

CANADA / JUDGMENT

Evergen Infrastructure Corp. v. Net Zero Waste Inc.

2024 BCCA 430

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 430 Evergen Infrastructure Corp. v. Net Zero Waste Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Evergen Infrastructure Corp. v. Net Zero Waste Inc.,

2024 BCCA 430

Date: 20241216

Docket: CA50256

Between:

EverGen Infrastructure Corp.

Appellant

(Respondent)

And

Net Zero Waste Inc., Jaye-Jay Earl Berggren, and Enviro GP Limited

(in its capacity as general partner of Enviro Limited Partnership)

Respondents

(Claimants)

Before:

The Honourable Justice Fleming

(In Chambers)

On appeal from: An award of an Arbitrator under the Arbitration Act,

S.B.C. 2020, c. 2, dated October 9, 2024

(Net Zero Waste Inc. v. EverGen Infrastructure Corp.).

Oral Reasons for Judgment

Counsel for the Appellant:

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Place and Date of Hearing:

Vancouver, British Columbia

December 13, 2024

Place and Date of Judgment:

Vancouver, British Columbia

December 16, 2024

Summary:

The parties entered into arbitration over a dispute arising from a share purchase agreement. The appellant seeks leave to appeal the arbitral award which made determinations according to generally accepted accounting principles ("GAAP").

Held: Application for leave dismissed. An arbitral award may only be appealed on a question of law. The appellant's grounds of appeal focused on the interpretation and application of GAAP. GAAP is not law and determinations made according to GAAP are findings of fact. The appellant has identified no question of law on which leave may be granted.

[1] FLEMING J.A.: The applicant, EverGen Infrastructure Corp. ("EverGen"), seeks leave to appeal an arbitral "award" made October 9, 2024, which is opposed by the respondents, Net Zero Waste Inc., Jaye-Jay Earl Berggren, and Enviro GP Limited (in its capacity as general partner of Enviro Limited Partnership).

Background

- [1] The parties' dispute originates in a share purchase agreement dated December 18, 2020 (the "SPA"), that involved EverGen's purchase of the shares of Sea to Sky Soils and Composting Inc. ("Sea to Sky") from the respondents, which completed on December 31, 2020.
- [2] Under the SPA, the purchase price included certain post-closing adjustments (the "Post-Closing Adjustments"). Post-closing Adjustments included the current liabilities of Sea to Sky, which are defined in the SPA as follows:

Current Liabilities" means the liabilities of the Corporation which, in accordance with GAAP, are shown on the balance sheet of the Corporation as "current liabilities" including, without limitation, accounts payable and accrued liabilities in respect of any goods purchased by, or services performed for the Corporation prior to the Closing Date, deferred revenue, rent and other amounts payable under property leases, GST/HST payable, capital taxes, other Taxes payable and accruals for any and all obligations in respect of employees, deferred revenue in connection with the carbon credits

[Emphasis added.]

- [2] A composting facility was a primary asset of Sea to Sky (the "Facility"). On November 20, 2020, the Ministry of Environment (the "MOE") issued a non-compliance advisory letter to Sea to Sky that identified specific areas of non-compliance with the Organic Matter Recycling Regulation, B.C. Reg. 18/2002 [OMRR].
- [3] In its Post-Closing Adjustments, EverGen recorded \$550,750 as a current liability of Sea to Sky, based on an estimate for the construction of a pond received February 28, 2021 provided by a company called WeaverTech (the "MOE Accrual"). The arbitrator's decision indicates that constructing the pond would have resolved two of the three non-compliance matters identified in the MOE advisory letter.
- [4] The respondents initiated the arbitration claiming EverGen had incorrectly complied with the SPA, which included an allegation it had failed to provide a fair and accurate statement of the calculation of the closing working capital. One of the grounds for this allegation (and the only issue relevant on appeal) was including the MOE Accrual as a current liability in the Post-Closing Adjustments.

