

CANADA / JUDGMENT

Green Light Solutions Corp. v. Kern BSG Management Ltd.

2025 BCCA 408

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 408 Green Light Solutions Corp. v. Kern BSG Management Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Green Light Solutions Corp. v.

Kern BSG Management Ltd.,

2025 BCCA 408

Date: 20251125

Docket: CA50380

Between:

Green Light Solutions Corp.

Applicant/Appellant

(Respondent)

And

Kern BSG Management Ltd.

Respondent

(Claimant)

Before:

The Honourable Justice Griffin

The Honourable Justice Iyer

The Honourable Justice Warren

On an application to vary: An order of the Court of Appeal for British Columbia,

dated May 8, 2025 (Green Light Solutions Corp. v. Kern BSG Management Ltd., 2025 BCCA 166, Vancouver Docket CA50380).

Counsel for the Applicant/Appellant:

M. Charles

Counsel for the Respondent:

M.G. Swanson

C. Fawcett

Place and Date of Hearing:

Vancouver, British Columbia

October 6, 2025

Place and Date of Judgment:

Vancouver, British Columbia

November 25, 2025

Written Reasons by:

The Honourable Justice Warren

Concurred in by:

The Honourable Justice Griffin

The Honourable Justice Iyer

Summary:

The applicant, Green Light Solutions Corp., applies pursuant to s. 29 of the Court of Appeal Act to vary the order of a chambers judge denying leave to appeal the costs component of a commercial arbitral award. The chambers judge concluded that the applicant failed to identify a question of law which, under s. 59(2) of the Arbitration Act, is a threshold requirement for granting leave and, in any event, he would not exercise his discretion to grant leave.

Held: Application to vary granted. The application for leave to appeal raised a question of procedural fairness, which is a question of law for the purpose of s. 59(2) of the Arbitration Act. The chambers judge failed to consider factors relevant to the exercise of his discretion. Considered afresh, it is in the interests of justice to grant the applicant leave to appeal.

Reasons for Judgment of the Honourable Justice Warren:

Introduction

- [1] The applicant, Green Light Solutions Corp. ("GLS"), applies under s. 29 of the Court of Appeal Act, S.B.C. 2021, c. 6, to vary the order of a single justice in chambers dismissing its application for leave to appeal the costs component of an arbitral award.
- [2] The chambers judge denied GLS leave to appeal on the ground that no question of law was raised by GLS, which, pursuant to s. 59(2) of the Arbitration Act, S.B.C. 2020, c. 2, is the threshold requirement for leave to appeal an arbitral award. The chambers judge also concluded that, even if a question of law had been raised, he would exercise his discretion to deny leave.
- [3] GLS says it did raise a question of law; specifically, whether the arbitrator's failure to provide the parties an opportunity to make submissions on costs before granting the costs award was a breach of procedural fairness. GLS also submits the chambers judge improperly exercised his discretion to deny leave by considering an irrelevant factor.
- [4] For the following reasons, I would grant the application to vary and grant GLS leave to appeal the costs component of the arbitral award.

Background

- [5] This proceeding arises from a dispute concerning a contract between GLS and the respondent, Kern BSG Management Ltd. ("Kern"), for the construction of a cannabis growing facility (the "Project"). GLS was the owner of the Project and Kern was the contractor. The consultant was PBX Engineering Ltd. (the "Consultant").
- [6] As the Project neared completion, GLS refused to pay invoices issued by Kern because of alleged deficiencies in Kern's work. Under the contract, GLS could deduct the difference in value between the deficient work and the amount called for by the contract from the amount due to Kern if the Consultant determined it was not expedient to correct the deficiencies. The Consultant was also to settle, at first instance, any disagreement between GLS and Kern about that difference in value.
- [7] In response to GLS withholding payment, Kern initiated the arbitration and sought payment of the outstanding invoices and contractual interest. In the arbitration, GLS took the position that it had the right under the contract to withhold payment until the Consultant had completed its valuation and determined the final amount owing to Kern.

The Award

- [8] The main issues in the arbitration were:
 - a) What amount was properly invoiced by Kern? (Kern said \$1,630,794.73 and GLS said \$1,392,736.38.)
 - b) Were there were deficiencies in Kern's work?

