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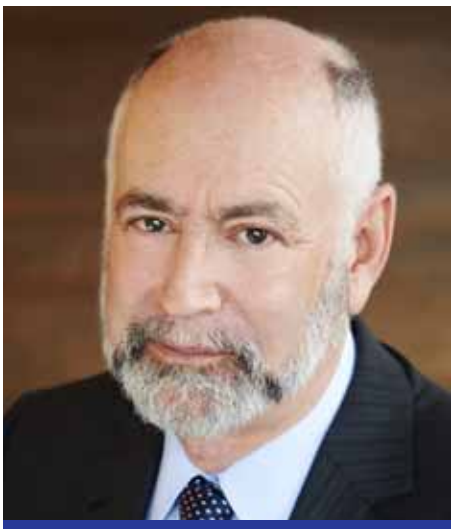
THE CITY OF OTTAWA V. THE COLISEUM INC., A CASE COMMENT

The domestic arbitration process in Canada has been vexed for many years by the question of appeals from arbitral awards.



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As recently noted in *Highbury Estates Inc. v. Bre-Ex Limited*,[1] there is no inherent right to appeal an arbitrator's award; any appeal right comes either from statute, or by express agreement of the parties. As to the former, Canadian domestic arbitration acts treat appeals in different ways. A common characteristic, however, is that appeals on questions of law will be permitted with leave of the court that is to hear the appeal (whether by separate application or on the appeal itself).[2] In Ontario, for example, parties have that right unless they exclude such appeals by contract. In Alberta, to posit another example, parties cannot by contract opt out of the leave/appeal process. Where leave applications and appeals on legal questions are available, parties who have won their arbitrations have faced months and years of litigation fighting about whether putative appeals raise pure questions of law and, if so, the standard of review that judges sitting on appeal should use in determining those appeals. For those winning parties, whether ultimately successful or not, the primary objectives of arbitration (efficiencies and costs) will have been defeated.

***Sattva Capital Corporation v. Creston Moly Corporation*[3] is an archetypical example of an arbitration followed by years of very expensive appellate litigation. *Sattva* is an extremely important arbitration-related case for two critically important reasons. First, the Court ruled that, as a general matter, contractual interpretation raises questions of mixed fact and law, such that appeal provisions in domestic arbitration statutes that give rights of appeal on questions of law, with leave of the court, will generally not apply. There will only be appeal rights where the parties have expressly agreed to provide for same. For many years, the courts, counsel and litigants have struggled on leave applications with distinctions made in decided cases between those issues that raised questions law, and those issues that raised questions of mixed fact and law. It is an understatement to say that the courts have not been consistent in their approach, and that the distinction between the two classes of cases has not always been easy to draw. This has resulted in inconsistencies and much delay in the final resolution of cases. In its ultimate decision on this issue, the *Sattva* Court ruled that inasmuch as contract interpretation is an exercise in which the principles of contractual interpretation are applied to words in a written agreement, considered in light of the factual matrix of a contract, and inasmuch as the goal of contractual interpretation is to ascertain the objective intentions of the parties, the exercise is inherently fact specific and thus does involve issues of mixed fact and law. It further ruled that in rare instances, it will be possible to extricate a question of law from within a question of mixed fact and law. Examples given by the Court of possible extricable questions of law were: 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.**

Second, the *Sattva* Court dealt with the appropriate standard of review for arbitral decisions. Without getting into the detail of the Court's reasoning on this issue,[4] the Court was driven by the facts that parties voluntary submit their commercial disputes to arbitration and select their own arbitrators. The Court thus held that:

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.[5]

The foregoing was very-much echoed in the 2016 arbitration-friendly decision of the Ontario Court of Appeal in *Popack*

v. Lipszyc,[6] where Justice Doherty wrote:

