CITATION: Johnson Bros. Corporation v. Soletanche Bachy Canada Inc., 2024 ONSC 6296
COURT FILE NO.: CV-24-720075-00CL
DATE: 20241114

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Johnson Bros. Corporation, a Southland Company, Applicant

AND:

Soletanche Bachy Canada Inc., Respondent

BEFORE: Cavanagh J.

COUNSEL: *Andrea Lee, Katie McGurk and Lena Wang*, for the Applicant

Alan Merskey and Graham Brown, for the Respondent

HEARD: August 15, 2024

ENDORSEMENT

Introduction

[1] The applicant, Johnson Bros. Corporation, A Southland Company ("JBros") brings an application for leave to appeal from the partial award of Arbitrator Joel Richter (the "Arbitrator") dated February 12, 2024 and from the final arbitration award of the Arbitrator dated March 11, 2024 dealing with costs of the arbitration and interest.

[2] The respondent, Soletanche Bachy Canada Inc. ("SBC"), opposes this application.

[3] For the following reasons, the application is dismissed.

Background

[4] The Southland Group ("Southland") specializes in heavy civil construction such as bridges, tunnels, marinas, peers, water facilities among others. Southland formed a joint venture with an engineering and consulting firm, Astaldi Canada Design & Construction Inc. ("SAJV") for purposes of the project.

[5] SAJV responded to a call for tenders by City of Toronto ("City") to build a new outflow and water treatment plant near Ashbridges Bay, Toronto (the "Project"). Following the closing of bids, in November 2018, the Project was awarded to SAJV and it entered into a contract with the City in January 2019.

[6] SAJV entered into a subcontract with JBros to perform the marine works scope required for the Project. On February 15, 2019, JBros entered into a subcontract (the "Subcontract") with SBC.

[7] The Subcontract is a standard construction document with supplementary subcontract conditions. The Subcontract contains a dispute resolution clause in the Subcontract Conditions at SCC 8.2 that provides for negotiation, mediation and arbitration. Clause 8.2.5 reads:

> By giving a *Notice in Writing* to the other party, not later than 10 *Working Days* after the date of termination of the mediated negotiations under paragraph 8.2.4, either party may refer the dispute to be finally resolved by arbitration under the Rules of Arbitration Construction Disputes as provided in CCDC 40 in effect of the time of bid closing with the following amendment:
>
> .1 the word "Contract" appearing in the rules shall read "Subcontract"; and
>
> .2 delete clause 7.1(b) and replace it with the following:
>
> "7.1(b) the date of the Work has been completed or the Subcontract has been terminated."
>
> The arbitration shall be conducted in the jurisdiction of the *Place of the Work*.

[8] The 2005 version of the CCDC 40 rules provides:

> 18.6 Final and Binding - The final award is final and binding on the parties and the parties agree to comply with it as soon as possible.

[9] The 2018 version of the CCDC 40 rules provides:

> 21.4 Subject to any express provisions under the terms of the Contract for the Agreement to Arbitrate which may provide otherwise ... any award is final and binding, with no right of appeal, and shall be enforceable in all respects in the same manner as a judgment of the court in the prevailing jurisdiction.

[10] SBC commenced work on the Project in 2019.

[11] Disputes arose between the parties and, as a result of those disputes, the parties held mediations with a mediator in 2020 which were unsuccessful.

[12] On October 28, 2020, JBros. took the position that it was terminating SBC's right to continue the Subcontract work for cause. SBC took the position that JBros did not properly carry out the termination of SBC's right to continue. SBC took the position that it was entitled to terminate the Subcontract and/or bring it to an end on the basis that JBros. had repudiated the Subcontract.

[13] On December 24, 2020, SBC registered a Claim for Lien ("the "SBC Lien") against the Project lands in the amount of $16,269,890.23. On February 10, 2021, SBC perfected this lien by commencing an action (the "Lien Action").

[14] There was correspondence between counsel for the parties in respect to SBC's Lien including whether the parties were required to mediate the issues in the SBC Lien.

[15] On March 17, 2021, counsel for JBros wrote to counsel for SBC advising that JBros intended to proceed with "the dispute resolution process set out in the Subcontract, namely, arbitration".

