills of Exchange Act

35 In *Daymond Motors Ltd. v. Thistletown Development Ltd.*, in 1956, the Ontario Court of Appeal gave judgment against three individual defendants based on a promissory note written on plain paper, in which their signatures appeared below the typed name of the limited company. [8] Their signatures were separate from the company name, and were not connected with it (as, for example, by a typed line following the typed name of the company). Roach J.A. held that there was no ambiguity on the face of the note, and that the stringent rule of the common law, which imposed personal liability on those who sign negotiable instruments, should apply. He further held that in the absence of ambiguity, no extrinsic evidence was admissible as to the intention of the signer.

36 In *Alliston Creamery v. Grosdanoff*, in 1962, Donley Co. Ct. J. dismissed an action against the president and secretary of a company based on a cheque which they had signed above the stamped name of the company. [9] The Court of Appeal reversed the trial judge's decision, applying the rationale from the *Daymond Motors* case. It held the defendants personally liable as there was nothing on the face of the cheque to indicate that they occupied any position as officers or officials of the company, or that they had signed the cheque other than in their personal capacities.

37 In 1962, McGillivray J., heard an appeal from a Small Claims Court in *H. B. Etlin Co. v. Asselstyne*. [10] He held that the manager of a limited company was not personally liable, having signed his name on a printed line immediately below the printed name of the corporation on a company cheque. The manager had not indicated on the cheque whether he was signing as agent or in a representative capacity. McGillivray J. noted that the signature, written on a printed line which immediately followed the company's name, and linked to it in that way, being obviously designed to receive the signature of an authorized name, was on a cheque printed on company stationery. He further noted that the cheque was not under seal, and would have no effect unless countersigned by an authorized agent of the company.

38 I regard *H. B. Etlin Co. Ltd.* as a case in which the court found ambiguity in the way the document was signed. The court considered the nature of the instrument. It was a cheque printed on company stationery, not under seal, which would have no effect without the signature of an authorized agent. The court also considered the manner in which it was signed, on the printed line below the printed company name, in determining that the manager had signed as agent.

39 In *Mauch v. Burt*, in 1964, the B.C. Supreme Court found the individual defendant liable on a promissory note, based on the fact that he had signed immediately below the name of the corporate defendant. Ruttan J. found that the word "we" in the body of the note signified the joint liability of the signer on his own behalf and on behalf of the corporation. [11] He stated, "The document as drawn suggests an intention to create a joint liability, and if not perfected as to both signatures, it is reasonable to presume the note was completed as far as the individual defendant at least was concerned." [12]

40 Ruttan J. found that there was ambiguity on the face of the note, based on the affixing of two signatures above the signature line, and admitted evidence extrinsic to the signature, on the issue of liability, as to how the company's cheques were normally signed. He stated, "However, I agree it is most unusual to find the signature of a company simply in the form of a typewritten name without any supporting signature by way of agent or officer. Finding such to be an ambiguity, I permitted parol evidence to be given."

41 Ruttan J. held that, because Mr. Burt had not specified that he was signing in only a representative capacity, he could not claim the protection of what was then s. 52(1) of the *Bills of Exchange Act*. Under the strict application of the common law, as noted above, it was presumed that a person who signs a negotiable

instrument is personally liable for the obligations it entails. Section 51(1) of the *Bills of Exchange Act* relieves against that presumption where the signer specifies, on the face of the instrument, that he is doing so in a representative capacity, as the agent or representative of a named principal. In that case, it is only the principal who is liable. The final sentence of section 51(1) qualifies the exception, by stating that where the signer specifies that he signs in a representative capacity, but does not identify the principal, he does not automatically avoid liability.

42 The effect of *Mauch v. Burt* was that, in the absence of an express indication of a signer that he is signing only in a representative capacity on behalf of a named principal, the signer was still presumed to be personally liable. This rule applied even where the signer signed the note immediately above or below the printed name of the corporation of which he is a signing officer. Ruttan J. held that in the absence of an express indication of an individual that he or she is signing in only a representative capacity, the signature of the individual who had signed a note immediately below the name of his corporation imposed personal liability on him.

43 In *Caplan v. Vigod*, in 1968, Senior Master Rodger gave summary judgment against two individual defendants on a promissory note which bore a corporate name and their signatures. [13] The defendants alleged that they had signed the note in their capacity as directors of a company. Master Roger found that there was no evidence on the face of the note supporting this defence. He concluded, on the authority of *Daymond Motors*, that their Affidavit of Merits did not disclose a triable issue. His decision was affirmed on appeal without written reasons.

44 In *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.*, in 1973, the Ontario Court of Appeal, in a decision later affirmed by the Supreme Court of Canada, came to a contrary result from the one reached in *Mauch v. Burt*. Mr. Fienberg, the individual defendant in the case, had signed a promissory note immediately below the corporation's name, which was affixed by a rubber stamp at the bottom of the note. He had not specified that he was signing in a representative capacity on behalf of the corporation. Nevertheless, the Court of Appeal concluded that he had signed only in a representative capacity, and did not incur personal liability. [14] The Court of Appeal held that the note, which began with the words "on demand we promise to pay", was that of the limited company alone, and that Mr. Fienberg, the individual signer, was not personally liable.

45 The Court in the *Albert Pearl* case, unlike the court in *Mauch v. Burt*, did not regard the word "we" on the promissory note as significant. This may be because a corporation, by its nature, is a collective entity that may use the first person plural when referring to itself.

46 At the outset of his analysis in *Albert Pearl*, Arnup J.A. stated:

> ***The first issue and indeed, in our view, the decisive issue with respect to the appeal is the question "Who is the maker or makers of the note?"*** The trial Judge found that the note was made not only by the corporation but also by Mr. Fienberg personally. There is only one signature written on the note.... [Emphasis added]

47 Arnup J.A. reviewed the jurisprudence and concluded:

> Having regard to the authorities, to the relevant sections of the *Bills of Exchange Act* R.S.C. 1970, c. B-5, and to the surrounding circumstances I have set out, ***we are unanimously of the opinion that this promissory note is to be regarded as the note of the corporation***.

> ***We have all expressed, in the course of the argument, our grave doubts as to how a single signature could be both the signature on behalf of the corporation and the signature of the individual himself, as a maker of the note, thereby involving him in personal liability***.... [Emphasis added]

48 In the Supreme Court of Canada, Spence J., on behalf of the court, affirmed the Court of Appeal's judgment on the issue. He stated:

> With respect, I have come to the conclusion that the Court of Appeal was quite correct in its view that the promissory note did not evidence the personal debt of the defendant John D. Fienberg. ***I make that statement not only by reference to the method of execution of the document, i.e., that the said Fienberg's signature appeared once only and that directly beneath the stamped signature of the appellant J.D.F. Builders Limited, but, having reviewed the evidence of Albert Pearl, I have come to the conclusion that it was his intention and also the intention of the defendant John D. Fienberg that the note should only pledge the credit of the appellant J.D.F. Builders Limited***. [Emphasis added]

49 In *Glatt v. Ritt*, in 1973, Wright J. dismissed an action against one of three individual defendants arising from his signature, with those of the others, on a promissory note, immediately following the name of their corporation. [15] The plaintiff argued, relying on the *Daymond Motors* case, that there was no ambiguity on the face of the note, that evidence to explain in what capacity the individual defendant signed was therefore not admissible, and that the defendant was liable for the obligations the cheque entailed. Wright J. rejected this argument. He held, following the Court's decision a year earlier in the *Albert Pearl* case, that the case was not governed by s. 52(1) of the *Bills of Exchange Act* and that the rule which the Court of Appeal had applied in *Daymond Motors*, excluding extrinsic evidence of the signer's intention, did not apply. He held that extrinsic evidence was admissible to explain the capacity in which the defendant had signed, and having heard that evidence, he found that it did not satisfy him that the defendant had signed only as an officer of the company. He therefore held that the defendant was personally liable.

50 After reviewing the *Albert Pearl* decisions, and the jurisprudence that had preceded them, he sought to reconcile them. He stated:

> The law as these cases determine it to be, would appear to be the following:
>
> (1) The general rule is that any person who signs a promissory note without indicating his representative status, or that otherwise he has no personal liability, is personally liable on the note.
>
> (2) Unless such a note is ambiguous on its face, no evidence may be led to establish the character in which the person signed or, adversely, to affect his personal liability.
>
> (3) A note in which the company's name is followed by three signatures is unambiguous. Such evidence is not admissible and judgment will go against the three individuals, even if it has already gone against the company: *Daymond Motors Ltd. v. Thistletown Development Ltd.*, *supra*.
>
> (4) The same rule applies where there are two signatures and the company's name appears below them: *Alliston Creamery v. Grosdanoff and Tracey*, *supra*.
>
> (5) ***The rule does not apply in Ontario where there is only one unexplained signature either on a corporate cheque form***: *H.B. Etlin Co. Ltd. v. Asselstyne*, *supra*, ***or under a stamped name of a corporation***: *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd. et al.*, *supra.*
>
> (6) ***Such a cheque or note is ambiguous, and extrinsic evidence may be heard, particularly if its denial would lead to a gross miscarriage of justice***: *H.B. Etlin Co. Ltd. v. Asselstyne* (supra, at p. 812 O.R.,

> p. 193 D.L.R.), ***and where there is a partial failure of consideration***: *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd. et al.*, *supra*. [Emphasis added]

51 Wright J. noted that the promissory note before him was almost identical in form to the one that the Court of Appeal had considered in *Daymond Motors Ltd. v. Thistletown Development Ltd.* He noted that there had been *three signatures* on the note in *Daymond Motors Ltd.*, and the court had found that there was *no ambiguity* and that *extrinsic evidence was not admissible*, whereas in the *Albert Pearl* case, there was *only one signature* and the court had found that *there was ambiguity* and that *extrinsic evidence was admissible*.

52 In *Medic v. Taylor*, in 1975, Craig J., of the B.C. Supreme Court, admitted extrinsic evidence in an action arising from a promissory note which bore a corporate name and, underneath it, the signatures of the two individual defendants, with nothing to indicate that they signed the note in a representative capacity. Craig J. found that there was ambiguity on the face of the Note and admitted extrinsic evidence, which he found established that the individual defendants were not personally liable. [16] Craig J. discussed the Ontario authorities and concluded, "I find it difficult, if not impossible, to reconcile some of the decisions which have been referred to me." [17] He referred to the dicta of Arnup J.A. and Spence J. in the *Albert Pearl* case, and concluded that the approach taken in that case was preferable to that taken in *Daymond Motors*. He found that there was doubt as to who was the maker of the note, and this doubt, taken with the position of the signatures beneath the corporate name, gave rise to an ambiguity on the face of the note. He allowed extrinsic evidence, which satisfied him that the individual defendants were not personally liable, and he dismissed the action against them.

53 In 1976, in *Stocco v. Szymonowicz* [(June 1, 1976), Arnup J.A., Lacourciere J.A., Zuber J.A. (Ont. C.A.)], the Ontario Court of Appeal (Arnup J.A. in an unreported oral judgment) dismissed an appeal from a summary judgment against the individual defendant, whose signature appeared, with that of another individual, on a cheque, immediately below the corporation's name. [18] There were no words above or below either signature to indicate any connection between the individuals and the company, nor were there words indicating that the individuals signed the cheque in a representative capacity. Arnup J.A., in dismissing the appeal, cited the Court's earlier decisions in *Alliston Creamery* and *Daymond Motors*.

