NOVA SCOTIA COURT OF APPEAL
Citation: ***Halifax (Regional Municipality) v. Canadian National Railway Company***, 2014 NSCA 104

Date: 20141124
Docket: CA 422562
Registry: Halifax

Between:

Halifax Regional Municipality

Appellant

v.

Canadian National Railway Company

Respondent

Judges:	Fichaud, Farrar and Bryson, JJ.A.
Appeal Heard:	September 16, 2014
Held:	Appeal dismissed with costs, per reasons for judgment of Fichaud, J.A.; Farrar and Bryson, JJ.A. concurring
Counsel:	Martin C. Ward, Q.C. and Guy Harfouche for the Appellant Dennis J. James and Melissa P. MacAdam for the Respondent

Reasons for Judgment:

[1] Canadian National Railway and Halifax Regional Municipality negotiated through lawyers, then signed a contract that apportioned the repair and maintenance costs for a series of bridges that span Canadian National's railway into Halifax. These arched concrete bridges carry municipal roads over the railway tracks. The contract said that Halifax would pay for "the subsurface layers to the surface of the arch". Canadian National and Halifax interpret those words differently. They disagree on who is responsible for the layer of fill below the elevation that is tangential to the apex of the arch. On an application for a declaration, the judge of the Supreme Court ruled that Halifax was responsible.

[2] Halifax appeals, and asks that the Court of Appeal either endorse Halifax's interpretation or rule the contract to be void for lack of *consensus ad idem*.

Background

[3] As envisaged by the former s. 145 of the *British North America Act*, Parliament (S.C. 1867, c. 13) established the Intercolonial Railway to connect the City of Halifax and Rivière du Loup in Québec. The railway into Halifax passes through a deep cut in the bedrock to reach the ocean terminal.

[4] The *Government Railways Act, 1881*, S.C. 1881, c. 25, brought the management of railways under the control of the Minister of Railways and Canals of Canada. In 1916 the Department of Railways and Canals constructed twelve concrete arched bridges to connect the sides of the rock cut and to span the rails below ("Bridges"). The Bridges support city streets in residential neighbourhoods.

[5] Mr. Nigel Peters is CN's Chief Engineer, Bridges and Structures. His affidavit described the Bridges:

> Some shorter span arches, as in the case of the Halifax arches, use fill material, placed over the arch to support the roadway surface. The fill is retained on the sides by the spandrel walls, so the term "spandrel filled arch" is used to describe such structures. In addition, where the roadway deck is supported above the crown of the arch, these structures are referred to as deck arches. The Halifax arch bridges are, therefore really "spandrel filled deck arches".

[6] The Canadian National Railway Company ("CN") was established by S.C. 1919, c. 13 to operate the Canadian Government's national system of railways, including the one into Halifax. Further to the *CN Commercialization Act*, S.C. 1995, c. 24, the Government of Canada publicly offered, then transferred its shares in CN to private interests.

[7] Over the years, CN and the City of Halifax, later Halifax Regional Municipality ("Halifax"), cooperated *ad hoc* on upgrades to water, sewage and utility facilities that affected individual bridges. But, before 2009, there was no formal agreement between CN and Halifax on responsibilities for overall maintenance of the Bridges.

[8] By 2008, it was apparent that the Bridges needed repair.

[9] On June 20, 2008, CN filed with the Canadian Transportation Agency an application for an Order to apportion with Halifax the repair costs of the Bridges. The application was further to s. 101 of the *Canada Transportation Act*, S.C. 1996, c. 10 and s. 16 of the *Railway Safety Act*, R.S.C. 1985, c. 32 (4th Supp.). Halifax disagreed with CN's proposed apportionment.

[10] On July 22, 2008, Halifax's counsel suggested to CN's counsel that they negotiate an allocation of responsibilities for the Bridges' repair and maintenance. Correspondence followed. The exchange culminated in a six hour meeting on September 10, 2008 at a hotel in Halifax.

[11] The Affidavit of Ms. Mary Ellen Donovan, Halifax's Director of Legal Services at the time, stated Halifax's approach to the September 10 meeting:

> 19. The guiding principle I adopted for these negotiations was that HRM's responsibility for the road and road works over the CN Structures should be limited to what would be required if the CN Structures did not exist and the road was constructed on the natural soil. Anything beyond this, which was required because of the existence of the railway cuts and the CN Structures, would be the responsibility of CN.
>
> 20. In the course of the meeting, there was discussion about what type of work would normally be done within HRM's area of responsibility.

