Court of King's Bench of Alberta

Citation: Quanta Canada Holdings II ULC v Bremar Construction Ltd, 2024 ABKB 317

Date: 20240529
Docket: 2301 10599
Registry: Calgary

Between:

Quanta Canada Holdings II ULC

Applicants

- and -

Bremar Construction Ltd.

Respondent

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] The Applicant, Quanta Canada Holdings II ULC ("Quanta"), seeks leave to appeal an arbitration decision (the "Decision"). Quanta submits that the Arbitrator made errors in interpreting the Subcontract between the parties. Those errors, Quanta contends, amount to errors of law because the Subcontract is a standard form contract that is used widely in the construction industry; therefore, Quanta asserts, the statutory test for leave to appeal is satisfied. The Respondent, Bremar Construction Ltd ("Bremar"), submits that Quanta's grounds of appeal are all questions of fact or mixed fact and law; accordingly, Bremar argues, the statutory test for leave for appeal is not met.

[2] After entering the Subcontract, Quanta underwent a corporate change and is now named EHV Power ULC. The Arbitrator referred to Quanta as EHV throughout his Decision. However, to be consistent with the style of cause in the present case, I will refer to the Applicant as Quanta.

II. Background

a. The Contracts

[3] Quanta and ENMAX entered the Prime Contract for the design, materials, construction, and installation of a duct and manhole system beneath the streets of downtown Calgary (the "Project") on January 18, 2018. The Prime Contract is the product of negotiations; it is not a standard form contract.

[4] Quanta and Bremar entered the Subcontract on May 30, 2018 (the "Subcontract") pursuant to which Bremar was to provide various services for the Project. The Parties used the CCA 1-2008 Stipulated Price Subcontract ("CCA 1"). The CCA 1 is one of the standard contracts prepared by the Canadian Construction Association for use in the construction industry.

[5] The Parties selected the optional provision that specified that the terms of the Prime Contract prevailed in the event of a conflict. The Parties made certain other minor modifications to the CCA 1.

[6] The Parties agreed to submit all disputes arising from the Subcontract to arbitration pursuant to the CCDC 40 Rules. The CCDC 40 Rules are standard arbitration rules used for construction disputes.

[7] The Subcontract did not provide for an appeal of arbitration decisions.

b. The Project

[8] The Project involved the construction of a 1.5 km underground duct bank and manhole system in downtown Calgary. The duct bank and manhole system is made up of concrete encased pipes or conduits containing electrical transmission cables. A different subcontractor, not Bremar, was responsible for providing the electrical transmission cables. The Project also involved the removal and salvage of old structures and equipment.

c. The Dispute

[9] The main issue in the Dispute was whether Quanta or Bremar should be responsible for the cost of removing and replacing a significant part of the duct bank installed by Bremar. Quanta required Bremar to remove and replace the sections of duct bank and held back a significant portion of the Subcontract price, so Bremar claimed against Quanta for the cost of performing the work and the holdback. Bremar claimed that, among other things, Quanta had caused delays and failed to perform its work properly and consistent with the terms of the Subcontract, which caused the sections of duct bank to be defective and require replacement. Quanta defended the claim by asserting that Bremar was the cause of delays and failed to perform its work diligently and in accordance with the terms of the Subcontract. Quanta further counterclaimed on the basis that it was required to make unplanned expenditures to mitigate the allegedly deficient work performed by Bremar.

d. The Arbitration and Arbitration Decision

[10] Bremar commenced the Arbitration on October 29, 2021. On January 29, 2022, the parties appointed Mr. Christopher J. O'Connor, KC as Arbitrator. Mr. O'Connor is an experienced and respected arbitrator who has adjudicated many construction disputes.

[11] The Arbitration hearing was held in Calgary from March 6-15, 2023. The Arbitrator received affidavit and *viva voce* evidence. The Parties provided written submissions to the Arbitrator following the hearing. The Arbitrator rendered the 90-page Decision on July 12, 2023.

