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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	**APPEARANCES:**
CHRISTIE BUILDING HOLDING COMPANY, LIMITED,	JANET I. JARDINE CHARLOTTE MEEK
applicant,	
- and -	
SHELTER CANADIAN PROPERTIES LIMITED,	GRANT A. STEFANSON CURTIS G. PARKER
respondent.	
	Judgment delivered April 7, 2021

JOYAL C.J.Q.B.

INTRODUCTION

[1] What constitutes "the record" for the purposes of a party's applications for leave to appeal the awards of an arbitrator where the parties have chosen to not create an evidentiary record? If, in the circumstances, the record is something other than the written decisions of the arbitrator, what ought it to include?

[2] The above questions are those that this court is required to address in the context of its case management of what continues to be a highly contentious

commercial dispute where one of the parties now seeks leave to appeal the Award of the arbitrator dated June 17, 2020 and the Supplemental Award connected to the issues of costs and interest dated August 27, 2020 (the "Awards").

[3] The applicant, Christie Building Holding Company, Limited ("Christie") filed two notices of application seeking leave to appeal both the Award (June 17, 2020) and the Supplemental Award (August 27, 2020).

[4] The president of Christie, Hartley David Klapman, swore an affidavit in support of the applications for leave to appeal the Awards. In an effort to address the matter of the record for the eventual leave applications, Klapman attached to his affidavit, amongst other things, a copy of Christie's written argument to the arbitrator. Also attached were various agreements that Christie entered into with the architects, engineers and contractors relating to the design and construction of the disputed project along with a set of "key documents" consisting of 136 documents (to which the court is left to presume reference was made during the course of the arbitration proceeding even if they were not marked as exhibits). By Christie's own admission, this does not represent all of the evidence that was before the arbitrator, only those portions that Christie referred to the arbitrator for the purposes of Christie's argument.

[5] Also appended to Mr. Klapman's affidavit is a 219-page document prepared by Christie's legal counsel purporting to be a verbatim transcription of some questions asked and answers given during the direct and cross-examinations of some of the witnesses who testified during the arbitration proceedings. Needless to say, as it relates to this 219-page document, but separate and apart from its other vehement

objections which I address below, Shelter Canadian Properties Limited ("Shelter") raises concerns that only those questions and answers (and documents) that Christie considers favourable to its case have been included in the attachments to Klapman's affidavit.

[6] Unlike the position of Shelter, it is Christie's submission that the record is not restricted to the reasons provided by the arbitrator. Instead, says Christie, the record should also include the written arguments of the parties and the evidence in support of its argument that were before the arbitrator for the purposes of reaching his decision.

[7] It is Christie's position that given that leave to appeal can be granted only on a question of law alone, the record as presented by Mr. Klapman and the attachments to his affidavit (and presumably any similarly selected filings to be provided by Shelter) are appropriate as the requisite analysis could not otherwise be conducted on the basis of the arbitrator's decisions alone. It is Christie's contention that because questions of law may include findings for which there is no evidence (or findings for which the arbitrator failed to consider all of the relevant evidence), without the ability to review the evidence that was before the arbitrator, it would be impossible for Christie to receive a fair hearing on either the leave applications or on any eventual appeal.

[8] Christie also invokes the landmark Supreme Court of Canada judgment in ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65 ("***Vavilov***") despite the case's origin in the area of administrative law and judicial review. Christie insists that now, as a result of ***Vavilov***, for any statutory appeal of

an arbitration decision, the standard of review in respect of both the applications for leave and the appeal proper, is one of correctness. Christie says this in turn implies a need for a more expansive record for the purposes of the requisite review of the appellate grounds that Christie has pled.

[9] Shelter, for its part, strenuously opposes Christie's approach to recreating a record. More specifically, it is Shelter's position that the answer to the question of "what constitutes a permissible record of the arbitration for the purposes of the application for leave to appeal" should be neither dictated nor shaped by the grounds of appeal raised by Christie in its notices of application for leave. Rejecting Christie's interpretation of ***Vavilov*** and its application to this case, Shelter instead urges this court to remain mindful of the Supreme Court of Canada's more applicable, still recent and repeated direction that the scope of appellate intervention in commercial arbitration is narrow. That is particularly so says Shelter given that this court's jurisdiction is limited to a question of law, and given the decision in ***Sattva Capital Corp. v. Creston Moly Corp.***[1], which acknowledges that even where jurisdiction exists, the deferential standard of reasonableness almost always applies to arbitration awards. It is against this backdrop that Shelter takes its position in respect of what constitutes the record for the purposes of Christie's leave applications and any eventual appeal. Put simply, it is Shelter's position that the record should be limited to the Awards and the accompanying reasons for decision.

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[1] 2014 SCC 53, at para. 75; and also, ***Teal Cedar Products Ltd. v. British Columbia***, 2017 SCC 32, at para. 1.

[10] Shelter insists that an evidentiary record of the arbitration proceeding was not created by design. Shelter argues that to now try to reconstruct a record after the fact — as Christie and Mr. Klapman attempt to do — risks creating a situation which, from a practical perspective, would not only be impossible and extraordinarily expensive, but it would also invite a rehearing of all of the issues that were decided by the arbitrator thereby unjustifiably compromising the finality that the parties presumably wished to obtain in the arbitration process.

[11] For the reasons that follow, I have rejected Christie's position that the record for the purposes of the leave applications and any eventual appeal should include all of that which is attached to the affidavit of Hartley Klapman. Instead, it is my view that the record of the arbitration proceedings should be limited to the five exhibits that were so marked at the arbitration proceedings and the "arbitration record" (so entitled at the arbitration) which consists of the pleadings. As well, the record will consist of the reasons for decision accompanying the arbitrator's Awards.

FACTUAL BACKGROUND

[12] A dispute arose between the parties in respect of a Development Agreement that they entered into in February 2012.

[13] This was a complex and extremely contentious commercial dispute that the parties agreed to resolve by private, final and binding arbitration. In accordance with section 16 of the Development Agreement, the arbitrator was selected on the basis of his knowledge and experience with the heavy/major buildings construction industry in Manitoba. By design, the Arbitration Agreement contained no right of appeal.

[14] The arbitration proceedings spanned over the course of 43 days between May 29, 2019 and January 29, 2020. The arbitrator was faced with the difficult task of resolving a multitude of highly contentious issues. The claims of Christie touched upon virtually every facet of a development project that had unfolded over more than seven years. Allegations of fraud, deceit, breach of fiduciary duties and bad faith had been made against Shelter. In turn, Shelter claimed more than $2 million in damages against Christie for the wrongful termination of a long-term property management agreement.

