TAB 7

1999 CarswellOnt 57

Ontario Court of Appeal

Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board

1999 CarswellOnt 57, [1999] O.J. No. 69, 116 O.A.C. 257, 42 O.R. (3d) 723, 44 C.L.R. (2d) 1

Bradscot (MCL) Ltd., Appellant and The Hamilton-Wentworth Catholic District School Board also known as The Hamilton-Wentworth Roman Catholic Separate School Board, Bondfield Construction Company (1983) Limited, Aquicon Construction Co. Ltd., James Kemp Construction Ltd., and Melloul Blamey Construction Inc., Respondent

Catzman, Laskin, Feldman JJ.A.

Heard: November 17, 1998

Judgment: January 13, 1999

Docket: CA C29958, M23448

Proceedings: affirming (June 5, 1998), Doc. 98-CV-148141 (Ont. Gen. Div.)

Counsel: *Glenn Grenier*, for the appellant.

Donald E. Morris, for the School Board respondent.

Subject: Contracts

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Construction law --- Building contract — Execution of formal contract — Tendering process — General

Construction company appealed finding that tender accepted by board was valid — Appeal was dismissed — Successful tender was submitted 30 seconds after specified deadline of one 1:00 — Tendering process imposed duty on board to treat all tenderers with fairness — Industry itself did not have clear rule on whether tender submitted between 1:00 and 1:01 would be late — Either interpretation was reasonable — Board acted in good faith and attempted to comply with duty of fairness to all tenderers — Trial judge did not err by finding tender was valid — Trial decision avoided damage claim against public body acting in good faith.

Construction law --- Building contract — Execution of formal contract — Tendering process — Fraudulent or negligent misrepresentation

Construction company appealed finding that tender accepted by board was valid — Appeal was dismissed — Successful

tender had discrepency between calculations and stipulated sum — Successful tenderer confirmed amount by telephone within 15 minutes of submission — Error in calculation in paragraph three was clerical error that did not disqualify bid — Board made no amendment to tender submitted — Board considered stipulated sum in paragraph two to be operative figure — Price submitted by successful tenderer was not uncertain and board acted in good faith.

Table of Authorities

Cases considered by *Laskin J.A.*:

Equity Waste Management of Canada Corp. v. Halton Hills (Town) (1997), 40 M.P.L.R. (2d) 107, 103 O.A.C. 324, 35 O.R. (3d) 321 (Ont. C.A.) — referred to

Gottardo Properties (Dome) Inc. v. Toronto (City) (1998), (sub nom. *Gottardo Properties (Dome) Inc. v. Regional Assessment Commissioner, Region No. 9)* 111 O.A.C. 272, 162 D.L.R. (4th) 574, 46 M.P.L.R. (2d) 309 (Ont. C.A.) — referred to

PCL Construction v. Alberta (1984), 5 C.L.R. 204, 51 A.R. 336 (Alta. C.A.) — distinguished

R. v. Ron Engineering & Construction (Eastern) Ltd., 13 B.L.R. 72, (sub nom. *Ron Engineering & Construction (Eastern) Ltd. v. Ontario)* 35 N.R. 40, 119 D.L.R. (3d) 267, [1981] 1 S.C.R. 111 (S.C.C.) — considered

Smith Bros. & Wilson (B.C.) Ltd. v. British Columbia Hydro & Power Authority (1997), 33 C.L.R. (2d) 64, 30 B.C.L.R. (3d) 334 (B.C. S.C. [In Chambers]) — considered

Vachon Construction Ltd. v. Cariboo (Regional District) (1996), 28 C.L.R. (2d) 145, 136 D.L.R. (4th) 307, 78 B.C.A.C. 43, 128 W.A.C. 43, 24 B.C.L.R. (3d) 379 (B.C. C.A.) — distinguished

APPEAL by plaintiff construction company from judgment of (June 5, 1998), Doc. 98-CV-148141 (Ont. Gen. Div.) finding that tender accepted by defendant school board was valid.

The judgment of the court was delivered by *Laskin J.A.*:

1 This appeal concerns the validity of a tender for a construction contract. In the spring of 1998 the respondent, the Hamilton-Wentworth Catholic District School Board, invited five general contractors to bid on a contract to build a new high school and library in Stoney Creek. The appellant Bradscot (MCL) Ltd. and the respondent Bondfield Construction Company (1983) Limited were two of the five bidders. The deadline for submitting tenders was Friday, May 8, 1998 at 1:00 p.m. Bradscot and three otherbidders' submitted their tenders before one o'clock. Bondfield's tender was submitted 30 seconds after one o'clock and it contained discrepancies in its bid price. The School Board, however, awarded Bondfield the contract.

2 Bradscot brought an application for a declaration that Bondfield's tender was invalid either because it was submitted late or because its price was uncertain. In a judgment dated June 5, 1998, Somers J. dismissed the application. Bradscot appeals, and if successful, asks this court to direct a reference or the trial of an issue on damages. Because in this court Bradscot sought relief only against the School Board, Bondfield took no part in the appeal.

First Issue: Was Bondfield's Tender Late?

3 This issue turns on the interpretation of the School Board's "Instructions to Tenderers". These instructions provided in part:

- Bids were to be submitted "only until 15:00 hours (3:00 p.m.) local time on Wednesday, April 22, 1998 (1998 04 22)."

- "Tenders not received by the time stated above WILL NOT be accepted by the Owner. Incomplete Tenders will be considered invalid."

- Tenders were to be submitted to the reception desk at the School Board's offices.

- "Without explanation, the lowest or any tender will not necessarily be accepted by the Owner." [My emphasis.]

4 The School Board's architect issued written instructions extending the tender deadline. The deadline was extended *only until* 4:00 p.m. Thursday, April 30, 1998, later clarified as Thursday, April 30, 1998, *at* 4:00 p.m., and then finally extended to Friday, May 8, 1998 *at*1:00 p.m. Other instructions from the architect required supplementary tender documents to be submitted *not later than* 3:00 p.m. on Friday, May 8th. (My emphasis.).

5 Bradscot argues that because Bondfield's tender was submitted 30 seconds after 1:00 p.m. on May 8th, it was submitted after the tender deadline and could not be accepted by the School Board. Bradscot relies on the instruction to tenderers that "[t]enders not received by the time stated above will not be accepted by the owner." The School Board takes the position that because Bondfield's tender was submitted before the clock reached 1:01 p.m. it was on time.

6 The legal and factual context in which this issue arises is important. The submission of a tender in compliance with tender instructions creates a unilateral contract between the general contractor and the owner.[1] This unilateral contract imposes rights and obligations on the parties intended to protect and promote the integrity of the tender system. One obligation imposed on the owner is a duty of fairness to all tenderers. A duty of fairness is needed to prevent abuse and to ensure a level playing field. As Williams J.A. observed in *Vachon Construction Ltd. v. Cariboo (Regional District)*[2]:

> On the other side, the tendering process is, and must always be, a carefully controlled process, since the opportunity for abuse or distortion is ever present. While that is not what happened in this case, the process must nonetheless be, and be seen to be fair to all bidders. For that reason, the process is often attacked for technical reasons and the law has accordingly applied strict rules for any alteration in the process by both bidder and owner.

A bid submitted after the tender deadline is invalid, and an owner that considers a late bid would breach its duty of fairness to the other tenderers.

7 Last minute jockeying for advantage that accompanies the tendering process is ripe for abuse. Counsel advised the court that tenders are typically submitted at the last moment because general contractors often receive price changes from their subcontractors right up to the tender deadline. Usually tenders are not completed and handed in until minutes or seconds before the deadline. Representatives of the general contractors delivering their tenders often synchronize their watches with the owner's clock so they can monitor the deadline. The representatives of Bradscot and Bondfield monitored the School Board's clock, which had a minute hand but not a second hand. Bradscot submitted its tender just before 1:00 p.m. on May 8th. Bondfield submitted its tender after 1:00 p.m. but before the minute hand on the School Board's clock registered 1:01 p.m. The School Board decided that Bondfield's tender was not late. I accept that in making this decision the School Board was acting in good faith and was attempting to comply with its duty of fairness to all bidders.

8 Tenders were opened at 3:00 p.m. on May 8th. Bradscot's tender and Bondfield's tender were within $1000 of each other. Bradscot's tender was $17,721,000.00 and Bondfield's tender was $17,720,000.00. Bondfield was awarded the contract, though the Board had no obligation to accept the lowest bid.

9 To prevent abuse and ensure fairness in cases such as this one, what is required is a clear rule. In formulating a rule I do not rely on any distinction in the meaning of the words "only until", "at", and "not later than". In my opinion, these words are used interchangeably in the instructions to tenderers. Unfortunately, the evidence on the application shows that the industry

itself does not have a clear rule. On one side, the Ontario General Contractors' Association is of the view that a tender received 30 seconds after a tender deadline of 1:00 p.m. is late. On the other side, the Hamilton Bid Depository, the Toronto Bid Depository and the architect who prepared the instructions to tenderers are all of the view that any tender received before the clock registers 1:01 p.m. is on time.

10 Only one other Canadian case has considered the issue, *Smith Bros. & Wilson (B.C.) Ltd. v. British Columbia Hydro & Power Authority*,[3], a judgment of Shaw J. of the British Columbia Supreme Court, relied on by Bradscot. That case dealt with the timeliness of a tender delivered by Smith Bros. between 11:00 a.m. and 11:01 a.m. The advertisement for the project and the instructions to tenderers stated that tenders would be received "until 11:00 a.m." and "not later than 11:00 a.m." Shaw J. held that Smith Bros.' tender was late and that if the owner, B.C. Hydro, considered the tender it would breach its duty of fairness to the other tenderers. He wrote: "In my opinion, one cannot read into the quoted words that the time for delivery of tenders will extend past 11:00 a.m. until almost 11:01 a.m. ... In my opinion, 11:00 a.m. describes a precise point in time, not the time that exists between 11:00 a.m. and 11:01 a.m..."[4] He also held that the fact B.C. Hydro's clock showed the time in hours and minutes but not in seconds made no difference.

11 In the present case Somers J. chose not to follow the *Smith Bros.* case, and instead took the opposite view. He concluded that Bondfield's tender was not invalid because it was submitted before the clock reached 1:01 p.m. Somers J. held:

> In my opinion when it is stated that some deed is to be done "at 2:00 p.m." the time is for that minute and the act is not overdue until the minute hand has moved off the 12 hand to the :01 position. The fact that that invitation to tenderers and subsequent addenda used other words which could be given a stricter interpretation should be viewed in light of two facts - (a) subsequent addenda made it clear that the time they were expressing using the words "at 4:00 p.m." (for example) were expressed as superseding the earlier instructions with the more stringent words; (b) In any event the words appear to have been used interchangeably and there is, thus, a vagueness or uncertainty which should not permit the very strict interpretation to be placed on them as sought by the applicant. I am of the view that had it been the intention of the Board or of the architects who drew the invitation to tenderers that a tender be made in strict manner suggested by the applicant, they would have expressed the time as 1:00:00 and would have used the more stringent words throughout. It follows from what I have said that on the basis of the submission of Bondfield of its tender at the time it did, does not render the tender invalid.

12 I do not think that there is one "right" interpretation of the words "at", "only until" or "not later than" in the instruction to tenderers. Both the interpretation given by Shaw J. in the *Smith Bros.* case and the interpretation given by Somers J. in the present case are reasonable, and each interpretation produces a clear rule that the industry can follow. Moreover, the appellant does not suggest that Somers J. applied incorrect principles of contract interpretation. Faced with two interpretations, either of which is reasonable, and no error in the application of the relevant legal principles, in my view this court should defer to the finding of the trial judge. Deference to the decision of Somers J. reflects sound judicial policy[5], avoids a damages claim against a public body that made good faith efforts to resolve a difficult problem and produces a rule that the Ontario industry can follow. I would therefore not give effect to this ground of appeal.

Second Issue: Was Bondfield's Tender Invalid Because Its Price Was Uncertain?

13 On this ground of appeal, Bradscot submits that Bondfield's tender was invalid for two reasons. First, Bradscot argues that Bondfield's tender price was uncertain because it contained two different amounts for the "basic stipulated sum". Because of this uncertainty Bradscot claims that Bondfield's tender could not be accepted by the School Board. Second, Bradscot argues that to cure this uncertainty the School Board improperly amended Bondfield's tender after it was submitted. Somers J. rejected both these arguments and I am not persuaded that he erred in doing so.

14 Paragraph 2 of the School Board's tender form required each tenderer to set out in words and figures its tender price, called the basic stipulated sum. The instructions to tenderers stated that this sum was not to include the federal goods and services tax, but instead that tax was to be calculated separately. Paragraph 3 of the tender form provided for the GST calculation. Bondfield's tender form contained a discrepancy because it showed in paragraph 3 a different amount for the basic stipulated sum from the amount shown in paragraph 2. Also, Bondfield's GST calculation was incorrect. Paragraphs 2

and 3 of Bondfield's tender read as follows:

2. I/WE

OF BONDFIELD CONSTRUCTION COMPANY (1983) LIMITED (Firm Name)

Agree to supply all necessary labour, materials, plant, equipment and services including specified allowances for the complete execution of the WORK, INCLUDING ALL TRADES, specified herein including Addenda numbered 1 to 7 inclusive.

AGREE to Complete the Work in accordance with the requirements of the Contract documents including applicable Provincial Sales Tax for the Basic Stipulated Sum of:

SEVENTEEN MILLION SEVEN HUNDRED TWENTY THOUSAND

($17,720,00)

Canadian Dollars

3. TENDER AMOUNT SUMMARY AND GST

		X
.1	**BASIC** Stipulated Sum Tender Amount: (same as above)	$17,200,000
.2	7% Federal **GST** to be added to Basic Stipulated Sum Tender Amount:	$ 1,240,000
.3	**OVERALL** Stipulated Sum Tender Amount: (Line 3.1 + Line 3.2 = Line 3.3)	$18,460,400

15 Fifteen minutes after the close of tenders, the president of Bondfield telephoned the School Board's architect to explain that the amounts in paragraphs 2 and 3 did not match and that the amount in paragraph 2 was the tender price. Bondfield confirmed its position by sending the following fax:

> We herewith confirm our telephone conversation wherein we advised you that there was some confusion with the tender amount submitted today for the above-noted project. The bid amount written in words is correct and the bid amount written in numbers is wrong. We trust this is satisfactory.

16 A tender must be valid when submitted. An owner cannot amend a tender after the deadline without breaching its duty of fairness to the other tenderers. The School Board, however, did not amend Bondfield's tender. The evidence of the Board's representatives, which was not contradicted, shows that they were not influenced by the telephone call or the fax from Bondfield. The School Board considered that paragraph 2 of Bondfield's tender was the operative figure and that the different amount in paragraph 3 resulted from a clerical error, which ought not to prevent Bondfield from obtaining the contract. Somers J. accepted the School Board's position, concluding:

> Here, [in paragraph 2] there is no discrepancy between the printed and numerical price. The only problem that arises is in the subsequent calculation paragraph which appears to be superfluous and, on the evidence, was not considered by the owners as being the operative part of the tender.
>
> .....
>
> In my view, nothing turned upon the arithmetical calculation required to apply the appropriate tax to the contract figure. The muddling of these amounts occasioned no doubt by the press of time and the confusion witnessed by the deponent Zurkuhl resulted in a clerical error which should not, in my view, stand in the way of the contracting parties carrying out their contract to construct this project.

17 I agree with these reasons. Paragraph 2 is where the tenderer must set out its bid price. Paragraph 3 simply requires a GST calculation using the amount set out in paragraph 2. In that sense paragraph 3, if not superfluous, is at least subordinate to paragraph 2. In my view, the error in paragraph 3 does not disqualify the bid because it does not make Bondfield's tender price uncertain. That price is set out in paragraph 2, the governing paragraph in the tender form.

18 Bradscot relies on two appellate decisions in support of its position, the decision of the British Columbia Court of Appeal in *Vachon Construction Ltd. v. Cariboo (Regional District)* and the decision of the Alberta Court of Appeal in *PCL Construction v. Alberta*[6], but both are distinguishable. In *Vachon*, one bid, by Can-form Construction, contained a discrepancy between the price stated in words and the price stated in figures. After the tender deadline Can-form's representative was permitted to amend the bid by selecting the lower price. This turned out to be the lowest bid and Can-form was awarded the contract. The next lowest bidder sued for damages. Its action was dismissed at trial but allowed on appeal. The British Columbia Court of Appeal held that because the price was uncertain Can-form's tender was invalid when it was submitted; and that the owner had breached its duty of fairness to the other tenderers by permitting Can-form to amend its bid after the close of tenders. The case before us differs on these two points: Bondfield's bid price was not uncertain and therefore no amendment was needed or made.

19 In the *PCL Construction* case, PCL's tender contained a $1,000,000 discrepancy between the price in words and the price in figures. The owner, the Alberta government, accepted the tender and then took the position that it had entered into a binding contract with PCL at the lower price. PCL brought an application for a declaration that it was not bound. While its application was pending, PCL negotiated a new contract with the Alberta government, because even at the higher price its bid was still the lowest. This new contract was subject to a price adjustment depending on the result of the lawsuit. The Alberta Court of Appeal held that PCL was not bound by its original tender because the government "had no right to correct the tender in the manner it did."[7] This case is distinguishable because the owner was seeking to take advantage of a clerical error in PCL's bid. The owner was acting unfairly and the court would not condone its conduct. In contrast, as I said earlier, the School Board was acting in good faith and was honestly attempting to resolve a difficult situation. The School Board's good faith conduct is relevant because it shows that the Board made no attempt to avoid its duty of fairness to all tenderers.

20 Bradscot makes one final submission on this part of its argument, that the trial judge misapplied the decision of the Supreme Court of Canada in *Ron Engineering*. To support his reasoning that paragraph 3 of the tender form was superfluous, the trial judge relied on the following passage from the reasons of Estey J. in *Ron Engineering*:

> It would be anomalous indeed if the march forward to a construction contract could be halted by a simple omission to insert in the appropriate blank in the contract the number of weeks already specified by the contractor in its tender. It would be a simple matter for the contractor, in executing the prescribed form after having fixed the contract price and all other terms which were directly dependent upon its tender, to complete the form in accordance with that tender where the proffered contract was inadequate ... I cannot conclude therefore that this omission has any bearing upon the rights of the parties to this appeal and specifically that it stands in the way of the owner in its assertion of its right to retain the tender deposit.[8]

21 As the appellant pointed out, however, this passage refers to the contract between the owner and the successful bidder, not the contract in issue here, the unilateral contract formed when a bid is submitted in response to an invitation to tender. I do not regard the trial judge's reliance on this passage as being material to his decision. The trial judge concluded, correctly in my view, that paragraph 2 of the tender form governed and therefore Bondfield's bid price was not uncertain. I would not give effect to this ground of appeal.

Conclusion

22 In its original notice of application Bradscot sought an injunction to prevent Bondfield from going ahead with the construction of the project. However, while this appeal was pending, Bondfield began construction because of the Board's concern that the school be built by August 1999. In this court Bradscot asked to amend its notice of application to seek against the School Board a reference or the trial of an issue on damages. The School Board opposed the amendment. I need not deal with this proposed amendment because I have concluded that Bondfield's tender was valid. Therefore I would dismiss the appeal with costs.

Appeal dismissed.

Footnotes

[1] *R. v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 (S.C.C.).

[2] (1996), 136 D.L.R. (4th) 307 (B.C. C.A.), at 317.

[3] (1997), 33 C.L.R. (2d) 64 (B.C. S.C. [In Chambers]).

[4] At para. 32-33.

[5] *Kerans, Standards of Review Employed by Appellate Courts* (1994) at p.80-81, *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.) and *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.).

[6] (1984), 5 C.L.R. 204 (Alta. C.A.).

[7] At p.211.

[8] At p. 127.

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TAB 8

2005 CarswellOnt 7257
Ontario Court of Appeal

MacDougall v. MacDougall

2005 CarswellOnt 7257, [2005] O.J. No. 5171, [2006] W.D.F.L. 291, [2006] W.D.F.L. 292, 205 O.A.C. 216, 262 D.L.R. (4th) 120

LEANNE HULL MACDOUGALL (Plaintiff / Appellant) and BARTLETT HERBERT MACDOUGALL (Defendant / Respondent)

Armstrong J.A., Goudge J.A., and Lang J.A.

Heard: October 7, 2005
Judgment: December 5, 2005
Docket: CA C42262

Proceedings: reversing in part *MacDougall v. MacDougall* (2004), 2004 CarswellOnt 1870 (Ont. S.C.J.)

Counsel: Bryan Finlay, Q.C., Stephen W. Ireland for Appellant
A. Burke Doran, Q.C., Jacqueline Mills for Respondent

Subject: Family; Contracts

Table of Authorities

Cases considered by *Lang J.A.*:

Algoma Steel Inc. v. Union Gas Ltd. (2003), 2003 CarswellOnt 115, 39 C.B.R. (4th) 5, 169 O.A.C. 89, 63 O.R. (3d) 78 (Ont. C.A.) — referred to

Amertek Inc. v. Canadian Commercial Corp. (2005), 5 B.L.R. (4th) 199, 31 C.C.L.T. (3d) 238, 2005 CarswellOnt 2784, 200 O.A.C. 38, 256 D.L.R. (4th) 287 (Ont. C.A.) — referred to

BG Checo International Ltd. v. British Columbia Hydro & Power Authority (1993), [1993] 2 W.W.R. 321, [1993] 1 S.C.R. 12, 147 N.R. 81, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 20 B.C.A.C. 241, 35 W.A.C. 241, 14 C.C.L.T. (2d) 233, 5 C.L.R. (2d) 173, 1993 CarswellBC 10, 1993 CarswellBC 1254 (S.C.C.) — followed

Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board (1999), 1999 CarswellOnt 57, (sub nom. *Bradscot (MCL) Ltd. v. Board of Education (Roman Catholic Separate) of Hamilton-Wentworth*) 116 O.A.C. 257, 44 C.L.R. (2d) 1, 42 O.R. (3d) 723 (Ont. C.A.) — considered

Casurina Ltd. Partnership v. Rio Algom Ltd. (2004), 2004 CarswellOnt 180, 40 B.L.R. (3d) 112, 181 O.A.C. 19 (Ont. C.A.) — considered

Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co. (1979), (sub nom. *Exportations*

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Consolidated-Bathurst Ltée c. Mutual Boiler & Machinery Insurance Co.) [1980] 1 S.C.R. 888, 112 D.L.R. (3d) 49, 32 N.R. 488, [1980] I.L.R. 1-1176, 1979 CarswellQue 157, 1979 CarswellQue 157F (S.C.C.) — followed

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235 (S.C.C.) — followed

L. (H.) v. Canada (Attorney General) (2005), 251 D.L.R. (4th) 604, 333 N.R. 1, [2005] 8 W.W.R. 1, 262 Sask. R. 1, 347 W.A.C. 1, 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 24 Admin. L.R. (4th) 1, 8 C.P.C. (6th) 199, [2005] 1 S.C.R. 401 (S.C.C.) — referred to

Palumbo v. Research Capital Corp. (2004), 190 O.A.C. 83, 2005 C.L.L.C. 210-003, 72 O.R. (3d) 241, 2004 CarswellOnt 3572, 35 C.C.E.L. (3d) 1 (Ont. C.A.) — considered

Petty v. Telus Corp. (2002), 2002 BCCA 135, 2002 CarswellBC 325, 164 B.C.A.C. 152, 268 W.A.C. 152, 33 C.C.P.B. 111 (B.C. C.A.) — considered

APPEAL by wife of judgment reported at *MacDougall v. MacDougall* (2004), 2004 CarswellOnt 1870 (Ont. S.C.J.), with respect to interpretation of marriage contract.