[12] The Arbitrator concluded, among other things, that:

(a) Quanta was entitled to order that the duct banks be inspected to determine if they complied with the Subcontract requirements. If the work was not defective, then Quanta was required to pay the cost of examination and restoration;

(b) Quanta's communications to Bremar should be characterized as a direction to examine and determine whether the work conformed to the requirements of the Subcontract, not a decision that the work was defective. The Arbitrator concluded that the work performed by Bremar was not defective, so Quanta was responsible for the cost of the work performed by Bremar; and

(c) Bremar met the notice requirements under the Subcontract and at common law because, for among other reasons, Quanta never made a decision in writing with respect to the requirements of the Subcontract. The Arbitrator found that such a decision was required to commence the notice period.

[13] The Arbitrator awarded Bremar $8,137,116 plus 80% of its reasonable legal fees, plus disbursements and Arbitration expenses. Only a portion of the Award is contested in these appeal proceedings.

III. The Test for Leave to Appeal an Arbitration Award

a. *Arbitration Act* s 44

[14] The *Arbitration Act* s 44 grants parties a limited right of appeal. An appeal is limited to questions of law unless the parties agree to a broader right of appeal. The Court is only to grant leave to appeal where the requirements of s 44 are satisfied. The parts of s 44 relevant to this application provide as follows:

(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may, with the permission of the court, appeal an award to the court on a question of law.

(2.1) The court shall grant the permission referred to in subsection (2) only if it is satisfied that

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and

(b) the determination of the question of law at issue will significantly affect the rights of the parties.

(3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

[15] The next two subsections of these Reasons address issues relevant to *Arbitration Act* s 44(2.1) and (3). Whether the proposed appeal grounds raise questions of law as required by *Arbitration Act* s 44(2) is dealt with later in a separate section of these Reasons.

b. Importance to the Parties

[16] Courts have not provided a good explanation as to what the *Arbitration Act* s 44(2.1)(a) requirement that "the importance to the parties of the matters at stake in the arbitration justifies an appeal" means. Without any principled framework to guide their reasoning, in each case judges have applied their idiosyncratic senses of what is important to the parties. This problem is not unique to Alberta as similar "importance to the parties" language is found in the appeal provisions of arbitration statutes of most provinces: see *The Arbitration Act***,** CCSM c A120 s 44(2); *The Arbitration Act*, 1992, SS 1992, c A-24.1 s 45(2)(a); *Arbitration Act*, 1991, SO 1991, c 17 s 45(1)(a).

[17] For many years, Alberta courts interpreted the words "importance to the parties" as a requirement that the matter proposed to be appealed have some degree of public importance: see ***Fuhr Estate v Husky Oil Marketing Company***, 2010 ABQB 495 at paras 92-96 and especially the cases cited at para 94. Alberta courts have now clarified that public importance is not required for leave: ***Capital Power Corporation v Lehigh Hanson Materials Limited***, 2013 ABQB 413 at para 35; ***Schafer v Schafer***, 2023 ABKB 448 at para 30.

[18] The Manitoba Court of Appeal endorsed a variation on the old Alberta approach in ***Winnipeg Airports Authority Inc v EllisDon Corp***, 2011 MBCA 51. The Court held at paragraphs 46 and 49 that in assessing the "importance to the parties" criterion, the Court may assess whether the proposed appeal has some importance beyond the dispute itself (*i.e.* that it has precedential value). A dispute that has precedential value may be important to both the parties and the public at large; thus, justifying the Court hearing the appeal.

[19] The BC Court of Appeal has taken a different approach that focusses on the dispute itself. Newbury JA, in ***JEL Investments Ltd v Boxer Capital Corporation***, 2011 BCCA 142 at para 29, held that the size of the dispute alone could support an inference that the matter was important to the parties. Justice Khullar, as she then was, in ***KBR Industrial Canada Co v Air Liquide Global E&C Solutions Canada LP***, 2018 ABQB 257 at para 76 pushed back against this idea holding that where the parties were large corporations, showing that an appeal was worth a significant sum of money was not sufficient on its own to establish the importance of the appeal to the parties.