[15] To resolve these issues, the arbitrator heard and considered *viva voce* evidence from seven fact witnesses and two expert witnesses. Using electronic means, reference was made to an estimated 1,500 – 2,000 documents (e.g., emails, letters, agreements, notices, reports, schedules, etc.) over the course of the arbitration proceedings.

[16] During the arbitration, in almost every instance when a document was displayed on a television screen, the witness would comment and elaborate upon, and provide important context to, the document in question. A number of admissions were made by Christie's fact witnesses while under cross-examination, which led to adverse findings against Christie and its principal, Mr. Klapman (see for example, paragraphs 216, 217, 347, 357, 366, 384, 390 and 480 of the Award).

[17] Printed copies of the documents referenced during the proceedings were later provided to the arbitrator in advance of closing arguments, but these documents were not marked as exhibits. A complete record of the documents referenced during the

proceedings therefore was not created, and does not exist, apart from what might be recorded in the collections of notes made by the arbitrator and legal counsel.

[18] Only five documents referenced during the proceedings were marked as exhibits (two expert reports, a transcript of a cross-examination on an affidavit, a document describing actuarial standards of practice and correspondence from the City of Winnipeg on a specific and discrete issue).

[19] At the request of the arbitrator, an "Arbitration Record" was prepared at the commencement of the proceedings and, by agreement, consisted of only the pleadings.

[20] Of significance to the issue now before this court is that the parties intentionally did not create an official transcription or record of the proceedings, it being the intent of the parties that the arbitration would remain private as between them and proceed without that added expense.

[21] In the weeks leading up to the commencement of the arbitration, the parties turned their minds to the issue of whether the proceedings should be recorded in some form for the benefit of counsel. It was thought that portions of the recordings could be useful to counsel for preparing their closing arguments. It was agreed that a digital audio recording would be made for each day of the proceedings with the assistance of staff at the Delta Hotel. At the end of each day, counsel were provided with a USB drive containing the recording for that day. The arbitrator was not provided with the digital files and, consequently, he did not review them as part of his deliberations. In total, approximately 250 hours of recordings exist on over 40 USB drives.

[22] While select portions of the recordings were typed out by the parties' legal counsel and the notes were provided to the arbitrator as part of their closing arguments, this was done simply as a means of reminding the arbitrator what the parties believed a witness had said on a particular subject.

[23] Neither party purported that they were providing the arbitrator with a complete and accurate transcription of the proceedings, nor could they as it would have been inappropriate to do so. As neither of the Awards make any reference to the notes counsel had provided to the arbitrator during the course of closing arguments, it is unknown what use, if any, the arbitrator made of those notes.

[24] On June 17, 2020, the arbitrator released a written decision totaling 84 pages in which he detailed his findings, analysis and conclusion in respect of every issue between the parties (except for costs and interest), with reference to *viva voce* evidence, documents, exhibits and relevant legal authorities.

[25] It is apparent and, indeed, expressly stated in the decision, that the arbitrator's findings and assessment of the evidence turned on the credibility and reliability of the witnesses. At paragraph 496 of the decision, the arbitrator concluded that "generally speaking, [he] found Mr. Klapman to be unreliable in much of his testimony", a finding that cannot be disturbed on an appeal limited to a question of law.

[26] Despite his not having made reference to it in the decision, the arbitrator also assured the parties that he had considered "all of the lengthy *viva voce* and voluminous documentary evidence" in arriving at the Award (Award, at paragraph 503).

[27] The reasons for decision are properly described as detailed, comprehensive and analytical.

[28] Following further written submissions and argument, on September 1, 2020, the arbitrator released a Supplemental Award resolving the issues of costs and interest, with an accompanying 21-page decision detailing his rationale for awarding elevated costs and pre-judgment interest to Shelter.

[29] The Awards were favourable in virtually every respect to the positions taken by Shelter.

[30] The Awards are final, and the only avenue for appeal is via ***The Arbitration Act***, C.C.S.M. c. A120, which requires leave of this court and only on a question of law, and only where Christie has met the statutory test set out in s. 44(2).

ANALYSIS

[31] In the analysis below, I focus upon the following:

1) How the choice to proceed at the arbitration hearing without creating or preserving an evidentiary record now leaves the parties without any such evidentiary record.

2) Absent an obvious evidentiary record, how are Christie's leave applications to be decided?

3) How, if at all, does the Supreme Court of Canada's judgment in ***Vavilov*** change the standard of review on appeals taken from arbitration decisions and if there is a resulting change, does it affect this court's decision respecting the appropriate record for Christie's leave

applications and any eventual appeal?

[32] As earlier noted, Christie seeks to put forward a "record" for its leave applications by attaching to the Klapman affidavit, amongst other things, a copy of its written argument (submitted to the arbitrator), various agreements Christie entered into with architects, engineers and contractors relating to the design and construction of the project and as well, a set of "key documents" consisting of 136 documents (presumably referred to during the course of the arbitration proceeding but not marked as exhibits). In addition, there is the earlier identified 219-page document prepared by Christie's legal counsel purporting to be a verbatim transcription of some questions asked and answers given during the direct and cross-examinations of some of the witnesses who testified during the arbitration proceedings.

[33] The key objectives of private commercial arbitration are efficiency and finality. Not surprisingly, the consequent scope of appellate intervention in commercial arbitration is comparatively narrow, limited as it is to a question of law. This limited scope for appellate intervention is seen to serve well the objectives of efficiency and finality and it is the antithesis to an invitation to a rehearing of the dispute (see ***Sattva***, at paragraph 75; ***Teal Cedar Products Ltd.***, at paragraph 1; and ***Wolfe et al. v. Taylor et al.; Fat Cat Farms Ltd. et al. v. Wolfe et al.***, 2017 MBCA 74, at paragraph 74).

[34] In considering to what extent this court should participate in an effort to create or reconstruct a record for the purpose of Christie's leave applications in a situation where the parties themselves specifically chose not to create an expansive evidentiary

record at the arbitration, the court is well to keep in mind these and other relevant jurisprudential reference points which are meant to remind a reviewing court to guard against a *de facto* rehearing of the dispute.

The choice to proceed at the arbitration hearing without creating or preserving an evidentiary record, now leaves the parties without any such evidentiary record.

[35] In the present case, the parties appear to have made two decisions in respect of the procedure followed at the arbitration. As Shelter has argued, those decisions have consequences, unintended or not, to the scope of any future appeal proceedings. The first decision was to not have a court reporter attend the hearing and prepare a transcript. The second decision was to not mark documents as exhibits and instead proceed informally by displaying them on a television screen and providing printed copies to the arbitrator at a later date, with each side then accepting that the other side was providing to the arbitrator only documents to which specific reference was made.