... [T]he nature of the specific order under appeal can also enhance the deference rationale. The application judge exercised her discretion in the context of a review of an award rendered in a private arbitration before a panel chosen by the parties to determine the dispute between them. The parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum. The application judge's decision not to set aside the award is consistent with the well-established preference in favour of maintaining arbitral awards rendered in consensual private arbitrations.[7]

The City of Ottawa v. The Coliseum Inc.[8] ("*Coliseum*") was an early opportunity for the Ontario Courts to apply what was apparently decided in *Sattva.* It was heard in first instance before the *Sattva* decision was issued, but decided approximately eight months thereafter. J. MacKinnon J. granted leave to appeal on the questionable basis that the proposed appeal did raise extricable questions of law. She then reversed the arbitral award on the basis that it was unreasonable. The Court of Appeal did not deal with the question as to whether the arbitrator had erred on an extricable error of law. It did, however, reinstate the award, based on its finding that arbitrator's interpretation of the contract in issue was reasonable. In doing so, it reinforced the import of Sattva in Ontario making it clear that, henceforward, where there are appeals, the courts will give great deference to decisions of adjudicators chosen by the parties.

***COLISEUM* AROSE OUT OF THE FOLLOWING FACTS.**

- Under a long term lease with the City of Ottawa (the "Ottawa"), Coliseum leased Frank Clair Stadium at Lansdowne Park, for use as a domed recreational facility.
- A dispute between the parties was resolved by a Settlement Agreement, pursuant to which Ottawa could terminate the lease in the event that it had plans to redevelop the stadium.
- Paragraph 5 of the Settlement Agreement provided that if Ottawa had redevelopment plans, the parties would enter into good faith negotiations to find Coliseum an alternative site appropriate for its operations. It also provided that Ottawa was to give Coliseum 12 months' notice of termination.
- Paragraph 6 of the Settlement Agreement provided that in the event of a termination under section 5, Ottawa would grant Coliseum an option to lease a portion of Ben Franklin Park. In the event that that park was unavailable, Ottawa agreed to grant an option to lease a similar property within 10 kilometers of Frank Clair Stadium. This option to lease was to be provided on or before delivery of the notice to terminate described in paragraph 5 of the Settlement Agreement. The parties were to then, in good faith, negotiate a new lease, failing which they would proceed to arbitration to fix the terms of that new lease.
- Ottawa did deliver notice of intention to terminate the lease and, at the same time, delivered an option to lease nearby Ledbury Park, as Ben Franklin Park was unavailable.
- After Coliseum objected to use of Ledbury Park, the parties unsuccessfully explored other sites.
- Coliseum commenced an arbitration, alleging that Ottawa had breached the Settlement Agreement.
- Following an 11-day hearing, with 11 witnesses and 750 documents, the arbitrator issued a 392-paragraph $2,240,000 award, ruling that Ottawa breached the Settlement Agreement by failing to take appropriate steps to determine that Ledbury Park was appropriate to Coliseum's operations as required by paragraph 5 of the Settlement Agreement.

Ottawa sought leave to appeal the Award under section 45(1) of the *Arbitration Act, 1991.*[9] The parties agreed that the importance to the parties of the matters at stake in the arbitration justified an appeal, and the Application Judge accepted that the determination of the questions of law would significantly affect the rights of the parties, so those two requirements of the statutory leave to appeal test were met.[10] Ottawa further submitted that the arbitrator had made three extricable errors in law: (i) he ignored the principle that an agreement to agree is not enforceable by failing to consider the import of the words "the parties will enter into good faith negotiations"; (ii) he failed to apply the rule of contractual interpretation that requires that general contractual language must yield to specific language; and, (iii) he speculated on Coliseum's contractual intentions rather than determining those intentions based upon the express words of the contract. With scant, if any, explanation or analysis, the Application Judge accepted each of these three as extricable errors of law, and so the appeal proceeded.[11]

