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COURT OF QUEEN'S BENCH OF MANITOBA

BETWEEN:	)	**APPEARANCES:**
	)	
I-NETLINK INCORPORATED,	)	Colin R. MacArthur
	)	for Broadband
	)	Communications North Inc.
Applicant,	)	
	)	
- and -	)	Dave Hill
	)	for I-Netlink Incorporated
BROADBAND COMMUNICATIONS NORTH INC.,	)	
	)	
Respondent.	)	
	)	
AND BETWEEN:	)	
	)	
BROADBAND COMMUNICATIONS NORTH INC.,	)	
	)	
Applicant,	)	
- and -	)	
	)	
I-NETLINK INCORPORATED,	)	
	)	Judgment delivered:
Respondent.	)	August 3, 2017

EDMOND J.

INTRODUCTION AND GOVERNING LEGAL TEST FOR LEAVE TO APPEAL

[1] Broadband Communications North Inc. ("BCN") and I-Netlink Incorporated ("I-Net") executed a Stipulated Price Contract made on December 31, 2005 and actually signed by the parties on March 10, 2006 (the "SPC"). Disputes arose between the parties and in accordance with the terms and conditions of the SPC, the matter was referred to arbitration.

[2] The parties agreed to bifurcate the hearing of the issues to be determined in the arbitration. The parties submitted that a preliminary issue or question to be determined was a threshold question which, in essence, was whether a CSA standard applied to the design and construction of a network to provide internet access to a number of communities in northern Manitoba.

[3] The arbitrator made and published his preliminary award on October 18, 2013.

[4] I-Net filed an application for leave to appeal the preliminary award of the arbitrator. The application judge heard the leave application and dismissed it. I-Net sought leave to appeal the decision of the application judge. The application for leave to appeal to the court of appeal was dismissed on jurisdictional grounds.

[5] Following the dismissal of the leave to appeal, the arbitration resumed and on November 13, 2015, the arbitrator delivered his final award (the "Award").

[6] Both I-Net and BCN filed applications seeking leave to appeal the Award pursuant to s. 44(2) of ***The Arbitration Act***, C.C.S.M. c. A120 (the "***Act***"). Section 44(2) provides:

> 44(2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question 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
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> (b) determination of the question of law at issue will significantly affect the rights of the parties.

[7] In its notice of application, and as amended during the course of oral submissions, I-Net seeks leave to appeal the Award on the following alleged errors of law by the arbitrator:

a) failing to hold that the absence of any direct reference to CSA standards in Appendix E of the SPC was significant and governs the interpretation of the SPC (as he had done with respect to Appendix D to the subject contract) contrary to the Court of Appeal decision of ***Geoffrey L. Moore Realty Inc. v. The Manitoba Motor League***, [2003] MBCA 71, at paras. 11-13 and 26;

b) failing to apply the legal principle that the intention of the parties to a contract is to be ascertained at the time that the contract is entered into (here on March 10, 2010) when he had already found that at that time, the parties knew that a survival standard as set out in the contract was not the same as the CSA standard;

c) in considering the subsequent conduct of the parties in determining the factual matrix existing at the time of the execution of the contract, contrary to the Court of Appeal decision in ***King v. Operating***

Engineers Training Institute of Manitoba Inc., 2011 MBCA 80, at paras. 70-73;

d) once he had determined that the measure of damages was for the foundations only, in then awarding damages themselves which exceeded the cost to remediate the foundations;

e) in requiring the applicant to pay $680,000 of damages for something that may never happen, that is to say, no replacement needs to be done at all in exchange for the $680,000 and therefore he erred in law in not stipulating that the $680,000 for potential damages was only to be paid upon proof of remediation;

f) in his December 5, 2015 addition to his Award, and his December 7, 2015 addition to his Award, in holding RST (PST) and GST were to be added to the Award, when:

   i. GST is paid only by the end user of a product or service and in the case of BCN, as an operator of a commercial network, the GST is a business input cost and fully refundable;

   ii. RST (PST) does not apply to real property but only to "tangible personal property" under ***The Retail Sales Tax Act***.

[8] I-Net submits that the above-noted grounds are questions of law, of importance to the parties in the matters at stake which justifies an appeal; will significantly affect the rights of the parties; and the questions of law present an arguable case on appeal.