[16] On April 8, 2021, SBC also commenced an action against JBros, SAJV and others for breach of trust under the *Construction Act* and payment under a labour and material payment bond (the "Trust and Bond Action").

[17] On April 21, 2021, counsel for JBros wrote to counsel for SBC and stated that "the binding dispute resolution process in the Subcontract remains operative and that the path forward to adjudicating the disputes arising from the Subcontract on their merits is to follow that contractual process".

[18] On July 15, 2021, counsel for SBC sent an email to counsel for JBros attaching a draft letter setting out proposed terms for mediation and arbitration (if necessary). The draft letter reads that SBC reserves the right to argue that the matters before the mediator in respect of the Project in 2020 were not referred to arbitration pursuant to SCC 8.2.5 and are now properly subject to litigation pursuant to SCC 8.2.6. The draft letter reads that SBC has the right to pursue its claims in the Superior Court of Justice and SBC has no obligation to agree to an arbitration.

[19] On August 25, 2021, the parties conducted a mediation which was unsuccessful.

[20] JBros delivered a "Notice to Arbitrate Pursuant to the Subcontract" dated September 2, 2021 in respect of its claims against SBC.

[21] On March 24, 2022, the parties entered into an agreement that provides for "Terms for Arbitration" (the "March 2022 Agreement"). The March 2022 Agreement states that the parties agree that "they are executing this agreement to simplify the disputes between them by avoiding potential procedural disputes and legal arguments".

[22] On March 29, 2022, JBros executed an agreement with the Arbitrator regarding his appointment ("Terms of Appointment"). On April 6, 2022, SBC executed the Terms of Appointment.

[23] Following the arbitration hearing, the Arbitrator issued a Partial Award dated February 12, 2024. In the Partial Award, the Arbitrator found that JBros improperly terminated SBC and that SBC was entitled to payment of $12,002,362.47. The Arbitrator dismissed JBros' counterclaim.

[24] The Arbitrator issued a Final Award dated March 11, 2024. In the Final Award, the Arbitrator awarded costs of the arbitration to SBC in the amount of $1,982,170.68.

Analysis

Does JBros' have a right to seek leave to appeal the Partial Award and the Final Award under the arbitration agreement?

[25] Section 45(1) of the *Arbitration Act, 1991* (the "*Arbitration Act*") provides:

> 45(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant 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) determination of the question of law at issue will significantly affect the rights of the parties.

[26] JBros submits that none of the pre-arbitration steps in the dispute resolution clause in the Subcontract was followed by the parties and, therefore, the parties were free to refer the matter to the courts or agree to arbitrate under any rules they saw fit. JBros submits that the arbitration agreement that governed the arbitration is the March 2022 Agreement.

[27] In support of this submission, JBros. cites SCC 8.2.6 of the Subcontract which provides:

> 8.2.6 On expiration of the 10 Working Days, the arbitration agreement under paragraph 8.2.5 is not binding on the parties and, if a Notice in Writing is not given under paragraph 8.2.5 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use.

[28] JBros submits that the arbitration agreement under paragraph 8.2.5 was not binding on the parties. JBros submits that the arbitration was not conducted pursuant to the terms of the Subcontract, or CCDC 40, but was an *ad hoc* arbitration under the March 2022 Agreement which does not provide that the award is final and binding without any appeal.

[29] JBros submits that the July 15, 2021 email and attached draft letter provides the context for the arbitration agreement that was signed the following year. It submits that this shows that the parties did not agree that the arbitration would proceed under CCDC 40 and that the arbitration proceeded as an *ad hoc* arbitration.

[30] JBros submits that the original arbitration agreement in SCC 8.2 was no longer binding on the parties and, therefore, they were free to resolve their disputes in any way they chose, including by another agreement to arbitrate. JBros submits that the parties chose this approach and signed a

new agreement to arbitrate which does not reference the CCDC 40 rules, does not state that the award will be final and binding, and is silent as to appeals.

[31] JBros submits that, therefore, pursuant to s. 45 of the *Arbitration Act*, it may appeal the awards to this court on a question of law, with leave.