***Lang J.A.*:**

1 The appellant wife, Leanne MacDougall, appeals from the judgment of Justice Croll, which granted various declarations flowing from her interpretation of the spousal support section of a marriage contract.

A. Overview

2 The wife challenges only two interpretations of the numerous ones considered by the trial judge. First, the wife challenges the interpretation of the subsection providing for the annual variation of support. Second, she challenges the interpretation of the subsection providing for a minimum amount of support.

3 The wife's first challenge succeeds because the interpretation given by the trial judge did not consider the context of the provision within the contract and the intention of the parties. The second challenge fails because the trial judge's interpretation is correct.

B. Facts

4 Before they married, the parties entered into a marriage contract. In their tenth year of marriage, when the husband was 53 years old and the wife 48, the parties executed a new marriage contract. They separated seven years later. The marriage contract requires the amount of spousal support to be determined through arbitration on the basis of several considerations,

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including the husband's income.

5 At the time of their marriage contract, both parties were financially secure. The husband expected to maintain and improve his already significant employment income and, in addition, anticipated a future inheritance of at least $3 million (ss. 12.3 and 13.1 of the contract).

6 The husband raises a new argument on this appeal. While he argues that the wife is not in financial need because she has significant assets, the wife's current financial position is irrelevant to the interpretation of the contract, which is an exercise in discerning the parties' intention at the time they entered into the marriage contract.

7 The marriage contract provides that support would depend, among other considerations, on both the husband's income from employment and his income from all sources. In accordance with these two categories of relevant income, the arbitrator fixed the initial amount of spousal support at $351,900 annually. At the time, the husband earned $1,180,005 in total income from all sources, $876,673 of which was attributable to his employment income as an investment dealer. Since then, apart from the year 2000 when the husband experienced a negative income, the husband's annual income from all sources has not fallen below $663,719 and his employment income had not fallen below $549,224.

8 Where the parties disagree is on the interpretation of the contract's variation provision when the husband experiences a decrease in income. The wife argues that, properly interpreted, the provision entitles her to support calculated on the greater of the husband's two income categories: his employment income and his income from all sources. The husband argues that the provision operates to reduce the wife's support by the greater of the two percentage decreases in his income.

9 For example, if the husband's employment income diminishes by 15%, and his income from all sources diminishes by 10%, the wife argues that she is entitled to a variation based on the greater of the husband's incomes so that her support would diminish by only 10%. In contrast, the husband argues that support would reduce by the higher percentage of decrease: 15%.

10 The parties also disagree on whether the contract provides a minimum level of annual support for the wife. While the husband argues that the subsection providing for minimum support applies only to the initial determination of support and not to its subsequent variations, the wife argues that it applies every year.

C. The Support Agreement

11 Section 15 deals with both spousal support and its variation. The two subsections at issue provide as follows:

> s. 15.5 The amount of support determined by the arbitrator shall be subject to annual variation in proportion to the annual increase or decrease, if any, in the Husband's total income from employment, or total income from all sources as described in paragraphs 15.4 and 15.3 hereof, whichever is greater.
>
> s. 15.4 The parties expressly agree that the amount of support awarded by the arbitrator in favour of the Wife and to be paid to her by the Husband in each year shall not be less than an amount equal to the greater, in any year, of:

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(a) 40% (FORTY PERCENT) of the Husband's total income from employment; and

(b) 20% (TWENTY PERCENT) of the Husband's a total income from all sources referred to in subparagraph 15.3 hereof.

The Parties agree that for the purpose of this Section 15 hereof, the Husband's total income from employment shall mean the average of the Husband's total income from employment in the three full calendar years immediately preceding the commencement of the arbitration provided for under this, Section 15.

12 The following is a brief summary of the other support subsections of the marriage contract that may inform the interpretation of the two challenged subsections:

15.1 An arbitrator will determine the amount of spousal support payable.

15.2 The arbitrator will consider the parties' intention that spousal support will be liberal and generous and reflect the standard of living enjoyed by the parties during their marriage.

15.3 The arbitrator will consider all the circumstances of the parties, including the husband's total income from all sources and any other income.

15.6 The parties shall make full financial disclosure on request as long as the husband is obliged to pay spousal support.

15.7 The parties agree to arbitration.

15.8 The husband's obligation to pay support shall end upon the earliest of the husband's death (providing there is life insurance); the wife's death; the wife's remarriage; or the wife becoming the spouse of another man.

15.9 Either party may seek a variation of support in the event of an unforeseen material change in circumstances.

15.10 The support payments shall be included in the wife's income and deducted from the husband's for income tax purposes.

13 The wife argues that other provisions of the contract may also be relevant to the interpretation. Those provisions are summarized as follows:

12.3 The husband specifically acknowledges that he anticipates receipt of a substantial inherited property.

13.1 The husband will be required to make an equalization payment only if, among other events, the husband inherits not less than $3 million.

17.1 The parties acknowledge that the wife holds life insurance on the husband's life in the amount of $2,500,000, which policy shall be maintained until the husband is no longer obliged to pay spousal support.

17.3 As long as the wife is entitled to spousal support, the husband shall provide the wife with sufficient funds to maintain the life insurance policy.

19.1 If the husband receives periodic disability insurance payments, or periodic payments of personal injury proceeds, such payments shall be considered part of the husband's total income from employment for the purposes of calculating spousal support.

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D. The Trial Decision

14 After canvassing the particulars of the parties' marriage and separation, as well as the post-separation arbitration results, the trial judge considered numerous interpretation issues. Those issues included the interpretation of the arbitrator's function; the subsection 15.2 "generosity" provision; the interpretation of the contract with respect to deductions and inclusions and other calculations of the husband's income; and a determination of the base year on which future variations would be calculated, which the trial judge concluded was 1996.

15 In interpreting the overall structure of the spousal support section and the arbitrator's function, the trial judge concluded that support was to be determined in a two-step process. First, the arbitrator would determine the base level of support. Second, the parties would apply the s. 15.5 variation formula to the initial support without any involvement of the arbitrator.

16 After determining that the contract provided a formulaic approach to variation, the trial judge interpreted the formula set out in the variation subsection. She canvassed the submissions made by both parties and agreed with the husband that, while "negative 10 is a larger absolute number than negative 40," the subsection referenced "the greater variation." In the example given by the trial judge, where one category of the husband's income decreased by 10% and the other by 40% the wife's support would decrease by 40%, because 40% is a greater variation than 10%.

17 Accordingly, the trial judge concluded that "whichever is greater" refers, not to the change that would give the wife the greater amount of support, but instead to the greater proportional change in the percentage increase or decrease of the husband's two defined types of income.

18 In explaining her reasoning, the trial judge said:

> While Mrs. MacDougall's interpretation of paragraph 15.5 is a creative one and accords with the mathematical principles of integers, in my view, it distorts the meaning of paragraph 15.5 and it does not reflect common sense. It is the size or span of the change that is determinative, not the absolute value of the negative number. In other words, a change of 40% is greater than a change of 10%, whether positive or negative.
>
> For these reasons, I find that the words "whichever is greater" in paragraph 15.5 modify the phrase "annual variation in proportion to the annual increase or decrease," and paragraph 15.5 refers to the greater proportional change, regardless of whether it is an increase or decrease.

19 The trial judge then considered the second issue in this appeal: whether the contract provided for a minimum annual amount of support. Based on her earlier determination that the contract required a two-step process, the trial judge concluded that the minimum support provision related only to the first step, the initial determination of support, and was not relevant to the later variation of support.

E. Principles of Interpretation

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20 The principles of contract interpretation are not in issue on this appeal. In interpreting a contract, effect must first be given to the intention of the parties. The principles are explained in *Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.):

> [T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intention of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of a policy which promotes a sensible commercial result. (p. 901)

21 In *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.) the Supreme Court provides further guidance:

> It is a cardinal rule of the construction of contracts that the various parts of the contract are to be interpreted in the context of the intentions of the parties as evident from the contract as a whole (pp.23-24)

22 Applying that principle to domestic contracts, a court must search for an interpretation that is in accordance with the parties' intention at the time they entered into the contract. Where two interpretations are possible, the court should reject the one that would produce a result that the parties would not have reasonably expected at the time they entered into the contract. Instead, the court should favour an interpretation that promotes the reasonable expectations of the parties and that provides a sensible result in the family law context. To arrive at such an interpretation, the court must interpret the provision in the context of the entire contract, including the entirety of the section at issue, to discern the likely intention of the parties.

F. Standard of Review

23 Given the context of the primary issue in this case — the interpretation of a variation provision in a domestic contract — the question arises as to the appropriate standard of review on appeal.

24 The appellant argues that the nature of the question in this case raises a question of law because it relates to the legal effect to be given to the words of the contract. Such a question attracts a standard of review of correctness. The respondent argues that the question is one of mixed fact and law, attracting a standard of review of palpable and overriding error.

25 The leading authority on standard of review is *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.). *Housen* does not address directly the standard of review for the interpretation of a contract. Rather, it canvasses the standard of review in a case involving the application of the law of negligence to findings of fact. In that context, it distinguishes among questions of fact, questions of law, and questions of mixed fact and law concluding that questions of fact are reviewed on the standard of palpable and overriding error and questions of law on the standard of correctness. Where the question of fact and of law are inextricably intertwined so that the question is one of mixed fact and law, the trial judge's finding is entitled to deference.

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26 This court has considered the interpretation of a contract in two post-*Housen* decisions: *Palumbo v. Research Capital Corp.* (2004), 72 O.R. (3d) 241 (Ont. C.A.) and *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2004), 181 O.A.C. 19 (Ont. C.A.).

27 In *Palumbo* , Laskin J.A. reviewed the trial judge's interpretation of a clause in an employment contract relevant to a damages claim in an action for wrongful dismissal. In considering the standard of review, he said:

> The standard of review of the interpretation of a contract provision ordinarily is correctness. However, even if a deferential standard of review is called for, I consider the trial judge's interpretation ... to be unreasonable. (para. 32)

28 In *Casurina*, Feldman J.A. upheld the interpretation of a contract, finding that the trial judge had applied the proper principles of interpretation, including consideration of the whole of the contract and the purpose of the trust at issue. Relying on *Petty v. Telus Corp.* (2002), 164 B.C.A.C. 152 (B.C. C.A.) at para. 14, referring to *Chitty on Contracts*, 28th ed. (London: Sweet & Maxwell, 1999) at para. 12-046, she found "the construction of a written instrument is a question of mixed fact and law." (para. 34)

29 Before *Housen* , Laskin J.A. wrote on a question of contract interpretation in *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board* (1999), 42 O.R. (3d) 723 (Ont. C.A.), at 728-29:

> I do not think that there is one "right" interpretation of the words ... in the instruction to tenderers. Both the interpretations given by Shaw J. in the *Smith Bros.* case and the interpretation given by Somers J. in the present case are reasonable ... Moreover, the appellant does not suggest that Somers J. applied incorrect principles of contract interpretation. Faced with two interpretations, either of which is reasonable, and no error in the application of the relevant legal principles, in my view this court should defer to the finding of the trial judge. [emphasis added]

30 To begin with, the trial judge must apply the proper principles of contract interpretation, including consideration of the clause in the context of the entirety of the contract. A failure to follow the proper principles, including a failure to apply a fundamental principle of interpretation, would be an error of law attracting review on the standard of correctness.

31 To the extent that this task of interpretation includes consideration of extrinsic evidence, or a determination of the factual matrix, the trial judge is involved in making a finding of fact, or drawing inferences from a finding of fact. Further, the trial judge's "interpretation of the evidence as a whole" is one involving factual or inferential determinations. See *Amertek Inc. v. Canadian Commercial Corp.* (2005), 200 O.A.C. 38 (Ont. C.A.) at para. 68. Such questions of fact are entitled to deference and are not to be overturned except in the case of palpable or overriding error, or its "functional equivalents": "clearly wrong", "unreasonable", and "not reasonably supported by the evidence". See *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.) at para. 110.

32 In interpreting the contract, the trial judge also applies the legal principles to the language of the contract in the context of the relevant facts and inferences. This requires the application of law to fact. This has been said to be a question of mixed fact and law. See *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at paras. 19, 21; *Amertek, supra* at para. 68.

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33 Accordingly, in reviewing the trial judge's interpretation of a contract, the appellate court must first classify the question as one of fact, law, or mixed fact and law. If the question is an inextricable intertwining of both fact and law, the question can be said to be one of mixed fact and law. *Housen* , *supra*, said this about such questions in the negligence context:

> To summarize, a finding of negligence by a trial judge involves applying a legal standard to a set of facts, and thus is a question of mixed fact and law. Matters of mixed fact and law lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. 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" and is subject to a more stringent standard. The general rule, as stated in *Jaegli Enterprises, supra*, is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error. (para. 36)

34 In this case, the first question of the interpretation to be given to the variation provision is to be reviewed on a standard of correctness. The trial judge's interpretation did not include a cardinal rule of contract interpretation: to examine the subsection within the context of the entire contract. In the second interpretation of the minimum support, the trial judge did consider the correct legal principles.

G. Issue 1: Did the trial judge err in concluding that the annual variation in spousal support would be calculated on the basis of the greatest proportional change in the husband's income?

35 The answer to this issue depends upon the interpretation of the following provision:

> s. 15.5 The amount of support determined by the arbitrator shall be subject to annual variation in proportion to the annual increase or decrease, if any, in the Husband's total income from employment, or total income from all sources as described in paragraphs 15.4 and 15.3 hereof, whichever is greater.

36 The parties agree that, if the husband experiences increases in both types of income, the wording of this subsection requires that spousal support be varied in accordance with the greater increase, which gives the wife the benefit of the greater amount of support. Following from that, argues the husband, in the event he experiences a decrease in one type of income, spousal support should vary in accordance with the proportional greater decrease.

37 In other words the husband says that "whichever the greater" must be taken to mean whichever is the greater number; whether positive or negative. On the other hand, the wife says it must be taken to mean, "whichever provides the wife with greater support."

38 If the husband's interpretation, which was accepted by the trial judge, is correct then the wife would be disentitled from all spousal support once the husband ceases employment. This would be so because, if the husband's income from employment decreased by 100%, spousal support would also decrease by 100% to zero. This would be the case even if the husband experienced an increase in income from all sources that more than compensated for his loss of employment income.

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39 In arriving at this interpretation, the trial judge's reasons demonstrate an error in two respects. First, they interpret subsection 15.5 as a stand-alone provision, without reference to other provisions of the contract or the intention of the parties, contrary to the approach required by *Consolidated-Bathurst, supra* and *B.G. Checo, supra*. Second, they do not promote a reasonable and fair result that would achieve the intention and objective of the parties when entering into the agreement.

a) The need to interpret the provision within the context of the entire contract

40 On the first point, the interpretation of subsection 15.5 must be made in the context of other provisions of the contract. In this case, other provisions indicate the parties' intention to provide for ongoing spousal support even in the face of the husband's unemployment, given his significant other income. This is so for several reasons.

41 First, subsection 15.8 of the contract provides for the termination of spousal support on the earliest of certain events, including the death of one of the parties or the remarriage of the wife. Importantly, this subsection does not provide for the termination of spousal support in the event the husband ceases employment.

42 If the parties had intended spousal support to end with the husband's employment, they would have explicitly so provided in this forty-three page sophisticated and comprehensive marriage contract. They did not do so despite the fact that, when the contract was executed, the husband, then 53 years of age, was anticipating a $3 million inheritance. Surely, the possibility that the husband might cease paid employment would have been within the reasonable expectation of the parties.

43 Second, on its face, this interpretation is inconsistent with subsection 15.2 of the contract, which provides that "support for the Wife be liberal and generous." While the trial judge concluded that this provision applies only to the determination of the initial amount of support, she also found that the intention of generosity was "inherent" in all future support adjustments. Even assuming that the trial judge was correct in both, it is inconsistent with this intentional generosity to find that the husband intended to be generous in setting the initial support but that, within days of exhibiting that generosity, he could render it nugatory and eliminate his obligation to pay spousal support by leaving his employment. Such an interpretation would be particularly illogical when the husband, a wealthy man, would reasonably expect to have other income from which to meet his obligations.

44 Third, the interpretation of the variation provision urged by the husband is inconsistent with subsection 15.4 of the contract, which as the trial judge found, provides minimum initial support for the wife. The parties cannot have intended both that the wife receive substantial minimum initial support in one subsection and then give the husband a unilateral means of terminating that support altogether in a later subsection.

45 Fourth, the contract provides that the wife will hold life insurance on the husband's life in the amount of $2,500,000, and that the husband will ensure payment of the $27,000 annual premium for that policy as long as the wife receives support. There would have been no reason for the parties to agree to the life insurance provision if they contemplated, at the time the contract was signed, that the husband would no longer pay spousal support once he ceased employment. If that had been the parties' intention, the contract would have provided that the husband was only obliged to maintain the life insurance as long as he continued to earn employment income.

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46 Fifth, under the terms of the contract, if the wife did not receive the proceeds of the life insurance at the time of the husband's death, the husband's estate was obliged to maintain her spousal support. It makes no sense that the wife would receive spousal support even after the husband's death, but receive no such support if he ceased employment during his lifetime.

47 Finally, despite the husband's argument to the contrary, the contract does not permit the wife to seek a remedy by invoking the provision of the contract allowing for variation in the event of a material change in circumstances. Such a remedy is, or may well be, precluded because the material change provision only allows for variation if the change in circumstances "could not be reasonably foreseen." Certainly, in the circumstances of these parties, it would be difficult, if not impossible, for the wife to argue that the husband's cessation of employment was not reasonably foreseeable.

48 Given this context to subsection 15.5, it must be interpreted in a manner reasonably consistent with the other provisions of the contract. An interpretation that would provide the wife with no support where the husband is earning sizeable non-employment income is inconsistent with the other terms of the contract.

b) Reasonable intention of the parties

49 Moreover, where two interpretations are possible, the interpretation chosen must promote the reasonable expectations of the parties and a sensible result in a family law context. The interpretation put forward by the husband does not produce such a result.

50 This is illustrated by a situation where the husband's income from all sources increases by 10% and his employment income decreases by 15%. In those circumstances, and on the husband's interpretation, even though the husband's overall income increases, the wife would suffer a 15% decrease in spousal support because 15% is a greater proportional change in income than 10%.

51 Such an interpretation cannot accord with the reasonable intention of the parties. It would not have been the parties' reasonable intention that the wife benefits during the husband's good years, but leaves her assuming all the risk in years when the husband experiences a downturn in his employment income. With such an interpretation, the wife would receive no spousal support if the husband receives no employment income, even if the husband's income from all sources more than compensates for his loss of employment income.

52 In contrast to the husband's interpretation, the wife's interpretation is consistent with the sections of the agreement referred to, particularly section 15.8, and conforms to the reasonable intention of the parties that the husband pay support that would not terminate simply if he stopped working.

53 For these reasons, it is my view that subsection 15.5 means that the initial spousal support shall be varied each year in a manner that provides the wife with the greater amount of support.

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H. Issue 2: Did the trial judge err in concluding that the contract did not provide for minimum support?

54 This issue depends on the interpretation of the following provision:

> 15.4 The parties expressly agree that the amount of support awarded by the arbitrator in favour of the Wife and to be paid to her by the Husband in each year shall not be less than an amount equal to the greater, in any year, of:
>
> > (a) 40% (FORTY PERCENT) of the Husband's total income from employment; and
> >
> > (b) 20% (TWENTY PERCENT) of the Husband's a total income from all sources referred to in subparagraph 15.3 hereof.
>
> The Parties agree that for the purpose of this Section 15 hereof, the Husband's total income from employment shall mean the average of the Husband's total income from employment in the three full calendar years immediately preceding the commencement of the arbitration provided for under this, Section 15.

55 The trial judge concluded that the arbitrator was only required to determine the initial amount of support, not further variations. Since the trial judge concluded that the "minimum annual support" applied only to the initial amount of arbitrator-determined support, and subsection 15.4 specifically ties its application to the period preceding the arbitration, it cannot be relevant to later variation of that support.

56 Further, the last paragraph of subsection 15.4 supports the trial judge's interpretation of the balance of the paragraph. The trial judge interpreted that last paragraph to refer to an averaging of the husband's income only for the three years that preceded the arbitrator's determination of initial support, not to provide for an averaging for the purposes of subsequent variations. That unchallenged interpretation supports the trial judge's conclusion that the balance of subsection 15.4 was not intended to apply to subsequent variations. Accordingly, whatever the standard of review, the trial judge's interpretation is correct.

57 Accordingly, I would dismiss the appeal on the second issue.

I. Result

58 For these reasons, I would allow the appeal and vary the judgment below by deleting subparagraph 1(6) and substituting the following:

> 1(6) The words "whichever is greater" in subsection 15.5 of the contract were intended to mean whichever results provides the Wife with the greater amount of support.

59 I would otherwise dismiss the appeal.

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J. Costs

60 The appellant has been largely successful on this appeal, and the respondent abandoned his cross-appeal. I would award the appellant costs fixed at $20,000.00 inclusive of disbursements and GST.

***D.H. Doherty J.A.*:**

I agree.

***Armstrong J.A.*:**

I agree.

Appeal allowed in part.

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TAB 9

2009 MBCA 28
Manitoba Court of Appeal

Bell Mobility Inc. v. MTS Allstream Inc.

2009 CarswellMan 80, 2009 MBCA 28, [2009] 8 W.W.R. 292, 176 A.C.W.S. (3d) 17, 236 Man. R. (2d) 167, 448 W.A.C. 167, 67 C.P.C. (6th) 118

BELL MOBILITY INC. (Applicant / Appellant) and MTS ALLSTREAM INC. (Respondent / Respondent)

R.J. Scott C.J.M., F.M. Steel, B.M. Hamilton JJ.A.

Heard: November 19, 2008
Judgment: March 13, 2009
Docket: AI 08-30-06957

Proceedings: affirming *Bell Mobility Inc. v. MTS Allstream Inc.* (2008), 55 C.P.C. (6th) 36, 229 Man. R. (2d) 97, 46 B.L.R. (4th) 59, 2008 CarswellMan 262, 2008 MBQB 144 (Man. Q.B.)

