COURT OF APPEAL FOR ONTARIO

CITATION: Canada Forgings Inc. v. Atomic Energy of Canada Limited, 2024 ONCA 677
DATE: 20240912
DOCKET: COA-23-CV-0135

2024 ONCA 677 (CanLII)

van Rensburg, Zarnett and George JJ.A.

BETWEEN

Canada Forgings Inc.

Plaintiff (Appellant)

and

Atomic Energy of Canada Limited

Defendant (Respondent)

Geoff R. Hall, for the appellant

Roger Gillot, Lia Bruschetta and Hannah Davis, for the respondent

Heard: April 8, 2024

On appeal from the judgment of Justice John Krawchenko of the Superior Court of Justice, dated January 6, 2023, with reasons reported at 2023 ONSC 4530.

George J.A.:

[1] The appellant, Canada Forgings Inc., is a forge shop based in Welland, Ontario. It produces custom steel forgings, including end fitting forgings for use in

the nuclear industry. The respondent, Atomic Energy Canada Ltd. (“AECL”), designs, constructs and refurbishes CANDU[1] nuclear reactors.

[2] The appellant’s initial statement of claim sought $18.5 million in damages against several named defendants, including AECL, Ian Salgo (an AECL employee), and Linamar Holdings Inc. (“Invar”).[2] This claim alleged seven distinct causes of action including defamation, civil conspiracy, criminal conspiracy and various forms of tortious conduct.

[3] In September 2007, AECL successfully moved to strike most of the causes of action as well as the claim against Mr. Salgo personally, leaving only the appellant’s defamation claim against AECL. In April 2009, the appellant moved to add a procurement law claim for an alleged breach of the duty of fairness. AECL, while reserving its right to argue that the procurement law claim was statute-barred and disclosed no valid cause of action at trial, consented to the amendment. In March 2013 the action against Invar was dismissed. Then, in August 2013, AECL was granted partial summary judgment dismissing the appellant’s claim for defamation, which left only the procurement law claim for trial.

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[1] CANDU (Canada Deuterium Uranium) is a Canadian pressurized heavy-water reactor design used to generate electric power.

[2] Invar Manufacturing Limited, which produces machined products for the nuclear industry, was amalgamated with several other subsidiaries of Linamar Holdings Inc.

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[4] The two primary issues at trial were 1) whether the appellant's procurement law claim was barred by the two-year limitations period, and 2) whether, in breach of an alleged duty of fairness under procurement law, AECL was liable for "steering" the end fitting forgings work away from the appellant towards one of its competitors, Patriot Forge Co. ("Patriot"). In addition, there was a dispute about whether the appellant should be permitted to call Tushaar Lakhotia, of Deloitte LLP ("Deloitte"), as a witness. Deloitte had been retained by AECL to prepare a report on its procurement practices (the "Deloitte Report"), which Mr. Lakhotia authored.

[5] The trial judge dismissed the action on the basis that the duty of fairness claim was discoverable prior to April 2007, two years before the appellant amended its statement of claim to add a procurement law claim against the respondent, and was therefore statute-barred. He also rejected the appellant's procurement law arguments. Furthermore, while he did not prevent the appellant from calling Mr. Lakhotia as a witness, the trial judge determined that the Deloitte Report was inadmissible.

[6] The appellant argues that 1) the trial judge's reasons are insufficient and do not permit meaningful appellate review, and 2) the trial judge erred by refusing to admit the Deloitte Report, which the appellant argues effectively prevented it from calling Mr. Lakhotia as a witness. The appellant seeks a new trial before a different judge. If the appeal is otherwise dismissed, the appellant seeks leave to appeal

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the costs order made on July 7, 2023, and, if leave is granted, appeals the costs order.

BACKGROUND FACTS

[7] Anticipating the need for refurbishments, the CANDU Owners Group retained AECL in 2004 to prepare an industry capacity assessment report. AECL canvassed suppliers, including machine shops, to inquire about their rates, their timeframes, and any potential problems they might have with the supply of materials. Both the appellant and Patriot were end fitting forgings suppliers. Precision Nuclear Inc. ("PNI"), Donlee Precision ("Donlee"), and Invar were the three machine shops capable of manufacturing end fitting components for the nuclear industry.

