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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:	)	
	)	
CHRISTIE BUILDING HOLDING COMPANY, LIMITED,	)	JANET I. JARDINE for the applicant
	)	
applicant,	)	
	)	
- and -	)	
	)	
SHELTER CANADIAN PROPERTIES LIMITED,	)	GRANT A. STEFANSON CURTIS G. PARKER
respondent.	)	for the respondent
	)	
	)	Judgment Delivered
	)	December 13, 2022

JOYAL C.J.K.B.

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I. INTRODUCTION

[1] A commercial dispute between the applicant Christie Building Holding Company, Limited ("Christie") and the respondent Shelter Canadian Properties Limited ("Shelter"), proceeded to a long and contentious arbitration hearing.

[2] The current proceeding before this court is a consolidation of two applications by Christie. Amongst other things, Christie seeks leave to appeal the arbitration awards issued by the arbitrator. The first of those awards was issued on June 17, 2020 ("Main Award") and the second on August 31, 2020 ("Costs Award").

[3] As the Arbitration Agreement contained no right of appeal, in order to appeal the awards, Christie can only do so by first obtaining leave under s. 44(2) of ***The Arbitration Act***, C.C.S.M. c. A120 (the "***Act***"). Section 44(2) of the ***Act*** reads as follows:

> **Appeal on question of law with leave**
>
> 44(2) If the arbitration agreement (other than a family arbitration agreement) does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that
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> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.

[4] Absent an arbitration agreement agreed to by contracting parties that addresses the right of appeal in a different way, s. 44(2) represents a clear statutory limitation on the scope of appellate review of arbitration awards in Manitoba.

[5] In considering leave applications pursuant to s. 44(2), it is clear from the governing jurisprudence that courts must take care to ensure that such leave applications and any eventual hearings on the merits, are not used as a forum to re-argue and re-litigate significant portions of the arbitration under the pretense of raising "questions of law".

[6] In addition to seeking leave under s. 44(2), Christie also seeks relief pursuant to a second notice of application wherein it seeks to set aside a portion of the first

award pursuant to ss. 45(1)(f) and (g) of the ***Act***. The relevant section and provisions of s. 45(1) read as follows:

> **Grounds for setting aside award**
>
> 45(1) On a party's application, the court may set aside an award on any of the following grounds:
>
> . . .
>
> (f) the applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;
>
> (g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement.

[7] I note as does counsel for Shelter that Christie's arguments with respect to s. 45(1) are new and were not previously pleaded. It is for that reason that Shelter submits that Christie ought not to be permitted to now make those arguments.

[8] Despite what one would assume would be a desire on the part of the parties to effectuate and exploit the efficiency and finality associated with commercial arbitrations, the approach taken by the parties, both before and after the awards, has been anything but efficient and final. As has already been noted in this court's previous judgments on preliminary issues and as was candidly acknowledged by one of the parties, these proceedings have been "unduly and unnecessarily prolonged, disproportionate, complicated, contentious and expensive".

[9] Complicating and perhaps contributing to the contentiousness, the inefficiency and the expense of this proceeding, has been an accompanying dispute about the Arbitration Record, a record, which as this court previously ruled in one of its judgments on a preliminary issue, is extremely limited (see ***Christie Building***

Holding Company, Limited v. Shelter Canadian Properties Limited, 2021 MBQB 77, at paras. 11 and 59 ("***Christie***"). As I will further explain later in this judgment, the apparent absence of an agreed approach to creating, organizing and preserving what should have been a clearer record and the now consequent limited nature of that record, leaves this court significantly "disarmed" in terms of its ability to meaningfully perform its task on either of these leave applications and/or on any eventual hearing on the merits.

II. ISSUES

[10] Based on the submissions of counsel respecting certain preliminary issues raised at this hearing and based upon the applicable statutory provisions that Christie invokes in seeking to appeal or set aside the two awards in question, the issues for my determination on this hearing are as follows:

i. Does the record filed by Christie on June 10, 2021 comply with the court's order dated May 27, 2021?

ii. Should the affidavit of Hartley Klapman sworn February 22, 2022 constitute part of the record for any of the determinations required on these applications?

iii. Does the standard of review need to be determined in deciding these applications and if so, what is the standard of review that ought to be applied?

iv. Has Christie identified a question of law of arguable merit?

v. Has Christie identified the balance of the test in s. 44(2)?

vi. Has Christie established a basis upon which to set aside any of the awards pursuant to s. 45(1)?

[11] For the reasons that follow, I have determined that:

i. The impugned materials and the portions of the record filed by Christie on June 10, 2021, do not transgress the court order dated May 27, 2021.

ii. The affidavit of Hartley Klapman sworn February 22, 2022, can be admitted into evidence in relation to what Christie says is its relevance and support of its second notice of application, which seeks relief pursuant to s. 45(1) of the ***Act***.

iii. In deciding these applications, it is necessary to determine the applicable standard of review and the standard of review on which the merits of any eventual appeal will be judged (should leave be granted) is reasonableness.

iv. Christie has either failed to clearly identify a question of law of arguable merit or, because of the impoverished and limited record from the arbitration, the court is disarmed from being able to meaningfully or adequately access whether any purported question of law is of arguable merit for the purposes of granting leave.

v. Having determined that Christie has not identified a question of law of arguable merit, there is no need to address the balance of the test in s. 44(2).

vi. There is no basis to set aside any part of the Main Award pursuant to

s. 45(1) as requested by Christie.

III. BACKGROUND AND CONTEXT

A. THE DISPUTE

[12] The arbitration awards of June 17, 2020 (Main Award) and of August 31, 2020 (Costs Award) arise from an arm's length commercial dispute concerning the renovation of a mostly unused commercial property into what is now known as the Specialized Services for Children and Youth Centre, operated by the Winnipeg Regional Health Authority ("WRHA") (the "SSCY Property"). Shelter was engaged, first by MWG Apparel Corp., a corporation in which Christie's principal has an ownership interest, and later by Christie to serve as the developer of the SSCY Property from the bid/RFP stage through to completion.

[13] The exact nature of the dispute and the various claims of Shelter and Christie against each other are set out in the document marked at the arbitration hearing as the "Arbitration Record". Among other claims, Shelter sought damages in connection with the early termination of a long-term Property Management Agreement for the SSCY Property. The claims of Christie touched upon virtually every aspect of the development, and included allegations that Shelter was responsible for millions of dollars of cost overruns and delays.

[14] The overarching position taken by Shelter in its pleadings was that the parties made a number of important revisions to the Development Agreement by their conduct and how they agreed to carry out the work. In turn, these consensual modifications

fundamentally altered the Development Agreement and the obligations and responsibilities of the parties thereunder.

B. ARBITRATION PROCEEDINGS

[15] In August 2018, the arbitrator for the dispute was appointed and the parties entered into an Arbitration Agreement dated November 29, 2018. The arbitrator served in that role until the issuance of the Costs Award in August 2020.

[16] Voluminous affidavits of documents were exchanged in 2018 containing over 12,000 documents, and examinations for discovery were completed over 19 days in 2018 and 2019.

[17] Following a series of preliminary attendances upon the arbitrator in early 2019, the substantive hearing proceeded over the course of 43 days between May 2019 and January 2020. The manner in which the oral and documentary evidence was adduced and recorded has been the subject of much debate. That issue was more fully discussed in this court's earlier preliminary judgment wherein, for the reasons provided, the court was required to make certain determinations about what is in the end, a very contested and now limited record for the purposes of these applications (see ***Christie***, at paras. 39, 56, 59 and 84 – 88). Irrespective of the determinations made by this court concerning the now limited record, I note that in total, at the arbitration hearing, the arbitrator heard evidence from six fact witnesses and two experts, and received thousands of pages of emails, letters, contracts, drawings, schedules, change orders, minutes and other documentary evidence.

C. FIRST ARBITRATION AWARD (PRIMARY CLAIMS)

[18] The Main Award was released on June 17, 2020, in which the arbitrator determined all aspects of the dispute and the parties' various claims, except for the matter of interest and costs. The Main Award came in the form of a comprehensive 81-page decision. After addressing and dismissing a late jurisdictional challenge from Christie, the arbitrator reviewed the evolution of the project, the Development Agreement and the design and construction of the SSCY Property. In that context, he then proceeded to address the parties' respective claims with reference to the extensive oral and documentary evidence, including the numerous admissions and concessions made by Christie's witnesses while under cross-examination which, in many cases, were determinative of the key issues.

[19] Where there were different views on what actually happened over the course of the project, the arbitrator considered the credibility and reliability of the witnesses. These considerations informed his analysis and were summarized at the end of the Main Award where he concluded by saying that he "found Mr. Klapman to be unreliable in much of his testimony" whereas by contrast, Mr. Mathieson, Shelter's main fact witness, "exhibited his considerable experience in the construction industry.... Accordingly, where their evidence conflicted in regard to how the project evolved, I prefer Mr. Mathieson's evidence."

D. EVENTS FOLLOWING FIRST AWARD

[20] Following the release of the Main Award, the parties were unable to resolve the issue of costs and interest, and the matter was referred back to the arbitrator. Briefs

were filed in support of the parties' respective positions in July 2020, and oral argument on these issues was heard on July 23, 2020. Shelter's counsel was asked to provide copies of its statements of account in support of Shelter's claim for solicitor-client costs. The accounts were provided for this limited purpose on July 24, 2020, with the proviso that Shelter was not waiving privilege.

[21] On August 4, 2020, counsel for Christie submitted that she had received "new information/evidence" following her review of the accounts. Specifically, counsel had obtained documentation from legal counsel for the WRHA concerning a settlement between the WRHA and Shelter in 2017 (a settlement concerning a singular aspect of the development and in which no money was paid to Shelter or fault admitted by either party).

[22] On the basis of this allegedly "new" information, Christie requested that the arbitrator rescind his findings of bad faith and reverse that part of the Main Award relating to the payment by Christie to Shelter of the sum of $348,791.34 (the "348K Award"). At the arbitrator's request, the parties provided submissions on his authority to revisit a final award and certain calculations respecting costs under the Tariff. Shelter objected to any consideration of the settlement documentation on the basis that it was protected by settlement privilege and, in any event, not relevant.

E. SECOND ARBITRATION AWARD (COSTS AND INTEREST)

[23] The Costs Award was issued on August 31, 2020. On the issue of the 348K Award, which the arbitrator declined to reverse, the following findings were made:

(i) Counsel for Christie was aware of the dealings between Shelter and the WRHA in November 2017, and could have questioned Shelter's representative about the settlement if she felt that it was relevant during discovery or at the hearing itself;

(ii) Taking guidance from the well-known Supreme Court of Canada judgment in ***R. v. Palmer***, [1980] 1 S.C.R. 759, the "new information/evidence" did not meet the criteria for the admission of new evidence;

(iii) The so called "new information/evidence" would not have persuaded him (the arbitrator) to amend or change the 348K Award, even if he had the authority to do so; and

(iv) None of the exceptions to the doctrine of *functus officio* applied such that the arbitrator did not have the authority to revisit the 348K Award and that, even if he had that authority, he would decline to do so.

[24] On the issue of costs, the arbitrator considered the case law in which solicitor-client costs are awarded. While the arbitrator agreed that the proceedings were prolonged as a result of positions taken by Christie (which were ultimately unfounded), the arbitrator was not satisfied that Christie's conduct rose to the level of

"reprehensive, scandalous or outrageous" as described in the case law. At the same time, the arbitrator found that the length of the proceedings (17 days for examinations for discovery and 43 days for hearing) could be attributed in large part to Christie's conduct. Also relevant was the fact that many of the defences and counterclaims were ultimately proven to be unfounded. That finding and the fact that Christie had rejected a formal offer to settle for $1.3 million (nearly $1 million less than the amount awarded to Shelter at the arbitration) suggested an award of elevated costs.

[25] The elevated costs were determined with reference to Tariff "A" of the ***King's Bench Rules***, Man. Reg. 553/88 (formerly the ***Queen's Bench Rules***), with modifications to account for the complexities of the case, the voluminous and extensive discovery and the length of pre-hearing matters and the hearing itself.

