IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Amos Investments Ltd. v. Minou Enterprises Ltd.,*** 2008 BCSC 332

Date: 20080320
Docket: S060625
Registry: Vancouver

Between:

Amos Investments Ltd. and
Guse Management Co. Ltd.

Petitioners

And:

Minou Enterprises Ltd., Game Holdings Ltd., Make Holdings Ltd.,
Matcon Holdings Ltd., Mega Management Ltd., Hartley Enterprises Ltd.,
White Dogs Holdings Ltd., Pals Holdings Inc.,
Janice Amos, Kathy Guse, Lorna Mattson and Michael Mattson

Respondents

Docket: S076055
Registry: Vancouver

In the Matter of the ***Commercial Arbitration Act***, R.S.B.C. 1996, c. 55
And Amendments Thereto

And

In the Matter of an Arbitration Pursuant to an
Order Dated September 30, 2006 of the Court
in Proceeding No. S060625

Between:

Amos Investments Ltd. and
Guse Management Co. Ltd.

Petitioners

And:

Minou Enterprises Ltd., Lorna Mattson and Michael Mattson

Respondents

Before: The Honourable Mr. Justice Curtis

Reasons for Judgment

Counsel for the Petitioners, Amos Investments Ltd. and Guse Management Co. Ltd.	Murray A. Clemens, Q.C.
Counsel for the Respondents,	F.G. Potts

Minou Enterprises Ltd., Lorna Mattson and Michael Mattson	& D. Magnus
Date and Place of Hearing:	January 14-17, 2008 Vancouver, B.C.

[1] These two petitions relate to a shareholders' dispute in a group of construction companies. Ron Amos, Kirk Guse and Michael Mattson are the owners of the majority of voting shares in what is referred to as the Matcon Group of Companies. In July of 2004, Mr. Amos and Mr. Guse advised Mr. Mattson that they no longer wished to carry on business with him and litigation ensued. Mr. Amos and Mr. Guse, through their holding companies, filed the petition in Action No. S060625 for an order winding up the various companies. Michael Mattson commenced an oppression action by petition under Action No. S062227 in the New Westminster Registry. These two petitions came on for hearing in September 2006. On the second day of the hearing, the parties entered a consent order dated September 20, 2006. The order was made in the winding up action. The oppression action was to be dismissed and matters relating to the amounts payable to Michael Mattson for his interest in the companies were referred to a Chartered Business Valuator.

[2] The valuator, Mr. Ron Patrickson, issued a report dated August 17, 2007. In that report, Mr. Patrickson fixed the value of Mr. Mattson's shares and other amounts to be paid to Mr. Mattson at $8,631,000. Counsel for Mr. Amos and Mr. Guse had submitted an Estimated Fair Market Value Report from BDO Dunwoody to the valuator according to which the mid-point of the range for the estimated value of Matcon shares was $3,255,000. Counsel for Mr. Mattson had submitted a report from PricewaterhouseCoopers to the valuator which estimated the value of the Mattson shares at $17,480,301 to $20,540,602 plus interest.

[3] Mr. Amos and Mr. Guse do not wish to pay Mr. Mattson $8,631,000 for his interest. They allege that the report of the valuator was an arbitration award, which they have applied to quash, or alternatively, to appeal, on grounds of arbitral error and errors of law.

[4] Mr. Mattson, feeling aggrieved for having been shut out of the business for three and a half years without having been paid for his interest with the exception of some $1,129,647 on his shareholder loan, seeks to enforce payment under the valuation.

[5] Mr. Amos and Mr. Guse have brought the present petition to have the valuation quashed or appealed under the ***Commercial Arbitration Act***, R.S.B.C. 1996, c. 55. Mr. Mattson has made application in the winding up action to strike that petition on the grounds that that valuation was not an arbitration but a final determination of value, or alternatively, if there was an arbitration for the court to deny relief to Mr. Amos and Mr. Guse. Mr. Mattson has also applied in the alternative for an order that there be an interim payment of the $3,255,000 amount suggested by Mr. Amos and Mr. Guse's expert if the challenge to the award is permitted to proceed on any basis, and also for an injunction controlling Mr. Amos and Mr. Guse's removal of funds from the companies while the matter is unresolved.

[6] The consent order entered by the parties reads as follows:

THIS COURT ORDERS that:

> 1. Subject to the terms of this Order, Amos Investments Ltd./Guse Management Co. Ltd., (together "Amos/Guse") or their respective designated entities or persons will purchase from Minou Enterprises, Lorna Mattson and Michael Mattson (together "Mattson") all shares, rights, title or interest of any type held by Mattson (the "Mattson Shares") in the Matcon Group of Companies, as listed in Schedule "A" to this Order.
>
> 2. The value of the Mattson Shares, will be computed (the "Valuation"):
>
> A. At their fair market value (pro rata en bloc) on a going concern basis;
>
> B. With the Valuation being on an estimate valuation level, as such valuation level is defined by the Canadian Institute of Chartered Business Valuators;

C. Without minority shareholder discount, but making all just discounts and adjustments to the purchase price of the Mattson Shares as would be applicable to the normal commercial arm's length purchase and sale of shares of a comparable closely held company in British Columbia;

D. As at September 30, 2005; and

E. Taking into account any amounts payable to Mattson by the Matcon Group of Companies pursuant to this Order (including Mattson's share of 2005 Profits, Loan Interest and the Severance, as such terms are defined in this Order).

3. The Valuation will be conducted by a Chartered Business Valuator with experience in valuing privately held construction companies (the "Valuator"), chosen as set out below:

A. Within 14 days of the entry of this Order, Mattson will nominate and retain a business valuator and Amos/Guse will nominate and retain a business valuator and counsel will give written notice of and contact details for such nominees (the "Nominees") to the other party's counsel;

B. Each Nominee will be instructed by his or her respective nominating party to use all reasonable efforts to agree on the appointment of the Valuator to determine the Valuation of the Mattson Shares, and make such other determinations as may be set out in this Order or are consequential thereto;

C. If the Nominees have not agreed and notified the respective party's counsel in writing of the name of the Valuator within 14 days of the appointment of the Nominees, then either party may apply in this proceeding for the appointment of the Valuator.

4. Subject to the terms of this Order, the Valuator will have all the powers and authority as an arbitrator appointed pursuant to the ***Commercial Arbitration Act***, R.S.B.C. 1996, c. 55, as amended and in force from time to time, and the applicable Domestic Commercial Rules of the British Columbia International Commercial Arbitration Centre;

5. The reasonable fees and disbursements of the Valuator shall be paid equally by Amos/Guse and Mattson, subject to the determination of the Valuator pursuant to subparagraph 11(E) of this Order;

6. As part of the Valuation, and based on the evidence presented, the Valuator shall determine for the year beginning October 1, 2004 and ended September 30, 2005, the amount by which Amos/Guse (including through providing the services of Kirk Guse and Ron Amos) should be remunerated in a fair and reasonable manner for their management and other contributions made to the businesses of the Matcon Group of Companies (the "Amos/Guse Fees:);

7. The Matcon Group of Companies shall pay, and the Valuation shall include and take into account, a management fee in full and final settlement of severance claims of Mattson equal to $12,500.00 per month for the period from August 1, 2004 to September 1, 2005 (less such payments of $12,500.00 made by the Matcon Group of Companies during that period), less required governmental deductions, if any (hereinafter, "Severance");

8. With regard to shareholders loans owing to Mattson by the Matcon Group of Companies:

A. Within 14 days of the entry of this Order, the Matcon Group of Companies shall pay all currently disclosed outstanding shareholders loans to Mattson, such amount being $1,129,647 (the "Current Loans"); and

B. The Current Loans shall earn interest as from October 1, 2005 to the date of payment at the rate of 6% per annum on the outstanding balance of such shareholders loans from time to time ("Loan Interest").