- c) If so, did those deficiencies entitle GLS to withhold payment?
- [9] The value of any deficiencies was not before the arbitrator because, as mentioned, that was to be determined at first instance by the Consultant.
- [10] The arbitrator, Mr. Stuart Hankinson, K.C., issued his award on December 17, 2024 (the "Award"). He did not answer the first question. On the second question, he found there were deficiencies in Kern's work, the value of which had to be determined by the Consultant. On the third question, he found that GLS was entitled to withhold payment to Kern, but not indefinitely. Additionally, he found that the Consultant should have valued the deficiencies by January 15, 2023, GLS should have paid any outstanding amount to Kern by January 15, 2023, and when the Consultant valued the deficiencies, Kern would be entitled to payment of the amount owing plus contractual interest from January 15, 2023.
- [11] The arbitrator included a cost term in the Award which awarded Kern "60% of its costs from GLS" and GLS "40% of its costs from Kern": Award at para. 103. He observed that costs are "very much a matter of the trier of fact's discretion": Award at para. 102. He determined that while neither party had been substantially successful and deficiencies existed that entitled GLS to withhold funds, GLS's and the Consultant's "deviations from the Contract requirements [had] necessitated [the] proceedings": Award at para. 101. It was on that basis that the costs award favoured Kern.
- [12] At para. 12 of the Award, the arbitrator stated that the arbitration had proceeded in accordance with the provisions of the Arbitration Act and the "CCDC 40 Rules for Mediation and Arbitration (2018)". However, in advance of the arbitration, the parties and the arbitrator agreed to a set of procedures for the arbitration referred to as "Procedural Order No. 1" which provided, in para. 5, that the parties had "agreed to dispense with the application of the CCDC 40 Rules for Arbitration of Construction Industry Disputes (2018)".
- [13] Part VII of Procedural Order No. 1 contemplated the parties making costs submissions:

VII. COSTS SUBMISSIONS

42. The parties agree that in the event an award of costs is sought in the Arbitration, the Arbitrator will exercise his discretion in a summary determination of the quantum of costs to be awarded and is not bound to apply the process generally used in the courts of British Columbia in respect to the taxation of costs. The Parties agree that costs submissions should contain a summary of each Party's legal costs including fees and disbursements. Summaries of legal fees should identify the individuals involved, their respective hourly rate(s), the number of hours billed and the totals. Disbursements should identify the type of charge, e.g., travel, copy, courier, expert fees, etc., and taxes should be recorded separately. Counsel's invoices, and other documentary proof of charges incurred, need not be submitted.

43. The timing of costs submissions, if any, will be determined by the Arbitrator in consultation with the Parties.

[14] In their written submissions to the arbitrator on the merits (before the hearing and before issuance of the Award), each party sought costs and included some submissions in support. For example, GLS's written submission dated August 18, 2023, provided:

267. In the circumstances, GLS asks that it in addition to the relief sought above, it also be awarded the costs of this arbitration, including the fees and associated costs of the Arbitrator, the hearing costs, the legal fees and legal expenses of GLS.

Further, in a reply submission dated April 26, 2024, GLS wrote:

213. Throughout its memorial, Kern makes unfounded allegations. It implies that GLS has been misleading the arbitrator, and makes what can only be described in substance as an allegation of fraud.

214. Ultimately GLS has been vexed with an arbitration that has been needlessly complicated by Kern's baseless attacks, failure to engage with issues raised by GLS, inappropriately splitting of their case, scant document disclosure, and false assertions made by its witnesses. All of this has been [paired] with repeated attacks on the candor and honesty of GLS and, by obvious implication, of its counsel. GLS says, without belabouring the point, which side is being careful with their evidence and argument is clear.

215. In the circumstances, there should be no question that GLS is entitled to recover its legal costs for this arbitration from Kern on a full indemnity basis, as is within the Arbitrator's jurisdiction under s. 50 of the Arbitration Act and is the ordinary award in arbitral proceedings. Further, under s. 50 of the Arbitration Act, GLS should be entitled to recover the fees and expenses of the arbitrators and expert witnesses, any administration fees of an institution; and any other expenses incurred in connection with the arbitral proceedings.

[Footnotes omitted.]

[15] These submissions were clearly made in anticipation of GLS being successful on the merits. The parties were not given the opportunity prior to the arbitrator's 60/40 apportionment of costs to make costs submissions based on the substantive outcome of the arbitration. Prior to making the costs award, the arbitrator was also not advised about any settlement offers or the quantum of legal costs incurred by either party.

[16] Kern's total costs were \$1,212,265.78 (legal fees of \$856,056.80, disbursements of \$21,178.94, and arbitrator's fees of \$335,030.04). In contrast, GLS's total costs were \$651,777.67 (legal fees of \$315,032.85, disbursements of \$1,714.77, and arbitrator's fees of \$335,030.05). If the costs component of the Award is effected on these numbers, GLS will be liable to pay Kern \$466,648.40 on account of costs. If the costs award is effected on the summarized legal fees and disbursements only, excluding the arbitrator's fees, GLS will be liable to pay Kern \$399,642.39 on account of costs. These amounts are substantial relative to Kern's claim of

\$1.63 million.

Material Provisions of the Arbitration Act

[17] The Arbitration Act provides two routes to challenge an arbitration award. Under s. 58(1), a party may apply to the Supreme Court of British Columbia to set aside an arbitral award on one or more of the grounds expressed therein. Under s. 59(2), a party may appeal an arbitral award to this Court on "any question of law arising out of an arbitral award" if all parties consent or if a justice of this Court grants leave to appeal.