[9] In its notice of application, BCN seeks leave to appeal the Award on the following alleged errors of law by the arbitrator:

a) in finding that the standard by which I-Net was required to construct the structures was CSA-37-01 calculated using reliability classification lll rather than CSA-37-01 calculated using reliability classification l;

b) in finding that Ashmede Asgarali or any other representative of BCN knew or ought to have known that the structures were to be constructed to CSA-37-01 using reliability classification lll;

c) in finding that there was an agreement between BCN and I-Net that geotechnical reports for each site need not be obtained;

d) in finding that the remediation of the foundations, as proposed by Michael Maendel, was established to a civil standard of proof, i.e., on the balance of probabilities;

e) to find that I-Net had not provided evidence that met the civil standard of proof to establish the cost of the remediation for the foundations;

f) in finding that the preliminary structural condition assessment prepared by Michael Maendel was an appropriate basis for the remediation of the foundations;

g) in failing to consider that I-Net bore the burden of proof to propose a method of remediation of the foundations based on the principle of mitigation;

h) by making an award that did not put BCN in the position it would have been had the SPC with I-Net been completed according to its terms;

i) in failing to properly consider and apply the responsibility assumed by I-Net for the design and construction of the structures, as a turnkey project, including the obligation to construct to the CSA-37-01 standard;

j) in finding that Charlie Clark as construction manager was not in a fiduciary relationship with BCN;

k) in interpreting provisions of the SPC to limit the legal and fiduciary obligations of Charlie Clark as construction manager;

l) in failing to consider and apply the obligations of honest performance as it related to I-Net in purportedly discharging its obligations under the SPC;

m) in failing to consider and apply the obligations of honest performance related to the contract entered into by Charlie Clark with BCN whereby Clark agreed to represent BCN as its construction manager;

n) in finding that BCN was required to complete the construction of the foundations as a prerequisite of payment;

o) in making an award that was not in accordance with the principles of law and equity and made findings of fact that were unreasonable or failed to make findings of fact that were reasonable.

[10] BCN submits that the above-noted grounds are questions of law of importance to the parties in the matters at stake which justifies an appeal; will significantly affect the rights of the parties; and the questions of law present an arguable case on appeal.

[11] The scope of appellate intervention in commercial arbitration is limited pursuant to s. 44(2) of the ***Act*** to questions of law. If either of the parties have satisfied the court that one or more of their grounds for seeking leave raise a question of law, then the court shall only grant leave if it is satisfied that the importance to the parties of the matters at stake in the arbitration justifies an appeal and determination of the question of law at issue will significantly affect the rights of the parties.

[12] Both parties have submitted that the threshold for leave to appeal on a question of law is a low one which requires the parties to show the legal question at issue has arguable merit (see ***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53, [2014] 2 S.C.R. 633 (QL); ***Manitoba Teachers' Society v. North***, 2005 MBQB 292, 199 Man.R. (2d) 149 at para. 10; and ***Domo Gasoline Corp. v. 2129752 Manitoba Ltd.***, 2013 MBQB 252, 297 Man.R. (2d) 254 at para. 5).

[13] Both parties argue that the other party's notice of application should be dismissed primarily on the basis that the grounds for seeking leave to appeal are not questions of law, but questions of fact or questions of mixed fact and law and thus fall outside the scope of appellate review permitted under the ***Act***.

[14] In deciding the issues in the two notices of application, I am guided by the Supreme Court of Canada case of ***Sattva*** and the recent decision of the Supreme Court of Canada in ***Teal Cedar Products Ltd. v. British Columbia***, 2017 SCC 32, [2017] S.C.J. No. 32 (QL). Although the test to grant leave pursuant to the governing legislation is different in British Columbia which was considered in ***Sattva*** (***Commercial Arbitration Act***, RSBC 1996 c. 55, now the ***Arbitration Act***) leave

applications in British Columbia and Manitoba are limited to questions of law. In ***Sattva***, the Supreme Court of Canada dealt with the function of a court in determining a leave application in a commercial arbitration at paras. 72-74:

> **72** At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an error of law was made. However, some preliminary consideration of the question of law is necessary to determine whether the appeal has the potential to succeed and thus to change the result in the case.
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> **73** *BCIT* sets the threshold for this preliminary assessment of the appeal as "more than an arguable point" (para. 30). With respect, once an arguable point has been made out, it is not apparent what more is required to meet the "more than an arguable point" standard. Presumably, the leave judge would have to delve more deeply into the arguments around the question of law on appeal than would be appropriate at the leave stage to find *more* than an arguable point. Requiring this closer examination of the point of law, in my respectful view, blurs the line between the function of the court considering the leave application and the court hearing the appeal.
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> **74** In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); "some hope of success" and "sufficient merit" (*R. v. Hubley*, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