[36] Shelter emphasizes that these decisions were made consistent with the characteristics of commercial arbitrations and the need for efficiency, cost effectiveness, confidentiality and finality. Shelter adds, however, that once these decisions were made, "the parties effectively crossed the Rubicon and can't cross back". In that respect, it is the position of Shelter that there is a consequence to proceeding in this manner (creating no official evidentiary record) for a 43-day arbitration, and it is now not open to either party to tender a selective and disputed evidentiary record and then to "task an appellate court with reviewing a decision for

errors of law that necessarily require a review of a complete evidentiary record". I agree.

[37] By attempting to file the Klapman affidavit that it has, and when I review much of its attached materials, it would appear that Christie is attempting to use these leave proceedings to relitigate many of the issues that were decided by the arbitrator. I agree with Shelter when it contends that the approximately 50 errors of law identified by Christie, are for the most part, in reality, errors of fact and/or errors of mixed fact and law so pled in the hope of attracting this court's endorsement of an eventual appeal. While I am not at this point in any way definitively making any determination as to the identification of valid extricable questions of law or whether such potential errors of law exist, I nonetheless raise this point as a caution in the context of what Christie suggests that this court inevitably must do: permit the reconstruction of a record so as to provide Christie with an opportunity to identify the arbitrator's misapprehension of the evidence or his conclusions based on the absence of evidence.

[38] In exercising the necessary caution about identifying extricable questions of law from questions of mixed fact and law and how such characterized questions might lead a court to an erroneous reconstruction of a more expansive record, I note the warning from the Supreme Court of Canada in ***Teal Cedar Products Ltd.*** (at paragraph 45):

> Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent (*Sattva*, at para. 54; *Southam,* at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant

> in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).
>
> [emphasis added]

[39] In considering the manner in which Christie has formulated the questions which constitute its grounds of appeal, the Supreme Court of Canada's cautionary message in ***Teal Cedar Products Ltd.*** serves as a reminder to this court to not reflexively invoke such formulated questions or grounds of appeal as a seductive but erroneous justification for creating or reconstructing a formal record that does not otherwise exist. In other words, this court must take care before embarking on a project to create or reconstruct an evidentiary record simply because Christie has formulated grounds of appeal largely made up of questions of mixed fact and law accompanied by a desperate request and need to reference evidence which may be contentious and not obviously available in the limited and existing record.

[40] Given the above caution and given the fact that in the present case, apart from the pleadings and the five exhibits that were marked as such, there is no obvious record, the question remains on what record is leave to appeal to be decided?

Absent an evidentiary record, how are Christie's leave applications to be decided?

[41] In advancing the reasons it has for the expanded record that Christie seeks to create using the Klapman affidavit, Christie references jurisprudential authorities arising from cases of judicial review. See for example: ***Sowemimo v. College of Physicians & Surgeons of Manitoba***, 2013 MBQB 42; ***Zeliony v. Red River***

College, 2007 MBQB 308; ***Pimicikamak et al. v Her Majesty the Queen in Right of Manitoba et al.***, 2018 MBCA 49, on appeal from 2014 MBQB 143 and 2016 MBQB 128; and ***Guinn v. Manitoba***, 2009 MBCA 82. While each of these cases are inevitably different from each other and are shaped by the specific facts and exceptions that may apply on the subject of when extrinsic evidence may be admitted to supplement a record, they all nonetheless relate to a judicial review, which by its nature, is distinct from an appeal arising from an arbitration where the decision maker was not an administrative tribunal sitting on behalf of an administrative body. Instead, an appeal from an arbitration is taken respecting an award made by a decision maker (the arbitrator) who is adjudicating a dispute that is private, which dispute is usually devoid of any public law component. I will briefly return to this point later in this judgment when I address the still recent Supreme Court of Canada judgment in ***Vavilov*** and its effect, if at all, on the question of the standard of review respecting commercial arbitration appeals and any connected relevance to the question of "what constitutes the record"?

[42] For now, it will suffice to note that Christie's identified judicial review jurisprudence has limited application in this case. Most of those decisions — which address the potential admission of extrinsic evidence — involve situations where an evidentiary gap is being filled not to provide an evidentiary foundation for the reassessment of the evidence or to reassess the factual basis for the decision maker's determinations, but rather, to demonstrate an impugned and flawed process or an issue of procedural unfairness. This is quite different from a request (as in the present

case) for the creation or reconstruction of a record in connection to a highly contentious 43-day arbitration hearing where the curation of *viva voce* testimony and most of the documentary evidence was not done even in a basic way so as to avoid dispute or controversy about certain testimonial or documentary aspects of the record. This distinction is particularly acute where such a created or reconstructed record is now being proposed in part, for the assessment of many questions of mixed fact and law even if as Christie argues, they are questions of mixed fact and law from which legal errors in principle are extricable and can be identified.

[43] Christie also relies upon the judgment in ***Rivergate Properties Inc. v. R.M. of West St. Paul***, 2004 MBQB 84, where the court on an application for leave to appeal under s. 44(2) of ***The Arbitration Act***, permitted an affidavit to be filed for the purposes of the leave application alone. I will place little reliance upon that judgment partly because it is distinguishable on its facts. More important is the fact that to the extent it was perhaps unclear at the time of that judgment as to what should be properly before a court on a leave application, such uncertainty has now been clarified with the Manitoba Court of Appeal's judgment in ***Fletcher v. Manitoba Public Insurance Corp. et al.***, 2008 MBCA 56, as noted and discussed below at paragraph 49.

[44] Keeping in mind the above distinctions, a more complete examination of all of the relevant and recent jurisprudence suggests that in the context of any appellate review of arbitration decisions and more specifically, in the context of applications

generally for leave to appeal, "affidavits containing information beyond any official record are not to be tendered" (see as noted ***Fletcher***, at paragraph 9).

[45] The consequence of an incomplete or absent record has been addressed by a number of reviewing courts.