54 In *Victor (Canada) Ltd. v. Farbetter Addressing & Mailing Ltd.*, in 1978, Morand J., of the Ontario High Court, gave an oral judgment against individual defendants based on their signatures on a cheque. [19] He found that the cheque was unambiguous on its face, and cited the earlier decisions in *Alliston Creamery* and *Daymond Motors*. He also referred to the Court of Appeal's decision in *Stocco* as an answer to the defence that the defendant had signed the cheques as an officer of the corporation. He did not refer to the *Albert Pearl* decision in his reasons.

55 In *Holtz v. G. & G. Parkdale Refrigeration Ltd.*, in 1980, Hollingworth J. of the Ontario High Court allowed an appeal from an order of Cornish Co. Ct. J., dismissing a motion for summary judgment, and substituted a judgment against an individual defendant, based on his signature on a cheque, immediately following the name of his corporation. [20] Hollingworth J. relied on the jurisprudence that preceded the *Albert Pearl* case, holding that a person signing a bill will be personally liable unless he shows clearly that he is signing only in a representative capacity. He stated:

> Wright J., in *Glatt*, appears to have interpreted *Albert Pearl (Management) Ltd.* as having created an exception to the general rule. It is said that when there is a single signature, the general rule of liability does not apply. There is an ambiguity and extrinsic evidence is admissible to resolve the ambiguity. I cannot accede to this interpretation.

56 Hollingworth J. noted that in the *Albert Pearl* case, the Court had considered extrinsic evidence. However, he found that such evidence was admitted for a reason other than to resolve an ambiguity on the face of the note. It was admitted, he said, to establish that the signature on the note was that of the defendant, who denied having signed the note. Once admitted for that purpose, however, the evidence could not be ignored by the Court. As a result of the extrinsic evidence already before it, the Court refused to allow judgment to go against the individual defendant.

57 Hollingworth J. relied on Wright J.'s reference to the *Albert Pearl* decision in *Glatt v. Ritt* in support of his analysis. Wright J. concluded that in *Albert Pearl*:

> [Such extrinsic evidence] having been properly admitted and having established that the individual had not signed, personally, the Court could not, in all conscience, give judgment against the individual contrary to the admissible evidence. [21]

58 On this basis, Hollingworth J. found that *Albert Pearl* was a case decided on its peculiar facts, and that the case should not be interpreted as having created an exception to the general rule of liability in the case of notes and bills bearing a single signature. He added that even if the *Albert Pearl* case could be said to create an exception, it did so only in so far as it suggested that, in situations where an obvious injustice would result if judgment were granted against an individual according to the strict rule of liability, then extrinsic evidence will be considered. He concluded:

> In the instant case there is no evidence on the face of the cheque to indicate that the individual defendant signed the cheque in a representative capacity. As a result, and in line with the decision of Morand J. in *Victor (Canada) Ltd. v. Farbetter Addressing & Mailing Ltd.*, I find that the general rule of liability applies in this case, and that the individual defendant, having signed the cheque in his personal capacity, is personally liable on the cheque.

59 In 1982, the Court of Appeal, in *Allprint Co. v. Erwin*, resolved the controversy surrounding its earlier decision in the *Albert Pearl* case. Dubin J.A., for the court, disapproved of Hollingworth J.'s attempt in *Holtz* to limit the application of the *Albert Pearl* decision. [22] In *Allprint*, a cheque was printed with the name of the defendant corporation, Edu-Media Holdings Limited, and was signed on a line printed immediately below the corporation's name by the individual defendant, who was Edu-Media's President and Chief executive officer, and a signing officer of the corporation.

60 Dubin J.A. noted that courts had determined the issue of the personal liability of a person who signs in that manner in conflicting ways, based on a commentary by the author of *Falconbridge on Banking and Bills of Exchange*, 7th ed. (1969), at p. 600, where it is stated:

> ***A man who puts his name to a bill makes himself personally liable, unless he states upon the face of the bill that he subscribes for another or by procuration of another, which are words of exclusion***. Unless he says plainly, "I am the mere scribe", he is liable. [Emphasis added]

It further states, at p. 603:

> Where the signatures did not indicate that the signers held positions in the company they were held personally liable.

61 Dubin J.A. disapproved of the decisions referred to in *Falconbridge*, that had interpreted the predecessor of s. 51(1) in such a way as to impose personal liability on any individual who signs a cheque or promissory note, even immediately above or below the printed name of a corporation, without stating

explicitly the office he holds in the corporation, or the fact that he is signing in a representative capacity. He stated:

> Many of the cases referred to have relied on either one or other of those passages to hold that a signing officer who signs his name in the place allotted for the signature of a signing officer of a corporation is personally liable unless at the same time he affixes to his signature the office which he holds in the corporation. With respect, ***I do not agree that this is the law, nor, in my opinion, should it be the law***. [Emphasis added] [23]

62 Dubin J.A. approved the decision of McGillivray J. in *H. B. Etlin Co. v. Asselstyne*. [24] As noted above, the manager of the limited company in that case had signed his name on a printed line immediately below the printed name of the corporation on a company cheque, without indicating that he did so as agent or in a representative capacity. McGillivray J. held that the signer was not personally liable, because his signature, affixed to the printed line which immediately followed the company's name, was linked to it in that way, and the line was obviously designed to receive the signature of an authorized name, on a cheque printed on company stationery, not under seal, which would have no effect unless countersigned by an authorized agent of the company.

63 In *H. B. Etlin Co. Ltd.*, the court found ambiguity in the way the document was signed. In determining that the manager had signed as agent, it considered the nature of the instrument, being a cheque printed on company stationery, not under seal, which would have no effect without the signature of an authorized agent, and the fact that it was signed on the printed line below the printed company name.

64 Dubin J.A., in *Allprint*, distinguished the Court of Appeal's 1956 decision in *Daymond Motors Ltd.*, in which the Court had held three individual defendants personally liable, as drawers of the promissory note, based on the fact that their signatures appeared below the typed name of the limited company. [25] In *Daymond*, he said, the note was on plain paper, and the names appeared separate from the company name, and in no way identified with it (as, for example, by a typed line following the typed name of the company). In that case, Roach J.A. had held that there was no ambiguity, and that the stringent rule of the common law, which imposed personal liability on those who sign negotiable instruments, should apply. Dubin J.A. approved of that decision.

65 *Daymond* was a case in which the court found ambiguity in the way the note was signed, and considered the nature of the instrument, being a promissory note written on plain paper, and the fact that the names were separated from the printed company name and not connected with it by means of a printed line, in determining that the parties intended the signers to attract personal liability for the obligations the note entailed.

66 Dubin J.A. disagreed with the Trial Judge in *Allprint*, who had considered himself bound by Hollingworth J.'s decision in *Holtz*, even though he disagreed with that decision. [26] Dubin J.A. held that Hollingworth J. had erred in holding that a signer incurred personal liability by signing a cheque imprinted or stamped with a corporate name where there was nothing on the face of the cheque, other than the single signature and corporate name, to indicate that the individual had signed in a representative capacity. He stated that Hollingworth J. had misinterpreted *Albert Pearl* as standing for the principle that it was only in the special circumstances of that case, where the alleged signer denied signing the note, that the court would look to extrinsic evidence in determining whether the signer had signed in his personal capacity and thereby attracted personal liability to himself. Dubin J.A. stated that the Court of Appeal and Supreme Court in *Albert Pearl* had allowed extrinsic evidence *after* finding that the cheque had been made by the corporation, and not by the individual signer, based solely on the manner in which it was written. In allowing the appeal and dismissing the plaintiff's motion for judgment, he stated:

> With respect, ***he*** [Hollingworth J.] ***should have first addressed the issue as "Who was the drawer of the cheque?". In the Holtz case, as in the case under appeal, there was only one signature by the drawer. In each case, in my opinion, it was obviously the signature of the limited company, and it was not necessary, under those circumstances, to avoid personal liability, for the signing officer to add further words indicating the capacity in which he signed the cheque on behalf of the limited company***. Furthermore, in my respectful opinion, Hollingworth J. erred in his interpretation of the *Pearl* case, *supra*, and in the limitation that he placed on it.
>
> ***If the Court of Appeal and the Supreme Court of Canada were of the opinion that the note in the Pearl case was unambiguous, in the sense that it was the note of the individual, the extrinsic evidence would have been limited to the issue as to whether the individual sued had in fact signed the cheque, and not with the view of determining the intention of the parties***. [Emphasis added]

67 In summary, Dubin J.A., for the Court of Appeal, held that the central finding in the *Albert Pearl* case was that an instrument, bearing a single signature immediately above or below the name of the corporation, was ambiguous on its face, and justified the court's consideration of extrinsic evidence. The Court of Appeal had tended to the view that in such a situation, the presumption should be that the note was signed by the corporation and not by the individual in his personal capacity. The decision of Spence J. in the Supreme Court relies on both the manner of signing and the evidence given by the signer.

68 The decisions of the court in *Albert Pearl*, and of Wright J. in *Glatt v. Ritt*, can be reconciled insofar as the court in *Albert Pearl* finds that:

> a) A single signature immediately before or after a corporation's name creates ambiguity as to who signed the instrument, and thereby renders extrinsic evidence as to liability admissible.
>
> b) In the absence of additional evidence supporting a finding of liability, that manner of signing supports a finding that the corporation alone is liable.

69 In *Builders' Supplies Ltd. v. Fraser*, in 2004, Cameron J. dismissed a motion for summary judgment against Mr. Fraser, the President of the corporate defendant, on a personal guarantee contained in a credit agreement between the plaintiff supplier of building products and the corporate defendant to which it had delivered such products. Mr. Fraser asserted that he had signed the credit agreement on behalf of his corporation only, and not in his personal capacity. He stated that he had not intended to personally guarantee the corporation's obligations to the plaintiff. Cameron J. noted: "A single signature ought not to bind both the corporation and the individual signing officer personally without clear evidence to that effect." He concluded:

> ***I cannot determine from the form and without cross-examination whether Mr. Fraser's single signature is only on behalf of the corporation as its president***, as he is described in the document***, or whether it also constitutes a separate agreement, in his personal capacity, as a guarantor of the corporation's indebtedness***. The guarantee is contained in a section headed "Customer Agreement". The customer appears to be the company referred to on page 1. Guarantees are not normally buried in a contract with other information irrelevant to the guarantee. Mr. Fraser is not described as a party separate from the corporation. [Emphasis added] [27]

70 At the summary trial in the same proceeding, Lederman J. noted that Mr. Fraser had testified that his attention was not drawn, at the time of signing, to the sub-paragraph of the credit agreement referring to a personal guarantee. That sub-paragraph was included in a section of the agreement headed "Customer

Agreement". It read, in part, "I/We hereby (jointly and severally) personally guarantee payment to Builders' Supplies Limited for all goods which you may supply my/our firm."

71 The "Customer Agreement" section was followed by a space for the name, date, and signature of a witness, and a section headed "Applicant/Personal Guarantors", the hand-printed name of the defendant, his individual signature, and the date, affixed. When he signed his name, no reference was made to the name of the company or the office he held in the company. The defendant relied on the Supreme Court's decision in the *Albert Pearl* case.

72 Lederman J. noted that Mr. Fraser did not say that he failed to read the guarantee clause, or that he read it but did not understand it. He testified that he understood the concept of a personal guarantee and the meaning of "jointly and severally". He had written the name of his company, along with its business address, in the part of the Agreement headed "Company's Information", and had identified himself, with his personal residential address and title, as a principal of the company.

