IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20210209
Docket: S205289
Registry: Vancouver

In the Matter of the *Arbitration Act*, R.S.B.C. 1996, c. 55

and

In the Matter of an Arbitral Award Issued on or About January 8, 2020

Between:

Flatiron Graham Joint Venture

Petitioner

And

British Columbia Hydro and Power Authority

Respondent

Before: The Honourable Mr. Justice D.M. Masuhara

Oral Ruling Re Application for Leave to Appeal an Arbitration Decision

In Chambers

Counsel for the Petitioner:	K. McEwan, Q.C. W.E. Stransky
Counsel for the Respondent:	J. McArthur P. Bychawski S. Kesar
Place and Date of Hearing:	Vancouver, B.C. February 1-2, 2021
Place and Date of Ruling:	Vancouver, B.C. February 9, 2021

[1] **THE COURT:** This ruling deals with an application by Flatiron Graham Joint Venture, who I will refer to as the "joint venture," for leave to appeal an arbitration decision relating to a design/build contract for a 250 kilometre 500 KB transmission line from Merritt to Mission, BC, which contract was entered into in November 2011. An arbitration award was issued March 29, 2018, after a 55-day hearing covering extensive detail. I will refer to this as the "final award."

[2] The issue of focus that arises from the final award and subsequent determinations was the arbitrator's determination of the amount that BC Hydro would get as a credit towards the contract price payable to Flatiron based on the deletion of a segment of the project that the join venture was originally required to perform and to be paid for, which I will refer to as the "Spuzzum section." This credit was determined to be $11,484,568.92, which is an amount that was put forth and advanced by the joint venture. BC Hydro had put forth a much larger figure of about $61 million.

[3] The joint venture, after receiving the award, then sought an order from the arbitrator directing BC Hydro to pay the joint venture $3,829,541.58 with respect to the excess withholdings made by BC Hydro for the deletion of the Spuzzum section. After further applications to the arbitrator, the end result was that the joint venture was unsuccessful. The decisions and reasons are relevant, and I will them address shortly. However, as this is a leave application, I will first identify the errors stated and then provide a summary of the passages from the arbitrator's decisions identified as relevant by the applicant.

[4] The two questions of law which it submits meets the requirements of s. 31 of the *Arbitration Act* are:

1. The arbitrator failed to apply the correct legal test to the assessment of his jurisdiction and whether he was *functus officio* with respect to the calculation of the withholding; and
2. The arbitrator ignored, forgot, or misconceived the evidence reflecting the exchanges between the parties, including those of

> BC Hydro, as to the calculation of BC Hydro's withholdings to date.

[5] I will also note here the terms of the notice to arbitrate, the parties' pleadings and exchanges on the evidence, which are identified and that which I will not repeat here, but I will note they are covered in the petitioner's written submissions to me.

[6] In terms of the chronology, the applicant refers to paragraphs 480 and 521 of the final award, which states at paragraph 48:

> In the result, it is my view that BC Hydro is limited to a credit for the Spuzzum deletion in the amount carried by FGJV in its tender for the work of $11,484,568.92, and I would dismiss BC Hydro's counterclaim to the extent it sought a greater amount. In the award I summarize below, I direct that this amount to be paid to BC Hydro on the assumption that BC Hydro has not withheld the amount from FGJV. If this assumption is wrong, the award will have to be modified.

[7] It is clear that that assumption was wrong.

[8] Further, the award also states at paragraph 521:

> I reserve my jurisdiction to address any issues which I may have overlooked and not addressed herein.

[9] On April 13 and May 10, 2018, FGJV applied for an a number of corrections to the award, including an order directing BC Hydro to pay to the joint venture the sum of $3,829,541.58 with respect to the excess withholdings by BC Hydro. The joint venture argued in the alternative that if the arbitrator were to accept that he could not determine the exact amount of the withholding on the evidence led at the arbitration, he declare that BC Hydro is obligated to pay any amount withheld on the Spuzzum credit in excess of the amount of the proper credit as determined in the award.

[10] On May 23rd, in his corrections and omissions award, the arbitrator stated in respect to the Spuzzum credit the following:

> Without reviewing the entirety of the record, I have no recollection of any evidence with respect to excess withholdings from the Spuzzum credit. BC Hydro disputes FGJV's calculation of the amount withheld and says this is a claim that was never advanced by FGJV in the arbitration and there is no evidence to support it. In my view this is an issue that should have been addressed during the course of the arbitration but was not. In the award I indicated I was uncertain as to what amount had been withheld by BC Hydro for Spuzzum. In the circumstances, as this was not a claim that was addressed in the arbitration, it is my view that I have no jurisdiction to make an order compelling BC Hydro to pay an amount that it disputes. I do have jurisdiction to direct that BC Hydro pay to FGJV the amount it withheld for the Spuzzum credit in excess of the amount of the $11,484,568.92, if any, and to direct that if there is disagreement on what is the amount that has been withheld, then an accounting shall be undertaken.