Counsel: P.J. Lukasiewicz, D.G. Hill, D.M. Olson for Appellant
E.W. Olson, Q.C., J.G. Edmond, R.A. McFadyen for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial

Related Abridgment Classifications

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Alternative dispute resolution --- Relation of arbitration to court proceedings — Arbitration as condition precedent to action

B and MTS entered into mobility alliance agreement to forge mutually beneficial strategic alliance — Agreement contained dispute resolution provision — MTS alleged that B breached agreement and B alleged that MTS repudiated agreement — MTS commenced action and filed motion for interim and interlocutory injunctive relief — MTS served B with notice of arbitration — B contended that MTS had elected to have dispute adjudicated in court and not by arbitration, and that commencing simultaneous proceedings was abuse of court's process — B brought unsuccessful motion to strike out and vacate notice of arbitration — B appealed — Appeal dismissed — B's argument was unduly focused on s. 17.4 of Mobility Alliance Agreement and particularly its last sentence — While wording of s. 17 was not without difficulty, parties' intentions were clear when read as whole — Motion judge was correct in how he interpreted words of s. 17 — Motion judge identified and applied proper principles of contractual interpretation and gave meaning to all word of s. 17.

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APPEAL by moving party from judgment reported at *Bell Mobility Inc. v. MTS Allstream Inc.* (2008), 55 C.P.C. (6th) 36, 229 Man. R. (2d) 97, 46 B.L.R. (4th) 59, 2008 CarswellMan 262, 2008 MBQB 144 (Man. Q.B.).

***B.M. Hamilton J.A.*:**

1 At issue in this appeal is the interpretation of a dispute resolution clause in a contract entered into between MTS Allstream Inc. (MTS) and Bell Mobility Inc. (Bell). How the clause is interpreted will determine whether pending arbitration proceedings commenced by MTS should be stayed because they are duplicitous of proceedings MTS commenced against Bell in the Court of Queen's Bench seeking injunctive relief.

2 The court proceedings and the pending arbitration arise from a dispute concerning the parties' respective obligations under the Mobility Alliance Agreement (the agreement) entered into by them in 1999. Pursuant to the agreement, they formed a mutually beneficial strategic alliance for the delivery of wireless services. Bell has taken the position that, in March 2008, MTS repudiated the agreement by forming a new alliance with third parties for the purpose of competing with Bell. MTS says that it did not repudiate the agreement and asserts that Bell breached it.

3 As a result of this dispute, the immediate concern for MTS was to ensure that Bell continued to supply handsets and wireless devices in accordance with the agreement. It filed a statement of claim on March 14, 2008, which seeks interim, interlocutory and permanent injunctions and specific performance to compel Bell to comply with its obligations under the

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agreement. At the same time, MTS filed a notice of motion returnable on several hours' notice seeking an interim injunction, which Suche J. granted and made returnable on March 27, 2008, for further hearing. After hearing the motion on March 27 and 28, 2008, McCawley J. [2008 CarswellMan 193 (Man. Q.B.)] ordered that the interim injunction be continued until the release of her decision. On April 7, 2008, she ordered that the interim injunction be rescinded and that the motion for an interlocutory injunction be dismissed.

4 On March 31, 2008, MTS issued a notice of arbitration to resolve the dispute pursuant to section 17 of the agreement, which is the dispute resolution clause at issue in this appeal. The portions relevant to this appeal read as follows:

17. Dispute Resolution

17.1 Disputes

Subject to the exceptions listed in section 17.3 and to section 17.4, any claim, controversy or dispute of any kind or nature whatsoever that arises between the Parties with respect to this Agreement, its interpretation, or any purported cancellation or termination hereof, (a "Dispute") which cannot be settled through negotiation, must be subject to attempts to resolve the Dispute according to this Section, and submission to arbitration pursuant to this Section 17 is a condition precedent to the bringing of any court action with respect to this Agreement.

17.2 Escalation to Presidents

If at any time either of the Parties believes that the dispute cannot be resolved by them at the Contract Manager level, the Contract Managers will notify the Presidents of their companies of the Dispute. The Presidents will meet to attempt to resolve the dispute.

17.3 Arbitration

If the Presidents are unable to resolve the Dispute within 15 days after the first President notifies the second of the Dispute, it shall be resolved by arbitration, by a single arbitrator, who is knowledgeable about the matter in Dispute. .... [The process for appointing the arbitrator is deleted.] The arbitrator thus determined will conduct the arbitration as herein set out and in accordance with the provisions of The Arbitration Act (Ontario). .... The arbitrator will not have authority to award punitive damages. The arbitrator's decision and award will be final and binding, not subject to appeal, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. All aspects of any arbitration, including any decision by the arbitrator, will be deemed to be Confidential Information for purposes of this Agreement.

The following matters shall be excluded from arbitration:

(a) claims by a Party or by a Third Party of infringement or violation of any Intellectual Property;

(b) any claims involving a Third Party against one or both Parties;

(c) any claim for interim or interlocutory injunctive relief under Section 17.4;

(d) claims involving injury to persons or damage to tangible property.

17.4 Equitable Remedies/Injunctive Relief

Notwithstanding the foregoing, the Parties agree that certain matters may arise that require resolution more quickly than by negotiation and/or arbitration, and that injunctive relief may be the only effective relief for a breach of certain covenants in this Agreement, which breach may cause a Party irreparable harm if not remedied immediately, non-compensable by damages alone. Each Party agrees that the other Party will be entitled, provided it acts in good faith, to seek equitable and injunctive relief on an interim and interlocutory basis in any court of competent jurisdiction

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or specific performance or other equitable remedies, in addition to any other remedies available to it, to enforce a Party's covenants in the event of such a breach or threatened breach thereof, without first complying with the other dispute resolution procedures described in this Section 17.

5 On April 7, 2008, Bell applied to the Court of Queen's Bench seeking an order striking out and vacating the notice of arbitration or an order staying the arbitration process because MTS had elected to resolve the dispute through the court proceedings. The judge dismissed Bell's application, rejecting its argument that the arbitration proceedings were contrary to section 17 and would be an abuse of the court's process.

6 Bell appeals.

7 As MTS acknowledges that the notice of arbitration must be vacated if this court allows the appeal, the only question is whether the judge erred in how he interpreted section 17.

8 For the reasons that follow, I am of the view that the judge did not err, and I would dismiss the appeal.

The Judge's Decision and the Parties' Positions

9 Neither party takes issue with the judge's conclusion that section 17.1 "suggests a presumption in favour of arbitration" (at para. 37). Their fundamental disagreement concerns the effect of commencing a court action pursuant to section 17.4.

10 Bell says that when a party commences an action under section 17.4, it makes an election to resolve the dispute by court proceedings and that arbitration cannot be pursued. In other words, under section 17, MTS had a choice of two independent routes to resolve the dispute and it elected court over arbitration when it filed its statement of claim.

11 MTS says that section 17.4 does not provide for an election between court and arbitration; rather, it is an exception to the mandated arbitration in urgent circumstances where irreparable harm is an issue. Thus, such a court proceeding is an additional, but not exclusive, remedy to arbitration.

12 In his reasons the judge identified this fundamental difference of interpretation and outlined the parties' arguments about the correct interpretation of section 17. I comment on these arguments later in my reasons.

13 The judge listed the "rather substantial evidentiary foundation" (at para. 9) filed by the parties and provided factual background concerning the relationship arising from the agreement, what led to the dispute and the subsequent court proceedings initiated by MTS, which I have referred to already. However, he commented that the "application turns principally upon [the] interpretation of s. 17" (*ibid.*).

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14 After analyzing the wording of section 17, the judge agreed with MTS's interpretation. He then stated that the interpretation was "reconcilable with the governing jurisprudence" (at para. 42). He quoted from two decisions, *B.M.W.E. v. Canadian Pacific Ltd.*, [1996] 2 S.C.R. 495 (S.C.C.), (*BMWE*), for the principle that "a provincial superior court has inherent jurisdiction to grant interlocutory injunctive relief to a party" (at para. 43) where final relief is to be granted in another forum, and *Kassem v. Secure Distribution Services Inc.* (2004), 43 B.L.R. (3d) 277 (Ont. S.C.J. [Commercial List]), as an example where recourse to the courts for "interim or interlocutory, equitable or legal relief" (at para. 47) was consistent with a dispute resolution clause mandating arbitration.

15 The fact that the statement of claim seeks final or permanent relief did not alter the judge's conclusion (at para. 45):

> Even if MTS's statement of claim seeks final or permanent relief, which, in light of the jurisprudence, was not required for injunctive relief, that fact does not alter my interpretation of the words of s. 17 of [the agreement]. Those words, in my view, make arbitration mandatory and thus, any such final or permanent relief (even if claimed) unavailable in a court action.

16 After noting that MTS did not claim damages in the statement of claim, the judge wrote (at para. 52):

> .... This would seem consistent with MTS's position that it always intended to seek (as it was required to do pursuant to [the agreement]), a final determination before the arbitrator where damages can, and in this case, undoubtedly will be sought.

17 Bell and MTS agree that the judge identified the appropriate principles for contractual interpretation in his reasons (at paras. 33-34):

> All parties agree that it is a fundamental principle of contract interpretation that courts are to give effect to the intentions of the parties. The determination of the parties' intent should come primarily from the words they have used in the written document that records their agreement. See ***Consolidated-Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.***, [1980] 1 S.C.R. 888, 32 N.R. 488, 112 D.L.R. (3d) 49, citing from ***Pense v. Northern Life Assurance Co.*** (1907), 15 O.L.R. 131 (C.A.), at 137.
>
> In examining the words of a contract so as to give effect to the intentions of the parties, the court should conduct its interpretive task mindful of the following:
>
> (a) all the words in the contract are to be given meaning, if possible;
>
> (b) the contract should be construed as a whole; and
>
> (c) the absence of words may be considered.
>
> See **Moore (Geoffrey L.) Realty *Inc. v. Manitoba Motor League***, [2003] 9 W.W.R. 385, 173 Man.R. (2d) 300, 293 W.A.C. 300; 2003 MBCA 71, at paras. 11-12.

Bell's Position

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18 Bell says that the judge erred in law by failing to apply correctly the principles of contractual interpretation so as to give full effect to the language of sections 17.3 and 17.4.

19 Bell highlights the following in its argument:

• The introductory words in section 17.1, "Subject to the exceptions listed in section 17.3 and to section 17.4," create exceptions to the presumption in favour of arbitration.

• The words "Notwithstanding the foregoing" at the beginning of section 17.4 mean notwithstanding what was said in sections 17.1, 17.2 and 17.3. Therefore, in effect, section 17.4 is a stand-alone provision.

• There is no reference at the beginning of section 17.4 to interim or interlocutory relief. Rather, it uses the words "that certain matters may arise that require resolution," which is broad in nature and, when read in the context of the clause, means matters where damages will not be a sufficient remedy. The reference to irreparable harm speaks to this, as well as a permanent solution, as do the words "[a] Party will be entitled ... to seek ... specific performance or other equitable remedies, in addition to any other remedies available to it."

20 In essence, Bell argues that section 17.4 is an entire code that is an exception to arbitration when the party seeks recourse in the courts for remedies other than damages. To interpret section 17.4 differently is to create a dual track process that could not have been the intention of the parties. Otherwise, there is an anomalous situation where there can be short term court jurisdiction alongside an arbitration process that has no jurisdiction to dissolve the injunction or to award damages for injunctive relief if the arbitration decides against MTS. This, Bell says, does not make sense.

21 Bell makes two other points. First, the judge was wrong to note that the non-inclusion of damages in the statement of claim was consistent with his interpretation, arguing that damages were not sought because the claim was one based on irreparable harm. This, it says, is consistent with its argument. Second, the judge was wrong to find support for his interpretation by relying on *BMWE* and *Kassem* as neither are applicable to the situation here.

22 Finally, Bell says the standard of review is correctness because there were no facts in issue and no factual matrix evidence before the judge. The facts referred to in the reasons were for context, but not used to interpret the intentions of the parties. Thus, the issue is one of law, not fact or mixed fact and law that would call for the deferential standard of palpable and overriding error.

MTS's Position

23 MTS argues that because the factual underpinning is important to the interpretation of section 17, the issue on appeal is one of mixed fact and law, which calls for the standard of review of palpable and overriding error. In addition, it says that deference is owed because the judge's interpretation is reasonable. In this regard it relies on *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board* (1999), 42 O.R. (3d) 723 (Ont. C.A.), in which Laskin J.A. wrote that "[f]aced with two interpretations, either of which is reasonable, and no error in the application of the relevant legal principles, in my view this court should defer to the finding of the trial judge" (at pp. 728-29). In any event, it says the judge was correct.

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24 As for Bell's interpretation of section 17, MTS says that Bell relies exclusively on section 17.4 and avoids reading section 17 in its entirety, as required by the principles of contractual interpretation.

25 MTS highlights the following in its argument:

- Section 17.1 requires the parties to resolve disputes first by negotiation, and if not successful, then by arbitration, subject to the exceptions in section 17.3 and section 17.4. This is evident from the use of the word "must" in the context of the wording of section 17.1: "[a Dispute] which cannot be settled through negotiation, must be subject to attempts to resolve the Dispute according to this Section..." (emphasis added).

- The relevant exception here is section 17.3(c), which excludes from the mandated negotiation and arbitration regime "any claim for interim or interlocutory injunctive relief under Section 17.4." It is telling that permanent relief is not referenced in the exception.

- Section 17.3(c) must be read with section 17.4.

- Bell referred to the words "certain matters may arise that require resolution" in section 17.4, but not to the words that immediately follow that phrase — "more quickly than by negotiation and/or arbitration." Thus, the "certain matters" for these purposes are those that require resolution on an urgent basis.

- The words "in addition to any other remedies available to it" in section 17.4 mean that there are no limits to the type of interim or interlocutory relief that a party may seek or on its right to pursue remedies through arbitration.

26 Thus, MTS says that section 17 does contemplate a dual track process in limited circumstances. Otherwise, the parties could be without an appropriate remedy in urgent circumstances.

27 Finally, MTS acknowledges that it would not be entitled to a permanent injunction under its interpretation of section 17, even though the statement of claim includes a request for such relief. It says that what it sought in the statement of claim is irrelevant to the interpretation of the section.

Decision

Standard of Review

28 This court's most recent pronouncement on standard of review for contractual interpretation was in *Prairie Petroleum Products Ltd. v. Husky Oil Ltd.*, 2008 MBCA 87, 231 Man. R. (2d) 1 (Man. C.A.), in which the trial judge had considered extrinsic evidence to assist in the interpretation of certain terminology used in a contract. Steel J.A. wrote (at para. 36):

> The proper interpretation and application of the principles of contractual interpretation is a question of law. A trial judge's determination of the factual matrix, consideration of extrinsic evidence and consideration of the evidence as a whole is a question of fact. Finally, the application of the legal principles to the language of the contract in the context of the relevant facts, or a question involving an intertwining of fact and law, is a question of mixed fact and law. See ***MacDougall v. MacDougall*** (2005), 205 O.A.C. 216; 262 D.L.R. (4th) 120 (C.A.); ***Kary Investment Corp. v. Tremblay*** (2005), 371 A.R. 339, 354 W.A.C. 339; 8 B.L.R. (4th) 40; 2005 ABCA 273, and **Hall** [Geoff R. Hall, *Canadian*

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> *Contractual Interpretation Law* (Markham: LexisNexis Canada Inc., 2007)], at pp. 106-107. See also, ***QK Investments Inc. v. Crocus Investment Fund et al.*** (2008), 225 Man.R. (2d) 176, 419 W.A.C. 176; 2008 MBCA 21, at para. 26, and ***Barcode Systems Inc. v. Symbol Technologies Canada Inc. et al.*** (2008), 225 Man.R. (2d) 312, 419 W.A.C. 312; 2008 MBCA 47, at paras. 1-2.

29 As is evident from the above quote, Steel J.A. relied on, in addition to the case law cited, Geoff R. Hall, *Canadian Contractual Interpretation Law* (Markham: LexisNexis Canada Inc., 2007), in which he writes about the evolution of the standard of review for contractual interpretation (at pp. 106-7):

> Until very recently, interpretation of a contract was considered a question of law reviewable by an appellate court on a standard of correctness. However, this approach was based on historical considerations quite divorced from the modern approach to contractual interpretation, in which questions of fact (the factual matrix) play a significant role in all cases. As a result, courts have recently concluded that contractual interpretation involves questions of law, questions of fact, and (most commonly) questions of mixed fact and law. ....
>
> .... Interpretation involves a complex interplay between the words of a contract and the context in which they arise. Consideration of the context involves questions of fact which require a trial judge to hear evidence, and consideration of the words cannot be cleanly separated from consideration of the context. ....

30 Where the contractual interpretation involves facts in dispute and extrinsic evidence (the admission of which can raise a question of law), the issues on appeal most often concern matters of fact and mixed fact and law. The standard of review is then palpable and overriding error. For a recent example of this, see *Barcode Systems Inc. v. Symbol Technologies Canada Inc.*, 2008 MBCA 47, 225 Man. R. (2d) 312 (Man. C.A.). This approach is in keeping with the deferential approach for findings of fact and mixed fact and law made by the judge of first instance, as articulated by the Supreme Court of Canada in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.).

31 Deference is also warranted when the judge, applying the relevant legal principles, interprets a contract that can sustain more than one reasonable interpretation because of an ambiguity. See *Martens v. Gulfstream Resources Canada Ltd.*, 1999 ABCA 283, 250 A.R. 62 (Alta. C.A.), *Bradscot* and *MacDougall v. MacDougall* (2005), 262 D.L.R. (4th) 120 (Ont. C.A.). However, it is important to remember that "[d]ifficulty in interpreting a contract is not synonymous with ambiguity" (*Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.) at para. 25).

32 Where the factual matrix, or extrinsic evidence, is not engaged, the question is one of pure contractual interpretation based on the words used. As will be explained, the case law demonstrates that such a question is one of law for which the standard of review is correctness, unless deference is called for because there is more than one reasonable interpretation in light of ambiguous wording.

33 In *MacDougall*, Lang J.A. thoroughly discussed standard of review for contractual interpretation in the context of interpreting a domestic contract. She wrote (at paras. 30-33):

> To begin with, the trial judge must apply the proper principles of contract interpretation, including consideration of the clause in the context of the entirety of the contract. A failure to follow the proper principles, including a failure to apply a fundamental principle of interpretation, would be an error of law attracting review on the standard of correctness.
>
> To the extent that this task of interpretation includes consideration of extrinsic evidence, or a determination of the

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> factual matrix, the trial judge is involved in making a finding of fact, or drawing inferences from a finding of fact. Further, the trial judge's "interpretation of the evidence as a whole" is one involving factual or inferential determinations. .... Such questions of fact are entitled to deference and are not to be overturned except in the case of palpable or overriding error, or its "functional equivalents": "clearly wrong", "unreasonable", and "not reasonably supported by the evidence". ....
>
> In interpreting the contract, the trial judge also applies the legal principles to the language of the contract in the context of the relevant facts and inferences. This requires the application of law to fact. This has been said to be a question of mixed fact and law.
>
> .....
>
> Accordingly, in reviewing the trial judge's interpretation of a contract, the appellate court must first classify the question as one of fact, law, or mixed fact and law. If the question is an inextricable intertwining of both fact and law, the question can be said to be one of mixed fact and law. ....
>
> [emphasis added]

34 The Ontario Court of Appeal confirmed that this approach applies in commercial matters in *3869130 Canada Inc. v. I.C.B. Distribution Inc.*, 2008 ONCA 396, 45 B.L.R. (4th) 1 (Ont. C.A.). Blair J.A. wrote (at para. 40):

> .... A trial judge must apply the proper principles of contractual interpretation, and a failure to do so is an error of law attracting review on the standard of correctness. To the extent that the contract interpretation involves a consideration of extensive evidence or a determination of the factual matrix, or a question of mixed fact and law, however, a more deferential standard may apply. ....
>
> [emphasis added]

35 I read the comments of Lang J.A. and Blair J.A. to mean that a deferential standard of review applies to the extent that the task of interpretation involves consideration of extrinsic evidence or a determination of the factual matrix. If such factual considerations are not involved, the task of interpretation is to put meaning to the words and it is a question of law.

36 I find support for this conclusion in the extensive case law emanating from the Alberta Court of Appeal on this subject. Two quotes will suffice to demonstrate my point.

37 In *Double N Earthmovers Ltd. v. Edmonton (City)*, 2005 ABCA 104, 6 M.P.L.R. (4th) 25 (Alta. C.A.), aff'd on other grounds, 2007 SCC 3, [2007] 1 S.C.R. 116 (S.C.C.), Russell J.A. wrote (at para. 16):

> The interpretation of contracts is a question of law: .... The standard of review for a question of law is one of correctness: .... However, where the factual circumstances are necessarily engaged in determining the essential terms of the contract, the standard of review of those facts is one of palpable and overriding error: ....

38 More recently, in *Conway v. Zinkhofer*, 2008 ABCA 392 (Alta. C.A.), the Alberta Court of Appeal wrote (at para. 31):

> Pure contractual interpretation involves issues of law subject to the correctness standard of review. However, where

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contractual interpretation necessitates fact-finding, the facts found by the trial judge will not be interfered with in the absence of palpable and overriding error: ....

39 See also, *Freyberg v. Fletcher Challenge Oil & Gas Inc.*, 2005 ABCA 46, 252 D.L.R. (4th) 365 (Alta. C.A.), *885704 Alberta Ltd. v. Oxford Properties Group Inc.*, 2005 ABCA 274, 34 R.P.R. (4th) 159 (Alta. C.A.), *White v. E.B.F. Manufacturing Ltd.*, 2005 NSCA 167, 12 B.L.R. (4th) 1 (N.S. C.A.), and *General Motors of Canada Ltd. v. R.*, 2008 FCA 142, 292 D.L.R. (4th) 331 (F.C.A.).

40 I agree with Bell that this is not a case where facts were in dispute or there was evidence of the factual matrix. No extrinsic evidence was before the court. The background facts, while extensive, were not in dispute. More importantly, they are not facts about the surrounding circumstances (the factual matrix) that existed at the time of execution of the agreement. Rather, they are subsequent in time and explain the sequence of events after the dispute arose and why the appeal is before this court. Tellingly, neither party argued the importance of surrounding circumstances. Rather, they concentrated on the words of section 17.

41 Thus, the issue on appeal is a question of pure contractual interpretation, which is a question of law, and the standard of review is correctness.

Analysis

42 For our purposes, the guiding principles of contractual interpretation are as explained by the judge. Simply stated, they are that the contract should be construed as a whole, all the words in the contract are to be given meaning, if possible, and the absence of words may be considered. The goal is to determine the objective intent of the parties at the time of execution. See *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), and *Moore Realty*.

43 The agreement is a 46-page document that sets out the parties' rights and obligations. However, in my view, in the circumstances here, it is only necessary to consider the words of section 17. The parties did not argue otherwise and both focussed their arguments solely on the words of the section. Neither referred to any other provisions in the agreement to inform the interpretation of the section. Thus, it is section 17 that must be construed as a whole.

44 I agree with MTS that Bell's argument is unduly focussed on section 17.4 and particularly its last sentence. When read in isolation, section 17.4 may be open to the interpretation asserted by Bell because some of the language is broadly worded. However, the words of section 17.4 must be interpreted in the context of the entirety of section 17.