The Arbitrator's Decision

- [5] In his decision, regarding the MOE Accrual, the arbitrator identified his task as determining whether or not including it as a current liability as of the closing date was in accordance with generally accepted accounting principles (GAAP) as provided for in the SPA.

- [6] The arbitrator noted that EverGen asserted the current liabilities should include the MOE Accrual, and \$550,750 was an accurate estimate of the monetary amount of Sea to Sky's liability, arising from the non-compliance referred to in the MOE advisory letter, as of the closing date of December 31, 2020.
- [7] Addressing the relevant evidence, the arbitrator accepted that Sea to Sky was committed to and told the MOE that it would rectify the out of compliance matters. His reasons also indicate there was disputed evidence about whether the out of compliance matters could be rectified at little or no cost, and EverGen's President testified in cross-examination that construction of the pond along with other work and improvements referred to by WeaverTech had not started as of the date of the arbitration hearing.
- [8] Both parties tendered expert evidence with respect to GAAP and whether the MOE Accrual constituted a current liability.
- [9] Identifying the issues as whether the MOE Accrual was a liability and if so whether it was a current liability under GAAP, the arbitrator observed that each expert relied on the three-part definition of liability found in the CPA Handbook. They also agreed that all three elements must be met in order for an amount to constitute a liability. Those elements include:
- a) They embody a duty or responsibility to others that entails settlement by future transfer or use of assets, provision of services or other yielding of economic benefits, at a specified or determinable date, on occurrence of a specified event, or on demand;
 - b) The duty or responsibility obligates the entity leaving it little or no discretion to avoid it; and
 - c) The transaction or event obligating the entity has already occurred.
- [10] The arbitrator also observed the CPA Handbook further states that liabilities do not have to be legally enforceable provided they otherwise meet the definition and can be based on equitable or constructive obligations. A constructive obligation is one that can be inferred from the facts in a particular situation as opposed to a contractually based obligation.
- [11] Disagreeing with the conclusion of EverGen's expert that the MOE Accrual was a current liability as at the closing date, the arbitrator considered each of the three elements for a liability and found that none were established.
- [12] To meet the first element, the arbitrator opined there must be a future obligation to pay money or transfer other assets or provide services. He found that the MOE advisory letter did not in itself create a financial liability; rather, it simply gave Sea to Sky notice that it was non-compliant with the OMRR and advised that consequences would follow. While the arbitrator agreed that Sea to Sky had a general obligation to comply with the OMRR, he found that there was no financial obligation to pay money or provide services in 2020.

- [13] The arbitrator also considered whether there was a moral or equitable commitment on the part of Sea to Sky to become compliant with the OMRR. He concluded that even if a moral or equitable commitment existed, it did not relate to 2020. Sea to Sky, he stated, had no intention of complying with the OMRR or spending money to rectify the out of compliance matters in 2020.
- [14] In finding the second element, an unavoidable financial obligation, was also not established, the arbitrator found that Sea to Sky's commitment to rectify non-compliance with the OMRR was completely discretionary. He wrote the discretionary nature of Sea to Sky's obligation was best illustrated by what had happened since 2020, referring to the evidence that no steps had been taken, or additional expense incurred, and thus far there had been no consequences for the non-compliance with the OMRR.
- [15] In cross-examination, EverGen's president agreed it had been within EverGen's "discretion" to carry out the construction of the pond.
- [16] Finally, the arbitrator found that the third element was not established because the event obligating Sea to Sky to incur cost had not occurred by the Closing Date. Identifying two obligations: one, to comply with the OMRR; and two, the obligation to rectify the out of compliance matters referred to in the MOE advisory letter, he noted the MOE Accrual was an estimate of the cost to comply. Further, although Sea to Sky was likely out of compliance by the closing date, there was no associated cost and no obligation to incur expenses to achieve compliance as of that day.
- [17] Accordingly, the arbitrator concluded the MOE Accrual was not a liability under GAAP and therefore not a liability on the closing day; and it could not be included in the determination of current liabilities under the SPA.
- [18] EverGen filed its notice of appeal of the Arbitral Award on November 7, 2024 and filed its application for leave on November 8, 2024.