[26] With respect to interest on the amounts awarded to Shelter, the arbitrator took notice of the quarterly interest rate prescribed by ***The Court of King's Bench Act***, C.C.S.M. c. C280 (formerly ***The Court of Queen's Bench Act***), but recognized that he had the discretion to depart from that rate. While Shelter sought interest at the rate of 5 percent per annum on the damages award, the arbitrator exercised his discretion to fix interest at the rate of 2.5 percent, a rate that was only marginally in excess of the prescribed rate.

IV. APPLICABLE LEGAL PRINCIPLES

A. THE APPLICANT MUST IDENTIFY A QUESTION OF LAW OF ARGUABLE MERIT

[27] It is clear that the statutory limitation in s. 44(2) requiring a question of law, sets out an exacting requirement for leave to appeal a commercial arbitration award.

[28] Whether leave may be granted involves a multifactorial analysis, starting with whether the applicant has identified a question of law of arguable merit (***Sattva Capital Corp. v. Creston Moly Corp.*** 2014 SCC 53 ("***Sattva***") (at para. 74):

> [74] In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit.... In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law.
>
> [emphasis added]

[29] The mere identification of a question of law does not confer jurisdiction on an appellate court where that question lacks arguable merit (***Teal Cedar Products Ltd. v. British Columbia***, 2017 SCC 32 ("***Teal Cedar***"), at paras. 4, 62).

[30] As was similarly expressed by Beard J. (as she then was) in ***Manitoba Teachers' Society v. North***, 2005 MBQB 292, without this additional requirement (at para. 9):

> [9] ... It will always be possible for a litigant to frame a leave application as a question of law, and without some way to limit the applications, there would be no end to litigation.

[31] ***Teal Cedar*** remains the leading authority from the Supreme Court of Canada on the scope of appellate review of commercial arbitration awards. Guidance can be found in the following statements from Gascon J. (at paras. 42 - 43):

> [42] Unlike privative clauses which merely "signa[l]" deference in the context of judicial review of administrative tribunal decisions, statutory limitations on the scope of appellate review of arbitration awards are "absolute" (*Sattva*, at para. 104). In consequence, a finding that the questions on appeal — the Valuation, Interest and Lillooet Issues — are not questions of law would wholly dispose of the issue of the courts' jurisdiction to review those questions.
>
> [43] The process for characterizing a question as one of three principal types — legal, factual, or mixed — is also well-established in the jurisprudence [citation omitted]. ... [I]t is not disputed that legal questions are questions "about what the correct legal test is" [citation omitted] factual questions are questions "about what actually took place between the parties" ... and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts".
>
> [emphasis added]

[32] It is important not to conflate at the leave stage, questions of law and errors of law. The former is required at the leave stage, whereas the latter is only considered at the merits stage if jurisdiction has been established. In other words, the issue on a leave application is not whether the arbitrator's decision — be it their contractual analysis, conclusions respecting liability or assessment of damages — was correct or reasonable. The issue is whether the arbitrator's decision raises a legal question of arguable merit conferring jurisdiction on the court to review the award. The following statement from Gascon J. in ***Teal Cedar*** is instructive (at para. 60):

> [60] Likewise, it is improper to claim that a court should have jurisdiction to review the arbitrator's contractual analysis merely on the basis that it was allegedly incorrect. Indeed, it would even be improper to claim jurisdiction to review an arbitrator's analysis merely on the basis that it was unreasonable. A court looking at the Amended Agreement could have held that the No Interest Clause precluded interest payments and that the Arbitration Clause incorporated that preclusion when it submitted "compensation" (without

> interest) to arbitration. But to immediately launch into the merits of the arbitrator's contractual analysis — whether it is incorrect or unreasonable — is to put the cart before the horse. His analysis must first be characterized as raising a legal question. And only on the basis of that characterization may his analysis then be reviewed.
>
> [emphasis added]

B. Contractual Interpretation is a Question of Mixed Fact and Law

[33] It is important to note in a case like the present, that the historical approach of characterizing issues relating to the rights and obligations of parties under a written contract as questions of law was laid to rest by the Supreme Court of Canada in ***Sattva***. Writing for the Court, Rothstein J. concluded (at paras. 50 and 52):

> [50] ... I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.
>
> . . .
>
> [52] … The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.
>
> [emphasis added]

[34] Rothstein J. explained how the shift away from the historical approach has been based in part on the adoption of an approach to contractual interpretation, which requires courts to have regard for the surrounding circumstances, or factual matrix, when interpreting a written contract. The objective of contractual interpretation — to ascertain the objective intentions of the parties — is an inherently fact specific exercise (***Sattva***, at paras. 46 – 49, 55).

C. ***EXTRICABLE QUESTIONS OF LAW WILL BE RARE***

[35] An "extricable question of law" is described in ***Teal Cedar*** as a "covert form of legal question", and is one that arises when, in the course of applying the legal test to a set of facts, the trial judge (or arbitrator) *alters the underlying legal test,* for example, by deleting a required element of that test (at para. 44):

> [44] … Such an allegation ultimately challenges whether the judge (or arbitrator) relied on the correct legal test, thus raising a question of law.

[36] Despite the above, there is an important distinction between the allegation that an arbitrator applied the wrong legal test or altered the legal test in the course of applying it (questions of law) and the allegation that the arbitrator's application of the correct legal test *should have resulted in a different outcome* (a question of mixed fact and law). In this regard, the Court in ***Teal Cedar*** impressed upon reviewing courts the need to exercise *caution* in identifying extricable questions of law, since mixed questions, by definition, involve aspects of law (at para. 45):

> [45] ... 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 [citation omitted]. 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]

[37] The distinction identified above has significantly different consequences in appeals from arbitration awards than it does in appeals from civil judgments. In the context of civil litigation, the characterization of a question as one of "mixed fact and

law" changes the standard of review (to palpable and overriding error), whereas the "identification of a mixed question when appealing an arbitration award defeats a court's appellate review jurisdiction" (***Teal Cedar***, at para. 46).

[38] In ***Sattva***, Rothstein J. noted the need for courts to be careful when being asked to extricate questions of law, a caution that applies equally to disputes involving contractual interpretation. The situations in which it will be possible to extricate such a question of law will be rare. The court in ***Sattva*** stated as follows (at paras. 53 – 55):

> [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law [citation omitted]. Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor"....
>
> [54] However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA,* the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:
>
> > Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact". [para. 36]
>
> [55] Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal

> error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.
>
> [emphasis added]

[39] The infrequency with which questions of law will be extricated from the interpretation process was confirmed more recently by the Supreme Court of Canada in ***Corner Brook (City) v. Bailey***, 2021 SCC 29, where the court addressed an issue of contractual interpretation in the context of a release (at para. 44).

> [44] ... The circumstances in which a question of law can be extracted will be uncommon. Whether something was or should have been within the common knowledge of the parties at the time the contract was entered into is a question of fact...
>
> [emphasis added]

D. CONTRACTUAL INTERPRETATION AND USE OF SURROUNDING CIRCUMSTANCES

[40] Given that much of what Christie argues suggests that the arbitrator's interpretation of the Development Agreement gives rise to questions of law, it is well to briefly review some of the principles of contractual interpretation.

[41] The general approach to contractual interpretation is well known, and was summarized by Rothstein J. in ***Sattva*** as follows (at para. 47):

> [47] ... [T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" [citation omitted]. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[42] The role of surrounding circumstances in contractual interpretation is to deepen a decision maker's understanding of the mutual and objective intentions of the parties. As Rothstein J. wrote (***Sattva***, at para. 57):

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement [citation omitted]. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract [citation omitted]. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement [citation omitted].
>
> [emphasis added]

[43] Examples of relevant surrounding circumstances or the "factual matrix" include the genesis, aim or purpose of the contract, the nature of the relationship created by the contract and the nature or custom of the market or industry in which the contract was executed (see ***IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing***, 2017 ABCA 157).

[44] As Rothstein J. remarked (***Sattva***, at para. 58):

> [58] The nature of the evidence that can be relied upon under the rubric of 'surrounding circumstances' will necessarily vary from case to case. ... [T]his includes ... 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man'.

The limits of what can be relied upon were expressed as follows:

> [58] ... It should consist only of objective evidence of the background facts at the time of the execution of the contract [citation omitted] that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.... Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

[45] It is also important when conducting contractual interpretation that the decision maker consider the principle of commercial reasonableness and efficacy. As Spivak J.A. remarked in ***Vesturland Development Ltd. et al. v. Gimli (Rural Municipality) et al***., 2021 MBCA 45 (at para. 42):

> [42] ... Contracts are to be interpreted in accordance with sound commercial principles and good business sense [citation omitted]. The interpretative principle of commercial efficacy — and its corollary, avoiding interpretations that result in a commercial absurdity — is one of several tools used by courts to give an accurate meaning to the parties' intentions as stated in a contract.

E. Whether an Arbitrator Gave Excessive Weight to the Surrounding Circumstances or "Factual Matrix" is a Mixed Question

[46] The issue in ***Teal Cedar*** was whether the arbitrator allowed the "factual matrix to overwhelm the words of the contract" when he interpreted the parties' amended settlement agreement. Gascon J. characterized this as the "overwhelming" principle. Despite some of Christie's protestations to the contrary, it is the same argument on which Christie relies in these leave applications.

[47] As Gascon J. explained, the "overwhelming" principle is subject to two formulations, *only one of which raises a question of law*. The first formulation is that the factual matrix overwhelms the plain wording of a contract when it is given excessive weight (***Teal Cedar***, at paras. 56 and 58):

> [56] The first formulation of this "overwhelming" principle is that the factual matrix overwhelms the words of a contract when it is weighed excessively. This formulation fails to confer appellate review jurisdiction here because it is a mixed question.
>
> . . .
>
> [58] The arbitrator, after a lengthy and complex hearing, was best situated to weigh the factual matrix in his interpretation of the Amended Agreement. The fact that he may have placed significant weight on that evidence in

> interpreting the agreement does not engage a legal question conferring jurisdiction on the courts under the *Arbitration Act* as it does not alter the underlying test he applied in this case.
>
> [emphasis added]

[48] The second formulation of the "overwhelming" principle — and the one that raises a question of law — is when the factual matrix is interpreted "in isolation from the words of the contract, effectively creating a new agreement between the parties". As Gascon J. explained, when the factual matrix is used in such a way so as to create a new agreement, this runs afoul of the legal principle that contractual interpretation must remain grounded in the text of the contract. In that case, however, Gascon J. concluded that (***Teal Cedar***, at para. 64):

> [64] ... The arbitrator's interpretation was rooted in the words of the contract, not overwhelmed by them. While the arbitrator may have placed significant weight on the factual matrix when interpreting the meaning of "compensation", there is no arguable merit to the claim that he interpreted that matrix isolated from the contract's words so as to effectively create a new agreement.
>
> [emphasis added]

[49] Where the applicant for leave attempts to formulate a question of law based on the second formulation of the "overwhelming" principle — which on its face appears to be what Christie is attempting to do with these leave applications — Gascon J. predicted that "it will often amount to nothing more than a complaint about how much weight was allocated to the factual matrix", a question of mixed of fact and law (***Teal Cedar***, at para. 65):

> [65] Again, contractual interpretation is a fact-specific exercise. It follows that a question of law premised on the failure to apply the principle that the factual matrix must not be interpreted in isolation from the words of the contract will be very difficult to extricate in practice. On closer examination, it will often amount to nothing more than a complaint about how much weight was allocated to the factual matrix — in effect, a disagreement about how the

> decision-maker interpreted the words of a contract in light of the factual matrix (*Sattva*, at paras. 50 and 65). In short, the supposed question of law will often reveal itself to be a question about whether the decision-maker applied the principle properly — a mixed question — and not about whether the decision-maker applied the proper principle. To extricate a question of law based on the alleged error of having overwhelmed the contract, a reviewing court must be satisfied that the decision-maker interpreted the factual matrix isolated from the words of the contract: an approach which could effectively create a new agreement. There is no arguable merit to the claim that the arbitrator's analysis here adopted such a flawed approach.
>
> [emphasis added]

[50] The principles discussed above from ***Teal Cedar*** were recently adopted by the Manitoba Court of Appeal in ***Rosenberg et al. v. Securtek Monitoring Solutions Inc.***, 2021 MBCA 100, a case in which the trial judge's use of the surrounding circumstances in interpreting a purchase agreement was central to the appeal. Regarding the overwhelming principle, Mainella J.A. wrote (at para. 83):

> [83] There are two manifestations of the overwhelming principle. The first is where the surrounding circumstances are given excessive weight so as to overwhelm the words of the contract; this is a question of mixed fact and law. The second is where the surrounding circumstances are interpreted in isolation from the words of the contract, effectively creating a new agreement; this is a question of law.
>
> [emphasis added]

[51] I note that in ***Rosenberg***, the nature of the error alleged by the appellant — that the trial judge allocated excessive weight to the surrounding circumstances so as to overwhelm the words of the purchase agreement — fit within the first formulation of the overwhelming principle, and thus was reviewed on a standard of palpable and overriding error. Shelter is right to point out that given Christie's reliance on this case, it is noteworthy that, had the decision maker at first instance been an arbitrator as

opposed to a trial judge, an appellate court would have had no jurisdiction to review the contractual analysis.

