

CANADA / JUDGMENT

Enliven Holdings Inc. v. Wong

2021 BCCA 80

COURT

British Columbia Court of Appeal

DECIDED

23 February 2021

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2021 BCCA 80 Enliven Holdings Inc. v. Wong

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Enliven Holdings Inc. v. Wong,

2021 BCCA 80

Date: 20210223

Dockets: CA46817; CA46818

Docket: CA46817

Between:

Enliven Holdings Inc. and Enliven Financial Inc.

Respondents

(Plaintiffs)

And

Kevin Hon Chi Wong

Appellant

(Defendant)

-and-

Docket: CA46818

Between:

Enliven Holdings Inc. and Enliven Financial Inc.

Respondents

(Plaintiffs)

And

Murtaza (Monty) Husain Qureshi

Appellant

(Defendant)

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated March 30, 2020 (Enliven Holdings Inc. v. Qureshi, 2020 BCSC 473, Vancouver Docket S1813768).

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Place and Date of Hearing:

Vancouver, British Columbia

November 16 and 17, 2020

Place and Date of Judgment:

Vancouver, British Columbia

February 23, 2021

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Butler

Summary:

The appellants, who are directors and shareholders of the respondent corporations, applied to the Supreme Court of British Columbia for an interim advance to pay for their legal costs in two actions brought against them by the respondent corporations. The chambers judge dismissed the appellants' application, concluding that the corporation was under no legal obligation to make advance payments to the appellants as the provisions of an executed unanimous shareholder agreement superseded the corporation's by-laws and, in doing so, removed any obligation on the part of the corporation to advance funds to the appellants. In any event, the chambers judge went on to find that the corporations had demonstrated a "strong prima facie case" of fraud on the part of the appellants, thereby rebutting any presumption of good faith, and disentitling them to any advance otherwise mandated. The appellants submit that the chambers judge erred: (1) in concluding that the unanimous shareholder agreement barred the advance sought because it superseded the indemnity provisions of the corporation's by-laws, and that he concluded as such because he failed to properly consider whether there was a conflict between the two and because he failed to read the two as a harmonious whole; and (2) in finding strong prima facie evidence of bad faith. Held: Appeal dismissed. The chambers judge's conclusion that the appellants have no right to an advance upon a proper construction of the by-laws and unanimous shareholder agreement is entitled to deference. No error in principle or palpable or overriding error has been demonstrated. This issue was dispositive of the appeal, and it is unnecessary to consider whether the judge erred in finding strong prima facie evidence of bad faith that otherwise disentitled the appellants to an advance of funds.

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1.0 INTRODUCTION

- [1] This litigation concerns an unsuccessful investment in a business start-up, pitting the investors against the former officers who started and operated the company, and who solicited their investment.
- [2] In this context, the issue that arises on this appeal is whether the company, closely-held and federally-incorporated, must provide an advance to cover the legal expenses of the former officers it is suing for (among other things) breach of fiduciary duty and fraud.
- [3] The respondents (plaintiffs) are the federally-incorporated companies. They are closely held by a number of shareholders, most of whom are resident in China. As one respondent (Enliven Holdings Inc.) is the holding company of the other (Enliven Financial Inc.), I shall refer to them jointly as one entity, "Enliven".

- [4] The appellants (defendants), Monty Qureshi and Kevin Wong, are the former officers of Enliven who started and operated the business, and who are being sued. They remain directors and shareholders.
- [5] In its lawsuit, Enliven has alleged a wide array of torts, including breach of fiduciary duty, fraud, deceit, unjust enrichment, and negligence. The defendants by counterclaim are the Chinese shareholders of Enliven (the investors).
- [6] In a separate but parallel action, the investors have personally sued the appellants, alleging in particular that the appellants deliberately misled them through a deceptive scheme to obtain investment funds. They accuse the appellants of failing to disclose key facts and information concerning the investment, and of operating what they say was in essence a "pump and dump" scheme.
- [7] Relying on Enliven's by-laws and section 124 of the Canada Business Corporations Act, RSC 1985, c C-44 [CBCA], the appellants applied to the Supreme Court of British Columbia for an interim advance of \$200,000 to pay for their legal costs in defending both actions, which they estimate will involve a 25-day trial.
- [8] The respondents opposed on the basis that the indemnity provisions in the by-laws had been superseded by the provisions of the current Unanimous Shareholder Agreement ("USA"), and neither the USA nor the statute entitled the appellants to an advance. But even if they were entitled to an advance, the respondents argued, the applicable provisions make any such entitlement dependent upon the appellants having acted in good faith and in the best interests of the company, and on the facts, they had not.
- [9] In reasons for judgment indexed at 2020 BCSC 473, Mr. Justice Walker dismissed the appellants' application. His primary reason for doing so was his conclusion that Enliven was under no legal obligation to make such a payment (the "entitlement issue"). The relevant provisions of the CBCA, he observed, were permissive, not mandatory. While the indemnity provisions in Enliven's by-laws did entitle the appellants to such an advance, the judge held that they had been displaced by the indemnity provisions of the USA, which did not. That was sufficient to dispose of the application.
- [10] The judge nevertheless went on to consider whether the company had demonstrated a "strong prima facie case" of fraud on the part of the appellants, thereby rebutting any presumption of good faith, and disentitling them to any advance otherwise mandated (the "bad faith issue"). This involved an extensive analysis and weighing of the conflicting affidavit evidence. As he stated at para 83, he embarked upon this analysis:

in the event that further evidence leads to a future determination that the USA and By-laws may be construed so as to operate without conflict and provide the Applicants with the right to apply for an advance payment.

- [11] The appellants raise two issues. First, they say the judge erred in concluding that the USA superseded the indemnity provisions of the company's by-laws and therefore barred the advance sought. They maintain that there was, in fact, no conflict between the two documents.
- [12] Second, they assert that the judge erred in law in finding strong prima facie evidence of bad faith. He did so, they say, by making the relevant findings without regard to material evidence, in the absence of evidence, and by applying an incorrect evidentiary standard.
- [13] I will first turn to the background of this matter in order to provide some context. I will then review the applicable statutory and corporate governance provisions before discussing the standard of review and the alleged errors.
- [14] For the reasons that follow, I would dismiss the appeal.