[18] The material portions of ss. 58 and 59 read:

Applications for setting aside arbitral awards

58 (1) A party may apply to the Supreme Court to set aside an arbitral award only on one or more of the following grounds:

- (h) the applicant was not given a reasonable opportunity to present its case or to answer the case presented against it;

Appeals on questions of law

59 (1) There is no appeal to a court from an arbitral award other than as provided under this section.

- (2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if
 - (a) all the parties to the arbitration consent, or
 - (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
- (3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.
- (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice 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.

The Chambers Judgment

- [19] GLS sought leave to appeal the costs component of the Award on the basis that the arbitrator made five legal errors:
- a) Failing to apply the correct test for substantial success.
 - b) Failing to apply the relevant test: where neither party was successful, each should bear their own costs.
 - c) Failing to consider a relevant principle: that is, offers to settle made between the parties.
 - d) Applying the wrong procedural rules.
 - e) Considering pre-litigation conduct.
- [20] In his reasons indexed at 2025 BCCA 166 ("RFJ"), the chambers judge dismissed the leave application. He found the alleged errors did not raise any question of law for the purposes of s. 59(2) of the Arbitration Act. He also determined that in respect of the third, fourth, and fifth alleged error he would, in any event, decline to exercise his discretion to grant leave.
- [21] On its application to vary the order of the chambers judge, GLS has narrowed its focus to the third and fourth alleged errors, so I will say no more about the first, second, and fifth.
- [22] The chambers judge referred to *Grewal v. Mann*, 2022 BCCA 30 at para. 31 for the propositions that "there is a narrow jurisdiction when a court considers an appeal from a commercial arbitration" and that leave should be granted only where an extricable question of law can be clearly perceived and articulated: RFJ at para. 5. He then observed that if an extricable question of law has been identified, s. 59(4) of the Arbitration Act sets out certain considerations in exercising the discretion to grant leave: RFJ at para. 6.
- [23] The chambers judge addressed the third alleged error, being the failure of the arbitrator to consider offers to settle, at paras. 11-12 of his reasons. He observed that s. 58 of the Arbitration Act sets out the grounds upon which an award can be set aside in the Supreme Court, while under s. 59 only questions of law can be appealed directly to this Court. He characterized the third alleged error as an alleged breach of procedural fairness and held that a breach of procedural fairness falling within s. 58(1)(h) was not a "question of law" for the purpose of s. 59:
- [12] Section 58(1)(h) specifically addresses circumstances such as those alleged here where "the applicant was not given a reasonable opportunity to present its case or to answer the case presented against it." In my view, to seek to recharacterize the types of breaches of procedural fairness described in s. 58(1)(h) as questions of law under s. 59 would be inconsistent with the legislative intent in enacting that section. I am not satisfied that the alleged breach of procedural fairness raises a question of law for the purposes of s. 59
- [24] For the same reason, the chambers judge found that the fourth alleged error, being the arbitrator's failure to apply the procedural rules, did not raise a question of law for the purpose of s. 59 of the Act: RFJ at para. 13.

- [25] The chambers judge also determined that even if the third or fourth alleged error raised a question of law, he would not exercise his discretion to grant leave in relation to the third "given the existence of s. 58(1)(h)" (RFJ at para. 12) and in relation to the fourth "given the structure of the new Arbitration Act" (RFJ at para. 13).

Standard of Review

- [26] In *Seylynn (North Shore) Phase II GP Ltd. v. Seylynn (North Shore) Properties Phase II Limited Partnership*, 2025 BCCA 330, this Court recently articulated the standard of review on an application to vary an order made by a justice denying leave to appeal an arbitral award:
- [40] The standard of review on an application under s. 29 of the Court of Appeal Act is highly deferential. The review is not to be treated as a re-hearing. For a review division to interfere with the order of a justice in chambers, an applicant must demonstrate that the justice was wrong in law, wrong in principle, or misconceived the facts: *Seattle Environmental Consulting Ltd. v. Workers' Compensation Board of British Columbia*, 2017 BCCA 386 at paras. 5-7.
- [41] The issue of whether a leave application under the Arbitration Act raises an extricable question of law is, itself, a question on which no deference is owed. Where there is an extricable question of law, deference is owed to a justice's exercise of discretion under s. 59(4) of the Arbitration Act in deciding whether to grant leave: *Greata Ranch Holding Corp. v. Concord Okanagan Developments Ltd.*, 2019 BCCA 304 at paras. 45-50.
- [27] Thus, the chambers judge's conclusion that an alleged breach of procedural fairness falling within s. 58(1)(h) of the Arbitration Act does not raise a question of law for the purpose of s. 59(2) is reviewable on a standard of correctness, while the judge's exercise of discretion to deny leave to appeal in any event is entitled to deference and will not be interfered with absent an error in principle.