V. THE CONSEQUENCES OF A LIMITED RECORD FOR A COURT SITTING ON APPEAL AND/OR HAVING TO DECIDE QUESTIONS RESPECTING LEAVE TO APPEAL

[52] Much of Christie's emphasis on these applications for leave to appeal involves a focus on the arbitrator's approach to issues connected to his contractual analysis and the arbitrator's contractual interpretation.

[53] It should be apparent from the applicable legal principles and the jurisprudence set out and discussed in the previous section, that contractual interpretation is now seen as involving issues of mixed fact and law. To repeat, "it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (see ***Sattva***, at para. 50).

[54] The factual matrix or the surrounding circumstances in a case such as this one, need be discerned from what should be the "discernable" testimonial and documentary evidence adduced at the arbitration hearing that can now be agreed to by the parties as having been part of the record. Alternatively, they can be discerned from that evidence which is identifiable by the court itself as having been part of the record. Regrettably, as I set out in my April 7, 2021 decision (***Christie***) dealing with the record, there is in the present case, because of what little was consensually created, transcribed or preserved from the arbitration hearing, no apparent agreement as between the parties as to what now constitutes the record. For the same reason, neither is there an otherwise clear or complete record that can be identified by the

court. As a consequence, this court is now stuck with the very limited and incomplete reviewable record as determined by the court (identified at paragraphs 59 and 86 of the April 7, 2021 decision).

[55] To be clear, the available record in the present case as I found it to exist, does not now include any evidence of the "factual matrix", the circumstances surrounding the formation of the Development Agreement or the project as a whole. The available record does not include any of the witnesses' evidence as to the property management arrangements, scheduling and delays, the involvements of consultants and the WRHA, change orders, liens, design issues, third-party contracts, or witness evidence on any of the other potentially important issues that are involved in this dispute. Put simply, apart from what is summarized in the decisions, there is no record of virtually any of the voluminous documentary and *viva voce* evidence that was adduced. Although the arbitrator assured the parties that all of the evidence was considered, the arbitrator himself acknowledged with reason, that the evidence was voluminous and that the reasons for decision, by necessity, fall short of outlining or summarizing all of that voluminous evidence (see Main Award, at para. 502).

[56] I am in agreement with Shelter's position that because of the impoverished record, both on this leave application and should leave be granted on any of the proposed questions, there is a practical limit to what this court can now do on the appeal. As a result, there is an obvious prejudice to Shelter's position in that much of what might clarify or substantiate the arbitrator's determinations and/or interpretations as it relates to questions of law (assuming they could be identified) or questions of

mixed fact and law (in respect of which an extricable question of law will be alleged), is not available insofar as there is not anything remotely approaching complete evidence of the factual matrix or the circumstances surrounding the formation of the Development Agreement or the project as a whole. More specifically, if leave is granted, for example, on the question of whether the arbitrator interpreted the factual matrix in isolation of any of the key agreements, the court will find itself in a position of having to perform what Shelter calls a "blind review" of the alleged error.

[57] Shelter properly asks a number of questions that underscore the problems with the record as it relates to this court's task of assessing arguable merit in deciding leave and/or as it relates to this court's more full task of review in the event leave was granted. For instance, how does the court review the alleged error against the standard of reasonableness in the absence of any evidence of the factual matrix respecting the agreement which agreement was supposedly "overwhelmed"? Even if the less deferential standard of review of correctness were to be applied (as submitted by Christie), the problem remains and in fact, becomes more pronounced. Indeed, assuming an error arising from a question of law, on the application of the correctness standard, in the absence of a complete evidentiary record, this court would not be in a position to undertake its own principled and interpretative analysis of the Development Agreement and the factual matrix as required.

[58] Similar concerns and limitations play out in the context of other proposed questions of law for which leave is being sought and where, even assuming a valid question of law has been formulated, the issue of arguable merit must be determined.

In this regard, I note that the extremely limited record leaves the court ill-equipped to properly consider whether the arbitrator erred in finding that there was an enforceable Property Management Agreement, whether Klapman was dishonest and acted in bad faith in his dealings with Shelter or whether the damages award reflected Shelter's actual financial loss as a consequence of the termination of the Property Management Agreement.

[59] In my view, Shelter is justified in saying that intended or not, the reality of the situation in the present case is that the extremely limited record has compromised and perhaps disarmed this court's ability to perform a fair and meaningful review as to the arguable merit of any purported question of law impliedly alleging legal errors made by the arbitrator.

[60] Despite the extremely limited record, I intend in the analysis section of this judgment, to address separately Christie's position as best I can as it relates to the purported questions of law proposed by Christie pursuant to s. 44(2), just as I will also address separately, Christie's submissions concerning s. 45(1). That said, in addition to the other reasons I will advance, I wish to be clear that part of my rationale for what will be my determination to deny leave, is grounded in my inability to meaningfully conduct a fair review (one that does justice to the integrity of the arbitration hearing) as it relates to arguable merit on the leave application and what would be a similarly compromised or disarmed capacity on any more full appellate review had leave been granted.

VI. ANALYSIS

[61] In this section, I will conduct my analysis of both the preliminary and more substantive questions on these applications with reference to the issues earlier identified at paragraph 10. For convenience, I will again set those issues out as follows:

A. Does the record filed by Christie on June 10, 2021 comply with the court's order dated May 27, 2021?

B. Should the affidavit of Hartley Klapman sworn February 22, 2022 constitute part of the record for any of the determinations required on these applications?

C. Does the standard of review need to be determined in deciding these applications and if so, what is the standard of review that ought to be applied?

D. Has Christie identified a question of law of arguable merit?

E. Has Christie satisfied the balance of the test in s. 44(2)?

F. Has Christie established a basis upon which to set aside any of the awards pursuant to s. 45(1)?

A. DOES THE RECORD FILED BY CHRISTIE ON JUNE 10, 2021 COMPLY WITH THE COURT'S ORDER DATED MAY 27, 2021?

[62] This court's order prescribing the scope of the record was entered on June 3, 2021. Paragraph 4 of the order stipulated that the record, amongst other things, "shall consist only of the five exhibits marked at the arbitration proceeding". That order

arose following a highly-contentious hearing and what was the court's need (acknowledged by both parties) to clarify what constituted the record for the purposes of these applications.

[63] Shelter objects to some of what Christie has filed as part of the record. As a consequence, Shelter now argues that the record does not comply with this court's order respecting the scope of the prescribed record and suggests that Christie has unilaterally augmented an exhibit so as to include documents that were not part of the original exhibit.

[64] Despite what is a somewhat confusing set of submissions respecting what and why each party understood was still open to contest respecting the record and despite Shelter's more stark position respecting what should be part of the record in compliance with the court's order, it would seem that based on Shelter's submissions, Shelter's principal objection is to the inclusion of parts of the Development Agreement found at Tab "G" of Exhibit 1.

[65] In the circumstances of these applications, I am prepared to accept as part of the record filed by Christie (Volumes 1 and 2) on June 10, 2021, that which Shelter impugns as the "augmented" Exhibit 1, which includes a series of documents: Tabs E, F, G, H and J.

[66] Contrary to the submissions of Shelter, I do not take Christie's contested filings as evidence of a deliberate attempt to not comply with the court's earlier ruling. Instead, I accept that Christie did attempt to seek this court's direction respecting the record in its letter sent to the court on June 21, 2021.

[67] On the question of the inclusion of the Development Agreement, I accept Christie's submission that the Development Agreement was already before the arbitrator as part of the "core book" of documents provided by Shelter at the commencement of the arbitration hearing. I find confirmation at paragraph 101 of the first award in which the arbitrator states, "the entire Development Agreement must be considered in order to interpret the meaning of any provision." Indeed, the arbitrator cites and frequently quotes the Development Agreement provisions throughout his decision.

[68] Accordingly, I will not be expunging or ruling as inadmissible those parts of the record filed by Christie on June 10, 2021 as requested by Shelter.

B. SHOULD THE AFFIDAVIT OF HARTLEY KLAPMAN SWORN FEBRUARY 22, 2022 CONSTITUTE PART OF THE RECORD FOR ANY OF THE DETERMINATIONS REQUIRED ON THESE APPLICATIONS?

[69] Shelter submits that Christie's filing of the February 22, 2022 affidavit of Hartley Klapman is another example of noncompliance with this court's order and an attempt by Christie to expand the scope of the record.

[70] Shelter objects to the introduction of the affidavit into evidence noting that paragraph 5 of this court's order stipulates that the record "for the consolidated leave applications, and any appeal should leave be granted, shall consist *only of* …." Shelter further argues that the rest of the same paragraph of the court order sets out an exhaustive list of the documents that constitute the record. Shelter points out that the term "consolidated leave applications" is defined as the notices of application in suit

numbers CI 20-01-28520 and CI 20-01-27758, meaning that the order defines the scope for both applications.

[71] It is Shelter's position that the new Klapman affidavit and the 27 new documents attached to it, ignores the court order and purports to create a separate record for this court's review of the supplemental award, a review that was initiated by the notice of motion filed in CI 20-01-28520. Put simply, Shelter contends that the new materials are not permitted under paragraph 5 of the court order.

[72] I have considered carefully the submissions of Shelter with respect to their objections to the February 22, 2022 Klapman affidavit. While I acknowledge that the issue of the record has been the subject of extensive oral and written submissions, two contested hearings before this court and an unsuccessful appeal to the Manitoba Court of Appeal, I am nonetheless, for the reasons argued by Christie's counsel, not prepared to expunge, nor rule inadmissible the impugned Klapman affidavit. I will admit it as part of the record for what Christie identifies as its potential use in relation to its second notice of application.

[73] I note as Christie has argued, that at paragraph 38 of its brief, Shelter does not deny that Christie specifically reserved its right to file further affidavit material in support of its second notice of application following the determination of the record issue. Indeed, it would appear that during the case management conference on February 9, 2022, Shelter acknowledged that Christie had reserved its right to do so.

[74] I accept Christie's submissions that specific discussions did take place during the case management conference of October 22, 2020 at the end of which Christie's

counsel advised that they had intended to file Mr. Klapman's affidavit regarding the second notice of application within a few days so as to comply with *King's Bench Rule* 38.07.1(1)(a), which requires that affidavits be filed within 30 days of the filing of notices of application. At that time, the court did direct that the 30-day requirement in *King's Bench Rule* 38.07.1(1)(a) was to be set aside and that Christie ought to wait until the determination of the record before filing any further materials.

[75] In addition to the above, I note Christie's argument that Shelter's reliance on the specific wording of this court's order need be seen from the perspective of Christie's current submission respecting that order. In that connection, and consistent with its intention, which it says was expressed at the October 22, 2020 case management meeting, the specific wording of the order was stipulated without counsel for Christie having any opportunity whatsoever to advise the court of its disagreement with the wording (she, Christie's counsel, submits that she was otherwise engaged in client meetings all that day). It is Christie's submission that by the time its counsel had an opportunity to review the draft order provided by Shelter's counsel, the order had already been signed. Christie's counsel submits that the words "<u>shall consist only of</u>" in paragraph 4 of the court order would not have been agreed to and, more importantly, the phrase is not consistent with the language of the decisions of this court rendered on April 7, 2021 and May 10, 2021. In that regard, Christie submits that nowhere in those decisions does the word "only" appear in relation to the documents referenced as forming the record.