[8] At this time, AECL hoped to secure contracts for the two refurbishment projects that were at issue in this trial: one at the nuclear power plant operated by Bruce Nuclear in Ontario (the "Bruce Project"), and the other at a nuclear power plant in Point Lepreau, New Brunswick (the "Lepreau Project"). In July 2004, when it learned of the potential refurbishment work, the appellant sent quotes for end fitting forgings directly to Invar, Donlee and PNI – though only Donlee had requested this quote; the other two submissions were unsolicited.

[9] In September 2004, AECL issued a call for tenders for the Bruce Project (the "Bruce Tender") to Invar, Donlee and PNI, the shops that could supply end fittings.

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Responses were due on October 12, 2004, and the bids were to be valid for 180 days, expiring on April 10, 2005. AECL did not issue any tender for end fitting forgings directly to either the appellant or Patriot.

[10] In advance of the October deadline for bids, the appellant sent fresh quotes to Donlee and PNI, but not to Invar. Patriot sent quotes to all three machine shops. All three in turn submitted bids to AECL to supply the end fittings for the Bruce Project. Invar and Donlee's bids had Patriot as their only forgings supplier, while PNI included both the appellant and Patriot. Invar's general manager Rob Reid, who passed away before the trial, deposed that Patriot was Invar's sole supplier of end fitting forgings and that, even though the appellant's unsolicited bid was cheaper, he did "not think that the price differential warranted a greater look into changing suppliers", because "the quality of [Patriot's] workmanship and of the products were well-known to us and their pricing was satisfactory".

[11] AECL's engineering and procurement departments ultimately concluded that 1) PNI's bid (which was the only one to involve both the appellant and Patriot) was technically non-compliant as PNI was not yet qualified to manufacture end fittings, 2) Donlee's bid was roughly $5 million more expensive than Invar's, and 3) Invar's bid was the lowest technically compliant bid. The trial judge accepted AECL's evidence that when evaluating bids, technical compliance with specifications was most important, and that price and delivery were only secondary considerations. In any event, Invar was AECL's presumptive choice.

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[12] However, by April 2005, the expiration date for the submitted tenders, AECL had not yet finalized its construction contract with Bruce Nuclear, and therefore had not awarded anyone a contract for end fittings.

[13] At trial, the appellant argued that AECL did not treat the initial September 2004 Bruce Tender as having come to an end, but rather modified the tender and extended it beyond the April expiry date for the quotes. Specifically, the appellant argued that AECL altered the structure of the Bruce Tender and "looped" the procurement of end fittings and end fitting forgings into a process originally designed for the procurement of end fittings alone. The appellant took the position that this was unfair because by involving only Donlee and Invar in the modified process, both of which used Patriot as their only forgings supplier, AECL effectively excluded the appellant from consideration.

[14] By the fall of 2005, negotiations between Bruce and AECL had still not yet concluded. Despite this hold up, AECL wanted to ensure that it had a sufficient supply of end fitting forgings in order to avoid disruptions and delays later on. To that end, AECL sought confirmation from Invar that it would maintain the pricing and delivery terms contained in its initial bid. AECL did not disclose to anyone, not even to Invar, that Invar was its presumptive choice.

[15] To give itself a further measure of security while things remained unsettled, AECL issued a letter of intent ("LOI") to Patriot, Invar's sole supplier. The LOI

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allowed AECL to "hedge its bets" by ensuring a timely supply of materials. It also facilitated Patriot's ability to order the materials necessary to build the end fitting forgings, should it be asked to do so. In addition, the LOI included an indemnification to Patriot to cover its out-of-pocket expenses should it ultimately not receive a purchase order from Invar, or any other machine shop:

> [I]f Patriot Forge Co. do not receive orders for the End Fitting Forgings for Bruce Units 1 & 2 and Lepreau, AECL shall guarantee that Patriot Forge Co. shall be paid for all reasonable out of pocket expenses in both time and material provided that these costs are substantiated and supported with documentary evidence of such costs.