[32] SDC submits that the arbitration agreement was initially comprised of the Subcontract (containing the dispute resolution clause) and the CCDC 40 Rules. SDC submits that the March 2022 Agreement was negotiated to avoid a jurisdictional dispute and became the third part of the agreement to arbitrate pursuant to s. 5(2) of the *Arbitration Act* which provides that if the parties to an arbitration agreement make a further agreement in connection with the arbitration, it shall be deemed to form part of the arbitration agreement.

[33] I disagree that the July 15, 2021 email sent by counsel for SBC to counsel for JBros and attached draft letter agreement is evidence that provides objective context for determining the terms of the arbitration agreement under which the arbitration was conducted. This correspondence is evidence of the negotiating position of SBC at the time and the proposed terms of the letter agreement were not accepted.

[34] JBros delivered the Notice to Arbitrate on September 2, 2021. The Notice to Arbitrate reads that it is "In the Matter of an Arbitration Under the Ontario Arbitration Act Pursuant to Part 8 of a CCA 1 - 2008 Subcontract". Part 8 of the Subcontract is headed "Dispute Resolution" and includes the provision for arbitration in section 8.2.5.

[35] The Notice reads under the heading "Request to Refer Dispute to Arbitration":

> 5. Part 8 of the Subcontract provides for a dispute resolution process for negotiation, mediation and arbitration. In particular, under SCC 8.2.5, either party *"may refer to the dispute to be finally resolved by arbitration under the Rules of Arbitration of Construction Disputes as provided in CCDC 40"*, with minor adjustments.
>
> 6. CCPC 40 provides that either party shall submit a dispute permitted under the contract to arbitration by giving the other party a written notice.
>
> 7. Jbros provides this written notice requesting that the dispute, as described herein, be referred to arbitration under the Subcontract.

[36] As noted, the Subcontract conditions, in section 8.2.5, expressly provide that either party may refer a dispute "to be finally resolved by arbitration under the Rules of Arbitration of Construction Disputes as provided in CCDC 40". The CCDC Rules of Arbitration of Construction Disputes as provided in CCDC 40, whichever version applies, provide that the award is "final and binding".

[37] Whether or not SDC could have been compelled to accept arbitration as the contractually agreed upon process for dispute resolution under the Subcontract, the evidence is that it did so,

and the Notice to Arbitrate, which expressly references, in particular, the dispute resolution process in section 8.2.5 of the Subcontract, was accepted as a valid notice of arbitration. The language of the Notice to Arbitrate, which was not challenged by SDC after it was delivered, supports the conclusion that the parties intended the arbitration to be conducted pursuant to the dispute resolution process in section 8.2.5 of the Subcontract which provides for arbitration under the rules of Arbitration of Construction Disputes as provided in CCDC 40.

[38] The March 2022 Agreement was made after JBros' Notice to Arbitrate was delivered and expressly references the Notice to Arbitrate and the two legal actions. In the March 2022 Agreement, at paragraph 5, the parties agreed that "[t]he arbitration is intended to, and shall address, all matters pleaded in the Lien Action pleadings, JBros' Notice of Arbitration and any other disputes between the parties' (sic) arising under the Subcontract". This provision, plainly read, shows that the parties agreed that the Notice to Arbitrate is a valid pleading of matters to be arbitrated.

[39] I do not accept the submission by JBros that the arbitration was an *ad hoc* arbitration without terms that the arbitration would finally resolve the disputes and that an award would be final and binding. When I read the March 2022 Agreement together with the Notice to Arbitrate, and give the words used their plain and ordinary meaning having regard to objective evidence of the surrounding circumstances, including the two legal actions, I conclude that in addition to the March 2022 Agreement, the parties included as part of the arbitration agreement the expressly referenced dispute resolution provisions in Part 8 of the Subcontract including, in particular, section 8.2.5 which provides for a dispute to be "finally resolved" by arbitration under the Rules of Arbitration as provided in CCDC 40.