[12] Mr. Dominique Poirier, CN's Senior Officer, Design and Construction, attended the meeting of September 10, 2008. His Affidavit says:

> 8. I took notes during the Meeting, which are my perception as to what was said and agreed upon between the Parties. A copy of my handwritten notes is attached as Exhibit "A". A copy of a transcription of those notes is attached as Exhibit "B".
>
> 9. I recorded in my notes that the Respondent [Halifax] agreed to take responsibility for the maintenance of the asphalt, base, sub-base and subgrade over the Bridges. …

Mr. Poirier's exhibited note states:

> HRM agrees to be responsibility [*sic*] of Asphalt, Base, Subbase, Subgrade.

[13] In the several months after the meeting, the parties' counsel exchanged versions of a draft agreement. I will track the drafting history of article 2, the focus of this appeal.

[14] On September 12, 2008, Ms. Donovan wrote to CN's Assistant General Counsel, Mr. Jean Patenaude:

> Outlined below are the major points agreed to by HRM and CN relating to future maintenance obligations of the two parties for the twelve overhead bridges carrying roads over the rail cut in Peninsular Halifax.
>
> …
>
> 2. HRM is responsible for 100% of the maintenance of the road and road works that pass over these bridges. The road and road works comprise the asphalt, sidewalks, curbs, lighting, as well as the gravel subsurface layers below the asphalt layer to the top of the arch.

[15] On September 16, 2008, Mr. Patenaude replied to Ms. Donovan with draft terms of agreement that included:

> 2. HRM is responsible for 100% of the maintenance of the road and road works that pass over these bridges. The road and road works comprises the asphalt, sidewalks, curbs, lighting, as well as the gravel subsurface layers below the asphalt layer to the top of the arch and all earth fill within the structure. [Mr. Patenaude's underlining]

[16] Ms. Donovan replied on September 23, 2008, suggesting wording changes that she described as "of a minor character" that "are intended to clarify the Agreement as proposed at the September 10, 2008 meeting". The attached draft included:

> 2. HRM is responsible for 100% of the maintenance of the road and road works that pass over these bridges. The road and road works comprises the asphalt, sidewalks, curbs, lighting, as well as the gravel subsurface layers and all earth fill within the structure that is situated below the asphalt layer and on top of the arch. [Ms. Donovan's underlining]

[17] On November 7, 2008, Mr. Patenaude responded to Ms. Donovan:

> On the basis of your proposed changes to paragraph 2, we are proposing additional clarification. This should not be an issue as it merely purports to replace the words "asphalt layer" with the defined expression of "road and road works".

Mr. Patenaude's draft para 2 said:

> 2. HRM is responsible for 100% of the maintenance of the road and road works that pass over these bridges. The road and road works comprises the asphalt, sidewalks, curbs, lighting, as well as the gravel subsurface layers below the road and road works to the top of the arch. [Mr. Patenaude's underlining]

Mr. Patenaude's note beside para 2 said "Deleted: asphalt layer to the" and "Deleted: and all earth fill within the structure".

[18] On November 20, 2008, Mr. Mark Tinmouth of Halifax's Department of Legal Services replied to Mr. Patenaude's letter of November 7. Mr. Tinmouth's letter said:

> With regard to your suggested change in paragraph 2, we would suggest that removing your suggested 'road and road works', clarifies the sentence without the confusion of using a term to define itself. In this way, it is understood that the asphalt found above the arch and below the asphalt is part of the road and road works.

Mr. Tinmouth's attached draft article 2 said:

> 2. HRM is responsible for 100% of the maintenance of the road and road works that pass over these bridges. The road and road works comprises the asphalt, sidewalks, curbs, lighting, as well as the gravel subsurface layers to the top of the arch.

Mr. Tinmouth's note beside article 2 said "Deleted: below the road and road works".