[15] ***Sattva*** also dealt with the approach to contractual interpretation and when contractual interpretation is a question of law. In essence, the Supreme Court of Canada stated that "contractual interpretation involves issues of mixed fact and law as

it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix." (at para. 50)

[16] Nonetheless, the Supreme Court of Canada stated that it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law, including:

a) the application of an incorrect principle;

b) the failure to consider a required element of a legal test; or

c) the failure to consider a relevant factor (***Sattva*** at para. 53).

[17] Further, in ***Sattva***, the Supreme Court of Canada expressed this caution concerning extricable questions of law at paras. 54 and 55:

> **54** However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:
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> > Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" ... . [para. 36]
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> **55** Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.

[18] In ***Teal Cedar***, the majority of the court dealt with the scope of appellate intervention in commercial arbitration cases. The majority of the Supreme Court of Canada stated that "limited jurisdiction and deferential review advance the central aims of commercial arbitration: efficiency and finality." (at para. 1)

[19] Further, ***Teal Cedar*** had this to say about the process of characterizing questions of law, fact, or mixed fact and law as follows (at paras. 43-45 and 47):

> **43** The process for characterizing a question as one of three principal types -- legal, factual, or mixed -- is also well-established in the jurisprudence (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35). In particular, it is not disputed that legal questions are questions "about what the correct legal test is" (*Sattva*, at para. 49, quoting *Southam*, at para. 35); factual questions are questions "about what actually took place between the parties" (*Southam*, at para. 35; *Sattva*, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (*Southam*, at para. 35; *Sattva*, at para. 49, quoting *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).
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> **44** That said, 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.
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> 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.

> **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).
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> . . .
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> **47** Given these principles, a question of statutory interpretation is normally characterized as a legal question. In contrast, identifying a question, broadly, as one of contractual interpretation does not necessarily resolve the nature of the question at issue. Contractual interpretation involves factual, legal, and mixed questions. In consequence, characterizing the nature of the specific question before the court requires delicate consideration of the narrow issue actually in dispute. In general, though, as the Court recently explained in *Sattva*, contractual interpretation remains a mixed question, not a legal question, as it involves applying contractual law (principles of contract law) to contractual facts (the contract itself and its factual matrix): para. 50.

[20] I was also directed to the Manitoba Court of Appeal decision of ***Selkirk Petroleum Products Ltd. v. Husky Oil Ltd.***, 2008 MBCA 87, 231 Man.R. (2d) 1, in which the Court of Appeal stated at para. 36 as follows:

> The proper interpretation and application of the principles of contractual interpretation is a question of law. A trial judge's determination of the factual matrix, consideration of extrinsic evidence and consideration of the evidence as a whole is a question of fact. Finally, the application of the legal principles to the language of the contract in the context of the relevant facts, or a question involving an intertwining of fact and law, is a question of mixed fact and law. See *MacDougall v. MacDougall* (2005), 262 D.L.R. (4th) 120 (Ont. C.A.), *Kary Investment Corp. v. Tremblay*, 2005 ABCA 273, 8 B.L.R. (4th) 40, and Hall, at pp. 106-7. See also, *QK Investments Inc. v. Crocus Investment Fund et al.*, 2008 MBCA 21, 225 Man.R. (2d) 176 at para. 26, and *Barcode Systems Inc. v. Symbol Technologies Canada Inc. et al.*, 2008 MBCA 47, 225 Man.R. (2d) 312 at paras. 1-2.

[21] The principles extracted from the above authorities can be summarized as follows:

a) Leave to appeal a decision of an arbitrator may only be granted if the ground for leave raises a question of law;

b) In general, questions of contractual interpretation are mixed questions, not legal questions, as they involve applying contractual law (principles of contract law) to contractual facts (the contract itself and its factual matrix);

c) Caution must be exercised in identifying an extricable question of law in disputes over contractual interpretation;

d) Extricable questions of law in the course of contractual interpretation include the application of an incorrect principle, the failure to consider a required element of a legal test or the failure to consider a relevant factor. The circumstances in which a question of law can be extricated from the interpretation process will be rare;

e) If either of the parties have satisfied the court that the arbitrator erred on a question of law, then the court shall only grant leave if it is satisfied that:

    i. the importance to the parties of the matters at stake in the arbitration justifies an appeal;

    ii. determination of the question of law at issue will significantly affect the rights of the parties;

f) Some preliminary consideration of the question of law is necessary to determine whether it has arguable merit.