[20] *Arbitration Act* s 44(2.1) is a materiality test. An appeal must be material to the parties to justify it being heard by the Court. This means that it must have a significant effect on the parties' rights in a way that is important to the parties. Where a proposed appeal will have a significant impact on rights, that impact will often be important to the parties if there are sizeable financial consequences or if the case has implications for the business of the parties or where the decision has broader precedential value.

[21] The approach that I use to determine if the proposed appeal is important to the parties is as follows:

(a) Where the determination of rights, not the value of the dispute, is asserted to satisfy the importance requirement, the appellant bears the burden to establish that the proposed appeal's impact on the parties' rights alone is important to the parties. This can be accomplished by showing that the decision has a material effect on the conduct of a party's business or by demonstrating the proposed appeal's precedential value to the parties or the public. Public in this sense includes a sub-set of the public such as participants in an industry.

(b) Where an impact on rights is established and where the value of the dispute is alleged to be the basis that the proposed appeal is important to the parties, the appellant must first establish that the value of the appeal is material to the dispute. If the proposed appeal has the potential to reverse a significant part of the arbitral decision measured in money terms, then it is material to the dispute. For this purpose, it is useful to adopt an informal guideline as to materiality. For present purposes, in my view, an appeal must be credibly valued at 25% or more of an arbitral decision to qualify as material. If the appellant establishes that the value of the appeal is material to the dispute, the Court may consider evidence of the size and financial capacity of the parties to determine whether the appeal is nevertheless unimportant to the parties.

[22] The proposed appeal in the present case concerns $5,121,518 of the total damages awarded by the Arbitrator of $8,137,116 which is 63% of the total arbitral award. The proposed appeal is material to the dispute. Consistent with the approach of Newbury JA in ***JEL Investments***, this amount is large enough to support an inference that the proposed appeal is of importance to the parties.

[23] The Respondent has adduced evidence that Quanta is part of an international corporate group that is a significant player in the construction industry. Quanta's parent company has assets of more than $15 billion and more than 200 direct and indirect subsidiaries. If Quanta's parent company was the party in the present case, I would have no trouble finding that the proposed appeal was not of importance to Quanta's parent company. The problem with the evidence adduced by Bremar is that it does not concern Quanta, it concerns Quanta's parent company or the whole Quanta family of companies which are not parties to this dispute.

[24] Though it may seem formalistic at times, the law provides that separate corporate personality must be respected. See, for example, ***Dow Chemical Canada ULC v Nova Chemicals Corporation***, 2014 ABCA 244, where the Court of Appeal denied an attempt to compel production of documents from a parent corporation and ***Chevron Corp v Yaiguaje***, 2015

SCC 42 where the Supreme Court of Canada ruled that a judgment against a US parent corporation could not be enforced against a Canadian subsidiary. I see no reason to make an exception to this approach in the context of applications for leave to appeal arbitration awards. The evidence that a respondent must adduce to show that a dispute is not material to a party must be evidence concerning that party. The evidence that Bremar has adduced concerning the significant size and financial resources of the corporate family to which Quanta belongs does not establish that the proposed appeal is not important to Quanta.