[40] In *Baffinland Iron Mines LP v. Tower-EBC G.P./S.E.N.C.*, 2023 ONCA 245, the Court of Appeal addressed provisions in the *Arbitration Act* for appeal of an arbitration award. The Court of Appeal, at para. 2, held that the *Arbitration Act* contemplates three different scenarios regarding appeals to the court on questions of law. The arbitration agreement may expressly provide for, be silent on, or preclude such appeals. In the first scenario, there is an appeal as of right; in the second, there is an opportunity to appeal but only with leave; and in the third, there is no appeal or right to seek leave to appeal at all. The application judge had held that the arbitration agreement precluded appeals by saying that disputes would be "finally settled" by arbitration and by incorporating rules waiving any form of recourse. The Court of Appeal, at para. 35, observed that "final and binding" is terminology which has been held to preclude appeals from an arbitration award. The Court of Appeal held that the phrase "final and binding" in an arbitration agreement precludes appeals because of the word "final". The Court of Appeal held that when the word "settled" is used in the context of a dispute being finally settled by arbitration, no further recourse regarding the dispute, beyond the arbitration award, is available.

[41] I conclude that the arbitration agreement included terms that the arbitration disputes would be "finally resolved" by arbitration and that the arbitration award would be "final and binding". Given these provisions, and on the authority of *Baffinland*, JBros has no right to seek leave to appeal the Partial Award or the Final Award.

If JBros had been allowed to seek leave to appeal on a question of law, should leave be granted?

[42] If I have erred in concluding that JBros has no right to seek leave to appeal, I go on to address the questions of law that, JBros submits, are raised by the Partial Award and the Final Award and in respect of which it seeks leave to appeal.

[43] JBros submits that four questions of law arise from the Partial Award and the Final Award which justify an order granting leave to appeal.

Did the Arbitrator reverse an onus for establishing a claim such that a question of law is raised? (JBros' Notice of Application paras. 2(o)(v); 2(p)(ii))

[44] JBros submits that at paragraph 226 of the Partial Award, the Arbitrator found that the existence of a change order between the City and the Applicant absolved SBC from proving its claim. JBros submits that the Arbitrator erred in law by shifting the legal burden from SBC being required to prove its claim to imposing a burden on JBros to show that SBC was not entitled to its claims.

[45] This issue involves the Arbitrator's treatment of the onuses on the parties having regard to evidence relating to Change Order 28. The Arbitrator addressed claims made by SBC for certain work. He found that Change Order 28 was issued by the City on June 16, 2021 and provided for a payment of $4,999,999 plus HST to SAJV and a 159 working day extension of time, stated to be in full compensation for the 2019-2020 offshore claims. The claims included claims that caused SAJV and "its subcontractors", which included SBC, to incur additional cost and additional time to perform work.

[46] The Arbitrator found that the existence of Change Order 28 and the fact that SAJV had settled these claims with the City for a substantial payment and a significant extension of time were never disclosed to SBC or referenced in JBros' pleadings. The Arbitrator found that JBros' failure to disclose the Change Order when it was issued was a deliberate decision made to withhold knowledge of the payment and time extension from SBC, and that JBros' was aware that disclosure would buttress SBC's position on almost all of its claims.

[47] Paragraph 226 of the Partial Award reads:

> Second, JBROS' position that it was for SBC to adduce evidence regarding the effect the substance of the settlement, including its components and effects, is plainly incorrect. While it is most certainly true that SBC had the onus of proving its claims, it could not be clearer that once Change Order 28 became known, the evidentiary burden on this issue shifted to JBROS. As between the Parties, it was JBROS (whether directly or through SAJV) that had the requisite knowledge of the settlement negotiations and, presumably possession or control over documents that undoubtedly pertained to those negotiations. JBROS could have induced material evidence and apparently chose not to do so. Mr. Best's evidence that he was "unaware" of any specific relief given in respect of SBC's claims was either untrue, or the result of wilful blindness.

[48] JBros submits that the Arbitrator shifted the legal burden which rested on SBC to prove its claims to JBros to disprove the claims, and this is a reversible error of law.

[49] The reasons given by the Arbitrator in paragraph 226 of the Partial Award make it clear that the Arbitrator did not reverse the legal burden of proof. The Arbitrator writes that "it is most certainly true that SBC has the onus of proving its claims ...". The Arbitrator held that once Change Order 28 became known, the "evidentiary burden on this issue shifted to JBROS", and that it failed to adduce evidence to discharge this evidentiary burden.