45 Section 17.1 provides that a dispute "which cannot be settled through negotiation, *must* be subject to attempts to resolve the Dispute according to this Section, and *submission to arbitration pursuant to this Section 17 is a condition precedent to the bringing of any court action with respect to this Agreement*" (emphasis added). I agree with MTS that the word "must" is mandatory in nature. It is the first of several phrases that speak to the mandatory nature of the regime of negotiation and arbitration, as will be explained. The condition precedent wording in italics, while not easily understood, is, in my view, clear enough to convey the importance of arbitration. Its meaning becomes evident when considered in light of

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the section as a whole.

46 In my view, Bell's argument fails to acknowledge that section 17.4 is an exception to negotiation and arbitration, which is the fundamental premise of the dispute resolution regime agreed to by the parties. The judge stated that "[s]ection 17.1 suggests a presumption in favour of arbitration which provides a reference point for interpreting the entirety of s. 17" (at para. 37). I would use stronger language by saying that negotiation and arbitration are mandated, except in certain circumstances.

47 Section 17.2 is uncontroversial and commits the parties to negotiation as a first method of resolving a dispute.

48 The first full paragraph of section 17.3 sets out the details of the arbitration procedure. The only crucial words in that paragraph are found near the beginning and they provide that a dispute, if not resolved by negotiation, "*shall be* resolved by arbitration" (emphasis added). Again, this is clear mandatory language.

49 What is also crucial are the subsequent exclusionary words in section 17.3:

.....

> The following matters shall be excluded from arbitration:

.....

> (c) any claim for interim or interlocutory injunctive relief under Section 17.4;

.....

50 Thus, section 17.3 provides that arbitration is mandatory to resolve disputes, with the limited exception, for our purposes, of a claim for interim or interlocutory injunctive relief under section 17.4.

51 Section 17.4 commences with the words "Notwithstanding the foregoing." The "foregoing" means the mandatory arbitration regime. Thus, those words introduce circumstances that need not follow such regime. The section goes on to set out those circumstances. In my view, the judge correctly interpreted what these circumstances are and the effect of section 17.4 (at paras. 38-41):

> Section 17.3(c) provides that "any claim for interim or interlocutory injunctive relief under s. 17.4" is excluded from arbitration. This would seem to establish that the purpose of s. 17.4 is to address the time sensitive issue of "interim or interlocutory" injunctive relief.
>
> Section 17.4 reveals that indeed, the parties did address their minds to situations of urgency requiring immediate attention. The opening sentence of s. 17.4 constitutes an acknowledgment by the parties that certain matters might arise which could require resolution "more quickly than by negotiation and/or arbitration", and that injunctive relief might be the only effective remedy for certain breaches of [the agreement] which could cause one of the parties irreparable harm (if not remedied immediately).
>
> When I read the provisions of s. 17 together as a whole, it is clear that s. 17.4 provides an exception from arbitration

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which is intended to allow either MTS or Bell Mobility to seek any claim for interim or interlocutory injunctive relief that may be required on an urgent basis, from a court of competent jurisdiction. This possibility is clearly intended to prevent the occurrence of irreparable harm. Absent the application of any of the other narrow exceptions set out in s. 17.3, where urgent interim or interlocutory injunctive relief is not claimed by either MTS or Bell Mobility, they must follow the mandatory negotiation and arbitration provisions of s. 17.

As a practical matter, where arbitration is to be pursued, a several week delay may occur prior to the appointment of an arbitrator. As a consequence, it would seem probable that any eventual award to a party will come only after a delay during which a potentially continuing harm may become non-compensable by damages. I agree with MTS that s. 17.4 is meant to address this deficiency. In that regard, the limited exceptions of s. 17.3 and what I have characterized as the presumption in favour of arbitration in s. 17.1, coexist in a coherent fashion to provide either MTS or Bell Mobility with an opportunity to avoid irreparable harm (by seeking interim or interlocutory injunctive relief) and at the same time, not be precluded from having access to the still more timely and supple process (and final determination) that can accompany arbitration.

52 I return to the condition precedent wording at the end of section 17.1, which I italicized in para. 45 above. Even though both parties had difficulty putting meaning to these words, they must be given meaning, if at all possible. As stated earlier, difficulty in doing so is not ambiguity.

53 Bell suggested two meanings. First, it said that the words are a reference to the ability to enter an arbitration award in court as permitted in section 17.3. Alternatively, it means that one must have submitted a dispute to arbitration before proceeding to court under section 17.4 for interim relief, which was not done here and not raised as an issue.

54 MTS says that the condition precedent wording simply mandates arbitration as the first method of resolving disputes before bringing a court action. However, the exceptions provide that it is not necessary to file a notice of arbitration before seeking interim relief from the courts. MTS says that the words at the end of section 17.4, "without first complying with the other dispute resolution procedures described in this Section 17," refer to requirements such as this.

55 I, as do the parties, find it difficult to give meaning to this condition precedent wording. However, when I consider section 17 as whole and its clear requirement to arbitrate, I am persuaded that the condition precedent wording in section 17.1 simply means what it says; the parties must submit a dispute to arbitration before bringing any court action. This is consistent with the mandated arbitration regime. I agree with MTS that this requirement is subject to the exceptions provided for in the agreement, particularly with respect to interim relief, as already explained.

56 While the wording of section 17 is not without difficulty, the parties' intentions are clear when the section is read as a whole. Section 17 does not contemplate the parties electing between arbitration and court proceedings. Nowhere does the section have words to that effect. Rather, negotiation and arbitration are mandated and court proceedings are only available in exceptional limited circumstances. Here, the limited circumstance was a claim for interim and interlocutory injunctive relief. Thus, the statement of claim filed by MTS is contemplated by the exception. The claim for a permanent injunction in the statement of claim is irrelevant to the interpretation of section 17.

57 Two final comments. First, as noted earlier, Bell argued that the judge erred in how he relied on the decisions in *BMWE* and *Kassem*. In light of my conclusion that the judge was correct in how he interpreted the words of section 17, I need not address this argument. Second, Bell argued that the judge's interpretation endorsed a dual track process which does

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not make sense. I disagree. The dual track aspect of the dispute resolution regime is limited to providing a remedy for urgent circumstances that the negotiation and arbitration regime cannot address.

Conclusion

58 The judge identified and applied the proper principles of contractual interpretation and gave meaning to all of the words of section 17 in the context of construing section 17 as a whole. I am of the view that he arrived at the correct interpretation of the section.

59 I would dismiss the appeal with costs.

Appeal dismissed.

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TAB 10

2009 ONCA 548
Ontario Court of Appeal

Plan Group v. Bell Canada

2009 CarswellOnt 3807, 2009 ONCA 548, [2009] O.J. No. 2829, 179 A.C.W.S. (3d) 40, 252 O.A.C. 71, 62 B.L.R. (4th) 157, 81 C.L.R. (3d) 9, 96 O.R. (3d) 81

Bell Canada (Respondent / Appellant) and The Plan Group, 1248163 Ontario Limited, 1248164 Ontario Limited and 1248165 Ontario Limited (Applicants / Respondents)

S.T. Goudge, E.E. Gillese, R.A. Blair JJ.A

Heard: December 18, 2008
Judgment: July 7, 2009
Docket: CA C48892

Proceedings: reversing *Plan Group v. Bell Canada* (2008), 71 C.L.R. (3d) 205, 2008 CarswellOnt 2447 (Ont. S.C.J.)

Counsel: Matthew P. Gottlieb, James D. Bunting for Appellant
Neal J. Smitheman, Antonio Di Domenico for Respondents

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

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Statutes considered by *R.A. Blair J.A.*:

Arbitration Act, 1991, S.O. 1991, c. 17
Generally — referred to

s. 6 — considered

s. 23(1) ¶ 3 — referred to

Statutes considered by *E.E. Gillese J.A.* (dissenting):

Arbitration Act, 1991, S.O. 1991, c. 17
Generally — referred to

s. 2(1) — considered

s. 23 — referred to

s. 23(1) — considered

s. 23(1) ¶ 3 — considered

Words and phrases considered

filing

[Per R.A. Blair J.A. (S.T. Goudge J.A. concurring):] The concept of "filing" the notice of arbitration signals that it is to be deposited or placed with an organization or institution overseeing the proceeding. The application judge equated it,

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however, with "delivering" the notice to, or "serving" it upon, the other side. In the context of a legal document relating to the resolution of disputes, "filing" cannot be properly or reasonably interpreted to bear such a meaning. . . . [T]he notion that "filing" may be equated with "delivery" - or with "service", or with "giving notice" - in the context of a legal-related proceeding is seriously flawed. "Filing" . . . in the dispute resolution milieu . . . means placing or depositing a document with the institutional overseer of the proceeding. It does not mean delivering the document to, or leaving it with, or serving it upon the other party.

filing

[Per E.E. Gillese J.A. (dissenting):] I see no reason to adopt an unnecessarily restrictive meaning of "file". "File" is not a defined term in the Alliance Agreement. As the parties intended that disputes would be resolved without recourse to the courts, it does not make sense to ascribe to that word a narrow, strictly legal meaning. . . . Further, the broader dictionary meaning of "file" includes delivery and receipt and to do that which is necessary to commence a legal proceeding. The common meaning of "file" includes "actual delivery" to the recipient (as opposed to simply mailing) or to initiate proceedings by proper formal procedure. For example, *The Canadian Dictionary of Law*, 3d ed. defines "file" as . . . To leave with the appropriate office for keeping. 2. Register. 3. Requires actual delivery. A mailed document is not filed until received by the other party. These broad meanings of "file" are consistent with the commencement of arbitration under s. 23 of the *Arbitration Act, 1991*.

APPEAL from judgment reported at *Plan Group v. Bell Canada* (2008), 71 C.L.R. (3d) 205, 2008 CarswellOnt 2447 (Ont. S.C.J.), interpreting arbitration clause in parties' agreement.

R.A. Blair J.A.:

I. Background

1 Bell and The Plan Group entered into an Alliance Agreement on February 1, 1999, concerning joint projects for the delivery of services to customers on cabling projects in the Greater Toronto Region. The Agreement contained a two-step dispute resolution process, found in section 22. The parties were first to engage in good faith discussions using "their commercially reasonable efforts to settle the dispute" (s. 22.1). Thereafter, if those discussions failed, the parties were to resort to arbitration (s. 22.2).

2 Section 22.2, the arbitration clause - the interpretation of which is at the heart of this appeal - reads as follows:

Bell and [The Plan Group] will settle by arbitration any dispute arising out of or related to this Agreement or any Subcontract that is not finally resolved pursuant to Section 21.1 hereof.[1] *A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc.* Bell and [The Plan Group] will select the arbitrator from a panel of persons knowledgeable in business information and the construction industry. The decision and award of the arbitrator will be final and binding and the award so rendered may be entered into any court having jurisdiction thereof. The arbitration will be held in Toronto, Ontario. The arbitrator will not be empowered to award punitive damages to either Party. *Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.* [Emphasis added.][2]

3 The second sentence of the arbitration clause (which I shall refer to as "the conduct of arbitration provision") stipulates

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that the arbitration will be conducted under the *Arbitration Act, 1991*, S.O. 1991, c. 17, "and the then-current rules" of the Institute. In this regard there are two sets of rules that were considered by the application judge -those that were in effect at the time the Agreement was negotiated (the "1999 Rules"), and those that were in effect at the time the dispute arose between the parties (the "Current Rules").

4 In 2005, a dispute arose between Bell and The Plan Group in relation to certain work performed under the Agreement for the Greater Toronto Airport Authority. Invoices exceeding $40 million in value were at the heart of the dispute. The differences could not be resolved through "commercially reasonable efforts to settle." Accordingly, on August 26, 2005, The Plan Group delivered to Bell a draft notice demanding arbitration. On December 14, 2005 it delivered a final notice demanding arbitration. No notice to arbitrate the dispute was - nor has one ever been - filed with the Institute, however. The last sentence of the arbitration clause (which I will refer to as the "waiver provision") specifies that a failure to file a notice of arbitration in time will constitute an irrevocable waiver of the claim.

II. The Positions of the Parties

5 Bell has repeatedly taken the position that, in order to commence the arbitration, The Plan Group must deliver to Bell and file with the Institute, a written notice of request to arbitrate. This position is based upon section 22.2 of the Agreement, and the requirements of Articles 11 and 13 of the Current Rules. Article 11 provides for the submission of disputes under agreements to arbitration "by delivering a written Notice of Request to Arbitrate to the respondent". Article 13 specifies that, "The arbitration *is deemed to have commenced* when a Notice of Request to Arbitrate ... *has been filed with the Institute* and the initial filing fee has been paid" (emphasis added). Bell also relies on Article 5, which says that, "By agreeing to the Rules, the parties agree that the arbitration shall be administered by the Institute", and the stipulation in Article 3 that, "To the extent that the Rules conflict with the Act, the provisions of the Rules shall apply".

6 The Plan Group contends, on the other hand, that no notice of arbitration need be filed with the Institute for the arbitration to be commenced. It submits that none of the Rules of the Institute apply to govern the initiation or commencement of the arbitration and that the Rules are only engaged after the arbitrator has been chosen and only to the extent that the Institute's rules pertain to the procedural conduct of the arbitration. The arbitration may be commenced in any way permissible under the Act, The Plan Group argues, and it has complied with section 23(1)3 of the Act by delivering provisional and final notices demanding arbitration upon Bell.

7 Underlying all of these arguments is the real issue between the parties. It is Bell's position that as a result of The Plan Group's failure to file a notice of arbitration with the Institute, its complaints are time barred by virtue of the closing sentence of Section 22.2 cited above. For reasons that are not entirely clear on the record, this issue has not been addressed directly. Instead, it has been equated by the parties - and by the application judge - with the issue of how the arbitration is to be commenced.

III. Law and Analysis

Interlocutory/Final Order

8 The Plan Group argues that the judgment below is interlocutory in nature and, therefore, that Bell requires leave to appeal, which it has not sought. I disagree. The decision is a final order because it finally determined the only issue raised in

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the application before the application judge.

9 The Plan Group's theory is that the practical and legal result of the decision is to confirm that an arbitration proceeding has already been commenced, given the declaration that the filing of a notice of arbitration was not necessary to commence the arbitration. The decision was therefore an intervention by the court to assist in the conduct of the arbitration in order to ensure that the arbitration was being conducted in accordance with the arbitration clause in the Agreement, as contemplated by s. 6 of the *Arbitration Act, 1991*. So far as is relevant, s. 6 provides:

> **Court intervention limited**
>
> 6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:
>
> 1. To assist the conducting of arbitrations.
> 2. To ensure that arbitrations are conducted in accordance with arbitration agreements.

10 The Plan Group accordingly submits that the decision below was simply interlocutory in nature, within the context of an ongoing arbitration proceeding; it did not finally determine any substantive matter in the arbitration.

11 There is no merit in this argument. It misconceives the nature and purpose of the interlocutory/final order dichotomy, which is to act as a gatekeeper for appeals to a higher court in the particular proceeding before the courts. An application, like an action, is a free-standing proceeding.

12 The classic explanation of whether an order is final or interlocutory is that of Middleton J.A. in *Hendrickson v. Kallio*, [1932] O.R. 675 (Ont. C.A.), at p. 678:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties - the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the application, but it is interlocutory if the merits *of the case* remain to be determined.
>
> [Emphasis added.]

13 Here, the merits *of the case* - i.e., of the application proceeding before the court -have been determined.

14 In my view, the decision of this Court in *Buck Brothers Ltd. v. Frontenac Builders Ltd.* (1994), 19 O.R. (3d) 97 (Ont. C.A.), is determinative of this issue. There, Morden A.C.J.O. made it quite clear that ancillary proceedings are not relevant in determining whether an order of a judge is final or interlocutory.

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15 In *Buck Bros.*, the application judge ordered that whether a condition precedent for arbitration had been met should be determined, not by the court, but by a panel of arbitrators appointed in accordance with the arbitration agreement. An appeal was launched, but the responding party moved to have the appeal quashed. The argument was that the order under appeal was interlocutory, because the real subject-matter of the litigation between the parties was still to be determined on the merits in the arbitration, and therefore the appeal was not properly before the court.

16 Morden A.C.J.O rejected this argument. At p. 100, after citing the passage from *Hendrickson v. Kallio* set out above, he said:

> In one sense, it can be said that the order in question does not determine "the real matter in dispute between the parties" (which is the right of the moving parties to be paid fair and equitable consideration by the responding parties and, if so, its amount, or, something less than this, whether the condition precedent to commencing an arbitration proceeding has been met). I do not think, however, that, in the circumstances, the order is interlocutory. I read the passage from *Hendrickson v. Kallio* as referring to "the real matter in dispute between the parties" *in the proceeding which is before the court* and not in some other proceeding which may, or may not, then be in existence. In accordance with this interpretation, I read "the litigation" in "the very subject matter of the litigation" as referring to the proceeding in which the order in question is made. Similarly, I read "the case" in "if the merits of the case remain to be determined" as also referring to the proceeding in which the order is made.
>
> [Emphasis in original.]

17 Contrary to the submission of The Plan Group, the decision of the British Columbia Court of Appeal in *Tamarack Capital Advisors Inc. v. SEM Holdings Ltd.* (2006), 54 B.C.L.R. (4th) 80 (B.C. C.A. [In Chambers]), does not conflict with *Buck Bros.* In *Tamarack*, the proposed appeal was from an order dismissing a motion for a stay of the action. It was a not a final order because it did not determine a substantive matter in the litigation; it had merely refused to stay the proceeding.

18 I conclude that the judgment of Wilton-Siegel J. here is a final order. Leave to appeal from it is not necessary.

Standard of Review

19 The parties disagree on the standard of review applicable to the application judge's interpretation of the Agreement. Bell submits that the interpretation of the Agreement is a question of law, and therefore is reviewable on a standard of correctness. The Plan Group argues that the interpretation of the Agreement involves questions of mixed fact and law, and that this court cannot intervene absent palpable and overriding error.

20 The historical view is that the interpretation of a contract is a question of law, and reviewable on the standard of correctness. However, the standard of appellate review in matters of contractual interpretation is not as straightforward as it once appeared to be, and there has been considerable debate about it in the jurisprudence since the decision of the Supreme Court of Canada in *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.).

21 *Housen* is considered to be the leading authority on the standard of appellate review, directing that the applicable standard of review will depend upon the nature of the question - whether the alleged error is one of law, mixed fact and law, or fact. But, it is fair to say that appellate courts across the country have sent mixed signals about the standard of review in

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contract interpretation cases in the post-*Housen* era. In British Columbia, the general approach seems to be to treat contractual interpretation as a matter of mixed fact and law attracting review on a deferential basis.[4] In Alberta, on the other hand, the opposite appears to be the case. The interpretation of contracts is considered to be a question of law, giving rise to a standard of correctness.[5] New Brunswick and Nova Scotia appear to hold to the traditional view that the standard of review in contractual interpretation is correctness, while recognizing that a trial judge's findings of fact and drawing of factual inferences should be accorded deference.[6]

22 Steel J.A. addressed the current status of this dialogue in *Prairie Petroleum Products Ltd. v. Husky Oil Ltd.* (2008), 295 D.L.R. (4th) 146 (Man. C.A.), at paras. 34-36, where she said:

> Until recently, interpretation of a contract was considered a question of law reviewable by an appellate court on a standard of correctness.
>
> At present, however, the standard of appellate review will depend on the nature of the question, whether it is a question of law, a question of fact or a question of mixed fact and law. *A question of law attracts the correctness standard, while a palpable and overriding error must be found with respect to a question of fact or mixed fact and law.* See *Housen*.
>
> The proper interpretation and application of the principles of contractual interpretation is a question of law. A trial judge's determination of the factual matrix, consideration of extrinsic evidence and consideration of the evidence as a whole is a question of fact. Finally, the application of the legal principles to the language of the contract in the context of the relevant facts, or a question involving an intertwining of fact and law, is a question of mixed fact and law.
>
> [Citations omitted; emphasis added.]

23 I generally agree with Steel J.A.'s summary, except for her categorical statement - purportedly reflecting *Housen* - suggesting that questions of mixed fact and law always attract the palpable and overriding error standard. In my view, *Housen* does not stand for such a definitive statement, nor does the jurisprudence in this Court.

24 It must be remembered, particularly when considering the appropriate standard of review for questions of mixed fact and law, that the Court in *Housen* did not tackle that subject in the context of contractual interpretation. It did so *clearly and explicitly* in the context of a negligence action, an entirely different brand of case.

25 The distinction between these two types of cases is meaningful for these purposes, it seems to me. Whereas the application of legal principles to the facts in a negligence action is very much a fact-driven exercise, the interpretation of a contract - leaving aside the factual issues that may underlie the task - is not; it is very much a legal exercise. In my view, Lang J.A. of this Court accurately summarized the effect of *Housen* in *MacDougall v. MacDougall* (2005), 262 D.L.R. (4th) 120 (Ont. C.A.), at para. 25, when she said:

> The leading authority on standard of review is *Housen v. Nikolaisen. Housen* does not address directly the standard of review for the interpretation of a contract. Rather, it canvasses the standard of review in a case involving the application of the law of negligence to findings of fact. *In that context*, it distinguishes among questions of fact, questions of law, and questions of mixed fact and law concluding that questions of fact are reviewed on the standard of palpable and overriding error and questions of law on the standard of correctness. Where the question of fact and of law are inextricably intertwined so that the question is one of mixed fact and law, the trial judge's finding is entitled to deference.
>
> [Citations omitted; emphasis added.]

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26 In determining the proper standard of review, however, it is important to keep in mind the distinction between the nature of the question addressed by the trial court (i.e. a question of fact, a question of law, or a question of mixed fact and law) and the standard of appellant review of the trial court's disposition of that question. The distinction does not matter if the trial court was answering a question of fact (where the standard of appellant review is palpable and overriding error) or a question of law (where it is correctness). But the distinction *is* important where the question addressed was one of mixed fact and law. To say that a matter raises a question of mixed fact and law, by itself, does not mean that the standard of appellate review is necessarily one of palpable and overriding error. As *Housen* tells us, at para. 36, "matters of mixed fact and law lie along a spectrum." Thus, where the question at issue is determined to be one of mixed fact and law, the appellate court must take a further step and go on to locate the precise question at the proper point on the *Housen* spectrum in order to determine the applicable standard of appellate review.

27 Where the matter referred to is more a matter of legal principle and sits towards the error of law end of the spectrum, the standard is correctness. Where the matter is one in which the legal principle and the facts are inextricably intertwined - where the facts dominate, as it were - it falls more towards the factual end of the spectrum, and significant deference must be accorded. Contractual interpretation, in my opinion, is generally the type of case that falls within the former category, negligence one that generally falls into the latter.

28 In my view, this distinction between the nature of the question to be determined and the standard of appellate review to be applied to that determination can help in clarifying a number of cases that might otherwise be misunderstood. For example, in *Casurina Ltd. Partnership v. Rio Algom Ltd.* (2004), 181 O.A.C. 19 (Ont. C.A.), at para. 34, Feldman J.A. concluded that, "The construction of a written instrument is a question of mixed fact and law". She did not say, however - nor should she be understood to have said, I think - that a deferential standard of appellate review must *always* be applied to the interpretation of a contract. Indeed, in *Palumbo v. Research Capital Corp.* (2004), 72 O.R. (3d) 241 (Ont. C.A.), Laskin J.A. observed at para. 32 that, "The standard of review of the interpretation of a contract provision ordinarily is correctness."

