COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1550 Alberni Limited Partnership v. Northwest Community Enterprises Ltd.,* 2023 BCCA 141

Date: 20230329
Dockets: CA47908; CA47909

Docket: CA47908

Between:

1550 Alberni Limited Partnership

Appellant
(Petitioner)

And

Northwest Community Enterprises Ltd.

Respondent
(Respondent)

– and –

Docket: CA47909

Between:

1550 Alberni Limited Partnership

Appellant
(Respondent)

And

Northwest Community Enterprises Ltd.

Respondent
(Petitioner)

Before: The Honourable Madam Justice Bennett
The Honourable Justice Griffin
The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated October 20, 2021 (*1550 Alberni Limited Partnership v. Northwest Community Enterprises Ltd.*, 2021 BCSC 2053, Vancouver Dockets S200178 & S208184).

Counsel for the Appellant: S.D. Coblin
M. Hashmi

Counsel for the Respondent:	H.A. Mickelson, K.C. C.R.J. Gallant
Place and Date of Hearing:	Vancouver, British Columbia September 12, 2022
Place and Date of Judgment:	Vancouver, British Columbia March 29, 2023

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Justice Griffin
The Honorable Mr. Justice Grauer

Summary:

The appellant appeals the dismissal of its petition to set aside an arbitral award and the granting of leave to the respondent to enforce the award in a cross-petition. A dispute arose between the parties, with the respondent arguing before the arbitrator that it received insufficient compensation for its work from the appellant. The agreement stipulated a final offer arbitration. The arbitrator was to pick the offer that best conformed with his findings of fact and law. He accepted the respondent's offer. The chambers judge dismissed the application for leave to appeal, finding no errors in law. Held: Appeal dismissed. The chambers judge did not err in concluding that the arbitrator did not make an error of law. The arbitrator had ample evidence to support his conclusion that the parties intended to change the contract, including the Change Order, the oral agreement of the parties, and the conduct of the parties. Considering his reasons as a whole, no error or question of law alone arises from his reasons.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] The appellant, 1550 Alberni Limited Partnership ("Alberni") appeals the dismissal of its petition to set aside an arbitral award and the granting of leave to the respondent, Northwest Community Enterprises Ltd. ("Northwest") to enforce the award in a cross-petition.

[2] Alberni is in the real estate development business. One of its projects in downtown Vancouver was known as "Alberni by Kengo Kuma", a 42-story luxury residential condominium building. Alberni is part of Westbank Projects Corp. ("Westbank"), a real estate development group with several luxury condominium projects in Vancouver. Michael Braun was the marketing director for Alberni. Ian Gillespie was the principal of Westbank. He initiated the idea of using a magazine as a promotional sales tool for "Alberni by Kengo Kuma". Alberni entered into a contract with Northwest, which is in the business of providing magazine production management services, to produce a promotional magazine for the project. Andrew Patton, the principal of Northwest, and Christine Ito, a key employee, were the main representatives of Northwest for this project. There was a difference of opinion regarding the payments owing under the contract and the matter was sent for arbitration. The arbitrator found in favour of Northwest.

[3] In dismissing the petition in reasons indexed at 2021 BCSC 2053, the judge held that the arbitrator did not make an arbitral error or an error of law.

[4] In my opinion, the chambers judge did not err, and I would dismiss the appeal.

Background

[5] Between August 2015 and January 2017, Northwest provided production management services to Alberni as the publisher of a magazine intended to promote Alberni's property development business. Under the Magazine Production Agreement, Northwest was paid a publisher's fee and was reimbursed for third-party expenses. The magazine was initially to be 144 pages and published within seven months; however, the dates were extended a number of times and the magazine was published in January 2017, some 17 months of production. The magazine contained 206 pages of content, and approximately 20 pages of advertisements. Northwest was not compensated for the additional pages. Alberni believed that it had overpaid third-party expenses, and therefore Northwest had already received sufficient compensation.

The Agreement

[6] On August 26, 2015, the parties entered into an agreement to produce a high-end lifestyle and culture magazine related to Alberni's property development business (the "Agreement") and subsequently amended the Agreement on December 22, 2015. The relevant terms of the Agreement, including an arbitration clause and the pricing structure for the magazine, are set out at para. 9 of the judge's reasons:

> 1. Northwest was to produce a 144-page magazine for a publisher fee of $150,000, plus GST. The magazine was to be delivered on or before February 16, 2016 (ss. 5.1, 7.1);
> 2. Northwest was to receive an additional publisher fee of $12,000 for every eight pages over the initial 144 pages (s. 5.2);
> 3. Northwest was to provide a budget to the petitioner setting out the anticipated third-party expenses for which it would be seeking reimbursement (s. 5.3);

4. Northwest would be entitled to reimbursement of any actual out-of-pocket third-party expenses (s. 5.4);
5. Any disputes arising out of the Agreement were to be resolved by arbitration, held as quickly as reasonably possible. The arbitration was to take the form of final offer arbitration under which the arbitrator was required to accept one of the parties' submissions in its entirety (ss. 8.1, 8.2); and
6. The Agreement constituted the entire agreement and understanding between the parties (s. 12.3).