[16] An AECL representative testified, and the trial judge accepted, that the LOI was not a purchase order and that its purpose was only to ensure that Patriot could, without risk, secure the necessary materials to fill an order from a machine shop, should it receive one.

[17] By late 2005, the scope of the Bruce Project had been reduced from what was initially contemplated. This was communicated to Invar by way of an addendum document – though not to Donlee or PNI. The appellant argued that this "addendum" (which references the original tender) supported its position that there was an extension or continuation of the expired tender process. The trial judge rejected that submission, accepting instead the evidence of Mr. Salgo of AECL, who explained that the term "addendum" was used at the request of AECL's

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engineering department so that they could update the technical specifications in their computer system, and that it had no significance beyond that.

[18] Invar was officially awarded the Bruce contract in December 2005. In April 2006, Invar issued a purchase order to Patriot for the end fitting forgings.

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DECISION BELOW

[19] The trial judge dismissed the action. He found that the appellant's procurement law claim was barred by the two-year limitation period. While the limitations question was dispositive, the trial judge also went on to address the procurement law issues. He rejected the appellant's arguments, finding that AECL had not steered the end fitting forgings work away from the appellant and towards Patriot. The trial judge further held that the Deloitte Report was inadmissible, which led the appellant not to call its author as a witness.

[20] After inviting and receiving written submissions, the trial judge awarded costs to AECL in the all-inclusive amount of $1,837,380.21.

ANALYSIS

Sufficiency of Reasons

[21] The appellant's complaint is that the trial judge's reasons are insufficient. I will start by setting out some of the principles that apply to appeals of this nature.

[22] Appellate courts have often commented on the "unfortunate trend" of appellants alleging inadequacy of reasons in order to add heft to otherwise weak

appeals: *Gendron v. Doug C. Thompson Ltd. (Thompson Fuels)*, 2019 ONCA 293, at para. 94, leave to appeal refused, [2019] S.C.C.A. No. 228. This court recently addressed this ground of appeal in *Farej v. Fellows*, 2022 ONCA 254, at para. 45, leave to appeal refused, [2022] S.C.C.A. No. 180, emphasizing two key points with respect to the sufficiency of reasons assessment. First, the overarching question is whether the reasons functionally permit meaningful appellate review. Even if the reasons are deficient, this ground of appeal will fail if despite the shortcomings a meaningful review can be conducted. Second, in determining whether the reasons are sufficient, they must be considered contextually. Relevant context includes the issues raised, the evidence adduced, and the arguments made at trial.

[23] The duty to provide adequate reasons has four objects: 1) to justify and explain the result; 2) to explain to the unsuccessful party why they were unsuccessful; 3) to provide for an informed consideration of the grounds of appeal; and 4) to satisfy the public that justice has been done. Insufficiency of reasons does not provide a "free standing basis for appeal": *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at paras. 98-99. As mentioned above, even when reasons are inadequate, meaningful appellate review may still be possible where the basis for the trial judge's decision is clear on a review of the entire record: *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 21; *Massoudinia v. Volfson*, 2013 ONCA 29, at para. 7.

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[24] While these principles apply to both criminal and civil appeals, courts have traditionally been reluctant to order a new trial in civil matters, unless the interests of justice plainly require it, which would only follow a finding that a substantial wrong or miscarriage of justice has occurred: *Brochu v. Pond* (2002), 62 O.R. (3d) 722 (C.A.), at para. 68.

[25] As I will explain further below, the trial judge's reasons in this case allow for meaningful appellate review. In any event, there is no miscarriage of justice here that would warrant a new trial.