[25] The proposed appeal also concerns the interpretation of a widely used standard form construction industry agreement, the CCA 1. The parties, being involved in the construction industry, have an interest in settling the meaning of standard form construction agreements. I find that there is precedential value in settling the meaning of the standard form construction agreement that makes the proposed appeal of importance to the parties and the broader construction industry.

c. Questions Expressly Referred to the Arbitral Tribunal

[26] Bremar submits that s 44(3) precludes the grounds of appeal raised by Quanta because the questions were all, in effect, submitted to the Arbitrator. The weight of authority, however, holds that a question of law "expressly referred to the arbitral tribunal" does not include all questions of law that the arbitral tribunal must implicitly decide to dispose of the case. The exclusion in s 44(3) refers to questions of law that are specifically and expressly posed to an arbitration panel: ***Driscoll v Hautz***, 2017 ABQB 168 at para 19; ***KBR*** at para 62; and ***1010805 Alberta Ltd v Sundial Growers Inc***, 2024 ABKB 173 at para 18. The appeal in the present case does not concern any questions of law that were specifically referred to the Arbitrator.

IV. Do the Grounds of Appeal Raise Questions of Law?

a. The Grounds of Appeal

[27] Quanta identified the following grounds of appeal in its Originating Application:

a. The Arbitrator erred in law by incorrectly interpreting provisions of the standard form CCA 1 2008 subcontract, including:
    (a) SCC 2.2 "Review and Inspection of the Work";
    (b) SCC 2.3 "Defective Work";
    (c) SCC 6.6 "Claims for a Change in Subcontract Price";
    (d) SCC 8.2 "Negotiation, Mediation and Arbitration"; and
    (e) SCC 12.2 "Waiver of Claims";
b. The Arbitrator erred in law by incorrectly identifying and applying the common law regarding notice of a claim; and
c. The Arbitrator erred in law by failing to identify the common law of contractual interpretation and correctly apply that law of contractual interpretation.

[28] Quanta's grounds of appeal are restated in its written submissions. The essence of Quanta's objection to the Decision is that the Arbitrator did not accept Quanta's submission that

Bremar acquiesced to Quanta's decision that the work was defective and did not comply with notice requirements in the Subcontract to dispute Quanta's decision.

b. Is the Interpretation of the CCA 1 a Question of Law?

[29] Rothstein J, writing for the Court in ***Creston Moly Corp v Sattva Capital Corp***, 2014 SCC 53 at para 50 held that "[c]ontractual interpretation involves issues of mixed fact and law." Two years later, Wagner J, as he then was, writing for the majority in ***Ledcor Construction Ltd v Northbridge Indemnity Insurance Co***, 2016 SCC 37 clarified at paragraphs 19-24 that ***Sattva*** does not apply to standard form contracts. Wagner J held that interpretation of standard form contracts is a question of law that is subject to appellate review on the correctness standard.

[30] The Respondent submits that the ***Ledcor*** rule that the interpretation of standard form contracts is a question of law only applies if the standard form contract is a contract of adhesion. Contracts of adhesion are typically standard form contracts that are drafted by a business entity as a condition of doing business or providing a service, often to consumers: ***Seidel v TELUS Communications Inc***, 2011 SCC 15 at para 47 and ***SR Petroleum Sales Ltd v Cdn Turbo*** (1995), 175 AR 52 (ABQB) at 57-58 *per* Veit J.

[31] The Respondent asserts that the Court's rationale for deeming the interpretation of standard form contracts to be a question of law is so that the Court, through correctness review, can protect the interests of vulnerable parties who have no alternative but to accept contracts of adhesion. The Respondent submits that such considerations are absent in the present case, so the Court should find that no question of law has been raised. While concerns about power imbalances may inform the rule in ***Ledcor***, in my view, the rule is not limited to standard form contracts that are contracts of adhesion.

[32] An important reason why correctness review applies to standard form contracts is because they are "common throughout an entire industry": ***Ledcor*** at para 39. See also, ***EnCana Oil & Gas Partnership v Ardco Services Ltd***, 2017 ABCA 401 at para 57, Justice Schutz in dissent but not on this issue, and ***Funk v Wawanesa Mutual Insurance Company***, 2018 ABCA 200 at para 29. Standard or model form contracts, like the Canadian Construction Association form in issue in the present case, perform a quasi-regulatory function by providing a common set of rules for use by participants in an industry. Just as there is a public interest in consistency in the interpretation of statutes and regulations, there is a public interest in the consistent interpretation of standard form agreements used widely in an industry.