[76] I note and accept Christie's submissions that the impugned Klapman affidavit seems to have taken into account this court's order by excluding the written submissions made by the parties to the arbitrator as it related to the second award and only attaches documents that were before the arbitrator. Nowhere in its brief has Shelter claimed that the content of the affidavit itself is inaccurate or that the exhibits attached thereto were not before the arbitrator when he made his second award.

[77] The order relied upon by Shelter makes no reference to that part of Christie's second notice of application, which seeks to set aside a portion of the arbitrator's second award. That order only refers to the "leave applications and any appeal resulting therefrom".

[78] I accept that all of the evidence in paragraphs 16 to 25 and Exhibits "T" to "DD" in the Klapman affidavit, address the requisite elements of the tests for this court to determine the issues raised in Christie's second notice of application regarding the relief sought pursuant to s. 45(1) of the ***Act***.

[79] Accordingly, without making comment at this stage about the appropriateness of what Christie filed as part of its second notice of application (seeking the relief pursuant to s. 45(1)) or whether, much of what Christie currently argues pursuant to s. 45(1) is properly before the court, for the reasons given, I am prepared to admit the affidavit of Hartley Klapman sworn February 22, 2022, for what Christie submits is its potential support for the relief Christie seeks under s. 45(1).

C. DOES THE STANDARD OF REVIEW NEED TO BE DETERMINED IN DECIDING THESE APPLICATIONS AND IF SO, WHAT IS THE STANDARD OF REVIEW THAT OUGHT TO BE APPLIED?

[80] Both Christie and Shelter agree that a determination of the standard of review applicable to these applications is required. Both Shelter and Christie properly acknowledge as does this court, the governing jurisprudence that supports that proposition. In that connection, the Supreme Court of Canada in ***Sattva*** stated as follows (at para. 75):

> [75] Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review.

[81] In ***Canada (Minister of Citizenship and Immigration) v. Vavilov***, 2019 SCC 65, ("***Vavilov***") the Supreme Court of Canada determined that appellate standards of review are to apply to statutory appeals and that, in considering questions of law, including those concerning the scope of the decision maker's authority, the applicable standard is correctness. The Court acknowledged that this was a departure from its recent jurisprudence, but that the shift was necessary to bring coherence and conceptual balance to the standard of review analysis (see paras. 17, 36 – 38). Nothing was specifically mentioned in ***Vavilov*** about the review analysis for arbitrations, which, even if regulated by statutory provisions, represent a distinct and private adjudicative forum that exists outside the typical administrative law framework.

[82] There continues to be legitimate debate as to whether the standard of review framework reformulated by ***Vavilov*** applies to appeals of commercial arbitration awards. As I noted in ***Christie***, at paragraph 65, in respect of these applications,

there have been a number of decisions from various lower courts both in this jurisdiction and other jurisdictions that would suggest that the issue of the applicable standard of review is far from determined. Given the clarity of the Supreme Court of Canada's reasoning and conclusions as found in ***Sattva*** and ***Teal Cedar*** respecting the application of the reasonableness standard of review in cases of commercial arbitrations, it is not obvious, given the Court's silence in ***Vavilov*** as it relates to commercial arbitrations, that the Supreme Court of Canada intended to so completely depart from its previous clear reasoning and strong conclusions in ***Sattva*** and ***Teal Cedar***.

[83] Christie argues that the analysis in ***Vavilov*** did indeed change the standard of review analysis for arbitrations. It is Christie's position that to the degree that there remained any doubt that ***Vavilov*** was intended to displace the Supreme Court of Canada's decision in ***Sattva*** and ***Teal Cedar*** regarding the standard of review to be applied to appeals from arbitrations brought pursuant to a legislative appeal process, the Supreme Court of Canada's judgment in ***Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District***, 2021 SCC 7 ("***Wastech***"), has now confirmed the change. Christie contends that ***Wastech*** makes it clear that the intention of the Supreme Court of Canada in ***Vavilov*** was to depart from the standard of review identified in ***Sattva*** and ***Teal Cedar***.

[84] Shelter for its part takes a contrary position and argues that ***Sattva*** and ***Teal Cedar*** have not been expressly overruled by ***Vavilov*** and that they remain as binding

authorities. Accordingly, Shelter contends that the standard of review in the present case is and would continue to be reasonableness.

[85] I am in agreement with the position advanced by Shelter.

[86] Although Christie insists that this issue was resolved by the Supreme Court of Canada in ***Wastech***, it would seem that Christie de-emphasizes the fact that the position it invokes from ***Wastech*** is that which comes from the minority opinion. It need be noted that six of the nine judges who were part of the majority 2021 judgment in ***Wastech*** left the question unanswered. What was not left unanswered, however, is the inaccurate suggestion that the issue has been fully considered or finally decided by the Supreme Court of Canada. In writing for the majority, Kasirer J. noted as follows (at paras. 45 and 46):

> [45] … I am mindful, however, that this Court's judgment in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which was released shortly after this appeal was heard, set out a revised framework for determining the standard of review a court should apply when reviewing the merits of an administrative decision. I note that *Vavilov* does not advert either to *Teal Cedar* or *Sattva*, decisions which emphasize that deference serves the particular objectives of commercial arbitration [citation omitted].
>
> [46] In these circumstances, I would leave for another day consideration of the effect, if any, of *Vavilov* on the standard of review principles articulated in *Sattva* and *Teal Cedar*. We have not had the benefit of submissions on that question, nor do we have the assistance of reasons on point from the courts below.
>
> [emphasis added]

[87] Prior to the comments of Kasirer J. (quoted above), the Alberta Court of Queen's Bench decided ***Cove Contracting Ltd. v. Condominium Corporation No. 012 5598 (Ravine Park)***, 2020 ABQB 106. Separate and apart from the clarifying comments of Kasirer J. in ***Wastech***, I find the reasons in ***Cove Contracting***

persuasive insofar it clearly rejects the notion that ***Vavilov*** can or should be read as having changed the standard of review on commercial arbitration appeals. At paragraphs 6 to 8 and paragraph 12, the court in ***Cove Contracting*** noted as follows:

> [6] 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.
>
> [7] 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.
>
> [8] I agree with that submission.
>
> . . .
>
> [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.
>
> [emphasis added]

[88] In ***Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporations***, 2020 ONSC 1516 ("***OLG***"), the Ontario Superior Court of Justice adopted and followed the reasoning and conclusions in ***Cove Contracting***. The court noted as follows (at paras. 71 – 74):

> [71] 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.

[72] 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.

[73] 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 its 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.

[74] 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]

[89] I agree with the observations in ***OLG*** that the reformulated standard of review framework in the administrative law context derives from constitutional considerations that justify deference by the judiciary to the legislature. Those same considerations are not present in private commercial arbitration matters where the parties' participation is consensual and the legislature had no role in the appointment of the decision maker.

[90] Based on the majority's opinion in ***Wastech***, the British Columbia Supreme Court in ***Spirit Bay Developments Limited Partnership v. Scala Developments Consultants Ltd***., 2021 BCSC 1415, held that *stare decisis* requires that ***Sattva*** and ***Teal Cedar*** continue to apply until the unanswered question has been addressed by the Supreme Court of Canada. In that regard, Davies J. noted as follows (at paras. 58 and 59):

> [58] I have concluded that the majority decision of the Court in *Wastech* precludes the conclusion that either *Sattva* or *Teal Cedar* has been impliedly over-ruled by *Vavilov*.
>
> [59] Although by leaving open the question of the standard of review to be applied in reviewing arbitral decisions under s. 31 of *Act* the majority in *Wastech* has allowed some uncertainty in administrative law to continue, I am satisfied that *stare decisis* requires that the reasonableness standard enunciated in *Sattva* and *Teal Cedar* must still be applied in determining the issues raised on this appeal.

[91] In addition to noting that ***Vavilov's*** reformulated standard of review framework in the administrative law context derives from constitutional considerations that justify deference by the judiciary to the legislature (and that such considerations are not

present in private commercial arbitrations), there are other compelling and practical reasons for the application of the reasonableness standard as contemplated and discussed in the analysis in both ***Teal Cedar*** and ***Sattva***. In that connection, I wish to add below one additional and significant point, which amongst others, if not adequately considered and appreciated, could have implications for the objectives served by commercial arbitrations were an appellate standard of review to apply.

[92] Separate from what should be seen as this court's clear lament in the unique and particular circumstances of this case respecting the failure of the parties to adequately and consensually organize, curate, and otherwise preserve an even minimally helpful record in anticipation of or for the purposes of an appellate review, an equally important point must be concurrently acknowledged. In that regard, it must be acknowledged that in the context of a private arbitration such as this one, it can properly be argued that with the clear consent of the parties (and with a clear identification of what is being done and agreed to) the "record" may often and appropriately so, look less formalistic, structured and transcribed than that which is associated with the record in a court of law. Presumably, that comparative and tolerable informality — where properly understood and agreed to by the parties in a way that leaves no doubt about what the parties intended and what was actually before the arbitrator — is what to some extent defines the unique and desired efficiency, proportionality and the legitimated finality of an arbitration in a private commercial dispute. There is a clear distinction however, between that type of comparative informality that distinguishes an arbitration proceeding from a court proceeding and

that which has occurred or resulted in the present case. Here, as a consequence of the absence of any clear consent, agreement and/or, common understanding on the part of the parties as to what would constitute a sufficiently accurate, reflective and usable record for the purposes of any eventual review, there is now effectively no record in respect of pivotal and foundational evidence as it relates to the witnesses' testimony and the documents adduced. As I suggested in the previously mentioned and connected decision in this case, in such a sorry scenario, it should not be left to the appellate court to have to chase entrails in a desperate attempt to try to create a record amidst an ongoing and embittered dispute about what the actual evidence was (see ***Christie***, at paras. 85 – 88).

[93] In the context of the broader debate about which standard of review should apply, the eventual clarifications by the Supreme Court of Canada will inevitably have an effect as to how much characteristic informality will be retained for arbitrations. It should be obvious that if Christie's position is accepted and were an appellate/***Housen Nikolaisen*** standard of review to be adopted as the standard of review necessary for commercial arbitrations, the implications for how the parties will have to address the record will be significant and commensurately less flexible and informal. The margin of maneuver for the parties (even with consent and agreement) to favour a more informal approach to the record and the recording of the evidence will be significantly more limited.

[94] Assuming the continuation of statutory provisions that require leave and which clearly limit appeals and arbitrations to questions of law (where arbitration agreements

are otherwise silent as to the standard of review), if ***Vavilov*** and the traditional appellate standards of review were to apply to the statutory provisions, the standard of review would be correctness. On an application of the correctness standard, were any errors to be found on the basis of identified and valid questions of law, the court would then be required to conduct and substitute its own analysis based on the record. In that scenario, once having found the error of law, the now-resulting substituted and fresh analysis required by the court, if it is to be fair, will require a record that permits such a fresh and meaningful analysis and review. In anticipation of that prospective need for a more meaningful record in the event of an identified error arising from a question of law, parties to an arbitration will in the future, inevitably feel obliged and be required to ensure a more formalistic and transcribed court-like record. Arbitrations (a forum chosen by private contracting parties for the efficiency and economy they provide) could very quickly become, in significant ways, less distinguishable from the more formal and rigid processes and adjudications of a court of law. The result and potential change seems a far distance away from what the still recent reasoning in ***Teal Cedar*** seems to understand and endorse about the objectives and possible advantages of a commercial arbitration for private contracting parties.

[95] For all of the reasons noted above, I am persuaded that the standard of review on which the merits of this appeal would have to be judged, assuming leave was granted, is reasonableness. Until the Supreme Court of Canada has answered the question of what effect, if any, ***Vavilov*** has on ***Teal Cedar*** and ***Sattva***, those authorities remain good law and are binding on this court.