[19] On December 4, 2008, Mr. Patenaude replied with a letter to Ms. Donovan:

> This is further to your letter of November 20, 2008 in connection with the above captioned matter and your suggested changes to the draft Terms of Agreement.
>
> We are suggesting adjustment to the wording in order to bring further clarity. …

Mr. Patenaude's draft included:

> 2. HRM is responsible for 100% of the maintenance of the road and road works that pass over these bridges. The road and road works comprises the asphalt, sidewalks, curbs, lighting, as well as the subsurface layers to the surface of the arch. [Mr. Patenaude's underlining]

Mr. Patenaude's note beside article 2 said "Deleted: gravel" and "Deleted: below the asphalt layer" and "Deleted: top".

[20] By a letter of January 6, 2009, Halifax's Mr. Tinmouth replied to Mr. Patenaude with another draft agreement. Mr. Tinmouth suggested no further changes to article 2. Mr. Tinmouth's enclosed draft used the wording of article 2 that appeared in Mr. Patenaude's draft of December 4, 2008.

[21] On January 29, 2009, Mr. Patenaude emailed Mr. Tinmouth with a draft agreement in signature form. Article 2 was re-numbered as article 2.2, but matched the wording in Mr. Patenaude's article 2 of December 4, 2008.

[22] Halifax and CN then signed a written agreement dated March 16, 2009 ("Agreement"). The Deputy Mayor and the Municipal Clerk executed on behalf of HRM and the Senior Vice-President, Eastern Region, on behalf of CN. Article 2.2 said:

> 2.2 HRM is responsible for 100% of the maintenance of the road and road works that pass over these bridges. The road and road works comprises the asphalt, sidewalks, curbs, lighting, as well as the subsurface layers to the surface of the arch.

This was the wording that Mr. Patenaude had proposed on December 4, 2008.

[23] The next year, CN prepared an estimate of costs for the repair of the Bridges on South Street, Tower Road and Jubilee Road. Halifax disagreed with CN's estimate and cost allocation. The parties had different interpretations of article 2.2.

[24] There are two layers of fill under the road asphalt and above the concrete arch. The upper layer is a granular base composed of gravel. It sits immediately below the asphalt and stops, several inches beneath the road surface, at the elevation that is tangential to the apex of the arch. Under this granular layer is the lower layer of general fill, a finer material that occupies the space down to the curved upper surface of the arch.

[25] CN's view was that Halifax was responsible for both layers to the full curved surface of the arch. Halifax felt it was responsible only for the upper layer to the apex of the arch.

[26] On October 31, 2011, CN applied to the Supreme Court of Nova Scotia for a declaration on the effect of article 2.2, and to resolve some other issues respecting responsibility for traffic control and relocation of utilities during construction.

[27] Justice LeBlanc heard the matter on May 6, 2013, and issued a decision on October 1, 2013 (2013 NSSC 307), followed by an Order of November 8, 2013. The judge agreed with CN's interpretation of article 2.2. His reasons (paras 19-20) adopted the principles stated in *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, paras 54-56 (quoted below, para 33). Justice LeBlanc then concluded:

> [23] … In my view, when read in the context of the entire section, the words "subsurface layers to the surface of the arch" are clear and unambiguous. Contrary to the position advanced by HRM, there is nothing in the language that narrows or limits the surface of the arch to its apex.
>
> [24] Nor are the words ambiguous when read in the context of the entire contract. The "surface" of an "arch" appears again in section 2.3 of the agreement. In that section, the parties agree that if a protective membrane is required "on the surface of a bridge arch", the cost of the membrane and its installation will be split evenly between the parties. The parties do not dispute that this section requires the membrane to be applied to the entire surface of the arch.
>
> [25] In its submissions, HRM asserts that there is a significant difference between responsibility for what is <u>on</u> the surface of the arch and a responsibility that extends only <u>to</u> the surface of the arch [Justice LeBlanc's underlining]. I disagree. The interpretation of section 2.2 advanced by HRM presumes that when descending from the asphalt to determine HRM's responsibility for subsurface layers, the only relevant point of reference is the centre of the structure. This presumption is unsupported by the actual language used in the agreement. The words chosen by the parties are not reasonably capable of the meaning ascribed to them by HRM.

> [26] Since I have decided that the meaning of the words [of] section 2.2 is unambiguous, I need not consider extrinsic evidence, the doctrine of contra preferentum, or the issue of failure to achieve *consensus ad idem*.

