

August 2014

The Relevance of *Sattva* for Appeals from Arbitration Awards in Alberta

Written by: Jonnette Watson Hamilton

Case commented on: *Sattva Capital Corp v Creston Moly Corp*, [2014 SCC 53 \(CanLII\)](#)

The Supreme Court’s decision in *Sattva Capital Corp v Creston Moly Corp* has quite rightly received a great deal of attention. It has attracted notice in contract law circles for changing the law by holding that contractual interpretation involves questions of mixed fact and law, and not questions of law (see e.g. “[Contract interpretation is no longer a question of law](#)”, “[A blockbuster decision in contractual interpretation](#)” and “[SCC issues ‘big change’ to contract law – Sattva gives last word to trial judges, arbitrators](#)”). And, because the precedent-setting decision arose from an arbitration hearing in British Columbia, it has also attracted commentary more focused on the arbitral aspects (see e.g. “[Finally, the Supreme Court of Canada puts some finality into Arbitrations](#)” and “[Supreme Court of Canada Limits the Right to Appeal Commercial Arbitral Decisions on Issues of Contractual Interpretation](#)”). Because the British Columbia arbitration legislation that facilitated and regulated the arbitration in *Sattva* is unlike that in the rest of common law Canada, I will focus on the arbitration aspects of the decision and then explore the difference the *Sattva* decision may make in arbitrations in Alberta (and in Ontario, Saskatchewan, New Brunswick, Prince Edward Island, Manitoba and Nova Scotia, all of which also adopted the [Uniform Law Conference of Canada’s Uniform Arbitration Act \(1990\)](#)).

The Supreme Court of Canada decision

The initial dispute was about a US\$1.5 million finder’s fee that Creston Moly was contractually obligated to pay Sattva Capital. The finder’s fee was payable in Creston shares. The parties disagreed about which date their contract required them to use to determine the price of the Creston shares. Depending upon the date chosen, Sattva would either get 11,460,000 shares or 2,454,000 shares. The arbitrator agreed with Sattva’s interpretation of the parties’ contract and awarded Sattva 11,460,000 Creston shares. Creston wanted to appeal.

Under British Columbia’s *Arbitration Act*, [RSBC 1996, c 55](#), s 31, appeals of arbitration awards are only available on questions of law and only with either the consent of all the parties to the arbitration or with leave of 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.

The British Columbia Supreme Court denied leave to appeal, holding there was no question of law. However, the British Columbia Court of Appeal held that leave should be granted and sent the dispute back to the Supreme Court for a decision on the merits of the appeal. The Supreme Court held the arbitrator's decision was correct and dismissed the appeal. However, the Court of Appeal held the arbitrator's decision was incorrect and allowed the appeal. The Supreme Court of Canada granted leave to appeal from both of the Court of Appeal's decisions and, in the end, agreed with the arbitrator and the British Columbia Supreme Court.

The Supreme Court acknowledged that “[h]istorically, determining the legal rights and obligations of the parties under a written contract was considered a question of law” (para 43). However, the unanimous decision determined that this historical approach should be abandoned (para 50). Henceforth, “[c]ontractual 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” (para 50). The Court acknowledged that it might be possible to extricate a question of law from the mixed fact and law context of contractual interpretation — for example, 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 (para 53) — those instances “will be rare” (para 55).

In this case, no question of law was raised. As a result, no appeal was available from the arbitrator's award.

While that was enough to dispose of the appeal, the Supreme Court went on to consider one of the three factors in section 31(2) that have to exist before leave can be granted and whether leave to appeal should have been granted in this case, assuming the issue had been a question of law. First they looked at whether an appeal would have been necessary to prevent a miscarriage of justice, as specified by section 31(2)(a). The Court held that in order to meet that standard, “an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case” (para 70). In other words, the appeal had to have some possibility of succeeding (para 71); without considering the full merits of the case (para 72), it had to be clear that an argument that the arbitrator's decision was unreasonable had merit (para 74).

Second, the Court looked at what considerations should factor into a court's exercise of the residual discretion in section 31(2). British Columbia courts had determined that the words “may grant leave” in section 31(2) meant a court can refuse leave to appeal even when one of the three requirements listed in section 31(2) has been satisfied. The Supreme Court agreed a residual discretion existed (without discussing the point), but disagreed with the list of factors to be considered in exercising that discretion as set out in the leading case of *British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology*, [2000 BCCA](#)

[496 \(CanLII\)](#), 2000 BCCA 496. The list was overly broad, extending beyond the historical bases for refusing discretionary relief — the parties’ conduct, the existence of alternative remedies, and any undue delay (para 87) — and repeating factors already considered in the section 31(2) analysis.

The Court’s final comment on appeals from arbitration awards was about the standard of review. Here the Court noted:

Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and *is different from judicial review of a decision of a statutory tribunal*. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick*, [2008 SCC 9 \(CanLII\)](#), 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it *is not entirely applicable* to the commercial arbitration context (para 104, emphasis added).

It is refreshing to see the Court acknowledge that appellate review of commercial arbitration awards is different from judicial review of decisions of statutory tribunals. This point is too often forgotten; see my post “[Arbitration is not Administrative Law](#).” However, in subsequent paragraphs, the acknowledged differences do not seem to play any role. For example, all of the precedents cited on the standard of review point are administrative law precedents: *Dunsmuir v. New Brunswick*, [2008 SCC 9 \(CanLII\)](#), 2008 SCC 9, [2008] 1 SCR 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, [2011 SCC 61 \(CanLII\)](#), 2011 SCC 61, [2011] 3 SCR 654, and *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011 SCC 62 \(CanLII\)](#), 2011 SCC 62, [2011] 3 SCR 708, citing David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy”, in M. Taggart, ed., *The Province of Administrative Law* (1997) 279.