[46] In ***Jamani v. Subway Franchise Systems of Canada, Ltd.***, 2008 ABQB 677, the Alberta Court of Queen's Bench addressed an application for leave to appeal an arbitrator's award pursuant to legislation identical to s. 44(2) of Manitoba's ***Arbitration Act***. The applicant alleged that the arbitrator had erred in law by failing to consider representations made by individuals who testified at the arbitration. In that case, the parties had agreed that there would be no transcript of the arbitration. At paragraph 21 of the judgment, the court explained the result of that decision:

> In their written argument, the Applicants refer to evidence which they say was given at the arbitration suggesting the Respondent had waived its right to enforce the restrictive covenant. As there is no transcript of the arbitration hearing and I have struck out those paragraphs of the affidavit filed on behalf of the Applicants which set out Mr. Jamani's recollection of the testimony given at the hearing, the Court has no record of that evidence.
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> [emphasis added]

[47] Given the court's determination respecting the question of the record, it would appear that the leave application was decided in ***Jamani*** on the face of the award as there was no evidentiary record identified in the arbitration proceedings.

[48] In ***Alberta Food & Commercial Workers Union Local, 401 v. Canada Safeway, Preshing, Greckol and McFetridge***, [1982] A.J. No. 932 (QL), (1982) 16 A.C.W.S. (2d) 390 (Q.B.), the Alberta Court of Queen's Bench was again forced to address the situation where on an application to quash an arbitrator's decision

surrounding statutory holiday pay, it was alleged (by the applicant) that there was no evidence upon which an arbitrator could make some of the findings that were made. In the absence of the complete record of the evidence before the arbitrator, a record which was not available, the court ruled that it was not possible to determine whether there was evidence to support the findings in question. The court acknowledged that where there is no duty imposed on the arbitral tribunal to keep an official record of its proceedings the court's supervisory power is said to be "disarmed". The court noted as follows (at paragraphs 10 and 11):

> The record before me is not necessarily a complete record of the evidence before the arbitration board. The position here is the same as that which confronted my brother McDonald, J., in the case *Woodwards Stores (Westmount) Ltd. v. Alberta Assessment Appeal Board Division No. 1, etc.*, [1976] 5 W.W.R. 496. He noted that in the case before him there was no transcript of evidence forming a part of the record and he found that it was simply not possible for the court to determine whether or not there was evidence supporting the conclusion which was in question before him. At page 4 at pages 512 and 513 he stated:
>
> > "However, there is no transcript of the evidence which forms part of the record. On this question, therefore, the record even broadened in scope as it is by R. 743 (2), retains for the purpose of a submission that there was 'no evidence' and hence and error of law, what Lord Summer called 'the inscrutable face of a Sphinx' (in Nat Bell at page 56). Where no duty is imposed upon the tribunal to keep stenographic or tape recorded transcription of its proceedings, the exercise by the court of its prerogative supervisory power is disarmed. (I adapt the language of Lord Summer at page 56 describing the effect of the *Summary Jurisdiction Act 1848 (Imp.)* Chapter 43). It is simply not possible for the court to determine whether or not there was evidence which supports the conclusion in question.
> >
> > Therefore the reasons given by the board and the chairman's notes cannot [*page 192] be attacked by certiorari as errors of law on the face of the record on the ground that there was no evidence to support them."

> There was evidence before the arbitration board which was not made available to me. Unless all the evidence presented to the arbitration board is before me and nothing can be found to support a finding of the board, I am not prepared to rule that there was no evidence supporting the board's finding. Consequently I do not find an error of law in this case requiring me to refer the matter back to the board with instructions.
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> [emphasis added]

[49] Where the nonexistence of an evidentiary record does not permit otherwise, limiting the record to the awards and the accompanying reasons for decision is consistent with the approach taken by the Manitoba Court of Appeal when hearing applications for leave to appeal orders of a Municipal Board. In ***Fletcher***, the Court of Appeal adopted the comments of Twaddle J.A. in ***Winnipeg City Assessor et al. v. Lakeview Management Inc. et al.,*** 2004 MBCA 11 (CanLII), 180 Man. R. (2d) 270, made in respect of an application for leave to appeal an order of the Municipal Board (at paragraph 10):

> In *Winnipeg City Assessor et al. v. Lakeview Management Inc. et al.*, 2004 MBCA 11, 180 Man.R. (2d) 270, a leave application from a Municipal Board order, my former colleague Twaddle J.A. had this to say (at paras. 3-6):
>
> > The Municipal Board is a statutory tribunal from which a statutory appeal lies with leave. Any such appeal is limited to questions of law and jurisdiction. The Board's findings of fact must be accepted by this court and, save perhaps in exceptional circumstances such as challenges to jurisdiction by reason of Board conduct, new evidence is not receivable. There are no such circumstances present here to justify the reception of new evidence.
> >
> > It is not uncommon on an application for leave to appeal from a decision of one statutory tribunal or another for the applicant to file an affidavit in which the deponent recites the history of the proceedings and identifies the issue on which leave is sought. Such an affidavit is unnecessary and sometimes leads, as it did in this case, to unnecessary cross-examination. Undesirable delay is often the result – particularly in assessment appeals where the entire statutory scheme is intended to have issues resolved as quickly as possible. …

> The point of law or jurisdiction to be argued should be apparent from the order of the tribunal or its reasons. …
>
> [emphasis added]

[50] In two other cases, a slightly modified approach was followed. In ***Wang v. Takhar***, 2019 ONSC 5535, the Ontario Superior Court of Justice held that where there is no transcript to which to refer on an application for leave to appeal an arbitration award, the record is limited to the exhibits that were filed and the decision. Similarly, in ***N.M. Paterson & Sons Ltd. v. A. & B. Rail Contractors Ltd.***, [1997] S.J. No. 294, 1997 CarswellSask 231 (SKQB), the court determined as follows (at paragraphs 9 and 10):

> On an appeal of an arbitration award, the court has only the record before it. The record is comprised of the arbitrator's decision and written reasons, the exhibits, and counsel's legal submissions. It does not include a transcript of any of the viva voce testimony that was heard by the arbitrator during the two day hearing. Obviously, the arbitrator's award was based in part on that testimony. It is not available to the court as it would be in the case of an appeal from a court judgment. Accordingly, even if some of the findings of fact are not well explained in the arbitrator's reasons, or are not borne out by the exhibits alone, the appeal court is not entitled to "rehear" the case or substitute its own view of the evidence and consider what it would have done had it been the arbitrator. It cannot delve into the evidence in an attempt to determine whether or not the arbitrator's findings of fact are "supported" by the evidence or are "contradicted" by the evidence as it is invited to do by the appellant. It can only vary or set aside the award if the arbitrator has made an error of law.
>
> The whole purpose and objective of the arbitration process would be undermined if a party who was unhappy with the award could have the dispute reheard in a court of law. Parties who want their dispute resolved by the courts should not agree to submit those disputes to arbitration.
>
> [emphasis added]

[51] From the above review of the jurisprudence, I can well understand the position taken by Shelter respecting the thousands of emails, letters, agreements, notices, reports, schedules and other documents referenced over the course of the arbitration

proceedings, but not made part of any official record, and now potentially included in a selective way, as part of the "record" proposed by the Klapman affidavit.