29 The palpable and overriding error standard of review, it seems to me, is designed to afford deference to trial judges in their essential fact-finding functions, including the drawing of inferences from the facts and the determination of issues where law and facts are inextricably intermixed. We leave it to trial judges to sort these matters out with good reason. They have seen and heard the witnesses and are attuned to the dynamics of the trial. In *Waxman v. Waxman* (2004), 186 O.A.C. 201 (Ont. C.A.), at para. 292, this Court articulated the policy reasons for giving such deference to trial judges:

> The "palpable and overriding" standard demands strong appellate deference to findings of fact made at trial. Some regard the standard as neutering the appellate process and precluding the careful second hard look at the facts that justice sometimes demands. This viewpoint is tenable only if facts found on appeal are more likely to be accurate than those determinations made at trial. If findings of fact were to be made on appeal they might be different from those made at trial. Most cases that go through trial and onto appeal will involve evidence open to more than one interpretation. Merely because an appellate court might view the evidence differently from the trial judge and make different findings is not, however, any basis for concluding that the appellate court's findings will be more accurate and its result more consistent with the justice of the particular case than the result achieved at trial.

30 The exercise of interpreting a contract is not essentially a fact-finding exercise, however. As the authorities cited above have noted, there may be questions involving the determination of the factual context in which the contract was negotiated, or considerations of extrinsic evidence, that evoke the fact-finding functions. Those decisions are to be addressed from the palpable and overriding error perspective. In substance, though, the exercise of interpreting a contract is a legal exercise,

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calling upon the learning and training that judges and lawyers acquire over years of experience. Apart from the truly factual aspects that may underlie the task, trial judges have no particular advantage over appellate judges in the art of contractual interpretation.

31 In my view, certainty in contract is an important policy value underlying the construction of contracts. This factor alone is sufficient to push the standard of review in such cases towards correctness and away from deference. At the very least, contractual interpretation is an exercise that generally falls much more towards the error of law end of the *Housen* spectrum, once the factual issues referred to above have been resolved or if - as is the case here - they are not in dispute. The Supreme Court of Canada has yet to consider the standard of review in contractual interpretation cases post-*Housen*. I am not entirely persuaded that it makes sense to take one type of analysis (the *Housen* analysis) that is designed to discourage appellate courts from re-trying *the factual issues* in cases, and apply its analytical paradigm (the facts/mixed fact and law/law spectrum) to what is essentially *a legal exercise*.

32 In any case, I am satisfied that the decision of the application judge must be set aside in this case whether the standard of review is properly one of correctness, or palpable and overriding error.

33 In my view, the issues raised on appeal tend toward questions of law, attracting review by this court on a standard of correctness. There were no underlying evidentiary or factual issues of a contested nature that the application judge was required to resolve. The arbitration clause was to be interpreted in light of its own wording in the context of the Agreement as a whole and having regard to the 1999 Rules and the Current Rules. There was no dispute as to what these Rules were. The application judge was in no better position than we are to ascertain the meaning of the arbitration clause in those circumstances.

34 Even if it can be said that the standard is palpable and overriding error, the decision cannot stand. In *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.), at para. 110, the Supreme Court of Canada observed that "clearly wrong" and "unreasonable" are the "functional equivalents" of palpable and overriding error. Respectfully, in my view, the arbitration clause cannot reasonably bear the interpretation endorsed by the application judge.

35 The errors in the application judge's reasoning manifest themselves particularly in two areas: (i) in his failure to give meaning and effect to an important term of the arbitration clause, namely the requirement in the conduct of arbitration provision that the arbitration was to be conducted "under ... the then-current rules [of the Institute]"; and (ii) in his interpretation of the phrase "to file" in the waiver provision as "to deliver" or "to serve" the notice upon Bell, which cannot be sustained.

36 I turn briefly now to a review of the relevant principles of contractual interpretation before resuming the analysis of the errors in the application judge's reasons, and the interpretation of the arbitration clause itself.

Principles of Contractual Interpretation

37 Little, if anything is to be found in the application judge's reasons about the principles of interpretation he invoked. Broadly speaking, however - as this Court noted in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust* (2007),

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85 O.R. (3d) 254 (Ont. C.A.), at para. 24 - a commercial contract is to be interpreted,

> (a) as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective;
>
> (b) by determining the intention of the parties in accordance with the language they have used in the written document and based upon the "cardinal presumption" that they have intended what they have said;
>
> (c) with regard to objective evidence of the factual matrix underlying the negotiation of the contract, but without reference to the subjective intention of the parties; and (to the extent there is any ambiguity in the contract),
>
> (d) in a fashion that accords with sound commercial principles and good business sense, and that avoid a commercial absurdity. [Footnotes omitted.]

38 In addition, as Doherty J.A. observed in *Glimmer Resources Inc. v. Exall Resources Ltd.* (1999), 119 O.A.C. 78 (Ont. C.A.), at para. 17, each word in an agreement is not to be "placed under the interpretative microscope in isolation and given a meaning without regard to the entire document and the nature of the relationship created by the agreement." Courts should not strain to dissect a written agreement into isolated components and then interpret them in a way that - while apparently logical at one level- does not make sense given the overall wording of the document and the relationship of the parties. Yet that is precisely the effect of accepting The Plan Group's interpretation of the word "conduct" in the arbitration clause and of minimizing or eliminating the import of the words "the then-current rules [of the Institute]."

Interpreting the Arbitration Clause

39 For ease of reference, I set out the text of section 22.2 of the Agreement - the arbitration clause - again here:

> Bell and [The Plan Group] will settle by arbitration any dispute arising out of or related to this Agreement or any Subcontract that is not finally resolved pursuant to Section 21.1 hereof.[7] *A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc.* Bell and [The Plan Group] will select the arbitrator from a panel of persons knowledgeable in business information and the construction industry. The decision and award of the arbitrator will be final and binding and the award so rendered may be entered into any court having jurisdiction thereof. The arbitration will be held in Toronto, Ontario. The arbitrator will not be empowered to award punitive damages to either Party. *Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim*
>
> [Emphasis added.]

40 I understand The Plan Group's argument to be the following. Arbitrations are governed by the provisions of the *Arbitration Act, 1991*, except to the extent that the parties have contracted out of those provisions, expressly or by implication. With that proposition, I do not quarrel. The Plan Group goes on to submit, however, that they and Bell have not contracted out of the provisions of the Act with respect to the commencement of arbitration proceedings; instead, they agreed only that the arbitrator, once appointed by the parties, would "conduct" the arbitration by applying only the Institute's procedural rules, that is, that portion of the Institute rules dealing with the procedural "conduct" of the arbitration by the arbitrator. The parts of the Institute's rules relating to commencement of the arbitration, the administration of the arbitration generally, and anything other than procedural conduct, have no application. Accordingly, The Plan Group properly commenced the arbitration, they say, by delivering a preliminary and final Notice of Request to Arbitrate to Bell in

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accordance with s. 23(1)3 of the Act which permits arbitration to be commenced in that fashion.

41 The application judge accepted this argument. Respectfully, I do not think it is tenable. As I have mentioned, his interpretation fails to give meaning to an important term in the arbitration clause specifying that the arbitration would be conducted under the "then-current rules" of the Institute, and further, assigned an unsustainable interpretation to the word "file" in the waiver portion of the clause.

Failure to Give Effect to the Phrase "The Then-Current Rules [of the Institute]"

42 The application judge did not apply the Current Rules. His interpretation failed to give meaning and effect to a critical term of the parties' agreement calling for conduct of the arbitration under "the then-current rules [of the Institute]." Early in his reasons, at para. 19, the application judge recognized that "[v]iewed on its own, the second sentence in the Arbitration Clause constitutes a straight-forward agreement to comply with the provisions of both the Act and *the rules of the Institute from time to time*" (emphasis added). He added that he "[saw] no reason not to give effect to the express wording of this provision." That is not what he did, however. In this respect, he erred in law by misapplying, or failing to apply, the principle that a contract is to be interpreted in a manner that gives meaning to all of its terms and avoids an interpretation that renders one or more of its terms ineffective.

(i) The Application Judge's Focus on "Conceptual Approaches"

43 Some background is necessary to understand how the application judge arrived at this result. The error stems in large part, in my view, from his undue focus on the parties' "conceptual approaches" to the arbitration rather than on the wording of the arbitration clause itself. Indeed, he was persuaded that, "*The issue on this application [turned] on* which of such conceptual approaches is applicable" (para. 15; emphasis added). Instead of asking himself what the clear wording of the conduct of arbitration provision meant -viewed in the context of the arbitration clause and the Agreement as a whole, and the Institute rules - he embarked upon a search for the proper "conceptual approach" to the type of arbitration agreed to by the parties.

44 The application judge's approach led him to ground his interpretation on a set of Institute rules (the 1999 Rules) that had no direct application and, even to the extent they provide "context" to the interpretive exercise, they did not support the interpretation he adopted. That error reinforced the narrow interpretation of the arbitration clause he embraced, premised on his erroneous conclusion as to the nature of the arbitration the parties had agreed to. This, in turn, led to his refusal to give effect to the set of Institute rules that were applicable (the Current Rules) because - in his view - they represented a "fundamental change" from that flawed view of the nature of the arbitration process agreed to.

45 An understanding of the two concepts put forward is therefore important to provide insight into his reasoning process. The two different conceptual approaches were summarized by the application judge at paras. 16 and 17 of his reasons:

> Plan says that the parties did not agree that the Institute would administer any arbitration under the Agreement. It submits that the parties agreed only to be bound by the procedural rules of the Institute (whether the 1999 Rules or the Current Rules) that apply in the conduct of an arbitration after the appointment of an arbitrator, and only to the extent that the arbitrator chooses to apply them. Accordingly, Plan submits that the rules of the Institute do not apply to determine the method of initiating arbitration. It also argues that the Arbitration Clause permits an arbitration to be

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commenced by any means recognized under law, including delivery of a notice demanding arbitration, using the language of paragraph 23(1)3 of the Act.

Bell argues that the parties agreed that (1) the Institute is to administer any arbitration under the Agreement; and (2) any such arbitration must be commenced by filing a Notice to Arbitrate with the Institute. Bell relies on the reference in the second sentence of the Arbitration Clause to the "then-current rules" of the Institute, and the substitution of the Current Rules for the 1999 Rules including, in particular, section 5 of the Current Rules. Bell says that, collectively, these provisions have the result that the parties are bound by the Current Rules of the Institute in their entirety including, in particular, the provisions respecting commencement of an arbitration.

46 The application judge adopted The Plan Group's conceptual approach.

47 I do not mean to suggest that the different conceptual approaches to the arbitration clause are meaningless. They shaped a good part of the debate between the parties. However, the meaning of a document is not determined by the conceptual approaches taken by the parties to it; it is the meaning of their written document that sheds light on their chosen conceptual approach. Here, the application judge tackled the interpretative exercise in the reverse. He ascertained what he believed to be the proper "conceptual approach" to the arbitration clause by relying on a set of Institute rules that had no application (the 1999 Rules). He then used that conceptual approach to interpret the arbitration clause in a way that would justify his refusal to give effect to the set of Institute rules that did apply (the Current Rules).

48 But, as outlined below, the structure of the arbitration clause read as a whole, and in the context of the 1999 Rules and the Current Rules, simply does not support the conceptual approach and interpretation advanced by The Plan Group and adopted by the application judge, in my opinion.

(ii) The Structure of the Arbitration Clause

49 The structure of the arbitration clause and the sequence in which it evolves are themselves of some significance. In fact, the parties outline their concept of the arbitration at the very outset of the clause. They do not agree that they will arbitrate their disputes by first appointing their arbitrator and then leaving it to the arbitrator to "conduct" the procedural aspects of the arbitration and the hearing in accordance with the procedural portion of the rules of the Institute. Rather, in the first two sentences of the arbitration clause, they agree (a) to resolve their disputes by arbitration, (b) to resort to a single arbitrator to do so, and (c) to have the arbitration conducted by the single arbitrator "under the Arbitration Act, 1991 (Ontario) and *the then-current rules* [of the Institute]." That is their "conceptual approach" to their dispute-resolution mechanism: a single-decision-maker arbitration held under the Act and the rules of the Institute in effect at the time the dispute arises.

50 The parties *then* turn their attention to a number of specifics about the arbitration process. They will themselves select the arbitrator from a panel of knowledgeable persons (contrary to the application judge's reasoning, this does "carve out" a right that would otherwise be governed by the rules of the Institute). The arbitrator's decision will be final and binding, and enforceable. The arbitration will take place in Toronto. The arbitrator will not be empowered to award punitive damages. Finally, the parties create what is in effect a limitation period for the bringing of claims which is tied to the filing of a notice of arbitration.

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51 I see nothing in the structure or development of the arbitration clause itself to suggest that the applicable rules of the Institute are to be limited to procedural rules to be applied by the arbitrator. Indeed, had the parties intended that to be the case they would have said "under the then-current rules [of the Institute] *pertaining to the procedural conduct of the arbitration and the hearing by the arbitrator*". They did not do so.

(iii) The Arbitration Clause in Context: The Agreement, the 1999 Rules, and the Current Rules

52 This view is buttressed by the language of the arbitration clause in the context of the Agreement and the rules of the Institute in effect at the time the Agreement was negotiated (the 1999 Rules).

53 A major flaw in The Plan Group's reasoning is to assume - as the application judge appears to have concluded - that the parties agreed to be bound (i) by a particular bundle of rules that could conveniently be amputated from the 1999 Rules (Part IV -Conduct of the Arbitration) and (ii) by any future changes to that specific bundle of rules only. That is not the case, however. The 1999 Rules may be of some assistance as an interpretive aid - they provide part of the context or factual matrix existing at the time the Agreement was negotiated - but they do not apply to this arbitration directly, nor did the parties ever agree that they would apply to any arbitration other than one that happened to be commenced during the period when they were in force. The parties did not agree in the arbitration clause to be bound by any particular set of rules. They agreed only that that the arbitration would be conducted under whatever set of Institute rules were operative at the time the arbitration in question took place.

54 The Agreement itself was for a five-year term which was renewable.[8] The parties had therefore agreed to a long-term contractual relationship. They clearly contemplated that disputes arising during that relationship would be resolved through arbitration conducted under the rules of the Institute and that those rules could change from time to time during the term of the Agreement.

55 Moreover - to the extent they may provide some guidance - the 1999 Rules do not support the amputation approach to the "conduct" of the arbitration or the lack of involvement of the Institute. The application judge drew comfort from the fact that the 1999 Rules are conveniently divided in four Parts: Part I - General; Part II -Commencing the Arbitration; Part III - The Arbitrators; and Part IV - Conduct of the Arbitration. He found reinforcement for The Plan Group's conceptual approach to the arbitration in these separate divisions of those Rules and, in particular, Part IV - Conduct of the Arbitration. The logic does not work, however.

56 First, it would be purely fortuitous if successor Institute rules continued to be similarly structured and divided. While it happened that the 1999 Rules were conveniently divided into Parts and that Part IV was conveniently entitled "Conduct of the Arbitration", the Current Rules are not divided in that fashion and there is no obvious successor to Part IV. The Current Rules consist of 49 individual rules and two Schedules. How the application judge understood the parties would determine what were revisions to or changes in the procedural rules in Part IV in such circumstances is unknown.

57 Second, the view that rules relating to the conduct of the arbitration can be separated into those that are "procedural" and those that are not, makes no sense. Rules relating to the conduct of arbitrations are in essence procedural in nature. They are not "substantive". They provide for the process or procedure to be followed by the parties in having the substantive nature of their dispute resolved by the arbitrator. Indeed, the set up of the 1999 Rules themselves is incompatible with the notion that only Part IV relates to "the conduct of arbitrations" (in spite of the title to that Part). The 1999 Rules are entitled: "Rules

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of Procedure for the Conduct of Arbitrations". In Article 1(d), they define themselves - taken in their entirety - as meaning "these *Rules for the conduct of arbitrations of the Institute*" (emphasis added). Thus, when the parties agreed that the arbitration would be conducted "under ... the then-current rules [of the Institute]", they were agreeing - so long as the 1999 Rules remained in effect, in any event - that it would be conducted under "these Rules for the conduct of arbitrations of the Institute", which, as worded, necessarily refers to the Rules as a whole.

58 Third, both the 1999 Rules and the Current Rules provide for the arbitration to be administered by the Institute. Rule 5 of the Current Rules expressly states that by agreeing to arbitration under the Rules, the parties agree that the arbitration shall be administered by the Institute. Article 3.1 of the 1999 Rules likewise stipulates that where parties have provided for arbitration under the auspices of the Institute, the arbitration is to take place in accordance with the rules in affect at the date of commencement of the arbitration. In both instances, then, once the parties agree to conduct the arbitration under the rules of the Institute, they accept that the arbitration will be administered by the Institute. This is consistent with the jurisprudence indicating that where parties agree to use the rules of an institutional arbitration body, they cannot cherry pick the rules they wish to apply and ignore the rest; they are bound to follow all of the rules: see e.g. *Spectra Innovations Inc. v. Mitel Corp.*, [1999] O.J. No. 1870 (Ont. S.C.J.).

59 In short, neither the 1999 Rules nor the Current Rules are amenable to be adopted by parties intending to administer their arbitration privately. Had the parties wished to adopt an arbitration mechanism that borrowed already existing arbitration rules but maintained a privately administered arbitration, they could easily have done so, for example, by resorting to the UNCITRAL Arbitration Rules or the CPR Institute for Conflict Prevention & Resolution - Non-Administered Arbitration Rules. Both those regimes permit such an opt-in or opt-out. The rules of the Institute do not.

60 Fourth, even the opening provision in Part IV of the 1999 Rules envisages the conduct of the arbitration "in all respects" - that is, not just what is touched on in Part IV- to be governed by the Act, the Rules, and the parties' agreements. Article 10.1 states:

> Subject to Article 2.1, the arbitration shall be *conducted in all respects* in accordance with the provision of the *Arbitration Act*, these Rules, the Arbitration Agreements and any other agreement of the parties applicable to the conduct of the proceedings.
>
> [Emphasis added.]

61 Finally, the provisions of Part IV clearly contemplate the involvement of the Institute in overseeing the arbitration - again, refuting the notion that the arbitration was to be a "non-administered" arbitration with the parties borrowing only the procedural-conduct related rules of the Institute for the purposes of their own arbitration. Notices, statements and written communications may be sent to the other parties "at the address set out on the records of the Institute" (Article 11.1). The parties are jointly and severally liable for costs and expenses of the arbitration, "including the administrative fees of the Institute" (12.1). The arbitrator or the Institute "may request supplementary deposits for the costs and expenses" (12.2). After the completion of the arbitration and delivery of the award, "the Institute shall provide an accounting" (12.3). Significantly, "the Institute", as well as the arbitrator, "may extend or abridge any time prescribed by these Rules" (14.2). Finally, the Institute's Schedule of Fees completes Part IV.

62 With respect, I am at a loss to understand how the framework of the 1999 Rules -even if Part IV of those Rules alone is to be considered - can be said to support the non-administrated arbitration interpretation adopted by the application judge. But that is the interpretation that led to his failure to apply the Current Rules.

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63 After a lengthy analysis of the arbitration clause in light of the 1999 Rules, the application judge then went on to consider whether the legal result would be any different with regard to the Current Rules. He answered that question in the negative because he concluded that the application of the Current Rules would result in a fundamental change from Plan Group's "conceptual approach," which he had accepted as applicable following his analysis of the impact of the 1999 Rules. At paras. 21, 56 and 59 of his reasons, he said:

> For the reasons set out below, I find that the Arbitration Clause did not mandate delivery and filing of a Notice of Arbitration in compliance with sections 4.1 and 4.3 of the 1999 Rules in order to initiate an arbitration. Instead, I find that the Arbitration Clause contemplated that after commencement of the arbitration and the appointment of the arbitrator, the arbitrator would apply the 1999 Rules during the proceedings.
>
> .....
>
> Moreover, even if they had agreed to the possibility of a change of some nature to the fundamental conceptual approach in the Arbitration Clause by means of a revision of the 1999 Rules, there is no basis for concluding that the parties agreed to the involvement of the Institute in the administration of any arbitration under the Agreement, which is implied by Bell's position.
>
> .....
>
> In summary, I do not think that the Court can find that the parties agreed to be bound by any revisions to, or replacement of, the 1999 Rules beyond revisions to, or changes in, the procedural rules in Part IV of the 1999 Rules in the absence of either (1) wording in the Arbitration Clause that is more extensive than the phrase relied upon by Bell or (2) other contextual evidence, both of which are lacking in this proceeding.

64 For the reasons I have articulated, these conclusions are unsustainable.

(iv) The Effect of the Term "The Then-Current Rules" of the Institute

65 In the end, the application judge refused to apply the Current Rules. In doing so, he ignored, and failed to give effect to, the clear and unequivocal language of the arbitration clause stipulating that the arbitration was to be conducted under "the then-current rules" of the Institute. The "then-current rules" cannot mean anything other that the Current Rules in the context of this arbitration. The Current Rules call for an arbitration administered by the Institute and commenced by the filing of a notice of arbitration with the Institute.

66 Four provisions of the Current Rules, in particular, are important for determining whether commencement of arbitration under the Agreement requires a party to file a request to arbitrate with the Institute. They are:

> 3. (a) The Rules shall apply where the parties have agreed that the National Arbitration Rules of the ADR Institute of Canada apply. ... *To the extent that the Rules conflict with the Act, the provisions of the Rules shall apply* except to the extent that the parties may not lawfully contract out of the provision of the Act...[9]
>
> 5. By agreeing to the Rules, the parties agree that the arbitration shall be administered by the Institute. ...

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11. Where a dispute falls under an arbitration clause or agreement, a party, as claimant, *may submit that dispute to arbitration by delivering* a written Notice of Request to Arbitrate to the respondent...

13. The arbitration is *deemed to have commenced* when a Notice of Request to Arbitrate ... has been *filed with the Institute and the initial filing fee has been paid*. The Institute shall notify the parties when an arbitration has been commenced and shall deliver to them a Notice of Commencement of Arbitration.

[Emphasis added.]

67 Clearly, where the Current Rules govern the arbitration - as in my view they do here - a dispute under an agreement is submitted to arbitration by delivering a Notice of Request to Arbitrate to the other party, but the arbitration is not deemed to have been "commenced" for purposes of its administration until that Notice is filed with the Institute and the initial filing fee paid. The Plan Group has not taken that step.

68 Were the arbitration governed by the 1999 Rules, The Plan Group would be in a different position. While sections 4.1 and 4.4 of those Rules call for the filing of a notice of arbitration with the Institute, the 1999 Rules also provided that in the event of a conflict between them and the Arbitration Act, the Act prevailed. Section 23(1)3 of the Act stipulates that an arbitration may be commenced in any way recognized by law, including where "[a] party serves on the other parties a notice demanding arbitration under the agreement." That is what the Plan Group did here.