[28] On December 11, 2013, Halifax appealed from the ruling on article 2.2.

Issues

[29] Halifax submits that the judge misinterpreted the Agreement and wrongly failed to consider the extrinsic evidence. Alternatively, if the written Agreement does not support Halifax's interpretation, Halifax says the Agreement should be declared void for absence of *consensus ad idem*.

Standard of Review

[30] In *United Gulf Developments Ltd. v. Iskandar*, 2008 NSCA 71, Justice Cromwell set out of the appellate standard of review to a judge's interpretation of a contract:

> [4] … Questions of law are reviewed on appeal for correctness. Questions of fact are reviewed for palpable and overriding (clear and determinative) error. Questions of fact include not only the findings of fact but the inferences drawn from them. Mixed questions of law and fact – the application of legal principles to the facts – are reviewed for palpable and overriding error unless there is an extractable error of law which is reviewed for correctness …
>
> [5] Applying these principles to the appellants' submissions, I conclude as follows:
>
> 1. Contractual interpretation is a question of law and therefore the judge's construction of the November 12th document should be reviewed for correctness: …
> 2. In interpreting a contract, the judge is entitled to consider, where appropriate, the surrounding circumstances. These are matters of fact and the judge's findings in relation to them should be reviewed for palpable and overriding error: …
> 3. Determining whether, in a particular situation, certain terms are essential requires the application of legal principles to the facts. Whether a term is essential is, therefore, a mixed question of law and fact. Absent some extractable error of legal principle, the judge's conclusions should be reviewed for palpable and overriding error.

[31] Justice Cromwell's first point has been modified by the Supreme Court's recent decision in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. Given the prominent role of surrounding circumstances, or the factual matrix, in the interpretation of a contract, Justice Rothstein for the Court characterized the interpretation of a contract as involving a mixed question of fact and law:

> [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. …
>
> [52] … 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.

Interpretation of Article 2.2

[32] Justice LeBlanc's reasons rested on legal principles of contractual interpretation that he drew from the 1998 decision of the Supreme Court in *Eli Lilly*, *supra*, namely: the parties' purely subjective intentions do not play an independent role in the construction of their written contract, and extrinsic evidence may not amend clear wording of a written contract.

[33] In *Eli Lilly*, Justice Iacobucci for the Court explained those principles:

> 54 The trial judge appeared to take *Consolidated-Bathurst* to stand for the proposition that the ultimate goal of contractual interpretation should be to ascertain the true intent of the parties at the time of entry into the contract, and that, in undertaking this inquiry, it is open to the trier of fact to admit extrinsic evidence as to the subjective intentions of the parties at that time. In my view, this approach is not quite accurate. The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in *Lampson v. City of Quebec* (1920), 54 D.L.R. 344 (P.C.), at p. 350:
>
> > … the intention by which the deed is to be construed is that of the parties as revealed by the language they have chosen to use in the deed itself … [I]f the meaning of the deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: "Our intention was wholly different from that which the language of our deed expresses…."
>
> 56 When there is no ambiguity in the wording of the document, the notion in *Consolidated-Bathurst* that the interpretation which produces a "fair result" or a "sensible commercial result" should be adopted is not determinative. Admittedly, it would be absurd to adopt an interpretation which is clearly inconsistent with the commercial interests of the parties, if the goal is to ascertain their true contractual intent. However, to interpret a plainly worded document in accordance with the true contractual intent of the parties is not difficult, if it is presumed that the parties intended the legal consequences of their words.

[34] Justice Iacobucci said that a contract is "possibly read in light of the surrounding circumstances". After Justice LeBlanc's decision, the Supreme Court of Canada issued its judgment in *Sattva, supra*, where Justice Rothstein for the Court expanded on the use of "surrounding circumstances":

> [43] Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law …
>
> [44] The historical rationale no longer applies. Nevertheless, courts in the United Kingdom continue to treat the interpretation of a written contract as always being a question of law …
>
> [45] In Canada, there remains some support for the historical approach. … However, some Canadian courts have abandoned the historical approach and now

treat the interpretation of written contracts as an exercise involving either a question of law or a question of mixed fact and law. …

[46] The shift away from the historical approach in Canada appears to be based on two developments. The first is the adoption of an approach to contractual interpretation which directs courts to have regard for the surrounding circumstances of the contract – often referred to as the factual matrix – when interpreting a written contract [citations omitted]. The second is the explanation of the difference between questions of law and questions of mixed fact and law provided in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para 35, and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras 26 and 31-36.

