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The Post-*Sattva* Scope of Arbitration Appeals

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***Creston Moly Corp.* v. *Sattva* Capital Corp., 2014 SCC 53 ("*Sattva*") is a landmark decision affecting arbitration practice in Canada in many ways. The decision is of particular importance because of its discussion of the right of a party to appeal an arbitral award when the underlying dispute arises out of an issue of contractual interpretation. Although appellate courts have restricted *Sattva*'s application in the context of appeals of trial courts' decisions, the recent SCC decision in *Urban Communications Inc. v. BCNET Networking Society*, 2016 SCC 45 confirms that the principles of *Sattva* continue to govern the limited scope of appeal in arbitration.**

The Supreme Court of Canada's decision in *Creston Moly Corp.* v *Sattva* Capital Corp., 2014 SCC 53 ("*Sattva*") considered the issue of whether the lower courts in British Columbia ought to have granted leave to appeal an arbitral decision respecting the proper interpretation of a contract. The arbitrator's decision was given in a proceeding conducted pursuant to the British Columbia *Arbitration Act*, RSBC 1996, c. 55 (the "*Act*"). Similar to Section 44 of Alberta's *Arbitration Act*, RSA 2000, c A-43, Section 30 of *the Act* limits appeals of arbitral decisions to questions of law alone. The SCC in *Sattva* held that contractual interpretation will typically involve issues of mixed fact and law, and accordingly, the circumstances in which an appealable question of law can be extracted from the process of contractual interpretation will be rare.1

Since *Sattva* was decided, appellate judges and commentators have relied on the unique factual circumstances of *Sattva* as a basis for limiting its application in the context of appeals of trial court decisions. The Alberta Court of Appeal in *Vallieres v Vozniak*, 2014 ABCA 290, held that "[t]he reasons in *Sattva* must be read having regard to the context in which it was decided. … Some of the restrictive language in *Sattva* does not apply to ordinary appeals in Alberta." A dissenting judge from the British Columbia Court of Appeal noted that *Sattva* was decided in the context of *the Act* and therefore the general comments made therein "must be considered in that context".2 Finally, one commentator stated "[i]t is therefore arguable… that the decision [*Sattva*] should be read as limited to the proper interpretation of the British Columbia Arbitration *Act* in a case in which the appeal did involve mixed questions of law and fact…3

Fortunately, some clarity with respect to *Sattva*'s application in the arbitral context was provided by the SCC in its decision to dismiss the appeal in *Urban Communications Inc. v BCNET Networking Society*, 2015 BCCA 297 ("*Urban*").4

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[1] *Sattva Capital Corp v Creston Moly Corp.*, 2014 SCC 53 at para 55.
[2] *Robb v Walker*, 2015 BCCA 117 at para 45.
[3] Earl A. Cherniak QC, "*Sattva* Revisited" (2015) 34:2 Adv. J. 6, at p. 7.
[4] *Urban Communications Inc. v. BCNET Networking Society*, 2016 SCC 45.

Urban focused on whether BCNET had properly exercised an option in a commercial agreement with *Urban*. The arbitrator had found that BCNET had properly exercised the option. The arbitrator's decision was appealed. The appeal was allowed, and the arbitrator's decision was overturned. On further appeal of that reversal, the BCCA held that the arbitrator had applied the legal principles of contractual interpretation to determine the parties' objective intention and then considered the objective meaning of the words in the context in which they were made and the surrounding circumstances.5 Accordingly, upholding the principles established by *Sattva*, the BCCA held that the arbitrator's decision "engaged questions of mixed fact and law, which are not reviewable under s. 31(1) of *the Act*."6 An appeal of that decision was then dismissed by the Supreme Court of Canada.

Urban has confirmed, therefore, that there remains a high restriction on judicial intervention in respect of arbitration decisions. The SCC has made it clear that courts will respect the legislative intent behind Section 30 of *the Act* (and corresponding provisions in other provinces) in relation to appeals, which is to allow only limited judicial intervention in respect of arbitration decisions because arbitration is intended to be "an alternate dispute mechanism" rather than "one more layer of litigation".7

Having said that, some uncertainty continues to lurk. On the same day as the SCC dismissed the appeal in *Urban* from the Bench, the same Court heard the appeal of *British Columbia (Ministry of Forests) v Teal Cedar Products Ltd.*, 2015 BCCA 263 ("*Teal*"). The decision in that case remains under reserve. In *Teal*, the British Columbia Supreme Court dismissed the application for leave to appeal on the issue of whether the arbitrator correctly interpreted the contract at issue, holding that it was an issue of mixed fact and law which was not appealable.8 After the decision in *Sattva* was rendered, the British Columbia Court of Appeal reversed that decision, holding that the arbitrator's interpretation of the contract raised a severable question of law - whether the arbitrator wrongly permitted the surrounding circumstances to overwhelm the express language of the agreement.9

Accordingly, parties considering arbitration must pay careful attention to how *Sattva* is applied and how *Teal* is decided. Arbitration is sometimes perceived as a faster and cheaper dispute resolution mechanism compared to traditional litigation, in part because of the certainty provided by many Arbitration Acts that arbitral awards are only appealable on questions of law. However, it remains to be seen what will be found to be an "extricable question of law"10 and how creative first-level and appeal courts will interpret and apply *Sattva*. The Supreme Court of Canada's decision in *Teal* may offer some clarity in that regard.

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[5] *Urban Communities Inc. v BCNET Networking Society*, 2015 BCCA 297 at para 67.
[6] *Urban Communities Inc. v BCNET Networking Society*, 2015 BCCA 297 at para 71.
[7] *Boxer Capital Corp. v JEL Investments Ltd.*, 2015 BCCA 24 at para 6, citing *Student Assn. of the British Columbia Institute of Technology v. British Columbia Institute of Technology*, 2000 BCCA 496 at para 14.
[8] *British Columbia v Teal Cedar Products Ltd.*, 2012 BCSC 543 at para 81.
[9] *British Columbia v Teal Cedar Products Ltd.*, 2015 BCCA 263 at paras 44 – 48.
[10] *Sattva Capital Corp v Creston Moly Corp.*, 2014 SCC 53 at para 53.