The issue framed by the Application Judge turned on the arbitrator's interpretation of paragraphs 5 and 6 of the Settlement Agreement and how those two sections interacted. As summarized by MacPherson J.A. for the unanimous Court of Appeal, the arbitrator interpreted those two sections so as to require Ottawa to provide a site similar to Ben Franklin Park as it was in 2004, provided that the alternative site was appropriate for Coliseum's operations. Once that was done, the parties were then to negotiate the lease terms. In sum and substance, paragraph 6 of the Settlement Agreement explained and modified the good faith negotiation ob-

ligation provided for by paragraph 5. In reaching this interpretation, the arbitrator noted that it accorded with what one Ottawa representative believed and told Coliseum and with what Coliseum relied upon.[12]

The Application Judge took a different view. She ruled that paragraphs 5 and 6 had to be applied sequentially. First, under paragraph 5, the parties had to negotiate in good faith to find Coliseum a new site. Then, if those negotiations failed, paragraph 6 required Ottawa to identify an alternative site. This was to be followed by negotiations of a new lease or, failing an agreement, an arbitration. As a foundation for her analysis, the Application Judge did take notice of the *Sattva* requirement that an extricable question of law had to be identified on a leave application. In her view, the arbitrator erred in law in his interpretation of the Settlement Agreement. Specifically, he erred in overlooking the paragraph 6 requirement that Coliseum exercise its option prior to the start of site negotiations and by finding that the general language of paragraph 5 overrode the specific language of paragraph 6. Further, the arbitrator erred in law by speculating as to Coliseum's intention in making the Settlement Agreement, and she ruled that his ultimate conclusions were unreasonable "having regard to the inconsistent conclusions the errors led him to".[13]

The Court of Appeal first considered whether it could review the Application Judge's decision granting leave to appeal. Relying upon section 49 of the Act, as well as its two earlier decisions in *Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce*[14] and *Denison Mines Ltd. v. Ontario Hydro*,[15] it ruled, correctly, that it had no such jurisdiction.[16]

The Court then considered whether the Application Judge erred in finding that the arbitrator's interpretation of the Settlement Agreement was unreasonable. It deciding that she had erred in this respect, the Court relied upon the following language of Bastarache and LeBel JJ. in *Dunsmuir v. New Brunswick*:[17]

> In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. <u>But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.</u> [underlining added by this writer].

Applying the underlined language above, the Court then wrote that while the Application Judge's own interpretation of the Settlement Agreement was both "possible" and "reasonable", so too was the arbitrator's. While it was true that the arbitrator's interpretation did not "flow entirely from an analysis of only the words inside the four corners of the Minutes of Settlement", it was also true that he had relied upon evidence that he had heard that provided "background and context" to his legal analysis. In that regard, he had been "entirely faithful" to Justice Rothstein's statement in *Sattva* that, when construing contracts, adjudicators may consider surrounding circumstances on the basis 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".[18]

It should be noted that the Application Judge and Court of Appeal also dealt with an issue unrelated to construction of the Settlement Agreement. On the initial appeal, the Application Judge reduced the arbitrator's damage award by 40 percent on the basis that he had relied upon a "paucity of evidence as to the relationship between the corporate entities and the extent of Coliseum's ability to control the flow of revenue to one or other entity".[19] The Court of Appeal reversed on this issue as well, accepting that there was a "significant amount of evidence" on damages, including experts, and noting that Ottawa's own expert did not make the adjustments that the Application Judge did. In the result, the Court of Appeal ruled that the arbitrator's damages award could not be said to have been unreasonable.[20]

As noted at the outset, the Court of Appeal's decision in *Coliseum* is significant as it makes it clear that the courts are required to give deference to arbitration decisions, even on issues that relate to extricable issues of law. While the *Sattva* Court did draw an exception to this broad statement for a few types of issues that would attract a correctness standard (being, "constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise"), it is hard to imagine that that exception could be raised in more than a miniscule number of commercial arbitrations. The decision is also useful because it raises a very high bar on any court that would upset an award based upon the deferential standard, properly defined and applied. This is exemplified, in particular, by the Court's reinstatement of the arbitrator's damages award. In order to upset an award, it will have to be found that an award under appeal was unreasonable in the sense that, paraphrasing from Justice Rothstein in *Sattva*, it did not fall within a range of possible, acceptable outcomes, defensible in fact and law.