69 But this arbitration is not to be conducted under the 1999 Rules. It is to be conducted under the Current Rules, which provide that *they* trump the Act (s. 3(a)), and which require a Notice of Request to Arbitrate to be filed with the Institute before the arbitration is deemed to have been commenced (s. 13).

The Waiver Provision

70 The second major error of the application judge is found in his treatment of the words "failure *to file* a notice of arbitration" (emphasis added) in the waiver provision of the arbitration clause, which states:

Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.

71 The concept of "filing" the notice of arbitration signals that it is to be deposited or placed with an organization or institution overseeing the proceeding. The application judge equated it, however, with "delivering" the notice to, or "serving" it upon, the other side. In the context of a legal document relating to the resolution of disputes, "filing" cannot be properly or reasonably interpreted to bear such a meaning.

72 The application judge addressed the meaning of the phrase "failure to file a notice of arbitration" only incidentally. He did so in the course of his lengthy examination of what he calls the "Operation of the Arbitration Clause in 1999." In the result, he rejected Bell's interpretation of the arbitration clause as providing for arbitration administered by the Institute and commenced by filing a notice to arbitrate with the Institute. This rejection - or, at least, his conclusion that the last sentence of the arbitration clause "is at best equivocal with respect to the agreement of the parties" - rests, as he saw it, on the failure of the parties to make reference to three things in that sentence, namely:

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(i) the failure to specify filing with the Institute in accordance with Article 4.1 of the 1999 Rules and to identify the "notice of arbitration" as the notice of arbitration provided for in Article 4 of those Rules;

(ii) the failure to insert the words "with the Institute" after the words "failure to file a notice of arbitration" (leaving open The Plan Group's suggested interpretation equating "filing" with "delivery" to the other party, he concludes); and

(iii) the failure to clarify, for limitation purposes, which of the filing requirements under Article 4.2 or Article 4.4- one requires the filing of a single notice; the other of three copies - applied.

73 There are a number of reasons why this rationale for the rejection of Bell's position is not sustainable under the language of the arbitration clause, even as interpreted through the lens of the 1999 Rules.

74 In the first place, the language of the arbitration clause makes it clear that the arbitration is to be conducted, not in accordance with the 1999 Rules (unless the arbitration happens to be commenced when they are in force), but in accordance with the Rules of the Institute in place from time to time - the "then-current rules." Consequently, there was no reason for the parties to refer specifically to any particular provisions in the 1999 Rules. Indeed, to have done so might well have created problems of interpretation in the future because references to specific rules might set up a conflict with different rules in effect at a later time.

75 Secondly, the notion that "filing" may be equated with "delivery" - or with "service", or with "giving notice" - in the context of a legal-related proceeding is seriously flawed. "Filing" is a well-understood concept in the dispute resolution milieu. It means placing or depositing a document with the institutional overseer of the proceeding. It does not mean delivering the document to, or leaving it with, or serving it upon the other party.

76 A cursory review of any number of dictionary resources confirms the distinction between these concepts. For example, *The Shorter Oxford English Dictionary*, 3d ed., defines the verb "file" to mean "to place in due manner among the records of a court or public office," and the verb "deliver" to mean "to hand over to another's possession or keeping."[10] Service involves the formal delivery of a document to someone: *Black's Law Dictionary*, 8th ed., *s.v.* "service".

77 Both the 1999 Rules and the Current Rules of the Institute use the terms "file", "deliver" and "serve" in distinct contexts. "Filing," is used in the context of depositing a document with the Institute - for example, a notice of arbitration or a pleading. Often, filing is what triggers the requirement for an administrative fee payment. Article 4.4 of the 1999 Rules requires the claimant to "*file at the office of the Institute* three copies of the Notice of Arbitration together with the administrative fee". Articles 4.6 - 4.8 provide that the pleadings are to be *served* on the opposite party *and filed* with the Institute. Rule 13 of the Current Rules deems the arbitration to have been commenced "when a Notice of Request to Arbitrate ... *has been filed with the Institute* and the initial filing fee has been paid." Under the Current Rules, pleadings are "delivered" to the parties and to the Institute, but they are not "filed" with the other party.

78 Finally, it was not necessary for the parties to the arbitration clause to have added the words "with the Institute" after the words "failure to file a notice of arbitration" in the final sentence of the arbitration clause. The fact that the notice was to be filed with the Institute is self-evident from a reading of the arbitration clause as a whole. The arbitration was to be conducted in accordance with the Rules of the Institute.

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79 The application judge's treatment of the waiver provision in the last sentence of the arbitration clause had several unfortunate consequences. It caused him to lose sight of the simple, straight-forward meaning of that stipulation in the arbitration clause: a notice of arbitration must be filed with the Institute within 12 months of the occurrence upon which the claim is based; otherwise the claim is irrevocably waived. Of equal importance, however, it skewed his interpretation of the balance of the arbitration clause. Instead of leading him to conclude - as it should have done - that the parties had agreed to an arbitration procedure to be administered by the Institute, his erroneous interpretation served to bolster his conclusion that type of arbitration agreed to was not one that was to be administered by the Institute and that the clause was to be interpreted largely in light of the application of the 1999 Rules.

The Dissent

80 I have had the opportunity to review the dissenting reasons of my colleague, Justice Gillese. Respectfully, I do no share her view of the proper disposition of the appeal for the reasons I have given.

81 In completion I should address an issue she has raised as a preliminary matter, namely, the question whether the matters in the application should have been referred to the arbitrator for determination, based on the principles set out in *Union des consommateurs c. Dell Computer Corp.*, [2007] 2 S.C.R. 801 (S.C.C.). The parties to this appeal are sophisticated commercial parties represented by sophisticated commercial counsel. They did not argue or ask us to deal with this issue, presumably for their own practical reasons. I would be reluctant to determine the appeal on that basis.

82 In any event, I do not see the application (and the appeal) as raising a question regarding the jurisdiction of the arbitrator, but rather a question of whether there *is* an arbitration within which the arbitrator may or may not exercise a jurisdiction.

IV. Disposition

83 Accordingly, for the foregoing reasons, I would allow the appeal, set aside the order of the application judge, and in its place direct that arbitration under the Alliance Agreement must be commenced by filing a Notice of Request to Arbitrate with the Institute.

84 Bell is entitled to its costs of the appeal and of the application. Counsel have agreed on amounts. In accordance with that agreement, the costs of the appeal are fixed at $20,000 and the costs of the application at $30,000. Both amounts are inclusive of fees, disbursements and GST.

***S.T. Goudge J.A.*:**

I agree.

***E.E. Gillese J.A.* (dissenting):**

85 I have read the draft reasons of my colleague, Blair J.A. With respect, I do not agree that the application judge's

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interpretation of the arbitration clause is to be reviewed on a standard of correctness. In any event, however, in my view, the application judge's interpretation is not only reasonable, it is correct. Accordingly, I would dismiss the appeal.

86 As will become apparent, the factual context plays a significant role in the disposition of this appeal. Thus, I begin there.

Background[11]

The Alliance Agreement

87 Going into the 1990s, Bell Gateways (a division of the appellant, Bell Canada ("Bell")) was dominant in the structured cabling market. Its competitors were principally small, unsophisticated cabling installation contractors. This changed in the early 1990s when electrical contractors entered the structured cabling market and larger contractors began providing the same value-added services as Bell. Electrical contractors brought sophisticated project-management skills to the cabling market and developed relationships with general contractors, project managers, electrical engineers and Bell's clients. Over time, customers gave their electrical and cabling work to electrical contractors.

88 These developments posed a problem for Bell Gateways because it found it difficult to penetrate the longstanding relationships that electrical contractors had with project managers and general contractors. Bell Gateways increasingly lost market share to electrical contractors, including the Plan Group, a premier structured cabling contractor.

89 In early 1998, Bell and the Plan Group joined forces and began to jointly pursue cabling projects. Success in those projects led Bell and the respondents ("Plan") to enter into an agreement dated February 1, 1999 (the "Alliance Agreement").

90 The Alliance Agreement contemplated that Plan would perform electrical and cabling services contracted in Bell's name and Bell would provide marketing, bonding and project financing services for Plan. It reflected the parties' expectation that a number of projects would be started during the term of the agreement. The initial term of the Alliance Agreement was for five years, ending on January 31, 2004.

91 Article 22 of the Alliance Agreement establishes a two-step process for resolving disputes that might arise between the parties. The first step in the process is set out in art. 22.1. It requires the party that considers a dispute to exist to provide written notice to the other. The parties must then make good faith efforts to resolve the dispute through a structured discussion process.

92 If the good faith efforts fail to resolve the dispute, the parties move to the second step of the dispute resolution process. The second step, contained in art. 22.2 (the "Arbitration Clause"), requires the dispute to be settled by arbitration. The last sentence in the Arbitration Clause provides that a failure to file a notice of arbitration within twelve months of the occurrences supporting a claim constitutes an irrevocable waiver of that claim (the "Waiver").

93 The full text of art. 22 is set out below.[12] The critical portions of the Arbitration Clause read as follows:

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> 22.2 Bell and [Plan] will settle by arbitration any dispute arising out of or related to this Agreement or any Subcontract that is not finally resolved pursuant to Section 22.1 hereof. A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc. ... Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim.

The Dispute

94 The parties contracted to provide the Greater Toronto Airport Authority ("GTAA") with electrical systems in its new airport terminal. Plan continued to work on the GTAA project after January 31, 2004, the end date of the initial five-year term of the Alliance Agreement.

95 By October 2004, Bell had not paid Plan for invoices it had rendered in relation to the GTAA project. The invoices claimed for amounts in excess of $40 million. Without collecting a significant amount of the invoiced amounts, Plan would have gone bankrupt.

96 On December 16, 2004, Plan accepted $23 million as settlement for the invoiced amounts (the "Settlement"). Plan says that it was compelled to accept the significantly reduced amount because it was in a vulnerable financial state. It further alleges that its compromised financial state was brought about by Bell's capital investment demands of Plan that were made as part of the Alliance Agreement, coupled with Bell's subsequent breach of cash flow obligations.

97 Plan wished to dispute the Settlement in accordance with art. 22.

98 On August 26, 2005, Plan took the first step in the dispute resolution process to which the parties are bound by virtue of art. 22 of the Alliance Agreement. It delivered written notice to Bell that a dispute existed between the parties. In addition, Plan alerted Bell to the possibility that the dispute might proceed to arbitration by attaching to the notice of dispute a 20-page draft "Notice Demanding Arbitration" (the "Draft Notice"), which set out particulars of its claim. Among other things, the Draft Notice asserted Plan's claim to compensation in respect of the Settlement.

99 What happened thereafter is most easily understood by means of a timeline.

A Chronology of the Events that Followed

September 8, 2005	• Bell responds to Plan's notice of dispute and Draft Notice. It asserts that Plan's claim was waived, pursuant to art. 22.2, as it was in respect of occurrences that took place over 12 months previously. It says nothing about the need to file a notice of arbitration with the Arbitration and Mediation Institute of Ontario Inc. (the "Institute") or in accordance with the Institute's rules. Bell also agrees to meet with Plan pursuant to art. 22.1.
Fall and winter 2005	• Bell asks for extensive particulars of Plan's claim. Plan provides them.
December 12, 2005	• Although discussions between the parties continue, Plan delivers a final notice demanding arbitration (the "Notice") to counsel for Bell. In the cover letter that accompanies the Notice, Plan states that it wishes to preserve its rights under the Alliance Agreement, reiterates its willingness to continue with settlement discussions and asks counsel for Bell to confirm that it can accept service of the

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	Notice. The Notice complies with the requirements for commencement of arbitration in s. 23(1)3 of the *Arbitration Act, 1991*, S.O. 1991, c. 17.
January 17, 2006	• As Plan has received no response to the Notice, it contacts Bell by email, asking when it might hear back.
January 20, 2006	• Bell responds by email, saying that it is continuing to review Plan's claim and asks for further particulars. It raises no issue about the adequacy of the Notice or the need for it to be filed with the Institute. It says that it has not ruled out the possibility of further meetings and discussions.
March 2, 2006	• Plan provides Bell with further particulars.
April 11, 2006	• Plan concludes that Bell is not making good-faith efforts to settle the dispute. It sends Bell a letter to that effect and advises that it will proceed in accordance with the Arbitration Clause. It asks Bell to contact it by April 18 to discuss the selection of a suitable arbitrator.
April 19, 2006	• Bell responds saying it will make an application to the court to seek relief consistent with its position that Plan's claims are not arbitrable because they have been waived and, in some cases, released. It says it will serve a notice of application shortly. Counsel for Bell asks counsel for Plan not to commence arbitration proceedings until it serves its notice of application.
Spring and summer 2006	• Plan makes a number of inquiries of Bell about the status of the notice of application and is assured repeatedly that the notice will be sent.
August 11, 2006	• Bell serves Plan with the notice of application. The relief sought includes a declaration that Plan had waived its claim and that Plan is barred from commencing arbitration by virtue of its failure to file a notice of arbitration in accordance with the Arbitration Clause.
September 20, 2006	• Bell serves Plan with the supporting affidavit material.
December 7, 2006	• Plan brings a motion seeking to stay Bell's application and refer the dispute to arbitration on the basis that Bell's application required the determination of arbitrable issues.
Spring or summer of 2007	• Settlement discussions take place in respect of Bell's application and Plan's motion. The parties agree to withdraw their respective court proceedings (*i.e.* the application and stay motion), without prejudice to their ability to advance their positions at arbitration.
Summer or fall of 2007	• Plan and Bell agree on the Honourable Coulter Osborne as arbitrator of the dispute.
September 2007	• The application and stay motion are withdrawn.
Fall 2007	• Bell refuses to appoint the Honourable Coulter Osborne or schedule a hearing of the arbitration until Plan files a notice of request to arbitrate in accordance with s. 11 of the Institute's rules.

The Proceedings Below

100 Plan found itself in a "catch 22" position. It could not get the matter before the arbitrator because Bell refused to accept that Plan had commenced arbitration and would not appear before the arbitrator unless Plan filed a notice of request to arbitrate with the Institute. If Plan took that step however, it was concerned that it would jeopardize its position in respect of the Waiver.

101 On November 8, 2007, in an attempt to get the court's help to break the deadlock, Plan brought a notice of application to the Superior Court of Justice. The relief sought was an order appointing the Honourable Coulter Osborne as arbitrator of the dispute, pursuant to art. 22.2 of the Alliance Agreement.

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102 On January 23, 2008, the parties agreed that they would advise the application judge that the only issue for determination was whether commencement of arbitration under the Alliance Agreement required a party to file a written request to arbitrate with the Institute. They also agreed not to rely on disputed evidence.

103 Plan maintains that it asked the court, alternatively, to resolve the impasse by appointing an arbitrator to interpret the Arbitration Clause regarding commencement of arbitration. It says that the agreement between counsel concerning the scope of the application pertained only to the relevance of disputed evidence and the suitability for summary determination by way of application. It says it did not abandon its alternative position that if the court declined to determine the matter summarily in accordance with the principles in *Union des consommateurs c. Dell Computer Corp.*, [2007] 2 S.C.R. 801 (S.C.C.), then the matter should be decided by an arbitrator appointed by the court, without prejudice to either party's position concerning the proper procedure for commencing arbitration.

104 On February 28, 2008, Wilton-Siegel J. heard the application.

105 By order dated April 29, 2008 (the "Order"), the court declared that as of December 14, 2005, the Arbitration Clause did not require a party commencing arbitration under the Alliance Agreement to file a Notice of Request to Arbitrate with the Institute.

106 Bell appeals.

Article 22 of the Alliance Agreement

107 For ease of reference, art. 22 is set out in full, below:

> **22. Dispute Resolution**
>
> 22.1 The Parties seek to avoid disputes whenever possible. In the event of a dispute between the Parties concerning any matter arising from or connected with this Agreement, the Parties shall use their commercially reasonable efforts to settle the dispute in accordance with the following procedures:
>
>> (a) A Party which considers that a dispute exists shall provide written notice (in this paragraph 22.1(a), a "Notice of Dispute") to the other Party to the attention of the other Party's representative. For this purpose the nominated representative of Bell shall be its Assistant Vice-President Internetworking and the nominated representative for [Plan] shall be either of Bill Kurtin or Marshel Cohen. (Either Party may change its representative(s) on written notice to the other Party.) Following the provision of a Notice of Dispute to a Party's representative, the representatives of the Parties will forthwith make commercially reasonable efforts to, in good faith, resolve all disputes which are the subject of such notice in no more than 10 days from the date of the notice.
>>
>> (b) Should the dispute between the Parties not be resolved pursuant to the settlement process set out in Paragraph 22.1(a) hereof during the 10 day period referred to therein, the dispute shall be referred for resolution to Bell's Vice-President Gateways and to either of Bill Kurtin or Marshel Cohen. Following such referral, such persons will

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> forthwith make commercially reasonable efforts, in good faith, to resolve all disputes which are the subject of such referral within 10 days from the date of such referral.
>
> 22.2 *Bell and [Plan] will settle by arbitration any dispute arising out of or related to this Agreement or any Subcontract that is not finally resolved pursuant to Section 22.1 hereof. A single arbitrator will conduct the arbitration under the Arbitration Act, 1991 (Ontario) and the then-current rules of the Arbitration and Mediation Institute of Ontario Inc.* Bell and [Plan] will select the arbitrator from a panel of persons knowledgeable in business information and the construction industry. The decision and award of the arbitrator will be final and binding and the award so rendered may be entered in any court having jurisdiction thereof. The arbitration will be held in Toronto, Ontario. The arbitrator will not be empowered to award punitive damages to either Party. *Failure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim*
>
> [Emphasis added.]

The Reasons of the Application Judge

108 The application judge understood the application to have raised a single issue: did the Arbitration Clause require a party to file a "Notice of Request to Arbitrate" with the Institute in order to commence arbitration? He noted that the parties had very different conceptions of how the Arbitration Clause operated and that the issue turned on which conceptual approach applied. At paras. 16 and 17 of the reasons, the application judge set out the parties' conceptual approaches:

> Plan says that the parties did not agree that the Institute would administer any arbitration under the Agreement. It submits that the parties agreed only to be bound by the procedural rules of the Institute (whether the 1999 Rules or the Current Rules) that apply in the conduct of an arbitration after the appointment of an arbitrator, and only to the extent that the arbitrator chooses to apply them. Accordingly, Plan submits that the rules of the Institute do not apply to determine the method of initiating arbitration. It also argues that the Arbitration Clause permits an arbitration to be commenced by any means recognized under law, including delivery of a notice demanding arbitration, using the language of paragraph 23(1)3 of the Act.
>
> Bell argues that the parties agreed that (1) the Institute is to administer any arbitration under the Agreement; and (2) any such arbitration must be commenced by filing a Notice to Arbitrate with the Institute. Bell relies on the reference in the second sentence of the Arbitration Clause to the "then-current rules" of the Institute, and the substitution of the Current Rules for the 1999 Rules including, in particular, section 5 of the Current Rules. Bell says that, collectively, these provisions have the result that the parties are bound by the Current Rules of the Institute in their entirety including, in particular, the provisions respecting commencement of an arbitration.

109 The application judge summarized the two relevant sets of Institute rules at paras. 5-14 of the reasons:

> **The 1999 Rules**
>
> The Rules of the Institute that applied at the time of execution of the Agreement (the "1999 Rules") were divided into four parts under the following headings: "General", "Commencing the Arbitration", "The Arbitrators" and "Conduct of the Arbitration". The following provisions have relevance to the issue herein.
>
> First, in Part I, section 2.1 provided that the provisions of the *Arbitration Act, 1991*, S.O. 1991, c.17 (the "Act") would govern in the event of any conflict between the Act and the 1999 Rules.
>
> Second, in Part II (entitled "Commencing the Arbitration"), section 4.1 required that written notice of a proposed arbitration be given by a party initiating arbitration to the Institute and all other necessary parties. Section 4.2 provided

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that the arbitration would be deemed to commence on the date on which the Institute received a Notice of Arbitration from the claimant (presumably, but not expressly, the written notice contemplated by section 4.1).

Third, in Part IV (entitled "Conduct of the Arbitration"), section 10.1 provided that the arbitration was to be conducted in accordance with the Act, the 1999 Rules and any applicable agreement between the parties including the arbitration agreement.

The Current Rules

Since at least 2003, the Institute has applied the ADR Institute of Canada, Inc. National Arbitration Rules (the "Current Rules"). The Current Rules are not divided into discrete sections in the manner of the 1999 Rules.

Section 3 of the Current Rules provides that the Current Rules, rather than the Act, govern in the event of any conflict, except to the extent that the parties may not lawfully contract out of the provisions in the Act.

The first sentence of section 5, upon which Bell places considerable reliance, provides that "[b]y agreeing to the Rules, the parties agree that the arbitration shall be administered by the Institute".

Section 11 of the Current Rules requires the delivery of a "Notice of Request to Arbitrate" to the respondent and to the Institute to commence an arbitration. Section 11 also specifies in detail the required content of a Notice of Request to Arbitrate.

Section 13 provides that an arbitration is deemed to have commenced when a Notice of Request to Arbitrate has been filed with the Institute and the initial filing fee has been paid.

More generally, in addition to the matters addressed by the 1999 Rules, the Current Rules address a number of procedural and substantive issues that are also addressed in the Act. The Current Rules essentially constitute a complete code for the commencement and conduct of an arbitration.

110 The application judge considered the operation of the Arbitration Clause at the time the Alliance Agreement was executed in 1999 and then considered whether the legal result was different under the Current Rules. He found that the Arbitration Clause did not mandate delivery and filing of a Notice of Arbitration in compliance with ss. 4.1 and 4.3 of the 1999 Rules in order to initiate arbitration.

111 Instead, the application judge interpreted the Arbitration Clause as providing that after commencement of arbitration and the appointment of the arbitrator, the arbitrator would apply the Institute rules to the conduct of the arbitration. He reached this conclusion because, on its face, he found the Arbitration Clause favoured Plan's interpretation. He gave several reasons for this conclusion, the most significant of which may be summarized as follows:

1. *The wording and order of the second and third sentences in the Arbitration Clause.* The Arbitration Clause does not say that any dispute or arbitration under the Alliance Agreement is to be resolved in accordance with the Institute rules. Instead, it refers specifically to the "conduct" of the arbitration being subject to the Act and the then-current Institute rules. Thus, "on a plain reading", the Arbitration Clause limits the reach of the 1999 Rules to the conduct of the arbitration rather than compliance with all of the Institute rules. Part IV of the 1999 Rules is entitled "Conduct of the Arbitration". It is separate and distinct from Part II of the 1999 Rules which is entitled "Commencing the Arbitration."

2. *The Arbitration Clause contemplates a procedure for appointment of an arbitrator outside the Rules.* Had the parties intended the reference in the second sentence of the Arbitration Clause to constitute an agreement to comply with all of the 1999 rules, the third sentence should have carved the appointment process out of the rules. The fact that it doesn't suggests the parties did not intend all of the Institute rules to apply.