The Dispute

[7] Production of the magazine did not proceed as anticipated. As noted by the chambers judge, the parties discussed various concepts and lengths of the magazine, as well as having additional issues produced after the first publication (at para. 11). Substantial increases in production costs were incurred and the timeframe of publication was extended from seven months to 17 months.

[8] In March 2016, Alberni issued a "Change Order" that included costs for 16 "A" stories, 10 "B" stories, 6 "C" stories, and 2 "D" stories for a total of $288,636.94. Each category of story had a set price determined by its complexity. Mr. Patton, for Northwest, referred to this as a "fixed-price model". The nature of the Change Order is central to the arbitration, the petition, and this appeal.

[9] What followed is set out in the chambers judge's reasons:

> [13] Between May and July 2016, the parties were discussing a magazine that would contain between 200 and 300 pages, a significant increase from the 144 pages originally contemplated. They also discussed the possibility of a second issue of the magazine.
>
> [14] On July 25, 2016, [Alberni] informed [Northwest] that Westbank's principal had decided to proceed with a 150-page magazine, and no longer wanted the 300-page version.
>
> [15] In January 2017, [Alberni] approved the first issue of the magazine, and the published version contained 206 pages of content and approximately 20 pages of advertisement.
>
> [16] Subsequently, [Alberni] advised [Northwest] that it no longer wished to proceed with a second issue of the magazine.
>
> [17] [Alberni] paid [Northwest] $690,328.58 for the production of the magazine made up for the $150,000 production fee and third-party expenses.

> [18] This, in turn, gave rise to the underlying dispute. [Alberni] refused to pay [Northwest] an additional publisher fee for the extra pages included in the magazine on the basis that it believed, upon reflection of the paid invoices to date, that it had overpaid [Northwest] by $387,610.99 in respect of third-party expenses that [Northwest] had not incurred.

[10] Alberni paid Northwest $690,328.58 to produce the magazine. Once Mr. Patton was advised that there would not be a second magazine, he submitted more invoices. He harassed Mr. Braun and Mr. Gillespie to the point that Arbitrator Smith (the "Arbitrator") referred to his conduct as "unconscionable" (Award at para. 87).

The Arbitration

[11] On November 22, 2018, Northwest commenced the underlying arbitration, seeking to obtain compensation for 59 additional pages that were published and a further 61 pages that were ultimately not included in the magazine.

[12] After the commencement of the arbitration, the Arbitrator confirmed with the parties that the arbitration should be determined in accordance with s. 8.2 of the Agreement. He said, at para. 22:

> By letter dated September 26, 2019 from Mr. Mickelson, with the consent of Mr. Hepburn, the Parties agreed in writing that the matter should be determined in accordance with s. 8.2 of the Agreement. The Parties also directed that "the Arbitrator will consider the jurisprudence and have regard to the legal foundation for the claims bearing in mind that the Parties agree that the principal dispute is on the facts", that the "Arbitrator will provide reasons for his decision", and "at the conclusion of oral argument, the Parties shall provide in a sealed envelope their proposed resolution of the matter and the Arbitrator will accept one of the resolutions."
>
> [Emphasis added.]

[13] Arbitration hearings were held for five days throughout August to October 2019 based on written witness statements and examinations-in-chief and cross-examination of the parties' witnesses. Northwest argued that the parties' pricing structure had changed because of the Change Order, which moved the agreement to a fixed-price model on a per story basis and therefore, it was not required to account for every dollar spent on third-party costs. Alternatively, it was due

compensation on the doctrine of *quantum meruit* as the product Alberni received was significantly more than the original agreement.

[14] In contrast, Alberni argued that Northwest was obligated to submit a budget and that it never agreed to all the additional pages. Alberni said that the Change Order did not change the agreement to a fixed-price model, but was a gratuitous accommodation on its part. It submitted that it never agreed to more than 150 pages. Alberni submitted that it overpaid Northwest by $387,610.99.

