

CANADA / JUDGMENT

Gormac Developments Ltd. v. Teal Cedar Products Ltd.

2020 BCSC 712

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Supreme Court of British Columbia

DECIDED

7 May 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gormac Developments Ltd. v. Teal Cedar Products Ltd.,

2020 BCSC 712

Date: 20200507

Docket: S160899

Registry: Vancouver

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

Between:

Gormac Developments Ltd.

Petitioner

And

Teal Cedar Products Ltd.

Respondent

Before: The Honourable Madam E. McDonald

(In Chambers)

Reasons for Judgment

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N.C. Gilewicz

Place and Date of Hearing:

Vancouver, B.C.

January 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

May 7, 2020

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INTRODUCTION

- [1] The petitioner, Gormac Developments Ltd. ("Gormac"), seeks leave pursuant to section 31 of the Arbitration Act, R.S.B.C. 1996, c. 55 (the "Act") to appeal from an arbitration award.
- [2] Gormac must demonstrate that it seeks to appeal on a question of law arising out of the arbitration award. If this threshold requirement is met, and before I exercise my discretion to grant leave to appeal on any question of law arising out of the arbitration award, I must be satisfied that one of the following circumstances set out in s. 31(2) of the Act exist:
- a) the result of the arbitration is important to the parties and the intervention of the court to determine the point of law may prevent a miscarriage of justice;

- b) the point of law is important to some class or body of persons of which Gormac is a member; or
 - c) the point of law is of general or public importance.
- [3] The respondent, Teal Cedar Products Ltd. ("Teal") makes a limited concession regarding the importance of the result to the parties as set out in s. 31(2)(a) of the Act. Teal concedes that this part of paragraph (a) is satisfied; however, it does not concede that Gormac satisfies the other statutory requirements for leave to appeal.

BACKGROUND

- [4] The arbitration between Gormac and Teal concerned a contract titled "Road Construction Agreement - 2 Year Replacement (Coastal Crown Tenure)" dated April 7, 1992 (the "Contract"). The Contract was a "replaceable contract" pursuant to the Timber Harvesting Contract and Subcontract Regulation, B.C. Reg. 22/96, formerly B.C. Reg. 258/91 (the "Regulation").
- [5] Fletcher Challenge Canada Ltd. ("Fletcher") and Interline Construction Ltd. ("Interline") were the original parties to the Contract. In 1993, Gormac purchased the Contract from Interline. Teal acquired Fletcher's interest in the Contract, along with Fletcher's forest licence.
- [6] The Contract expired on December 31, 1993; however, Teal and Gormac agreed to abide by the Contract until they could reach a new agreement. No new agreement was ever reached.
- [7] In August and September of 2015, the parties attended an arbitration before Murray A. Clemens, Q.C. (the "Arbitrator").
- [8] The Arbitrator described the underlying dispute between the parties as arising from the fact that over time, Teal began to harvest less old growth and more second growth timber within the tenure. This resulted in less new road construction and more road reconstruction and road rehabilitation work to access the second growth areas.
- [9] When Gormac learned that Teal was using another contractor to perform road reconstruction and road rehabilitation within the tenure, Gormac took the position that it was entitled to that work pursuant to the Contract. However, Teal took the position that road reconstruction and road rehabilitation were not included under the terms of the Contract, leaving it free to contract with another party for that work.
- [10] The main issue before the Arbitrator was whether the Contract, when properly construed, included logging road reconstruction and road rehabilitation work within the services agreed to be provided, or only new road construction. The alternative issue was whether Gormac could establish entitlement under the Regulation to a replaceable contract for the road reconstruction and road rehabilitation as a result of having performed that work in 2003.

- [11] On November 26, 2015, the Arbitrator issued the Final Partial Award (the "Award"), which Gormac now seeks leave to appeal. As part of the Award, the Arbitrator decided and declared that: (a) the Contract does not include replaceable road reconstruction or road rehabilitation work; and (b) Gormac failed to establish that it was entitled to a replaceable contract for road reconstruction and/or road rehabilitation work based on the work it performed in 2003.
- [12] On January 22, 2016, Gormac filed a petition seeking leave to appeal from the Award pursuant to s. 31 of the Act. On July 4, 2018, Teal filed its response to petition.

ISSUES

- [13] To decide this application, I must determine the following issues:
- a) Is there a question of law arising out of the Award?
 - b) If there is a question of law arising, does any one of the circumstances in s. 31(2) of the Act exist?