[52] The selective manner and presentation of some of the many documents that Christie now seeks to have considered as part of the record, even if they had been referenced at the arbitration hearing, could unfairly affect, *ex post facto*, the integrity of the arbitration proceeding and the considered analysis provided by the arbitrator in his comprehensive reasons. By extension, it could affect the integrity of this court's review of those comprehensive reasons.

[53] First, separate from the uncertainty in relation to whether all relevant documents (those otherwise before the arbitrator) will be included, there is an understandable worry about whether such a selective presentation of those documents could potentially distort and skew the significance of that documentary evidence insofar as it de-emphasizes the initial manner in which that evidence was received at the arbitration hearing accompanied as it was in many cases by *viva voce* testimony and commentary. Shelter is right to suggest that to consider the documents in isolation of the *viva voce* evidence would be tantamount to the court reviewing an entirely different case from the one that was presented before the arbitrator. It is Shelter's position that even assuming that Christie could provide this court with the totality of the documents referenced over the course of the proceedings, this court would still be in no position to evaluate an argument suggesting that the arbitrator made findings for which there was "no evidence". Shelter underscores the problems with this approach by contending that the documents do not even explain half of the story.

[54] Second, as it relates to the documents that were not marked as exhibits in respect of which there is now no official record (apparently 10,000 such documents), concerns can also be legitimately raised about the creation of a new "documentary record". In that connection, even if the Manitoba Court of Appeal had not been clear in ***Fletcher*** respecting its direction that information outside of an official record is generally not to be tendered on a leave application, I am in agreement with Shelter that as a matter of accuracy, given the thousands of documents that were put before the arbitrator, there can be no guarantees that what the parties would produce at this stage by way of a "documentary record" would be the same as what the arbitrator received.

[55] Third, as it relates to any proposed presentation by Christie of what is purported to be a "verbatim" transcription of some of the arbitration proceedings, my concerns are similar to those already stated. With the parties having made the deliberate decisions that they did about how the arbitration was to be conducted, including how (if at all) the evidence would be preserved and received, it is clear that an official transcript of the *viva voce* evidence does not exist. It should not now fall to the court to reconstruct one at the appellate stage. In that regard, I mention again that it is impossible in the circumstances not to have concerns about what such an attempted reconstruction could do to the integrity of the initial proceedings themselves and this court's process and task of appellate review. I again share Shelter's view that it does suspend disbelief to suggest optimistically that a court reporter could now accurately transcribe more than 250 hours of a hearing that they did not attend in order to

reconstruct a transcript that is destined to become part of a record that is still potentially incomplete.

[56] All of the above informs any discussion of what has been derisively referred to as the use of a "homemade transcript". In that connection, Shelter renews its overall concerns by saying that it would be improper to include as part of the record what is nothing more than a "homemade transcript" prepared, reviewed and edited by one of the parties' lawyers. I endorse those concerns particularly in a case such as this one where there are clearly significant and potentially determinative differences in how the parties view the admissions made by the various witnesses. Such a proposed unofficial transcription prepared by a party to a litigation poses all sorts of potential difficulties with respect to not only accuracy, but the connected issues of verification and authentication. In a case as contentious as this one, where the views of the evidence are as differing as they are, one can easily anticipate that for the party who did not prepare the transcript, the time and expense associated with reviewing it, verifying it, and then contextualizing it to respond to what might be challenges for clarity or accuracy, would be enormous, disproportionate and to repeat, potentially unfair to the integrity of both the arbitration proceeding and any connected application for leave or eventual appeal.

[57] The cost and time expenditure may not be limited to an opposing party. Respecting unofficial transcriptions prepared by a party to a litigation, the Alberta Court of Appeal in ***R. O. v. D. F.***, 2015 ABCA 14, had the following to say (at paragraph 16):

> This proposal for homemade transcription and translation supervised by a party to the litigation who also reviews and "corrects" any errors cannot provide any reasonable assurance of completeness, sufficiency, accuracy or reliability. To remedy the obvious deficiencies in this proposal, the appellant suggests, as a backup, that the approximately 21 hours of audio tape be filed with the Court for verification and authentication purposes as need be. As noted, this is not a reasonable suggestion. It is not the responsibility of the judges of the Court, or the responsibility of Court staff, to research, verify and authenticate what an appellant proposes to constitute the transcripts and appeal record relevant to the appeal.
>
> [emphasis added]

[58] While the dangers posed by the presentation of a reconstructed record on appeal are many, the most basic and foundational, is the concern that a review, whether on leave or on the merits, not take place on the basis of unjustifiably admitted extrinsic evidence which suddenly presents an evidentiary record that was not before the decision maker. Despite certain exceptions, this proposition is true in judicial review cases and it is no less applicable in applications for leave to appeal and on appeals proper. Put simply, it is a limitation meant to ensure that the contemplated but focussed review (whatever the standard of review) does not expand into a *de novo* hearing (see ***Fletcher***, at paragraph 9; and ***Manitoba Metis Federation Inc. v. Brian Pallister et al***., 2019 MBQB 118, at paragraph 66). See also ***Pimicikamak et al. v Her Majesty the Queen in Right of Manitoba et al.***, in the judgments of both this court and the Court of Appeal.

[59] Accordingly, given the specific choice of the parties to not create an evidentiary record at the arbitration hearing and given the forgoing analysis and determinations concerning the inappropriateness of the record proposed by the Klapman affidavit, the record for the purpose of Christie's leave applications (and any appeal were leave to

be granted) will include the following: the five exhibits marked at the arbitration proceedings; the "arbitration record" (consisting only of the pleadings) and the reasons for decision respecting the Awards.

[60] Before concluding, I address and explain in paragraphs 61 to 89 below why Christie's invocation of the Supreme Court of Canada's judgment in ***Vavilov*** has no application to my decision respecting the record.

How, if at all, does the Supreme Court of Canada's judgment in Vavilov change the standard of review on appeals taken from arbitration decisions and, if there is a resulting change, does it affect this court's decision respecting the appropriate record for Christie's application for leave to appeal?

[61] It is Christie's position that the implications of ***Vavilov*** may extend to the issue of what need constitute the record in the present case (for the purpose of its appeal) and as well, on the issue of what the record might be if it is something other than the written decision of the arbitrator.