Positions of the Parties

GLS

- [28] GLS contends that the chambers judge was incorrect in concluding that the questions of procedural fairness on which it sought leave to appeal are not questions of law for the purpose of s. 59(2) of the Arbitration Act.
- [29] GLS says it is well-established that questions of procedural fairness are questions of law. It points to several statutory appeal decisions in support of this proposition, including: *Seaspan Ferries Corporation v. British Columbia Ferry Services Inc.*, 2013 BCCA 55; *Rutledge v. British Columbia (Director of Adult Forensic Psychiatric Services)*, 2017 BCCA 251; *Sharma v. Edmonton (Police Service)*, 2019 ABCA 501 (Chambers); and *Shapiro v. Swingler*, 2021 ONSC 6191.

- [30] GLS also emphasizes that there is no language in s. 59(2) that limits appeals to only some questions of law, and in particular, no language limiting the scope of s. 59(2) to questions of law that do not also fall within s. 58(1). To the contrary, GLS submits the word "any" in s. 59(2) indicates no such limitations were intended.
- [31] Citing a portion of the relevant Hansard debates, GLS contends that the amendments reflected in the current Arbitration Act were aimed at efficiency and argues that an interpretation that would require questions of procedural fairness to be determined in one court and other questions of law to be determined in another court in cases where both types of questions are raised is incompatible with that objective. Instead, GLS says that logically interpreted, the Arbitration Act creates two overlapping routes to challenge an arbitral award: this Court may hear appeals on all questions of law, including questions of law that fall within s. 58(1), and the Supreme Court may hear set-aside applications on the specific grounds listed in s. 58(1) through the less procedurally onerous process contemplated by s. 58.
- [32] Turning to the chambers judge's exercise of discretion, GLS observes that the existence of s. 58(1)(h) as an alternative procedure is not among the factors listed in s. 59(4) that are to be considered when exercising the discretion to grant leave to appeal. GLS contends the chambers judge erred in considering this as a factor in the exercise of his discretion to deny leave to appeal.

Kern

- [33] Kern contends that the chambers judge was correct in concluding that procedural fairness questions are not questions of law for the purpose of s. 59(2) of the Arbitration Act.
- [34] Kern submits it is well recognised that the Legislature has chosen to limit the scope of appeals from arbitral awards with a view to advancing the central objectives of commercial arbitration, specifically, efficiency and finality: e.g., *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 1; *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure)*, 2022 BCCA 440 at para. 73 (Chambers). Kern argues that the chambers judge's conclusion concerning the scope of s. 59(2) is consistent with those objectives and emphasizes that two other justices of this Court, sitting in chambers, have held that issues of procedural fairness fall within s. 58(1) and are therefore not questions of law for the purpose of s. 59(2): *A.L. Sims* at paras. 89, 94; *Magnum Management Inc. v. Chilliwack Hangar Corp.*, 2024 BCCA 212 at para. 54 (Chambers).
- [35] Kern says that GLS "relies on judicial review cases and *Seaspan*" for the proposition that procedural fairness questions are questions of law and submits that these are distinguishable because in "judicial review the court is entitled to review the evidentiary record that was before the administrative decision maker", while *Seaspan* involved a different legislative regime that does not include the equivalent of s. 58 of the Arbitration Act. I pause to note that, as already mentioned, several of the cases GLS relied on, including

those mentioned in para. 29 above, were statutory appeal cases not judicial review cases.

- [36] Kern also submits that the existence of s. 58(1)(h) as an alternative procedure through which GLS could challenge the costs award is a relevant factor weighing against the exercise of discretion to grant leave to appeal and the chambers judge's conclusion in this regard is entitled to deference.

Analysis

Legal framework

- [37] As this Court recently reiterated in *Seylynn* at paras. 44-45, there are three requirements that must be met before leave can be granted to appeal an arbitration award:

1. The appeal must be based on a question of law arising out of the award.
2. The leave judge must be satisfied that one of the three circumstances identified in s. 59(4) of the Arbitration Act exists.
3. The leave judge must be prepared to exercise the residual discretion implicit in the phrase "the Court of Appeal may grant leave".

The threshold question is whether a question of law "can be clearly perceived and identified": *Grewal* at para. 32.