9. The Matcon Group of Companies shall make full disclosure of all relevant financial records, and other like documents as determined by the Valuator. Unless determined otherwise by the Valuator, all applicable deadlines herein for submissions to the Valuator shall run from the date of full disclosure of all 2005 fiscal year financial records, which the Matcon Group of Companies shall

disclose within 10 days of the appointment of the Valuator (the "Disclosure Date").

10. In accordance with this Order the Valuator shall:

A. Determine the value of the Mattson Shares in accordance with paragraph 2 herein;

B. Determine the Amos/Guse Fees, in accordance with paragraph 6 herein;

C. Make all due adjustments for Amos/Guse Fees and Severance to the 2005 financial statements for the Matcon Group of Companies to determine the profits of the Matcon Group of Companies for the 2005 fiscal year, the proportionate share (based on Mattson's Share proportion) of such amount being payable by way of bonus to Mattson's account (the "2005 Profits");

D. Determine the Loan Interest in accordance with paragraph 8 herein; and

E. Determine the fair and reasonable terms and conditions upon which:

i. the Mattson Shares are to be sold to and purchased by Amos/Guse or their designated entities or persons;

ii. Mattson shall be paid for Severance, 2005 Profits and Loan Interest, if any, by the Matcon Group of Companies;

all of which will include the payment of cash on closing and interest payable on any balance owing.

(the "Valuator Matters")

11. The Valuator Matters shall be determined as follows (the "Valuation Process"):

A. The Valuator may determine the process and rules applicable to the Valuation Process, including any modification of the time requirements set out in this paragraph 11 as the Valuator may deem necessary, and what financial information (including such documents from 2005 and 2006 as may be determined by the Valuator), document disclosure, evidence and submissions are required to allow the parties to make proper submissions with regard to the Valuation and Amos/Guse Fees, subject to the terms of this Order. Any application for further financial disclosure, beyond that made by the Matcon Group of Companies pursuant to paragraph 9 of this Order, shall be made within seven days of the Disclosure Date, and heard and the issue determined by the Valuator, as soon as reasonably possible thereafter. It is understood and agreed that the Valuator may correspond with and seek and obtain information from the parties at any time during the Valuation Process, and the parties agree to fully cooperate with the Valuator, providing responsive and full disclosure to the Valuator and other party in a timely manner;

B. The Valuator Matters, as resolved by the Valuator, shall be final and binding upon the parties as an award of an arbitrator pursuant to the provisions of the ***Commercial Arbitration Act***, R.S.B.C. 1996, c. 55, as amended and in force from time to time;

C. Mattson and Amos/Guse will deliver written submissions (each an "Initial Submission") to the Valuator, within 21 days of the Disclosure Date or at such later date the Valuator determines as a result of the need for further financial disclosure pursuant to paragraph 11 (A), whichever is later. Each party may, within 10 days of receipt of the Initial Submission, make a reply submission (each a "Reply Submission") to the Valuator. Each Initial Submission shall address all issues related to the Valuator Matters, and the terms and conditions applicable to the purchase and sale of the Mattson Shares by Amos/Guse or their respective designated entities or persons. Each Reply Submission shall be limited to reply to issues raised in the other party's Initial Submission. Each Initial Submission and Reply Submission will be made in writing and communicated concurrently to the other party's legal counsel;

D. Within 30 days after expiry of the time for receipt of the Reply Submissions (the "Decision Date"), the Valuator will determine and communicate in writing to the parties his resolution of

the Valuator Matters; and

E. Within 30 days of the Decision Date make any determination of costs and disbursements payable by Mattson and/or Amos/Guse in relation to the steps set out in this Valuation Process, including the costs of the Valuator, the two Nominees and legal counsel representing the parties. It is agreed that either party may make offers of settlement before or during the Valuation Process, which offers may be argued by the parties to entitle them to costs in relation to the steps set out in this Valuation Process;

12. The closing of the purchase and sale of the Mattson Shares pursuant to the Valuation process will take place at the offices of Robertson Downe & Mullally in Abbotsford, British Columbia, on the first business day following 30 days after the Decision Date, or such other day as the parties may agree in writing.

13. Either party or the Valuator may, on an expedited basis, seek further directions of this Court as may be necessary to carry out the terms of this Order, and in which case Rule 51A shall not apply.

14. Mattson will execute and deliver in a timely fashion such reasonable documentation prepared by legal counsel for the Matcon Group of Companies as may be necessary to waive the appointment of auditors for the Matcon Group of Companies or subsidiaries or affiliates thereof and otherwise permit the Matcon Group of Companies, subsidiaries and affiliates to be brought and remain in good standing with the necessary governmental authorities and banks (the “Matcon Documents”).

15. Execution of the Matcon Documents is without prejudice to Mattson’s rights as a shareholder, director, officer or employee of the Matcon Group of Companies. Ron Amos and Kirk Guse shall indemnify Mattson for any liability which may result from Mattson’s execution of the Matcon Documents for any actions originating after July 16, 2004.

16. Subject to paragraph 5, 11(E) and paragraph 13 of this Order, there shall be no costs of this proceeding awarded to any party.

[7] According to law, a consent order is to be interpreted as a contract between the parties that made it, using the usual methods for construing a contract: ***Bankirk Developments Ltd. v. Orca Estates Ltd.***, 2006 BCCA 238; ***Streifel v. First Heritage Savings Credit Union***, [1992] B.C.J. No. 2472 (QL) (B.C.C.A.).

Was the Valuation an Arbitration Award?

[8] The ***Commercial Arbitration Act***, R.S.B.C. 1996, c. 55 states:

2(1) This Act applies to the following:

(a) an arbitration agreement in a commercial agreement;

(b) an arbitration under an enactment that refers to this Act, except insofar as this Act is inconsistent with the enactment regulating the arbitration, or with any rules or procedure authorized or recognized by that enactment;

(c) any other arbitration agreement.

…

36 The court may order at any time that the whole matter, or a question of fact arising in a proceeding, other than a criminal proceeding, be tried before an arbitrator agreed on by the parties if

(a) all parties interested, and not under disability, consent,

(b) the proceeding requires a prolonged examination of documents, or a scientific or local investigation that cannot, in the opinion of the court, conveniently be made before a jury or conducted by the court through its other ordinary officers, or

(c) the question in dispute consists wholly or partly of matters of account.