The foregoing being said, it is unfortunate that the Court did not take the opportunity provided by this appeal to deal with whether the Application Judge properly applied *Sattva* in concluding that the appeal before her raised extricable questions of law. Implicitly, as evidenced by paragraphs 42 through 44 of its decision, the Court thought that she did err. It is implicit in the appeal decision that, in effect, the Application Judge erred by finding that the arbitrator misapplied legal principles to the facts before him. But, this is far from clear. Perhaps the Court did not delve into this issue as it ruled that there was no appeal from the Application Judge's decision to grant leave to appeal. It is this writer's view that notwithstanding that decision on jurisdiction, it did remain open on appeal to consider whether extricable errors of law on contractual interpretation had been raised.

It is also this writer's view that the issues before the Application Judge, insofar as they related to contractual interpretation, were not extricable ques-

tions of law. In *Sattva*, the Supreme Court made it clear that, in essence, contractual interpretation is comprised of the identification of the proper legal test and then the application of that test to a set of facts. It is an exercise of applying the proper test to the words of a written agreement, considered in the light of the relevant factual matrix. In this context, there is a great difference between the "application of an incorrect principle" on one hand (this being the type of extricable error of law identified by the Court), and the misapplication of a correct legal principle (this being an error of mixed fact and law).[21] In first instance, the Application Judge appears to have readily accepted Ottawa's characterizations of the arbitrator's errors as purely legal. There is little consideration given to this precise question in her decision, and scant attention is paid to how the *Sattva* Court distinguished between errors of law based upon the application of an incorrect principle and errors that happen when correct legal principles are misapplied to the facts.

It is fairly clear that the Application Judge overturned the award based upon her view that correct legal tests had not been properly applied to the facts in the case. As specifically noted in *Sattva*, it is because there is a close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the agreement in issue, that the ability to extricate a pure question of law material and determinative to an appeal will be very rare. The errors in *Coliseum* did not fall within the exception.

1 2015 ONSC 4966, para. 41
2 Quebec, Newfoundland, Prince Edward Island, the Yukon, Northwest Territories, Nunavut and the federal Commercial Arbitration Code excepted
3 [2014] 2 S.C.R.
4 A subject covered in these pages in Robson, Jim, "The Impact of *Sattva* on the Judicial Review of Commercial Arbitral Decisions", Canadian Arbitration and Mediation Journal, Vol. 25, No 1
5 *Sattva*, para. 106
6 2016 ONCA 135
7 As cited in paragraph 33 of *Coliseum*, with citations omitted.
8 2016 ONCA 363, rev'g. 2014 ONSC 3838 (CanLii)
9 S.O. 1991, c. 17
10 *Arbitration Act, 1991,* S.O. 1991, c. 17, section 45(1)(a) and (b)
11 Para. 38 of application decision
12 Paras. 38 and 39
13 Paras. 47-51 and 53 of application decision, set out in para. 18 of appeal decision
14 (1996), 29 O.R. (3d) 612 (C.A.)
15 (2001), 56 O.R. (3d) 181 (C.A.)
16 It should be noted that this is not the situation in all provinces. In British Columbia, for example, leave application decisions can be appealed, as was the situation that prevailed in *Sattva.*
17 [2008] 1 S.C.R. 190
18 *Sattva*, at para. 47
19 Application decision, para. 72
20 Paras. 46 to 49
21 Although even this may be a distinction without much real significance in commercial arbitration, as even regarding errors on extricable questions of law, the courts will defer to arbitrators on a reasonableness standard unless the errors relate to constitutional questions or questions of law that are of central importance to the legal system and outside the arbitrator's expertise.