Issues

- [38] The alleged errors that GLS now seeks to raise on an appeal of the costs component of the Award merge into a single question: whether the arbitrator's failure to give the parties an opportunity to make submissions on costs after the substantive issues had been decided was a breach of procedural fairness.
- [39] There is no dispute that this question could have grounded an application by GLS to the Supreme Court to set aside the costs award under s. 58(1)(h) of the Arbitration Act. It also raises a question about the arbitrator's jurisdiction to make the costs award in the circumstances. As such, it may also fall within s. 58(1)(c) of the Arbitration Act, which permits an application in the Supreme Court to set aside an arbitral award that "deals with a dispute not falling within the terms of the arbitration agreement or contains a decision on a matter that is beyond the scope of the arbitration agreement". Neither the parties nor the chambers judge characterized GLS's challenge to the costs award as a challenge to the arbitrator's jurisdiction, so my analysis will proceed primarily on the basis that GLS seeks to appeal on procedural fairness grounds.
- [40] The questions to be answered on this application are:

- a) Was the chambers judge correct in concluding that an alleged breach of procedural fairness falling within s. 58(1)(h) of the Arbitration Act does not give rise to a question of law for the purpose of s. 59(2) of the Arbitration Act?
- b) If the alleged breach of procedural fairness does give rise to a question of law for the purpose of s. 59(2), did the chambers judge err in principle in exercising his discretion to deny GLS leave to appeal?

Does an alleged breach of procedural fairness falling within s. 58(1)(h) give rise to a question of law for the purpose of s. 59(2)?

- [41] As noted, the chambers judge concluded that characterising a breach of procedural fairness falling within s. 58(1)(h) of the Arbitration Act as a question of law for the purpose of s. 59 of the Arbitration Act would be inconsistent with the legislative intent of these provisions. This finding implies a legislative intent against overlap: that the legislative intent was for s. 58 to apply exclusively to challenges to an arbitration award based on the grounds listed in s. 58(1), even if the ground(s) in question also raise a question of law. Put another way, it implies the legislative intent was for the scope of s. 59(2) to be restricted to questions of law that fall outside one or more of the grounds listed in s. 58(1).
- [42] The chambers judge's conclusion was based on the existence of s. 58(1). The same can be said of the equivalent conclusion in *A.L. Sims and Magnum*. As mentioned, in each of those cases, a single justice in chambers held that issues of procedural fairness fall within s. 58(1) and are therefore not questions of law for the purpose of s. 59(2): *A.L. Sims* at paras. 89, 94; *Magnum* at para. 54. As in the present case, it is not apparent from the reasons in *A.L. Sims* and *Magnum* that the justices had the benefit of full argument on the interpretation of s. 59(2).
- [43] The guiding principle of statutory interpretation--the modern rule--is well-settled. The words of an Act must be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21, 1998 CanLII 837; *Chisholm v. Valemount Forest Products*, 2025 BCCA 48 at paras. 16-17. In short, regard must be had to text, context, and purpose. In my view, all three of these considerations support the conclusion that the phrase "any question of law arising out of an arbitral award" in s. 59(2) is not restricted to questions of law that do not fall within s. 58(1).
- [44] The narrow question is whether an analysis of the text, context, and purpose of s. 59(2) reveals a legislative intent to limit the scope of s. 59(2) such that "any question of law" excludes any questions of law falling within a ground listed in s. 58(1).

- [45] The text of s. 59(2) does not evince that intention. The phrase "any question of law arising out of an arbitral award" signifies breadth. This arises from the use of the word "any", which signals universality or non-specificity, and the absence of words indicating that s. 59(2) must be read as subject to s. 58(1). For example, s. 59(2) does not say "any question of law arising out of an arbitral award other than those falling within one or more of the grounds set out in s. 58(1)".
- [46] In *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294, the text of s. 59(2) was found to support the conclusion that appeals under that section are not limited to only certain questions of law. In determining that a misapprehension of the evidence was a question of law for the purpose of s. 59(2), Justice Voith, for the Court, wrote that while "it is sometimes difficult to determine whether the issue being raised by an appellant is a question of law", where a clear question of law has been raised, there is no basis to further limit that appellant's right of appeal (at para. 69). He emphasized the language of s. 59(2); specifically, that it provides that an appeal may be brought "on any question of law arising out of an arbitral award": at para. 70, emphasis in original.
- [47] In *Escape 101 Ventures* at paras. 41, Justice Voith referenced a well-developed body of jurisprudence dealing with the interpretation of contracts in the arbitration context, citing: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53; *Teal Cedar, Richmond Mines Inc. v. Teck Resources Limited*, 2018 BCCA 452; and *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 as examples. These authorities establish that questions of contractual interpretation generally give rise to questions of mixed fact and law and not to extricable errors of law and instruct that courts should exercise caution in identifying extricable errors of law. However, Justice Voith explained that these authorities do not suggest that the Court lacks jurisdiction to review certain types or categories of questions of law under s. 59(2) of the Arbitration Act: at paras. 63-65.
- [48] There is a substantial body of jurisprudence in which breaches of procedural fairness and natural justice have been characterized, in the context of other statutory appeal regimes, as questions of law. In other words, the ordinary meaning of "questions of law" includes questions of procedural fairness. For example:
- In *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29 at paras. 26-30, the question of whether there had been an abuse of process was characterized as a question of law in an appeal of a decision of a hearing committee of the Law Society of Saskatchewan under s. 56(1) of The Legal Profession Act, 1990, S.S. 1990-91, c. L-10.1.
 - In *Morabito v. British Columbia (Securities Commission)*, 2024 BCCA 377 at para. 50, an allegation of abuse of process was characterized by this Court as a question of law in an appeal of a decision of the British Columbia Securities Commission under s. 167 of the Securities Act, R.S.B.C. 1996, c. 418.