THE LAW

- [14] This court's jurisdiction to grant leave to appeal from an arbitration award is governed by the following relevant provisions of the Act:

31 (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if

- (a) all of the parties to the arbitration consent, or
 - (b) the court grants leave to appeal.
- (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
- (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.
- (3) If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just.
- [15] The requirements for obtaining leave to appeal from an arbitration award were recently considered in *MSI Methylation Sciences, Inc. v. Quark Ventures Inc.*, 2019 BCCA 448 at para. 54, where Justice Hunter stated:

[54] Thus, there are three distinct requirements that must be met before leave can be given to appeal an arbitration award:

- (a) the appeal must be based on a question of law arising out of the award;
- (b) the leave judge must be satisfied that one of the three circumstances identified in s. 31(2) of the Act exists; and
- (c) the leave judge must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave "

[16] In MSI, at paragraph 72, Justice Hunter summarized the principles that apply to an application for leave to appeal under the Act:

[72] From these authorities, and having in mind the legislative evolution of s. 31 of the Arbitration Act, I draw the following principles in relation to appeals from arbitration awards:

- (a) Appeals are limited to questions of law arising out of the award. If the proposed question is not a question of law arising out of the award, there is no jurisdiction to grant leave to appeal.
- (b) A question of law may be explicit or implicit in the award. If the question of law is explicit in the award, the statutory precondition is met. If the asserted question of law is implicit in the award, in the sense that it must be extricated from the application of the law to the facts, care must be taken to distinguish between an argument that a legal test has been altered in the course of its application (a question of law) and an argument that application of the legal test should have resulted in a different outcome (a question of mixed fact and law).
- (c) One means of determining whether the challenged proposition is a question of law or part of a question of mixed fact and law is to consider the level of generality of the question. If the answer to the proposed question can be expected to have precedential value beyond the parties to the particular dispute, the question is more likely to be characterized as a question of law. On the other hand, if the answer to the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants, the question will likely be considered a question of mixed fact and law. I would add to this that when the "question" is stated as a ground of appeal that is integrally tied to the facts of the case, it will more likely be characterized as a question of mixed fact and law, the answer to which cannot be of general application because of the integration of the particular facts of the case to the question. The more the question can be abstracted from the particular facts to a question of principle, the more likely it is that the challenged proposition will be characterized as a question of law with potential precedential value.
- (d) A narrow scope for what constitutes extricable questions of law is consistent with finality in commercial arbitration.

- [17] It is key to determine whether the issues raised by Gormac amount to extricable questions of law in the Arbitrator's analysis and if they do, whether there is arguable merit to Gormac's submission that the findings on those questions were unreasonable: *Richmont Mines Inc. v. Teck Resources Ltd.*, 2018 BCCA 452 at para. 62.
- [18] However, I must exercise caution in determining whether there are extricable questions of law raised because questions of mixed fact and law "by definition, involve aspects of law": *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 54; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 [Teal (SCC)] at para. 45.
- [19] Keeping the principles enumerated in the authorities in mind, I will now address Gormac's proposed questions of law.

ANALYSIS

- [20] Gormac argues that the Arbitrator made the following errors of law in the Award:
- a) Failing to properly interpret and apply the Regulation;
 - b) Failing to consider the Contract as a whole; and
 - c) Failing to consider material evidence regarding the B.C. forest industry.
- [21] Teal opposes the relief sought. Teal argues that Gormac is unable to meet the statutory requirements necessary to obtain leave to appeal, including because the issues raised by Gormac are "at best, questions of mixed fact and law". Teal also submits that granting leave to appeal after such an inordinately lengthy dispute between the parties would undermine the goals of efficiency and finality at the heart of commercial arbitration.

Failure to Properly Interpret and Apply the Regulation

- [22] Gormac submits that the Arbitrator failed to apply the correct (or reasonable) legislative test when he failed to consider that the aggregate of road construction contract work performed by Gormac met the six-month threshold for a replaceable contract under the Regulation and he erroneously considered "road reconstruction" and "road rehabilitation" separately from "road construction". As a result of improperly applying the test, Gormac says the Arbitrator erroneously concluded that the amount of road reconstruction and road rehabilitation work performed by Gormac fell short of the six-month threshold, thereby disqualifying Gormac from a replaceable contract.
- [23] In paragraph 6 of the Award, the Arbitrator refers to s. 152 of the Forest Act, R.S.B.C. 1979, c. 140 for the definition of "replaceable contract":
6. Section 152 of the Act defined "replaceable contract" to mean a contract:

- (a) that includes a requirement that the holder of the forest license, timber license or tree farm license, as the case may be, by a prescribed time before expiry of the existing contract, must, if the contractor has satisfactorily performed the existing contract up to the time of the offer, make an offer to the contractor, conditional on the contractor continuing to satisfactorily perform the existing contract, of a replacement contract that
- (i) provides for payment to the contractor of the amounts agreed by the parties, or failing agreement, of the amounts settled by the method of dispute resolution provided under the existing contract at the time of the offer, and
- (ii) subject to a requirement as to the length of term prescribed under section 157(d)(ii), is otherwise on substantially the same terms and conditions as the existing contract, and

[24] In paragraph 7 of the Award, the Arbitrator refers to s. 22 of the predecessor Regulation for the definitions of "contract", "sub-contract" and "phases of a timber harvesting operation":

a contract, as defined in section 158.1 of the Act, for the whole or a part of one or more phases of a timber harvesting operation, [] as the case may be, where the contract or subcontract

(a) is derived from any of the licenses to which section 23(1) applies, and

(b) either

(i) will take or is likely to take more than 6 months to complete, or

(ii) when taken together with any previous contract or subcontract between the parties during a calendar year, will take or is likely to take more than 6 months in the aggregate to complete, and

"contractor" and "subcontractor" have corresponding meanings."

(b) "Phases of a timber harvesting operation" was defined to include " . Logging, road construction, logging road maintenance, logging road access road construction and any other phases or combinations of them that are part of a timber harvesting operation under a license ".

[Emphasis added by Arbitrator.]

[25] Gormac does not assert that the Arbitrator failed to consider an applicable statutory provision. Gormac agrees that the Arbitrator correctly identified the key statutory elements in paragraph 102 of the Award when he states:

A key element of the new [legislative] regime was that if contracts existed at the time of the introduction of the new legislation which took more than six months to complete or when taken together with any previous contract between the parties during a calendar year took more than six months in the aggregate to complete, the contractor was entitled to a written replaceable contract for that work.

- [26] However, as mentioned above, Gormac submits that the Arbitrator erred in law in his application and interpretation of the six-month test under the Regulation because he applied it individually to each of Gormac's road construction obligations under the Contract.
- [27] Gormac relies on Teal (SCC) at paragraph 45 to support its argument that the interpretation of the Regulation, and its position that the Regulation sets out a legal test requiring the Arbitrator to consider the aggregate of Gormac's work in a particular year to decide if it met the six-month threshold for a replaceable contract, is a question of law.
- [28] In MSI, Justice Hunter refers to Teal (SCC) and more specifically to Justice Gascon's explanation of how implicit questions of law may arise:
- [69] The Supreme Court's most recent consideration of s. 31 of the Arbitration Act is found in Teal Cedar Products Ltd. v. British Columbia, 2017 SCC 32, a decision cited extensively by the chambers judge. In Teal Cedar, Gascon J. for the majority explained that implicit questions of law can arise in the application of the law to the facts if the arbitrator fails to consider a required element of the legal test:
- [44] while the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. For example, if a party alleges that a judge (or arbitrator) while applying a legal test failed to consider a required element of that test, that party alleges that the judge (or arbitrator), in effect, deleted that element from the test and thus altered the legal test. As the Court explained in Southam, at para. 39:

... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Such an allegation ultimately challenges whether the judge (or arbitrator) relied on the correct legal test, thus raising a question of law (Sattva, at para. 53; Housen, at paras. 31 and 34-35). Accordingly, such a legal question, if alleged in the context of a dispute under the Arbitration Act, and assuming the other jurisdictional requirements of that Act are met, is open to appellate review. These "extricable questions of law" are better understood as a covert form of legal question -- where a judge's (or arbitrator's) legal test is implicit to their application of the test rather than explicit in their description of the test -- than as a fourth and distinct category of questions.

- [70] Justice Gascon added a caution, however, in approaching the extrication of implicit questions of law from questions of mixed fact and law, since mixed questions of fact and law by definition involve aspects of law:

[45] Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question -- for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments -- are transparent (*Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

[Emphasis added by Justice Hunter.]

[71] Finally, Gascon J. emphasized the importance of the distinction when applied to appeals from arbitration awards as opposed to judicial decisions where the relevance of the distinction is limited to the standard of review:

[46] From this standpoint, the characterization of a question on review as a mixed question rather than as a legal question has vastly different consequences in appeals from arbitration awards and civil litigation judgments. The identification of a mixed question when appealing an arbitration award defeats a court's appellate review jurisdiction (*Arbitration Act*, s. 31; *Sattva*, at para. 104). In contrast, the identification of a mixed question when appealing a civil litigation judgment merely raises the standard of review (*Housen*, at para. 36).