[96] Accordingly, in assessing whether the issues raised in these applications for leave, raise questions of law of "arguable merit", I will be conducting that assessment in light of the standard of review on which the merits of the appeal would be judged (were leave to be granted). That standard of review is reasonableness. In other words, it should be understood and assumed if and where I have been required to comment on the arguable merit of a properly formulated question of law, I will have made my determination respecting arguable merit after having assessed the arbitrator's analysis and decision for what should be a discernable and "reasoned exercise" of decision making as it relates to the question in issue.

[97] Even on a more preliminary assessment examining the "arguable" merit of a question of law (as opposed to the review conducted on an appeal hearing), my review of each proposed question should be assumed to have been undertaken mindful of the arbitrator's reasons which reasons need be examined in light of the governing law and the facts found on the evidence (which evidence in the present case, may or may not be available or discernable for this court's review because of the limited nature of the record).

[98] Separate from the distinct, but required determination this court must make pursuant to s. 44(2) respecting whether issues represent true questions of law, for the purposes of these leave applications, it should be understood that in assessing the arguable merit of the issues *vis-à-vis* the arbitrator's decision and any eventual reasonableness review on appeal, I have been guided by the Supreme Court of Canada's most recent instruction in ***Vavilov*** respecting the reasonableness review. In

that regard, amongst other propositions, I note that the Supreme Court of Canada made clear that the reasonableness review is to be concerned with both the decision making process and its outcomes. To be reasonable, the court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic. The decision must also be justified in light of the legal and factual context, including, most importantly, the governing statutory scheme or in the present case, the relevant contractual provisions.

[99] In addition to the above, I am also mindful of the Court's assertions in ***Vavilov***, which underscore that:

- The reasonableness review is a robust form of review (see para. 13);
- Where reasons are required, they are the primary mechanism by which decision makers show that their decisions are reasonable, both to the affected parties and to the reviewing courts (see para. 81);
- The burden is on the party challenging the decision to show that it is unreasonable (see para. 100); and
- A court applying the reasonableness standard does not ask what decision it would have made in place of that of the decision maker, nor does it attempt to ascertain "the range" of possible conclusions that would have been open to the decision maker, or conduct a *de novo* analysis or seek to determine the "correct" solution to the problem. A principled approach to the reasonableness review requires that the decision maker's reasons be placed first (see paras. 83 – 84).

[100] In assessing arguable merit on the proposed questions of law, assuming they are properly identified as questions of law, I will also be attentive to what the Supreme Court of Canada in ***Vavilov*** suggested might be the signs of an "unreasonable" decision. In that connection, I will be on the lookout for the absence of "reasoning that is both rational and logical" (see para. 102) as such reasons may "fail to reveal a rational chain of analysis", which when read in conjunction with the record, do not make it possible to understand the decision maker's reasoning on a critical point (see para. 103) or which might "exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise" (see para. 104). No less important, will be my attentiveness to what the Court in ***Vavilov*** identified as the second type of fundamental flaw, which, along with those mentioned above, might also show a decision to be unreasonable. To ensure that this second type of flaw does not exist, I will examine the arbitrator's reasons with the awareness that a decision must be "justified in relation to the constellation of law and facts that are relevant to the decision" (see para. 105).

[101] When conducting my analysis in the present case as explained above, I wish to underscore that I will be doing so while recognizing the earlier explained distinction between assessing questions of law for arguable merit and assessing errors of law as part of the full review at the appeal stage. The issue on a leave application is not whether the arbitrator's decision on any proposed question of law will ultimately be determined to be reasonable, but rather, whether any properly formulated question of

law, which judged on a standard of reasonableness, is one of arguable merit thereby conferring jurisdiction to review the award.

[102] I will make one final point in this section. If I am wrong in my earlier explained determination and it is in fact the standard of correctness that applies to my task of assessing arguable merit pursuant to s. 44(2), I am for the reasons earlier identified and because of the limited record, significantly compromised or disarmed in my capacity to conduct the requisite and fresh review even for the purpose of assessing leave. In such a scenario, it would be unfair to grant leave and proceed with an appeal when a proper and meaningful review would ultimately be impossible.

D. HAS CHRISTIE IDENTIFIED A QUESTION OF LAW OF ARGUABLE MERIT?

[103] It is Christie's position that in addition to its argument pursuant to s. 45(1) of the ***Act*** that the arbitrator's decision awarding payment of $348,791 plus interest to Shelter be set aside (an argument that I address later in this judgment), leave should be granted pursuant to s. 44(2) based on what Christie says are identifiable questions of law of arguable merit.

[104] Christie contends that the arbitrator's decision that he could interpret the Development Agreement and all of the remedies sought by the parties thereunder on the basis of post-contractual conduct, constitutes an error of law, which along with the other identified questions of law of arguable merit, justify leave pursuant to s. 44(2).

[105] As part of Christie's argument suggesting that the arbitrator applied the wrong test in interpreting the terms of the Development Agreement (by interpreting it based on the subsequent conduct of the parties), Christie contends that the surrounding

circumstances/factual matrix were allowed to overwhelm the words of the Development Agreement effectively creating a new agreement and/or ignoring the clear, unambiguous language of the Development Agreement. Also in connection to the Development Agreement, Christie argues that the arbitrator applied an incorrect principle and failed to consider a required element of the legal test and/or failed to consider a relevant factor in interpreting the terms of the Development Agreement. In doing so says Christie, the arbitrator altered the underlying test, which he then utilized to assess all of the claims of the parties against each other.

[106] Christie also argues that pursuant to s. 44(2), leave ought to be granted on the basis of the arbitrator's interpretation of the Guarantee and Undertaking and the Estoppel Certificate. Leave should also be granted says Christie, on the basis of the arbitrator's findings of bad faith against Christie.

[107] Specifically, it is Christie's position that leave to appeal ought to be granted given that the arbitrator erred in law and/or on an extricable question of law in applying the wrong legal test to the interpretation of the Guarantee and Undertaking, s. 5.2 of the Lease, the Estoppel Certificate and the Release. Christie also alleges that the arbitrator erred in law by making a finding of fact for which there is no evidence by making inconsistent findings and in applying the wrong or no legal test when concluding that Christie acted in bad faith.

[108] For the reasons that follow, I am not persuaded nor am I able to conclude on the record before me, that Christie has identified in any of its submissions or in its grounds of appeal, an arguable question of law.

[109] In giving full consideration to the breadth of Christie's arguments respecting the identification of a question of law of arguable merit, I have obviously remained mindful of the earlier discussed legal principles. In considering some aspects of Christie's arguments on these leave applications, I have also remained mindful of the extent to which, in some instances, those principles — as they relate to mandated interpretative approaches to contractual interpretation — require this court to be able to examine in a full way, aspects of a record that would otherwise provide this court meaningful insight into what the arbitrator had before him if and where he was required to consider such things as the surrounding circumstances and the factual matrix.

[110] Apart from what I will explain is Christie's failed effort to present properly defined questions of law (rather than what are questions of fact and/or questions of mixed fact and law), the already described "impoverished record" significantly prevents and/or inhibits me — even "disarms" me — from being able to give meaningful and full consideration to the arbitrator's reasons insofar as they rely upon or are informed by aspects of the adduced testimonial and documentary evidence that was not properly curated or preserved as part of a record for review. Such a deficiency impacts to a greater or lesser degree, not only my task in searching for and evaluating an "arguable" question of law on these leave applications, but it would also in my view, impact any meaningful review on a merits hearing were leave to be granted.

[111] In reviewing the submissions of Christie, it is clear that Christie does not agree with the findings of the arbitrator on matters of fact, the damaging credibility findings made against its principal and main witness, the arbitrator's application of the law to

the facts of this complex case or for that matter, the way in which the arbitrator exercised his discretion on matters of costs and interest. While I acknowledge Christie's disagreement and disappointment in this regard, that is not enough to justify what is in my view, Christie's attempt to use these leave applications as a forum to re-argue and re-litigate its case under the pretense of raising "questions of law" of arguable merit.

[112] Leaving aside the problems with the record, I agree with Shelter's contention that with Christie arguing as it has, it is doing exactly what the Supreme Court of Canada has cautioned reviewing courts to be mindful of on leave applications. That is particularly so in those leave applications involving disputes over contractual interpretation — situations where, in order to gain jurisdiction, the applicant for leave and its counsel seek to strategically frame any alleged errors as questions of law. Again, I agree with Shelter that if properly framed, many of the alleged errors raised in Christie's materials are exclusively questions of fact or, at most, questions of mixed fact and law, none of which are subject to appellate review.

[113] With the above comments in mind, I will briefly address and explain below why Christie's proposed questions of law as outlined in its submissions, are not such so as to justify the granting of leave. Shelter is correct in its response to Christie's submissions when it (Shelter) suggests that the identified questions of law advanced by Christie can be categorized as arising from issues relating to the following: the interpretation of the Development Agreement (a category of issue under which more specific sub issues have been raised and will also be addressed); the arbitrator's

findings regarding the Property Management Agreement; the arbitrator's findings of bad faith; the arbitrator's damage award; the arbitrator's discretionary decision as to costs; and the arbitrator's discretionary award of interest. Each of these areas or categories wherein Christie suggests the arbitrator committed errors that constitute questions of law of arguable merit, will be briefly, but separately examined.

1) <u>The Interpretation of the Development Agreement</u>

[114] Despite Christie's submissions, I have determined that Christie has not presented an identifiable question of law of arguable merit in respect of the following:

i. the arbitrator's general or overall interpretation of the Development Agreement;

ii. the arbitrator's alleged reliance on subsequent conduct to interpret the Development Agreement;

iii. the arbitrator's alleged reliance on surrounding circumstances in a way that Christie insists allowed those surrounding circumstances to overwhelm the Development Agreement and create a new agreement; and

iv. the arbitrator's alleged ignoring of clear, unambiguous language in the Development Agreement.

(a) <u>The Arbitrator's General or Overall Interpretation of the Development Agreement</u>

[115] On a reading of the award as it relates to the arbitrator's general overall interpretation of the Development Agreement, there is nothing, despite Christie's submissions, to suggest a question of law or an inextricable question of law. Nor is there anything in the award to suggest that the arbitrator did not understand that his task was to interpret the Development Agreement in light of the appropriate factual

matrix. That was the correct legal test and that is precisely the type of interpretation the arbitrator performed.

[116] Shelter points out in its submissions that it is clear from the Arbitration Record that the arbitrator was faced with the challenging task of "resolving a constellation of affirmative claims by Christie against Shelter", claims touching upon every aspect of the development of the SSCY Property. Christie's claims were based on various theories of the law and causes of action, including breach of contract, contract default, negligence, breach of fiduciary duty and breach of the duty of good faith. As Shelter argues, although not determinative of the claims that did not succeed for any number of other reasons (including admissions made by Klapman during cross-examination), the arbitrator did as he had to, consider the nature of the relationship between Christie and Shelter and their various obligations and rights under the Development Agreement. In that regard, the arbitrator's contractual analysis with reference to the correct principles of contractual interpretation starts at page 25 and proceeds to page 29 of the Main Award.

[117] At no point can the arbitrator's interpretation of the Development Agreement be seen to be based upon incorrect interpretative principles. I am in complete agreement with the submission of Shelter that the arbitrator's reasons suggest that he understood his task, consistent with the modern approach to contractual interpretation. As described in ***Sattva***, that task required him to read the Development Agreement as a whole giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the

parties at the time of the formation of the contract (February 2012). It is clear from the award that the arbitrator understood what was the nature, role and limits in the use of surrounding circumstances, including the limitation that stipulates that surrounding circumstances should consist only of the objective evidence of the background facts at the time of the execution of the contract.

[118] There is nothing in the arbitration's reasons in respect of the Main Award that would suggest that in the course of interpreting the Development Agreement, he altered the relevant test(s) in any material way. Despite the fact that Christie insists that the arbitrator did indeed apply the wrong test by allowing the factual matrix to overwhelm the words of the Development Agreement and that the arbitrator did the same in respect of other documents and agreements that were considered by the arbitrator in his analysis, Christie's contention is not substantiated.