2.0 BACKGROUND

- [15] For present purposes, the background can be briefly summarized.
- [16] Enliven was originally incorporated as Ascendo Credit Services Inc. in June 2014, renamed Jigsaw Financial Inc. in August 2014, and finally renamed Enliven Financial Inc. in January 2015. Ultimately, the shares of Enliven Financial Inc. were acquired by Enliven Holdings Inc. in September 2017.
- [17] Enliven was the brainchild of the appellants, Monty Qureshi and Kevin Wong, who sought to develop a consumer lending business that would employ an end-to-end technology platform for near-prime unsecured lending via online application that would maximize effectiveness and efficiency.
- [18] Mr. Wong had been a vice president of Deloitte Canada's Life Sciences Group. He is fluent in both English and Mandarin. Mr. Qureshi had extensive banking experience with CIBC and J.P. Morgan Chase. They were the first shareholders of the company, issuing founders' shares to themselves for nominal value.
- [19] Yuncai Wang is a successful businessman and high net worth investor whose first language is Mandarin, and whose English is limited. He became interested in finding opportunities for investment in Canada.
- [20] In the fall of 2014, Kevin Wong met with Mr. Wang. He introduced him to Mr. Qureshi, and presented what was then Jigsaw Financial Inc. as an investment opportunity. Mr. Wong provided Mr. Wang with promotional materials that explained the nature of the start-up business plan, including the technology platform, and the intention to acquire, if possible, the Canadian personal unsecured lending business of Citi-Financial. Some materials were provided in both Mandarin and English, and the investors point to what they say was a significant discrepancy between what was represented in Mandarin about the technology platform ("the [company] owns an advanced and maturely operational web-based system"), on which they say they relied, and what was stated in English ("We are aiming to develop a

fully comprehensive, state-of-the-art and robust end-to-end technology platform").

- [21] Mr. Wang agreed to invest \$2,000,000 in the business if Mr. Qureshi was prepared to do the same. He was. They each invested \$2,000,000 in the fall of 2014 to purchase shares at an agreed value of \$0.50 per share. This was the first round of investment.
- [22] The second round of investment took place in the fall of 2015 and March 2016 at a price of \$0.75 per share. The investors were relatives and associates of Mr. Wang. In the meantime, Enliven continued to pursue the Citi-Financial opportunity, and was short-listed as a suitor by Citi-Financial.
- [23] Mr. Wang held a non-executive position on Enliven's board. Mr. Qureshi was the Chief Executive Officer, while Mr. Wong was Enliven's Chief Operating Officer. Both Mr. Qureshi and Mr. Wong were also directors, and they ran the business.
- [24] In May 2016, Enliven acquired a mortgage brokerage and service business, Spectrum Canada Mortgage and Services Inc., for \$2,700,000 in cash and shares. The investors allege that this was not a prudent acquisition, asserting that the appellants misrepresented important information concerning it and how it performed.
- [25] In October 2016, Citi-Financial advised that Enliven's bid for its Canadian unsecured lending business would not be accepted. Enliven pursued the acquisition of another loan portfolio and related assets. That, too, ultimately proved unsuccessful, but it led Enliven to engage Deloitte to undertake a valuation of the company for financing purposes to support an acquisition if it proceeded.
- [26] The investors maintain that they were misled and misinformed about this valuation process, in the context of a third round of investment that occurred between September and November 2017 at a value of \$0.90 per share.
- [27] Thereafter, matters deteriorated. Enliven's only operating business was Spectrum, and the company was never able to develop or acquire a fully functional and operating technology platform. Mr. Qureshi became concerned that without further funding, Enliven would have to be wound up.
- [28] Mr. Wang and his associates were alarmed, and claim the appellants frustrated their efforts to obtain full financial information. In August 2018, the investors terminated the appellants' employment, and took control of Enliven. They then struck a committee to investigate the affairs of Enliven during the period of the appellants' management. That committee has yet to report.
- [29] Enliven then commenced this action, and the investors a parallel action. The nature of their claims was summarized by their counsel as follows:

The Appellants were at all material times the managing directors of the [Respondent corporations], private CBCA companies. They have been sued by the companies they ran and by Chinese investors whom they induced to invest over \$10 million, ostensibly to fund a business they knew was non-existent. As they failed to build the business that they promised, they ran what can only be described as a "confidence game" of concealment and delay to draw more and more money out of the pockets of the Chinese investors.

- [30] In their counterclaim, the appellants seek an order winding up Enliven and distributing its assets. The investors contend that because of the founders' shares that Mr. Qureshi and Mr. Wong acquired at nominal value, they would do better from such a distribution than would the investors, who bought their shares at a higher average value.
- [31] After the hearing of the appellants' application for advance funding for defence costs, but before judgment was pronounced, it came to Enliven's attention, and thence to the judge's, that the applicants had received advances towards their defence costs under a directors' and officers' insurance policy issued to the company by AIG.
- [32] The judge agreed with the appellants that the funding from AIG was not material to the entitlement issue (whether Enliven was obliged to make an advance payment). The judge concluded, however, that AIG's advance of defence costs was material to the issue of the appellants' good faith as directors of the company. In his view, the appellants were obliged (but had failed) to disclose to Enliven and to the court the fact that they had requested coverage from AIG, and the quantum of the payments made.
- [33] I now turn to consider the provisions relevant to the entitlement issue.

3.0 THE STATUTORY AND CORPORATE GOVERNANCE PROVISIONS

3.1 The CBCA

- [34] I begin with the CBCA. Part X deals with Directors and Officers. It begins by assigning to directors the power to manage the business and affairs of the corporation, but this is subject to the provisions of any unanimous shareholder agreement:

Duty to manage or supervise management

102 (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.

- [35] It then authorizes the directors, again subject to any unanimous shareholder agreement, to make, amend or repeal by-laws that regulate the corporation's business:

By-laws

103 (1) Unless the articles, by-laws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend or repeal any by-laws that regulate the business or affairs of the corporation.

Shareholder approval

- (2) The directors shall submit a by-law, or an amendment or a repeal of a by-law, made under subsection (1) to the shareholders at the next meeting of shareholders, and the shareholders may, by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal.
- [36] The CBCA deals with unanimous shareholder agreements under Part XII, Shareholders. By section 146, it allows shareholders, by unanimous agreement, to restrict the powers of the directors to manage the corporation in accordance with section 102:

Unanimous shareholder agreement

146 (1) An otherwise lawful written agreement among all the shareholders of a corporation, or among all the shareholders and one or more persons who are not shareholders, that restricts, in whole or in part, the powers of the directors to manage, or supervise the management of, the business and affairs of the corporation is valid.