73 Lederman J. rejected Mr. Fraser's argument, based on the *Albert Pearl* decision, that his signature on the credit agreement could be interpreted as either a signature on behalf of the corporation, or a signature in his personal capacity, and that a single signature should not attract personal liability in such circumstances of ambiguity. Lederman J. concluded:

> In the signature section which is headed "Applicant/Personal Guarantors", he has printed his name and signed it in his personal capacity without making any reference to the corporation or to the office that he holds in the corporation....
>
> . . .
>
> ***Although there is only one signature of Fraser at the bottom of the application, I find that***, just as he read and understood every other section of the application form, ***Fraser must have read and understood the guarantee provision. He understood the capacity in which he was singing the document and assumed his responsibility as personal guarantor. He signed the document without referring to the company or his position as President. He is, therefore, liable as a guarantor***. [28]

74 Gray J. expressed a similar view of the *Albert Pearl* decision in *Fisker Cargo Inc. v. Toronto Fashion Group Ltd.* [29] In that case, decided in 2009, the issue was whether the individual defendant, George Elian, was personally liable on a promissory note given by the corporate defendant, Toronto Fashion Group Ltd. The corporate defendant was, to the knowledge of both the plaintiff and Mr. Elian, defunct by the time the parties met and Mr. Elian signed the promissory note. Gray J. therefore concluded,

> Thus, it seems highly unlikely that Mr. Fisker would have accepted a promissory note that was simply executed by the corporation, and not by Mr. Elian personally." [30]

He later continued,

> It is far more likely that the promissory note was prepared for exactly the reason stated by Mr. Fisker, namely, to secure Mr. Elian's covenant on the receivables, in exchange for continuing to do business with Mr. Elian's stores." [31]

75 Gray J. concluded, with regard to the *Albert Pearl Case*, relied on by the defendant:

> It is not clear, in my view, that the Court of Appeal unequivocally accepted the proposition that a single signature on a promissory note can bind only one party. It is true that Arnup J.A., at p. 597, stated: "We have all expressed, in the course of the argument, our grave doubts as to how a single

> signature could be both the signature on behalf of the corporation and the signature of the individual himself, as the maker of the note, thereby involving him in personal liability." However, it is clear that the Court did not decide the case on the basis of that proposition. Rather, ***the Court looked at the surrounding circumstances and determined that it was the intention of the parties that the corporation alone was executing the note***.

76 Gray J. also considered the passage from Spence J.'s reasons in the Supreme Court, quoted above, concluding that he also had considered the evidence of Mr. Pearl in concluding that it was the intention of the parties that the individual defendant had signed the Note solely in a representative capacity and not with the intention of incurring personal liability.

77 Gray J. additionally relied on the decisions that Arnup J.A. referred to in his decision in the *Albert Pearl* case, including *Daymond Motors*, [32] *Mauch v. Burt*, [33] and *Beaver Lumber Co. v. Denis*, [34] in which individuals had signed promissory notes, purportedly on behalf of corporations, and where the individuals had been found personally liable. There is no indication that Gray J. was referred to the Court of Appeal's decision in *Allprint*.

78 *Gray J.* concluded:

> In this case, in addition to the surrounding circumstances that I have reviewed, which indicate, strongly in my view, that it was intended that Mr. Elian sign the note personally, and thus become personally liable to pay the outstanding invoices, I also conclude, based on the cases I have reviewed, that there is nothing on the face of the note that would indicate that Mr. Elian was signing in a representative capacity only, and thus he is liable personally. Accordingly, he cannot claim the protection of s. 51(1) of the *Bills of Exchange Act*. [35]

79 Gray J.'s decision in *Fisker Cargo Inc.* supports the view that a single signature immediately above the name of his corporation creates ambiguity which can be resolved by reference to extrinsic evidence. In the *Albert Pearl* case, the extrinsic evidence led to a finding that the corporation alone was liable. In *Fisker Cargo Inc.*, it led to a finding that the individual signer was liable.

80 In *Wellton Express International (Ontario) Inc. v. Noormohamed*, in 2012, Moore J. dismissed a motion for summary judgment against the individual defendant, Arif Noor, on what was alleged to be a personal guarantee of the debts of the corporate defendant, CMT, in the amount of $750,000 USD. The plaintiff, Wellton, a freight forwarding company, had extended credit to CMT over time, with monthly balances owed to Wellton that had varied but occasionally exceeded $750,000 CDN. [36] Throughout their business dealings, Mr. Noor had never personally guaranteed CMT's debts to Wellton, but the one page credit agreement signed in June 2008 contained a term reading: "the signatory on his/her own behalf agrees to be personally liable for credit extended!"

81 Under Mr. Noor's name, at the bottom of the page, was printed: "Signature of applicant, on his/her own behalf and on behalf of the company". There was an illegible signature on the agreement that Mr. Noor admitted resembled his own but he had no memory of signing. There were no discussions or negotiations between Wellton and CMT regarding the form or content of the credit agreement.

82 Moore J. found that the credit agreement was incomplete, ambiguous, and confusing, because it failed to specify the following:

> a) The name or names of the applicant for credit;
>
> b) All of the officers and directors of the corporate defendant;

c) The title over which Noor was to sign the document;

d) Mr. Noor's proper name;

e) The fact that Mr. Noor was to sign on his own behalf, and on behalf of the company, by providing two signature lines;

f) The legal basis, terms, conditions, or time, by which it purported to bind Mr. Noor personally for credit that the plaintiff was extending to the corporate defendant. [37]

83 Faced with the above omissions, Moore J. was unable to resolve the ambiguity of the signature and determine whether the parties intended Mr. Noor to be personally liable. He found that this was a genuine issue for trial. In dismissing the plaintiff's motion for summary judgment against Mr. Noor, he cited Lederman J.'s decision in *Builders' Supplies Ltd. v. Fraser*.

84 Based on the foregoing jurisprudence, I conclude that where a person's signature appears immediately above or below the name of his corporation, without another signature on the document, and without a clear indication that the person was signing in a representative capacity only, the instrument will be deemed to be ambiguous and the court will look to other evidence, both from the nature and content of the document and the circumstances in which it was signed, to determine whether the parties intended the signer to have personal liability for the obligations it entailed. The single signature will generally not attract personal liability, in the absence of other evidence that demonstrate an intention of the parties that the signature was to have this effect.

85 In the present case, I find that the nature and content of the Loan Agreement, and the circumstances in which it was signed, establish that Mr. McCallum, in signing below the name of Construct Michigan Corporation, an agreement that states: "*If Calvin McCallum* (Construct Michigan Corporation) *terminates the contract prior to the five year term, he will be liable to repay $50,000.00* within 2 years of the contract termination.", demonstrates that the parties intended him to be personally liable for the obligations the agreement entailed.

ii) Liability based on the authority which Mr. McCallum gave to Construct Michigan Corporation to act as his agent in committing him to personal liability for its contractual obligation to H.S.C.

86 Besides signing the Loan Agreement, containing the explicit statement that he would be liable if he left his job before completing his term of employment, without specifying that he was signing in a merely representative capacity, Mr. McCallum additionally assumed personal liability by authorizing Construct Michigan Corporation, as his agent, to enter into the Loan Agreement on his behalf, and to undertake that, in those circumstances, he would be personally liable to repay the balance of the funds he had received.

87 Agency is the relationship that exists between two persons when one, the agent, is considered in law to represent the other, the principal, in such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property. [38] The grant of the right to exercise another person's legal powers, thereby potentially affecting the grantor's legal position, is an essential feature of agency. [39]

88 Whether an agency relationship exists is a question of fact. [40] It is the effect, in law, of the way the parties have conducted themselves, and the language they have used, that must be investigated to determine whether an agency relationship has, in fact, come into existence. [41]

89 The appointment of an agent need not be in writing. Since a deed or writing is not required for the appointment of an agent by a natural person in Ontario, given the *Business Corporations Act*, none is required for a corporation. [42]

90 A corporation can be the agent of an individual or of another corporation. [43] The leading case on the principles of corporate agency is *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.* [44] The defendant corporation in that case was a real estate developer and the individual defendant, though not officially appointed, acted as its managing director. The individual contracted with architects, who did their work but were not paid, and sued the corporation. The English Court of Appeal held that, since the Board allowed the individual defendant to act as (unofficial) managing director, they had represented that he had the authority to enter into contracts of the kind that a managing director would, in the normal course of business, be authorized to enter into. This included the contract with the architects. The corporation was therefore liable. The court set out four conditions under which a contract entered into by an individual, purporting to be an agent, could be enforced:

> a) There must be a representation by the principal that the agent had authority to contract on behalf of the principal.
>
> b) Such a representation must have been made by a person with authority.
>
> c) The other party must have been induced by the representation and relied upon it.
>
> d) The company was not deprived of its capacity to enter into the contract by its articles.

91 Both legal texts and case law explain that it is possible to allege agency without making it part of a corporate veil-piercing argument. In fact, this is the correct way to plead it. An agency relationship would have the effect of "circumventing", as opposed to "piercing", the corporate veil. [45] Welling, in *Corporate Law in Canada: The Governing Principles*, 3rd ed., *supra*, notes that the "[t]heory of corporations as agents has suffered in the hands of those who confuse it with the logically unacceptable notion of "piercing the corporate veil." As he goes on to explain:

> Professor Ballantine noted as early as 1925 that most of these sloppily reasoned cases could be explained by a liberal application of ordinary agency rules. Twentieth century judges, however, were disinclined to justify their conclusions by agency analyses. They perceived a dilemma: express agency arrangements are rarely set up, and to infer agency without an agreement would come perilously close to reversing *Salomon* itself. The dilemma is a mirage. ***All we need is a set of rules establishing when agency can be inferred. Once the rules are established, any case turns on its facts***. [Emphasis added] [46]

92 Canadian courts have confirmed that agency can be alleged distinct from any veil-piercing argument. The Court of Appeal for Ontario commented on this in *Dumbrell v. Regional Group of Cos.*, where Doherty J.A. stated, with respect to agency and the corporation's existence as a separate legal entity:

> **The concepts of piercing the corporate veil and holding that a corporation acts as an agent for the individual who controls that corporation achieve the same result in that they both impose personal liability for what appear to be corporate actions. They achieve that result, however, in different ways. The agency relationship assumes that the corporation and the controlling mind are distinct, but that on the relevant facts the former acted as agent for the latter**. Piercing the corporate veil ignores the legal persona of the corporation: Bruce L. Welling, *Corporate Law in Canada: The Governing Principles*, 2d ed. (Markham, Ont.: Butterworths, 1991) at 122-36. [Emphasis added.] [47]

93 An agency relationship can be created expressly (through an agency agreement) or implicitly. Professor Welling states there are a set of rules that may be applied to determine if there is an agency relationship between the principal shareholder and a corporation. The determination as to whether there is an implied agency relationship is a fact-specific inquiry.