3. *Plan's interpretation is more consistent with the context in which the Arbitration Clause was negotiated.* The

application judge gave a detailed explanation for this view, based on the 1999 Rules and the wording of the Arbitration Clause. For example, Bell's interpretation was based on its position that the Institute would administer the arbitration. However, this position was based on s. 5 of the Current Rules, for which there was no counterpart in the 1999 Rules. Moreover, there is nothing in the Arbitration Clause to say that the Institute would administer the arbitration. Further, Plan's interpretation is consistent with the 1999 Rules which are divided into parts, making it feasible that only the parts governing conduct of the arbitration would apply.

112 After concluding that the Arbitration Clause did not mandate compliance with the 1999 Rules for commencement of arbitration, the application judge considered whether the Current Rules had that effect. This question arose because the Arbitration Clause provides that the arbitration will be conducted in accordance with the "then-current" Institute rules. Bell argued that if the Arbitration Clause did not mandate filing of a Notice to Arbitrate under the 1999 Rules, the result is different because of ss. 3 and 5 of the Current Rules. The effect of those sections, read together with the Arbitration Clause, Bell argued, was that any arbitration must be commenced in accordance with the Current Rules, *i.e.* by filing a Notice of Request to Arbitrate with the Institute under s. 11.

113 After outlining Plan's response to this argument, the application judge explained that the difference between the parties turned on fundamentally different views of the nature of the agreement between the parties in 1999 with respect to (1) the scope of the rules to which the parties agreed to be bound, and (2) the involvement of the Institute in the administration of an arbitration. He concluded that the parties agreed that the arbitrator was to apply the procedural rules of the Institute in effect from time to time in the conduct of the arbitration. He did not agree that either (1) the remaining rules of the Institute were also to be applied in respect of any arbitration under the Agreement; or (2) the Institute was to administer any such arbitration.

114 Thus, the issue was whether, by the reference to the then-current rules of the Institute in the second sentence of the Arbitration Clause, the parties agreed to accept the possibility that their agreement could be overridden by a substitution of the Current Rules for the 1999 Rules by the Institute.

115 He gave two reasons for rejecting the notion that by referring to the "then-current" Institute rules, the parties intended that they would be bound by anything more than changes to procedural rules. First, he found it unlikely that the parties turned their minds to the possibility that by virtue of a change to the Institute rules, the fundamental approach to arbitration embodied in the Arbitration Clause could be changed without their involvement. There was nothing in the limited scope of the 1999 Rules or the Act to suggest the possibility of such a fundamental change. He saw it as far more likely that the parties envisaged that possible changes to the Institute rules would relate to the conduct of arbitration.

116 The second reason, given at paras. 55-58 of the reasons, is a contextual consideration:

> Most important, the Agreement was the product of a negotiation between two sophisticated commercial parties represented by legal counsel. In the absence of wording suggesting otherwise, the Court should proceed on the basis that the conceptual approach to arbitration set out in the Arbitration Clause was meaningful to the parties. In the absence of express wording suggesting otherwise, I do not think the Court should interpret the acknowledgment in the Arbitration Clause of possible revisions to the 1999 Rules to constitute an agreement to be bound by rules that change the fundamental conceptual approach in the Arbitration Clause without the consent of the parties.
>
> Moreover, even if they had agreed to the possibility of a change of some nature to the fundamental conceptual approach in the Arbitration Clause by means of a revision of the 1999 Rules, there is no basis for concluding that the parties

agreed to the involvement of the Institute in the administration of any arbitration under the Agreement, which is implied by Bell's position.

If the parties were agreeable to Institute administration of any such arbitration, they could have selected this approach from the outset. Despite the more limited set of provisions in the 1999 Rules, they could have agreed that the arbitration was to be governed in all respects by the 1999 Rules. Alternatively, they could have addressed the possibility of future Institute involvement in the Arbitration Clause. They did neither. The failure to do either reinforces the conclusion that the parties did not agree to accept Institute administration of any arbitration.

In addition, the position of Bell implies that the parties agreed to accept all revised rules of the Institute, sight unseen and without any opportunity to consider the consequences thereof for any arbitration under the Agreement. While I think it is reasonable to contemplate an agreement of this nature extending to revisions of procedural rules designed to facilitate the conduct of an arbitration, it is unreasonable to expect that the parties in this proceeding would have agreed to be bound by a revision that broadened the scope of the operation of the rules of the Institute. For example, I do not think it is reasonable to conclude that the parties agreed to comply with any revision to the rules that imposed additional costs of arbitration upon the parties without their consent by imposing Institute involvement in respect of any arbitration.

117 Accordingly, the application judge could not find that the parties agreed to be bound by any revisions to, or replacement of, the 1999 Rules beyond changes to procedural rules in the absence of either wording to that effect in the Arbitration Clause or other contextual evidence.

118 In the result, he concluded that as of December 14, 2005, the Arbitration Clause did not require that in order to commence arbitration, a party had to file a "Notice of Request to Arbitrate" with the Institute.

The Issue

119 The Order declared that as of December 14, 2005, the Arbitration Clause did not require a party commencing arbitration under the Alliance Agreement to file a Notice of Request to Arbitrate with the Institute. Thus, the issue on appeal is whether the application judge erred in making that declaration.

120 The application judge was required to interpret the Arbitration Clause in order to reach the conclusion that such notice was not required. Accordingly, the first step in the analysis is to determine what standard of review applies to the application judge's interpretation of art. 22.2.

121 Before turning to the standard of review, however, a preliminary matter needs to be addressed.

A Preliminary Matter

122 In *Dell* at paras. 84-86, the Supreme Court laid down "a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator." The court should "depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law" or a question of mixed law and fact where "the questions of fact require only superficial consideration of the documentary evidence in the record." Further, "[b]efore departing from the general rule of referral, the court must be satisfied that the

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challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding." Thus, "even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process."

123 This court has endorsed a similarly deferential approach that mandates referral to arbitration where it is arguable that a dispute falls within the scope of an arbitration clause: see *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (Ont. C.A.); *Greenfield Ethanol Inc. v. Suncor Energy Products Inc.*, 2007 ONCA 823 (Ont. C.A.), aff'g (Ont. S.C.J.); *Dancap Productions Inc. v. Key Brand Entertainment Inc.* (2009), 246 O.A.C. 226 (Ont. C.A.). Moreover, although the court has concurrent jurisdiction to decide the arbitrability of a dispute under the *Arbitration Act, 1991*, it will construe broadly drafted arbitration clauses generously, "consistent with the legislative policy... which favours arbitration over litigation where the parties so provide by agreement": see *Woolcock v. Bushert* (2004), 246 D.L.R. (4th) 139 (Ont. C.A.), at paras. 23, 25; *Greenfield* at para. 11.

124 In my view, it may well have been preferable had the application judge been asked to refer the whole matter to arbitration, including the dispute regarding the validity of commencement. Such an approach would have been consistent with the parties' agreement in art. 22.2 to have all disputes "arising out of or related to" the Alliance Agreement resolved by arbitration. Further, Bell's stance appears to be a delaying tactic, and, as the decision of my colleague may permanently prevent the arbitration from taking place, it cannot be said that the court proceedings have been "best for the arbitration process". However, the application judge did not refer the issue of commencement to the arbitrator and neither party asked this court to approach the appeal on this basis.

125 Having said that, it is significant that the Order is consonant with the *Dell* principles, set out above, and the jurisprudence of this court. The Order does not state that Plan has commenced arbitration. It simply says that as of the relevant date, it was not necessary to file a notice with the Institute to commence arbitration pursuant to art. 22.2 of the Alliance Agreement. That is, the Order leaves the question of whether Plan commenced arbitration with the arbitrator, just as the jurisprudence urges.

126 I do not see the form of the Order as some kind of happenstance. The Order takes its form from the conscious decision of counsel for both parties to ask the application judge to perform a single task and decide a single question: interpret the Arbitration Clause and determine whether, on December 14, 2005, a party had to file a notice with the Institute to commence arbitration. The parties did not ask the application judge to decide if Plan had commenced the arbitration nor did he decide that question. Consequently, it is open to Bell to raise that matter as an issue once the parties are before the arbitrator.

127 I raise this preliminary matter for a single purpose - it provides an additional reason for dismissing the appeal. If the Order stands, the parties can appear before the arbitrator and have him decide whether Plan commenced the arbitration. That is, the arbitration will be conducted in a way that conforms with the guidance of this court and that of the Supreme Court.

The Standard of Review in Contractual Interpretation

128 I agree with much of what my colleague has said generally in respect of appellate review on matters of contractual interpretation. However, I disagree with the view that the question of contractual interpretation in this appeal attracts a standard of review of correctness. To explain my position, I must recap some of the discussion on the guiding legal

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principles.

The Guiding Legal Principles

129 As my colleague noted, historically, interpretation of a contract was treated as a question of law, reviewable on a standard of correctness. However, *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 (S.C.C.) dictates that a more nuanced approach be taken by reviewing courts. The standard of review in contractual interpretation - as in other types of civil proceedings - depends on the nature of the question that the trial judge decided: was it one of law, fact, or mixed law and fact? Questions of law are reviewable on a standard of correctness. Questions of fact are reviewable on a standard of palpable and overriding error, or the "functional equivalents" of "clearly wrong", "unreasonable" or "not reasonably supported by the evidence": *L. (H.) v. Canada (Attorney General)*, [2005] 1 S.C.R. 401 (S.C.C.), at para. 110. Questions of mixed law and fact, however, lie along a spectrum, with some questions being more akin to questions of law and others being more akin to questions of fact.

130 At para. 36, *Housen* explains the approach that appellate courts are to take when determining the standard of review to apply to a question of mixed law and fact. Such matters

> lie along a spectrum. Where, for instance, an error with respect to a finding of negligence can be attributed to the application of an incorrect standard, a failure to consider a required element of a legal test, or similar error in principle, such an error can be characterized as an error of law, subject to a standard of correctness. 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" and is subject to a more stringent standard. The general rule... is that, where the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be overturned absent palpable and overriding error.

131 While *Housen* is a negligence case, this court recognized in *MacDougall v. MacDougall* (2005), 262 D.L.R. (4th) 120 (Ont. C.A.), that the *Housen* principles inform the standard of review to be applied by appellate courts when reviewing decisions based on the interpretation of contracts.

132 Writing for the court, Lang J.A. explained in *MacDougall* at para. 30, that the trial judge must apply the proper principles of contract interpretation and that a failure to follow such principles is an error of law attracting review on a correctness standard. At para. 31, Lang J.A. states that when the task of interpretation includes consideration of extrinsic evidence or a determination of the factual matrix, the trial judge is making findings of fact or drawing factual inferences. Such findings are not to be overturned except in the case of palpable and overriding error. At para. 32, she states that where the trial judge applies legal principles to the language of the contract in the context of the relevant facts and inferences, he or she is applying law to fact, which is a question of mixed law and fact. Similarly, if the question is an "inextricable intertwining" of law and fact, it is a question of mixed law and fact. Questions of mixed law and fact are to be reviewed in accordance with the principles from *Housen*, quoted above: *MacDougall* at para. 33.

133 Based on *Housen* and in accordance with *MacDougall*, I understand that an appellate court should determine the standard of review in matters of contractual interpretation in the following way. Begin by identifying the nature of the question that the trial judge decided. This first step is extremely important as a mischaracterization of the question can obscure the true issues and alter the applicable standard of review.

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134 If the question is either one of law or fact, the standard of review is straight forward - the former is to be reviewed on a standard of correctness; the latter on a standard of palpable and overriding error or its "functional equivalents".

135 If, however, the question is one of mixed law and fact, the standard of review may be either correctness or palpable and overriding error. To decide which of those standards applies, the appellate court must determine whether the trial judge made an "extricable" error in legal principle in arriving at his or her interpretation. In the area of contractual interpretation, errors in principle include the failure to apply proper principles of contractual interpretation,[13] the application of an incorrect standard,[14] or the failure to consider a required element of a legal test.[15] Such errors constitute errors of law.

136 If an error of law can be identified (*i.e.* extricated), the trial judge's interpretation is subject to review on a standard of correctness. Where, however, the alleged error cannot be extricated from the factual findings, the trial judge's interpretation is to be subjected to a more deferential standard of review. In such cases, appellate courts should review the decision on a standard of palpable and overriding error or its "functional equivalents".

Determining the Standard of Review in Matters of Contractual Interpretation

137 Before determining the standard of review in accordance with these principles, it is useful to recognize that three matters complicate the application of the *Housen* principles to matters of contractual interpretation.

138 First, it can be difficult to determine the nature of the question. For example, in the present case Bell asserts that the contractual interpretation question decided by the application judge is one of law whereas Plan says it is a question of mixed law and fact.

139 Second, if the question is one of mixed law and fact, it is difficult to establish where it lies on the spectrum. A spectrum is not an "either-or" proposition. I do not think it is possible to place a question at a precise point on the spectrum. At most, it appears to me that a question of mixed law and fact can be seen to lie more closely toward one end of the spectrum, rather than the other.

140 In my view, however, *Housen* resolves this second difficulty as it provides that if the trial judge has not made an extricable error of law, the question is to be reviewed on the standard of palpable and overriding error.

141 The third challenge arises from the nature of the task that the trial judge performs when interpreting a contract. When interpreting contracts, trial judges are engaged in the application of settled legal principles - which are designed to give effect to the mutual intentions of the parties - to the contractual provisions. However, the "proper" interpretation often depends, to a greater or lesser extent, on a consideration of the factual matrix and the weighing of evidence. Thus, the very nature of the task performed by the trial judge can make it difficult to determine whether an "extricable" error in law has been committed.

A Deferential Standard of Review is Owed in the Present Case

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142 In my view, the application judge's interpretation of art. 22.2 of the Alliance Agreement is reviewable on a standard of palpable and overriding error or its functional equivalents of clearly wrong, unreasonable or not reasonably supported by the evidence.

143 I reach this conclusion for three reasons. First, the question in this case is one of mixed law and fact. Second, the application judge committed no extricable error of law. Third, there are sound policy reasons for a deferential standard of review in this case.

1. The question is one of mixed law and fact

144 As I have mentioned, the first step in determining the standard of review is to identify the nature of the question that the application judge decided. My colleague treats the question as one of law or, if mixed law and fact, as falling at the correctness end of the spectrum. I do not agree.

145 The reasons of the application judge make it clear that his interpretation of the Arbitration Clause depends on the application of legal principles to the language used by the parties with due consideration for the factual matrix, particularly the facts as he found them to be in 1999 when the Alliance Agreement was entered into. As I explain more fully below, it is not possible to interpret the Arbitration Clause without regard to such factual determinations. Accordingly, the application judge was deciding a question of mixed law and fact.

146 My colleague gives three reasons for viewing the question as one of law or strongly akin to a question of law. The first is that the application judge heard the matter in writing, without oral evidence, and the same written materials are available to this court. However, the law is clear that a first instance judge's findings are to be accorded deference by an appellate court, even when he or she heard no oral evidence: *Equity Waste Management of Canada Corp. v. Halton Hills (Town)* (1997), 35 O.R. (3d) 321 (Ont. C.A.), at pp. 334-35. There are numerous reasons for giving deference to factual findings of trial judges apart from those that arise when the trial judge has heard testimony firsthand and observed witnesses: *Housen* at para. 24.

147 The second reason given by my colleague for holding that a correctness standard applies is that there are no underlying evidentiary or factual issues of a contested nature. This, however, does not necessarily make the question one of law alone. To reiterate, a question of mixed law and fact is one in which the trial judge "applies the legal principles to the language of the contract in the context of the relevant facts and inferences": *MacDougall* at para. 32.

148 In the recent decision of *Dumbrell v. Regional Group of Cos.* (2007), 85 O.R. (3d) 616 (Ont. C.A.), at para. 52, Doherty J.A. explained that contractual interpretation involves the interplay between the words of a contract and the context in which those words were chosen:

> No doubt, the dictionary and grammatical meaning of the words (sometimes called the "plain meaning") used by the parties will be important and often decisive in determining the meaning of the document. However, the former cannot be equated with the latter. The meaning of a document is derived not just from the words used, but from the context or the

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circumstances in which the words were used. Professor John Swan puts it well in *Canadian Contract Law* (Markham, Ont.: Butterworths, 2006) at 493:

> There are a number of inherent features of language that need to be noted. Few, if any words, can be understood apart from their context and no contractual language can be understood without some knowledge of its context and the purpose of the contract. Words, taken individually, have an inherent vagueness that will often require courts to determine their meaning by looking at their context and the expectations that the parties may have had.

149 In the present case, the application judge was called on to interpret the Arbitration Clause within the Alliance Agreement as a whole and in the context of these parties, in the particular circumstances at the time the Alliance Agreement was created, with regard to the expectations the parties had at that time. That is, the application judge was called on to decide a question of mixed law and fact, not one of law alone.

150 The third reason given by my colleague for a correctness standard of review is that the interpretation of a contract is "very much a legal exercise". I agree that interpreting the language of a contract is a legal exercise. That, however, does not change the fact that the application judge was required to interpret art. 22.2 within its unique factual matrix. The application judge did not decide a question of wide or general application nor did he answer a broad jurisdictional question. In fact, he answered a very narrow, discrete question - as of December 2005, did art. 22.2 of the Alliance Agreement require a party to commence arbitration by means of filing a notice with the Institute? Identifying the precise question that the application judge was called on to decide reinforces my view that the true nature of the question is one of mixed law and fact. The question builds into it the factual context, namely, the situation of the parties and their expectations at the time the agreement was entered into.

2. The application judge committed no extricable error of law

151 In interpreting a particular clause of an agreement, the trial judge is engaged in drawing a legal inference as to what the parties intended from the objective standpoint of the law of contract. Such an inference, although a conclusion of law, may be dependent on findings of fact regarding the words of the document and the surrounding circumstances. In such situations, the meaning of the words in the contract cannot be divorced from their context and the factual circumstances in which the agreement was made. That is, it may be inherently difficult to "extricate the legal questions from the factual" in matters of contractual interpretation, just as in negligence: *Housen* at para. 36.

152 This is just such a case. The application judge held that the Arbitration Clause did not require the delivery and filing of a notice of arbitration with the Institute in order to commence the arbitration. In his view, the Arbitration Clause contemplated that after the commencement of arbitration and the appointment of the arbitrator, the arbitrator would apply the Institute's procedural rules, as amended from time to time. The application judge held that the subsequent replacement of the 1999 Rules with the Current Rules could not retroactively change the intention of the parties as of 1999 when the Alliance Agreement was executed.

153 In drawing a legal conclusion as to what the parties mutually intended from the words of the contract and the surrounding circumstances, the application judge was involved in a context-driven inquiry that depended on the weighing of documentary and other evidence, findings of fact and factual inferences. The end result is a legal conclusion that cannot be neatly or easily separated from its factual underpinnings.

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154 Although the application judge did not recite the principles of contractual interpretation when interpreting the Arbitration Clause, he carefully and thoughtfully applied them. He thoroughly dealt with the arguments of both parties and gave cogent reasons for choosing the interpretation advanced by Plan. In so doing, he indicated the principles of contractual interpretation that guided him.

155 On my reading of his reasons, the application judge interpreted art. 22.2 in the context of the whole agreement and the factual matrix. Unlike my colleague, as I explain below, I view the application judge as having given meaning and effect to the requirement in the second sentence of art. 22.2 that the arbitration be conducted under the then-current Institute rules and to the meaning of "file" in the Waiver. In my view, his reasons demonstrate no extricable error of law.

3. Policy reasons favour a deferential approach in this case

156 Since the nature of the question is one of mixed law and fact, in the absence of an extricable error of law, this court should accord deference to the trial judge's interpretation. This conclusion flows from *Housen* and is based on sound judicial policy.

157 Although it may be difficult to identify the nature of the question and the standard of review - particularly where questions of mixed law and fact are involved - *Housen* provides guidance in two ways. First, it grounds the issue of the standard of review in the different roles that trial and appellate courts play. The "primary role of trial courts is to resolve individual disputes based on the facts before them and settled law". The primary role of appellate courts, by contrast, "is to delineate and refine legal rules and ensure their universal application": *Housen* at para. 9.

158 Because of the different roles of trial and appellate courts, the precedential value of the question can be of some relevance in determining its nature and the standard of review. If the question is "apt... to be of much interest to judges and lawyers in the future", or if the dispute is over a "general proposition that might qualify as a principle of law", it is more likely to be a question of law reviewable for correctness: *Housen* at para. 28, citing *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 37. Conversely, where "the matrices of facts at issue... are so particular, indeed so unique" that the decision would not have precedential value, it "draws nigh to being an unqualified question of mixed law and fact" that is generally subject to a more stringent standard, unless the error is traceable to an error in principle that would engage the law-making function of an appellate court: *Housen* at paras. 28, 36-37; *Southam* at para. 37.

159 In the present case, the interpretation of the Arbitration Clause is of little or no precedential value. The dispute regarding art. 22.2 depends on a unique matrix of facts that is particular to two parties to a specific negotiated agreement. Further, there is no identifiable error in legal principle at issue that would engage the law-making function of the appellate court.

160 The second way in which *Housen* provides guidance is that it directs appellate courts to be cautious in finding that a trial judge erred in law in his or her determination of negligence because it is "often difficult to extricate the legal questions from the factual": *Housen* at para. 36. In my view, and for the same reason, this court should be reluctant to find the application judge's interpretation to be attributable to an error of law. As I have explained, the application judge was engaged in the application of settled legal principles to the evidence and the facts of the case. His legal conclusion regarding the parties' intentions is an "inextricable intertwining of fact and law": *MacDougall* at para. 33.

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161 Furthermore, a deferential approach reflects sound judicial policy. In *Bradscot (MCL) Ltd. v. Hamilton-Wentworth Catholic District School Board* (1999), 42 O.R. (3d) 723 (Ont. C.A.), Laskin J.A. deferred to a trial judge's interpretation of a contractual provision that was reasonable (and therefore not "unreasonable"), noting that the appellant had not alleged any error in the application of the relevant legal principles. In my view, this approach is consistent with *Housen*. As discussed above, where the question is one of mixed law and fact and no extricable error in principle has been made, deference should be paid to the trial judge's interpretation of a contractual provision in the absence of palpable and overriding error or an interpretation that is clearly wrong, unreasonable or not reasonably supported by the evidence.

162 In *Bradscot*, Laskin J.A. referred to his earlier decision in *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.). In *Gottardo*, he stated at para. 48:

> Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

163 This passage was quoted with approval by the majority in *Housen* at para. 12 in relation to findings of fact and the drawing of factual inferences. In relation to questions of mixed law and fact, the majority held that "in the absence of a legal error or a palpable and overriding error, a finding of negligence by a trial judge should not be interfered with": *Housen* at para. 31. As the majority explained at para. 32, since both legal and factual inferences

> are intertwined with the weight assigned to the evidence, the numerous policy reasons which support a deferential stance to the trial judge's inferences of fact, also, to a certain extent, support showing deference to the trial judge's inferences of mixed fact and law.