[62] Respecting the issue of what constitutes the record, Christie submits that a number of references throughout ***Vavilov*** suggest that the record must be more than the reasons for decision.

[63] Concerning what the record should be if it can be more than the reasons for decision in circumstances like those in the present case, Christie argues that this court must take note of what Christie describes as a signaling in ***Vavilov*** of a "marked departure" from the traditional standard of review of reasonableness to correctness in cases involving statutory appeals from an administrative decision. Christie argues by extension that this also affects statutory appeals of arbitration decisions. The corollary

for Christie is that given this purported change toward a standard of review of correctness and given the way it (Christie) has pled its grounds of appeal for the purposes of leave, there is now, an inexorable need for this court, as a reviewing court, to "undertake its own analysis" and consult a record considerably more expansive than that suggested by Shelter.

[64] I have considered carefully the arguments raised by Christie respecting the standard of review and the application generally of ***Vavilov*** and what, if any effect, it has in the present case respecting the issue of a record. Insofar as Christie argues that its interpretation of the standard of review now requires this court to undertake its own analysis of a now created or reconstructed evidentiary record in order to decide if leave should be granted, I am in disagreement with that position and I reject it. Having so determined, I am nonetheless not persuaded that I must decide or that I am implicitly deciding in this judgment whether the reasoning and framework in ***Vavilov*** applies to appeals from commercial arbitrations and whether ***Sattva*** and ***Teal Cedar Products Ltd.*** have been overruled such so as to change the standard of review on commercial arbitration appeals.

[65] I acknowledge as does Shelter, that there is a genuine debate in the lower courts across Canada that arises from ***Vavilov*** as to whether its framework for determining the standard of review of an administrative decision applies to a court review of an arbitral award. Representative of that debate and division for example is on the one hand, the reasoning and conclusions set out in ***Cove Contracting Ltd. v. Condominium Corporation No. 012 5598 (Ravine Park)***, 2020 ABQB 106, and

the Ontario Superior Court of Justice decision in ***Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*** ("***OLG***"), 2020 ONSC 1516. In contrast with those two cases are the judgments of this court in ***Buffalo Point First Nation et al. v. Cottage Owners Association***, 2020 MBQB 20 ("***Buffalo Point***") and ***Broadband Communications North Inc. v. 6901001 Manitoba Ltd.***, 2021 MBQB 25 ("***Broadband Communications North***").

[66] As a backdrop to this debate, I note that the standard of review for appeals from commercial arbitration awards had been settled for some time and had been confirmed by the Supreme Court of Canada in amongst other cases, ***Sattva*** and ***Teal Cedar Products Ltd.*** For example, in ***Sattva***, decided in 2014, the court noted as follows (at paragraphs 104 and 106):

> Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick* [citation omitted], and the cases that followed it, is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).
>
> …
>
> ... In the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise (*Alberta Teachers' Association*, at para. 30). The question at issue here, whether the arbitrator interpreted the Agreement as a whole, does not fall into one of those

> categories. The relevant portions of the *Dunsmuir* analysis point to a standard of review of reasonableness in this case.
>
> [emphasis added]

[67] It is instructive to note that in ***Teal Cedar Products Ltd.***, decided in 2017, after having acknowledged the limited jurisdiction for appellate review of arbitration awards (because the jurisdiction is statutorily limited to questions of law), the court wrote as follows (at paragraphs 1 and 74):

> … [E]ven where such jurisdiction exists, our Court recently held that a deferential standard of review — reasonableness — "almost always" applies to arbitration awards [citations omitted]. Together, limited jurisdiction and deferential review advance the central aims of commercial arbitration: efficiency and finality.
>
> …
>
> … This preference for a reasonableness standard dovetails with the key policy objectives of commercial arbitration, namely efficiency and finality.

[68] There can be no question that ***Vavilov*** did indeed reset the standard of review framework to be applied when a court is reviewing the merits of an administrative decision which now includes, as a starting point, a presumption of reasonableness (see ***Vavilov***, at paragraph 16). The question remains however, given that the present case does not involve an administrative decision, is Christie's position respecting the application of ***Vavilov*** correct and is derogation from the presumption of reasonableness required?

[69] A derogation of the presumption of reasonableness in an administrative law case occurs where the Legislature has signaled an intention that a different standard is to apply. An example of such a signal can be found where the Legislature stipulates a statutory appeal mechanism that provides for a process of appeal from an

administrative decision maker to a court of law. In the case of such a statutory appeal mechanism, the appellate standards of review will apply. In other words, the standard will be determined in connection with the nature of the question (correctness for questions of law, palpable and overriding errors for questions of fact and for questions of mixed fact and law where a legal principle is not readily extricable) (see ***Vavilov***, at paragraphs 36 and 37).

[70] As noted, there is indeed a debate/division amongst lower courts across Canada (in the immediate aftermath of ***Vavilov***) as to whether ***Vavilov*** has impacted the standard of review of commercial arbitration awards. It is important to note however, the Supreme Court of Canada's decision in ***Vavilov***, which is both thorough and complex, does not at any point refer to its earlier judgments in ***Sattva*** or ***Teal Cedar Products Ltd.***, let alone indicate that it intended to overrule these seminal decisions.

[71] The Alberta Court of Queen's Bench judgment in ***Cove Contracting Ltd.***, specifically rejected the notion that ***Vavilov*** changed the standard of review as it relates to commercial arbitration appeals. The court stated as follows (at paragraphs 6, 7, 8 and 12):

> I find that *Vavilov* does not change the standard of review on commercial arbitration appeals, because *Vavilov* and its two companion decisions deal with judicial review of administrative bodies, and because the Supreme Court makes no reference in its December 19, 2019 decisions to its earlier decisions in *Teal Cedar Products Ltd. v British Columbia* 2017 SCC 32 and *Creston Moly Corp v Sattva Capital Corp* 2014 SCC 53, which establish reasonableness as the standard of review on commercial arbitration appeals.
>
> The framework established in *Vavilov* is based on the intentions of the legislatures expressed in the legislation creating administrative bodies: *Vavilov* at para 7, 8, 12, 17, 23, 24, 26, 30, 33, 36, 37, 44, 46, 82 and

> 140. This reasoning does not apply to appeals from commercial arbitrators. As Mr. Feraco submits, in his supplemental brief on behalf of Ravine Park:
>
> > This appeal is not a statutory appeal or judicial review of an administrative decision as contemplated in the *Vavilov* decision**.** Rather, in this case, the parties had agreed by way of contract to participate in arbitration as the means of resolving their disputes**.** The arbitration was not statutorily mandated**.** It does not involve an administrative body**.** Rather, the parties contractually agreed to this form of alternative dispute resolution.
> >
> > . . .
>
> I agree with that submission.
>
> . . .
>
> *Teal* and *Creston Moly* have not been overruled by *Vavilov.* They are binding on me. The standard of review applicable to this case is reasonableness.
>
> [emphasis added]