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
>
> (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)

[48] The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

> The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the

> relevant background would reasonably have been understood to mean. [p. 115]
>
> [49] As to the second development, the historical approach to contractual interpretation does not fit well with the definition of a pure question of law identified in *Housen* and *Southam*. Questions of law "are questions about what the correct legal test is" (*Southam*, at para. 35). Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties — a fact-specific goal — through the application of legal principles of interpretation. This appears closer to a question of mixed fact and law, defined in *Housen* as "applying a legal standard to a set of facts" (para. 26; see also *Southam*, at para. 35). However, some courts have questioned whether this definition, which was developed in the context of a negligence action, can be readily applied to questions of contractual interpretation, and suggest that contractual interpretation is primarily a legal affair (see for example *Bell Canada*, at para. 25).
>
> [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.

[35] In *Sattva*, Justice Rothstein explained the mechanics of the objective approach to contractual interpretation:

> [56] I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. …
>
> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, *they must never be allowed to overwhelm the words of that agreement* (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to *deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract*. The interpretation of a written contractual provision *must always be grounded in the text and read in light of the entire contract* (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, *courts cannot use them to deviate from the text* such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. B.C. Tel Mobility Cellular Inc.* (1997), 101 B.C.A.C. 62).
>
> [58] The nature of the evidence that can be relied upon under the rubric of "surrounding circumstances" will necessarily vary from case to case. It does, however, have its limits. *It should consist only of objective evidence* of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that *was or reasonably ought to have been within the knowledge of both parties* at or before the date of contracting. Subject to these requirements and the parol evidence rule discussed below, this includes, in the

words of Lord Hoffmann, "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (*Investors Compensation Scheme*, at p. 114). Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.

(c) *Considering the Surrounding Circumstances Does Not Offend the Parol Evidence Rule*

[59] It is necessary to say a word about consideration of the surrounding circumstances and the parol evidence rule. The parol evidence rule precludes admission of evidence outside the words of the written contract that would add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing (*King*, at para. 35; and Hall, at p. 53). To this end, *the rule precludes, among other things, evidence of the subjective intentions of the parties* (Hall, at pp. 64-65; and *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129, at paras. 54-59, per Iacobucci J.). The purpose of the parol evidence rule is primarily to achieve finality and certainty in contractual obligations, and secondarily to hamper a party's ability to use fabricated or unreliable evidence to attack a written contract (*United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316, at pp. 341-42, *per* Sopinka J.).

[60] The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, *not to change or overrule the meaning of those words. 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*; therefore, the concern of unreliability does not arise.

[61] Some authorities and commentators suggest that the parol evidence rule is an anachronism, or, at the very least, of limited application in view of the myriad of exceptions to it (see for example *Gutierrez v. Tropic International Ltd.* (2002), 63 O.R. (3d) 63 (C.A.), at paras. 19-20; and Hall, at pp. 53-64). For the purposes of this appeal, it is sufficient to say that the parol evidence rule does not apply to preclude evidence of surrounding circumstances when interpreting the words of a written contract. [Emphasis added]

[36] How do these principles apply to the Agreement between Halifax and CN?

[37] Halifax's factum summarizes its submission:

35. The context discloses that [Halifax] was responsible for the road and the road works which pass over the bridges while [CN] was responsible for the bridges themselves. The bridges were constructed to accommodate the rail line beneath the City's streets. As such, the context indicates that the words should be interpreted in a manner which limits [Halifax]'s responsibility to

> its roads as opposed to the [CN]'s railway bridges. There are two types of gravel or fill involved, the upper layer which relates to the road and extends from the surface of the road down to the apex of the arch and the bottom layer known as general fill which relates to and fills in the bridge structure. The context suggests that the words subsurface layers to the surface of the arch should as part of road and road works be interpreted in a manner which limits [Halifax]'s responsibility to that fill which relates to the roadway as opposed to the bridge.

