

### **Arbitration Caution: Be Careful about How You Conduct**

In my last [Case Comment](#), I examined some of the elements of the recent watershed Supreme Court of Canada decision, *Sattva Capital Corp v. Creston Moly Corp*, which provides a complete compendium on the application of the principles that are engaged where leave to appeal an arbitration award to the British Columbia Supreme Court is sought.

One of the elements I did not address in that Case Comment was the residual discretion of the Supreme Court to deny leave even where the substantive requirements of a Leave Application are met. Some of those factors were alluded to in the *Sattva* decision and include *the conduct of the parties and the urgent need for a final answer*.

An application of those principles can be found in a recent B.C. Supreme Court decision representing one of the first post *Sattva* cases, [Owners, Strata Plan BCS 3165 \(“Owners”\) v. KBK No. 11 Ventures Ltd. \(“KBK”\)](#), which was successfully argued by Shane Coblin of our firm. In that case, while the Court decided largely that the issues sought to be appealed were matters of fact or mixed fact and law and therefore did not satisfy the requirement that leave to appeal an arbitration award can only be founded on a question of law, nevertheless, the Judge did address the question of whether he should exercise his discretion to refuse the granting of leave to appeal, and in doing examined the two grounds referenced above.

On the matter of the conduct of the parties the Court considered the behaviour of the Owners in their attempt to delay the hearing of the arbitration, including commencing a futile Supreme Court of BC Action four days before the arbitration was scheduled to start and spending four days on a failed application to stay the Arbitration Hearing, as well as the Owners’ failure to acknowledge and pay any of their financial obligations to KBK, even the ones for which no appeal was sought.

The Owners’ failure to pay even those obligations they were not contesting gave support to KBK’s claim to the urgency of obtaining a final answer so it would not be unduly burdened financially. As a result the Court exercised its discretion, in particular, on the basis of the urgent need for a final outcome, to deny the Leave Application even if the Owners had met the other burdens for a successful Leave Application.

As mentioned previously, given the other findings of the Court, the Judge’s refusal to exercise his discretion in favour of granting leave to appeal was not critical in this case. However, it does stand as a cautionary tale that the objectives that are set out in Rule 19 of the British Columbia International Arbitration Centre Rules, that I have noted in a prior [Case Comment](#), i.e. that the process should “strive to achieve a just, speedy and economical determination on its merits” are to be ignored at one’s peril.

## KORNFELD LLP

On a personal note, since my last Case Comment, I was honoured to have been appointed a Queen's Counsel (QC) by the Government of British Columbia. I want to thank all of you who conveyed your support and good wishes.

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Herb Silber, Q.C. brings a strong combination of experience, knowledge and empathy to the arbitration process as Arbitrator or counsel. Herb's approach creates the positive, respectful atmosphere critical to a successful arbitration process.



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