[9] It is not argued by either party that the matter was referred to arbitration by the court under s. 36 of the ***Commercial Arbitration Act***, nor does that appear to have been the case as the presiding judge was not requested to deal with that matter, other than by signing the order drafted by the parties.

[10] In order for the valuation in this case to have been an arbitration, there must therefore have been an agreement by the parties to arbitrate. Does the consent order contain such an agreement on its terms? In the event of the court finding the wording ambiguous, extrinsic evidence may be considered.

[11] The terms of the order speak of a "purchase" of "all shares, rights, title or interest of any type held by Mattson (the "Mattson Shares")." The order states, "The value of the Mattson Shares will be computed (the "Valuation")" and "The Valuation will be conducted by a Chartered Business Valuator with experience in valuing privately held construction companies (The Valuator)". On their face and considered in isolation, these statements suggest the process is akin to that of an appraisal – that is that the Valuator, using his knowledge and expertise, and his usual methods of doing so is to compute a number. The order goes on however, to set out the process the Valuator is to follow in performing his function. Paragraph 4 states, "the Valuator will have all the powers and authority as an arbitrator appointed pursuant to the ***Commercial Arbitration Act***, RSBC 1996, c. 55, as amended and in force from time to time, and the applicable Domestic Commercial Rules of the British Columbia International Commercial Arbitration Centre." Paragraph 11 delineates the determination process and states, "The Valuator may determine the process and rules applicable to the Valuation process." Paragraph 11 B provides, "The Valuator Matters as resolved by the Valuator, shall be final and binding upon the parties as an award of an arbitrator pursuant to the provisions of the ***Commercial Arbitration Act***, RSBC 1999, c. 55, as amended and in force from time to time."

[12] It is clear from the consent order that what is contemplated is not a simple request that a valuator reach an opinion independently, but rather that the parties will present evidence and submissions before the valuator who is to reach his conclusions on the basis of an adversarial proceeding conducted before him.

[13] The words "is an arbitrator" in paragraph 4 and "as an award of an arbitrator" in paragraph B could mean either that the Valuator is an arbitrator and his decision is an award, or that the Valuator is another sort of entity that is not an arbitrator, but shall have the powers of an arbitrator and his decision shall be "final and binding upon the parties as an award of an arbitrator." Considering the nature and importance of the dispute and the process set forth, I read the agreement between the parties as appointing the Valuator as an arbitrator under the ***Commercial Arbitration Act***.

[14] When counsel advised Goepel J. on the 20th of September 2006 that the parties had settled upon the terms of a consent order, Mr. Kuhn on behalf of Amos and Guse, advised the court, "Amos and Guse will receive credit for the salary to be determined by the arbitrator pursuant to the rest of this process and said, 'this is a valuation/arbitration process and it is set out in the letter' … including such documents from 2005 and 2006 as determined by the arbitrator." Justice Goepel then specifically inquired of counsel about the process and the following was said:

THE COURT: Okay. And what, the letter of April 21 has an arbitration provision contained in it?

MR. KUHN: Yes, it does.

THE COURT: Presumably with respect to how valuation is going to be agreed upon?

MR. KUHN: Sorry?

THE COURT: Well, I mean, you've set up this process that the shares will be valued as at September 30. I take it from what you're telling me that your April 21 letter has some form of arbitration process built into it if the parties can't agree. Presumably I take it you've agreed as to who is doing the valuation, and often things can fall apart at that stage.

MR. KUHN: Valuation -- my friend and I have agreed that the valuator will act as an arbitration for

the purposes of making those decisions that are necessary to determine the valuation.

THE COURT: So you're basically appointing one person --

MR. KUHN: Yes.

THE COURT: -- who is going to decide what the value is and you both use whatever he comes up with.

MR. KUHN: And the process of appointing that person is set out in the letter, which is both of us pick one valuator who will in turn pick a third, and that third valuator will act as a sole valuator/arbitrator for the purposes of making decisions.

[15] Mr. Potts, acting for the Mattson interest was present during these remarks and took no objection to the court being advised in the terms used. As I interpret what was said, the parties jointly represented to the court that a part of the matters in issue before the court to be resolved pursuant to the terms of a consent order the court was requested to make, was to be referred to an arbitrator for determination; and it was on that basis the court made the order requested. In those circumstances, to my mind, it is difficult for a party having made such a representation to the court to now take the position that the proceeding was not an arbitration.

Does the consent order contractually limit the right to appeal or challenge the decision?

[16] Mr. Patrickson's decision in this case, being an award of an arbitrator is subject to the provisions of the ***Commercial Arbitration Act***. The ***Act*** provides:

30(1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may

(a) set aside the award, or

(b) remit the award to the arbitrator for reconsideration.

(2) The court may refuse to set aside an award on the grounds of arbitral error if

(a) the error consists of a defect in form or a technical irregularity, and

(b) the refusal would not constitute a substantial wrong or miscarriage of justice.

(3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

31(1) A party to an arbitration 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 this section, 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.

32 Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

[17] It is submitted on behalf of Amos and Guse that Mr. Patrickson made arbitral errors and errors of law, such that his award should be quashed. The preliminary position taken in reply to that is that any right to challenge or appeal the award is waived by the provision in the consent order that states, "The Valuator Matters, as resolved by the Valuator, shall be final and binding upon the parties as an award of an arbitrator pursuant to the provisions of the ***Commercial Arbitration Act***, R.S.B.C. 1996, C. 55, as amended and in force from time to time." An award of an arbitrator, which Mr. Patrickson was, made under the ***Commercial Arbitration Act*** is normally subject to sections 30 and 31, concerning challenges to it. As I interpret the wording of the order, it simply states the decision is as final and binding as an ordinary arbitration award; that is, an award subject to the usual provisions of the ***Act***.

[18] In the case of ***Denison Mines v. Ontario Hydro***, [2000] O.J. No. 3623 (QL) (Ont. S.C.J.), it was held that parties could contract out of s. 45(1) of the Ontario ***Arbitration Act***, S.O. 1991, c.17 which provides, "If the arbitration agreement does not deal with questions of law, a party may appeal an award to the court on a question of law with leave …". The arbitration agreement in that case was worded as follows:

> … all disputes arising in connection with this agreement shall be finally settled under the provisions of the ***Arbitrations Act*** of Ontario by three arbitrators.