Halifax says that article 2.2's use of "to" is "directional" and supports the view that its responsibility ends at the elevation where the granular fill first touches the apex.

[38] Halifax's submission channels the image of a typical city road that happens to be on a railway bridge. This road, in the nature of roads, is just several inches deep. So everything below must be to CN's account. CN counters that its railway *per se* could operate nicely without the Bridges and that the entire bridge structure, including the disputed fill, exists only to support Halifax's road.

[39] Halifax contends that its proposed interpretation at least creates an ambiguity, and the judge erred by not considering the extrinsic evidence.

[40] In short, my view is this. The text of article 2.2, read in the context of the entire written Agreement, supports the judge's interpretation. Evidence of the parties' purely subjective intentions cannot alter the parties' mutual intentions that are objectively manifested by the contractual wording of their written and signed Agreement. The surrounding circumstances comprise the objective evidence of the background facts, either known or which reasonably ought to have been known to both parties at or before the contract's signature. That evidence was properly admitted before Justice LeBlanc. The judge did not rely on that evidence. But the consideration of those surrounding circumstances supports the judge's interpretation of article 2.2.

[41] I will elaborate.

[42] Article 2.2 says that the HRM is responsible for "the subsurface layers", in the plural, without qualification. It does not confine Halifax's responsibility to what Halifax's factum (quoted above para 37) terms the "upper layer" down to the apex of the arch, and then assign to CN what Halifax's factum terms the "bottom layer".

[43] Article 2.2 says Halifax is responsible "to the surface of the arch". A surface is a plane, not a line crossing the apex of a curved plane.

[44] This construction is supported by the rest of the Agreement.

[45] Article 2.1 describes CN's responsibility:

> 2.1 CN is responsible for 100% of the maintenance of the superstructure and substructure of the bridges. This comprises the foundation, supports, arch and concrete box that forms the bridge structure. The substructure and superstructure component includes maintenance responsibility for basic handrails which meet required safety standards at the time of initial construction or at the time of required replacement of the handrails due to their condition. Any upgrade of the handrails for aesthetic or other purposes, at the request of HRM, is the responsibility of HRM.

Article 2.1 says nothing about subsurface layers or fill. The only mention of subsurface layers or fill is in article 2.2 – *i.e.* the "subsurface layers" that are allocated to HRM's responsibility. HRM's submission would mean that the Agreement explicitly assigned responsibility for the top layer of fill but neglected to specify the bottom layer.

[46] Article 2.3 says that if a protective membrane is required "on the surface of a bridge arch", Halifax and CN will split the cost 50/50. Halifax notes that article 2.3 uses "on" instead of "to". But the word "to" can apply to the entire plane of the arched surface. In Justice LeBlanc's view, with which I agree, the significance of article 2.3 is that the Agreement did not allocate responsibility based simply on Halifax's idealized model of Halifax's "road", several inches deep, sitting on CN's "bridge", meaning everything beneath. The negotiation of article 2.3 generated for Halifax a subsurface responsibility that touched the full curved plane of the arch. The question is – How did the negotiation affect article 2.2?

[47] This leads to a consideration of the surrounding circumstances, as discussed in *Sattva*. The parol evidence rule does not bar the admission of evidence showing the surrounding circumstances. That evidence was admitted here. Once admitted, the evidence is available for use by counsel and the court. The critical point is how that evidence is used. The surrounding circumstances should function to "deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract". The surrounding circumstances should not "overwhelm the words of that agreement", "deviate from the text such that the court effectively creates a new agreement", "add to, subtract from, vary, or

contradict a contract that has been wholly reduced to writing", or "change or overrule the meaning of those words". (*Sattva*, paras 57-60).

[48] Here, the telling circumstances are the communications respecting article 2.2 that passed between the parties' counsel during the to and fro of bargaining. An objective appraisal of those communications supports the judge's interpretation of that provision.

[49] Article 2.2, as executed, used the words proposed by Mr. Patenaude's letter of December 4, 2008 (above paras 19 and 22) to Halifax's counsel. That letter responded to the letter of November 20, 2008 from Halifax's Mr. Tinmouth (above para 18). Mr. Tinmouth's November 20 draft had proposed that Halifax be responsible for the "gravel subsurface layers to the top of the arch". Mr. Patenaude's reply of December 4 proposed that Halifax be responsible for "subsurface layers to the surface of the arch". Mr. Patenaude's December 4 draft underlined "surface" and said in a side-note: "Deleted: gravel", "Deleted: below the asphalt layer" and "Deleted: top".