[50] It was open to the Arbitrator to give Change Order 28, and the "deliberate decision" of JBros to withhold knowledge of the payment extension and time extension from SBC, the weight that he did, and to draw the inferences that he did. The question that arises from the Arbitrator's ruling that the evidentiary burden shifted to JBros is not a question of law but one of whether, given the facts as found by the Arbitrator, including that JBros deliberately withheld Change Order 28, his ruling was justified.

[51] JBros has not shown that the Arbitrator's decision in this respect raises a question of law in relation to whether the Arbitrator shifted to JBros the legal burden which rested on SBC to prove its claims.

Do the Arbitrator's awards of damages in respect of delay caused by weather raise a question of law? (paragraphs 2(o)(i), (ii), (iii) and (vii) of the Notice of Application)

[52] JBros submits that the Arbitrator made a number of findings on SBC's damages resulting from delay caused by weather. JBros refers to statements made by the Arbitrator that SBC had not claimed damages resulting from delay caused by weather and had simply raised the issue of weather in partial answer to JBros' termination of the subcontract. JBros submits that the Arbitrator then awarded SBC more than $2 million in damages for delay resulting from adverse weather conditions. JBros submits that these are inconsistent findings that, in the absence of an explanation justifying the conclusion, amount to an error in law.

[53] In support of this submission, JBros cites *Trajkovich v. Ontario (Minister of Natural Resources)*, 2009 ONCA 898, at para. 18, where the Court of Appeal held that the trial judge had implicitly made inconsistent findings on the central issue of factual causation which was an error of law requiring appellate intervention.

[54] This issue relates to paragraph 319 of the Partial Award where the Arbitrator awarded amounts in respect of "Extended 2019 Marine Season" and "Extended 2020 Marine Season" of $2,195,625.10, and $908,691.18, respectively.

[55] In the Partial Award beginning at para. 154, the Arbitrator addresses whether JBros was entitled to direct SBC to work outside of the May 1 to October 31 Marine Seasons at SBC's cost. The Arbitrator addressed the parties' positions including by reference to the language of the Subcontract and noted that the issue turns on contractual interpretation. The Arbitrator concluded that "SBC was entitled to be compensated for its extra costs and expenses associated with having

to work off-season in 2019 and/or 2020, and SBC's maintaining that position in its dealings with JBROS could not have constituted a valid basis for SBC's termination".

[56] In the next section of the Partial Award beginning at para. 160, the Arbitrator addressed issues under the heading "The Interpretation of the Subcontract's Weather Provisions and How SBC Dealt with Adverse Weather". In the Partial Award, at para. 167, the Arbitrator writes that "SBC has clarified that the significance of adverse weather in this arbitration is limited, as it seeks neither compensation nor an extension of time to perform its Subcontract. Rather, weather is relevant only as one of several factors that contributed to delay".

[57] The Arbitrator went on to consider the issue of "adverse weather" in several paragraphs on the Partial Award as one of contractual interpretation: see paragraphs 170, 177-179. The Arbitrator concluded at para. 182 that he was not called upon to quantify the impacts of any adverse weather on SBC's performance, although he found that there was some impact and that JBros had not satisfied him that SBC performed otherwise than reasonably and competently in meeting adverse weather challenges. The Arbitrator found at para. 182 that JBros' reliance on weather-related matters in support of its decision to terminate SBC was unfounded.

[58] The Arbitrator's reasons in the Partial Award show that he addressed the claim by SBC for compensation for extra costs and expenses associated with having to work outside the Marine Season separately from the interpretation of the Subcontract's weather provisions and how SBC dealt with adverse weather. The Arbitrator expressly found that "weather is relevant as only one of several factors that contributed to delay." The Arbitrator found that delay was relevant to the claims by SBC for compensation for work done outside of the Marine Seasons in 2019 and 2020.

[59] Determination of whether the Arbitrator made inconsistent findings with respect to (i) compensation for work done by SDC after the end of the "Marine Season" in 2019 and 2020, and (ii) how SBC dealt with "adverse weather", requires interpretation of the terms of the Subcontract, as was done by the Arbitrator in making these findings. The separate findings are not, on their face, plainly inconsistent, as was the case in *Trajkovich*. The question that arises from these findings is not one of law, but, because it requires contractual interpretation, one of mixed fact and law.