[119] As was already outlined when I set out the general applicable legal principles as it relates to contractual interpretation, and as I will more fully explain in the paragraphs below, the distinction between the two formulations of the "overwhelming" principle is important when it comes to this court's determinations with respect to these leave applications. It must be remembered that a question about whether the factual matrix overwhelmed the words of the Development Agreement because it was given excessive weight, is a question of mixed fact and law. The question as to whether the factual matrix was interpreted in isolation from the words of the Development Agreement, is a question of law. In the present case, I am in agreement with Shelter that the issues raised by Christie relating to the arbitrator's analysis are questions of

fact or questions of mixed fact and law (from which no covert legal question can be extricated) as are Christie's complaints about how the arbitrator interpreted the Development Agreement in light of the factual matrix and the weight attributed to the surrounding circumstances. Properly characterized, those issues raised by Christie do not create questions over which this court has jurisdiction to conduct the type of review that Christie seeks.

(b) The Arbitrator's Alleged Reliance on Subsequent Conduct to Interpret the Development Agreement

[120] It is Christie's contention that in his interpretive analysis, the arbitrator went outside the permissible factual matrix by considering the conduct of the parties after the execution of the Development Agreement. It is Christie's position that the conduct within the category of "subsequent conduct" in respect of which the arbitrator allegedly based his interpretive analysis relates to the fact that first, Christie, not Shelter, entered into the construction contract with Bird, the contract for architectural services with Prairie, and impliedly if not expressly, with the other consultants. Second, Christie suggests that reliance was placed on subsequent conduct insofar as the arbitrator allegedly based his interpretive analysis on the fact that Christie arranged its own financing.

[121] In response to Christie's submissions on this point, Shelter asserts that the arbitrator presided over a lengthy and complex hearing, involving conflicting and technical evidence, credibility issues, numerous witnesses, expert reports and thousands of pages of documentary evidence. The complex and varied nature of that evidence underscores the fact that contractual interpretation is an inherently fact

specific exercise and that the arbitrator was best suited to weigh the factual matrix as he did. With that said, Shelter insists that neither of the events referred to above and at paragraph 119 of Christie's brief constitutes conduct that can be characterized as subsequent to the formation of the Development Agreement. I agree.

[122] Shelter is persuasive in its submissions when it argues that the arbitrator found, as a matter of fact, that Christie entered into the construction contract with Bird prior to signing the Development Agreement with Shelter. The Development Agreement was signed in 2012, whereas the construction contract between Bird and Christie was signed on December 21, 2011 (see the Main Award, at paras. 53, 171). The same is true for the contracts between Christie and the design/engineering consultants. It was the finding of the arbitrator that it should have been contemplated at the time when the construction contract was entered into in December 2011, that Christie would also be entering into direct contracts with Prairie and the engineering consultants.

[123] Shelter's submissions are also persuasive when it identifies that Christie arranged its own financing for the project over many months in 2011 and well before it entered into the Development Agreement with Shelter. In this connection, Shelter emphasizes that the arbitrator found that the financing was arranged by Christie and conditionally approved by the lender by November 2011. By the time the Development Agreement had been finalized and signed on February 9, 2012, Christie and Shelter were both aware of the fact that Christie had arranged its own financing. It was also clear that Christie had already directly engaged the contractor Bird and that Christie would be entering into direct contracts with Prairie and the engineering consultants.

[124] Shelter is right when it says that it appears that the arbitrator considered all of this to be important context to the Development Agreement and a component part of the factual matrix relevant to interpreting the nature and scope of Shelter's obligations, which it is suggested, changed when Christie removed Shelter's contractual authority to control the contractor and the designers. While Christie may disagree with the weight attributed to these aspects of the factual matrix by the arbitrator, such related determinations clearly do not give rise to questions of law.

[125] There is nothing inappropriate and certainly no principle of contractual interpretation transgressed (and certainly nothing giving rise to a question of law of arguable merit) where the arbitrator in a case like the present, can be seen to have considered the evidence in question as part of the factual matrix. As Shelter underscores, the fact that he placed significant weight on this evidence, does not raise a question of law of arguable merit and it does not confer jurisdiction on this court to review his analysis. In any event, the jurisprudence is clear that the factual matrix consists of "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (***Sattva***, at para. 58)

[126] Also, as it relates to the supposed "subsequent conduct", I accept Shelter's submission that the arbitrator's consideration of the so-called subsequent conduct and surrounding circumstances was both necessary and appropriate in order to resolve the issue of whether, through their course of conduct on the project, Shelter and Christie agreed to act in manner different from what was expressed in the Development

Agreement (see ***Domco Construction Inc. v. Aliva Holdings Inc.,*** 2003 SKQB 506, at paras. 16 – 27; and ***Triple R. Contracting Ltd. v. 384848 Alberta Ltd.***, 2001 ABQB 52, at para. 21). In this regard, the jurisprudence has established that parties to a written agreement may agree to act in manner other than what is expressly set out in the contract by virtue of their subsequent course of conduct. I note that the arbitrator's reasons seem to suggest an awareness, consideration and an application of this jurisprudence insofar as he concludes at paragraph 164 of the award that:

> [T]he strict wording of the Development Agreement is not applicable to the dispute because the conduct of the parties prior to and after signing the Development Agreement significantly changed their relationship.

[127] Again, Christie may be dissatisfied and in disagreement with the arbitrator's findings that through their subsequent conduct, the parties agreed to alternative arrangements with respect to various aspects of the Development Agreement. That disagreement and dissatisfaction however, does not transform the arbitrator's findings into any error in principle that gives rise to a valid question of law for the purposes of this court's granting of leave.

(c) *The Arbitrator's Alleged Reliance on Surrounding Circumstances in a Way That Christie Insists Allowed Those Surrounding Circumstances to Overwhelm the Development Agreement and Create a New Agreement*

[128] Christie argues that leave to appeal ought to be granted on the question of whether the arbitrator allowed the surrounding circumstances to overwhelm the words of the Development Agreement effectively creating a new agreement.

[129] The argument advanced by Christie corresponds to the second formulation of the "overwhelming" principle. It was in ***Teal Cedar*** that the court explained that in

order to extricate a question of law based on the alleged error of allowing the surrounding circumstances to have overwhelmed the Development Agreement, "a reviewing court must be satisfied that the decision maker interpreted the factual matrix isolated from the words of the contract; an approach which could effectively create a new agreement" (at para. 65).

[130] In the context of the present case and the leave applications brought by Christie, this court must address the question as to whether the arbitrator interpreted the factual matrix in isolation from the words of the Development Agreement. In my view, there is little in the arbitrator's reasons and nothing from the limited record before me that would suggest that the arbitrator interpreted the Development Agreement in such a manner. In this connection, I am persuaded by Shelter's submission that the arbitrator's interpretive analysis was consistently grounded in the text of the Development Agreement and where the claims of Christie were premised on specific provisions of the Development Agreement, the arbitrator's interpretative analysis properly began with the review of the key provisions.

[131] In the present case, the factual matrix consisted of the objective evidence of the facts known to both Christie and Shelter at the time of the formation of the Development Agreement. When I review the Main Award and the arbitrator's clear engagement in the process of contractual interpretation, it is in no way apparent that he interpreted the factual matrix isolated from the words of the Development Agreement or that he did so in a way so as to create new agreements.

[132] Despite the fact that Christie has framed the question on which it seeks leave as one based on the second formulation of the "overwhelming principle", it is, as Shelter suggests, a situation where in fact, Christie appears to be complaining about that which falls within the first formulation of that same principle. As Shelter suggests, Christie's overall complaint in regard to the arbitrator's interpretative analysis appears to be two-fold: first, the fact that any weight at all was attributed to the factual matrix; and second, the fact that the arbitrator attributed more weight to some aspects of the factual matrix than others.

[133] Shelter is correct in its characterization of Christie's position. I also agree that neither complaint, properly understood and formulated, gives rise to a question of law of arguable merit.

[134] When I examine parts of Christie's submissions as it relates to the surrounding circumstances and its contention that they have been permitted to overwhelm the Development Agreement, I can understand why Shelter would argue that if Christie had its way, the arbitrator would have interpreted the Development Agreement in isolation from the factual matrix and the circumstances surrounding the formation of the contract.

[135] There can be no question but that the arbitrator's consideration of the factual matrix (in interpreting the rights and obligations of Shelter and Christie under the Development Agreement) was what the jurisprudence required. To the extent that he was so required and did consider the factual matrix and then attributed a certain weight to that evidence, does not provide a basis in the circumstances of this case for

the identification of a question of law of arguable merit that would justify the granting of leave. To repeat, to the extent that the arbitrator was required to consider the surrounding circumstances/factual matrix, his interpretive analysis was ground in the text of the Development Agreement. Rather than interpret the factual matrix in isolation (as alleged by Christie), the arbitrator's interpretive analysis properly began with a review of the agreement's key provisions. Nothing the arbitrator did can be seen to have effectively created a "new agreement".

(d) *The Arbitrator's Alleged Ignoring of Clear, Unambiguous Language in the Development Agreement*

[136] Christie argues that the arbitrator ignored the preamble to the Development Agreement just as it alleges that the arbitrator ignored the definition of "fixed cost turnkey basis" in s. 1.1 of the Development Agreement. Christie's further argues that the arbitrator ignored the definition of "work".

[137] Despite Christie's submissions on this point, it can be seen that the arbitrator did specifically consider the preamble at paragraphs 18 and 163 of the decision. Also, the arbitrator can be seen to have specifically considered the phrase "fixed cost turnkey basis" at paragraphs 163 and 208 of the award and in fact, agreed with the point made by Shelter that the definition was not incorporated into any other provision of the Development Agreement. As it relates to the suggestion that the arbitrator ignored the definition of work, Shelter is right to note that the arbitrator carefully considered the definition of "work" in the context of interpreting the default provisions (see Main Award, at paragraphs 391 – 97).

[138] As part of Christie's submission seeking leave to appeal, separate from its suggestion that clear unambiguous language was ignored in interpreting the Development Agreement, it also suggests that the arbitrator applied incorrect legal principles or failed to consider relevant factors. In regard to those submissions made by Christie, I agree with Shelter that no valid issues were raised that represent potential questions of law of arguable merit.

[139] First, mindful of my earlier review of the applicable legal principles, I am not persuaded that the arbitrator applied any incorrect legal principles.

[140] Second, I note that much of Christie's argument respecting the failure to consider relevant factors is similar to its submission and complaint about the insufficient weight placed on some aspects of the factual matrix and the excessive weight attached to other aspects of it. Put simply, I do not see the arbitrator as having ignored relevant factors in a way that gives rise to a question of law of arguable merit.

[141] I will conclude this section by saying that much of the arbitrator's interpretation and treatment of the Guarantee and Undertaking, Estoppel Certificate, the Release and the WRHA Lease, involve an analysis and interpretation that is highly fact specific. Given that the arbitrator's interpretation of these documents was so highly fact specific and firmly grounded in the text, it is not obvious how any of Christie's submissions persuasively identify a question of law. Christie's submissions in relation to the Guarantee and Undertaking, the Estoppel Certificate, the Release and the WRHA Lease are in reality, complaints respecting the weight attributed to the broader factual matrix.

As such, the questions that arise are more obviously questions of fact. They are not questions that will assist Christie in gaining jurisdiction for the purposes of leave.

2) The Arbitrator's Findings Regarding the Property Management Agreement

[142] Christie seeks leave to appeal the arbitrator's determinations regarding the Property Management Agreement. Christie challenges the arbitrator's determination that there was an enforceable Property Management Agreement as between the parties by virtue of s. 7 of the Development Agreement.