[26] The appellant's primary concern appears to be that the trial judge's reasons do not sufficiently mention key evidence that the appellant tendered and relied on, and do not explain why that evidence was apparently not considered. I would reject this argument. First of all, a trial judge is under no obligation to refer to every piece of evidence in their reasons; they are only required to refer to evidence, and to resolve conflicts in evidence, that is material to the issues to be determined. An appellate court cannot disturb a trial judge's findings simply because they failed to refer to some of the evidence. Likewise, it is not our function to second-guess how the trial judge weighed the evidence.

(i) Limitations Issue

[27] The appellant submits that the trial judge's treatment of the limitations issue was inadequate. I do not accept this argument. The trial judge's reasons reveal an

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understanding of the issues and the proper application of s. 5 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, and relevant case law. Similarly, the reasons demonstrate careful consideration of the factual question of when the appellant, or its counsel, discovered or ought to have discovered its procurement law claim.

[28] The trial judge thoroughly reviewed the evidence he relied on to find that the appellant and its lawyer at the time[3] had the requisite knowledge of the material facts to ground a plausible inference of liability on the respondent's part in December 2005, January 2006, February 2006 and March 2006 (when it filed its original statement of claim).

[29] He pointed to a December 22, 2005, letter written by the appellant's lawyer to AECL, which made clear the appellant's understanding that AECL had gone "ahead and negotiated a deal directly with [the appellant's] competitor, agreeing to pay a price higher than [the appellant's] price". He also discussed the notes from a January 9, 2006 meeting involving AECL, the appellant's lawyer and two of its representatives, at which, the trial judge found, the appellant's lawyer asserted that AECL had dealt directly with Patriot, that the appellant's pricing was lower than Patriot's, and that this was unfair, which was the "very essence of the duty of fairness complaint that [the appellant] would assert over three years later".

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[3] Not Mr. Hall.

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[30] The trial judge also considered a February 2006 phone call between the appellant's lawyer and AECL's counsel. Relying on contemporaneous notes prepared by the appellant's lawyer, the trial judge found that, during this call, the appellant was told that AECL and Patriot had entered into a LOI, noting also in his reasons that, while the appellant's lawyer did not request a copy of the LOI at that time, his knowledge of its existence and his understanding of its purpose could have grounded the procurement law claim that was not filed until over three years later.

[31] Even if the appellant did not discover its procurement law claim in any of December 2005, January 2006 or February 2006, the trial judge explained that, in his view, the appellant had surely discovered the claim by March 2006, when it served and filed its original statement of claim. The trial judge specifically relied on paras. 26 to 29, where the appellant pleaded, among other things, that AECL had agreed to issue a purchase order to Invar for the Bruce Project and to issue instructions to the manufacturers to carry Patriot's forgings for the Lepreau Project as well, and that Patriot had received an unfair and unreasonable windfall when it was offered the Lepreau work without competition.

[32] Then, at paras. 57 and 58 of his reasons, the trial judge addressed the evidence the appellant relied on in support of its position that the procurement law claim was not discoverable until much later, well within the limitation period:

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In response to question of discoverability, [the appellant] offered the following to support a proposition that the new claim was not discovered until much later than suggested by [the respondent] and thus the amendment to their claim was not statute barred:

- Actual documentary discovery did not take place until late 2007.
- For costs reasons, [the appellant] did not want their lawyers to undertake a first review of [the respondent's] disclosed documents and instead [the appellant] undertook its own review which occurred in 2008.
- After completing their own internal review of the disclosed documents, [the appellant] drew two documents to their lawyer's attention: the LOI and a Recommendation and Authorize to Purchase (RAP).
- With the physical copy of the LOI and the RAP in hand, lawyers for [the appellant] were only then able to understand what had happened and realized that the procurement claim should have been asserted against AECL instead of Invar.
- [The appellant] proceeded in 2009, in a timely fashion, to seek to amend the Statement of Claim to assert a procurement claim against AECL that is now before the court.

The overarching argument advanced by [the appellant] was that, until their counsel Mr. Graham saw the LOI and RAP, the material facts were simply too uncertain and there was no basis for [the appellant] to draw a plausible inference of liability against AECL for a procurement/breach of duty of fairness claim. I reject [the appellant's] argument on this issue, in its entirety. [Emphasis in original.]