[33] Consistent interpretation of standard form contracts is best maintained by correctness review by Courts and the system of *stare decisis* or precedent. Justices Slatter and O'Ferrall explained in ***Styles v Alberta Investment Management Corporation***, 2017 ABCA 1 at para 19:

> An exception exists, however, for standard form contracts and standard form contractual wording where "there is no meaningful factual matrix that is specific to the parties to assist the interpretation process". In such cases the precedential value of the decision overrides. Such contracts cannot have one interpretation in one situation, and another in the next. As a result, the standard of review of standard form wording is correctness [citation omitted].

[34] In addition to affirming precedent as an important rationale for correctness review of the interpretation of standard form contracts, Slatter and O'Ferrall JJA seemingly broadened the question of law category in ***Ledcor*** from "standard form contracts" to "standard form contractual

wording." This formulation has not been followed outside Alberta, but a subsequent Alberta case cites ***Ledcor*** as the reason to apply the correctness standard to the interpretation of "standard wording" in an insurance policy: ***Builders Capital (2014) Ltd v Aviva Insurance Company of Canada***, 2022 ABCA 120 at para 25. However, it is not necessary to determine whether the ***Ledcor*** principle has been extended by ***Styles*** to apply to "standard wording" because, as will be explained later in these Reasons, I find that in the present case the parties used a standard form contract.

[35] The question of whether the interpretation of a standard form contract is a question of law is not settled by establishing that the contract is a standard form contract. Wagner J in ***Ledcor*** explained at para 48:

> Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard form contract that is specific to the particular parties assists in the interpretation. Deference will also be warranted if the parties negotiated and modified what was initially a standard form contract, because the interpretation will likely be of little or no precedential value. There may be other cases where deferential review remains appropriate.

Accordingly, to determine whether the interpretation of the CCA 1 in the present case is a question of law, I must consider whether the standard form was modified, the extent to which it was modified, and whether the modifications mean that the interpretation of the standard form would have little precedential value.

[36] The ***Ledcor*** analytical framework requires me to answer the following questions:

(a) Is the agreement a standard form contract?

(b) Has the standard form contract been modified in a material way?

(c) Is there a meaningful factual matrix specific to the parties to assist the interpretation process?

(d) Would the interpretation of the standard contract or clause in issue have precedential value?

[37] ***Ledcor*** is a response to the conclusion in ***Sattva*** that the factual matrix surrounding the formation of a contract necessarily means that all questions of contractual interpretation are questions of mixed fact and law. Concluding that a contract is a standard form and that ***Ledcor*** applies does not mean that a question of law has necessarily been raised. A court must still consider whether the asserted ground of appeal is an independent question of interpretation (*i.e.* a question of what the applicable legal standard is) or if it is problem with the application of the contractual legal standard to the facts of the case: ***Teal Cedar Products Ltd v British Columbia***, 2017 SCC 32 at para 45. This point is explained well by Hunter JA in ***Trenchard v Westsea Construction Ltd***, 2020 BCCA 152 at para 43:

> Thus, if the interpretation of the Lease involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, the interpretation by the trial judge should be reviewed on a correctness

> standard. The application of the interpretation of the Lease to the particular circumstances of the dispute remains a question of mixed fact and law, and is subject to deferential review, absent the identification of an extricable question of law. [emphasis added]

[38] The approach described in ***Trenchard*** is consistent with ***Housen v Nikolaisen***, 2002 SCC 33 at para 27 which provides that the application of the correct legal standard to the facts of a case resulting in an allegedly wrong result raises only a question of mixed fact and law.

c. Analysis Using the *Ledcor* Framework

i. The Positions of the Parties

[39] Quanta submits that the Subcontract is a standard form contract that is widely used throughout the construction industry and that, accordingly, questions concerning its interpretation are questions of law reviewable on the correctness standard.

