Arbitration at the Crossroads: The Supreme Court of Canada will choose the way.

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On November 1, 2016, the Supreme Court of Canada will be asked to decide the fate of non-international arbitration in Canada when it hears two appeals from the British Columbia Court of Appeal ("BCCA"). In doing so, the SCC will determine whether its vision of arbitration, and cultural change in dispute resolution more broadly, will become more established or begin to unravel.

Beginning with its decision in *Desputeaux v Éditions Chouette* in 2003 (in which the SCC established that arbitration is not part of the court system of any state and that disputes regarding statutory rights may be arbitrated as between the parties to the dispute) and ending, more recently, with its decision in *Sattva Capital Corp. v. Creston Moly Corp. in* 2014 (in which the SCC restricted rights of appeal from arbitration awards involving the interpretation of contracts) the SCC has sought to recognize and establish arbitration as a truly independent alternative to court litigation. The reasons for providing the public with such an alternative, and for reforming the court process itself, were well set out by the Court in *Hryniak v. Mauldin* 214 SCC 7.

The decision of the BCCA in *Urban Communications v BCNET* 2015 BCCA 297, ("*BCNET*") applied both the letter and the spirit of the SCC decision in *Sattva*. The Court concluded that the issue under appeal turned on the interpretation of a contract which engaged questions of mixed fact and law and which are therefore not reviewable as questions of law. The BCCA in the *BCNET* case also rejected the holding in the Court below that the arbitrator had decided four "extricable questions of law". In characterizing the award in that manner, the lower Court had simply ignored a more fundamental question on which the determination of the arbitrator had actually turned, namely whether the exercise of the option in that case, on the wording of a particular letter, was conditional or non-conditional.

Interestingly, in applying this analysis the BCCA in *BCNET* held that the same result would have obtained under pre-*Sattva* jurisprudence in British Columbia.

The analysis of the BCCA in the *BCNET* case is in stark contrast with that of the BCCA in *British*

Columbia v Teal Cedar Products 2015 BCCA 263, ("*Teal*") the other case to be argued on November 1 in the SCC.

The decision of the BCCA in *Teal* turns *Sattva* on its head. Whereas many would interpret *Sattva* as standing for the proposition that decisions of arbitrators on the interpretation of a contract are not reviewable *because* they engage issues as to the factual matrix and commercial context, the BCCA in *Teal* holds that the decisions of arbitrators are *only* non-reviewable *in relation to* their findings as to the factual matrix and commercial context. On that approach, once those matters are determined or agreed, the resulting interpretation is *always* reviewable as a point of law.

Whereas many would interpret *Sattva* as standing for the proposition that the deference to be paid to arbitration awards is based upon the *presumed* expertise of the arbitrators chosen by the parties, the BCCA in *Teal* holds that deference should only be accorded *if it is established on the appeal* that the arbitrators were in fact expert on the point under consideration. The BCCA in *Teal* goes on to question whether contract interpretation can ever be a matter of expertise. Again, this would appear to blunt the main thrust of *Sattva*.

Whereas *Sattva* creates the impression that a reviewable arbitration award would be a rare occurrence, especially on a point of contract interpretation, the BCCA in *Teal* strongly suggests that the application of legal principles in the interpretation of contracts is generally a question of law *of central importance to the legal system as a whole* and suggests that the restriction of appeals from arbitration awards "would be at the expense of the certainty which lies at the heart of the common law of contract".

Essentially, the BCCA in *Teal* operates on the simple premise that the only legitimate outcome to a commercial dispute is one which bears a court's seal of approval as to any points of law which a losing party can identify. While it pays lip service to the ultimate standard of reasonableness by finding the arbitrator's award to have been unreasonable, the BCCA in *Teal* does so in the dubious context that the decision of the arbitrator would have been upheld by both the judge of first instance (who appears to have had some expertise in the subject matter) and by the Chief Justice of the province who sat on the appeal when it first came before the BCCA. Were they unreasonable too?

If the BCCA in *BCNET* is correct in having been deferential, then the BCCA in *Teal* was neither correct nor deferential. The SCC will decide.