94 In *Caplan v. Vigod*, Thompson J. went through the criteria for piercing the corporate veil, and also mentioned that if liability based on agency was alleged, then the creation of such a relationship would need to be established by resort to the principles of agency. [48]

95 Cameron Harvey in *Agency Law Primer* (3rd ed.) states:

> Disclosed principals are either named or unnamed. A named principal is one whose identity is known to the third party. If the third party knows that (s)he is dealing with an agent, but does not know the identity of the principal, then the principal is an unnamed principle. **When an agent acts with actual (or presumed) authority on behalf of a named or unnamed principal to make a contract with a third party, subject to a couple of exceptions, the resulting contract is between the third party and the principal. The agent dropped out of the picture, so to speak, and it can neither sue nor be sued on a contract. However, an agent can be liable or entitled to sue on such a contract according to custom or if that was the intention of the parties, to be inferred from the form in terms of the contract, how the agent signed a contract, and perhaps surrounding circumstances**. [Emphasis added.] [49]

96 Professor Anthony Van Duzer, in *Law of Partnerships and Corporations*, 2nd ed., writes that, in the case where an agent has no connection of any kind with the principal, the law is clear - the principal is not liable. [50] Where an agent does not disclose that he is acting for a corporation, the agent, and not the corporation, will be liable.

97 In *3253791 Canada Inc. v. Armstrong*, a defendant sought to avoid personal liability by claiming that a contract had been entered into on behalf of a corporation. [51] Notwithstanding that the other party to the contract had received cheques in partial payment of the obligations under the contract and shipping labels in the name of the corporation, the court did not find that the parties intended that the corporation was to be the party to the contract.

98 I find that Mr. McCallum represented to Sutherland and H.S.C. that Construct Michigan Corporation had authority to enter into the Loan Agreement on his behalf. Indeed, he stated that the only reason he was not entering into the Agreement himself, without involving his corporation, was to preserve his tax status as an independent contractor.

99 I further find that Mr. McCallum had the necessary authority to represent to Sutherland and H.S.C. that Construct Michigan Corporation was authorized to enter into the Loan Agreement on his behalf. He was, after all, the subject of the Employment Agreement, for whose personal benefit Sutherland and H.S.C. were advancing the funds. He was also the President and sole shareholder of Construct Michigan Corporation, which was to enter into the Loan Agreement and receive the funds on his behalf.

100 I find that Sutherland and H.S.C. were induced to advance the funds to Mr. McCallum by Mr. McCallum's representation that Construct Michigan Corporation was authorized to enter into the Loan Agreement on his behalf, and by his acknowledgment that he would be liable to repay the balance of the funds if he left before completing the term of his employment. I am satisfied that they would not have advanced the funds but for Mr. McCallum's undertaking, directly or indirectly, through his holding company, that he would be liable to repay the balance of the funds if he did not remain on the job for the full five year term.

101 Construct Michigan Corporation was not deprived of its capacity to enter into the Loan Agreement by the terms of its articles. Mr. McCallum testified at his examination that the company was incorporated in 1998, that he was its President until it stopped operating, and that the company stopped operating when he resigned, which was after the Statement of Claim in the present proceeding was served on him.

102 Based on the foregoing findings, I conclude that Mr. McCallum authorized Construct Michigan Corporation to enter into the Loan Agreement as his agent, and to undertake, on his behalf, that he would be personally liable to repay the balance of the funds advanced to him if he did not continue his employment for the completion of the five year term set out in his Employment Agreement. Mr. McCallum is therefore personally liable pursuant to that contractual obligation.

iii) Liability based on Promissory Estoppel

103 In addition to assuming personal liability by signing the Loan Agreement, and by authorizing Construct Michigan Corporation, as his agent, to enter into the Agreement on his behalf, Mr. McCallum is now estopped from denying his personal liability, having regard to the fact that H.S.C. relied on his promise to its detriment, and to his benefit, by advancing the funds to him.

104 The principle of promissory estoppel was definitively spelled out in the 1991 Supreme Court of Canada case of *Maracle v. Travelers Indemnity Co. of Canada*, as follows:

> ***The party relying on the doctrine of promissory estoppel must establish that the other party has, by words or conduct, made a promise or assurance which was intended to affect their legal relationship and to be acted on. The representee must also establish that, in reliance on the representation, he acted on it or in some way changed his position***. While an admission of liability is one of the factors from which a court may infer that a promise was [page537] made not to rely on the limitation period, it is not an alternate basis of promissory estoppel. The admission of liability must go beyond an offer of settlement and extend to the limitation period. There must be words or conduct from which it can be inferred that the admission was to apply whether the case was settled or not, and that the only issue between the parties, should litigation ensue, is the issue of quantum. If this inference is drawn as a finding of fact and the admission led the plaintiff to miss the limitation period, promissory estoppel has been established. [52]

105 Promissory estoppel exists where one party has, explicitly or otherwise, made a promise to another with the intention of affecting their legal relationship by the other party's reliance on it. [53] Three requirements must be met in order for a legal obligation to arise in this manner:

> a) A promise was made by one party to another while a legal relationship existed between them;
>
> b) The other party, to the promisor's knowledge, relied on the promise;
>
> c) The other party altered its position to its detriment as a result of its reliance on the promise made to it. [54]

106 The first element of promissory estoppel is the making of a promise or assurance that is intended to affect the legal relations between the parties. Thus, some legal relations between the parties must exist at the time the promise is made. [55] In the present case, a legal relationship existed between Mr. McCallum and Sutherland, and its Aggregate Division, H.S.C., when they entered into the Employment Agreement. The Employment Agreement was in effect when they entered into the Loan Agreement, which made reference to it.

Professor Waddams writes, in *The Law of Contracts* (4th ed.), that Commonwealth law is moving in the direction of the *Second Restatement of the Law*, towards the protection of promises by reason of, and to the extent of, subsequent reliance. [56] The *Second Restatement* provides:

> **90. Promise Reasonably Inducing Action or Forbearance**
>
> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. [57]

107 Historically, promissory estoppel could be used only as a shield, and not as a sword, and a cause of action could not be founded on it. [58] More recent jurisprudence suggests that the prohibition of causes of action based on promissory estoppel is not absolute.

108 In *Myles v. Body Shop Canada*, Nordheimer J., the motions judge, permitted a plaintiff to amend his Claim to plead what the defendants argued amounted to promissory estoppel as a cause of action. [59] He found that the amended claim did not use promissory estoppel as a cause of action, but rather as an adjunct to other causes of action, and was therefore permissible.

109 Nordheimer J. relied on *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.* He referred to the following passage from Lord Justice Brandon's reasons in *Amalgamated Investment*:

> This illustrates what I would regard as the true proposition of law, that, **while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed**. [Emphasis added] [60]

110 In the present case, H.S.C. has a cause of action against Mr. McCallum based on the contractual obligation that Mr. McCallum undertook to it in the Loan Agreement, and based on the acknowledgment that the Agreement contained, that he would be liable to repay the balance of funds advanced to him if he left his job before the end of his 5 year term of employment. Sutherland has a cause of action against Mr. McCallum based on the Promissory Note that he signed.

111 Nordheimer J. referred to the reasons of Lord Denning M.R. in *Amalgamated Investment*, which cast estoppel in an even broader light, and held that it was arguable that estoppel could be invoked as part of the basis for the plaintiff's claim. [61]

112 Jennings J. granted leave to appeal in *Myles v. Body Shop Canada*, on the issue of whether the pleading of promissory estoppel was permissible. [62] In doing so, he noted that Nordheimer J.'s decision in *Myles* appeared to conflict with the Court of Appeal's decision in *Doef's Iron Works Ltd. v. Mortgage Corp. Canada Inc.*, [63] released about a month before Nordheimer J.'s decision, and three months before Jennings J. heard the application for leave to appeal. [64] Nordheimer J.'s decision makes no reference to the Court of Appeal's decision in *Doef's*, and no appeal from Nordheimer J.'s decision in *Myles* is reported.

113 In *Doef's*, a husband borrowed money. He agreed with the lender that if he was unable to repay the money in a short time, a particular real property, owned by his wife, would be conveyed to the lender as a security. The property was subject to a mortgage which the wife had granted to a company that her

husband owned. The husband was unable to repay the loan within a required time and his wife, at his request, conveyed the property to the lender. At the time of the transfer, when the lender asked him about the mortgage, the husband told him not to worry about it; that it was "not a real mortgage". The real estate market fell and, with the mortgage in place, there was not sufficient equity to repay the lender. The lender sought a declaration that the mortgage was void and of no effect, relying on the husband's representation and the doctrine of promissory estoppel. Cumming J., the trial judge, found that the doctrine of promissory estoppel was established, and declared the mortgage null and void. [65]

114 On appeal, the Court of Appeal in *Doef's*, citing *Conwest Exploration Co. v. Letain*, [66] and *Reclamation Systems*, overturned the trial decision on the basis that the trial judge had improperly permitted the doctrine of promissory estoppel to be used as a sword. In *Doef's*, the plaintiff's case was based solely on the husband's representation. The principle that Nordheimer J. relied on in *Myles*, that promissory estoppel may be used as an adjunct to another cause of action, was therefore not applicable in *Doef's*.

115 In the present case, H.S.C. sues Mr. McCallum on the Loan Agreement which he signed, which names Construct Michigan Corporation as a party. H.S.C. asserts that it entered into the Loan Agreement with Mr. McCallum, and that the naming of Construct Michigan Corporation was a mere artifice, proposed by Mr. McCallum, ostensibly to preserve his status as an independent contractor.

116 In *Reclamation Systems Inc. v. Ontario*, the General Division struck a pleading of promissory estoppel. [67] In his comprehensive review of the authorities in that case, Cumming J. does not refer to *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, which was pivotal to Nordheimer J.'s decision in *Myles v. Body Shop Canada*.

117 The Court of Appeal noted in *Schwark Estate v. Cutting* that the prohibition of causes of action based on promissory estoppel is not absolute. [68] In reversing a trial judge's decision for the plaintiff, based on proprietary estoppel, MacFarland J. set out the parameters of that cause of action. She stated:

> The test for proprietary estoppel is set out in this court's decision in *Eberts v. Carleton Condominium No. 396 et al.*, [2000] O.J. No. 3773 (Ont. C.A.) at para. 23:
>
> > Proprietary estoppel is a form of promissory estoppel. It is commonly supposed that estoppel cannot give rise to a cause of action, but proprietary estoppel appears to be an exception to that rule: see Lord Denning in *Crabb v. Arun District Council* (1975), 1 Ch. 179 (Eng. C.A.) at 187-188. But there must be an estoppel. The basic tenets of proprietary estoppel are described in McGee, Snell's Equity, 13 ed (2000) at pp. 727-28:
> >
> > > Without attempting to provide a precise or comprehensive definition, it is possible to summarize the essential elements of proprietary estoppel as follows:
> > >
> > > (i) An equity arises where:
> > >
> > > (a) the owner of land (o) induces, encourages or allows the claimant (c) to believe that he has or will enjoy some right or benefit over O's property;
> > >
> > > (b) in reliance upon this belief, C acts to his detriment to the knowledge of O; and
> > >
> > > (c) O then seeks to take unconscionable advantage of C by denying him the right or benefit which he expected to receive.

118 It is puzzling why Lord Denning's recognition of proprietary estoppel should be accepted in Canada as an exception to the prohibition of promissory estoppel as a cause of action, but that Lord Denning's

reasons in *Amalgamated Investment*, which cast estoppel in a broader light, and held that it was arguable that estoppel could be invoked as part of the basis for the plaintiff's claim, is not accepted.