[60] JBros has failed to show that the Arbitrator's findings with respect to the awards for compensation in respect of the Extended 2019 Marine Season and the Extended 2020 Marine Season and his separate findings about the effect of "adverse weather" are inconsistent and raise a question of law.

<u>Does the Arbitrator's award of damages related to COVID impacts without evidentiary support raise a question of law? (Para. 1(o)(iv) of Notice of Application)</u>

[61] JBros points out that the Arbitrator awarded damages related to COVID-10 impacts. JBros submits that he awarded $800,000 without, it submits, any basis in the evidence. JBros submits that in making this finding without evidentiary support, the Arbitrator erred in law.

[62] The Partial Award, at paras. 294-296, reads:

COVID-19 Impacts ($1,052,664.18)

294. SBC claims $1,052,664.18 for direct costs (e.g., sanitation) and productivity (daily inefficiencies and unavailability of equipment), calculated as an adverse impact of eight days. SBC multiplied the eight-day impact by the cost of each working spread, and then added 15 percent for profit and overhead. The one manhour per day cost for cleaning was supported by SBC's tracking of costs and man-hours and SBC reported regularly on these to JBROS. JBROS then made its claim for the impact of the Pandemic to the City. SBC argues that JBROS acknowledged the contractual basis for these claims by flowing them up to the City, with its own claims for profit and overhead, and that JBROS was paid at least a part of the Pandemic claims (while other parts of the claims were outstanding). In this regard, SBC notes that JBROS had told the City that the Pandemic's impact on suppliers and subcontractors was evolving, unprecedented and staggering and that it would affect offshore construction.

295. JBROS notes that HKA [SBC's delay and damage expert] found no support for that part of SBC's claim that related to the delayed supply of the spherical grab. Moreover, that equipment should have been procured earlier, before the onset of the Pandemic. As to the sanitation portion of the claim, JBROS argues that that claim presumes that the extra work was done during productive work time and that claims are made for days on which no work was done.

296. Based on the foregoing submissions, I award $800,000 in respect of this claim.

[63] JBros relies on legal authority standing for the principle that the basis for an arbitrator's decision must be "intelligible", meaning capable of being made out and logically connected to its basis. The reasons must show, when read in the context of the record and the submissions, that the trier has seized the substance of the matter. JBros relies on authority that where an arbitrator's lack of reasons rises to the degree that the decision is not sufficiently intelligible to permit appellate review, an error of law has been committed.

[64] SBC submits that reasonableness of the Arbitrator's decision with respect to COVID damages can be discerned from the record, and that JBros did not put some parts of the evidentiary record before me on this application.

[65] SBC refers to paragraph 279 of the Partial Award where the Arbitrator writes that in reviewing quantification of SBC's claims, he made reference to its "Damages Workbook" that, he wrote, provides support for the discrete claims that SBC makes. The Arbitrator noted that the evidence in support of the claims was not, unless otherwise indicated, challenged by JBros' direct evidence or by cross-examination. The Damages Workbook was not put into evidence on this application by JBros.

[66] In paragraph 294 of the Partial Award, the Arbitrator referred to SBC's claim of $1,052,664.18 for COVID-19 impacts, and he described how this amount was calculated by SBC by reference to the evidence. The evidence cited by the Arbitrator is not in the record before me.

[67] The Arbitrator wrote at para. 295 that JBros notes that HKA found no support for that part of SBC's claim that related to "the delayed supply of spherical grab" and, moreover, that equipment should have been procured earlier, before the onset of the Pandemic. The Arbitrator referred to JBros' argument as to the sanitization portion of the claim that it presumes that the extra work was done during productive work time and that claims are made for days on which no work was done. The Arbitrator concluded that "[b]ased on the foregoing, I award $800,000 in respect of this claim".