- [37] The shareholders entered into such an agreement here, and the principal tension between the parties in relation to the indemnity issue arises out of the different ways that subject is treated in the by-laws and the USA.
- [38] Returning to Part X of the CBCA, it is section 124 that permits a corporation to provide indemnity to a director or officer, whether under its by-laws, a unanimous shareholder agreement, or otherwise. It is also the section that permits a corporation to obtain insurance of the sort of which the appellants appear to have availed themselves. The relevant portions read as follows:

Indemnification

124 (1) A corporation may indemnify a director or officer of the corporation, a former director or officer of the corporation or another individual who acts or acted at the corporation's request as a director or officer, or an individual acting in a similar capacity, of another entity, against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of that association with the corporation or other entity.

Advance of costs

- (2) A corporation may advance moneys to a director, officer or other individual for the costs, charges and expenses of a proceeding referred to in subsection (1). The individual shall repay the moneys if the individual does not fulfil the conditions of subsection (3).

Limitation

- (3) A corporation may not indemnify an individual under subsection (1) unless the individual

- (a) acted honestly and in good faith with a view to the best interests of the corporation, or, as the case may be, to the best interests of the other entity for which the individual acted as director or officer or in a similar capacity at the corporation's request; and
- (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the individual's conduct was lawful.

Indemnification in derivative actions

- (4) A corporation may with the approval of a court, indemnify an individual referred to in subsection (1), or advance moneys under subsection (2), in respect of an action by or on behalf of the corporation or other entity to procure a judgment in its favour, to which the individual is made a party because of the individual's association with the corporation or other entity as described in subsection (1) against all costs, charges and expenses reasonably incurred by the individual in connection with such action, if the individual fulfils the conditions set out in subsection (3).

Right to indemnity

- (5) Despite subsection (1), an individual referred to in that subsection is entitled to indemnity from the corporation in respect of all costs, charges and expenses reasonably incurred by the individual in connection with the defence of any civil, criminal, administrative, investigative or other proceeding to which the individual is subject because of the individual's association with the corporation or other entity as described in subsection (1), if the individual seeking indemnity
 - (a) was not judged by the court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and
 - (b) fulfils the conditions set out in subsection (3).

Insurance

- (6) A corporation may purchase and maintain insurance for the benefit of an individual referred to in subsection (1) against any liability incurred by the individual
 - (a) in the individual's capacity as a director or officer of the corporation; or
 - (b) in the individual's capacity as a director or officer, or similar capacity, of another entity, if the individual acts or acted in that capacity at the corporation's request.

[Emphasis added.]

[39] Two things are immediately obvious.

- [40] First, as noted by the chambers judge, the section is permissive, with the exception of subsection (5). Outside of the circumstances described in that subsection, which contemplate a finding that the director or officer has committed no fault, a corporation has no obligation to indemnify a director or officer unless it chooses to assume one.
- [41] Second, the ability of a corporation to choose to indemnify a director or officer is circumscribed by subsection (3). It may only do so where the director or officer, though at fault, has met the requirements of subparagraphs (a) and (b), essentially by having acted honestly and in good faith with a view to the best interests of the corporation (the "good faith requirement"). Hence the chambers judge's investigation into whether the respondents had demonstrated a strong *prima facie* case that the appellants had not done so.
- [42] Of course, such an investigation would not be necessary in the case of a true indemnity as contemplated by subsection (1), repaying the individual for costs incurred, including amounts paid to settle the claim or satisfy any judgment. There, the assessment would be based on what had transpired in the proceeding in question. This is evident from the structure of subsection (2).
- [43] Subsection (2) provides for an advance of the sort sought by the appellants. As noted, it is permissive, and by definition, contemplates a payment before there has been any determination of the claims on their merits. Accordingly, it imposes an obligation on an individual who has received an advance to repay the monies if that individual does not satisfy the good faith requirement, a determination to be made later.
- [44] But then we come to subsection (4), which permits a company to indemnify an officer or director, or provide an advance, but this time subject to court approval, and again requiring the individual to fulfil the good faith requirement.
- [45] What distinguishes subsection (4) from subsection (1)? The heading suggests that subsection (4) covers derivative actions. But, as the Ontario Court of Appeal observed in *Cytrynbaum v Look Communications Inc*, 2013 ONCA 455 at paras 34-41, that would appear to be an incomplete description. The subsection itself refers to "an action by or on behalf of the corporation or other entity" (emphasis added). Clearly, then, it contemplates more than just derivative actions, which would be actions on behalf of a corporation. But there is a distinction between subsections (1) and (4).
- [46] Section 124(1) allows a corporation to indemnify a current or former director or officer of the corporation, and others acting in similar capacities at the corporation's request, in relation to "any civil, criminal, administrative, investigative or other proceeding" in which the individual is involved because of that association. In other words, it contemplates indemnifying the director or officer no matter who is advancing the claim, or in what type of proceeding, so long as the claim arises out of the individual's association with the corporation.

- [47] Section 124(4), on the other hand, is narrower. It contemplates indemnifying the director or officer "in respect of an action by or on behalf of the corporation or other entity" (emphasis added), to which the individual is made a party because of that individual's association with the corporation or other entity. It is only in these circumstances, a subset of the proceedings contemplated in subsection (1) that comprises actions by a corporation against its current or former directors or officers (and others in like position), that court approval is required.
- [48] That is the situation we have here. If, as the appellants submit, they are entitled to an advance for their expenses in this litigation, that entitlement does not come from the CBCA, but must be found in Enliven's by-laws or USA. If it is there, then, by section 124(4), court approval is still a prerequisite. That would require the court to focus, as the chambers judge did, on the good faith requirement set out in subsection (3).
- [49] If it is not there, court approval will not be necessary until the end of the proceeding. Then, the court will be in a position to assess whether the appellants met the good faith requirement, rather than having to determine, as the chambers judge attempted to do, whether the respondents could establish a sufficiently strong likelihood that they did not.