[11] On July 15, 2019, FGJV provided its accounting and applied for:

(a) a settlement of those accounts; and

(b) an order directing BC Hydro to pay FGJV all amounts that it is withholding with respect to the Spuzzum credit in excess of the $11,484,568.92 plus any applicable markup on that amount.

[12] On January 8, 2020, the arbitrator released the Spuzzum withholding award. The arbitrator did not address the merits of the claim, and the arbitrator held that he was unable to make a determination of the excess amounts that BC Hydro is withholding. He summarized his reasons at paragraph 32:

> The final award deprives me of any jurisdiction to address a new issue which should have been raised during the course of the arbitration. In my view it can be said that final award did not finally address the issue before me, as this issue was never raised in the arbitration. In my view this issue was not fairly raised by the proceedings, and as a consequence I have no jurisdiction to address it at this stage of the proceedings. Accordingly, I would dismiss FGJV's application with costs to BC Hydro on a full indemnity basis.

[13] On May 19, 2020, FGJV commenced these proceedings. As mentioned, the narrow application before me today is whether the joint venture should be granted

leave to appeal the arbitration award in respect to the Spuzzum award. Under s. 31(2) of the *Arbitration Act*, the court may grant leave on a question of law if:

1. The importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice;
2. The point of law is of importance to some class or body of persons of which the applicant is a member; or
3. The point of law is of general or public importance.

[14] In this case the applicant focuses on the "importance of the result of the arbitration to the parties" as a justification for the leave sought.

[15] Now, in terms of the approach to leave applications, *Urban Communications Inc. v. BCNET Networking Society*, 2015 BCCA 297, cites the well-known case of *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, and the approach to a leave application. There are three aspects which are relevant here:

- in considering whether leave to appeal should be granted under s. 31(2)(a) of the act, the applicant must demonstrate the alleged legal error is material to the final result and has arguable merit in order to establish that its determination may prevent a miscarriage of justice.
- having found an alleged error of law and a potential miscarriage of justice, a court must be cautious in weighing a non-exhaustive list of discretionary factors before rejecting an otherwise eligible appeal on discretionary grounds; and
- even where leave to appeal is granted, the court’s standard of review of the arbitrator's decision on the merits is one of reasonableness unless the question of one that would attract a correctness standard, such as a constitution question or a

> question of law or one of central importance to the legal system as a whole and outside of the arbitrator's experience.

[16] The applicant relies upon the principle that an arbitrator is to determine the issues raised by the proceeding and that his refusal to address the extent of BC Hydro's withholding was a failure on the part of the arbitrator to fully discharge his jurisdiction. The joint venture argues that the arbitrator understood he was *functus officio* as of the date of the accounting and that this was wrong in law and failed to consider or address:

1. the tenets of the doctrine *functus officio*;
2. the well-recognized exceptions to the doctrine in the context of arbitrations;
3. the orders leading to the application; and
4. the evidence that the issue has been raised for determination in the arbitration and refusing to undertake the accounting that he ordered in the course of the proceedings was an arbitral error.

[17] The applicant submits that whether or not an arbitrator is *functus officio* by a certain point in the chain of events or otherwise has jurisdiction to address a claim is a question of law. The applicant argues that an error in law has arisen given the arbitrator's statements regarding his assumption that if he is incorrect, that his award would have modified, with an explicit recognition that BC Hydro may have withheld monies; his explicit reservation of jurisdiction to address any matters that he did not address or may have overlooked in his award; his comment in the Correction and Omissions award that:

> I do have jurisdiction to direct BC Hydro to pay to FGJV the amount it withheld from the Spuzzum credit from the excess of the amount of $11,484,568.92, if any, and to direct that if there is disagreement on what is the amount that has been withheld, then an accounting shall be undertaken.

[18] And the applicant's submission on an accounting to the arbitrator on July 15, 2019, and then refusal to address the question stated that he would consider earlier.

[19] The applicant states that this question of law is significant given the narrow scope for an appeal of an arbitral decision, and thus attracts a more flexible and less formalistic approach to arbitral scope and jurisdiction, citing *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848 and *Finlay Forest Industries v. International Woodworkers of America Local 1-424*, 1975 CanLII 938 (BCCA).

[20] With respect to the second error of law, the applicant submits that the error here was his conclusion that:

> There was no evidence led at the arbitration that the amount proposed by FGJV for the deleted work was different than the total of the pay items for such work.

[21] Or that the issue "never came up".