- In Rutledge at para. 32, allegations of breaches of natural justice and procedural fairness were characterized as raising a question of law in an appeal from a decision of the British Columbia Review Board under s. 672.72(1) of the Criminal Code, R.S.C. 1985, c. C-46.
- In Sharma at para. 8, allegations of breaches of natural justice and procedural fairness were characterized by the Alberta Court of Appeal as questions of law on an application for permission to appeal a decision of the Alberta Law Enforcement Review Board under s. 18 of the Police Act, RSA 2000, c. P-17.
- In Stubicar v. Calgary (Subdivision and Development Appeal Board), 2022 ABCA 299 at para. 46 (Chambers), the question of whether the duty of procedural fairness was met was characterized as a question of law in an application for permission to appeal a decision of the Calgary Subdivision and Development Appeal Board under s. 688 of the Municipal Government Act, R.S.A. 2000, c. M-26.
- In Shapiro at para. 16, an issue of procedural fairness was characterized as a question of law in an appeal from a decision of the Landlord and Tenant Board under s. 210(1) of the Residential Tenancies Act, 2006, S.O. 2006, c. 17.

- [49] As I have already alluded to, a breach of procedural fairness can also amount to jurisdictional error. Whether an alleged breach of procedural fairness constitutes a jurisdictional error has also been characterized as a question of law: *Bessette v. British Columbia (Attorney General)*, 2019 SCC 31 at para. 23.
- [50] As mentioned, GLS relies on *Seaspan*, where this Court held that s. 50 of the Coastal Ferry Act, S.B.C. 2003, c.14, which permits appeals from decisions of the British Columbia Ferries Commissioner "on a question of law", is properly interpreted as allowing appeals on procedural fairness grounds.
- [51] In *Seaspan*, Justice Groberman, for the Court, wrote that procedural fairness issues "might be thought to raise mixed questions of law and fact, in that they require the application of a legal standard - that of procedural fairness - to the particular context of the case", but that "[e]qually, however, it may be thought that the question of whether a tribunal has followed proper procedures raises an issue of law": at para. 37. Ultimately, it was unnecessary for him to definitively characterize the issue in that case as a pure question of law because he held that s. 50 of the Coastal Ferry Act is properly interpreted as allowing appeals on issues of procedural fairness "whether such issues are categorized as issues of law alone or as issues of mixed law and fact": at para. 38. He reasoned that the language used in s. 50 to restrict appeals to questions of law is less rigid than the language used in some other statutes, such as where appeals are restricted to a "question of law alone", and broad enough to allow appeals "on questions that are predominantly, if not exclusively, issues of law": at para. 41.

- [52] Kern argues that Seaspan is distinguishable because the Coastal Ferry Act does not contain a provision equivalent to s. 58(1) of the Arbitration Act that provides a second route to challenge decisions on procedural fairness grounds and it contains a privative clause restricting judicial review. Kern submits it was against that backdrop that the words "on a question of law" in s. 50 of the Coastal Ferry Act were held to be broad enough to permit appeals on procedural fairness grounds.
- [53] Kern's argument is correct as far as it goes. Seaspan is not determinative of the statutory interpretation question here because it concerned the interpretation of somewhat different language, in a different statute, with no equivalent to s. 58(1) of the Arbitration Act. Nonetheless, Seaspan is helpful as an example of a case where the phrase "on a question of law" in a legislative provision conferring appellate jurisdiction has been interpreted as broad enough to encompass a breach of procedural fairness. Whether s. 59(2) of the Arbitration Act is properly interpreted as similarly broad requires a contextual and purposive interpretation of that legislation, the exercise to which I now return.
- [54] To recap to this point, the text of s. 59(2) indicates that an alleged breach of procedural fairness can ground an appeal because a breach of procedural fairness is generally viewed as giving rise to a question of law, the use of the word "any" indicates universality, and there are no limiting words in s. 59(2) such as "other than those falling within one or more grounds set out in s. 58(1)" that would indicate this Court lacks jurisdiction to review that particular category of question of law.
- [55] I turn now to context.
- [56] As mentioned, this Court in *Escape 101 Ventures* already held that s. 59(2) of the Arbitration Act is not restricted to certain types or categories of questions of law. However, in that case it was not necessary for the Court to comment on the interrelationship between ss. 58 and 59.
- [57] The statutory interpretation presumption of overlap applies to the analysis of that interrelationship. So long as overlapping provisions can apply without conflict, it is presumed that each is intended to operate fully according to its terms, and for the purposes of statutory interpretation, conflict is defined narrowly: *Thibodeau v. Air Canada*, 2014 SCC 67 at para. 92; *Reference re Broadcasting Regulatory Policy CRTC 2010-167 and Broadcasting Order CRTC 2020-168*, 2012 SCC 68 at paras. 37, 41. This presumption is explained by Ruth Sullivan in *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2022), at p. 329:

Under the presumption of overlap, when provisions overlap without conflict it is presumed that each is meant to apply. However, the presumption is rebutted by showing that in the circumstances one (or more) of the provisions was intended to exhaustively declare the applicable law. If one provision is exhaustive, the other cannot apply.

- [58] There is no conflict between s. 58 and s. 59 of the Arbitration Act. The introductory words of s. 58(1) provide that a party to an arbitration "may apply to the Supreme Court to set aside an arbitral award only on one or more of the following grounds". The word "only" limits the grounds on which an application to the Supreme Court may be made. There is no language that indicates the Supreme Court is the exclusive venue for a challenge to an arbitration award on one or more of the listed grounds. While the Legislature could have included such limiting language, it did not. Also, as already discussed, s. 59 does not include any language limiting its scope in relation to s. 58.
- [59] The only language in the Arbitration Act that expressly limits the scope of s. 59(2) is found in s. 59(3) which provides that a party to an arbitration may seek leave to appeal to this Court "on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal on any question of law arising out of an arbitral award" (emphasis added). The Legislature considered the circumstances in which an appeal of an arbitral award on a question of law should be precluded and made a conscious decision to preclude such appeals only by agreement of the parties.
- [60] In summary, the context aligns with the ordinary meaning of the text of s. 59(2) and does not indicate that the Legislature intended the s. 58 review procedure in the Supreme Court to be the exclusive procedure for reviewing questions of law falling within s. 58(1).
- [61] The final consideration is purpose.
- [62] Both GLS and Kern emphasized that the central aims of commercial arbitration are efficiency and finality.
- [63] A two-route structure for challenging an arbitration award predates the current version of the Arbitration Act. The current Arbitration Act replaced the Arbitration Act, R.S.B.C. 1996, c. 55 [1996 Act], which replaced the Commercial Arbitration Act, S.B.C. 1986, c. 3 [1986 Act]. All three versions provide a right to apply to the Supreme Court of British Columbia to set aside arbitral awards on specific grounds--s. 58 of the current Arbitration Act, s. 30 of the 1996 Act, and s. 30 of the 1986 Act. All three versions also allow an appeal on any question of law arising out of an award by consent or with leave--s. 59 of the current Arbitration Act, s. 31 of the 1996 Act, and s. 31 of the 1986 Act. This structure has long been regarded as preserving the integrity of the arbitration system and advancing the objectives of efficiency and finality by restricting challenges as of right to an expressly limited list of grounds, limiting appeals to questions of law, and requiring leave to appeal to ensure only matters of consequence may be appealed: see *Escape 101 Ventures* at paras. 55-62; *Seylynn* at para. 48.
- [64] The material difference between ss. 58 and 59 of the current Arbitration Act and its predecessors is that the current Act streamlines the process for appeals. Previously, appeals on questions of law were directed, at first instance, to the Supreme Court by consent or on leave: see s. 31(1) of the 1996 Act, for example. There was a right of appeal to this Court from an order of the Supreme Court on a leave application (*Jakobsen v. Wear Vision Capital Inc.*,

2004 BCCA 147) and from an order of the Supreme Court on the substance of an appeal. Now, under the current Act, appeals on questions of law may go straight to this Court, thereby eliminating one level of appeal for each of the leave application and the appeal proper.

- [65] The streamlining objective of this change is reflected in the relevant Hansard debates (British Columbia, Official Report of Debates of the Legislative Assembly (Hansard), 41-5, No. 318 (27 February 2020) at 13:35 (Hon. David Eby):

This bill includes the established appeal provision, however, with some necessary modifications. The existing structure of the appeal provision has created too much court process and unwelcome delay. Arbitrations decided within months from commencement until a final award should not then be subjected to several years of appeals in court, as has occurred under the present provision.

This was not the fault of either the courts or the parties. It was a regrettable consequence of the design of the provision itself. The bill updates the provision to streamline appeals and speed up the process, thereby lowering party costs and conserving court resources.