164 In contractual interpretation, as in negligence, it can be inherently difficult to extricate the legal questions from the factual. Owing to the fact-sensitive nature of the inquiry - ascertaining the parties mutual and objective intentions - courts frequently make conclusions regarding the "proper interpretation" of a contractual provision without directly applying the interpretive principles or canons of construction. Conclusions as to the "proper interpretation" of a contractual clause summarily express conclusions of law as to what the parties are objectively taken to have intended based on a set of facts. In these situations, as I have said, the interpretation of a contract is a question of mixed law and fact.

165 While courts express opinions on the "proper interpretation" of a contract, there may be more than one reasonable interpretation. It is not uncommon, for instance, for various guidelines or canons of construction to point in different directions on a set of facts and for different courts to reach different conclusions regarding the interpretation of a particular clause.

166 Accordingly, a deferential approach to the application judge's interpretation of a contract, given the absence of an identifiable error of law, is grounded in sound judicial policy and consistent with the guidelines laid down by the Supreme Court in *Housen*.

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Interpreting the Arbitration Clause

167 The application judge's interpretation of the Arbitration Clause underlies the Order. If his interpretation is reviewed on a palpable and overriding error standard, I see no basis on which to interfere with it. He made no extricable error in legal principle and his interpretation is not "plainly unreasonable". While one might reasonably interpret the Arbitration Clause other than as the application judge did, that is a function of its wording and does not make the application judge's interpretation unreasonable.

168 In any event, however, as I have said, in my view, the application judge was correct in finding that a party did not have to file a notice with the Institute in order to commence arbitration. I reach that conclusion based on the following chain of reasoning:

1. The Arbitration Clause does not specify how arbitration is to be commenced;

2. The Arbitration Clause does specify that the arbitration will be conducted in accordance with the *Arbitration Act, 1991* and the then-current Institute rules;

3. Article 24.6 of the Alliance Agreement says that Ontario law governs;

4. In 1999, when the Alliance Agreement was executed and at the time of the dispute in 2005, the *Arbitration Act, 1991* was the Ontario law that applied to the Alliance Agreement;

5. Section 23(1) of the *Arbitration Act, 1991* reads as follows: An arbitration may be commenced in any way recognized by law, including the following:

> 1. A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement.
>
> 2. If the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party serves notice to exercise that power on the person and serves a copy of the notice on the other parties.
>
> 3. *A party serves on the other parties a notice demanding arbitration under the agreement.*
>
> [Emphasis added.]

6. Thus, as the application judge held, in 2005, the Arbitration Clause did not require a party commencing arbitration in respect of a dispute under the Alliance Agreement to file a notice of request to arbitrate with the Institute. It appears from s. 23 of the Act that filing such a notice would have been an acceptable way of commencing arbitration, just as was the method chosen by Plan (*i.e.* service on Bell of a notice demanding arbitration under the agreement);

7. The Waiver does not detract from this reasoning;

8. This reasoning promotes a result that is reasonable, fair and sensible.

169 Below, I explain how I arrive at the foregoing reasoning. Before doing so, I make the following observations about the principles that guide the courts when interpreting contracts.

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The Principles that Guide Contractual Interpretation

170 The primary goal when interpreting a contract is to give effect to the intention of the parties. There is no need to repeat the general principles of contractual interpretation which assist in achieving that goal as they are well set out in the reasons of the majority. However, the following quotation from *Consolidated-Bathurst Export Ltd. c. Mutual Boiler & Machinery Insurance Co.* (1979), [1980] 1 S.C.R. 888 (S.C.C.), at p. 901 provides useful guidance:

> *[T]he normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract.* Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. *Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties.* Similarly, an interpretation which defeats the intention of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.
>
> [Emphasis added.]

171 What, then, was the true intent of the parties in February 1999 when they entered into the Alliance Agreement? Did they intend that if a dispute arose between them that could not be resolved through good faith discussions, the party with the claim could commence arbitration in only one way, namely, by complying with the Institute's rules for commencement of arbitration? I turn now to the analysis which leads me to conclude that the answer to that question is "no".

Article 22

172 The Arbitration Clause does not stand alone - it is but one part of art. 22. Article 22 establishes a two-step process for dispute resolution. Given that art. 22.2 governs the second step in a two-step dispute resolution process, the first of which is contained in art. 22.1, both logic and the guiding principles of contractual interpretation dictate that article 22 be considered as a whole.

173 Article 22 reflects the parties' shared intention to resolve disputes quickly, cooperatively and without recourse to the courts. The first step in the dispute resolution process is laid out in art. 22.1. Pursuant to art. 22.1(a), a party who considers a dispute to exist must provide a designated representative of the other party with written notice to that effect. Within 10 days of the date of the notice, designated representatives of both parties must make commercially reasonable efforts, in good faith, to resolve the dispute. If the dispute is not resolved within 10 days, pursuant to art. 22.1(b) the dispute "shall" be referred to other designated persons in the two organizations (the "second tier"). Within a further 10 days, the second tier must again make commercially reasonable efforts, in good faith, to resolve the dispute.

174 It is worthy of note that while art. 22.1(a) makes it clear how the dispute resolution process is to be commenced (*i.e.* by written notice delivered by the party alleging the dispute to a designated representative of the other party), art. 22.1(b) does not indicate how the dispute is to be referred to the second tier should the initial good faith discussions fail to resolve the dispute. That is, it says nothing about how to commence the second tier discussions.

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175 If the dispute is unresolved through the good faith efforts required by art. 22.1, the parties move to the second step of the dispute resolution process. Art. 22.2 governs the second step; it states that the parties "will settle by arbitration" any disputes unresolved through the first step. It goes on to stipulate that a single arbitrator, selected by the parties from a panel of persons knowledgeable in business information and the construction industry, will conduct the arbitration in Toronto in accordance with the *Arbitration Act, 1991* and the then-current rules of the Institute. Failure to file a notice of arbitration within 12 months "after the occurrences supporting a claim" constitutes an irrevocable waiver of that claim.

176 Three things are immediately apparent on reading art. 22.2. First, it says nothing expressly about how arbitration is to be commenced. In that regard, it stands in sharp contrast with art. 22.1(a) which, as has been noted, spells out the requirements for commencing the dispute resolution process.

177 Second, while art. 22.2 is silent on how the arbitration is to be commenced, as already indicated, a number of other aspects of the arbitration process are specified.

178 Third, the Waiver is in the last sentence of art. 22.2 and it says nothing expressly about commencement of arbitration. That makes sense. The Waiver, on which more is said below, is an important provision which affects substantive rights. How a party commences arbitration is a procedural matter.

How is arbitration to be commenced under art. 22.2?

179 I return to the question which lies at the heart of this appeal. In February 1999, when the parties entered into the Alliance Agreement, did they intend that arbitration could be commenced by only one method, namely, in accordance with the then-current Institute rules?

180 Art. 22.2 does not say that and, with respect, there is no basis on which to imply such an intention. What is clear is this: the parties intended that if the good faith efforts called for by art. 22.1 failed to resolve the dispute, the matter would go to arbitration. How was the arbitration to be commenced? In the absence of any specified manner, I see no reason why the Arbitration Clause must be interpreted so as to permit a party to commence arbitration by one method only, namely, compliance with the Institute rules. The parties to the Alliance Agreement are sophisticated, experienced businesses. Legal counsel assisted in the drafting of the agreement. Had they intended to stipulate a single method by which to commence the arbitration process, that matter would have been specified, just as the method for commencement of the first step in the process in art. 22.1 is specified and just as so many other aspects of the arbitration process are specified.

181 Moreover, art. 24.6 of the Alliance Agreement provides that it is to be governed and construed in accordance with Ontario law.[16] Accordingly, in 1999, when the parties entered into the Alliance Agreement, the *Arbitration Act, 1991* applied to the agreement. Section 2(1) of the *Arbitration Act, 1991* provides that, subject to exceptions that do not apply in this case, the Act applies to arbitrations conducted under an arbitration agreement. "[A]rbitration agreement" is defined as "an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them". Clearly, art. 22.2 is such an agreement. Thus, as I have said, the *Arbitration Act, 1991* applied to art. 22.2.

182 Consequently, I see the true intention of the parties - as expressed in the Arbitration Clause - to be that arbitration

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could be commenced "in any way recognized by [Ontario] law". Thereafter, the parties would select an arbitrator with the specified background who would conduct the arbitration in accordance with the Act and the Institute rules, as amended.

183 This interpretation is consistent with the flow and structure of art. 22. As has been noted, the method for commencing the dispute resolution process itself is spelt out in art. 22.1(a) but, thereafter, nothing is specified in terms of how notice should be given to move the dispute resolution forward. Art. 22.1(b) says nothing as to how the dispute is to be placed before the second tier, should the initial good faith discussions fail. Similarly, art. 22.2 says nothing as to how to commence arbitration should both tiers of the good faith discussions fail. This suggests that the parties' intention was that once the dispute resolution process was commenced, they would co-operate in seeing it through to settlement.

184 It is also consistent with the Alliance Agreement as a whole. Under the terms of the Alliance Agreement, Bell and Plan agreed to work collaboratively and cooperatively. The Alliance Agreement is not a standard form contract, nor is it a contract in which one party provides goods or services and the other pays for them. It is not a detailed agreement. Rather, it sets out the parties respective rights and obligations in broad terms to create a unique arrangement in which the parties agree to work together to deliver expensive, complicated, technical electrical cabling projects.

185 The parties' agreement to extensive levels of co-operation in all aspects of the joint venture is evident throughout the Alliance Agreement, beginning with the preambles in which the parties recognize that each has unique capabilities and express the desire to cooperate in providing their services on cabling projects. In art. 2, the parties agree to coordinate their marketing efforts in respect of existing and new customers and to collaborate in pursuing business opportunities. In art. 3, Plan agrees to refer to Bell all of its cabling project customers in the region and Bell agrees to use Plan to provide customer services to all of its customers in the region. In arts. 8 and 9, the parties agree to provide one another with all training necessary to support customer inquiries in respect of deliverables. The parties also agree to forego any other similar types of alliance agreements in the region and to work together on all new cabling projects.

186 In short, within the structure created by the Alliance Agreement, co-operation between the parties is the hallmark. Similarly, the interpretation I offer for how arbitration is to be commenced relies on the parties' co-operation, within the agreed-on structure provided by art. 22.

187 Furthermore, the factual matrix supports this interpretation. The parties had been working together in a co-operative fashion. As has been mentioned, they were sophisticated, experienced business people working with legal counsel. Their whole approach - both from a legal and a business perspective - was to set out, in broad strokes, that which they wished to accomplish and then co-operate in seeing the matter through to fruition.

188 The interpretation given by my colleague is restrictive and technical - arbitration can be commenced in only one way, by filing a notice with the Institute. In my view, for the reasons already given, such an interpretation is not consistent with the flow and structure of the overall dispute resolution process in art. 22, with the Alliance Agreement as a whole or the factual matrix.

189 Furthermore, the interpretation adopted by my colleague relies heavily on the statement in art. 22.2 that the arbitration is to be conducted under the Institute's rules. There are two responses to this. First, recall that the sole reference to the Institute in art. 22.2 is in the second sentence, which provides that the arbitrator "will conduct the arbitration under the

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Arbitration Act, 1991 (Ontario) and the then-current rules of the... Institute". One cannot conduct an arbitration unless it has been commenced. Thus, on a plain reading, art. 22.2 says that the Institute rules are to apply to the conduct of the arbitration, not to its commencement.

190 Second, and in any event, even if "conduct" of the arbitration is taken to include its commencement, I see no reason to constrain it to include commencement only by compliance with the Institute rules. That is not what art. 22.2 says. Art. 22.2 says that the arbitrator is to conduct the arbitration under both the *Arbitration Act, 1991* and the Institute rules. Both contain rules for the commencement of arbitration. There is nothing in the wording of art. 22.2 to suggest that the Institute's rules are to govern commencement. Indeed, there is force to the argument that as art. 22.2 refers to the *Arbitration Act, 1991* before the Institute rules, the parties' evinced an intention that the rules set out in the *Arbitration Act, 1991* are to govern commencement of arbitration.

191 Nor do I see *Spectra Innovations Inc. v. Mitel Corp.*, [1999] O.J. No. 1870 (Ont. S.C.J.) as supportive of the interpretation advanced by my colleague. The wording of the clause in *Spectra* is materially different than the Arbitration Clause. The clause in *Spectra* provided that the arbitration tribunal should determine the matter "*acting in accordance with the Rules [of the ICC]*" (emphasis added). However, the Arbitration Clause stipulates that the arbitrator "will *conduct* the arbitration *under the Arbitration Act, 1991* (Ontario) and the then-current [Institute rules]" (emphasis added).

192 Moreover, as the application judge noted at para. 41 of his reasons:

> While the arbitration clause in *Spectra* also addresses the appointment of the arbitrator by the parties (in this case, an arbitration board), it does not refer to compliance with the applicable rules in the context of the conduct of the arbitration by the arbitrator so appointed. This difference points to a specific intention in the Arbitration Clause that the arbitrator, once appointed, would be required to apply the procedural rules in the Act and in the rules of the Institute, as in effect from time to time, rather than to a more general intention that the Institute was to administer all aspects of the arbitration, as was held to be the case in *Spectra*. Accordingly, rather than supporting the interpretation of the Arbitration Agreement proposed by Bell, I think that the decision in *Spectra* actually supports the interpretation of Plan by identifying the unique feature of the Arbitration Clause that distinguishes it from clauses that would contemplate the administrative involvement of the Institute.

193 Further, in *Spectra*, the court relied on the factual matrix in interpreting the clause. After observing that the applicant was based in Singapore, the respondent was based in Ontario and the agreement concerned the supply of product in India, the court in *Spectra* concluded at para. 17:

> ...The I.C.C. court which was founded in Paris in 1923, has a long-standing reputation as one of the leading institutions for arbitration of international commercial disputes. *In this context*, it would be altogether logical that the parties would want to resolve any dispute by setting up an arbitration board acting in accordance with the Rules of conciliation and arbitration of the I.C.C.
>
> [Emphasis added.]

194 No such inter-jurisdictional commercial considerations operate in the case at bar, in which all aspects of the business arrangement take place in Ontario and the parties have expressly chosen to have their agreement governed by Ontario law.

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195 Finally, the Waiver is an exclusionary provision which warrants strict interpretation as its operation affects substantive rights. In contrast, the clause in *Spectra* dealt with matters of mere procedure.

The Waiver

196 The Waiver is the mechanism chosen by the parties to ensure that claims under the Alliance Agreement are dealt with in a timely fashion - file a notice of arbitration within 12 months of the occurrences which support a claim or the claim is to be treated as irrevocably waived.

197 Bell contends that the Waiver dictates that arbitration could have been commenced in only one way - by filing a notice with the Institute. It says that the word "file" in the Waiver must mean to file with the Institute and, as the Notice was not filed and issued through the Institute, Plan's claim is extinguished. In large measure, my colleague accepts that contention by interpreting the word "file" in the Waiver as a crucial indicator of the parties' intention that the Institute rules were to govern the commencement of arbitration.

198 With respect, I see the Waiver to be of little significance in determining whether the arbitration has been commenced.

199 "Waiver" of a claim and "commencement" of arbitration are not synonymous. The Waiver may be a defence to be raised in the arbitration but it does not dictate whether and how the arbitration is to be commenced.

200 Similarly, I see no reason to adopt an unnecessarily restrictive meaning of "file". "File" is not a defined term in the Alliance Agreement. As the parties intended that disputes would be resolved without recourse to the courts, it does not make sense to ascribe to that word a narrow, strictly legal meaning. Where the parties wanted to closely circumscribe some aspect of the dispute resolution process they did so - good faith discussions were to be conducted within 10 days of the date of the notice of dispute, the arbitration was to be in Toronto, the arbitrator was to be selected from a panel of persons with a particular background and so on.

201 Further, the broader dictionary meaning of "file" includes delivery and receipt and to do that which is necessary to commence a legal proceeding. The common meaning of "file" includes "actual delivery" to the recipient (as opposed to simply mailing) or to initiate proceedings by proper formal procedure. For example, *The Canadian Dictionary of Law*, 3d ed. defines "file" as follows:

> **File.** v. 1. To leave with the appropriate office for keeping. 2. Register. 3. Requires actual delivery. A mailed document is not filed until received by the other party.

202 These broad meanings of "file" are consistent with the commencement of arbitration under s. 23 of the *Arbitration Act, 1991*.

203 To the extent that there is ambiguity in the Waiver, as it is an exclusionary provision, it ought to be construed strictly

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against the forfeiture of legal rights. This principle of interpretation is particularly apt in the present case where Plan sought to commence arbitration in a manner which complied with a plain reading of the Arbitration Clause and with the express purpose of protecting its rights and Bell raised no objection to the form of the purported commencement of arbitration until many months later. The broader interpretation advanced here recognizes commencement of arbitration by any means allowable in law and would not work an injustice by causing the loss of rights.

204 I do not intend to suggest that the Waiver is irrelevant or unimportant. To the contrary. On its own, the Waiver is important as it is the mechanism that the parties chose to ensure that claims would be raised in a timely fashion. Furthermore, if this matter were permitted to proceed to arbitration, as I have mentioned, it raises a significant issue for the arbitrator to decide.

The result is reasonable, fair and commercially sensible

205 In the quotation from *Consolidated Bathurst* set out above, the Supreme Court states that where a provision admits of more than one construction, the court should choose the one which produces a result that is more reasonable, fair and commercially sensible.

206 The result, on the interpretation advanced above, is that Plan may assert that it commenced arbitration on December 12, 2005, when it delivered to Bell the Notice pursuant to s. 23 of the *Arbitration Act, 1991*, if not earlier. That matter, however, remains to be determined by the arbitrator. I say that because, as I have already explained, the Order does not declare that Plan has commenced arbitration and, if so, on what date. By answering the question in the manner in which the parties had framed it (*i.e.* in the negative), the application judge left the question of when Plan commenced arbitration, if at all, to be determined by the arbitrator.

207 In my view, this result is reasonable, fair and commercially sensible.

208 When parties have agreed that disputes are to be settled by arbitration and that the *Arbitration Act, 1999* applies, it is reasonable for the parties to follow the provisions of that legislation regarding commencement of arbitration.

209 Moreover, this interpretation promotes a fair result as it would permit the arbitration to proceed while leaving it to the parties to pursue the issues of both commencement and operation of the Waiver before the arbitrator.

210 There is no commercial necessity that would augur in favour of excluding the operation of s. 23 of the *Arbitration Act, 1991*.

211 No commercial injustice arises from this interpretation. Bell was given ample notice of Plan's intention to take its claim to arbitration. It took advantage of that notice by demanding extensive particulars in respect of the claim. Moreover, Bell was manifestly aware of all the elements of a notice of request to arbitrate under the Institute's then-current rules.

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212 There is no evidence that Bell would suffer any prejudice from this interpretation of the Arbitration Clause. Instead, the evidence suggests opportunism on the part of Bell. It seeks - very late in the day - to invoke the Waiver on grounds that are entirely formalistic in nature. Plan delivered the Draft Notice to Bell on August 26, 2005, when it initiated the good faith discussions required by art. 22.1(a). Bell raised no objection then to the fact that the Draft Notice was made under the *Arbitration Act, 1991* instead of the Institute rules. Nor did it suggest that such a notice would not be adequate to preserve Plan's rights with respect to the Waiver. It raised the Waiver, but only to suggest that Plan's claim was out of time as the occurrences on which it was based had taken place over 12 months previously.

213 In the context of good faith discussions, Bell should have raised this objection at that time, if it were genuine. At the very least, if no objection were raised when the Draft Notice was delivered, Bell should have raised its concerns when the Notice was delivered on December 12, 2005. Instead, Bell remained silent on this issue, demanded further particulars and suggested that the good faith discussions might continue.

214 In summary, interpreting the Arbitration Clause to allow commencement of arbitration in any manner recognized by s. 23 of the *Arbitration Act, 1991* - which would include the Institute rules as well as delivery of a notice demanding arbitration - meets the reasonable expectations of the parties, reflects their intention as expressed in the Alliance Agreement in 1999 when they executed the agreement, and produces a result that is reasonable, fair and commercially sensible.

Disposition

215 Accordingly, I would dismiss the appeal with costs to the respondents fixed at $20,000, inclusive of disbursements and G.S.T.

Appeal allowed.

Footnotes

1 This appears to be a mistake. The reference should be to Section 22.1.

2 I have italicized the two provisions in the Agreement that are central to the appeal.

3 "Application" here is used in the sense of "motion". See *Buck Bros., infra*, at p. 1000.

4 See e.g. *Petty v. Telus Corp.* (2002), 164 B.C.A.C. 152 (B.C. C.A.); *IWA - Forest Industry Pension Plan (Trustees of) v. Aspen Planers Ltd.* (2006), 56 B.C.L.R. (4th) 1 (B.C. C.A.); *A.L. Sott Financial (FIR) Inc. v. PDF Training Inc.* (2008), 77 B.C.L.R. (4th) 154 (B.C. C.A.).

5 See e.g. *Double N Earthmovers Ltd. v. Edmonton (City)* (2005), 363 A.R. 201 (Alta. C.A.), aff'd [2007] 1 S.C.R. 116 (S.C.C.); *Western Irrigation District v. Alberta* (2002), 312 A.R. 358 (Alta. C.A.); *Dreco Energy Services Ltd. v. Wenzel* (2008), 440 A.R. 273 (Alta. C.A.); *942925 Alberta Ltd. v. Thompson* (2008), 432 A.R. 177 (Alta. C.A.).

6 See e.g. *Pharmacie Acadienne de Beresford Ltée v. Beresford Shopping Centre Ltd./Ltée* (2008), 328 N.B.R. (2d) 205 (N.B. C.A.), at para. 16; *Ryan v. Sun Life Assurance Co. of Canada* (2005), 230 N.S.R. (2d) 132 (N.S. C.A.), at para. 15; *White v. E.B.F. Manufacturing Ltd.* (2005), 239 N.S.R. (2d) 270 (N.S. C.A.), at para. 16; *United Gulf Developments Ltd. v. Iskandar* (2008), 267 N.S.R. (2d) 318 (N.S. C.A.), at para. 5.

7 This appears to be a mistake. The reference should be to Section 22.1.

8 That it was ultimately not renewed is immaterial.

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9 The latter caveat has no relevance to the case at bar.

10 See also, *The Canadian Oxford Dictionary*, 2d ed., *s.v.* "file" and "deliver"; *Black's Law Dictionary*, 8th ed. *s.v.* "file" and "deliver".

11 The Facts Are Taken Largely from the Notice Demanding Arbitration Prepared by Plan.

12 It can be found at para. 107 below.

13 *MacDougall* at para. 30.

14 *Housen* at para. 36. Although stated to be an example of an extricable error in the negligence context, I see no reason that it ought not to apply equally to contractual interpretation.

15 *Ibid.*

16 Article 24.6 provides: *Governing Law.* This Agreement shall be governed and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable therein. The Parties hereby attorn to the non-exclusive jurisdiction of the Courts of Ontario.

End of Document

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