[143] Christie suggests that its submissions establish that there was no enforceable Property Management Agreement that was ever entered into between the parties as contemplated by the clear language in ss. 7.4, 13.2(b) and 13.1(e). It is Christie's position that in finding otherwise, the arbitrator made an error of law and/or an inextricable error of law as he did not follow the tests for contractual interpretation by ignoring the clear language of the Development Agreement and/or by allowing the surrounding circumstances to overwhelm the clear language in the Development Agreement such that a new contractual term was created. Part of Christie's argument includes the submission that the arbitrator also erred in law in finding that the terms in ss. 7.1 – 7.3 of the Development Agreement formed the Property Management Agreement contrary to what Christie says are the legal tests for formation of contract set out in ***Matic et al. v. Waldner et al.***, 2016 MBCA 60. These errors say Christie, give rise to clear questions of law that would justify leave to appeal.

[144] Despite the submissions of Christie, I have come to the determination that there is no arguable merit to the suggestions that the arbitrator applied a wrong legal test

or any incorrect principle in finding that s. 7 was an enforceable Property Management Agreement. More fundamentally and specifically for the purposes of these leave applications, I further find that his determination on this highly fact specific issue does not give rise to any question of law. Instead, this issue is a question of mixed fact and law and is not entitled to leave or a more full review on the merits.

[145] When I examine what it is that the arbitrator did in his analysis with respect to this issue, I see the arbitrator's correct application of the law of contract formation to the facts of this case.

[146] Shelter reminds this court that Christie took the position in the arbitration that s. 7 of the Development Agreement amounted to an "agreement to agree", and thus was unenforceable. That position was based in large part on s. 7.4, which as Shelter notes, made reference to the parties executing "a formal Property Management Agreement". Shelter emphasizes that because Christie refused to sign a formal Property Management Agreement and, in doing so, actively deceived Shelter as to its true intentions (a finding of fact made by the arbitrator at paragraphs 427 – 32), it asserted that it was under no obligation to use Shelter as the property manager for the SSCY Property. In its submissions, Shelter contends that Christie continues to read select portions of the Development Agreement in isolation and ignores other relevant provisions. Shelter also insists that Christie misrepresents the arbitrator's analysis on this "key issue" just as Christie ignores the evidence of Klapman, its principal, who as suggested in the arbitrator's reasons, virtually conceded the matter in cross-examination.

[147] Based on my examination, there is nothing to support the assertion that the arbitrator applied any wrong legal test or principle and accordingly, his findings and determinations regarding the Property Management Agreement are not subject to appellate review. In this regard, I note that the arbitrator approached the matter by first reviewing the words of s. 7 of the Development Agreement. His analysis then proceeded with reference to the correct principles of contract formation and then to some of the instructive appellate decisions such as ***Matic***. It seems clear that the arbitrator appreciated the distinction between an enforceable contract and an agreement to agree just as he understood that in determining whether the former existed, that determination was to be made on a standard of an "objective reasonable bystander". Overall, the arbitrator's reasons reflect an appreciation and application of the key principles expressed in ***Matic***, which included (at para. 61):

> [61] … At common law, an agreement is binding if the parties consider that it contains all essential terms, even if the parties also agree that those terms will subsequently be recorded in a more formal document together with the usual terms ancillary to that type of agreement. However, an agreement is not final or binding if it is merely an agreement to later agree on essential provisions, or to defer the binding nature of the agreement until the execution of the proposed subsequent formal contract.
>
> [emphasis added]

[148] I agree with Shelter that the arbitrator did appear to be alive to the argument from Christie that a formal Property Management Agreement, as contemplated by s. 7.4, had not been signed. The arbitrator explained however, that Christie's argument, for various different reasons, could not succeed. The issue was not whether the formal agreement contemplated by s. 7.7 had been signed, but whether s. 7, read as a whole in proper context, constituted a binding agreement respecting the property

management arrangements. The arbitrator's reasons disclosed that he considered the three legal requirements for a binding contract as outlined in ***Matic*** (at para. 57):

> [57] … [T]he intention to contract; the essential terms of the contract have been settled; and the terms are sufficiently certain. Whether the three requirements are met in any case is to be determined from the perspective of the objective reasonable bystander.

[149] In the present case, the arbitrator applied the correct legal test in properly considering the three requirements and he found that ss. 7.1 to 7.3 of the Development Agreement contained the essential terms of the Property Management Agreement. In that connection, he considered the evidence of both Shelter's and Christie's witnesses that it was their intention from the outset that Shelter would be the property manager for the SSCY Property for as long as it was under lease to the WRHA.

[150] The arbitrator can be seen to have considered, but in the end, disagreed with Christie's contention that s. 7 did not contain all the essential terms of a Property Management Agreement. He noted that the plain and ordinary meaning of s. 7.1 was that Christie had appointed Shelter as the exclusive property manager during the term of the WRHA Lease and any extension.

[151] Even if Christie was correct in its view that the execution of the formal agreement contemplated by s. 7.4 was a condition precedent to there being an enforceable contract, it seems clear that the arbitrator held that Christie would have had to act reasonably in fulfilling the condition. Shelter points to the guidance that the arbitrator found in the Supreme Court of Canada judgment in ***Dynamic Transport Ltd. v. O.K. Detailing Ltd***., [1978] S.C.R. 1072, at 1084. It was in that case that

the Court noted that, "the court will readily imply a promise on the part of each party to do all that is necessary to secure performance of the contract".

[152] In examining the reasons in the Main Award, I note that the arbitrator came to certain conclusions after having read the Development Agreement as a whole and having carefully weighed all the conflicting evidence that he was required to consider. He considered s. 13.2(b) and s. 9.1(a)(v) and further noted that if he accepted Christie's interpretation that s. 7 did not constitute an enforceable agreement, his determination would effectively render s. 9.1(a)(v) meaningless. No less significant was the arbitrator's findings of fact, that Klapman had no intention of ever signing a formal Property Management Agreement and indeed, specifically noted that he actively attempted to deceive Shelter. At paragraph 441 of the Main Award, the arbitrator noted:

> … It is incongruous that Christie can rely on its breach of its obligation to do so to escape liability for not allowing Shelter what was clearly bargained for when the parties entered into this venture and what section 7 of the Development Agreement bound Christie to do.

[153] As noted, there is nothing in relation to the arbitrator's findings or determinations with respect to the Property Management Agreement that give rise to any question of law and certainly not one of arguable merit.

3) <u>The Arbitrator's Findings of Bad Faith</u>

[154] Christie argues that leave to appeal ought to be granted on the basis of the arbitrator's findings of bad faith against Christie and its principal, Klapman.

[155] Shelter responds by saying that the arbitrator's finding of bad faith do not give rise to a question of law of arguable merit in that the arbitrator's decision was guided

by the correct legal test as it relates to the duty of honest contractual performance as set out by the Supreme Court of Canada in ***Bhasin v. Hrynew***, 2014 SCC 71. In ***Bhasin***, the Court noted that "parties must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract" (at para. 73).

[156] When I examine the duty identified in ***Bhasin*** and apply it to the situation surrounding the property management arrangements, I note the arbitrator's clear findings of fact that Klapman deceived Shelter regarding the Property Management Agreement and further, that he had clandestine discussions with another property manager while Shelter was working to remove the builders' lien and obtain compensation from the WRHA for delay. I also note his determination that Klapman deliberately left the false impression that Christie was self-managing in order to "keep Shelter on side" and further, that Klapman acknowledged in cross-examination that he was in fact being dishonest.

[157] Shelter is correct in submitting that none of the above findings are subject to appellate review nor is, in the absence of an extricable question of law, the arbitrator's application of the legal test to the facts. That is a mixed question.

[158] In its response to Christie's submissions on this point, Shelter insists that the arbitrator did not alter the legal test (in the process of applying it) by engaging in "judicial moralism" or by imposing upon Christie a duty of loyalty. Shelter simply asserts that ***Bhasin*** requires that parties not lie or knowingly mislead each other about matters linked to the contract. Insofar as Klapman admitted that he misled Shelter

about the property management arrangements, the arbitrator was justified in finding that as a matter of fact. Shelter stresses that it cannot be ignored that Shelter was not given the opportunity to manage the SSCY Property because Klapman lied to and deceived Shelter about the property management arrangements in the first place.

[159] Despite Christie's claims, I am not persuaded that the finding of bad faith had any bearing on the award for lost property management fees. In that connection, the arbitrator had found that there was a contract, that there was with Christie's appointment of a third party property manager, a breach, and that the breach caused damages and compensable financial loss to Shelter.

[160] Put simply, there is nothing in the arbitrator's relevant determinations or findings of bad faith that give rise to any question of law of arguable merit.

4) <u>The Arbitrator's Damage Award</u>

[161] Christie seeks leave to appeal the damages awarded to Shelter for Christie's breach of the Property Management Agreement. In my view, Christie's submissions do not raise a valid question of law of arguable merit.

[162] As it relates to the arbitrator's damage award, the analysis conducted by the arbitrator was very fact specific and it was conducted after a full consideration of Christie's arguments. The issue of the arbitrator's damage award is addressed at paragraphs 444 – 471 of the Main Award where a review of the arbitrator's reasons and analysis confirms that the arbitrator did consider and apply the correct legal test for assessing damages for breach of contract.

[163] The arbitrator first examined the well-established principle that the purpose of damages "so far as possible, is to put the injured party in the position he or she would have been in, had there been no breach".

[164] In the circumstances of this case, the arbitrator properly noted that "damages should be equivalent to the loss of revenue that would have been received for the duration of the agreement, less the costs for providing the services." This approach is consistent with the common law method of measuring damages for a breach of services contract (see ***Tristar Cap & Garment Ltd. v. Super Save Disposal Inc.***, 2014 BCSC 690, at para. 35). In using this approach, the arbitrator went on to assess damages by conducting a careful review of the evidence from the several fact and expert witnesses. It should be noted that he accepted the evidence of Shelter's actuarial expert that the management fees that would have been paid to Shelter over the 30-year term of the Property Management Agreement (equal to the term of the WRHA Lease) would have totalled $3,029,208. The arbitrator then discounted that amount to the present value at a discount rate of three percent: $1,977,700.

[165] Insofar as the arbitrator made additional findings of fact on this issue, as findings of fact, they cannot be the subject of appellate review pursuant to s. 44(2).

[166] I am also not persuaded that the arbitrator inflated costs with additional costs. It seems clear that Christie's request that some allocation of overhead expenses should be deducted from the management fee revenue was an argument that was considered, but rejected. Neither am I persuaded that there is anything in the reasons that demonstrates that the arbitrator ignored any evidence on the issue of damages. In

the end, Christie's criticisms of the damages award relate largely to matters of weight, findings of fact or in respect of how the arbitrator applied what were in my view, the correct legal principles to the evidence. As noted elsewhere in this judgment, those criticisms do not give rise to questions of law.

[167] Insofar as Christie also seeks leave on the basis that the arbitrator did not take into account contingencies in awarding Shelter the present value of a future income stream, this argument is an argument respecting the application of the law that raises questions of fact and questions of mixed fact and law. As Shelter has argued, the reasons reflect that the arbitrator did consider contingencies as part of the damages analysis, but not in the way Christie would have preferred. In the context of these applications and s. 44(2), that is not a proper basis for the granting of leave.

5) The Arbitrator's Discretionary Decision on Costs

[168] Christie argues for leave to appeal the arbitrator's decision to award costs for the second counsel's attendance at the examination for discovery and in preparation for the arbitration hearing.

[169] As Shelter has emphasized, cost awards are "quintessentially discretionary". They are treated as questions of fact or questions of mixed fact and law and typically, they are insulated from appellate review (see ***Nash v. Nash***, 2019 MBCA 31, at para. 42; ***K-Rite Construction Ltd. v. Enigma Ventures Inc.***, 2020 ABQB 566, at paras. 30 – 33; and ***Coffey v. College of Licensed Practical Nurses (Man.)***, 2008 MBCA 33, at para. 42).

[170] In the present case, the arbitrator's decision respecting costs and the appropriate quantum was clearly an exercise in discretion. The decision to award costs to Shelter on an elevated basis was made mindful of a range of factors relevant to the specifics of this case, including the complexity of the issues, the result of the arbitration and the fact that Shelter was successful (consistent with the general rule that costs should follow the event in favour of the successful party). A part of the discretionary determination also considered the conduct of Christie, which was seen as having prolonged the hearing and the examinations for discovery. Perhaps of essential importance to the arbitrator's exercise of his discretion as it relates to costs, was the fact that Christie was seen to have rejected a highly favourable formal offer to settle that was made prior to the start of a very long arbitration hearing.