- [66] Interpreting ss. 58 and 59 as providing distinct, but overlapping, routes to challenge an arbitral award on a question of law does not damage the general objectives of efficiency and finality or the more specific objective reflected in the current Arbitration Act of streamlining the appeal process by removing one level of appeals. A party seeking to challenge an arbitral award on only one or more questions of law that fall within the s. 58(1) grounds will almost certainly invoke the s. 58 process, as s. 59 has the additional hurdle of obtaining leave. The narrower interpretation of s. 59(2) adopted by the chambers judge would compromise the aim of efficiency where a party seeks to challenge an arbitration award on multiple questions of law, only some of which fall within the s. 58(1) grounds. In such a case, if the watertight compartment interpretation was correct, the party would be forced to invoke both the s. 58 and s. 59 processes, simultaneously.
- [67] In summary, the interpretation of s.59(2) that is most consistent with the general objectives of efficiency and finality in arbitration and the more specific objective of streamlining review processes that is reflected in the current Arbitration Act is one that permits this Court to hear appeals on all questions of law, including those that fall within s. 58(1), and the Supreme Court to hear set-aside applications on the specific grounds listed in s. 58(1).
- [68] Again, the question GLS seeks to raise on appeal is whether the arbitrator's failure to give the parties an opportunity to make submissions on costs after the substantive issues had been decided was a breach of procedural fairness. For the reasons expressed, it is my view that this is a question of law falling within s. 59(2) of the Arbitration Act.

Did the chambers judge err in principle in exercising his discretion to deny GLS leave to appeal?

[69] The chambers judge determined that even if an alleged breach of procedural fairness falling within s. 58(1)(h) did raise a question of law for the purpose of s. 59(2), he would not exercise his discretion to grant leave given the structure of the Arbitration Act, and in particular, the existence of s. 58(1)(h).

[70] GLS contends that the chambers judge erred in considering the existence of s. 58(1)(h) as a factor in the exercise of his discretion because the existence of s. 58(1)(h) as an alternative procedure is not among the circumstances set out in s. 59(4).

[71] For ease of reference, s. 59(4) provides:

On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice 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.

[72] In my view, it was open to the judge to consider the existence of s. 58(1)(h) and the structure of the Act in the exercise of his residual discretion. As noted, where a question of law has been raised, the leave judge must be satisfied that one of the three circumstances identified in s. 59(4) of the Arbitration Act exists and the leave judge must be prepared to exercise the residual discretion implicit in the phrase "the Court of Appeal may grant leave".

[73] However, s. 59(4) requires the Court to consider the three listed factors in deciding whether to grant leave. In my view, the judge erred in principle in failing to do so. As such, I would exercise the discretion afresh.

[74] I am satisfied that the circumstances identified in s. 59(4)(a) exist--the importance of the result to the parties justifies the intervention of the Court and the determination of the point of law may prevent a miscarriage of justice.

[75] Although not yet finally quantified, the costs award potentially exposes GLS to a liability of between \$400,000 and \$466,000. This is substantial relative to Kern's claim, which it valued at about \$1.63 million, and justifies this Court intervening.

[76] To establish that a miscarriage of justice may be prevented, the applicant must demonstrate that the determination of the point of law on appeal is material to the result in dispute, and if decided differently, would lead to a different result: *Sattva* at paras. 69-70. As the determination of the point of law must be shown as capable of changing the result, the appeal itself must have a possibility of success: *Sattva* at para. 71. The threshold is whether the appeal has arguable merit, such that it would not be dismissed based on a preliminary examination of the question of law: *Sattva* at paras. 71, 74.

- [77] There is no dispute that prior to the arbitrator's 60/40 apportionment of costs, the parties were not given the opportunity to make submissions concerning the costs award that should be made in light of the substantive outcome of the arbitration, the arbitrator was not advised about settlement offers, and the arbitrator did not know the quantum of legal costs that had been incurred by each party. Given these circumstances, and the provisions of Procedural Order No. 1 dealing with costs submissions, I am satisfied the appeal has arguable merit.
- [78] The final question is whether I would exercise my residual discretion to grant leave. For the following reasons, I would.
- [79] As discussed, the issue raised by GLS on appeal is of significance to the parties. There was no suggestion that an appeal would unduly hinder the progression of the underlying dispute, being the valuation of the deficiencies and determination of the amount owing by GLS to Kern. Although s. 58(1) of the Arbitration Act does provide GLS with an alternative review procedure, when GLS selected the s. 59(2) appeal route it contemplated an appeal that raised other alleged questions of law that do not fall within s. 58(1). While GLS has now narrowed the scope of the appeal to questions that fall within s. 58(1), the time for bringing an application under s. 58(1) has expired: Arbitration Act, s. 60(1). Given all of these circumstances, it is in the interests of justice to grant GLS leave to appeal.

Disposition

- [80] For these reasons, I would grant the application to vary the chambers judge's order dismissing GLS' leave to appeal application. I would grant GLS leave to appeal the costs component of the Award on the question of whether the arbitrator's failure to give the parties an opportunity to make submissions on costs after the substantive issues had been decided was a breach of procedural fairness.

"The Honourable Justice Warren"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Iyer"

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