The Award

[15] As per s. 8.2 of the Agreement, each party submitted a final resolution under seal. Northwest submitted a reduced claim for $175,000 for the additional pages of content (valued at $189,000 including GST).

[16] Alberni submitted a proposal of $0 on the basis that it had already overpaid Northwest by approximately $350,000 in third-party expenses and abandoned any claim for compensation for the overpayment.

[17] The Arbitrator opened his comments by pointing out that s. 8.2 of the Agreement compelled him to accept the proposal, in its entirety, that most closely comports with the law and his findings of fact (Award at para. 122).

[18] He was very sceptical of the evidence of Mr. Patton and Ms. Ito. He did not rely on their uncorroborated evidence, but only accepted the parts of their evidence that was “supported by documents, usually in the form of email communications and invoices” (Award at para. 126).

[19] His findings with respect to the Change Order are key to his decision. He concluded that the importance of the Change Order “cannot be overstated” and that it was “essentially a written modification” of the Agreement (Award at para. 124). The relevant excerpt of the Change Order is as follows:

Schedule "C"

CHANGE ORDER FORM

PROJECT: 1550 Alberni

1550 Alberni Limited Partnership
501-1067 WEST CORDOVA ST
VANCOUVER, BC V6C 1C7

Commitment CO Reference: 15-24015N1 ~~C01~~ CO2

Date: March 22, 2016

CONSULTANT: Northwest Community Enterprises Ltd.
87 East Cordova Street
Vancouver, BC V6A 1K3

TERMS: ALL TERMS TO FOLLOW ORIGINAL CONSULTANT AGREEMENT

CONTACT INFO: Andy Patton

QUANTITY	DESCRIPTION	COST CODE	VALUE
	Original Contract $150,000	24-015	
16	Story A	24-015	$ 53,051.68
10	Story B	24-015	$ 53,977.50
6	Story C	24-015	$ 47,923.14
2	Story D	24-015	$ 44,940.00
	Production: West Magazine Issue 1	24-015	$ 75,000.00

OTHER COMMENTS OR SPECIAL INSTRUCTIONS

Cost Code $ Amount

SUBTOTAL	$	274,892.32
GST	$	13,744.62
PST		
TOTAL	$	288,636.94

ORDERED BY Hweely Lim

REQUISITION APPROVED BY
Development Manager

BUDGET APPROVED BY
Finance / Accounting

FINAL APPROVAL
Judy / Theo / Ian G

[20] The Arbitrator concluded the following:

> 125. Whether this change to the Agreement is characterized as a modification of contract, a separate contract, or the implication of a term following cases such as *MJB Enterprises Ltd. v. Defence Construction*

> [*(1951) Ltd.*, [1999] 1 S.C.R. 619] and *Fairwood Construction Ltd. v. Lin* [[1997] B.C.J. No. 1123, 1997 CanLII 4292 (S.C.)], the result is the same. The intention of the parties was that the Claimant would be compensated for additional Publisher services rendered to meet requests for time extensions and extra content.

[21] The Arbitrator relied on an internal Alberni email to support Northwest's claim:

> 127. The July 25, 2016 internal email from Mr. Braun to Ms. Lim is a critical document in the unfolding of the narrative. In that email Mr. Braun acknowledged the fact that Northwest and 1550 Alberni were working on interviews and photography beyond the 144 pages originally intended. He acknowledged that fault for the escalating cost of the magazine was not solely attributable to Northwest, and in particular, that significant increases in Production Costs resulted from the Bao Bao photo shoot that was requested by Mr. Gillespie.

[22] Alberni argued that the additional 59 published pages and 61 unpublished pages claimed had not been approved by Alberni in accordance with s. 5.2 of the Agreement. The Arbitrator made the following finding in response to that submission:

> 130. [Alberni]'s argument is an attractive one on the face of the Magazine Production Agreement as originally written. However, I am persuaded by [Northwest] that the contract between the parties evolved over time based on the words, conduct and written documents exchanged between the parties. [Alberni] did approve stories that did not make it into the published magazine. Publication of further issues of the magazine was discussed. Applying the principles of law relating to the doctrine of *quantum meruit* I find that there was [an] implied term that [Northwest] would be compensated for the preparation of additional pages even if those additional pages were not used. Indeed, such a term was expressly agreed notwithstanding the entire agreement clause in s. 12.3 based on the representation from Mr. Braun in the email of July 4, 2016 in which he conceded that Northwest would be compensated for 160 extra pages and saying that the extra page claim should be submitted on a separate invoice.