[Emphasis added by Justice Hunter.]

[29] At paragraph 72 of *MSI*, Justice Hunter draws the following principle from Justice Gascon's explanation:

(b) A question of law may be explicit or implicit in the award. If the question of law is explicit in the award, the statutory precondition is met. If the asserted question of law is implicit in the award, in the sense that it must be extricated from the application of the law to the facts, care must be taken to distinguish between an argument that a legal test has been altered in the course of its application (a question of law) and an argument that application of the legal test should have resulted in a different outcome (a question of mixed fact and law).

[30] Turning now to the allegation that the Arbitrator failed to properly apply the Regulation, before the Arbitrator considered Gormac's claim for a right to a replaceable contract, he notes (at paragraph 106 of the Award) that the definition of "contract" in the Regulation relates to "the whole or part of [sic] one or more phases of a timber harvesting operation" [emphasis added by Arbitrator]. He also notes that "[o]n its face, the Contract concerns the quantity of new road construction and no reconstruction or road rehabilitation work".

- [31] The Arbitrator ultimately concludes that there is insufficient evidence to ground a finding that Gormac is entitled to a replaceable contract under the Regulation. He explains why the evidence falls short of establishing a right to a replaceable contract in paragraphs 110 to 114 of the Award.
- [32] In my view, Gormac is not raising an explicit question of law in the context of this particular issue. Great care must be taken to distinguish between arguments that a legal test has been altered in the course of its application, and one alleging that the application of the legal test should have resulted in a different outcome: MSI, at para. 72.
- [33] The Arbitrator found the evidence lacking and insufficient to meet the six-month threshold in the Regulation. Gormac's issue is really an argument that the application of the six-month threshold in the Regulation should have resulted in a different outcome.
- [34] I am also concerned that this issue and question raised lacks the level of generality required to make it a question of law since it seems integrally tied to the facts of the case. As was the case in MSI, I find that this alleged error is too closely tied to the particular facts of the case to be considered an extricable question of law, or to have wider precedential value.
- [35] As such, I decline to grant leave to appeal on this ground because I am not satisfied that Gormac has raised a question of law.

Failure to Construe the Whole of the Contract

- [36] Gormac submits that the Arbitrator committed an error of law by failing to consider relevant provisions of the Contract. For example, Gormac says the Arbitrator failed to incorporate subsection 4.05 into his analysis, which refers to the nature of the work to be performed changing over time. Gormac submits that the Arbitrator's decision is unreasonable, contrary to specific contractual terms and inconsistent with the original parties' intention.
- [37] In the Award, the Arbitrator states at paragraph 40:
40. Below are individual provisions of the Contract primarily relevant to the interpretation issue. These extracts from the Contract are set out for convenience only. I do not suggest and have not approached this interpretation issue by looking only at these isolated provisions, but have considered them in the context of the Contract as a whole.
- [38] The Arbitrator found that when the Contract was entered into, Fletcher and Interline knew or ought to have known the Contract was replaceable and that the Contract would continue after the roads in the 1992 road construction plan had been built.
- [39] At paragraph 49 of the Award, the Arbitrator sets out the principles of contractual interpretation and he notes the parties' agreement with these principles. At the hearing of this application, neither party suggested that the Arbitrator had incorrectly stated the applicable principles in the Award.

- [40] The Arbitrator then proceeded to analyse the meaning of "road construction", "road rehabilitation" and "road reconstruction" and he noted the parties' positions as follows:
94. Both parties in this arbitration were in agreement that the words were unambiguous and led to only one interpretation. They differed, however, in what the interpretation is. Gormac contends that the words "construct roads", "construct all roads", "construct all weather roads" and "construct only those roads" found in Schedule A must include reconstruction and rehabilitation work given the closely related nature of the activities all directed at the same purpose.
95. Teal contends that reading the Contract as a whole leads to the conclusion that the parties' intention was to include only new road construction particularly given the reference at subparagraph (d) of Schedule A
- [41] The Arbitrator states his conclusions regarding the interpretation of the Contract as follows:
102. As I have noted, the words "road construction", "road reconstruction" and "road rehabilitation" from a grammatical and usage point of view are different albeit related activities. Reading the contract as a whole supports the view that the parties intended those activities to be separate for contracting purposes and the absence of any mention of road reconstruction and road rehabilitation in Schedule "A" reinforces that interpretation as do the payment provisions such that on a plain reading of the contract as a whole I find that the original parties agreed and intended at the time the contract was entered into to include only new road construction and not reconstruction and road rehabilitation work. This conclusion is bolstered by the circumstances surrounding the parties' entry into this Contract in April 1992. A key element of the new regime was that if contracts existed at the time of the introduction of the new legislation which took more than six months to complete or when taken together with any previous contract between the parties during a calendar year took more than six months in the aggregate to complete, the contractor was entitled to a written replaceable contract for that work. That was the genesis of the Contract in question here. As noted above the record of work performed by Interline for Fletcher included minimal reconstruction and rehabilitation work and in an amount insufficient amount [sic] to qualify for a replaceable contract.
- [Emphasis added.]
- [42] In my view, this is not one of those limited cases where an error in contractual interpretation gives rise to extricable questions of law, such as where the question would have precedential value or where the initial decision maker considered an incorrect principle: *Richmont*, at paras. 65 and 67. There is no suggestion either that the Contract here is a standard form of contract that is widely used in the forest industry. On the contrary, there appears to be a "meaningful factual matrix that is specific to the parties" that assisted the Arbitrator in the interpretive process: *Richmont*, at para. 67, citing *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 24.