3.2 Enliven's by-laws

- [50] By-Law No. 1 ("By-laws relating generally to the conduct of the affairs of Enliven Holdings Inc.") was approved on February 15, 2017. It generally follows the provisions of the CBCA, adopting its definitions, and providing that "in the event of any inconsistencies between the by-laws and provisions of the [CBCA], the provisions of the [CBCA] shall prevail" (Article 2.1(e)).
- [51] Article 10 deals with "Standard of Care and Protection of Directors and Officers". The indemnity provision is set out in section 10.3:

10.3 Indemnity

Every individual who at any time is or has been a director or officer of the Corporation or who at any time acts or has acted at the request of the Corporation as a director or officer or in a similar capacity of another entity, (for purposes of this Section 10.3 an "Other Entity") together with the heirs and legal representatives of every such individual (each such individual for purposes of this Section 10.3 being an "Indemnified Person"), shall at all times be indemnified and held harmless against all costs, charges, expenses, damages and liabilities of whatsoever nature or kind (including any amount paid to settle an action or to satisfy a fine or judgment) by the Corporation to the fullest extent possible and in every circumstance permitted by the Act. In addition and without prejudice to the foregoing, but subject to the limitations in the Act regarding indemnities in respect of derivative actions, each Indemnified Person shall at all times be indemnified and held harmless by the Corporation against all costs, charges and expenses, including any amount paid to settle an action or to satisfy a judgment, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of the association of the individual with the Corporation or Other Entity, if:

- (a) the individual acted honestly and in good faith with a view to the best interests of the Corporation or, as the case may be, to the best interests of the Other Entity for which the individual acted as a director or officer or in a similar capacity at the request of the Corporation; and
- (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the conduct of the individual was lawful.

The Corporation shall advance money to a director, officer or other individual for the costs, charges and expenses of any proceeding contemplated by the foregoing provisions of this Section 10.3; provided that the individual shall repay the money if the individual does not meet the conditions set out in clauses (a) and (b) above. Nothing in this Section 10.3 shall affect any other right to indemnity to which any individual may be or become entitled by contract or otherwise, and no settlement or plea of guilty in any action or proceeding shall alone constitute evidence that the Indemnified Person did not meet either of the conditions set out in clause (a) or (b) above of this Section 10.3 or the corresponding conditions in the Act. From time to time the directors may determine that this Section 10.3 shall also apply to employees of the Corporation who are not directors or officers of the Corporation or to any particular class of such employees, either generally or in respect of a particular occurrence or class of occurrences and either prospectively or retroactively. From time to time the directors of the Corporation may also revoke, limit or vary the continued application of this Section 10.3; provided that no such action shall affect any right of any individual or any liability of the Corporation which has arisen prior to the date of such action. With the approval of the court (and the Corporation shall be obligated to apply for such approval at the cost and expense of the Corporation unless the Indemnified Person consents otherwise), the Corporation shall indemnify an Indemnified Person in respect of an action by or on behalf of the Corporation or Other Entity to procure a judgment in its favour, to which the Indemnified Person is made a party because of the association of the individual with the Corporation or Other Entity, against all costs, charges and expenses reasonably incurred by the Indemnified Person in connection with such action if:

- (a) the individual acted honestly and in good faith with a view to the best interests of the Corporation or, as the case may be, to the best interests of the Other Entity for which the individual acted as a director or officer or in a similar capacity at the request of the Corporation; and
- (b) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the individual had reasonable grounds for believing that the conduct of the individual was lawful.

Notwithstanding anything to the contrary contained in this Section 10.3, an Indemnified Person shall be indemnified by the Corporation in respect of all costs, charges and expenses reasonably incurred by such individual in connection with the defence of any civil, criminal or administrative, investigative or other proceeding to which the individual is subject because of the association of the individual with the Corporation or Other Entity, if the individual seeking indemnity:

- (i) was not judged by a court or other competent authority to have committed any fault or omitted to do anything that the individual ought to have done; and
- (ii) fulfils the conditions set out in clauses (a) and (b) above in this Section 10.3.

With the approval of the court (and the Corporation shall be obligated to apply for such approval at the cost and expense of the Corporation unless the Indemnified Person consents otherwise), the Corporation shall advance money to a director, officer or other individual for the costs, charges and expenses of any proceeding contemplated by the foregoing provisions of this Section 10.3; provided that the individual shall repay the money if he individual does not meet the conditions set out in clauses (a) and (b) above in this Section 10.3.

- [52] While the section refers to, and parallels, the provisions of section 124 of the CBCA, it is structured quite differently and is considerably more dense.
- [53] It begins with a general entitlement of any individual who is or has been a director or officer, together with their heirs and legal representatives, to be fully indemnified by the corporation "to the fullest extent possible and in every circumstance permitted by the [CBCA]".
- [54] It then describes what the CBCA covers in section 124(1), but "subject to the limitations in the [CBCA] regarding indemnities in respect of derivative actions". In other words, like section 124(1), it refers to indemnity for expenses incurred in respect of "any civil, criminal, administrative, investigative or other proceeding". This indemnity is subject to the good faith requirement that the CBCA sets out in section 124(3).
- [55] Next, the section deals with advances, and it is upon this provision that the appellants rely. It provides that the corporation shall advance money to a director or officer for the costs and expenses of any proceeding "contemplated by the foregoing provisions of this Section 10.3". Unlike section 124(2) of the CBCA, it is mandatory; but like that subsection, it is subject to the obligation to repay the advance if the individual does not meet the good-faith requirement.
- [56] After dealing with the right of directors to revoke, limit or vary the application of section 10.3, the section goes on to deal with claims by the corporation itself, roughly paralleling section 124(4) of the CBCA. It provides that "[w]ith the approval of the court", which the corporation must obtain at its expense, the corporation shall indemnify the director or officer in respect of any action by or on behalf of the corporation to procure a judgment in its favour. Unlike section 124(4), it does not mention an advance. Like section 124(4) it is

dependent upon the individual meeting the good faith requirement.