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[33] With a complete understanding of the appellant's position, the trial judge went on to explain why he did not attach the same significance as the appellant did to the LOI. In his view, the appellant's representatives knew or ought to have known that they had a claim before they read the full LOI:

> On 22 December 2005, Mr. Graham wrote to [the respondent] to express [the appellant's] complaint and threatened litigation. Mr. Graham's letter expressly complained that [the respondent] had made the decision to source certain end fittings from Patriot, a competitor of [the appellant], even though [the appellant's] pricing was lower.
>
> One need only refer to Mr. Graham's initial letter of December 2005 to conclude that there was no uncertainty as to any material facts. In fact, that letter speaks to exactly the opposite when he wrote:
>
>> "The information we have indicates that [the respondent], despite having called for bids in 2004, and without notice to our client, **went ahead and negotiated a deal directly with our client's competitor, agreeing to pay a price higher than our client's price**". [Emphasis in original.]

[34] These passages, and the several paragraphs that follow in the trial judge's reasons, fully and clearly explain why he found that, as of late 2005, the appellant "had actual and/or constructive knowledge of the material facts upon which a plausible inference of liability on AECL's part could be drawn that AECL had dealt directly and entered into agreements with Patriot that resulted in [the appellant]

being denied the opportunity to compete fairly for the forgings work for the Bruce and Lepreau projects and that this was unfair" (emphasis removed).

[35] The trial judge's analysis of the limitations issue, and his ultimate decision that the procurement law claim was statute-barred, was not, as the appellant claims, conclusory. In short, his reasons allow for meaningful appellate review.

[36] I would therefore reject this ground of appeal.

(ii) Procurement Law Issue

[37] While the limitations issue is dispositive, I will still explain why I would reject the appellant's argument that the trial judge's reasons are insufficient on the procurement law question.

[38] When a business wishes to procure services, and issues a "request for proposal", or "RFP", inviting suppliers to bid for a contract, the law divides the procurement process into two separate contracts: "Contract A" and "Contract B". Contract A is the agreement entered into when a bidder submits a compliant bid in response to an invitation to tender. It imposes certain obligations on the procuring authority about how bidders will be treated. Contract B is the agreement between the procuring authority and the winning bidder: *The Queen (Ontario) v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111. The Supreme Court in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, held that Contract A can only be formed between a procuring authority

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and compliant bidders; in other words, a procuring authority is contractually obliged, by Contract A, to accept only compliant bids and, more importantly for present purposes, only compliant bidders have legal remedies arising from the procurement process as against the procurement authority. Whether Contract A is formed depends on the parties' intentions to create a legal relationship through a call for tenders and the submission of a compliant bid.

[39] In my view, the trial judge's reasons demonstrate a thorough understanding of these principles and their proper application.

[40] In its submissions on appeal, the appellant incorrectly frames the issue as whether AECL complied with its obligations under the terms of Contract A. But this was not at all the issue the trial judge had to consider: the question before him was whether Contract A was created in the first place between AECL and the appellant. After citing the applicable law, he answered this question in the negative: he found that no Contract A had been formed between the appellant and AECL, and therefore AECL had no obligations to the appellant.

[41] The bottom line is, there can be no breach of a duty of fairness in procurement law when there is no Contract A, and I would reject the appellant's submission that the trial judge's reasons offered only a "conclusory" statement on this point. The reasons clearly explain why the trial judge rejected the appellant's argument. He specifically considered the evidence the appellant relied upon in

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support of its position that the Bruce Tender was "extended" beyond its stated expiry in April 2005, and expressly found that there was no basis for that conclusion, since "AECL's procurement department [had] internally discussed the need to address the now expired major bids received in respect of the Bruce Project". As the trial judge observed, the appellant "was not a party to the original Bruce Tender – nor would it have been party to any Contract A formed in relation to the Bruce Tender". The trial judge's reasons explain how he reached this finding and his conclusion that, since the tendering period expired in April 2005 and was not extended or modified to "sweep" the appellant into the process, AECL owed no duty of fairness, implied or otherwise, to the appellant.