BACKGROUND

[22] The parties negotiated, agreed and signed the SPC on March 10, 2006.

[23] The SPC required I-Net to perform the work required by the contract documents respecting the installation and commissioning of a data network which was to bring internet access to a number of communities in northern Manitoba.

[24] A dispute arose between I-Net and BCN as to the construction of the towers, including their bases and foundations.

[25] The dispute proceeded to arbitration and the parties agreed to bifurcate the hearing of the issues to be determined in the arbitration.

[26] The preliminary or threshold question was expressed by I-Net as follows:

> Was I-Net required under its contract with BCN to build these towers, including their foundation to a CSA standard?

[27] BCN expressed the threshold question as follows:

> What contractual requirement stipulates the standard for the design for the towers and foundations as part of the project to be built by I-Net?

[28] The parties submitted extensive documentation to the arbitrator which commenced September 9, 2013.

[29] On October 18, 2013, the arbitrator issued his preliminary award. His conclusion on the threshold question was as follows:

> 51. The construction of the towers must comply with the terms the parties agreed to in the SPC. As tower construction standards are referenced in both

Appendix "D" and Appendix "E", the applicable standards must satisfy the requirements of both appendices. The Appendix "D", the parties agreed that all towers would meet a "survivability standard. That is not the same as the CSA standard. If Appendix "D" was the only relevant reference to standards, I-Net's position that survivability is the only applicable standard would be more compelling. However, that is not what the parties agreed to when they signed the SPC.

52. In Appendix "E", the parties agreed that I-Net would provide BCN with detailed drawings for its "review and acceptance" prior to the commencement of construction of the towers at each location. Knowing that the Site Surveys would not be completed contemporaneously with the signing of the SPC, the parties provided for their delivery at a later date. That difference in timing does not diminish the importance of these drawings in setting out the standard for construction of the towers.

53. While Appendix "E" does not specify that the drawings must be based on a CSA standard, it does require I-Net to provide "load analysis engineered drawings of tower class used at site.." I-Net complied with the requirements of Appendix "E" by including the drawings it ordered from Trylon in the Site Surveys it submitted to BCN. When BCN signed those Site Surveys, it confirmed that it had reviewed and accepted the plans I-Net proposed for that location. At that point, the contents of the Site Survey, including the specifications in the "load analysis engineered drawings," became part of the standard for constructing the towers.

54. I find that the drawings in the Site Surveys not only meet the requirements of Appendix "E" but also satisfy the survivability standard required by Appendix "D". Accordingly there is no conflict between the application of the standards in the two appendices. Although the CSA standard exceeds what is required in Appendix "D", I-Net, when it submitted the drawings, committed to use CSA standards in constructing the towers and their foundations.

55. BCN states the preliminary issue as "What contractual requirement stipulates the standard for the towers and foundations as part of the project to be built by I-Net?" The answer to that question is that the standards for construction must meet or exceed the requirements of both Appendix "D" and Appendix "E" of the SPC. I-Net frames the issue as "Was I-Net required under its contract with BCN to build these towers, including their foundations, to a CSA standard?" The answer to I-Net's question is yes, even though the SPC makes no direct references to CSA standards. Once I-Net included drawings specifying CSA standards in the Site Surveys and those drawings were accepted by BCN, I-Net became obliged to construct the towers and foundations to the standards it submitted.

[30] In 2013, I-Net sought leave to appeal the preliminary award of the arbitrator in Court of Queen's Bench file No. CI 13-01-86381 (the "2013 leave application").