119 In *La Cie McCormick Canada Co. v. Brian Barr Holdings Ltd.*, Hoy J. allowed the plaintiff to amend its Claim to assert a claim of promissory estoppel. [69] She noted that the situation before her was novel, in that the representation was alleged to have been made by an insolvent company under *Companies' Creditors' Arrangement Act* ("CCAA") protection to its Monitor, and could have been reflected in a report of the Monitor, filed with and approved by the Court in the CCAA proceeding, and could dramatically affect third parties. She stated:

> The pleading raises the issue of the ability of an insolvent company to take a different position in relation to a transaction before the court in one court-sanctioned insolvency process — the *CCAA* proceeding - than in another.... Given this special context, it is not plain and obvious to me, and I am not satisfied beyond a reasonable doubt, that the plaintiff's alternative claim, or anticipatory defence, as the plaintiff would characterize it, cannot succeed because it amounts to invoking the doctrine of promissory estoppel as a "sword". In my view, this claim (or anticipatory defence) should be permitted to proceed to trial to permit a full consideration of the effect of representations made to an officer of the court in a *CCAA* proceeding.

120 In the present case, Mr. McCallum seeks to distance himself from Construct Michigan Corporation, of which he is the directing mind, notwithstanding that he caused the company to default on its obligation to repay the loan which HSC made to it, for Mr. McCallum's personal benefit, to enable him to buy a home in Owen Sound. In doing so, he seeks to avoid the liability which, in the Loan Agreement, he acknowledged he would have to repay the loan that was being made for his benefit.

121 In the context of the cause of action of inducing a corporation to breach its contract, the plaintiff must show:

> (a) An enforceable contract of the plaintiff;
>
> (b) knowledge by the defendant (Mr. McCallum) of the plaintiff's contract;
>
> (c) an intentional act on the part of the defendant (Mr. McCallum) to cause a breach of that contract;
>
> (d) a wrongful interference on the part of the defendant (Mr. McCallum); and
>
> (e) resulting damage. [70]

122 There must be some separate interest that makes Mr. McCallum's conduct "his own", as opposed to conduct done in his role as the guiding mind of Construct Michigan Corporation. [71] It is clear, from the jurisprudence on this cause of action, that the Court attempts to strike a balance between personal liability of directing minds of a corporation for inducing breach of contract and the well-established principle that personal liability will not flow from the acts of a corporation.

123 To strike this balance, the Court requires that a simple assertion that the directing mind of the corporation stood to gain financially from the breach is not enough. Instead, the act of causing the breach must be motivated by a personal interest that is independent of, and inconsistent with, the corporation's best interest. As Finlayson J.A. said in *Normart Management Ltd. v. West Hill Redevelopment Co.*:

> To conclude otherwise would be to challenge the recognized separate legal identity afforded to corporations under our law and to conclude that every corporate action which may give rise to a breach,

by virtue of the decision making authority of the corporate management, is an action of the directing minds personally. [72]

124 In the present case, Construct Michigan Corporation had no interest apart from Mr. McCallum's personal interest because it was, in fact, an artifice designed to preserve Mr. McCallum's tax status as an independent contractor. It had no source of funds apart from what Mr. McCallum provided to it, and any income it earned was Mr. McCallum's income. This is clear from Mr. McCallum's testimony regarding Construct Michigan Corporation's re-payments of H.S.C.'s loan. He gave the following evidence in that regard:

> Q. And I take it you left knowing that money was then owed to Harold Sutherland Construction?
>
> A. Yes, sir.
>
> Q. So, now if you look at paragraph 4...
>
> Mr. Pitblado: Of the claim?
>
> Mr. Barrie: Yeah, 4(a)
>
> Q. You can see it's asserted that of the $50,000 which Harold Sutherland Construction says is owed pursuant to the agreements which we've reviewed, that you actually started to make payments on that debt and paid it down to $44,545.46 by December 20, 2010, is that true? Is that...
>
> A. Yes.
>
> Q. Okay. And who made those payments?
>
> A. Construct Michigan Corporation.
>
> Q. Okay, so you're saying it had to be a — it had to be a viable entity still at that stage in order to make the payments, correct?
>
> A. I was feeding money into the company to try and keep it going.
>
> Q. Okay, but was it still operating in 2010?
>
> A. Yes.
>
> Q. Was carrying on business?
>
> A. It was in 2010, it was carrying business, yes.
>
> Q. Okay, what was its business after — what was its business after you resigned from Harold Sutherland Construction Limited in July of 2010?
>
> A. Seeking sales.
>
> Q. Well, was there any...
>
> A. There wasn't any sales.

. . .

> Q. Okay. Now, help me with this. If you look — we go — we go back to where we left off, you seem to have agreed that you paid down the sum to $44,545.46 by 20 December, 2010, do you remember we talked about that?
>
> A. Yes, sir.
>
> Q. Why, if you had employment, did you stop making any further payments?
>
> A. Because I couldn't sustain it.
>
> Q. I take it what that means is that you had other family expenses to meet and that they became more important, is that fair?
>
> A. I — yes, there wasn't enough money coming in...

125 As a general proposition, courts may look behind corporate structures:

> a) where a principal-agent relationship between two related corporations leads to liability despite separate legal personalities;
>
> b) where it is necessary to do so to give effect to legislation, especially taxation statutes; or
>
> c) where it can be shown that (1) the *alter ego* exercises complete control over the corporation or corporations whose separate legal identity is to be ignored and (2) the corporation or corporations whose separate legal identity is to be ignored are instruments of fraud or a mechanism to shield the *alter ego* from its liability for illegal activity. [73]

126 As the Court of Appeal stated the matter in *Gregorio v. Intrans-Corp.*, this latter circumstance, sometimes called the *alter ego* basis of piercing the corporate veil, "is applied to prevent conduct akin to fraud, that would otherwise unjustly deprive claimants of their rights": [74]

> a. Complete control requires more than ownership, but necessitates a demonstration that there is complete domination of the subsidiary corporation and the sub does not, in fact, function independently [75] - or, as put in one case, a demonstration that the subsidiary is a "puppet" of the parent. [76] A list of some of the criteria by which to assess the independence of the subsidiary was set out by the Court of Appeal in *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce*; [77] and,
>
> b. The impropriety must be linked to the use of the corporate structure to avoid or conceal liability for that impropriety. [78]

127 The evidence in the present motion does not support a finding that Mr. McCallum employed Construct Michigan Corporation dishonestly, or to conceal illegal conduct. The protection that Construct Michigan Corporation afforded to Mr. McCallum as its officer, director, and sole shareholder, cannot therefore be lifted, on that basis, to render him liable for the company's own obligations.

128 Mr. McCallum is nevertheless precluded, by promissory estoppel, from denying the personal liability that he assumed by signing the Loan Agreement, and by authorizing Construct Michigan Corporation to enter into the Agreement on his behalf, and to acknowledge that he would be liable to repay the balance of the funds advanced to him if he quit his job before the end of his 5 year term of employment. I find that Mr. McCallum made a promise to Sutherland and H.S.C., both orally and in the Loan Agreement, that he would

be personally responsible for repaying the funds in that event, intending it to affect their legal relations. To his knowledge, Sutherland and H.S.C. relied on his promise, in advancing the funds to him. They thereby altered their position to their detriment, and to his benefit, by advancing the funds he needed to purchase a home in the area and thereby facilitate his performance of his duties under the Employment Agreement.

d) Does Mr. McCallum have a claim for set-off based on Sutherland's constructive dismissal of him?

129 For the reasons that follow, I find that Mr. McCallum was not constructively dismissed by Sutherland, and that he is therefore not entitled to any damages that can be set off against the amount which he must repay to Sutherland and H.S.C. of the funds advanced to him.

130 I find that the substitution of the smaller excavator did not amount to a constructive dismissal of Mr. McCallum. He acknowledges that he did not voice any concerns regarding the safety of the equipment to Sutherland Construction. Additionally, he has not advanced any evidence in support of his assertion that the excavator was unsafe.

131 I find that the assignment of Mr. Gail also did not amount to a constructive dismissal of Mr. McCallum. Mr. Gail was a subcontractor and not a regular employee of Sutherland Construction. Conduct, in order to amount to a constructive dismissal, must be the conduct of the employer. Here, Sutherland Construction was unaware of Mr. Gail's conduct. Mr. McCallum chose not to mention it to Harold Sutherland because he did not wish to cause him unnecessary stress, having regard to his fragile health.

132 Once it came to the attention of Sutherland Construction that Mr. Gail had been fishing in front of a working crew during working hours, it rebuked Mr. Gail and did not renew his contract. Mr. McCallum acknowledges that this issue was not important enough for him to bother the principal of Sutherland Construction about it.

133 In any event, the delay of six months or more from when, sometime before the winter of 2009, the substitution of the smaller excavator and the assignment of Mr. Gail and his fishing in the view of the work crew, until May 2010, when Mr. McCallum first informed Sutherland Construction that he would be leaving, was too long to permit Mr. McCallum to rely on those events as amounting to a constructive dismissal. Arnold-Bailey J. of the B.C. Supreme Court noted, in *Danielisz v. Hercules Forwarding Inc.*:

> An employee may decide to act on a breach of the employment contract committed by the employer and end their employment. Or an employee may opt to continue with the employment. If an employee decides to treat the breach as a constructive dismissal, he or she must communicate that decision to the employer in a reasonable time: *Farquhar v. Butler Brothers Supplies Ltd.* (1988), 23 B.C.L.R. (2d) 89 (B.C.C.A.), at 92 and 93. [79]

134 It is clear that Mr. McCallum's primary motivation for terminating his employment with Sutherland Construction was that his wife had secured employment in Thamesford, and he was unable to sustain a long distance relationship with her. He stated at his examination for discovery that his wife had new employment and it made it difficult for him to continue to live with her because she had to move from the Owen Sound location to Thamesford. That meant that he had to travel back and forth. He was asked:

> Q. Yeah. And did you express all these things that I just put to you to Mark Shortt and others that, look, I've got to terminate my employment because I can't live like this anymore, I've got to be with my wife, she moved to Thamesford, she got a new job, it's a good thing to do and I've got to move?
>
> A. Yeah, I believe I probably did say that.

135 Mr. McCallum testified that she accepted the job in Thamesford, in southwestern Ontario, in the summer of 2010. He stated that in late May or June 2010, when he was seeking to relocate, he "put his name out there" and eventually secured employment in July as a Senior Estimator and Project Manager with CoCo Paving, before leaving his position with Sutherland Construction. He then gave the following evidence:

> Q. So am I correct that your evidence is that even before you offered your formal resignation, you were looking for work elsewhere in the Thamesford area so that you could join your wife?
>
> A. Yes, sir.
>
> Q. And you in fact obtained that employment, I take it, even before handing in your resignation, fair?
>
> A. Well, I talked to Harold (Sutherland) and said that I was going to be resigning in the winter in about February.
>
> Q. Well, okay, so you even told him before hand?
>
> A. I told him a long time in advance, and he had — I told him about my wife and he said that he wasn't too happy to hear that and....
>
> Q. Well, you can understand...
>
> A. ...he was going to have to find — he was going to have to find someone more than likely if that's what I'm telling him, and I said I would — I would do that if I were you, yes, I would try and find someone to take my place.
>
> Q. Okay, so you were telling him essentially in advance that you...
>
> A. Yes, sir.
>
> Q. ...were in breach — gonna breach the agreement that you'd signed?
>
> A. No, I was telling him that I was going to end the contract, yes.