[40] Bremar submits that the Subcontract is not a standard form contract because it is not self-contained and has been modified. Bremar asserts that despite originating as a standard form, the CCA 1 in the present case exists within a factual matrix that is relevant to a decision-maker charged with interpretation because it incorporates the Prime Contract and has been modified.

ii. Is the CCA 1 a Standard Form Contract?

[41] The CCA 1 is a form of subcontract that has been drafted and approved for use by the Canadian Construction Association. The CCA 1 is not a contract of adhesion like a rental car agreement. The CCA 1 is designed to be used by construction industry participants who have both agency and sophistication.

[42] Excerpts from the Alberta Construction Association (ACA) website provided in an affidavit relied on by Quanta explain what the ACA calls “industry standard contracts”, which includes the CCA 1, in the following terms:

> The Canadian Construction Documents Committee (CCDC) develops, produces, and reviews standard construction contracts, forms and guides. It is a national joint committee, formed in 1974, and includes representation from across the Canadian construction industry.
>
> ...
>
> CCDC documents are used in contractual arrangements across the Canadian construction industry. They provide cost savings through balanced standard contract forms, and help to ensure standardization for bidding and contracting procedures. Each year, more than 50,000 copies of CCDC documents are sold.
>
> By using uniformed and standardized documents from CCDC, practitioners in the Canadian construction industry are using documents that are:
>
> - relied upon as familiar industry standards,
> - developed through a collaborative and consensus-based approach that allows for the serious consideration of rights, interests and obligations of all parties,

- protect the interest and preserve the rights of all parties involved in a construction project, and
- provide balance, uniformity and standardization for bidding and contracting procedures.

[43] I accept the description of the nature and purpose of Canadian Construction Association standard form contracts on the ACA website and am satisfied that the CCA 1 is a standard form contract.

iii. Has the CCA 1 Been Modified in a Material Way?

[44] The modifications to the CCA 1 are minor and consistent with the way in which the CCA 1 was designed to be used. The CCA 1 has blank spaces that parties are to fill with their names, the contract amount, and the contract dates. These blank spaces were completed. The parties also modified the interest rates applicable to late payments by striking out the standard percentages above the prime rate. None of these modifications alter the meaning of the text of the CCA 1.

[45] The CCA 1 provides two sets of clauses for parties to choose between to define the relationship between the Prime Contract and the CCA 1. Parties may choose either clauses from the A group (1A, 2A, and 3A) or the B group (1B, 2B, and 3B).

[46] Bremar's main argument is that CCA 1 clause 2A provides that the terms of the Prime Contract are binding on the parties and, in the event of a conflict between the wording of the CCA 1 and the Prime Contract, the wording of the Prime Contract prevails. Bremar submits that because the Prime Contract was negotiated between ENMAX and Quanta, there is a relevant factual matrix that must be considered when interpreting the CCA 1.

[47] I would agree with Bremar if Quanta's grounds of appeal required interpretation of the Prime Contract or if Bremar provided a plausible response to the grounds of appeal that involved interpretation of the Prime Contract. Instead, the grounds of appeal all relate to the CCA 1 and the CCA 1 clauses in issue have not been modified from their standard form. Bremar has not advanced any argument why the standard terms of the CCA 1 should be read in a special way because of the factual matrix relevant to the Prime Contract.

iv. Is There a Meaningful Factual Matrix?

[48] The factual matrix that may be used for the purpose of interpreting a contract includes "the surrounding circumstances known to the parties at the time of contract formation": ***Corner Brook (City) v Bailey***, 2021 SCC 29 at para 35. The only factual matrix Bremar alleged to be relevant to the interpretation of the CCA 1 is the factual matrix surrounding the formation of the Prime Contract. The previous subsection of these Reasons explains why the factual matrix surrounding the Prime Contract is not relevant to the interpretation of the standard terms of the CCA 1. There is no suggestion that the CCA 1 has its own factual matrix relevant to the task of interpretation.

v. Will the Interpretation of the CCA 1 Have Precedential Value?