- [57] As the part of section 10.3 that deals with indemnity "in respect of an action by or on behalf of the Corporation" does not mention an advance, any entitlement to an advance must be found in the earlier reference that obliges the corporation to advance money "for the costs, charges and expenses of any proceeding contemplated by the foregoing provisions ".
- [58] Those foregoing provisions, as we have seen, contemplate the general right to "be indemnified and held harmless against all costs, charges, expenses, damages and liabilities of whatsoever nature or kind ", and the more specific right to be indemnified against such costs and expenses "in respect of any civil, criminal, administrative, investigative, or other proceeding in which the individual is involved because of the association of the individual with the Corporation ".
- [59] I accept that these "foregoing provisions" are broad enough to encompass claims brought directly by the corporation, as contemplated in the proviso that these "foregoing provisions" are "subject to the limitations in the [CBCA] regarding indemnities in respect of derivative actions". In other words, as the CBCA provides, court approval is required where the claim is brought by the corporation. Prima facie, then, and subject to the provisions of the USA, the appellants are entitled under the by-laws to the advance they seek.
- [60] Under Article 20, "General", the by-laws discuss unanimous shareholder agreements in section 20.1:

20.1 Unanimous Shareholder Agreement

Notwithstanding anything contained in the by-laws, the provisions of the by-laws shall be amended to the extent necessary to give effect to the provisions of any unanimous shareholder agreement in force between Corporation and its shareholders, and to the extent that there is any conflict between the provisions of the by-laws and any such unanimous shareholder agreement, the provisions of the unanimous shareholder agreement shall prevail.

[Emphasis added.]

- [61] The appellants say that no such conflict arises, and the two documents can stand together, providing different rights depending on different circumstances. The judge found that the USA provision, which I will turn to next, displaced section 10.3 of By-law No. 1.

3.3 The Unanimous Shareholder Agreement

- [62] Enliven's shareholders began as shareholders in Enliven Financial Inc., and in that capacity entered into a unanimous shareholder agreement. Then, in September 2017, the shares of Enliven Financial Inc. were all acquired by Enliven Holdings Inc. (the "acquisition"), and the shareholders of Enliven Financial became shareholders of Enliven Holdings: Mr. Qureshi, Mr. Wong, and the investors, as well as two others who had been shareholders in Spectrum. Concurrent with the closing of the acquisition on September 26, 2017, the shareholders entered into the USA:

to provide for the management and operation of the Corporation, and to regulate the dealings of the Shareholders in the Shares and certain other matters of and related to the Corporation on the same terms as the Unanimous Shareholder agreement which governed [Enliven Financial Inc].

[63] The previous unanimous shareholder agreement is not in evidence. The USA defines "Old Agreement" as "the unanimous shareholder agreement dated October 14, 2014, among the Corporation, [Mr. Qureshi, Mr. Wong and Mr. Wang]".

[64] Article 1 of the USA deals with Interpretation. It provides in section 1.4:

Unanimous Shareholder Agreement. This Agreement shall be construed to be a "unanimous shareholder agreement" as such term is defined in the CBCA and accordingly, to the extent necessary to give effect to the terms of this Agreement, the powers and authorities of the Board are removed from the directors and are conferred upon the Shareholders.

[Emphasis added.]

[65] Article 6 of the USA deals with the "Management of the Corporation". By section 6.1, the number of directors is set at four, and by section 6.2, those four comprise one designated by Mr. Wong (initially Mr. Wong), one designated by Mr. Qureshi (initially Mr. Qureshi), one designated by Mr. Wang (initially Mr. Wang), and one designated by another principal shareholder, Jing Tian (initially Yibo Wang).

[66] Section 6.5 contains the indemnity clause:

Indemnity. The Corporation hereby agrees to indemnify each director and his or her heirs and legal representatives, both during and after his or her tenure as a director against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgment, reasonably incurred by him or her in respect of any civil, criminal or administrative proceeding to which he or she is made a party by reason of being or having been a director of the Corporation provided that:

- a) he or she acted honestly and in good faith with a view to the best interests of the Corporation; and
- b) in the case of a criminal or administrative proceeding that is enforced by a monetary penalty, he or she had reasonable grounds for believing that his or her conduct was lawful.
- c) The Parties hereby agree that the Articles and by-laws of the Corporation will not be amended to render this provision ineffective.

[67] This provision is considerably narrower than either section 10.3 of the by-law, or section 124 of the CBCA. It roughly parallels subsections 124(1) and (3) of the CBCA, providing indemnity "in respect of any civil, criminal or administrative proceeding" subject to the good faith requirement. It focuses, however, solely on directors, and so does not cover officers who are not also directors. It says nothing about advances, either permissive or mandatory, and makes no specific reference to actions by Enliven against directors, or to

court approval.

[68] If, as the chambers judge found and the respondents contend, this provision displaces section 10.3 of the by-law, then the appellants are not entitled to any advance. Moreover, Enliven would require court approval under section 124(4) of the CBCA before indemnifying the appellants at the end of the proceedings, given the nature of the claim.

[69] Under the general provisions of Article 10 of the USA, section 10.2 says this:

Entire Agreement. This Agreement constitutes the full and entire agreement between the Parties with respect to the subject matter of this Agreement and cancels and supersedes any prior understandings and agreements between the Parties with respect to such subject matter, including the Old Agreement and the first Amended Agreement.

[Emphasis added.]

4.0 THE ENTITLEMENT ISSUE

4.1 The judge's reasons

[70] After summarizing the parties' positions, the chambers judge said this (all emphasis was added by the judge):

[68] In the absence of any evidence to provide context for the enactment of the USA in the face of the By-laws, I have, for the purpose of this application, construed the documents on their face in relation to the temporal aspect of their implementation.

[69] I accept that in the absence of any other evidence, the Applicants' position would at least be arguable if the By-laws were enacted after the USA; the By-laws could be seen as an expansion of the Company's indemnity obligation contained in the USA. However, the opposite is the case, at least insofar as the evidence brought to my attention on this application. The Company and its shareholders entered into the USA after the By-Laws were enacted, provided for a smaller cohort group entitled to seek indemnity, and did not provide for advance payments.

[70] In addition, and as noted in the excerpt above, s. 10.3 of the By-laws specifically provides that the Company, through its directors, may "revoke, limit or vary the continued application of" the indemnity provisions found therein. On its face, and in the absence of any other evidence, s. 10.3 contemplates what the Company and the parties did by entering into the USA.

[72] For those reasons, there is no conflict between the two. The USA supersedes the By-laws in respect of indemnity rights and obligations.

[73] However, assuming a conflict does exist, both the USA and By-laws address the result.