136 Based on Mr. McCallum's own testimony, I find that he was not constructively dismissed in 2009, but terminated his employment voluntarily in about July 2010, in order to join his wife in Thamesford.

e) Calculation of Damages

137 For the reasons that follow, I find that there is no genuine issue for trial as to the amount that Mr. McCallum owes to the plaintiffs.

138 Mr. McCallum acknowledged in his examination for discovery the balance he owes on the promissory note he signed on August 22, 2008, by which he personally promised to pay Sutherland Construction $232,035.39 on September 12, 2008. He acknowledged owing $3,208.46 to H.S.C. Aggregates Ltd. as of July 9, 2010. The prejudgment interest calculation on the amount owed at 3% per year totals $372.36 ($3,208.46 × 3% interest × four years and 114 days) leaving a total of $3,623.54 owing as of October 31, 2014.

139 Mr. McCallum acknowledges that Construct Michigan Corporation owed $44,545.46 to Harold Sutherland Construction Ltd. as of December 20, 2010. Prejudgment interest on that amount at 3% per year totals $5,133.10 ($44,545.46 × 3% × 3 years and 315 days) leaving $49,707.85 owing as of October 31, 2014.

Conclusion and Order

140 Based on the foregoing, it is ordered that:

1. The plaintiffs' motion for summary judgment is allowed.

2. The defendant Calvin McCallum shall pay to the defendant Harold Sutherland Construction Ltd. the sum of $3,623.54.

3. The defendants Calvin McCallum and Construct Michigan Corporation shall pay to H.S.C. Aggregates Ltd. the sum of $49,707.85.

4. If the parties are unable to agree on costs, they may deliver written arguments, not to exceed four pages, together with a Costs Outline, by November 15, 2014.

Motion granted.

Footnotes

1 *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) [hereinafter Hryniak] (CanLII)

2 *Hryniak*, at para. 49

3 *Hryniak*, at para. 57

4 *Hryniak*, at para. 58

5 *Hryniak*, at para. 66

6 *Gibson v. Minet* (1791), 1 Black. H. 569 (U.K. H.L.) at p. 606, (1791), 126 E.R. 326 (U.K. H.L.)

7 *Bills of Exchange Act*, RSC 1985, c B-4

8 *Daymond Motors Ltd. v. Thistletown Development Ltd.*, [1956] O.W.N. 867 (Ont. C.A.)

9 *Alliston Creamery v. Grosdanoff*, [1962] O.R. 808 (Ont. C.A.), 1962 CanLII 214 (CanLII)

10 *H. B. Etlin Co. v. Asselstyne*, [1962] O.R. 810 (Ont. C.A.)

11 *Mauch v. Burt* (1964), 45 D.L.R. (2d) 187, 47 W.W.R. 696 (B.C. S.C.)

12 *Mauch v. Burt*, *ibid*, at para. 8.

13 *Caplan v. Vigod* (1967), [1968] 1 O.R. 214 (Ont. Master), 1967 CanLII 268 (CanLII)

14 *Albert Pearl (Management) Ltd. v. J.D.F. Builders Ltd.* (1972), [1973] 1 O.R. 594 (Ont. C.A.), affirmed (1974), [1975] 2 S.C.R. 846 (S.C.C.)

15 *Glatt v. Ritt*, 1973 CANLII 735 (CanLII)

16 *Medic v. Taylor*, [1975] 6 W.W.R. 725, 59 D.L.R. (3d) 321 (B.C. S.C.)

17 *Medic v. Taylor*, *supra*, at p. 322 D.L.R., p. 727 W.W.R.

18 Referred to in *Holtz v. G. & G. Parkdale Refrigeration Ltd.*, 1980 CanLII 1836 (CanLII), and *Allprint Co. v. Erwin* [1982 CarswellOnt 125 (Ont. C.A.)], 1982 CANLII 1917 (CanLII)

19 In *Victor (Canada) Ltd. v. Farbetter Addressing & Mailing Ltd.* (1978), 3 B.L.R. 312 (Ont. H.C.)

20 *Holtz v. G. & G. Parkdale Refrigeration Ltd.*, 1980 CanLII 1836 (CanLII)

21 *Glatt v. Ritt*, *supra*, at p. 457 O.R., p. 305 D.L.R.

22 *Allprint Co. v. Erwin* (1982), 38 O.R. (2d) 13 (Ont. C.A.)

23 *Allprint Co. v. Erwin*, *Supra*.

24 *H. B. Etlin Co. v. Asselstyne*, [1962] O.R. 810 (Ont. C.A.)

25 *Daymond Motors Ltd. v. Thistletown Development Ltd.*, [1956] O.W.N. 867 (Ont. C.A.)

26 *Holtz v. G. & G. Parkdale Refrigeration Ltd.* (1980), 30 O.R. (2d) 513 (Ont. H.C.)

27 *Builders' Supplies Ltd. v. Fraser*, [2004] O.J. No. 3601 (Ont. S.C.J.) at para 7.

28 *Builders' Supplies Ltd. v. Fraser*, [2005] O.J. No. 1540 (Ont. S.C.J.), at paras 17, 19.

29 *Fisker Cargo Inc. v. Toronto Fashion Group Ltd.* [2009 CarswellOnt 7248 (Ont. S.C.J.)], 2009 CanLII 64832

30 *Fisker Cargo Inc.*, *supra*, at para. 28

31 *Fisker Cargo Inc.*, *supra*, at para. 30

32 *Daymond Motors Ltd. v. Thistletown Development Ltd.*, [1956] O.W.N. 867 (Ont. C.A.)

33 *Mauch v. Burt* (1964), 45 D.L.R. (2d) 187 (B.C.S.C.)

34 *Beaver Lumber Co. v. Denis* (1963), 41 W.W.R. 570 (B.C.S.C.)

35 *Fisker Cargo Inc.*, at para. 43

36 *Wellton Express International (Ontario) Inc. v. Noormohamed*, 2012 ONSC 3919 (Ont. S.C.J.) (CanLII)

37 *Wellton* at para 42.

38 *Canadian Agency Law*, by G. Fridman, 2nd ed., Lexis Nexis Canada Inc., 2012.

39 *Royal Securities Corp. v. Montreal Trust Co.* (1966), [1967] 1 O.R. 137 at 155 (H.C.).

40 *Canadian Agency Law*, at para. 1.3; *Vallières c. Samson* (2009), 252 O.A.C. 253 (Ont. Div. Ct.), at 256-57.

41 *Canadian Agency Law*, at para. 1.2.

42 *Business Corporations Act*, R.S.O. 1990, c. B. 16, s. 15

43 Bruce Welling, *Corporate Law in Canada: The Governing Principles*, 3rd ed. (London, Ont.: Scribblers Publishing, 2006), at pp. 135-137.

44 *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 2 Q.B. 480 (Eng. C.A.).

45 Welling, at p. 136; Peter Watts & F.M.B. Reynolds, *Bowstead & Reynolds on Agency* (London, England: Thomson Reuters, 2010), at para. 1-024.

46 Welling, above, at p.137

47 *Dumbrell v. Regional Group of Companies Inc.*, 2007 ONCA 59, 85 O.R. (3d) 616 (Ont. C.A.), at para. 80

48 *Clarkson Co. v. Zhelka*, [1967] 2 O.R. 565 (Ont. H.C.)

49 *Agency Law Primer* (3rd ed.) (Toronto: Carswell, 2003) states, at p. 77:

50 Anthony Van Duzer, *Law of Partnerships and Corporations*, 2nd ed. (Toronto: Irwin Law, 2003), ch. 5

51 *3253791 Canada Inc. v. Armstrong*, [2002] O.J. No. 3424, 27 B.L.R. (3d) 230 (Ont. S.C.J.)

52 *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.), 1991 SCC 58 (CanLII), (1991), 3 C.C.L.I. (2d) 186 (S.C.C.) [at p. 51 S.C.R.]

53 *Maracle v. Travelers Indemnity Co. of Canada*, *supra*, at para. 13

54 *Rama Corp. v. Proved Tin & General Investments*, [1952] 2 Q.B. 147 (Eng. Q.B.), at p. 149-50.

55 *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.); *Hansen v. British Columbia (Minister of Transportation & Highways)*, [2000] B.C.J. No. 1112, 2000 BCCA 338 (B.C. C.A.).

56 *The Law of Contracts* (4th ed.) Canada Law Book, 1999, at p. 141

57 *Restatement of the Law Second, Contracts 2d*, The American Law Institute, American Law Institute Publishers (1981)

58 *Reclamation Systems Inc. v. Ontario* (1996), 27 O.R. (3d) 419 (Ont. Gen. Div.), 1996 ON SC 7950 (CanLII); *Canadian Superior Oil Ltd. v. Paddon-Hughes Development Co.*, [1970] S.C.R. 932 (S.C.C.), 1970 SCC 3 (CanLII), and *Gilbert Steel Ltd. v. University Construction Ltd.* (1976), 67 D.L.R. (3d) 606 (Ont. C.A.), referred to in *Reclamation Systems*; and *Doef's Iron Works Ltd. v. Mortgage Corp. Canada Inc.*, [2004] O.J. No. 4358 (Ont. C.A.)

59 *Myles v. Body Shop Canada*, [2004] O.J. No. 6084 (S.C.J.)

60 *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.* (1981), [1982] Q.B. 84 (Eng. C.A.), at p. 131

61 *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, at p. 122

62 *Myles v. 94272 Canada Ltd.*, [2005] O.J. No. 901 (Ont. Div. Ct.)

63 *Doef's Iron Works Ltd. v. Mortgage Corp. Canada Inc.*, [2004] O.J. No. 4358 (Ont. C.A.)

64 The Court of Appeal released its decision in *Doef's* on October 13, 2004, a month before November 17, 2004, when Nordheimer J. heard the motion in *Myles v. Body Shop Canada*. Nordheimer J. released his decision on November 30, 2004, about a month after the Court of Appeal's decision in Doef's, and Jennings J. granted leave to appeal from the decision in *Myles* on February 8, 2005, approximately three months after the Court of Appeal's decision in *Doef's*.

65 *Doef's Iron Works Ltd. v. Mortgage Corp. Canada Inc.* 2002 WL 31978146, 2002 CarswellOnt 5968 (Ont. S.C.J.).

66 *Conwest Exploration Co. v. Letain* (1963), [1964] S.C.R. 20 (S.C.C.), 1963 SCC 35 (CanLII)

67 *Reclamation Systems Inc. v. Ontario* (1996), 27 O.R. (3d) 419 (Ont. Gen. Div.), 1996 ON SC 7950 (CanLII)

68 *Schwark Estate v. Cutting*, 2010 ONCA 61 (Ont. C.A.) (CanLII).

69 *La Cie McCormick Canada Co. v. Brian Barr Holdings Ltd.* [2009 CarswellOnt 4146 (Ont. S.C.J.)], 2009 CanLII 37708

70 *Toronto Star Television v. Etre Belle Telemarketing Corp.*, [1999] O.J. No. 3946 (Ont. S.C.J.) at para. 11

71 *Montreal Trust Co. of Canada v. ScotiaMcLeod Inc.*, 1995 CarswellOnt 1203 (Ont. C.A.) at para. 25; *Truckers Garage Inc. v. Krell*, 1993 CarswellOnt 875 (Ont. C.A.) at para. 40.