Leave to Appeal an Arbitral Award

- [19] Rule 12(b) of the Court of Appeal Rules, B.C. Reg. 120/2022 provides that an appellant must apply for leave to appeal where an enactment, other than the Court of Appeal Act, S.B.C. 2021, c. 6 stipulates that leave is required to appeal the order in question.
- [20] The requirement and test for leave to appeal an arbitral award to this Court are set out in s. 59 of the Arbitration Act, S.B.C. 2020, c. 2.
- [21] Subsection 59(2)(b) provides that a party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if a justice grants leave to appeal under subsection (4).
- [22] Subsection 59(4) provides that a justice may grant leave if any one of the following criteria are met:

- (a) 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,
 - (b) The point of law is of importance to some class or body of persons of which the applicant is a member, or
 - (c) The point of law is of general or public importance.
- [23] Finally, the justice must be prepared to exercise the residual discretion implicit in the phrase "the justice may grant leave": *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 54.
- [24] Thus, there are three distinct requirements for leave to appeal: (1) a question of law, (2) a circumstance identified in s. 59(4), and (3) the exercise of the justice's discretion to grant leave.

Positions of the Parties

EverGen

- [25] EverGen submits that the arbitrator made three intertwined errors of law in deciding the MOE Accrual was not a current liability that include:
- (1) incorrectly interpreting GAAP to require an expenditure of money in the fiscal year 2020 or prior to the closing date;
 - (2) incorrectly determining that compliance with the OMRR was discretionary; and
 - (3) failing to consider a relevant element of the "legal test" under GAAP, that being whether the MOE Accrual constituted a "constructive liability" and as set out in the CPA Handbook.
- [26] Addressing the second branch of the leave test, EverGen relies on s. 59(4)(a) and argues a clear miscarriage of justice would result if leave is denied, because the alleged errors pertain to a material issue in dispute and the most financially significant one, which if decided differently would therefore significantly affect the outcome of the case.
- [27] Finally, EverGen submits there are no circumstances that support the exercise of discretion to refuse to grant leave as the arbitration has proceeded expeditiously, there are no alternative remedies for the relief sought, and the appeal would not cause undue delay.

Respondents

- [28] The respondents' main submissions is that no question of law is raised in this appeal. They emphasize that it is well settled law that determinations under GAAP are questions of fact and all three questions pertain to the interpretation of GAAP. Addressing the merits, they assert that EverGen has not challenged the arbitrator's determination on the first element of a liability, which is determinative given the requirement that all three elements be established. The respondents also assert EverGen mischaracterizes the arbitrator's decision

including his finding regarding the discretionary nature of the liability under the second element, by pointing to the mandatory nature of the OMRR while ignoring the arbitrator's focus on whether there was a financial liability arising from the obligation to comply. Further, the respondents deny the arbitrator failed to consider whether there was a liability based on a constructive obligation, given he expressly recognized it as a possible form of liability before considering the facts.

- [29] Addressing the second ground for leave, the respondents argue that there can be no miscarriage of justice if leave is refused because the ultimate determination of whether the MOE Accrual was a current liability, would not be impacted even if EverGen succeeds on the three issues it raises, given the asserted failure to challenge the first element of the definition. Consequently, they submit, the Court should exercise its discretion to dismiss the application for leave.

Analysis

Legal Framework

- [30] *Urban Communications Inc. v. BCNET Networking Society*, 2015 BCCA 297 at para. 64, aff'd 2016 SCC 45, helpfully summarizes the principles governing applications for leave to appeal arbitral awards, with reference to *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53:

- 1) The historical approach in which issues of contractual interpretation were held to be questions of law is to be abandoned (para. 50);
- 2) In considering an application for leave to appeal under s. 31(1) of the Act [now s. 59 (2)(b)] a court must be "cautious in identifying extricable questions of law in disputes over contractual interpretation" given the legislature's intention to restrict such appeals (para. 54);
- 3) At the same time, an extricable question of law may still arise from within what was initially characterized as a question of mixed fact and law (e.g., the application of the correct legal principle, failure to consider an element of a legal test, or failure to consider a relevant factor) (paras. 53-54);
- 4) In considering whether leave to appeal should be granted, 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" (para. 79);
- 5) 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 (para. 92).