[74] The By-laws provide that they shall be amended to give effect to any unanimous shareholders' agreement:

20.1 Unanimous Shareholder Agreement.

Notwithstanding anything contained in the by-laws, the provisions of the by-laws shall be amended to the extent necessary to give effect to the provisions of any unanimous shareholder agreement in force between Corporation and its shareholders, and to the extent that there is any conflict between the provisions of the by-laws and any such unanimous shareholder agreement, the provisions of the unanimous shareholder agreement shall prevail.

[75] Section 9.1 of the USA also provides that in the event of conflict, the USA shall prevail. That section also requires the shareholders to take steps to amend the Company's articles in the event of conflict between the USA and the articles (the constating [sic] document authorizing the By-laws):

9.1 Implementation of this Agreement. The Shareholders covenant and agree with each other and with the Corporation to vote the Shares owned by them at all times, and to cause their respective nominees to the Board, where applicable, to act at all times, in order that the provisions of this Agreement shall govern the affairs of the Corporation to the maximum extent permitted by law. In the case of any conflict between the provisions of this Agreement and the provisions of either the Articles of the Corporation, the Shareholders agree to take or cause to be taken such steps and proceedings as may be required under the CBCA to amend such Articles of the Corporation, as necessary to resolve such conflict so that the provisions set forth in this Agreement shall, to the maximum extent permitted by law, at all times prevail.

[76] Further, s. 6.5(c) of the USA provides that the By-laws shall not be amended to render its indemnity provision ineffective

[77] The fact that the Company's articles and By-laws have not been amended does not alter what on the face of the documents is the parties' intent in the event of conflict concerning indemnification.

[78] At one point in his oral submissions in reply, Mr. Qureshi suggested the Company's interpretation of the effect of the USA would exclude the right of indemnity to other classes of persons described in s. 124(1) of the CBCA. The submission was brief, without any reference to authorities, and was not followed up with any submissions concerning the potential impact of any conflict between the USA and the CBCA (e.g., assuming the Company's submission that the CBCA applies only to publicly traded companies is without merit, whether some or all of the indemnity provisions in the USA might be void).

[79] I note that Cytrynbaum CA holds that a company cannot attempt through its by-laws or other documents to oust the merits-based test and the requirement for court approval for advance payments as found in s. 124(4) of the CBCA (which on its face, the USA does not purport to do):

[48] This court held in Bata Industries Ltd., at p. 329, that s. 136 of the OBCA, the Ontario equivalent to s. 124 of the CBCA, is "a comprehensive code of general application by which the indemnification of officers and directors, and former officers and directors, is

regulated." Like s. 136 of the OBCA, s. 124 "establishes the circumstances under which a corporation may, with and without court approval, indemnify an officer or director, and when a corporation must indemnify an officer or director" and, "[b]y implication the circumstances under which a corporation cannot indemnify an officer or director." It follows that the by-laws and indemnity agreements cannot oust s. 124(4). Section 124(4), when read with the other subsections of s. 124, provides that court approval is required for advance funding and that approval can only be granted if the officer or director claiming advancement "acted honestly and in good faith with a view to the best interests of the corporation". The application judge correctly held that the provision applied in this case to the directors' and officers' claims for advance funding.

- [80] The parties also did not address the point made in *Bata Industries*, i.e., whether the CBCA is akin to the Ontario statute and a complete code. Nor did they address whether, in light of the permissive language in s. 124(4), the CBCA affords the Applicants the right to apply to court to compel the Company to make an advance payment in the absence of a right to do so found in a company's articles, by-laws, or shareholders' agreement. Instead, the Applicants' grounded their application on the combined effect of the By-laws and the CBCA.
- [81] In these circumstances, it is inappropriate for me to embark upon a determination of whether the indemnity provisions in the USA contravene the CBCA and are void as a result.
- [82] In conclusion, the indemnity provisions in the By-laws are displaced by the USA, where there is no obligation on the Company to make an advance payment. There is no basis to ground the application on the CBCA because the statute is permissive and does not oblige the Company to make an advance payment. The application is dismissed.

4.2 Overview and standard of review

- [71] The appellants submit that the judge erred in principle by concluding that the USA indemnity superseded the provision in the by-laws because it came later, while failing to determine whether there was in fact a conflict between the two. The judge therefore failed to consider whether the two could stand together, whether either mandated something prohibited by the other.
- [72] There is no conflict, the appellants say, because there is no inconsistency. The trimmer provision in the USA says nothing about overriding the more expansive provision in the by-law. Instead, it provides a minimum level of indemnity for directors that it specifies cannot be rendered ineffective by amendment to the by-laws. It does not provide for an advance, but it does not say that there cannot be one. It does not include officers, but it does not say that they cannot be indemnified. For both, one looks to the by-law.

- [73] By proceeding as he did, the appellants submit, the judge allowed the surrounding circumstance of timing to overwhelm the interpretation, instead of giving the words in each document their ordinary meaning and reading them as a harmonious whole. They maintain that a proper consideration leads to the conclusion that the broader coverage of the by-laws' indemnity section, including its provision for advance payments, does not conflict with the focused coverage of the USA.
- [74] These errors, the appellants argue, amount to errors of law. The issue turns on the documents alone, and accordingly must be reviewed on a standard of correctness.
- [75] The respondents say that the issue does not turn on the documents alone. Instead, they assert, the judge's conclusion was predicated not only on the interpretation of the documents' plain and unambiguous words, but also upon the surrounding circumstances, including the existence of the by-law provision of which the shareholders would have been aware when they entered into the USA.
- [76] Accordingly, relying in particular on *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53, and *Housen v Nikolaisen*, 2002 SCC 33, the respondents submit that the question is one of mixed law and fact, and therefore subject to the deferential standard of palpable and overriding error.
- [77] In *Sattva*, the Supreme Court of Canada had this to say about the standard of review in cases of contractual interpretation:
- [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, *[Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 SCR 748]* 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 .
- [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, 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 [Arbitration Act], 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]

[Emphasis added.]

- [78] The purpose of distinguishing between questions of law and those of mixed law and fact "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" was reiterated by the Supreme Court in *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37. There, the court considered that purpose not to apply with the same force in cases involving standard form contracts that impact parties well beyond the particular dispute:
- [34] In my view, however, while contractual interpretation is generally a question of mixed fact and law, in situations involving standard form contracts, it is more appropriately classified as a question of law in most circumstances.
- [79] We do not have standard form contracts here, and I have no difficulty in concluding that the result of construing the documents in question to determine whether the appellants are entitled to an advance is unlikely to have an impact beyond the parties to this dispute.