[19] The court then referred to the case of ***Labourers' International Union of North America, Local 183 v. Carpenters and Allied Workers Local 27 et al*** (1997), 34 O.R. (3d) 472 as follows:

> 17 In this context, I note that the mere use of the word "binding" in an arbitration agreement is, by itself, not sufficient to preclude an appeal pursuant to s. 45(1): see *Charles v. Saveway Gas & Fuels Ltd.*, [1993] O.J. No. 833 (Gen. Div.), Doyle J., online: Quicklaw (unreported).
>
> 18 In *Labourers' International Union of North America, Local 183 v. Carpenters and Allied Workers' Local 27*, 34 O.R. (3d) 472 (C.A.), ("Labourers' International") Finlayson J.A. held that the use of the word "final", in the context of an arbitration agreement governed by the 1980 Act, means an intent to bar appeals from arbitration awards. In Labourers' International, the 1980 Act also applied to the arbitration agreement, which provided that:
>
> > The parties hereto agree on the speedy resolution of any dispute which may arise amongst them in the interpretation, application or administration or any alleged violation of these Minutes of Settlement ... by final and binding arbitration under the Arbitration Act, R.S.O. 1980, c. 25. ... [Emphasis added.]
>
> 19 The applicant in Labourers' International sought to rely on this clause, and the 1980 Act. The respondent sought to rely on s. 45(1) of the 1991 Act, in order to appeal the arbitration award. Finlayson J.A. for the court held that the parties' intention is paramount, with respect to the right of appeal. I am guided by his analysis. He stated:
>
> > In my view, the proper approach to the problem of agreements containing arbitration clauses that overlap the provisions of the former [1980] and present [1991] Arbitration Acts, is to analyze each agreement within the context that it was written. In the case in appeal, the parties could have provided for an appeal if they had wanted one, but failing that affirmative decision, one was not available to them. The argument now made that they did not intend to exclude an appeal because they failed to employ the language of exclusion of the later statute is not persuasive. An examination of the language of the agreement and the circumstances surrounding its making is necessary in order to determine the parties' intentions.
> >
> > Looking at the agreement in appeal from this perspective, it is apparent that the parties

intended to exclude, to the fullest extent possible under the law, any review of the resolution of their dispute. At the time of the making of the agreement, it was not necessary to exclude a right of appeal expressly, because there was no right of appeal without their express agreement under the former [1980] Arbitrations Act. The emphasis of the parties was on a "speedy resolution of any disputes" that was coupled with an undertaking in para. 25 of the agreement that the parties would withdraw the current proceedings before the Ontario Labour Relations Board. They further undertook in para. 26 to uphold "these Minutes of Settlement in any proceedings" before the board.

Furthermore, the parties agreed that this "speedy resolution" would be reached by "final and binding arbitration". Although a "final and binding" clause does not necessarily preclude judicial review, it does reflect an intention to exclude a right of appeal. In the context of judicial review, the Supreme Court of Canada has held that a "final and binding" clause is only a limited privative clause. Although such a clause may reflect some notion of deference, it does not preclude judicial review, even for intra-jurisdictional errors of law on the face of the record: see *Dayco (Canada) Ltd. v. National Automobile, Aerospace & Agricultural Implement Workers Union*, [1993] 2 S.C.R. 230 at pp. 264-68, 102 D.L.R. (4th) 609 at pp. 630-33, and *United Brotherhood of Carpenters & Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at p. 334, 102 D.L.R. (4th) 402 at p. 414.

....

The effect of the words "final and binding" on the right of appeal was also considered in *Yorkville North Development Ltd. v. North York (City)* (1988), 64 O.R. (2d) 225, 48 R.P.R. 225 (C.A.). Morden J.A. reviewed the case-law on the issue, stating at p. 227:

> Unless the context indicates otherwise, it is generally accepted that where a legislative provision provides that an order is "final" there is no appeal from that order ....
>
> In *Kydd v. Watch Committee of City of Liverpool* [1908] A.C. 327 (H.L.), Lord Loreburn L.C., said at pp. 331-2: "where the legislative provision says, speaking of such an order of quarter sessions, that it is to be final, I think it means there is to be an end of the business at quarter sessions ...". I refer to similar elaborations in the following passages:
>
> > The words here are "final and binding", but I am unable to perceive any material difference between those words and the words "final and conclusive". In my view the important word for present purposes is "final", and I think it is intended to mean, and should be construed as meaning, final in the sense of admitting of no further disputation *Re McCosh's Application*, [1958] N.Z.L.R. 731 at p. 734 (Sup. Ct.).
> >
> > This case *Cushing v. Dupuy* (1880), 5 App. Cas. 409 appears to me to be clear authority for the view that where a decision of a court is made "final", this excludes any right of appeal which would otherwise have existed.
> >
> > ....
> >
> > I find myself quite unable to regard the concluding words of the section "final and conclusive" as having any meaning whatever if they do not exclude the right of appeal. If an appeal is to be allowed, the decision of the court is no longer final and conclusive *Achilleos v. Housing Com'n*, [1960] V.R. 164 at pp. 166 and 168.

Accordingly, the parties' use of the words "final and binding" in para. 23, referring to their agreement to resolve disputes by arbitration, indicated an intention that there would be no right of appeal.

[Emphasis added.]

[20] In the ***Denison*** case, the court held at para. 20:

Looking at the entire context of what took place between Denison and Hydro, and having regard to the analysis of Finlayson J.A., I conclude that the parties are bound by the clear wording of

Article XI. It follows that leave to appeal to this court should not be granted.

[21] The ***Denison*** decision was reversed in the Ontario Court of Appeal on that court finding a different agreement governed the arbitration. (***Denison Mines Ltd. v. Ontario Hydro*** (2002), 58 O.R. (3d) 26.).

[22] It is clear from the authority referred to that an arbitration agreement cannot waive judicial review such as is contemplated under s. 30 of the British Columbia ***Commercial Arbitration Act***. Section 45 of the Ontario ***Act*** referred to specifically contemplates the parties addressing appeals on the issue of law in the agreement. The British Columbia ***Act*** does not; rather it states how appeals of law shall be dealt with. In the ***Labourers International*** case, the court comments "The parties could have provided for an appeal if they had wanted one." In British Columbia at the time of the consent order in issue, the ***Commercial Arbitration Act*** already specifically set out how appeals and challenges to an arbitration award were to be handled, such that it was not necessary for the parties to do so in their agreement.

[23] In the context of the British Columbia Legislation and the circumstances of this case, I do not read the wording of the order to constitute a contracting out of a right to appeal the arbitrator's award.

[24] Furthermore, in British Columbia, it may not even be possible to do so in the initial agreement, as s. 35 of the ***Commercial Arbitration Act*** provides:

> **Exclusion agreements**
>
> **35** If, after an arbitration has commenced, the parties to it agree in writing to exclude the jurisdiction of the court under sections 31, 33 and 34, the court has no jurisdiction to make an order under those sections except in accordance with the agreement, but otherwise an agreement to exclude the jurisdiction of the court under those sections has no effect.

[25] I find that in this case, there is no waiver nor contractual bar to a challenge to the award made in accordance with that allowed by the provisions of the ***Commercial Arbitration Act***.

Was there an arbitral error?

[26] The ***Commercial Arbitration Act*** defines arbitral errors as follows:

> **"arbitral error"** means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:
>
> (a) corrupt or fraudulent conduct;
>
> (b) bias;
>
> (c) exceeding the arbitrator's powers;
>
> (d) failure to observe the rules of natural justice;

[27] The basic model of a system of arbitration involves an opportunity for the parties to present their opposing positions and evidence to support them to the arbitrator before the decision is made. Such a process was clearly contemplated by the parties in this case.