72 *Normart Management Ltd. v. West Hill Redevelopment Co.*, [1998] O.J. No. 391 (Ont. C.A.), at para. 19

73 *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), 1996 ON SC 7979 (CanLII), at paras. 19 to 23. See also the cases cited by Perell J. in *Miquelanti Ltda. v. FLSmidth & Co. A/S*, 2011 ONSC 3293 (Ont. S.C.J.), paras. 18 to 21.

74 *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (Ont. C.A.), 1994 ON CA 2241, para. 28.

75 *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), 1996 ON SC 7979 (CanLII), para. 22, appeal dismissed [1997] O.J. No. 3754 (Ont. C.A.).

76 *Canada Life Assurance Co. v. Canadian Imperial Bank of Commerce* (1974), 3 O.R. (2d) 70 (Ont. C.A.), 1974 ON CA 886 (CanLII), para. 43, leave to appeal refused, [1974] S.C.R. viii (S.C.C.).

77 *Canada Life Assurance*, *supra.*, para. 42.

78 *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, 2012 ONSC 5167 (Ont. S.C.J.) (CanLII), para. 77, quoting *Trustor AB v. Smallbone (No.2)*, [2001] 3 All E.R. 987 (Eng. Ch.), at 996.

79 *Danielisz v. Hercules Forwarding Inc.*, 2012 BCSC 1155 (B.C. S.C.), at para. 71.

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5

Canadian Contractual Interpretation Law

SECOND EDITION

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Chapter 2

FUNDAMENTAL PRECEPTS OF CONTRACTUAL INTERPRETATION

2.1 WORDS AND THEIR CONTEXT

2.1.1 The principle

Contractual interpretation is, for the most part, an exercise in giving effect to the intentions of the parties. In doing so, it is of paramount importance to achieve accuracy in interpretation. There is little point in giving effect to the intentions of the parties if the court has not accurately discerned what those intentions are. Accuracy in interpretation requires consideration of two things, namely the words selected by the parties to set out their agreement, and the context in which those words have been used.[1] Words and their context, therefore, are the primary theme of the law of interpretation of contracts, and set the parameters for the interpretive exercise. An interpretation which strays too far from the words selected by the parties is not legitimate because it fails to give effect to the very means the parties invoked to define their legal obligations. An interpretation which strays too far from the context in which the parties used those words risks inaccuracy; even if an interpretation is literally correct, if the words are taken out of context, the meaning does not accurately correspond to what the parties were attempting to do. Interpretation therefore involves a search for meaning within the constraints of the words and their context. An ideal interpretation is one which accords with both.

The fact that interpretation involves a consideration and reconciliation of both the words used and the context of their use was commented upon by the Supreme Court of Canada in *Montréal (City) v. 2952-1366 Québec Inc.*[2] The case involved a matter of statutory rather than contractual interpretation, but the Court's observations about the interaction between words and their context are nonetheless instructive. "Any act of communication presupposes two distinct but inseparable components: text and context."[3] Thus interpretation must have regard both for the words in question and the manner or context in which they are used, and ideally the two lead to the same conclusion: "Courts perform their

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1 The first edition of this book was cited with approval for this point in *Golden Capital Securities Ltd. v. Investment Industry Regulatory Organization of Canada*, [2010] B.C.J. No. 1458, 8 B.C.L.R. (5th) 227 at para. 44 (B.C.C.A.).

2 [2005] S.C.J. No. 63, [2005] 3 S.C.R. 141 (S.C.C.).

3 *Ibid.*, at para. 15 [citation omitted].

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2014 SCC 53, 2014 CSC 53
Supreme Court of Canada

Creston Moly Corp. v. Sattva Capital Corp.

2014 CarswellBC 2267, 2014 CarswellBC 2268, 2014 SCC 53, 2014 CSC 53, [2014] 2 S.C.R. 633, [2014] 9 W.W.R. 427, [2014] B.C.W.L.D. 5218, [2014] B.C.W.L.D. 5219, [2014] B.C.W.L.D. 5230, [2014] B.C.W.L.D. 5255, [2014] S.C.J. No. 53, 242 A.C.W.S. (3d) 266, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 373 D.L.R. (4th) 393, 461 N.R. 335, 59 B.C.L.R. (5th) 1, 614 W.A.C. 1

Sattva Capital Corporation (formerly Sattva Capital Inc.), Appellant and Creston Moly Corporation (formerly Georgia Ventures Inc.), Respondent and Attorney General of British Columbia and BCICAC Foundation, Interveners

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

Heard: December 12, 2013
Judgment: August 1, 2014
Docket: 35026

Proceedings: reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 554 W.A.C. 114, 326 B.C.A.C. 114, 2 B.L.R. (5th) 1, 36 B.C.L.R. (5th) 71, 2012 BCCA 329, 2012 CarswellBC 2327, Bennett J.A., Kirkpatrick J.A., Neilson J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2011), 2011 CarswellBC 1124, 2011 BCSC 597, 84 B.L.R. (4th) 102, Armstrong J. (B.C. S.C.); and reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 319 D.L.R. (4th) 219, 2010 BCCA 239, 2010 CarswellBC 1210, 7 B.C.L.R. (5th) 227, Levine J.A., Low J.A., Newbury J.A. (B.C. C.A.); reversing *Creston Moly Corp. v. Sattva Capital Corp.* (2009), 2009 BCSC 1079, 2009 CarswellBC 2096, Greyell J. (B.C. S.C.)

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Darrell W. Roberts, Q.C., David Mitchell, for Respondent
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David Wotherspoon, Gavin R. Cameron, for Intervener, BCICAC Foundation

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public

Headnote

Alternative dispute resolution --- Appeal from arbitration awards — Question of law

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator concluded that stock exchange would have probably valued finder's fee at $0.15 per share under terms of agreement and that SC lost opportunity to sell shares at that value — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Alternative dispute resolution --- Appeal from arbitration awards — Leave to appeal — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — CM brought application for leave to appeal arbitration award and chambers judge dismissed application as it was not brought on basis of question of law but on question of fact or mixed fact and law — CM's appeal from decision to dismiss application for leave to appeal arbitrator's award of damages was allowed — CA Leave Court decided that the construction of s. 3.1 of Agreement, and in particular "maximum amount" proviso, was question of law — SC's appeal to Supreme Court of Canada allowed — Unless Court places restrictions in order granting leave, order granting leave is "at large" — Appellants may raise issues on appeal that were not set out in leave application — Historical approach regarding determination of legal rights and obligations of parties under written contract as question of law should be abandoned — Even if it had been question of law, Court of Appeal Leave Court should have deferred to decision of Supreme Court Leave Court.

Business associations --- Powers, rights and liabilities — Contracts by corporations — Miscellaneous

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Contracts --- Construction and interpretation — Resolving ambiguities — Reasonableness

Dispute arose between CM and SC regarding SC's finder's fee under fee agreement, with SC taking position that it was entitled to be paid in shares of CM valued at $0.15 per share — Arbitrator found that under agreement SC was entitled to fee equal to maximum amount payable pursuant to rules and policies of TSX Venture Exchange, and quantum of fee was US$1.5 million — Arbitrator found that under agreement, fee was payable in shares based on market price, as defined in agreement, unless SC elected to take it in cash or combination of cash and shares — Arbitrator found market price, as defined in agreement, was $0.15 per share — CM appealed arbitration award without success — Further appeal was allowed, Court of Appeal holding that to give effect only to "market price" definition resulted in absurdity that could not reasonably be within contemplation of parties or in accordance with good business sense — SC's appeal to Supreme Court of Canada allowed — Arbitrator's decision that shares should be priced according to Market Price definition gave effect to both Market Price definition and "maximum amount" proviso — Arbitrator's interpretation of agreement achieved goal by reconciling market price definition and "maximum amount" proviso in reasonable manner.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Question de droit

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu que la bourse aurait probablement évalué les honoraires d'intermédiation à 15 cents l'unité en vertu des termes de l'entente et que SC avait perdu l'occasion de vendre les actions à ce prix — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que

l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Résolution alternative des conflits --- Appel interjeté à l'encontre de sentences arbitrales — Demande d'autorisation d'appel — Divers

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — CM a déposé une demande d'autorisation d'appel à l'encontre de la sentence arbitrale et le juge siégeant en son cabinet a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit — Appel interjeté par CM à l'encontre de la décision ayant rejeté la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts a été accueilli — Formation de la Cour d'appel saisie de la demande d'autorisation a conclu que l'interprétation de l'art. 3.1 de l'entente, et en particulier de la stipulation relative au « plafond », constituait une question de droit — Pourvoi de SC formé devant la Cour suprême du Canada accueilli — À moins que la Cour n'impose des restrictions dans l'ordonnance accordant l'autorisation, cette ordonnance est de « portée générale » — Appelant peut soulever en appel une question qui n'était pas énoncée dans la demande d'autorisation — Approche qui a prévalu par le passé selon laquelle la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit devrait être abandonnée — Même s'il s'était agi d'une question de droit, la formation de la Cour d'appel saisie de la demande d'autorisation aurait dû s'en remettre à la décision de la formation de la Cour suprême saisie de la demande d'autorisation.

Associations d'affaires --- Pouvoirs, droits et responsabilités — Contrats signés par la société — Questions diverses

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

Contrats --- Interprétation — Résolution des ambiguïtés — Caractère raisonnable

Litige opposait CM et SC concernant les honoraires d'intermédiation de SC qui étaient prévus dans une entente et qui, selon SC, devaient lui être payés sous forme d'actions de CM évaluées à 15 cents l'unité — Arbitre a conclu qu'en vertu de l'entente, SC avait droit à des honoraires équivalant au montant maximal payable en vertu des règles et des politiques de la Bourse de croissance TSX, et le montant des honoraires s'élevait à 1,5 million $US — Arbitre a conclu qu'en vertu de l'entente, les honoraires étaient payables sous forme d'actions en fonction du cours, tel que l'entente le prévoyait, à moins que SC ne choisisse d'être payée en argent comptant ou à la fois en argent comptant

et sous forme d'actions — Arbitre a conclu que le cours, selon la définition qu'en donnait l'entente, s'établissait à 15 cents l'unité — CM a interjeté appel à l'encontre de la sentence arbitrale, sans succès — Cour d'appel a accueilli l'appel après que la Cour ait estimé que de donner effet qu'à la définition du « cours » donnait lieu à une absurdité que les parties n'avaient raisonnablement pas voulu créer ou qui ne correspondait pas au bon sens des affaires — Pourvoi formé par SC devant la Cour suprême du Canada accueilli — Décision de l'arbitre selon laquelle les actions devraient être évaluées en fonction de la définition du cours donnait effet non seulement à la définition du cours, mais également à la stipulation relative au « plafond » — Interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

The dispute concerned which date should be used to determine the price of shares and thus the number of shares to which SC was entitled. The arbitrator ruled in favour of SC, and CM sought leave to appeal from the Supreme Court Leave Court, which dismissed the application on the grounds that it did not involve a question of law, but rather mixed fact and law. The Court of Appeal granted CM leave to appeal, holding that it was a question of law. The Supreme Court dismissed the appeal, but the Court of Appeal reversed this decision and found in favour of CM. SC appealed both this decision and the decision of the Court of Appeal Leave Court to the Supreme Court of Canada.

Held: The appeals were allowed.

Per Rothstein J. (McLachlin C.J.C., LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring): The issue of whether the Court of Appeal Leave Court erred in finding a question of law for the purposes of granting leave to appeal was properly before the Court. While the subject of the appeal was important to the parties, the question was not a question of law within the meaning of s. 31 of the Arbitration Act. Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law. Canadian courts, however, have moved away from this historical approach. 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". Questions of law "questions about what the correct legal test is". Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties. 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. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. The fact that the legal system leaves broad scope to tribunals of first instance to resolve issues of limited application supports treating contractual interpretation as a question of mixed fact and law.