As for the standard of review itself, the Court held “[i]n 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” (para 106, emphasis added). And, in analyzing whether an arbitrator’s decision was reasonable, “it is permissible for reviewing courts to supplement the reasons of the original decision-maker” (para 110). Indeed, the Court relies almost entirely on the reasons offered by Justice Armstrong of the British Columbia Supreme Court (paras 107-119). This is arbitration’s version of the administrative law point about deference to “the reasons offered or *which could be offered* in support of a decision” (*Dunsmuir* at para 48), i.e., the result is correct because reasons could have been offered in support.

Application to Alberta

In Alberta, the equivalent of British Columbia’s section 31 is section 44 of the *Arbitration Act*, [RSA 2000, c A-43](#):

44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

Both the British Columbia and the Alberta legislation make appeals of arbitration awards on questions of law available if the parties consent or if the court grants leave to appeal. The Alberta statute allows parties more latitude to fashion their own agreement about appeal rights, not restricting them to questions of law.

Both the British Columbia and the Alberta legislation limit a court's discretion to grant leave by setting out conditions that the parties must meet. However, British Columbia courts have a residual discretion because that province's statute states that "the court *may* grant leave" if those conditions are met. An Alberta court, on the other hand, is told that it "*shall* grant [leave] only if it is satisfied" those conditions are met. The use of the word "shall" suggests an absence of residual discretion in Alberta, but the House of Lords in *Pioneer Shipping Ltd. et al. v. B.T.P. Dioxide Ltd.*, [1980] 1 All ER 117 (CA), aff'd [1981] 2 All ER 1030 at 1034 (HL), held that a very similar leave to appeal provision in the English legislation did not affect the general discretionary nature of the granting of leave (see also John J. Chapman, "Judicial scrutiny of domestic commercial arbitral awards" (1995) 74 Canadian Bar Review 401 at 412).

Finally, the conditions for granting leave in Alberta are narrowly focused on only the parties. It is only the importance of the dispute to the parties and whether their rights will be significantly affected by the appeal that counts. The courts are seen as dispute resolvers only, a continuation of the role of private arbitration. In British Columbia, appeals from arbitration may have a wider focus, beyond that of the parties only. The appeal can be important to the parties or to a group that the appealing party is a member of, or to the general public. Some Alberta courts have read into the Alberta appeal provisions the requirement that the appeal be in the public interest. See, for example, my 2011 post "[Leave to Appeal an Arbitration Award: Is There a Public Interest Requirement?](#)" (The Alberta Law Reform Institute has examined the public interest requirement in [Arbitration Act: Stay and Appeal Issues, 2013](#) (Final Report 103) in the context of re-thinking appeals from arbitration awards and it has recommended that section 44(2) be repealed in its entirety and that there be no appeals without the parties' agreement (para 138)).

So what do these similarities and differences in the British Columbia and Alberta legislation amount to when it comes to applying *Sattva* in this province?

Most importantly, the Court's precedent-setting decision that contractual interpretation issues are questions of mixed fact and law will apply to restrict potential appeals from arbitration awards in Alberta. Contract interpretation questions are prominent in commercial arbitrations and, because they are no longer questions of law and leave to appeal is only available for questions of law, there should be fewer requests for leave to appeal and fewer leaves to appeal granted. It is not quite the abolishment of all appeals with leave that the Alberta Law Reform Institute

recommended, but it is a big step in that direction. Members of the legal profession and the public will know less and less about arbitration as cases such as *Sattva* will simply be decided, privately and confidentially, by decision-makers chosen by the parties to the dispute.

The Court's interpretation of section 32(1)(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 — will probably be persuasive in Alberta. Section 31(1)(a) is the closest the British Columbia legislation comes to Alberta's party-focused conditions for granting leave. Recall that section 44(2) of the Alberta legislation requires that the importance to the parties of the matters at stake in the arbitration justifies an appeal and that determination of the question of law at issue will significantly affect the rights of the parties. This is similar in substance, if not form, to the British Columbia provision. Therefore the Court's interpretation that what was required was that "an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case" (para 70) is probably an accurate description of what section 44(2) requires.

The Court's narrowing of the discretion of the court hearing the leave to appeal application is probably not relevant to Alberta. It is not clear that courts in Alberta have a residual discretion to decline to grant leave if the conditions in section 44(2) are met. Section 44(2) does not say that courts must grant leave if the conditions are met, but it does say they "shall" grant leave only if the conditions are met. Thus it appears that Alberta courts cannot take "the parties' conduct, the existence of alternative remedies, and any undue delay" (para 87) into account in deciding leave application under section 44(2).

The Court's final point, namely, that the standard of review will almost always be reasonableness, barring a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise, will apply in Alberta. It is a general point about arbitration and the types of issues that are generally argued and determined in arbitration.

In summary, the principles of arbitration law decided by the Supreme Court in *Sattva* should be highly persuasive in Alberta, despite the differences in the arbitration statutes in British Columbia and Alberta.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter @ABlawg