[28] The ***Commercial Arbitration Act*** s. 22(1) provides that the Rules of the British Columbia International Arbitration Centre for the conduct of domestic commercial arbitrations apply unless the parties agree otherwise. Paragraph 4 of the Consent Order states, "the Valuator will have all the powers and authority as an arbitrator appointed pursuant to the ***Commercial Arbitration Act***, R.S.B.C. 1996, c. 55 … and the applicable Domestic Commercial Rules of the British Columbia International Commercial Arbitration Centre."

[29] Those rules provide as follows:

> 19 Conduct of the Arbitration
>
> (1) Subject to these Rules, the arbitration tribunal may conduct the arbitration in the manner in considers appropriate but each party shall be treated fairly and shall be given full opportunity to present it case.

[30] Section 6 of the ***Commercial Arbitration Act*** empowers the arbitrator to "… determine, subject to the rules of natural justice, how evidence is to be admitted." A failure to observe those rules in defined as an arbitral error under the ***Act***.

[31] In this case, Mr. Patrickson independently sought out evidence which he used in reaching his decision. The parties were not notified prior to this being done, nor were they given the opportunity to contradict it or challenge its admissibility or accuracy.

[32] In particular, Mr. Patrickson's decision reveals that:

at page 5:

> In addition to reviewing the documents outlined in Appendix A, we have:
>
> - Conducted confidential, "no names basis", interviews with management of a large private BC-based construction company with the objective of gaining an understanding of the industry, remuneration with in the industry and valuation metrics as at the Valuation date;
> - Conducted confidential, "no names basis", discussions with individuals familiar with the construction industry or the sale of construction companies;
> - Conducted a review of public market data and research reports relating to the BC economy and the BC construction industry, and general economy in Canada as at the Valuation Date; and
> - Performed a search for comparable private company transactions through the database Capital IQ.

at page 12:

> In addition to reviewing the above documents, we:
>
> - Had confidential discussions regarding market remuneration with the CFO of a large private BC-based construction company; and
> - Reviewed various valuation reports and analysis containing in our past files which contained market remuneration adjustments.

at page 14:

> Based on our experience, purchasers of shares of real estate holding companies and/or investment holding companies do not typically give sellers the full benefit of 88(1)(d), since it is only the purchaser who can take advantage of 88(1)(d). We are aware of the circumstances in which the discount is approximately 20% to 25% of the latent capital gains taxes where the purchasers can take full advantage of 88(1)(d). This would be in contrast to a typical 50% recognition of latent corporate taxes in the absence of being able to utilize 88(1)(d).

at page 17:

> When selecting the EBITDA multiples, we reviewed and took into consideration:
>
> - Discussions with either those in the industry or familiar with actual transactions within the industry.

at page 18:

> Increases (or decreases) in projected contract revenue was based largely on economic forecasts of residential and non-residential construction activity in British Columbia, including the Lower Mainland and Thomspon-Okanagan areas of British Columbia for years 2006 to 2010, prepared by CUCBC on or about the Valuation Date.

[33] This independently obtained evidence, which the parties had no means to challenge or test, related to matters of marked significance to the Valuation. For example, the quantification of executive salaries can have a dramatic affect on companies' profitability, and when a multiplier is then applied to the profits of a company, a dramatic affect on the opinion of value. In this case, without revealing to whom he spoke to or what he was told, Mr. Patrickson obtained information on executive remuneration in the industry from the management of a large BC-based private construction company. He also looked at valuation reports of other companies that comparability of which the parties could not challenge because neither their names nor their details were disclosed.

[34] In the case of ***Pfizer v. Canada (Deputy Minister of National Revenue Customs and Excise – MNR)***, [1977] 1 S.C.R. 456, the Supreme Court of Canada allowed an appeal against a ruling of the Tariff Board, The Court held as follows at p. 463:

> Counsel for the appellant has pointed out that the two publications there mentioned had not been put in evidence nor referred to at the hearing, and took exception to this procedure. In my view, the objection is well founded. While the Board is authorized by statute to obtain information otherwise than under the sanction of an oath or affirmation (*Tariff Board Act*, c. T-1, s. 5(9)), this does not authorize it to depart from the rules of natural justice. It is clearly contrary to those rules to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it.

[35] In the case of ***Kane v. University of British Columbia***, [1980] 1 S.C.R. 1105, the Supreme Court of Canada quashed a decision of the University Board of Governors suspending a professor. The reasons of the majority of the Court contain the following reference to the ***Pfizer*** decision at page 1115 - 1116:

> A recent decision of this court which has relevance for this appeal is *Pfizer Company Limited. v. Deputy Minister of National Revenue for Customs and Excise,* [1977] 1 S.C.R. 456, in which Pigeon J., speaking for the court, said at p. 463:
>
> > While the Board is authorized by statute to obtain information otherwise than under the sanction of an oath or affirmation ... this does not authorize it to depart from the rules of natural justice. It is clearly contrary to those rules to rely on information obtained after the hearing was completed without disclosing it to the parties and giving them an opportunity to meet it.
>
> Pfizer is not a case in which a tribunal heard one party in the absence of the other. It establishes, however, the principle that each party to a hearing is entitled to be informed of, and to make representations, with respect to evidence which affected the disposition of the case. See also *R. v. Birmingham City Justices*; *Ex p. Chris Foreign Foods (Wholesalers) Ltd.*, [1970] 1 W.L.R. 1428; *R. v. Barnsley Metropolitan Borough Council*; *Ex p. Hook*, [1976] 3 All E.R. 452; *R. v. Justices of Bodmin*; *Ex p. McEwen*, [1947] 1 K.B. 321.
>
> 6. The court will not inquire whether the evidence did work to the prejudice of one of the parties; it is sufficient if it might have done so: *Kanda v. Government of Malaya*, *supra*, at p. 337. In the case at bar, the court cannot conclude that there was no possibility of prejudice as we have no knowledge of what evidence was, in fact, given by President Kenny following the dinner adjournment. See *Jeffs v. New Zealand Dairy Production & Marketing Board*, [1967] 1 A.C. 551 (P.C.), at p. 567. We are not here concerned with proof of actual prejudice, but rather with the possibility or the likelihood of prejudice in the eyes of reasonable persons.

[36] Dickson J., as he then was, in delivering the reasons of the Court at p. 1112 - 1114 stated:

The following propositions, in my view, govern the outcome of this appeal:

1. It is the duty of the courts to attribute a large measure of autonomy of decision to a tribunal, such as a board of governors of a university, sitting in appeal, pursuant to legislative mandate. The board need not assume the trappings of a court. There is no *lis inter partes*, no prosecutor and no accused. The board is free, within reason, to determine its own procedures, which will vary with the nature of the inquiry and the circumstances of the case. Members of the board are drawn from all constituencies of the community. They normally serve without remuneration in the discharge of what is frequently an arduous and thankless form of public service. Few, if any, of the members of the board will be legally trained. It would be wrong, therefore, to ask of them, in the discharge of their quasi-judicial duties, the high standard of technical performance which one may properly expect of a court. They are not fettered by the strict evidential and other rules applicable to proceedings before courts of law. It is sufficient that the case has been heard in a judicial spirit and in accordance with the principles of substantial justice: per Lord Parmoor in *Local Government Board v. Arlidge*, [1915] A.C. 120], at p. 140. Let me make it clear that in this appeal nothing has been said which in any way impugns the integrity or *bona fides* of any member of the Board of Governors of the University of British Columbia.