[50] Mr. Patenaude's reference to the plural "layers" and deletion of "gravel" is reasonably interpreted as a proposal that Halifax's responsibility not be limited just to the gravel that comprises the upper layer. Rather it would extend also to the finer non-gravel fill that occupies the lower layer. Mr. Patenaude's draft replaced "top" with "surface". This is reasonably interpreted as a proposal that Halifax's responsibility extend to the entire plane of the arch's surface, and not just to the top of the crown.

[51] Mr. Tinmouth replied on January 6, 2009 with a draft that accepted Mr. Patenaude's proposed wording of article 2.2. Without further debate, that wording appeared in the formal contract executed by Halifax on March 16, 2009.

[52] In my view, the judge made no error in his interpretation of article 2.2.

Consensus ad Idem

[53] Halifax submits alternatively that the court should declare the Agreement void for absence of *consensus ad idem*.

[54] Halifax's factum summarizes its submission:

> 54. Mutual mistake occurs when both parties to a contract are operating at cross purposes in that they have a different understanding of the meaning of a

> particular contract provision. Those differing understandings, or interpretations, may be reflected in either a patent ambiguity or, alternatively, a latent ambiguity which can only be established by reference to extrinsic evidence. In the case of a mutual mistake, the disputed provision is void for failure to achieve *consensus ad idem* where there is an ambiguity which can reasonably be interpreted in more than one way, and each party interprets the ambiguity in a different contradictory way.
>
> …
>
> 60. … The Appellant considered that it was responsible for the granular fill down to the point where the surface of the arch was encountered, whereas the Respondent considered that the Appellant was responsible for all granular fill for the roadway and general fill within the bridge structure. Even if the Learned Justice found there was no ambiguity on the face of the document, he should have examined the extrinsic evidence to determine, on an objective basis whether there was *consensus ad idem* on this fundamental provision.

Halifax's factum asked that article 2.2 be severed from the Agreement. At the appeal hearing, counsel revised that request to submit that the absence of *consensus ad idem* meant the entire Agreement should be declared void.

[55] I respectfully disagree.

[56] First – a summary of the legal principles that govern the convergence of *consensus ad idem*, mutual mistake and certainty.

[57] The search for agreement focusses primarily on "the mutual and objective intentions of the parties as expressed in the words of the contract". Surrounding circumstances, consisting of "objective evidence" that "was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting", may "deepen a decision-maker's understanding" of the consensual meaning that is expressed in the written contract. The purely subjective intentions of the parties, on the other hand, are not pertinent. (*Sattva*, paras 57-59).

[58] The objective approach has consequences for the law of mistake.

[59] In *The Law of Contracts*, 6th ed (Toronto: Canada Law Book Inc., 2010), Professor S.M. Waddams explains:

> [¶ 90] … If either party had reason to know of the other's meaning, that meaning should prevail. Only if neither had reason to know the other's meaning will there be no contract….

> [¶ 319] If we start from the initial proposition that reasonable expectations are entitled to protection it follows that mistake standing alone is insufficient for relief. *One who signs a written document cannot complain if the other party reasonably relies on the signature as a manifestation of assent to the contents, or ascribes to words used their reasonable meaning*. But the other side of the same coin is that only a reasonable expectation will be protected. If the party seeking to enforce the document knew or had reason to know of the other's mistake the document should not be enforced. [Emphasis added]

[60] In *The Law of Contract in Canada*, 6th ed (Toronto: Carswell, 2011), Professor G.H.L. Fridman states:

> [page 13] **(a) The essence of contract**
>
> Agreement is at the basis of any legally enforceable contract. There must be a *consensus ad idem*.
>
> …
>
> [page 15] The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms. As Fraser C.J.A. said in *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*, [(2003), 17 Alta. L.R. (4th) 243 at 249 (C.A.)];
>
> > the parties will be found to have reached a meeting of the minds, in other words be *ad idem*, where it is clear to the objective reasonable bystander, in light of all the material facts, that the parties intended to contract and the essential terms of that contract can be determined with a reasonable degree of certainty.
>
> *Sometimes it is a simple matter to decide what the parties have manifested to each other, and consequently, whether they have agreed, and if so, upon what. This is especially true where a document containing their agreement has been prepared and signed by the parties.* … [Emphasis added]
>
> [page 17] **(b) Certainty**
>
> "The question of certainty " said Cromwell J.A. in *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, [(2000), 189 N.S.R. (2d) 1 (C.A.), leave denied (2001), 270 N.R. 196 (note) (S.C.C.)] "does not relate to the correct meaning of the words, but rather to whether the words are capable of being given a reasonably certain meaning by the

> court." The court cannot make for the parties a bargain which they themselves did not make in proper time. …
>
> [pages 249-50] (i) *Bilateral mistake*
>
> Bilateral mistakes fall into two categories. First, both parties are in error, but their mistakes are different. For example, A believes that B wishes to buy a second-hand car, which is what he is selling, while B wishes to buy a new car and believes that the car A is selling is a new car. Second, the error in the minds of both parties is the same, as, for example, where A and B believe that the car is a new car when in fact it is a second-hand car. The former has been termed "mutual" mistake, the latter "common" mistake. A theoretical distinction might be made between these two kinds of bilateral mistake.
>
> In mutual mistake the issue would seem to be: what would a reasonable person infer from the words and conduct of the parties? *If, despite their different mistakes, it would appear to the outside world that the parties were in agreement as to a contract and its terms, then a contract would exist at common law*. As it was put in one Canadian case, "mutual assent is not required for the formation of a valid contract, only a manifestation of mutual assent. … Whether or not there is a manifestation of mutual assent is to be determined from the overt acts of the parties." [*Walton v. Landstock Investments Ltd.* (1976), 72 D.L.R. (3d) 195 (O.C.A.), at p. 198, *per* Houlden, J.A.]. … [Emphasis added]

[61] In *The Law of Contracts*, 2nd ed (Toronto: Irwin Law Inc., 2012), p. 527, Professor John D. McCamus elaborates:

> The mere fact that one party suffers from a misunderstanding of one or more of the terms of an agreement does not necessarily lead to the conclusion that no *consensus* has been achieved. Where the other party correctly understands the meaning of the agreement, a *consensus* may be achieved on the basis of the objective theory of contract formation. *Notwithstanding the misunderstanding, the other party to the agreement may be entitled to rely on the mistaken party's objective manifestation of assent as a basis for the creation of a valid and binding consensus.* As Blackburn, J. observed in *Smith v. Hughes* [(1871), L.R. 6 Q.B. 597 (Div. Ct.)]: "If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party and that the other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." *Thus, even where a consensus may be said to fail at a subjective level, the consensus may be achieved on an objective basis and the contract so created is an enforceable one.* A *consensus* may fail, however, where each party has a different understanding of a

> term that is so ambiguous or vague or imprecise that neither party can insist on his or her own meaning as being the true or correct meaning of the term of which the other party has objectively assented. In such a circumstance, the common law of contract formation holds that no enforceable contract has been created. Similarly, a *consensus* will fail where one party is aware of the other party's mistaken understanding of a particular term. Again, the lack of *consensus* leads to the conclusion that no contract has been created at common law. … [Emphasis added]

[62] As discussed earlier, the reasonable interpretation of article 2.2 is that Halifax is responsible for the upper and lower subsurface layers to the full surface of the arch. As article 2.2 supports a reasonably certain meaning, it is not void for uncertainty. There is no basis to conclude that CN knew Halifax had a different and mistaken understanding of article 2.2.

[63] Consequently, Halifax's signature to the Agreement is an objective manifestation of Halifax's assent to that reasonable interpretation of article 2.2. As Professor McCamus says, whatever may be the parties' subjective views, the *consensus* is "achieved on an objective basis and the contract so created is an enforceable one".

Conclusion

[64] I would dismiss the appeal with appeal costs of $4,000 plus reasonable disbursements payable by Halifax to CN.

[65] I understand from counsel that the costs ordered in the Supreme Court have not been quantified. Those costs remain for Justice LeBlanc, if the parties cannot agree.

Fichaud, J.A.

Concurred: Farrar, J.A.

Bryson, J.A.