[22] The applicant recognizes the deference to be accorded to the arbitrator, but in the circumstances here argues that in reaching this conclusion, the arbitrator ignored, forgot, or misconceived the evidence adduced in the arbitration and the Spuzzum withholding award. The applicant relies upon *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, [2011] 2 SCR 175; and *Armstrong v. Armstrong*, 2012 BCCA 166, which cited and referred to the *Sharbern Holding* case.

[23] The applicant also submits that the questions identified are of importance to the parties given the amount in issue is $3.8 million plus interest and costs. The applicant also submits that based on the errors regarding the reservation of authority and direction of the arbitrator and the evidence adduced regarding BC Hydro's withholding of funds, that there is arguable merit of the position of the applicant, and moreover there was an error in terms of natural justice in not having all of its issues heard.

[24] BC Hydro submits that the courts are to show due respect to the parties' decision to arbitrate and the commercial arbitral process, where efficiency and finality are the central aims of commercial arbitration and the inquiry into an appeal of a commercial arbitration is to be narrow. I do not take issue with that stated approach. BC Hydro also submits that the court should take care in determining whether a true question of law has been identified, given the tactical interest of a party, to craft questions of law which may well not be questions of law. BC Hydro relies upon the caution that is stated in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32; and *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448.

[25] The submission here is that the questions put forth are, in fact, questions of mixed fact and law. With respect to the question of whether the arbitrator ignored or misconceived the evidence, it is argued that the proposed question is not one that can be extracted from the specific facts of the arbitration to a question of principle. BC Hydro argues that the two questions of law proposed, if they are questions of law, they submit the importance of the result of the arbitration is not sufficient to justify the intervention of the court. While I recognize the size of this project and the entities involved, I will note here that counsel for BC Hydro did not press this point too hard.

[26] BC Hydro also argues the errors of law are not material to the final result, nor of arguable merit. It argues that the joint venture from the outset identified $11.48 million as a direct cost credit to BC Hydro for the Spuzzum deletion and that nowhere in its defence to BC Hydro's counterclaim did the joint venture assert its budgeted costs for the work subject to the deletion or $15.3 million or that BC Hydro was withholding amounts with respect to the Spuzzum deletion in excess of $11.4 million credit offered by the joint venture.

[27] BC Hydro argues that there was no evidence in the arbitration that any work performed by the joint venture was unpaid. There was no evidence in the arbitration that BC Hydro had withheld any excessive amount and that in substance, the

Spuzzum payment application is a new claim that was not pleaded in the arbitration and consequently there is no jurisdiction legal or factual basis for the arbitrator to grant the relief sought by the joint venture in the Spuzzum payment application.

[28] With respect to the second error of law, BC Hydro argues that the joint venture has not established a reasoned belief for concluding that the arbitrator must have forgotten, ignored, or misconceived the evidence in a way that affected his conclusion. As a final point, BC Hydro argues that even if the requirements under the *Arbitration Act* have been met, that the court should exercise its residual discretion to deny leave, applying the approach from the *BCIT* case.

[29] With respect to the submissions, I will note at that the commercial dispute here has been long and intensive, that efficiency and finality are keys to commercial arbitration and that the arbitrator has reviewed and analyzed a very large body of evidence and received extensive submissions over a long hearing, and subsequently. Despite, though, BC Hydro references to the joint venture evidence regarding the amount paid to the joint venture, the claim of the joint venture that only referred to the $11.4 million of direct costs which were sought by the joint venture, the comments of the arbitrator's belief of the amounts would be equal and other comments with respect to his views as to the claim, I am left with the notice to arbitrate and the pleadings and the terms and the breadth of what was stated, the evidence of BC Hydro personnel and documents during the arbitration regarding withholding of sums of BC Hydro, which were well in excess of the $11.4 million, the comments on the arbitrator referencing his assumption, and that the assumption itself was wrong regarding the payment to BC Hydro in the credit, his comment that his [indiscernible] would have to be modified if it turned out to be wrong, that though he stated:

> In the circumstances that this was not a claim that was addressed in the arbitration, it is my view that I have no jurisdiction to make an order compelling BC Hydro to pay an amount that it disputes.

[30] But then states immediately after:

> I do have jurisdiction to direct that BC Hydro pay to the joint venture the amount it withheld from the Spuzzum credit in excess of the amount of $11,484,568.92, if any, and to direct that if there is disagreement on what is the amount that has been withheld, an accounting shall be taken.

[31] Which accounting the joint venture applied for but was rejected by the arbitrator.

[32] Based on the forgoing, I am led to the conclusion that the applicant has identified the required questions of law, that they are of importance to the parties, they are material to the final result, and have arguable merit and that granting leave will prevent a miscarriage of justice.

[33] In the result, leave to appeal is granted to the questions put forth by the joint venture. That concludes my ruling.

"The Honourable Mr. Justice Masuhara"