2. As a constituent of the autonomy it enjoys, the tribunal must observe natural justice which, as Harman L.J. said [*Ridge v. Baldwin*, [1962] 1 All E.R. 834 (C.A.), at p. 850], is only "fair play in action". In any particular case, the requirements of natural justice will depend on "the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth": per Tucker L.J. in *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109, at p. 118. To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument.

3. A high standard of justice is required when the right to continue in one's profession or employment is at stake: *Abbott v. Sullivan*, [1952] 1 K.B. 189], at p. 198; *Russell v. Duke of Norfolk*, *supra*, at p. 119. A disciplinary suspension can have grave and permanent consequences upon a professional career.

4. The tribunal must listen fairly to both sides, giving the parties to the controversy a fair opportunity "for correcting or contradicting any relevant statement prejudicial to their views": *Board of Education v. Rice*, [1911] A.C. 179], at p. 182; *Local Government Board v. Arlidge*, *supra*, at pp. 133 and 141.

5. It is a cardinal principle of our law that, unless expressly or by necessary implication empowered to act ex parte, an appellate authority must not hold private interviews with witnesses (de Smith, *Judicial Review of Administrative Action*, (3rd ed.) 179) or, *a fortiori*, hear evidence in the absence of a party whose conduct is impugned and under scrutiny. Such party must, in the words of Lord Denning in *Kanda v. Government of the Federation of Malaya*, [1962] A.C. 322, at p. 337 "… know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them ... whoever is to adjudicate must not hear evidence or receive representations from one side behind the back of the other". In *Errington v. Minister of Health*, [1935] 1 K.B. 249, Greer L.J. held that a quasi-judicial officer must exercise powers in accordance with the rules of natural justice, and must not hear one side in the absence of the other:

> If ... he takes into consideration evidence which might have been, but was not, given at the public inquiry, but was given *ex parte* afterwards without the owners having any opportunity whatsoever to deal with that evidence, then it seems to me that the confirming Order was not within the powers of the *Act*. (p. 268)

The principle was summarized in the headnote in these words:

> If the Minister holds a private inquiry to which the owners are not invited or takes into

> consideration *ex parte* statements with which the owners have had no opportunity of dealing he is not acting in accordance with correct principle of justice.

[37] The cases cited by Mr. Mattson's counsel recognize that the concept of natural justice can mean different things in different cases and that the standard is variable to suit the circumstances. In particular, Mr. Mattson's position relies upon the decision in ***Zaleschuk Pubs Ltd. v. Barop Construction Ltd.*** (1992), 68 B.C.L.R. (2d) 340. In the ***Zaleschuk*** case, the operator of a pub, beer and wine store in a strip mall in Surrey could not agree on a rental rate with the landlord. The lease contained an arbitration clause and the issue of the appropriate market rent went to arbitration. The arbitrator was a qualified appraiser not legally trained. The arbitrator viewed some property without advising the parties or hearing their submissions on what information he obtained. Vickers J. ruled as follows at pp. 349 - 351:

> Zaleschuk's alternative position is to have the award set aside. Counsel argues there has been a breach of the ordinary rules of natural justice by the arbitrator visiting the site and the comparables. He says Zaleschuk was not afforded the opportunity of a fair hearing when the arbitrator assessed these physical sites without the knowledge of the parties.
>
> In the course of the argument before the arbitrator counsel for Barop invited the arbitrator to look at the comparables and no objection was made to the suggestion by counsel for Zaleschuk. His words used at the arbitration hearing were as follows:
>
>> You are not bound by the rules of evidence, but you are bound by the rules of natural justice. The rules of natural justice require that each party have a full opportunity to present their evidence and that each party have an opportunity to meet the case presented against him.
>>
>> Accordingly, while you can draw on your own knowledge and your own expertise to consider and weigh the evidence, it would not be appropriate for you to do your own independent analysis, without giving each party notice of that analysis, and an opportunity to respond to it.
>>
>> In summary, I am saying to you that in particular, you should, except for using your own expertise to consider and weigh the evidence, you should confine yourself to the evidence presented during the course of this hearing. I believe that you are familiar with the areas in which most of the comparables have been drawn. If you have not already done so, on behalf of the Landlord, we invite you to look at the comparables. Photographs have been presented by the Landlord for your assistance, and we submit that they accurately show the factors which are germane to determining whether they are a fair comparable or not.
>
> At the hearing before me counsel for Zaleschuk said the suggestion to have the arbitrator visit the comparables was so improper that it called for no comment by the opposing side in the course of the hearing. But one cannot lose sight of the fact the arbitrator is not legally trained. I am sure he would listen closely to what counsel had to say. If he is invited to visit the comparables how can he know such conduct is wrong if counsel fails to take issue with the suggestion at the time it is made?
>
> Counsel for Zaleschuk relied upon the decision of the Supreme Court of Canada in *Kane v. Board of Governors of University of British Columbia*, [1980] S.C.R. 1105; 18 B.C.L.R. 124, [1980] 3 W.W.R. 125, 31 N.R. 214, 110 D.L.R. (3d) 311. In that case the president of the University of British Columbia suspended Kane for misuse of University property. Kane appealed to the Board of Governors and appeared before that body with counsel as did the president of the University. Kane was asked to leave so the Board could deliberate but the president remained during the deliberations and provided the Board with additional facts. The Court held there had been a denial of natural justice to allow the president to provide the additional facts in the absence of Kane. Observing that the rules of natural justice was only "fair play in action", Dickson, J., for the majority said at p. 135 [B.C.L.R.]:
>
>> In any particular case, the requirements of natural justice will depend on "the circumstances of

> the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth": per Tucker L.J. in *Russell v. Norfolk (Duke)*, [1949] 1 All E.R. 109 at 118.
>
> The arbitrator in this case was not a statutory tribunal. He was a lay person chosen by the parties because of his particular skills in the field of appraisals. Any person reviewing the process could not fail to ignore the obvious skills of the arbitrator for which he was selected by the parties. They sought an appraiser doubtless because they felt his particular skills would lead to a proper conclusion. In making that observation I do not mean to imply that lay arbitrators are somehow relieved of a responsibility to be fair. But matters must be reviewed in context. As Tucker L.J. said, the circumstances of the case, the nature of the inquiry, the rules set by the parties and the subject matter are all relevant considerations.
>
> I have already noted that counsel for Barop invited the arbitrator to view the comparables without dissent from Zaleschuk's counsel in the course of the arbitration hearing. As well it should be noted that Zaleschuk was aware the arbitrator was on the site in the course of the hearings but he did not advise his counsel. One day, at the end of the hearings, Zaleschuk apparently left some notes on the table which the arbitrator felt obliged to return to him and so he went to the premises to leave the notes with Zaleschuk. Perhaps it was unusual, but I draw nothing sinister from such an act of courtesy. While on the site the arbitrator made a cursory inspection of the interior and exterior. He also viewed the comparables in the area. In his award he acknowledges he was not retained as an expert. As a result of his visit he places more value on the opinion of one expert over the other.
>
> While it might have been better if the arbitrator had advised the parties of his inspection, particularly where the matter was raised in argument, I do not believe, in the context of this arbitration hearing, it can be said there has been any denial of natural justice. The parties were well aware of the arbitrator's field of expertise; Zaleschuk knew the arbitrator was on the premises; and counsel for Barop invited him to inspect the comparables without any complaint from opposing counsel. I conclude there has been no arbitral error. In reaching his decision the arbitrator founded his conclusion upon the expert evidence of a professional witness called to support Barop. He did not rely on his own appraisal.