- [31] With this framework in mind, I turn then to whether EverGen's alleged errors of law raise a question or questions of law arising out of an arbitral award, as required by s. 59(2)(a).

Question of Law

- [32] As the respondents have emphasized several authorities establish that GAAP is not law and determinations made under GAAP are findings of fact.
- [33] In *Symes v. Canada*, [1993] 4 S.C.R. 695 at para. 37, Justice Iacobucci, writing for the majority, observed that "[a]ny reference to G.A.A.P. connotes a degree of control by professional accountants which is inconsistent with a legal test for 'profit' under [the Income Tax Act]" (emphasis in original). He also referred to well accepted principles of business or accounting practice, in reaching a determination of profit, as interpretative aids and no more. Subsequently, in *Canderel Ltd. v. Canada*, 1998 CanLII 846, [1998] 1 S.C.R. 147, Iacobucci J. held, "[w]ell-accepted business principles, which include but are not limited to the formal codification found in GAAP, are not rules of law but interpretive aids" (para. 53). Similarly, and much more recently, in *Close v. Weigh West Marine Resort Incorporated*, 2009 BCCA 216, this Court determined that a summary trial judge's conclusion that financial statements were not prepared in accordance with GAAP was a finding of fact (at para. 22). Then in *H.R.S. Resources Corp. v. Thompson Creek Metals Company Inc.*, 2024 BCSC 1847, Justice Riley (as he then was) affirmed that GAAP is a non-legal tool which may be referenced by contracting parties as an "objective standard" to make certain contractual determinations: at paras. 213-219.
- [34] Although EverGen attempts to distinguish some of these cases based on their factual context, it acknowledges there is no contrary authority and the GAAP, along with the CPA Handbook, provide the only framework for all three asserted errors of law. Describing each of the errors as based on the "contractually mandated" test, EverGen also contends that by including GAAP in the SPA, the principles of GAAP effectively became the parties' own private law or they are elevated to legal principles or a legal test.
- [35] I reject EverGen's argument in light of the jurisprudence recognizing GAAP as a non-legal tool and findings based on GAAP as findings of fact and in the absence of any contrary authority. But I also can see no merit in the notion that by agreeing in a contract to use a particular tool or set of non-legal principles, the parties are not only contractually bound to use that tool or those principles, but they also achieve the status of law.
- [36] The first alleged error is that the arbitrator erred in law by interpreting GAAP to require an expenditure of money in the fiscal year 2020. As GAAP is not law, I find that any alleged error in interpreting the requirements of GAAP does not constitute a question of law.
- [37] The second alleged error is that the arbitrator erred in law by finding that compliance with the OMRR was discretionary, rather than mandatory. As the respondents point out, contrary to EverGen's assertion, it is clear from the decision the arbitrator did not find there was a discretion not to comply with the OMRR. Instead he found that the expenditure of \$550,750, or the MOE Accrual arising from non-compliance identified in the MOE advisory letter was discretionary, as contemplated by the second element of the accepted definition of a liability under the CPA Handbook. Again, this is not a question of law but a finding of fact, supported

I would add, by the continued non-compliance and the absence of any financial consequences for EverGen as of the hearing date.

[38] The third alleged error is that the arbitrator erred in failing to consider elements of the correct legal test of what constitutes a current liability, as set out in the CPA Handbook and the principles of GAAP. Again, as neither constitutes a legal test or legal principles, I am satisfied no question of law is raised.

[39] Given EverGen's failure to identify a question of law is dispositive of this application, I will not go on to consider the two other requirements for leave.

Disposition

[40] Leave to appeal is denied.

"The Honourable Justice Fleming"

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