- [80] Moreover, neither indemnity provision is ambiguous or difficult to construe in and of itself. Section 10.3 of the by-laws plainly, if verbosely, obliges the corporation to advance funds to the appellants for their legal expenses incurred in defending these claims, subject to court approval and the good faith requirement of the CBCA. Under section 6.5 of the USA, the corporation has no such obligation. The problem, as the judge identified, is determining the intention of the parties as to whether one displaces the other. This is an inherently fact-driven process, to be determined on the basis of not only the words used in the documents, in their plain and ordinary meaning, but also the surrounding circumstances.
- [81] Determining what are the surrounding circumstances that may properly be considered is also a question of fact: *IFP Technologies (Canada) Inc v EnCana Midstream and Marketing*, 2017 ABCA 157 at para 83 (leave to appeal ref'd, 2018 CanLII 28111 (SCC)). As the Supreme Court of Canada put it in *Sattva* at paragraph 60: "The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting " (emphasis added).
- [82] It follows that unless there is an extricable question of law, the chambers judge's interpretation is entitled to deference; as such, it may be overturned only in the case of palpable and overriding error.
- [83] As the Supreme Court explained in *Sattva* at para 53, extricable questions of law include apparent legal errors such as "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".
- [84] Do such errors arise in this case?

4.3 Legal or palpable error?

- [85] The appellants point to two aspects of the chambers judge's reasons that they say constitute errors of law.
- [86] First, they emphasize the judge's analysis of the two agreements "in relation to the temporal aspect of their implementation" (para 68; emphasis added), concluding that the USA superseded the by-laws, and thus no conflict arose. They argue that it was an error of law for the judge to rely on timing to "sidestep whether in fact there was a conflict, particularly when both documents referred to and contemplate the possibility of a conflict".
- [87] Second, related to the first, they maintain that the judge erred in failing to read the contracts as a harmonious whole, with the intention of reconciling apparently inconsistent provisions. For this proposition, they rely on *Salah v Timothy's Coffees of the World Inc*, 2010 ONCA 673 at para 16, and *Samson Cree Nation v O'Reilly & Associés*, 2014 ABCA 268 at para 82.

- [88] The appellants maintain that, in accordance with the applicable legal principles, the correct question is not which document came first, but whether there is a conflict between the two documents when read together. That they must be read together, the appellants assert, follows from the fact that the by-laws refer to and anticipate unanimous shareholder agreements, indicating that they are expressly intended to be read together to address possible conflicts.
- [89] In this case, the appellants argue, a conflict will only arise if the indemnity provisions in question cannot stand together. But it is "plain", they assert, that the indemnity provisions of the USA were to provide a minimum level of protection for directors that could not be removed without the consent of the principal shareholders, but were not intended to render ineffective the indemnity and advanced provisions in the by-laws. Otherwise, they point out, officers who were not directors would be left out altogether under the indemnity provision of the USA, which surely cannot have been intended.
- [90] In my view, the argument of the appellants, properly considered, does not demonstrate errors of law, but rather indicates only that there may be more than one reasonable interpretation of how the indemnity provisions were intended to apply.
- [91] Let us consider the surrounding circumstances.
- [92] First, there is the context of the provisions of the CBCA, with which both documents were intended to comply.
- [93] The chambers judge observed, as have I, that the indemnity provisions of the CBCA are generally permissive. With the exception of the circumstances outlined in section 124(5), a corporation is not obliged to provide for any indemnity at all. If it does choose to indemnify directors or officers, how it does so, and on what terms, is up to the corporation. It can do so through its by-laws, or through a unanimous shareholder agreement, or by contract with the individuals involved, or on an ad hoc basis by resolution before or after the fact, to name a few alternatives. But even if not expressly stated in the terms of any indemnity provision, all such provisions are subject to the CBCA's good faith requirement and its requirement of court approval where the claim is by or on behalf of the corporation. As section 124 makes clear, and as the chambers judge recognized by reference to the Cytrynbaum case, the parties may not contract out of these requirements.
- [94] It follows from this that the omission of a reference to, for instance, advances, or coverage for officers as opposed to directors, does not mean that they were not considered, or were intended to be included elsewhere. A narrower provision like that contained in the section 6.5 of USA, does not prevent a corporation from agreeing to indemnify an officer, or providing an advance, if it wishes to do so in any given instance. That will always be open to it in accordance with the provisions of the CBCA. What section 6.5 does do, as the appellants suggest, is set out a minimum "guaranteed" level of coverage--one that cannot be rendered ineffective by any amendment to the Articles and by-laws. But it does not necessarily follow that it was not intended to supplant the wider coverage provided by the earlier by-law.

- [95] This is particularly so, in my view, in the context of a closely-held start-up corporation like Enliven, whose shareholders are few, and whose directors number four, two of whom are the founders of the company and its principal executive officers. This was not like large widely-held corporations where expansive indemnification rights might be expected to foster the attraction of talent to the board and executive suite.
- [96] There is a further surrounding circumstance arising out of the CBCA: the right of the shareholders by unanimous shareholder agreement "to provide for the management and operation of the Corporation", as stated in the recitals to the USA, and as indicated in section 1.4 of the USA.
- [97] I turn then to another significant surrounding circumstance: timing, as recognized by the chambers judge. For what is clear is that the parties, including the appellants, signed the USA at a time that the corporate structure had been reorganized. The few shareholders of this closely-held company would have been well aware of the provision in the earlier by-law. They chose, nevertheless, to adopt or maintain a more restricted indemnity agreement. Did they intend it to sit alongside the earlier provision, or did they intend it to supplant it?
- [98] In concluding that they intended the latter, the judge considered a number of features of the by-laws and the USA in addition to their temporal relationship, while keeping that context in mind.
- [99] The first feature was the reference in section 10.3 of the by-laws that specifically permitted the directors to "revoke, limit or vary the continued application of" the indemnity provision in that section. The judge commented, at para 70, that section 10.3 "contemplates what the Company and the parties did by entering into the USA."
- [100] The appellants maintain that this was a clear error because the USA was not a revocation or limitation by the directors, but rather was an agreement of the shareholders. There was no directors' resolution purporting to amend the by-laws to revoke, limit or vary the section 10.3 indemnity provision.
- [101] The appellants' argument in this regard ignores section 1.4 of the USA, which indicates that "to the extent necessary to give effect to the terms of this Agreement, the powers and authorities of the Board are removed from the directors and are conferred upon the Shareholders."
- [102] It may have been contextually inexact for the judge to liken the directors' revocation power to the power of the majority of the shareholders to amend the by-laws, but this does not, in my view, indicate error. I say this because it would remain fair to say that the concept of the indemnity provision being varied or limited, whether by directors or shareholders, must have been clearly understood. More importantly, as the judge later pointed out (para 76), this power under section 10.3 appears to have been specifically addressed by the agreement in section 6.5(c) of the USA that the articles and by-laws of the corporation "will not be amended to render this provision ineffective." In short, the power granted to the directors