[38] The reasoning in the ***Zaleschuk*** case does not apply to this case. To begin with, the arbitrator was specifically invited to look at the comparables without objection. It would appear that the parties knew which properties were being considered as comparables. In this case, Mr. Patrickson considered evidence concerning companies for which the identity and the details were not disclosed to either party. Furthermore, Mr. Patrickson spoke to unnamed persons concerning appropriate levels of executive remuneration. Such a conversation could easily be much more significant than simply viewing a known comparable.

[39] I find in this case that Mr. Patrickson’s consultation with unidentified persons concerning levels of executive remuneration, and consideration of valuation information relating to other companies, without the parties having a chance to present their positions on such evidence was not fair to the parties and amounted to a contravention of the principles of natural justice having application in the circumstances.

[40] The valuation to be conducted by Mr. Patrickson was to be his assessment of the shares. “At their fair market value, … As at September 30, 2005.” Normally, the evidence considered in establishing fair market value on a particular date is the evidence available prior to that date, because, of course, in some cases subsequent events, when known, could markedly change or even extinguish the value earlier arrived at. Evidence of events subsequent to a valuation date is frequently referred to as “hindsight” evidence.

[41] The issue of the use of hindsight evidence was considered by McEachern CJSC, as he then was, in the case of ***Cyprus Anvil Mining Corporation v. Dickson*** (1983), 40 B.C.L.R. 180. That was a proceeding to fix the value of dissenting shareholders under the ***Canada Business Corporations Act***. McEachern CJSC held at pp. 201 - 202:

A difficult question often arises in these cases about the admissibility and usefulness of subsequently obtained information.

This problem arises here because of the redrilling program in 1979-80 - after the valuation date - and the subsequent Development Report including Case 4B-V. The law in this connection is compendiously stated by Greenberg J. in *Re Domglas Inc.*; *Domglas Inc., v. Jarislowsky* (1980), 13 B.L.R. 135, [1980] Que. S.C. 925 (Que. S.C.), particularly at pages 175-9 under the heading "Hindsight." That judgment has recently been affirmed on appeal, 138 D.L.R. (3d) 521 (Que. C.A.).

Greenberg J. starts with the general proposition that hindsight appraisals are unacceptable, but to this, the authority he cites adds the important qualifications [p. 176, quoting G. Ovens “The Valuation of Private Business and Professional Practice, Can. Institute of Chartered Accountants, December 1959]:

> "...excepting where it [hindsight] applies to evidence in existence or which can be reasonably assumed to have been true as of the required valuation date."

I pause to mention that this so-called rule does not apply to valuation reports prepared after the valuation date except to the extent that they rely wholly or partly upon subsequently obtained information. That is the problem in this case and I shall return to it shortly.

Greenberg J. goes on to mention other authorities which make it clear that subsequently acquired information is admissible for limited purposes such as measuring the accuracy of projections, or testing assumptions which are used by valuators in the preparation of opinion evidence: see *Tabco Timber Ltd. v. R.*, [1971] S.C.R. 361, 15 D.L.R. (3d) 748; *Connors v. R.*, [1978] C.T.C. 669, 78 D.T.C. 6497; affirmed [1979] C.T.C. 365, 79 D.T.C. 5256 (Fed. C.A.); and *Diligenti v. RWMD Operations Kelowna Ltd.* (1977), 4 B.C.L.R. 134 (S.C.).

Many of the authorities which seem to prohibit the use of hindsight in the valuation process are tax cases or cases which deal with the use of evidence about events which occur after the valuation date such as sales of comparable properties the price of which may be affected by market forces not necessarily operating at the valuation date. I have no doubt that such evidence is not properly admissible as evidence of value at an earlier date, but I am not satisfied that the exceptions to hindsight mentioned in the next preceding paragraph are the only bases upon which subsequently acquired information may be used.

I say this because the Court's task is to determine fair value, and value in this case depends in part upon the physical quantity and quality (e.g. tonnage and grade) of ore in the ground. When the method of valuation is not market value but a discounted cash flow analysis, the prohibition against after-acquired information may well apply to components of the valuation such as metals prices, cost of mining and transportation, etc. (except to the extent permitted by conventional exceptions), but it is doubtful wisdom to disregard a better understanding of the physical and unchanging components of the subject of the valuation. Thus the distinction between an altered state of affairs, and an altered (usually better) understanding of a continuing state of affairs convinces me the so-called hindsight rule should not always be followed.

[42] In the case of ***Nunachiaq Inc. v. Chow*** (1993), 8 B.L.R. (2d) 109 Newbury J., as she then was, in addressing the issue of hindsight evidence in a valuation case stated at pp. 120 - 123:

From the choice of valuation date, it follows that hindsight evidence -- evidence of trends or occurrences taking place after the valuation date -- should not be admitted to bolster or weaken predictions of those occurrences or trends made as at the valuation date. In the much-quoted words of Danckwerts J. in the context of an estate tax case, "It is necessary to assume the prophetic vision of a prospective purchaser at the moment of the death of the deceased, and firmly to reject the wisdom which might be provided by the knowledge of subsequent events." (*Holt v. I.R. Commissioners*, [1953] 2 All E.R. 1499 (Ch. Div.) at p. 1501.) This view is clearly in accord with that taken in various textbooks on valuation: see Bonbright, *Valuation of Property*, vol. 1 (1937) at p. 84

and Campbell, *The Principles and Practice of Business Evaluation* (1975) at p. 19, both quoted in V. Krishna, "Determining the 'Fair Value' of Corporate Shares" (1987) 13 Can. Bus. L.J. at 137-138.

However, Canadian courts have made some exceptions to the rule. In *Domglas*, Greenberg J. noted three decisions in which hindsight evidence had been admitted to "test the validity of the forecasts and assumptions of the experts where those differed, and thus to assist in determining whose forecasts were, and accordingly whose valuation as of [the valuation date] was, the more valid.": per Fulton J. in *Diligenti v. RWMD Operations Kelowna Ltd (No. 2)* (1977), 4 B.C.L.R. 134 at 142 (S.C.). In *Domglas* itself, the Court ruled that in order to measure the reasonableness of projections made as of a date in April 1978, evidence of the actual results of 1978 was both relevant and admissible.