[72] In ***OLG***, the Ontario Superior Court of Justice adopted and followed the reasoning and conclusions in ***Cove Contracting Ltd.*** They noted as follows (at paragraphs 71 – 74):

> The Supreme Court of Canada's comprehensive decision in *Vavilov* does not refer to the court's previous decisions in either *Sattva* or *Teal Cedar*. It is not reasonable to conclude that the Supreme Court meant to overrule these important decisions without making any reference to them or to the area of law to which they relate.
>
> Further, as a matter of legal principle it is appropriate that *Vavilov* does not apply to commercial arbitrations. The administrative law standard of review established in *Vavilov* derives from constitutional considerations that justify deference by the judiciary to the legislature. This principle does not apply to commercial arbitrations. The standard of review for commercial arbitrations is guided by commercial considerations about respect for the decision-makers chosen by the parties. As a result, deference is justified by the parties' contractual intent. It is for this reason that Rothstein J. identified the key differences between administrative decisions and arbitral awards in *Sattva* and concluded that the judicial review framework for administrative decisions is not applicable in the commercial arbitration context.
>
> It therefore follows that a change to the judicial review framework for administrative decisions does not result in an automatic change to the standard of review for arbitration decisions. This is the conclusion reached by G.S. Dunlop

J. in *Cove Contracting Ltd. v. Condominium Corporation No. 012 5598 (Ravine Park),* 2020 ABQB 106, as follows at paras. 10-12:

> 10. … I read *Vavilov* as limited to administrative decision makers, because that is the context of *Vavilov* and it's companion cases, and because … the majority in *Vavilov* provides guidance on the application of prior administrative law jurisprudence, but no guidance on the application of other jurisprudence. *Teal* and *Creston Moly*, are two recent Supreme Court of Canada decisions on the standard of review on commercial arbitration appeals. *Vavilov* says nothing about *Teal* and *Creston Moly.*
>
> 11. The Supreme Court's earlier decisions in *Teal* and Creston Moly provide a compelling rationale for the reasonableness standard of review on a commercial arbitration appeal:
>
> > … In an arbitral context like this one, where the decision under review is an award under the Arbitration *Act,* Sattva establishes that the standard of review is 'almost always' reasonableness. …
>
> 12. *Teal* and *Creston Moly* have not been overruled by *Vavilov*. They are binding on me. The standard of review applicable to this case is reasonableness.
>
> I agree with and adopt G.S. Dunlop J.'s conclusion in this case. The standard of review applicable to the majority's contractual interpretation of the GRSFA and to the damage award is reasonableness. Although OFNLP makes a strong case for the application of a reasonableness standard to the appeal relating to the honour of the Crown doctrine, I have decided that the standard of review I will apply to the majority's approach to the honour of the Crown doctrine is correctness in light of its constitutional implications.
>
> [emphasis added]

[73] The above decisions in ***Cove Contracting Ltd.*** and ***OLG*** are in conflict with the judgments of this court in ***Buffalo Point*** and ***Broadband Communications North***, both of which involved an appeal under s. 44(2) of ***The Arbitration Act***. The reviewing judges followed what they concluded was the instruction and direction given in ***Vavilov*** (which they concluded applies to appeals from the decision of arbitrators) so as to hold that the standard of review in those cases should be the appellate

standard of correctness. Their adoption of and application of the ***Vavilov*** framework to arbitration decisions, represents an obvious departure from the past case law which held that arbitration decisions are reviewable on a standard of reasonableness.

[74] While it is not at all clear that the question of the standard of review has to be decided for the purposes of resolving the issue respecting the record in the present case, to the extent that it later might become relevant, I will note that I find persuasive, certain aspects of the reasons and conclusions set forth in ***Cove Contracting Ltd.*** and ***OLG***. I certainly accept as was noted in ***OLG*** that the ***Vavilov*** framework for the standard of review in the administrative law context, "derives from constitutional considerations that justify deference by the judiciary to the legislature" (at paragraph 72). Such a proposition in the context, is all the more meaningful when considering the connection to the public law dimension of administrative law, a dimension which is not obviously present nor applicable in the case of commercial arbitrations where the parties' participation is consensual and dictated by private agreement.

[75] Again, without deciding the issue, it need be acknowledged that it is anything but obvious that the Supreme Court of Canada intended ***Vavilov*** to apply to a statutory appeal of a commercial arbitration award and thereby overrule its own significant judgments in ***Sattva*** and ***Teal Cedar Products Ltd.*** along with the long-standing legal principles which acknowledge the reasons for limited judicial intervention in commercial arbitration. If that had been the intention of the Supreme Court of Canada,

it is reasonable to suggest that such an intention would have been more clearly and obviously stated in a case as significant as ***Vavilov***.

[76] Whatever the standard of review, that review, whether on a leave application or on any eventual appeal, can only be conducted on the basis of what must be the appropriate or permissible evidentiary record. Nothing in ***Vavilov*** would or could change the inappropriateness of using what is in this case, the problematic and disputed evidentiary record proposed by Klapman.

[77] The task for this court on Christie's leave application will require a rigorous exercise of identifying (or not) a question or questions of law. Identifying a question of law should not be confused with an application of a standard of review — whatever that standard is. In the present case, the obligation to identify a question of law is statutorily set out. That narrow basis for appeal existed before and separately from anything that ***Vavilov*** (assuming its application) has instructed in respect of statutory appeals. Whatever the current applicable standard of review for an appeal from an arbitration decision, nothing in relation to a leave application will change the obligation to identify a question of law, the meaning and scope of which has similarly not changed.

[78] In the context of any review for possible legal errors giving rise to questions of law, it is necessary to repeat once again that whatever else ***Vavilov*** may have changed, its analysis cannot be used to justify a utilization of an otherwise inappropriate and impermissible created or reconstructed evidentiary record under the guise of a potentially "new framework" for appeals from arbitration decisions.

[79] If the evidentiary record chosen by the parties in the present case is inadequate for the purpose of demonstrating or identifying a valid question of law, so be it, as that is not — in the circumstances of this case — something that this court can or should change and it is not something which can be made dependent upon or connected to a possibly changed standard of review.

