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Ontario Judge Applies Correctness Standard to Condominium Act Arbitrations

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His Honour distinguished the more stringent standard of review of reasonableness recently set by the Supreme Court of Canada (S.C.C.).

In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the S.C.C. followed the general trend toward increasing deference for extra-judicial decision makers, and ruled that the standard of review for appeals from commercial arbitrations is reasonableness.

Justice Smith distinguished the standard set by the S.C.C. on the basis that arbitrations under the *Condominium Act* involve parties subject to an inherent power imbalance being sophisticated condominium developers versus condominium boards, made up of unit holders with little to no experience in condominium law.

Justice Smith reviewed the reasoning in the *Sattva* decision, and also the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 (*Dunsmuir*) to assist determining the degree of deference to be afforded to arbitral decisions. However, Justice Smith did not apply the *Dunsmuir* analysis. In particular, Justice Smith did not consider whether the questions in issue involved issues of fact or law, the ability of the parties to choose an arbitrator, or the expertise of the arbitrator.

Not only is the correctness standard of review inconsistent with the approach of the S.C.C., but it is unclear that a correctness standard will actually level the power imbalance noted by Justice Smith. For example, if an arbitrator's decision favours the condominium corporation and unit holders, the less-stringent correctness standard may support an appeal by the

developer.

- Research contributed by David Shore, 2014/2015 articling student