[23] The Arbitrator concluded that there were some overpayments, but Alberni did not press its counterclaim, and Northwest did include a discount in terms of what it sought as final compensation (Award at para. 135).

[24] In addition, the move to a fixed-price model removed the need for the approval of third-party costs, as they were now included in the fixed price per story (Award at para. 137).

[25] The Arbitrator's conclusion is as follows:

> 141. [Alberni] proposes resolution as set out in Schedule "B" that would have no damages payable to [Northwest] and that abandons the counterclaim for overpayment of Production Costs. [Alberni]'s position that the parties should walk away is predicated on a strict reading of the original Agreement. I find, however, that the original Agreement was modified in writing in the Change Order of March 22, 2016, by oral agreement of the parties and by conduct of the parties. The parties modified the original contract to move from a 144-page magazine to be produced in a 7-month time frame to a much more ambitious project that spanned 17 months. Production Costs necessarily went up and the Publisher Fee was implicitly, if not expressly, adjusted by the parties to track the extra services by way of the extra page fee that was contemplated under the original Agreement.
>
> …
>
> 143. In the result I am bound to adopt [Northwest]'s Proposed Resolution as set out in Schedule "A" to this Award because it most closely comports with applicable law and the facts. In addition, in accordance with the verbal agreement of the parties regarding costs to follow the event, with s. 11 of the *Arbitration Act* and with Rule 41 of the [British Columbia International Commercial Arbitration Centre] Rules, costs are awarded on an indemnity basis to [Northwest]. [Northwest] is entitled to be reimbursed for actual reasonable legal fees and disbursements.

[26] Thus, the Arbitrator concluded that the Northwest proposal of $175,000 should be accepted. The parties had agreed that costs would be paid on an indemnity basis.

The Chambers Judgment

[27] Alberni brought a petition to the Supreme Court of British Columbia to set aside the arbitral award and for leave to appeal the arbitral award. Northwest brought a counter-petition to enforce the arbitral award as an order of the Court.

[28] After setting out the background, the chambers judge outlined the applicable legal framework. He noted that for leave to appeal under s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, the threshold requirement was a clear question of law (at para. 38). I note, parenthetically, that the arbitration was conducted prior to the proclamation of the new *Arbitration Act*, S.B.C. 2020, c. 2, and that the litigation proceeded under the old *Act*.

[29] Once a question of law has been identified, then the other factors are considered: the importance of the arbitration in terms of principle or money to the parties, the importance of the point of law to the final result, and whether the appeal has arguable merit (at para. 40).

[30] The chambers judge concluded that there was no arbitral error, a defined type of error under s. 1 of the *Act* that can include failure to observe the rules of natural justice. That conclusion is not an issue in this appeal (at para. 51).

[31] He then turned to the question of whether there was an error of law. He set out the issues at para. 52:

> [52] In the alternative, [Alberni] argues that leave to appeal the Award should be granted because the arbitrator made the following errors of law:
>
> 1. The arbitrator placed an impossible burden on [Alberni];
> 2. The arbitrator made two critical findings of fact in the absence of any admissible evidence to support them; and
> 3. The arbitrator proceeded on a wrong legal principle, effectively treating the approval and payment of an invoice as foreclosing [Alberni]'s ability to question its legitimacy at a later date.

[32] The first and main issue was whether the Arbitrator made findings of fact in the absence of evidence. The first finding of fact in issue was that the Change Order modified the Agreement and switched it to a fixed-price model. Alberni submitted that the Change Order was only a budget. It submitted that the only other evidence was that of Mr. Patton, who the Arbitrator found to be incredible.

[33] The chambers judge concluded that there was evidence, other than that of Mr. Patton, that supported the conclusion that the Change Order was a change to the Agreement, setting out the following examples at para. 61:

> [61] In addition, the arbitrator also found that the words, conduct and written documents exchanged between the parties provided further support that the parties moved away from the Agreement as it was originally written. For example, as the project evolved, the parties did not follow the budget and pre-approval procedure contemplated by s. 5.3 of the Agreement. Instead, the reimbursement for production costs was dealt with on an ad hoc, invoice-by-invoice basis. The arbitrator concluded that the Change Order established

> a new protocol for the reimbursement of production costs that deviated from the Agreement.

[34] Thus, the chambers judge concluded that the issue was, at its highest, a question of mixed fact and law (at para. 62).

[35] Alberni also asserted that there was no evidence to support the Arbitrator's conclusion that there was no overpayment. Alberni submitted that the Arbitrator made mathematical errors and argued that there was an overpayment of at least $127,246, leading to an error in selecting Northwest's final offer.