- [43] Gormac's position about the meaning of the phrases "construct roads", "construct all roads", "construct all weather roads" and "construct only those roads" was not accepted by the Arbitrator. In my view, the Arbitrator's interpretation of the Contract, which included these phrases, is inextricably bound up with the evidence about the parties' original intentions and the rest of the factual matrix. As such, even if Gormac had correctly identified an error in the Arbitrator's decision regarding the interpretation of the Contract, I am unable to see how such an error could be extricated from the facts of this case: Richmond at para. 72.
- [44] While Gormac may disagree with the Arbitrator's conclusions about the correct interpretation of the Contract, for the purposes of the application for leave to appeal, I am unable to agree that the Arbitrator made an error of law by failing to construe the Contract as a whole. The Arbitrator explains how his reading of the Contract as a whole and the evidence supports his conclusions. From my reading of the Award, it cannot be said that the Arbitrator obviously failed to consider the Contract as a whole.
- [45] It is also important to note that the Arbitrator is not required to refer to every submission, statutory provision or piece of jurisprudence in his decision. There is also no requirement for the Arbitrator to make specific findings on each constituent element for his decision to be reasonable: Sattva, at para. 75, citing Newfoundland and Labrador Nurses' Union v. Newfoundland & Labrador (Treasury Board), 2011 SCC 62 at para. 16.

Failure to Consider Material Evidence

- [46] Gormac submits that the Arbitrator erred in law by ignoring relevant and material evidence, specifically the expert evidence, concerning the meaning of logging road construction in the timber harvesting operations of the coastal B.C. forest industry. In Gormac's view, the Arbitrator should have recognized the experts' evidence as consistent with Gormac's argument that there is no reasonable support for distinguishing between "road construction", "road reconstruction" and "road rehabilitation" when interpreting the Contract.
- [47] The Arbitrator refers to the expert evidence in the Award. For example, he states at paragraph 90 of the Award: "There was very little in difference and no material conflicts between the evidence of these two expert witnesses whose evidence was generally uncontroversial."
- [48] While Gormac may disagree with the Arbitrator's assessment and weighing of the expert evidence, I am unable to accept its submission that the evidence was ignored or inadequately considered in a manner that amounts to an error of law. I fail to see an indication that the Arbitrator did not consider relevant factors or evidence which might indicate that he improperly weighed all of the factors: Van de Perre v. Edwards, 2001 SCC 60 at para. 15. Rather, based on my reading of the Award, it appears that the Arbitrator considered the expert evidence and gave it little weight, as he was entitled to do.

- [49] In concluding that this ground for seeking leave is not convincing, I am mindful that the Arbitrator is best situated to weigh the factual matrix following a hearing and interpret a contract. This is supported by Teal (SCC) (at paragraph 59) where Justice Gascon states:
- [59] The identification of an alleged legal error should be based on the arbitrator's application of the wrong test, not on the fact that one would have applied the appropriate legal test differently. Otherwise, it does not raise a legal question conferring jurisdiction on the courts to review the arbitration award (Sattva, at paras. 63-66); rather, it skips the jurisdiction stage and immediately proceeds with a review of the arbitrator's analysis of a mixed question.

CONCLUSION

- [50] In my view, each issue raised by Gormac on this application involves a question of mixed fact and law. I am unable to find any extricable questions of law in the issues raised. Since Gormac has not raised an extricable question of law, I do not need to consider whether any of the circumstances set out in s. 31(2) of the Act exist. The petition is dismissed with costs to the respondent.

"E. McDonald J."

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Prepared on 27 October 2026 · Esheria