[49] Canadian Construction Association standard form agreements, like the CCA 1 in the present case, are widely used in the construction industry. The interpretation of these standard forms is accordingly of significant interest to the industry: ***Prairie Roadbuilders Limited v***

Flatiron-Dragados-Aecon-Lafarge JV, 2019 ABQB 934 at para 91. A decision from this Court that interprets the terms of the CCA 1 would have precedential value.

vi. Interpretation vs Application

[50] The proposed grounds of appeal primarily relate to the section of the Decision under the heading "Notice" which begins at page 74 (para 277) and runs to page 79 (para 296). The critical paragraphs are 289-292 which read as follows:

> [289] As noted earlier, EHV relies in its closing submissions on SCC 8.2.1. It is found under the heading 8.2 "Negotiation, Mediation, and Arbitration." It provides that the Subcontractor will be deemed to have accepted the decision of the Contractor under paragraph 8.1.1 unless, within 7 working days after receipt of that decision, the Subcontractor sends a notice in writing of a dispute to the Contractor. The notice is required in respect of a decision made by the Contractor under SCC 8.1.1, which provides that the Contractor shall decide on questions arising under the Subcontract and interpret the requirements therein. The decision is required to be given in writing, and in exercising its decision, the Contractor is required to use its powers to enforce the faithful performance of the Subcontract by both parties.
>
> [290] In my view, this section has no application, as there was no decision in writing made by EHV with respect to the requirements of the Subcontract. EHV relied upon SCC 2.3.1 to reject work that it believed failed to comply with the Contract documents and was defective, and it directed that Bremar correct the perceived defective work. There was no dispute that could be the subject of the dispute resolution process in SCC 8.2 and there was no objective and considered determination of the dispute by EHV in writing with respect to the interpretation or the requirements of the Contract.
>
> [291] EHV also relies upon Article 6.1(f) of the Prime Contract, which is found under Article 6.1, "Contractor's Roles and Responsibilities." It provides that the contractor shall give written notice, within 72 hours, of any decision of the project manager that it believes to be at variance with the contract documents or to be in error. In my view, this section is not applicable as there is no decision or determination of a project manager that is at issue in this arbitration. In addition, the decision of the project manager that is addressed in the subsection is the decision of the project manager referred to in the articles that preceded Article 6.1(f). I also accept Bremar's submission that the article does not include any language deeming the project manager's decision to have been accepted if notice was not provided within 72 hours. Accordingly, it cannot constitute a waiver of rights for falling to give notice.
>
> [292] In my view, the circumstances of this case are governed by SCC 2.3.1 and SCC 2.2.5. EHV was of the view that the construction of the conduits constituted defective work because the work failed to comply with the subcontract documents. I have found that the work was not defective and that EHV breached its obligation under the Contract to clean and swab the conduits prior to the mandrel pull. In my view, EHV's directions to rebuild were, in effect, directions to examine that the work conformed to the requirements of the subcontract

> documents under SCC 2.2.5. As I have found that the work did conform to the subcontract documents, it follows that Bremar is entitled to the cost of the examination and restoration of the work. It is clear from this section that notice was not required, as the section provides a remedy for compensation for Bremar if the work is not found to be defective but says nothing about notice.

[51] The Arbitrator found that Bremar was not required to provide notice within 7 days pursuant to SCC 8.2.1 because Quanta had not made a "decision in writing" that Bremar's work was defective pursuant to SCC 8.1.1. Instead, the Arbitrator characterized Quanta's communications and actions as a direction that the work be examined to determine if it complied with the Subcontract Documents pursuant to SCC 2.2.5.