In *Whitehorse Copper*, McEachern C.J.S.C. also referred to an exception to the usual rule:

> The most difficult part of this case is to determine what may properly be considered in determining fair value on the valuation date without being overwhelmed by subsequent events. At the trial I could not avoid being aware of the then current rapid and wholly unexpected escalation in metal prices. Similarly, I am aware of the turbulent price variations which have occurred since then. But, disabusing my mind as best I can of these subsequent events, *and using some of them only as an aid to test the potential of the copper belt*, I have concluded that the best evidence I have of fair value of the Little Chief mine on November 22, 1978 is Ex. 12 which is a complete study of the projected operation of the Little Chief joint venture. [at 168]

In *Cyprus Anvil*, his Lordship considered the question at greater length and again made an exception in respect of information that assists the Court "to ascertain the physical quality of an unchanged component" that existed on the valuation date. He stated:

> I have no doubt that [hindsight] evidence is not properly admissible as evidence of value at an earlier date, but I am not satisfied that the exceptions to hindsight mentioned in the next preceding paragraph are the only bases upon which subsequently acquired information may be used.
>
> I say this because the Court's task is to determine fair value, and value in this case depends in part upon the physical quantity and quality (e.g. tonnage and grade) of ore in the ground. When the method of valuation is not market value but a discounted cash flow analysis, the prohibition against after-acquired information may well apply to components of the valuation such as metals prices, cost of mining and transportation, etc. (except to the extent permitted by conventional exceptions), but it is doubtful wisdom to disregard a better understanding of the physical and unchanging components of the subject of the valuation. Thus the distinction between an altered state of affairs, and an altered (usually better) understanding of a continuing state of affairs convinces me the so-called hindsight rule should not always be followed.

Thus, on the issue of tonnage and grade, it is my view that the use of information discovered subsequent to the valuation date, and analyses using that information, would not offend the hindsight rule because these components of fair value have not changed since the valuation date. All that may be changed is one's understanding of those unchanged components, and I reject the suggestion that such information should always be disregarded. [at pp. 201-202 [40 B.C.L.R.]]

This ruling was not argued at the appeal level: see 33 D.L.R. (4th) 641 at 649. (See also *Manning v. Harris Steel*, supra, at p. 74-75.)

In *Smeenk v. Dexleigh*, supra, the dissenters from an amalgamation "squeeze-out" declined to adduce their own expert evidence concerning the value of the company's investment in a subsidiary, but argued that because the subsidiary had, after the amalgamation date, sold a property and received insurance proceeds in respect of the destruction of another property, evidence of the proceeds in each case should be admitted to increase the figure reached by the company's valuator. They relied on land expropriation cases in which evidence of "comparable sales" occurring after the

valuation date was considered. The Court, however, gave short shrift to this argument:

> In my opinion these authorities do not support the applicants' methodology. The *Pawson* case is concerned with the forcible taking of land by an expropriating authority and with the relevance of subsequent comparable sales -- not the sale of the expropriated lands. That principle has not been adopted, in Ontario at least, with regard to the valuation of shares of shareholders who have voluntarily dissented from the decision of the majority to amalgamate two companies.
>
> . . . . .
>
> As I have said, the law by which I am to be guided is that, in valuing the shares of the applicants, evidence of transactions taking place after valuation day is irrelevant or has little weight because, first, it invokes the benefits of hindsight and, second, it is meaningless unless there is also evidence as to whether or not alteration in values has taken place since valuation day. [at 418-420].

In the case at bar, I was urged to admit and consider two types of "hindsight" evidence. The first -- evidence as to concentrate inventories on hand in the old Pine Point operation as at the valuation date, which became known later -- would appear to fall squarely within the exception described in *Cyprus Anvil* -- i.e., evidence providing a "better understanding of the physical and unchanging components of the subject of the valuation". The second type of evidence sought to be adduced by Nunachiaq was evidence of subsequent metals prices and to a lesser extent, exchange and inflation rates, as a "guide" to the reasonableness of the predictions made by the experts as at the valuation date. I agreed to hear the evidence at the time, but having reviewed the cases discussed above, I conclude that as helpful as such evidence might be, it should have little, it any, weight. I can see no distinction in principle between evidence of this kind and any other type of hindsight evidence not available to a valuator when making his determination as at the valuation date.

[43] In the present case, Mr. Kuhn as counsel for Amos and Guse wrote a letter dated February 21, 2007, which, among other issues specifically objected to the case of hindsight evidence in the valuation process. The decision of Mr. Patrickson indicates that he relied upon the evidence concerning an offer of employment from Tyam Construction made March 22, 2006 (Appendix A to the decision) and as referred to in Appendix C to the decision, an October 19, 2005 forecast of the Conference Board of Canada, a January 2006 B.C. Economic Forecast from Credit Union Central of British Columbia, a November 2005 Economic Analysis of British Columbia from Credit Union Central of British Columbia, as well as an October 2005 Economic Analysis of British Columbia BC Non Residential Construction Forecast, both from Credit Union Central. Such hindsight evidence could not, in my opinion, have been admissible in this valuation. An arbitrator who considers inadmissible evidence in reaching a decision has exceeded his powers.

[44] I do not find it necessary to deal with the other arbitral errors alleged.

[45] The arbitral errors that occurred in this case, namely the collection of evidence in the absence of the parties upon which they were not heard and the use of inadmissible hindsight evidence are not matters of “a defect in form or a technical irregularity” (***Commercial Arbitration Act*** s. 30(2)(a)) nor are they errors of fact or law on the face of the award (s. 30(3)). These arbitral errors significantly detracted from the underlying fairness of the proceeding for which the appropriate remedy is to set aside the award. It would not, in my opinion, be appropriate to remit the award to the arbitrator for reconsideration as he has already stated his opinion of the value of the Mattson interest. It would be unreasonable to expect him to re-examine his stated opinion by attempting to remove the influence of the evidence improperly considered.

[46] Mr. Patrickson’s award is set aside under s. 30(1) of the ***Commercial Arbitration Act*** for arbitral error. It is unnecessary to deal with matters argued under s. 31 in light of this result.

[47] In the circumstances of the award being set aside, Mr. Mattson’s counsel has applied for an order that the

$3,255,000 value placed upon his interest by the expert for Amos and Guse be paid pending final resolution. As I understand Mr. Clemens' statement at the end of this hearing, his clients are prepared to make payment of the $3,255,000 sought with the shares to be held in escrow as security for payment of the amount when valued, provided they can vote the shares. I find the appropriate order is that the sum of $3,255,000 shall be paid into trust to abide the result of this proceeding and the Mattson shares still be held in escrow, without Amos and Guse having power to vote them until this matter is resolved. That way, each party has some measure of security, but not the use of that which will come to them when the issue has settled.

[48] I decline to grant any injunction restricting Amos and Guse's conduct of the companies and their business. Such an injunction would be a very serious limitation of an ongoing business concern. There is no evidence that Mr. Mattson is at risk of not being paid what is found to be justly owing – particularly once the $3,255,000 is paid into trust. I decline to make any ruling on the issue of interest payable on the $3,255,000 which I understand under the consent order to be a matter determined by the valuator.

[49] The parties may address any matters necessary to clarify the orders made.

"V.R. Curtis J."