[171] The arbitrator clearly determined that elevated costs were appropriate in the circumstances of this case. He then, following oral submissions, directed the parties to provide their calculations in respect of party-party costs based on Tariff "A", with modifications. In that regard, the parties were directed to take into consideration the involvement of two lawyers throughout the proceeding. The arbitrator clearly considered Christie's position that the Tariff does not enumerate an amount for a second counsel at discoveries or trial, but as Shelter concedes, he did nonetheless make allowance for a second counsel (see the Costs Award, at para. 63).

[172] An arbitrator's discretion to award costs in the manner he/she sees fit is well grounded at s. 53(1) of the ***Act***. Shelter is correct in saying that there is no requirement, at common law or by statute, for an arbitrator in Manitoba to calculate

costs strictly in accordance with ***King's Bench Rules***. In awarding the costs he did, the arbitrator was guided, but not bound by the Tariff.

[173] I have determined that the arbitrator's decision to award elevated costs, taking into account the involvement of two counsel, is a matter of discretion in respect of which the arbitrator made no error in principle and he did not fail to consider any relevant factor. The arbitrator's decision with respect to costs, does not give rise to any question of law and certainly no question of law of arguable merit.

6) <u>The Arbitrator's Discretionary Award of Interest</u>

[174] The arbitrator's award in this regard was highly discretionary and it does not give rise to a question of law.

[175] Section 56 of the ***Act*** confers the same powers and wide discretion on an arbitrator on matters of prejudgment and postjudgment interest as those held by a King's Bench judge. The discretion to award interest at a rate higher than the prescribed rate is well established in the case law and as Shelter emphasizes, it is codified in s. 81(1)(b) of ***The Court of King's Bench Act***.

[176] In the present case, the arbitrator properly observed that he was not bound by the quarterly interest rate prescribed by ***The Court of King's Bench Act*** and that he appreciated that his discretion to deviate should nonetheless be guided by consideration of changes in the quarterly rate, the circumstances of the case and conduct of the proceeding. Having proceeded with that careful consideration of the authorities in which interest was awarded at a rate higher than the prescribed rate,

the arbitrator nonetheless found that 2.5 percent per annum would be a reasonable rate.

[177] The arguments Christie make concerning the arbitrator's discretionary decision to award prejudgment interest on the present value of the lost property management fees from November 1, 2014 onwards, does not involve a question of law of arguable merit. To repeat, the arbitrator's determination was highly discretionary and in any event, the issue as to when prejudgment interest should begin is a question of fact (see ***Apotex Fermentation Inc. v. Novopharm Ltd.***, 1997 CaswellMB 25, at para. 3 (Man. Q.B.)). Moreover, as Shelter notes, due to the nature of the damages award, it was vital that prejudgment interest start to accrue from that date.

E. HAS CHRISTIE SATISFIED THE BALANCE OF THE TEST IN S. 44(2)?

[178] Given that I have determined that none of Christie's arguments give rise to a question of law of arguable merit, my consideration of the balance of the test in s. 44(2) becomes unnecessary.

[179] Irrespective of ss. 42(a) and (b) of the ***Act***, Christie has not been able to identify a question of law and/or a question of law of arguable merit so as to confer appellate jurisdiction on this court. Accordingly, Christie cannot satisfy the foundational part of the test in s. 44(2).

F. HAS CHRISTIE ESTABLISHED A BASIS UPON WHICH TO SET ASIDE ANY OF THE AWARD PURSUANT TO S. 45(1)

[180] Christie argues that the arbitrator's decision awarding payment of $348,791, plus interest, to Shelter be set aside pursuant to s. 45(1) of the ***Act***. In advancing its position pursuant to s. 45(1), Christie points out that the position posited by Shelter

during the arbitration hearing (and adopted by the arbitrator in the first award) was that Christie precluded Shelter from recovering WRHA monies advanced by Shelter under a Guarantee and Undertaking. Christie submits that unbeknownst to either the arbitrator or Christie, Shelter had provided a Release to WRHA for those monies prior to the commencement of the arbitration hearing and reserved its right to pursue WRHA for other monies not covered by the Release. Christie argues that this "revelation" suggests that contrary to s. 45(1)(g), Shelter did not comply with the Arbitration Agreement (or with the analogous ***King's Bench Rules***) regarding disclosure of documents.

[181] Christie also contends that the arbitrator's award ought to be set aside pursuant to s. 45(1)(f) as Christie was not given a fair, or any, opportunity to examine the parties regarding this Release during discovery or at the hearing, which as a consequence, precluded Christie from fully responding to Shelter's case.

[182] In addition to the above arguments, Christie contends that the arbitrator's decision that he could interpret the Development Agreement and all of the remedies sought by the parties thereunder on the basis of their post-contractual conduct, be set aside pursuant to s. 45(1)(f). In this regard, Christie argues that the jurisprudential authority relied upon by arbitrator in reaching this decision included a Manitoba case not referred to by either party and decided after the arguments had been presented by both parties. Christie complains that it had no opportunity to address the applicability of the jurisprudence in question.

[183] I have examined carefully the submissions made by Christie in respect of s. 45(1). Following that examination, even assuming that that part of Christie's s. 45(1) position is properly before the court, I have concluded that there is no basis to set aside the Main Award under s. 45.

[184] Based on the notice of application filed on September 25, 2020, the only ground upon which Christie invoked s. 45(1) of the ***Act***, is in relation to s. 45(1)(i), which gives the court discretion to set aside an arbitral award if it was "obtained by fraud". Given the thrust of Christie's recent written and oral submissions, that previous position no longer seems to be seriously advanced by Christie. Instead, the new position taken by Christie in respect to s. 45(1), relates to its arguments that the award should be set aside under ss. 45(1)(f) and (g), about which I say more in the paragraphs below. It is fair and reasonable for Shelter to call these ss. 45(1)(f) and (g) arguments "new" as they had never been previously pleaded.

[185] I am not persuaded that this application and its ss. 45(1)(f) and (g) arguments are properly before the court. I say that given that the application and the accompanying arguments were not previously pleaded and that the only ground for relief under s. 45 of the ***Act*** in either of the notices of application was that relating to the Main Award having been obtained by fraud (s. 45(1)(i)).

[186] Even had I determined that Christie's application and arguments made pursuant to ss. 45(1)(f) and (g) were properly before the court, they are without merit.

[187] On the materials before me, there is no basis for the allegation that the procedures followed in the arbitration did not comply with the Arbitration Agreement.

I note and accept Shelter's submissions wherein it explains that the Arbitration Agreement confirmed that the parties had exchanged affidavits of documents disclosing all relevant documents and that it provided for a right of inspection over all non-privileged documents. Shelter submits that there can be no question but that both Shelter and Christie exchanged voluminous affidavits of documents in 2018 and thereby complied with the agreement's provisions. In fact, Shelter emphasizes that Christie spent "an astounding eight days questioning Shelter's representative on discovery, seeking answers to nearly 400 undertakings." In noting that the Arbitration Agreement provided that the parties would have rights of discovery, oral and documentary, Shelter also notes that all procedures with respect to discovery were strictly adhered to and that there is no evidence to the contrary. Shelter goes further and says that while Christie may now regret not exploring a potential area in discovery, such regret does not equate to a denial of procedural fairness.

[188] Insofar as any of the documents in question were not produced by Shelter, I accept Shelter's submission that they were not produced because they were and are irrelevant to the dispute. It is indeed not clear how these documents have any bearing whatsoever on the issues in dispute. As Shelter explains, the documents are evidence of a settlement agreement in November 2017, whereby Shelter both released WRHA from any potential claims relating to two change orders on the project, and, at the same time, preserved "a theoretical claim in respect of a portion thereof." Shelter stipulates that no claim was ever filed and no money was paid to Shelter under the settlement. I note that the arbitrator found that the documents would have had no

impact on his finding that Klapman engaged in misconduct by removing Shelter's ability to recover money from the WRHA in 2014 and 2015.

[189] Even assuming that the documents in question were relevant, I am not persuaded that Christie was ever entitled to them. As Shelter persuasively argues, the so-called "new information" were letters marked "without prejudice" and were obviously the product of settlement negotiations between Shelter and WRHA. There is no question but that settlement privilege is a "class privilege", which carries with it a presumption of inadmissibility (see ***Sable Offshore Energy Inc. v. Ameron International Corp.***, 2013 SCC 37, at para. 12).

[190] When I consider that the documents in question were irrelevant and that Christie was never entitled to the settlement documents in the first place, the fact that they were not produced does not appear to raise any legitimate issue with respect to procedural fairness.

[191] When I take note of the arbitrator's decision concerning the application to admit the so-called "new evidence", his decision made pursuant to the governing case of ***R. v. Palmer***, further supports my view that Christie was denied neither due process, nor was it treated unfairly in terms of any discovery and/or production.

[192] Indeed, the arbitrator found that counsel for Christie was in fact aware of the dealings between Shelter and the WRHA when the settlement was made. I remain mindful of that finding when I consider Christie's claim that an unfairness resulted from the fact that it was not given an opportunity to cross-examine Shelter's witnesses on the documents. As Shelter properly points out, this claim ignores the arbitrator's

finding that counsel was already in possession of or should have had sufficient information to explore these issues on discovery. Further, as reflected in the supplemental award, even after Christie was given a full opportunity to make submissions on the significance of the documents from its perspective, the arbitrator was not persuaded that the documents were relevant.

[193] Christie attempts to use section s. 45(1) to challenge one additional aspect of the arbitrator's decision. Again, for the first time in its brief, counsel for Christie contends that the arbitrator's determination that he could interpret the Development Agreement on the basis of the parties' post-contractual conduct, is a decision that Christie says should be set aside pursuant to s. 45(1)(f) of the ***Act***. Specifically, Christie argues that the case upon which the arbitrator relied in reaching his decision was one not provided to him by counsel and that Christie was not given an opportunity to address the applicability of that jurisprudence.

[194] While I have already determined that Christie's arguments made pursuant to s. 45(1)(f) and (g) are not properly before the court, I can also note as Shelter contends, that Christie is wrongly invoking s. 45 as an alternative or indirect route to appeal the arbitrator's finding regarding the Development Agreement and his interpretation of the surrounding circumstances. Shelter is justified in insisting that these were among the substantive issues in the arbitration and they should only be reviewed frontally by this court and only where they involve questions of law of arguable merit.

[195] Applications to set aside arbitration awards under s. 45 of the ***Act*** are not concerned with the substance of the parties' dispute. The issue of contractual interpretation clearly goes to the heart of the issue in the present case and is distinct from the sort of issue addressed by s. 45 of the ***Act***. Given that the grounds for setting aside an arbitration award pursuant to s. 45 are not generally concerned with the substance of the parties' dispute, it ought not to be treated as an alternative and indirect appeal route (see ***Alectra Utilities Corporation v. Solar Power Network Inc.***, 2019 ONCA 254, at paras. 24 and 27) in relation to the substantive issues.

[196] As it relates to Christie's argument concerning the jurisprudence relied upon by the arbitrator in respect of which Christie says it did not have an opportunity to respond, I am persuaded by Shelter's submissions that throughout the proceedings, Christie would have known full well of Shelter's position that the Development Agreement had been modified by the parties' conduct and that counsel would have had a full opportunity to address that particular position in argument. It is not persuasive to suggest, as Christie seems to be doing, that the decision in ***Rosenberg*** created or referred to any new law that was determinative of the outcome. In that context, I agree with Shelter that unless there was new law or that the parties were not given an opportunity to speak to the issue before it was decided, the arbitrator was not otherwise restricted to consider only those cases provided by counsel.

[197] As already stated, there is no basis to set aside the Main Award under s. 45(1).

VII. CONCLUSION

[198] For the foregoing reasons, Christie's applications made pursuant to s. 44(2) and s. 45(1) of the ***Act*** are dismissed with costs. If costs and the nature of those costs cannot be agreed to, counsel will advise the court following which any related specific and required determinations will be made.

_____ C.J.K.B.