[52] Quanta's position is that the Arbitrator's characterization of Quanta's communications is wrong, and the Arbitrator's corresponding application of SCC 2.2.5 is wrong in law because SCC 2.2.5 provides:

> The Contractor may order any portion or portions of the Subcontract Work to be examined to confirm that such work is in accordance with the requirements of the Subcontract Documents. If the work is not in accordance with the requirements of the Subcontract Documents, the Subcontractor shall correct the work and pay the cost of examination and correction....

[53] Quanta submits that SCC 2.2.5 could not apply because Quanta's notice to Bremar indicated that an examination had already been performed by Quanta and it had been determined that the work was defective. Hence, Quanta's issuance of a notice of breach of contract to Bremar on November 8, 2018. According to Quanta, its notice of breach and instruction to Bremar to remediate the work was a "decision in writing" within the meaning of SCC 8.1.1 that triggered the 7-day time limit in SCC 8.2.1 for Bremar to dispute Quanta's decision.

[54] Quanta submits that the Arbitrator found at paragraph 290, quoted above, that Quanta relied on SCC 2.3.1 to reject the work that it believed failed to comply with the Subcontract Documents. The Arbitrator went on to say that despite the rejection of the work there was no dispute that could be the subject of the dispute resolution process in SCC 8.2. Quanta submits that if a Subcontractor does not dispute the rejection of work by a Contractor, then the Subcontractor has accepted the rejection. Quanta submits that the Arbitrator "committed an error in law to find that because the Subcontractor did not question the rejection of the work, that means there was no dispute at the time and therefore the Subcontractor was entitled to ignore the notice requirements."

[55] Quanta's position is, in essence, that Quanta provided Bremar with written notice that it had determined that Bremar's work was defective. Bremar acquiesced to Quanta's position that the work was defective and undertook remediation work without protest. Quanta submits that if Bremar wished to dispute Quanta's position that the work was defective, it was required to follow the process in SCC 8.2.1, including respecting the 7-day period within which to make an objection. Quanta submits that it "is a legal absurdity that a Subcontractor can evade timely notice requirements [in SCC 8.2.1] by agreeing with the Contractor's determination under SCC 2.3.1 of defect and then performing the remediation without any protest...."

[56] There is no dispute as to what the terms of the Subcontract mean so correctness review pursuant to ***Ledcor*** does not come into play. Instead, the grounds of appeal relate to the

Arbitrator's fact-finding and how the Arbitrator applied the terms of the Subcontract to the peculiar facts of the case. These are questions of mixed fact and law. Consistent with ***Trenchard*** and ***Housen***, then, the question is whether there are any extricable questions of law. This is, of course, because leave to appeal may only be granted under section 44(2) of the *Arbitration Act* on questions of law.

[57] The grounds of appeal boil down to the Arbitrator's characterization of Quanta's communications and actions and the corresponding application of the sections of the Subcontract to the facts as characterized. Though I recognize that legal conclusions are sometimes implicit in the characterization of facts and in some cases questions of law may be extricable when a decision-maker characterizes facts, that is not true in the present circumstances. The Arbitrator's legal conclusions cannot be intelligibly separated from his fact-finding and characterization of the facts. The grounds of appeal raised by Quanta are quintessential questions of mixed fact and law and, in my opinion, there are no extricable questions of law.

X. Conclusion

[58] The application for leave to appeal the Decision is dismissed. If the parties are unable to agree on costs, they may make submissions of 5 pages or less supported by a Bill of Costs on or before June 14, 2024 or such other date as the parties may agree upon and advise the Court.

Heard on the 3rd day of May, 2024.
Dated at the City of Calgary, Alberta this 29th day of May, 2024.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Mike Preston & Brian McLean, McLean & Armstrong LLP
for the Applicant

Scott Hammel, KC, Fergus Schappert & Haley Edmonds Miller, Thomson LLP
for the Respondent