[31] In the 2013 leave application, I-Net sought leave to appeal the preliminary award pursuant to s. 44(2) of the ***Act*** and the grounds for appeal raised included the following:

> 2. (b) the arbitrator erred in law in failing to hold that the absence of any direct reference to CSA standards in Appendix E to be significant and to govern the interpretation of the specific Stipulated Price Contract (as he had done with respect to Appendix D to the subject contract) contrary to the Court of Appeal decision in *Geoffrey L. Moore Realty Inc. v The Manitoba Motor League*, [2003] MBCA 71, at paragraphs 11-13;
>
> . . . .
>
> (e) the arbitrator erred in law in failing to apply the legal principle that the intention of the parties to a contract is to be ascertained at the time that the contract is entered into (here on March 10, 2010) when he had already found that at that time, the parties knew that a survival standard as set out in the contract was not the same as the CSA standard;
>
> (f) the arbitrator erred in law in considering the subsequent conduct of the parties in determining the factual matrix existing at the time of the execution of the contract, contrary to the Court of Appeal decision in *Robert King v Operating Engineers training Institute of Manitoba Inc.*, 2011 MBCA 80, at paragraphs 70-73;

[32] Although the oral reasons for decision are short, and it is difficult to discern whether the application judge reviewed the questions required to grant leave pursuant to s. 44(2) of the ***Act***, it is clear that the application judge found that the arbitrator did not commit any errors and he refused to grant leave to appeal.

[33] I-Net sought leave to appeal the decision of the application judge and the application for leave to appeal to the court of appeal was dismissed on jurisdictional grounds.

[34] Although the application for leave to appeal was dismissed, I-Net made reference to the following statement in the reasons for decision, ***I-NetLink Inc. v. Broadband Communications North Inc.***, 2014 MBCA 38, 306 Man.R. (2d) 78 (QL), at para. 18:

> Finally, in this case, the prejudice or injustice to I-Net is very limited. The arbitrator's preliminary award now at issue is just that - an award on a preliminary question. The arbitration will proceed to a final award and I-Net, if it still feels aggrieved, can apply for leave to appeal that award to the Court of Queen's Bench under s. 44(2) and to this court under s. 48 of the *Act*.

[35] Following the dismissal of the application for leave to appeal, the arbitration resumed and on November 13, 2015 the arbitrator delivered the Award.

[36] The arbitrator concluded at page 36 of the Award as follows:

> The Preliminary Award found that the standard for the build, as specified in the SPC and the Site Surveys, was to a CSA Reliability Class III standard. I-Net breached that contract when it failed to construct the foundations in a manner consistent with the terms of the SPC. Further to the documents submitted, the testimony of the witnesses, the opinions of experts and arguments by counsel, I award the following:
>
> 1. BCN is entitled to damages of $680,000 as compensation to remediate the foundations of the eighteen towers that remain standing;
> 2. BCN is awarded $80,000 towards the cost of reconstructing the towers and foundations at the five sites where the original towers have been dismantled subject to the rebuilding being completed by the end of 2016;
> 3. BCN is awarded party and party costs;
> 4. BCN's claim against Charlie Clark in his capacity as Construction Manager is denied;
> 5. BCN's claims for punitive damages and solicitor client costs are denied;
> 6. The costs of the arbitrator are to be shared equally by I-Net and BCN.
>
> I retain jurisdiction in this matter and remain available to provide the parties with clarification of this Award or assistance in the implementation of any of its terms.

[37] Following delivery of the Award, counsel for the parties sought clarification of the Award. The arbitrator issued a number of clarifications in which he ruled as follows:

a) The $80,000 awarded towards the cost of constructing new towers and foundations was at each of the five sites such that the total amount available to BCN is $400,000 subject to three conditions being met:

(i) the reconstruction must meet or exceed the requirements specified in the SPC and site surveys;

(ii) BCN must produce evidence of the costs incurred for constructing new foundations and towers at each site;

(iii) all work must be completed by the end of 2016.

[38] The arbitrator further clarified that the $680,000 awarded for the remediation of the foundations at the 18 sites did not include PST and GST. The arbitrator added the PST and GST to the Award for a total Award of $761,600. Further, the $80,000 awarded per site for re-constructing new towers and foundations at the five sites did not include PST and GST. Any sum payable to BCN was ordered to be subject to costs actually incurred. If taxes were payable on the amounts expended by BCN, I-Net was required to pay the taxes.

ANALYSIS

[39] Each of the grounds raised by the parties will be reviewed to determine whether the ground or question of law raised qualifies for leave pursuant to s. 44(2) of the ***Act***.

I-NET'S APPLICATION FOR LEAVE

[40] Dealing first with I-Net's grounds for seeking leave to appeal the Award, I will address the first three grounds set forth in paragraph 7(a), (b) and (c) above.

[41] Before assessing whether these grounds qualify for leave pursuant to s. 44(2) of the ***Act***, BCN submitted that these grounds are practically identical, if not identical, to the issues that were raised before this court in the 2013 leave application.