[36] The chambers judge set out the Arbitrator's reasons on this point at para. 65:

> [Alberni] submitted that there were overpayments to Northwest, and that Production Costs went far beyond the budget anticipated when the Agreement was signed. The substantial portion of the increased Production Costs were, however, authorized by [Alberni], particularly in the March 22, 2016 Change Order in which a Production Costs budget of $288,636.94 was approved. In addition [to] that sum, [Alberni] had earlier approved Invoices #116, #117, #118, #119 from December, 2015 in the amount of approximately $21,000. Moreover, [Alberni] previously requested the participation of [Northwest] in the Bao Bao photo-shoot. The travel costs related to that request totaled approximately $70,000.
>
> Thus, by the end of March, 2016, Production Costs approximated $400,000 in respect of matters for which [Alberni] gave express approval. The increase in the expected budget from approximately $140,000 in November, 2015 was therefore not something for which [Northwest] could alone be faulted. In addition to the matters approved up to the end of March, 2016, [Alberni] also approved budgets for subsequent stories as reflected in Invoices #178, #179, #182, and #185. These approved Production Costs amounted to another approximately $95,000. When the approved budget items are combined with the approved Publisher Fee of $150,000, the explanation for the ultimate cost of $690,328.58 becomes apparent.

[37] The chambers judge concluded that the proposed error was based on a finding that the contract had not been changed by the Change Order. He said:

> [67] Similar to [Alberni]'s other proposed errors of law discussed below, its position is premised again on its argument that ss. 5.3 and 5.4 of the Agreement continued to govern the parties' dealings throughout. However, I have already concluded that the arbitrator did not err in concluding that the fixed-price model replaced ss. 5.3 and 5.4 of the Agreement. Under that model, [Northwest] was not required to justify every dollar spent. Accordingly, there was no need for the arbitrator to engage in the strict mathematical approach suggested by [Alberni].

[38] Next, the chambers judge addressed the issue of the burden of proof. Alberni submitted that the Arbitrator required it to prove a negative; that is, the Arbitrator required Alberni to prove it had not incurred the expenses billed for after finding that Northwest had failed to keep reliable records of incurred expenses. The chambers judge noted that failure to apply the correct burden of proof is a question of law (at para. 69).

[39] Alberni submitted that Northwest was in the best position to give the evidence on the third-party expenses in terms of whether there was overpayment. The chambers judge noted that the argument was again based on the terms of ss. 5.3 and 5.4 of the agreement, and not on the amended contract, which as a fixed-price model, did not require the justification of third-party expenses (at paras. 71–72). He concluded that because the Arbitrator found that the contract had been changed, the issue of the burden of proof was not an issue before him, and thus, did not rise to an error of law (at paras. 73–74).

[40] Finally, Alberni submitted that s. 5.4 of the Agreement required Northwest to prove that it had incurred the third-party expenses claimed, and that it did not waive its right to challenge the production expenses by paying or approving certain invoices.

[41] Given the conclusion that s. 5.4 no longer operated, the chambers judge concluded that no error in law arose (at paras. 76–78).

[42] In essence, to succeed before the chambers judge, Alberni needed first to establish that the question of whether the contract had been changed to a fixed-price model was a question of law. If it failed on that issue, it could not succeed on its remaining grounds.

[43] Having found no error of law, the chambers judge concluded that it was not necessary to address the issues in s. 31(2) of the *Arbitration Act* (at para. 81). In addition, he granted Northwest's petition to enforce the award of $340,000 which included $175,000 plus $165,000 in legal fees and disbursements (at para. 82).

Issues on Appeal

[44] Alberni says that the chambers judge erred in failing to:

(1) properly apply the test for leave to appeal;

(2) identify the questions raised by it as questions of law; and

(3) review the evidence that was before the Arbitrator.

Positions of the Parties

Alberni

[45] On the first issue, Alberni submits that the chambers judge asked whether the Arbitrator had in fact erred in law, as opposed to asking whether it had raised a question of law. Having concluded that no error had been made, he worked backward from that position to conclude that no question of law had been raised. As a result, he did not consider the remaining factors. Alberni submits that the chambers judge erred by going beyond a preliminary assessment of arguable merit.

[46] On the second issue, Alberni submits that the chambers judge erred in concluding that there was evidence to support the Arbitrator's finding that the Agreement had been modified to a fixed-price model. It submits that there was no evidence corroborating Mr. Patton, that the Change Order was a budget not a modification of the contract, and that there was no other evidence supporting the Arbitrator's conclusion. No evidence supporting a finding of fact is, Alberni submits, a question of law alone. Furthermore, Alberni submits that the conduct of the parties did not support the finding. Indeed, it submits that the Arbitrator failed to consider evidence of Mr. Braun that indicated overpayments were not intentional and not a waiver of contractual rights, and the failure to consider that evidence was a separate error of law.