[42] I would therefore reject this ground of appeal.

Deloitte Report

[43] The appellant argues that the trial judge erred by finding the Deloitte Report to be inadmissible. To understand this ground of appeal, it is important to know how this issue arose.

[44] The Deloitte Report was prepared at AECL's request, in response to an anonymous complaint to the Competition Bureau alleging non-compliance with the *Competition Act*, R.S.C. 1985, c. C-34. The report is unrelated to this litigation, mentions neither the appellant nor the Bruce or Lepreau Projects, and was found to be a privileged document. The appellant moved for production of the report in these proceedings several years before the trial, during the course of the

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respondent’s summary judgment motion. After AECL refused to voluntarily produce it, the appellant brought a refusals motion to seek a court order mandating its production. The motion was dismissed. The appellant did not appeal that order. AECL’s summary judgment motion proceeded without the report.

[45] Then, nine days before the commencement of this trial, the appellant advised that it would be calling the report’s author, Mr. Lakhotia, as a witness. Mr. Lakhotia was summonsed as a witness at trial for the express purpose of having him produce the report. He attended with counsel and the issue was argued and determined at the time the appellant proposed to call his evidence.

[46] In concluding that Mr. Lakhotia would not be permitted to produce the Deloitte Report, the trial judge held that the earlier refusals motion had already determined the report’s admissibility. He also found that the report was a privileged document. Given that ruling, the appellant decided to not call Mr. Lakhotia as a witness.

[47] I see no error in the trial judge’s conclusion that, by reason of the earlier decision in the proceedings, which had not been appealed, the appellant was precluded from seeking admission of the Deloitte Report through Mr. Lakhotia’s evidence at trial. Even if the refusals motion was dismissed largely on the basis of the appellant’s default of prior orders in the proceedings, the appellant’s remedy was to address the admissibility issue well in advance of the trial, and not to assume that a document that was previously determined not to be produceable in

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the proceedings would be admitted simply by calling its author as a witness at trial. Nor was this a case where, because of the way evidence had developed at trial, the trial judge was being asked to take a fresh look at an evidentiary issue that had only been addressed on an interlocutory basis before. The appellant was simply re-asserting the same production request that had been previously denied.

[48] Furthermore, and in any event, the trial judge determined on the basis of uncontroverted evidence that had been filed at the time of the original refusals motion that the report was subject to solicitor-client privilege. Although the appellant complains about the second-hand nature of that evidence, the trial judge could properly consider it as it had been properly tendered as part of the prior motion. There is no basis on which to disturb his substantive admissibility finding.

[49] I would therefore reject this ground of appeal.

Costs

[50] The appellant argues that the costs award is excessive and represents an error in principle. It asks that if the appeal is dismissed, the costs award be set aside in favour of an award that comports with the governing principles.

[51] An award of costs by a trial judge is an exercise in discretion and will only be set aside when the trial judge has made an error in principle or if the costs award is plainly wrong. Here, the trial judge canvassed the factors in r. 57.01(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, that judges are to consider when exercising their discretion to award costs, in particular r. 57.01(1)(0.b), the

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reasonable expectations of the parties. He noted that during a security for costs motion in advance of the trial, AECL anticipated that its costs would be approximately $1.6 million. Therefore, the final costs award of approximately $1.8 million could not have exceeded the appellant’s reasonable expectations.

[52] The proceedings were lengthy and the dispute complex.

[53] The trial judge committed no error in principle and the costs award is not plainly wrong. The costs awarded by the trial judge are reasonable and owed deference.

[54] While I would grant the appellant leave to appeal the trial judge’s costs award, I would dismiss the costs appeal.

CONCLUSION

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

[56] I would order that costs of the appeal be payable by the appellant to AECL in the agreed upon all-inclusive amount of $60,000.

Released: September 12, 2024 “K.M.v.R.”

“J. George J.A.”
“I agree. K. van Rensburg J.A.”
“I agree. B. Zarnett J.A.”

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