[80] From the earlier discussion in this judgment, it should be apparent that I have already determined that in the particular and vexing circumstances of this case, there is as a result of the purposeful choices made by counsel, no real evidentiary record. For the reasons that I have already set out (which significantly, exist separately from the question of whether, following ***Vavilov***, arbitration decisions are subject to the appellate standards of review), I have determined that the problem respecting the absence of an evidentiary record cannot now be addressed with a created or reconstructed evidentiary record. That determination is rooted largely in the need to protect the integrity of the initial arbitration proceeding (as the parties chose to conduct it and the basis upon which the arbitrator adjudicated it) and the integrity of this court's reviewing function on appeal. Having made that determination, I am not persuaded that the manner in which Christie has pled its grounds of appeal can or should dictate the need for (or render permissible) the otherwise created or reconstructed evidentiary record proposed by Klapman. In the circumstances of this case, my determinations in this regard — connected as they are to the integrity of the two proceedings (the arbitration hearing and the appellate review) — have no specific connection to the issue of ***Vavilov's*** application to a commercial arbitration.

[81] As clearly noted, I certainly acknowledge the existence of the current disagreement/debate in the lower courts across Canada since ***Vavilov*** concerning whether arbitration decisions are now subject to the appellate framework (with the applicable standards of appellate review) or whether they remain as before, subject to the reasonableness standard set out in ***Sattva*** and ***Teal Cedar Products Ltd.***[2] That said, I find myself in the present case in a similar position to that of Bennett J.A. in ***Nolin v. Ramirez***, 2020 BCCA 274. Although the court was not dealing with the issue of a record, Bennett J.A. did acknowledge the percolating and continuing debate as it relates to ***Vavilov's*** application. Nonetheless, in a context where there remains an absence of a clear appellate court consideration of the issue, she noted as follows (at paragraph 39):

> In my opinion, it makes no difference in this case whether the standard of review is reasonableness or palpable and overriding error, as the result would be the same. Since it is unnecessary to decide the obviously complex question, I will leave it to another day.

[82] As it relates to my specific determination respecting the record, I am of the same view as Bennett J.A. in ***Nolin v. Ramirez***. In the present case, whatever the standard of review, it will not and should not change what is by necessity the very limited evidentiary record that is before me on the leave applications. Just as Christie's formulated grounds of appeal alone cannot make admissible an otherwise inadmissible created/reconstructed evidentiary record where the integrity of the review makes it

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[2] For an interesting and further discussion of the point see: Paul Daly "One Year of *Vavilov*" (University Research Chair in Administrative Law & Governance, University of Ottawa, CLEBC Annual Administrative Law Conference, 20 November 2020), 2020 CanLIIDocs 3614, at pages 27 – 30.

inappropriate to do so, neither should the identification of a particular standard of review.

[83] If at some later point on the leave applications or any eventual appeal I need address the question of whether ***Vavilov*** applies to arbitration decisions, I will do so. For now, on the question of the record, the issue of ***Vavilov's*** application has no relevance or effect and accordingly, it requires no decision or comment further to that which I have already provided.

SUMMARY OF CONCLUSIONS

[84] If, for perhaps understandable reasons, the parties to a private arbitration — in the name of first blush efficiency, cost saving and finality — choose to proceed with an arbitration hearing without concern for creating or preserving some type of record that may involve an official transcription of *viva voce* testimony or the clear organization, accumulation and marking of exhibits, it can be expected that any ensuing lack of clarity, confusion and discrepancy will limit and complicate what is an already narrow scope for appellate review. That is the situation in the present case.

[85] In the present case, an evidentiary record of the arbitration proceedings was not created by design. To now try to reconstruct without agreement, an accurate record after the fact and to put it before the court, is from a practical perspective, an near impossibility. Even if it could be done, it is, needless to say, an unduly expensive task. No less concerning is the fact that such an approach could easily descend into a *de facto* rehearing of all of the issues that had been decided by the arbitrator with what Shelter accurately describes as "a finality".

[86] While the scope for appellate review remains narrow, the court cannot and will not in the present case abdicate in respect of its jurisdiction to fully consider Christie's applications for leave to appeal on a question of law. That said, the determination respecting the question of leave will be made in the present case on the basis of a record involving the pleadings, the five exhibits so marked and the arbitrator's reasons for decision in respect of the Award and the Supplemental Award dealing with costs and interest.

[87] It is clear that in the present case, the parties made the conscious choice to conduct the arbitration proceeding in a particular manner. They chose to proceed without a court reporter and without marking most documents as exhibits. Christie's effort to have this court reconstruct some form of official record represents both a time consuming and potentially unworkable approach that cannot be reconciled with the key policy objectives of a commercial arbitration, namely, efficiency and finality. Moreover, such an approach and its potential for subtle, but unfair distortion, should discomfort any court where that court, in the context of the proposed reconstruction and evidentiary retrofit (of a record), would be forced to inadequately chase, sort through and curate evidentiary entrails only to be left to rely on what still amounts to a "homemade record". No court can be indifferent to the consequent implications for fairness, not to mention the connected question respecting the appropriate deployment of judicial resources.

[88] When a party to what had been an arbitration now seeks from a reviewing court the creation or reconstruction of an evidentiary record for the purpose of appeal, after

having intentionally and jointly chosen to not create an evidentiary record, the reviewing court cannot do what it should not do: permit a rehearing in a court of law (and risk substituting its own views) on the basis of an evidentiary record potentially different than what was before the arbitrator. In such an extreme scenario, any appealing party seeking the reconstruction of the evidentiary record must be made to realize that the much vaunted and often justifiable efficiencies and cost savings of the arbitration process cannot be permitted to compromise a reviewing court's concerns for the integrity and fairness of its own processes and its specific task on review.

[89] In the present case, as with any leave application where a party seeks to identify a question of law, the now-limited reviewable record (as identified at paragraphs 59 and 86) will be examined for purported questions of law. Those questions may have arisen from what must be identified as potential errors relating to jurisdiction, mischaracterizations and/or misapplications of the law and/or, where viable (given the non-existence in the present case of an evidentiary record), any identifiable errors in connection to misapprehensions of the evidence or conclusions unsupported by the evidence. Respecting this last category of purported legal error based on misapprehensions of the evidence or conclusions unsupported in the evidence, given the absence of an evidentiary record and given the decisions like that of ***Alberta Food & Commercial Workers Union Local, 401***, it will remain to be seen whether this court is now in the position where its reviewing powers and capacity have been in part, already "disarmed".

[90] This court will now await the scheduling of the leave applications on the basis of the identified record.

_____ C.J.Q.B.