under section 10.3 of the by-laws is curtailed by section 6.5(c) of the USA.

- [103] The judge next referred to the provision in section 20.1 of the by-laws that, to the extent of any conflict between the by-laws and any USA, the USA shall prevail.
- [104] It is here that the appellants say the judge erred in principle by failing to determine whether there was any conflict, impermissibly relying on the temporal component as a principle of interpretation.
- [105] But as I see it, this mischaracterizes what the judge did. Rather than employing timing as a principle of interpretation, it is my view that he considered it as a factor to take into account as part of the surrounding circumstances from which the parties' intentions were to be discerned, as he was entitled to do. In stating in para 72 that "there is no conflict", and concluding that the USA superseded the by-laws in respect of indemnity rights, the judge was not intending to indicate, as the appellants suggest, that he found it unnecessary to assess whether the documents conflicted. This is clear from what the judge said thereafter, acknowledging that there was a discrepancy in the breadth of coverage offered by the two documents.
- [106] In fact, the existence of conflict in the breadth of coverage is implicit in the judge's conclusion that the USA provision superseded the by-law. Otherwise, whether one superseded the other would be immaterial.
- [107] Moreover, when the judge went on to consider the bad faith issue, he did so in the event further evidence led to a different construction of the USA and by-laws "so as to operate without conflict and provide the Applicants with the right to apply for an advance payment" (para 83; emphasis added).
- [108] As I see it, in his earlier reference to there being no conflict, the judge was doing no more than acknowledging that these were not, contrary to the appellants' submission, contemporaneous documents that must be construed as a harmonious whole.
- [109] The judge did not have before him a series of inter-related documents or agreements that were executed at the same time as part of a single transaction, as was before the court in both the Samson Cree Nation and Salah, upon which the appellants rely. As the Ontario Court of Appeal noted in para 16 of Salah:

Where a transaction involves the execution of several documents that form parts of a larger composite whole--like a complex commercial transaction--and each agreement is entered into on the faith of the others being executed, then assistance in the interpretation of one agreement may be drawn from the related agreements.

With respect, that is not this case.

- [110] What the judge had to deal with was something different, as noted above. Given the existence of the by-laws, did the parties intend the more restricted provision of the subsequent USA to sit alongside the earlier provision, or to supplant it?
- [111] The judge further acknowledged a conflict by then turning to consider the indications within the documents as whether one was intended to prevail over the other. In this way, again contrary to the appellants' submission, he did read the documents together, in order to discern the intention of the parties in relation to any conflict between the two.
- [112] This brings us back to section 20.1 of the by-laws, and the other provisions considered by the judge on this question, particularly sections 9.1 and 10.2 of the USA. They all point in the same direction. Section 20.1 of the by-laws stipulates that the provisions of the unanimous shareholder agreement shall prevail in the event of any conflict with the provisions of the by-laws. Section 10.2 of the USA provides that the USA constitutes the full and entire agreement between the parties with respect to its subject matter, and cancels and supersedes any "prior understandings and agreements between the Parties with respect to such subject matter".
- [113] The appellants argue that section 10.2 of the USA is intended to be limited to prior shareholder agreements, and would not cancel and supersede the indemnity provisions in the by-law, but that is not what it says. The parties include the company and the shareholders, including the directors, and refers to "prior understandings and agreements". In my view, that would be wide enough to include a company's articles: see, for instance, *Minister of National Revenue v Dworkin Furs (Pembroke) Ltd et al*, [1967] SCR 223 at 233, citing *Theatre Amusement Co v Stone* (1914), 50 SCR 32 at 37, for the proposition that a company's articles constitute a contract between the company and its shareholders. Consequently, the judge's reference to it cannot be considered an error, whether of principle or of fact.
- [114] In these circumstances, it is by no means "plain", as the appellants would have it, that the indemnity provisions of the USA were to provide a minimum level of protection for directors that could not be removed without the consent of the principal shareholders, but were not intended to render ineffective the indemnity and advanced provisions in the by-laws. If that were so, why include them at all? By doing so, the shareholders (who include the directors) give the directors nothing that they did not already have under the by-laws, other than the protection from revocation. As to this "protection", section 6.5(c) of the USA does not prevent the by-laws from being rendered ineffective. Rather, it stipulates that the USA indemnity provision will not be rendered ineffective. That is consistent with an intention to reduce coverage, and does not detract from the shareholders' ultimate power. So even that part of the provision adds nothing practical.
- [115] Taken as a whole, the USA provision only subtracts; why subtract if the operation is not intended to yield a difference?

- [116] In these circumstances, I can find no error in principle, extricable legal error, or palpable and overriding error of fact in the judge's reasoning, and his conclusion is entitled to deference.
- [117] It follows that the judge's conclusion must stand: there is no obligation on Enliven to make an advance payment, and the application was properly dismissed.
- [118] Given this result, I do not find it necessary to consider whether the judge erred in relation to the merits-based test he discussed beginning at para 83, either in relation to the tests he applied or the facts he found on the competing affidavits.
- [119] The judge dealt with that issue in case "further evidence leads to a future determination" that the by-laws and USA should be construed differently so as not to conflict. Both the appellants and respondents were intimately involved in the affairs of Enliven from its inception, and in a position to put forward on this application any evidence relevant to the construction of the by-laws and USA. I see no need to provide for the contingency of further evidence materializing. The time to adduce it was on the application in the court below.

5.0 DISPOSITION

[120] For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Butler"

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