The issue whether the proposed appeal was on a question of law was expressly argued before the Leave Courts of both the Supreme Court and Court of Appeal. There was no reason why SC should be precluded from raising this issue on appeal despite the fact it was not mentioned in its application for leave to appeal to the Supreme Court of Canada. Appellate review of an arbitrator's award will only occur where the requirements of s. 31(2) of the Arbitration Act are met and where the leave court does not exercise its residual discretion to nonetheless deny leave. Even if the Court of Appeal Leave Court had identified a question of law and the miscarriage of justice test had been met, it should have upheld the Supreme Court Leave Court's denial of leave to appeal in deference to that court's exercise of judicial discretion. The Court of Appeal Court erred in holding that the Leave Court's comments on the merits of the appeal were binding on it and on the Supreme Court Appeal Court. A court considering whether leave should be granted is not adjudicating the merits of the case. A leave court decides only whether the matter warrants granting leave, not whether the appeal will be successful. This is true even where the determination of whether to grant leave involves 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. The fact that the Court of Appeal provided its own reasoning as to why it came to the same conclusion as the Leave Court did not vitiate the error.

The arbitrator's decision that the shares should be priced according to the market price definition gave effect to both the market price definition and the "maximum amount" proviso. The arbitrator's interpretation of the agreement, as reconciled the market price definition and the "maximum amount" proviso in a manner that cannot be said to be unreasonable.

Le litige portait sur la date devant servir à déterminer le prix des actions et, ainsi, le nombre d'actions auxquelles SC avait droit. L'arbitre a tranché en faveur de SC, et CM a déposé une demande d'autorisation d'appel auprès de la Cour suprême, laquelle a rejeté la demande au motif qu'elle ne soulevait pas une question de droit, mais une question mixte de fait et de droit. CM a obtenu l'autorisation d'appeler de la Cour d'appel, laquelle a estimé qu'il s'agissait d'une question de droit. La Cour suprême a rejeté l'appel, mais la Cour d'appel a infirmé cette décision et a tranché en faveur de CM. SC a formé un pourvoi à l'encontre de cette décision et de la décision de la formation de la Cour d'appel saisie de la demande d'autorisation d'appel auprès de la Cour suprême du Canada.

Arrêt: Les pourvois ont été accueillis.

Rothstein, J. (McLachlin, J.C.C., LeBel, Abella, Moldaver, Karakatsanis, Wagner, JJ., souscrivant à son opinion) : C'était à bon droit que la Cour était saisie de la question de savoir si la formation de la Cour d'appel a commis une erreur en concluant à la présence d'une question de droit dans le cadre de la demande d'autorisation d'appel. Bien que la question faisant l'objet du pourvoi était importante, il ne s'agissait pas d'une question de droit au sens de l'art. 31 de l'Arbitration Act. Historiquement, la détermination des droits et obligations juridiques des parties à un contrat écrit était considérée comme une question de droit. Les tribunaux canadiens, toutefois, ont abandonné cette approche historique. 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 ». Les questions de droit « concernent la détermination du critère juridique applicable ». Or, lorsqu'il s'agit d'interprétation contractuelle, le but de l'exercice consiste à déterminer l'intention objective des parties. En établissant une distinction entre les questions de droit et les questions mixtes de fait et de droit, on vise 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. 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 au tribunal administratif siégeant en première instance étaye la proposition selon laquelle l'interprétation contractuelle est une question mixte de fait et de droit.

La question de savoir si l'appel proposé soulevait une question de droit a été expressément débattue devant les formations de la Cour suprême et de la Cour d'appel saisies de la demande d'autorisation. Rien n'empêchait SC 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 suprême du Canada. L'appel d'une sentence arbitrale n'est donc entendu que si les critères de l'art. 31(2) de l'Arbitration Act 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. Même si la formation de la Cour d'appel 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 Cour suprême saisie de la demande d'autorisation de rejeter cette demande, par égard pour l'exercice du pouvoir discrétionnaire de cette cour. La Cour d'appel 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 Cour d'appel saisie de la demande d'autorisation la liaient et liaient également la formation de la Cour suprême saisie de l'appel. 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. Cela vaut même lorsque l'étude de la demande d'autorisation appelle un examen préliminaire de la question de droit en cause. L'autorisation accordée ne saurait lier le tribunal chargé de statuer sur l'appel ni restreindre ses pouvoirs. Le fait que la Cour d'appel soit arrivée à la même conclusion que celle saisie de la demande d'autorisation pour des motifs différents n'annule pas l'erreur.

La sentence arbitrale, selon laquelle l'action devrait être évaluée en fonction de la définition du cours, donnait effet à cette dernière et à la stipulation relative au « plafond ». L'interprétation par l'arbitre de l'entente atteignait cet objectif en conciliant la définition du cours et la stipulation relative au « plafond » d'une manière qui ne pouvait être considérée comme déraisonnable.

APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), reversing dismissal of appeal from arbitrator's decision; APPEAL from judgment reported at *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), reversing decision to dismiss application for leave to appeal arbitrator's award of damages.

POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2012), 2012 BCCA 329, 2012 CarswellBC 2327, 36 B.C.L.R. (5th) 71, 2 B.L.R. (5th) 1, 326 B.C.A.C. 114, 554 W.A.C. 114 (B.C. C.A.), ayant infirmé le rejet d'un appel interjeté à l'encontre d'une sentence arbitrale; POURVOI formé à l'encontre d'un jugement publié à *Creston Moly Corp. v. Sattva Capital Corp.* (2010), 2010 BCCA 239, 2010 CarswellBC 1210, 319 D.L.R. (4th) 219, 7 B.C.L.R. (5th) 227 (B.C. C.A.), ayant infirmé la décision de rejeter la demande d'autorisation d'appeler à l'encontre de la sentence arbitrale portant sur les dommages-intérêts.

Rothstein J. **(McLachlin C.J.C. and LeBel, Abella, Moldaver, Karakatsanis and Wagner JJ. concurring):**

1 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 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.

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 (B.C. S.C.) (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 (B.C. C.A.) ("CA Leave Court")).

10 The British Columbia Supreme Court judge who heard the merits of the appeal (2011 BCSC 597, 84 B.L.R. (4th) 102 (B.C. S.C.) ("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 (B.C. C.A.) ("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 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. 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 (B.C. S.C.)

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).

B. British Columbia Court of Appeal — Leave to Appeal Decision, 2010 BCCA 239 (B.C. C.A.)

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 (B.C. S.C.)

23 Armstrong J. reviewed the arbitrator's decision on a correctness standard. He dismissed the 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 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 (B.C. C.A.)

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:

(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.

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.

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.

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 (*Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology*, 2000 BCCA 496, 192 D.L.R. (4th) 122 (B.C. C.A.) ("*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 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 (Man. C.A.), 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 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 (U.K. H.L.), 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 (U.K. H.L.); and *Reardon Smith Line v. Hansen-Tangen*, [1976] 3 All E.R. 570 (U.K. H.L.)).

45 In Canada, there remains some support for the historical approach. See for example *Jiro Enterprises Ltd. v. Spencer*, 2008 ABCA 87 (Alta. C.A.) (CanLII), at para. 10; *QK Investments Inc. v. Crocus Investment Fund*, 2008 MBCA 21, 290 D.L.R. (4th) 84 (Man. C.A.), at para. 26; *Dow Chemical Canada Inc. v. Shell Chemicals Canada Ltd.*, 2010 ABCA 126, 25 Alta. L.R. (5th) 221 (Alta. C.A.), at paras. 11-12; and *Costco Wholesale Canada Ltd. v. R.*, 2012 FCA 160, 431 N.R. 78 (F.C.A.), 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 (P.E.I. C.A.), at para. 11; *269893 Alberta Ltd. v. Otter Bay Developments Ltd.*, 2009 BCCA 37, 266 B.C.A.C. 98 (B.C. C.A.), at para. 13; *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230 (B.C. C.A.), at para. 44; *Plan Group v. Bell Canada*, 2009 ONCA 548, 96 O.R. (3d) 81 (Ont. C.A.), 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 — 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 & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), 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 (S.C.C.), at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.):

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

49 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 Inc*. Questions of law "are questions about what the correct legal test is" (*Southam Inc.*, 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 Inc.*, 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 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 Inc.* 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.

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 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. BC Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62 (B.C. C.A.)).

58 The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable

man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

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

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

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

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

(d) Application to the Present Case

62 In this case, the CA Leave Court granted leave on the following issue: "Whether the Arbitrator erred in law in failing to construe the whole of the Finder's Fee Agreement ..." (A.R., vol. 1, at p. 62).

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

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

65 However, it appears that the arbitrator did consider the "maximum amount" proviso. Indeed, 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 application also failed the miscarriage of justice and residual discretion stages of the leave analysis set out in s. 31(2)(a) of the *AA*.

(4) May Prevent a Miscarriage of Justice

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

68 Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal "may prevent a miscarriage of justice" in order for it to grant leave to appeal pursuant to s. 31(2)(a) of the *AA*. The first step in this analysis is defining miscarriage of justice for the purposes of s. 31(2)(a).

69 In *BCIT*, Justice Saunders discussed the miscarriage of justice requirement under s. 31(2)(a). She affirmed the definition set out in *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (B.C. 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 *Cusson v. Quan*, 2009 SCC 62, [2009] 3 S.C.R. 712 (S.C.C.), which discusses the test of whether "some substantial wrong or miscarriage of justice has occurred" in the context of a civil jury trial (para. 43).

70 Having regard to *BCIT* and *Quan*, I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the *AA*, an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

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 (Man. C.A.), at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (Alta. C.A.) (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 Inc.*, at

para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (Man. C.A.) (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174 (P.E.I. C.A.), at para. 11); and "credible argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270 (Sask. C.A. [In Chambers]), 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 (*N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 (S.C.C.), 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.

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 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 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 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.

(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".

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 c. Lafontaine (Village)*, [1991] 1 S.C.R. 326 (S.C.C.), at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (*MiningWatch Canada v. Canada (Minister of Fisheries & Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6 (S.C.C.), 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 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 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. c. Bellusci*, 2012 SCC 44, [2012] 2 S.C.R. 509 (S.C.C.), 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 (S.C.C.), at para. 15; and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297 (S.C.C.), 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 & Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 (S.C.C.), 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 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 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 *New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), 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 *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 *A.T.A. v. Alberta (Information & Privacy*

Commissioner), 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), 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 (*A.T.A.*, 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.

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 *N.L.N.U.*, 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 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.]

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 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 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).

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]

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 (S.C.C.), 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 (B.C. C.A.), at para. 27, leave to appeal refused, [2013] 3 S.C.R. viii (note) (S.C.C.)). 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 (Ont. 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.

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.

Appeals allowed.

Pourvois accueillis.

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 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

(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.

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Commercial List Court File No. CV-17-11773-00CL

BRIDGING FINANCE INC., AS AGENT FOR SPROTT BRIDGING INCOME FUND L.P.
Applicant

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

BRIEF OF AUTHORITIES OF THE RESPONDENTS, Thomas Canning (Maidstone) Limited and 692194 Ontario Limited
(Motion Returnable September 27, 2017)

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