[68] The Arbitrator's statements in Paragraph 295 of the Partial Award give rise to a clear inference that he reduced SBC's claim to account for the matters raised by JBros in relation to the "spherical grab" equipment and the "sanitization portion" of the claim. The amounts for these reductions are not reproduced in the Partial Award. They would be likely be shown in the "Damages Workbook" that was before the Arbitrator but, because JBros did not include this evidence, I am unable to make this determination on the limited record before me.

[69] JBros accepts that the sufficiency of the Arbitrator's reasons must be evaluated when read in the context of the record and the submissions. JBros failed to provide necessary parts of the evidentiary record in its application materials before me. As a result, I am unable to find that there is a basis for JBros' submission that the Arbitrator's reasons with respect to this award of damages are insufficiently unintelligible to permit appellate review such that the decision raises a question of law.

Award of statutory holdback - Paragraph 2(p)(i) of the Notice of Application

[70] In JBros' Notice of Application, it pleads that in the Final Award, the Arbitrator made errors of law including that he made an error in principle or was plainly wrong by ordering JBros to pay SBC holdback "prior to Substantial Performance of the Work" and by awarding interest on holdback.

[71] At paragraph 316 of the Partial Award, the Arbitrator awarded SBC outstanding invoices and statutory holdback of $2,878,466.87. At paragraphs 8-11 of the Final Award, the Arbitrator awarded SBC interest on outstanding invoices and holdback.

[72] JBros submits that in doing so, the Arbitrator erred in law because basic holdback under the *Construction Act* was not due and owing to SBC at the time of the awards. JBros submits that the Project had not reached substantial performance at the time of the Arbitrator's awards and that JBros is required to retain basic holdback from SBC and is prohibited by the *Construction Act* from releasing it to one subcontractor when the time for liens to be filed has not passed. JBros also submits that the absence of reasons by the Arbitrator is an error of law.

[73] The Arbitrator recorded (in para. 9 of the Final Award) JBros' submissions that "holdback only became due upon Substantial Performance of the Work, an event that never occurred; ...". SBC notes that JBros did not previously argue before the Arbitrator that release of the holdback

was not yet due, and that this issue was raised for the first time in the submissions by JBros in relation to interest and costs. This is clear from the Partial Award beginning at para. 311 (under the heading "Outstanding Invoices and Holdback") where the Arbitrator refers to the arguments made by JBros in opposition to this claim and he makes no mention of any opposition based on an argument that release of the holdback was not yet due.

[74] The Arbitrator wrote at para. 7 of the Final Award that the only issue left open regarding pre-Award interest was the calculation of interest on the claims that the Arbitrator accepted. The Arbitrator, at para. 11 of the Final Award, rejected the submission by JBros that SBC had used erroneous dates for its interest calculations and that pre-Award interest should be modified (based, in part, on the submission that the holdback is not yet due). The Arbitrator did so by exercising his discretion not to revisit SBC's entitlement to pre-Award interest because he accepted that JBros was improperly attempting to relitigate SBC's entitlement to pre-Award interest under the guise of submissions on "calculation".

[75] JBros does not challenge that the issue of whether the holdback should be ordered to be released because the time of substantial performance had not passed was not raised with the Arbitrator at the liability phase of the arbitration and only in its submissions with respect to interest. JBros submits that it was within the Arbitrator's authority to correct the Partial Award and he did not do so. However, JBros never asked the Arbitrator to make such a correction. I reject JBros' submission that the Arbitrator made an error of law by failing to make a correction to the Partial Award based on an argument that was not made (except in respect of pre-Award interest) and that he was not asked to correct.

[76] The Arbitrator exercised his discretion in response to JBros' submission that the holdback is not yet due and, therefore, SBC's interest claim should be reduced. Whether the Arbitrator erred in so exercising his discretion does not raise a question of law.

[77] For these reasons, I am not satisfied that JBros has shown that there are questions of law raised by its proposed appeal. As a result, it is not necessary for me to decide whether (i) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and (ii) determination any one or more of the questions raised by JBros will significantly affect the rights of the parties.

[78] If I had decided that JBros had a right to seek leave to appeal on a question of law, I would decline to grant leave.

Disposition

[79] For these reasons, JBros' application is dismissed.

[80] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable to be agreed upon by counsel and approved by me (with reasonable page limits).

Cavanagh J.

Date: November 14, 2024