[47] Finally, on the third issue, Alberni submits that the failure of the chambers judge to review the evidence that was before the Arbitrator amounted to a denial of natural justice, which it submits, is an error of law.

[48] Alberni then submits that this Court should find an error of law, consider the remaining factors in s. 31(2) of the *Arbitration Act* in its favour, and grant leave to appeal. In addition, it submits that the standard of review on the issue of arguable merit is that found in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, that is, one of correctness. It asks this Court to apply the decision in *Vavilov*.

Northwest

[49] Northwest submits that there are only two issues on appeal: (1) whether the chambers judge correctly concluded that Alberni failed to raise a question of law alone arising out of the Award; and (2) if he was incorrect, should leave to appeal be granted (or denied) based on the remaining factors in s. 31(2) of the *Arbitration Act*.

[50] Northwest submits that there was ample evidence supporting the finding of the Arbitrator that the Agreement had been modified to a fixed-price model. Indeed, it submits that Alberni's own evidence supports that conclusion. Northwest says that what Alberni is really complaining about is that the Arbitrator did not accept its assessment of the evidence, which is not a question of law, but a question of fact. Furthermore, if a question of law was raised, leave should still be refused on the basis of the other factors in s. 31(2) of the *Arbitration Act*.

Legal Framework

[51] Section 31 of the former *Arbitration Act* governs the application for leave to appeal this arbitral award:

> **Appeal to the court**
>
> 31(1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if
>
> (a) all of the parties to the arbitration consent, or
>
> (b) the court grants leave to appeal.
>
> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that

> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.
>
> (3) If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just.
>
> …
>
> (4) On an appeal to the court, the court may
>
> (a) confirm, amend or set aside the award, or
>
> (b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

Discussion

[52] In my view, Alberni must demonstrate, as a threshold issue, whether the appeal raises a question of law alone. If it is not successful on that issue, then the other grounds of appeal fall.

Is there an extricable question of law?

[53] The first hurdle an applicant for leave to appeal an arbitral award (in this case, Alberni) must overcome is showing that the appeal is based on a question of law alone. In *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paras. 35–37, 1997 CanLII 385, the Court discussed the approach to distilling whether an issue is a question of law alone:

> [35] Section 12(1) of the *Competition Tribunal Act* contemplates a tripartite classification of questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact. Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or *vice versa*.

> [36] For example, the majority of the British Columbia Court of Appeal in [*Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, 1994 CanLII 103], concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. The rule on which the British Columbia Securities Commission seemed to rely — that newly acquired information about the value of assets can constitute a material change — was a matter of law, because it had the potential to apply widely to many cases.
>
> [37] By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

[54] When there are no "extricable questions of law", issues of contractual interpretation are questions of mixed fact and law and, as such, cannot be appealed under s. 31 of the *Arbitration Act*. That approach was discussed in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at paras. 49–55:

> [49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in [*Housen v. Nikolaisen*, 2002 SCC 33] and *Southam*. Questions of law "are questions about what the correct legal test is" (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam*, at para. 35)…

[50] With respect for the contrary view, 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.

[51] The purpose of the distinction between questions of law and those of mixed fact and law further supports this conclusion. One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation. For this reason, *Southam* identified the degree of generality (or "precedential value") as the key difference between a question of law and a question of mixed fact and law. The more narrow the rule, the less useful will be the intervention of the court of appeal:

> If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future. [para. 37]

[52] Similarly, this Court in *Housen* found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings (paras. 16-17). These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. 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.

[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 (*Housen*, at paras. 31 and 34-35). 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" ([*King v. Operating Engineers Training Institute of Manitoba Inc.*, 2011 MBCA 80], at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

> [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.

[55] In *Urban Communications Inc. v. BCNET Networking Society*, 2015 BCCA 297 at para. 64, aff'd 2016 SCC 45, this Court summarized the post-*Sattva* approach to the consideration of leave to appeal from arbitral awards:

> 1. The historical approach in which issues of contractual interpretation were held to be questions of law is to be abandoned ([*Sattva* at] para. 50);
> 2. In considering an application for leave to appeal under s. 31(1) of the *Act*, a court must be "cautious in identifying extricable questions of law in disputes over contractual interpretation" given the legislature's intention to restrict such appeals, although an extricable question of law may still arise from within what was initially characterized as a question of mixed fact and law (e.g., the application of the correct legal principle, failure to consider an element of a legal test, or failure to consider a relevant factor) ([*Sattva* at] paras. 53-54);
> 3. In considering whether leave to appeal should be granted under s. 31(2)(a) of the *Act*, the applicant must demonstrate the alleged legal error is material to the final result and has arguable merit in order to establish that its determination "may prevent a miscarriage of justice" ([*Sattva* at] para. 79);

> 4. Having found an alleged error of law and a potential miscarriage of justice, a court must be cautious in weighing a non-exhaustive list of discretionary factors before rejecting an otherwise eligible appeal on discretionary grounds ([*Sattva* at] para. 92); and
> 5. Even where leave to appeal is granted, the court's standard of review of the arbitrator's decision on the merits is one of reasonableness unless the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside of the arbitrator's experience ([*Sattva* at] paras. 102-106).

[56] As for the last paragraph quoted above, I note that the standard of review was stated before the SCC decision in *Vavilov*, which I will address shortly.

[57] In *On Call Internet Services Ltd. v. Telus Communications Company*, 2013 BCCA 366, leave to appeal to SCC ref'd, 35577 (13 March 2014), Justice Kirkpatrick noted that questions of law must be clearly defined and that restraints on leave are important to preserve the integrity of the arbitration system as a forum for speedy and final adjudication (at para. 35, citing *Ed Bulley Ventures Ltd. v. Eton-West Construction Inc.,* 2002 BCSC 826 at paras. 5–6).

[58] In *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, the Court examined the scope of appellate intervention in commercial arbitration in British Columbia, and concluded that the jurisdiction is limited by: i) statutorily requiring a question of law alone; and ii) by a standard of review of reasonableness (which is also considered at the leave stage), which advances the "central aims of commercial arbitration: efficiency and finality" (at para. 1).

[59] The Court identified the test for determining what is a question of law in *Southam* and *Sattva* and concluded that while the application of a legal test is a question of mixed fact and law, whether an arbitrator relied on the correct legal test at the outset, or during the application, is a question of law (at para. 44).

[60] However, the Court continued with the warning that appellate courts must proceed cautiously when identifying extricable questions of law:

> [45] Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of

> law. The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent (*Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

[61] While the interpretation of a contract within the factual matrix is a question of mixed fact and law, it is a question of law when "the factual matrix overwhelms the words of a contract when it is interpreted in isolation from the words of the contract, effectively creating a new agreement between the parties" (at paras. 55, 62). An excessive weighing of the factual matrix is a question of mixed fact and law (at para. 56).

[62] The bottom line, summarized from *Teal Cedar*, is: "Was the proper principle applied?", and not "Was the principle applied properly?" (at para. 65).

[63] *Teal Cedar* also makes it clear that courts assessing whether there is an extricable question of law alone must consider the arbitrator's reasoning as a whole (at para. 69).

[64] In *Sattva*, at para. 54, the Court advised that courts should be "cautious in identifying extricable questions of law in disputes over contractual interpretation", as applicants will seek to frame any alleged errors as questions of law even though the legislature has sought to restrict such appeals. However, this does not mean that such questions cannot be addressed in considering granting leave when they clearly arise: *British Columbia (Ministry of Forests) v. Teal Cedar Products Ltd.*, 2015 BCCA 263 at para. 51, rev'd in part on other grounds 2017 SCC 32.

[65] The instructions in *Sattva* are clear. The Arbitrator in this case was asked to interpret the contract, and that required ascertaining the objective intentions of the parties. In order to do that, the Arbitrator was required to consider the factual matrix

or surrounding circumstances. That process is "inherently fact specific": *Sattva* at para. 55. As noted in *Sattva*, "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": *Sattva* at para. 55.

[66] I agree with Alberni that an absence of evidence to support a material fact is a question of law.

[67] The next step is to determine if there was an absence of evidence to support the conclusion that the contract switched to a fixed-price model which would compensate Northwest for additional pages or if the argument is founded on complaints regarding the Arbitrator's assessment of the evidence or sufficiency of the evidence, which are questions of fact: see e.g., *K.L.B. v. British Columbia*, 2003 SCC 51 at para. 62; *B.C. Ferry and Marine Workers' Union v. British Columbia Ferry Services Inc.*, 2014 BCCA 256 at para. 30 (Chambers). If there is some evidence supporting the conclusion, then the issue is not a question of law: see e.g., *2293611 Ontario Inc. v. JSegal Holdings Limited*, 2016 ONSC 7577 at para. 42; *Hayes Forest Services Ltd. v. Weyerhaeuser Company Ltd.*, 2008 BCCA 31 at paras. 70–72.

[68] Alberni submits that the only evidence of the change to a fixed-price model is found in the "self-serving" evidence of Mr. Patton, who defined what Alberni referred to as a new budget, as a fixed-price model. Alberni points out that the Arbitrator expressly rejected Mr. Patton's evidence. However, it fails to acknowledge that the rejection is of his uncorroborated evidence (Award at para. 126).

[69] Alberni submits that the Arbitrator erred in his interpretation of the Change Order. It submits that it was not a change to a fixed-price model, but only a new budget. The Arbitrator concluded that the parties intended that Northwest would be further compensated for the additional services it rendered to meet the various requests by Alberni for time extensions and extra content.

[70] The Arbitrator concluded that the original contract was changed by the Change Order, oral agreement of the parties, and the conduct of the parties. The conduct of the parties included that as the parties moved away from the original Agreement, with expanded timelines and content, they did not follow the procedures set out in s. 5.3 relating to the submission and approval of budgets. Production costs were treated on an *ad hoc* basis, as invoices were presented.

[71] The Arbitrator also relied on emails — for example, the July 25, 2016 internal email, where Mr. Braun acknowledges that Alberni was in part to blame for the escalating costs. (Award at para. 127). The Arbitrator also applied *quantum meruit*, finding that there was an implied term that Northwest would be compensated for the preparation of additional pages (Award at para. 130). In the July 4, 2016 email, it was expressly agreed by Mr. Braun that Northwest would be compensated for an additional 160 pages, and up to 300 pages. That was later withdrawn, but after Northwest had worked on the project on that basis.

[72] It must be recalled that the issue before the Arbitrator was whether Northwest was entitled to additional compensation under the Agreement or under legal principles related to *quantum meruit* (Award at para. 1).

[73] In my view, there is ample evidence to support the conclusion that the parties intended to change the Agreement in order to compensate Northwest for the additional work it performed at the behest of Alberni. The structure of the Change Order, with the sliding price on a per story basis supports that the parties agreed to move to a fixed-price model. It was not necessary for Northwest to see the Change Order for that to be evidence that supported the conclusion of the Arbitrator. It clearly came about as a result of the discussions between the parties as the publication was being developed.

[74] The parties chose the Arbitrator to determine the issues in their case, which were, as they identified at the outset, primarily issues of fact. The Arbitrator considered and weighed the evidence and interpreted the documents. Considering

his reasons as a whole, in my view, no error or question of law alone arises from his reasons.

[75] The other errors alleged by Alberni all turn on whether there is a question of law arising from the interpretation of the Agreement. In my opinion, there is not, and therefore, there is no need to address the other issues raised by Alberni.

[76] I would add two things. Firstly, Alberni alleges that the chambers judge erred by making a finding and then reasoned backwards to conclude the Arbitrator made no error in law, rather than asking whether the appeal raised a question of law alone. The chambers judge, in order to determine if there was a question of law, had to determine if there was any substance to it — a party cannot simply assert that they have a question of law and obtain leave on that basis. The chambers judge did not err in delving into the issue of whether there was a question of law: see e.g., *Ecoasis Resort and Golf LLP v. Bear Mountain Resort & Spa Ltd.*, 2021 BCCA 285 (Chambers). On the other hand, the chambers judge at para. 67 of his reasons, stated that he had found that the Arbitrator did not err in concluding that the fixed-price model replaced ss. 5.3 and 5.4 of the Agreement, and as a result, the other grounds were not relevant. Given the context of that statement, it is evident that the chambers judge did not conclude that the Arbitrator did not err — he concluded that the Arbitrator did not err in law and that the issue was at best a question of mixed fact and law. In my view, the chambers judge did not reason backwards, but simply used a short form in describing what he concluded. The result is the same.

[77] The second matter is that Alberni asks this Court to apply the decision in *Vavilov* as the standard of review for commercial arbitration. While I understand the frustration in the Bar regarding the refusal of some Courts of Appeal (including ours) to decide the issue, this is not the appropriate case to resolve that important question. Courts should not decide issues that are not necessary to its decision. The standard of review plays no role in the decision in this case, and it would not be appropriate, no matter how desirable, to decide that issue in this context.

Conclusion

[78] Having found that the chambers judge correctly concluded that there was no question of law from which leave to appeal could be granted, there is no need to address the additional grounds of appeal, as they all stood or fell on that primary gatekeeping decision.

[79] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Grauer"