[42] BCN submits that the doctrine of *res judicata*, cause of action estoppel or issue estoppel are applicable and it would amount to an abuse of the court's process to permit the present leave application to in effect reconsider the same issues and the decision of the application judge in the 2013 leave application.

[43] Before analyzing the applicability of the doctrines of *res judicata* and abuse of process, it is important to identify the clear findings made in the preliminary award. The parties identified the issue before the arbitrator before releasing the preliminary award as a "threshold issue". The threshold issue is identified in paragraph 3 of the preliminary award and, in essence, is a matter of contractual interpretation. The arbitrator reviewed the evidence and all of the documentation relevant as part of the factual matrix at the time the parties entered into the contract and concluded at para. 55 of the preliminary award that "… Once I-Net included drawings specifying CSA standards in the Site Surveys and those drawings were accepted by BCN, I-Net became obliged to construct the towers and foundations to the standards it submitted."

[44] In my view, the preliminary award addressed the issue of what standard was applicable to build the towers, including their foundations, and that decision was a final decision on that issue subject only to the clarification made regarding the applicable reliability class of the CSA standard made in the Award.

[45] At page 2 of the Award, the arbitrator stated that "The Preliminary Award, … forms an integral part of this Award." Under the heading, The Remaining Issues, in the Award, the arbitrator identified one of the remaining issues as:

1. Clarification of the standard set out in the Preliminary Award.

[46] The arbitrator clarified the standard for the build and concluded that "The parties agreed that the standard for the build under the terms of the SPC and site surveys was CSA reliability Class lll." (p. 12 Award) The reliability class of the CSA standard applicable to the construction of the towers, including their foundations is a separate ground of appeal which will be dealt with below.

[47] The legal concepts of *res judicata* and abuse of process were reviewed in the recent decision of ***Loewen v. Manitoba Teachers' Society***, 2013 MBQB 8, 287 Man.R. (2d) 141 (QL), aff'd 2015 MBCA 13, 315 Man.R. (2d) 123.

[48] ***Loewen*** made an application for leave to appeal an arbitrator's decision who reconsidered her entitlement to retain benefits paid to her through her employer's disability insurer after obtaining a damages award in a civil action relating to the same injury. The first arbitrator determined that ***Loewen*** was not disentitled to benefits as a result of her success in the civil claim. The insurer appealed to the court and the matter was referred back to the arbitrator for final determination. Because the first arbitrator had been appointed as a judge, a new arbitrator was assigned, who decided *res judicata* and issue estoppel did not apply, and that he was entitled to consider all the issues anew.

[49] Dewar J. provided an excellent summary of the applicable law of the doctrine of *res judicata* and abuse of process as follows:

> **80** The prevailing attitude amongst jurists is that parties are not entitled to have their cases heard more than once. Binnie J. in the case of ***Danyluk v. Ainsworth Technologies Inc.***, 2001 SCC 44, [2001] 2 S.C.R. 460, [2001] S.C.J. No. 46 (QL), put it like this:
>
> > 18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. ... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided. [emphasis added]
>
> **81** Since early times, the law has given judges certain tools to address a situation in which a losing party in one proceeding tries to take another "bite at the cherry". These tools are found in the doctrines of *res judicata* and abuse of process. *Res judicata* has two branches - namely cause of action estoppel and issue estoppel. Both branches of *res judicata* require certain criteria in order to be applied. In the case of cause of action estoppel, the criteria are:
>
> a) the parties must be the same;
>
> b) the matter in dispute must be identical;
>
> c) the proceeding must be brought for the same object; and
>
> d) the first judgment must be a final judgment.
>
> (Brown & Beatty, ***Canadian Labour Arbitration***, 3rd ed., at para. 2:3221.)
>
> **82** In the case of issue estoppel, the criteria are:
>
> a) that the same question has been decided;
>
> b) that the judicial decision which is said to create the estoppel was final; and
>
> c) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceedings in which the estoppel is raised.
>
> (***Angle v. Canada (Minister of National Revenue - MNR)***, [1975] 2 S.C.R. 248.)
>
> **83** The authorities indicate that even where the criteria are present, there remains a residual discretion in the court to refuse to apply the doctrine where the result is unjust (See ***Danyluk***).
>
> **84** The second, and broader, tool available to an adjudicator to which an application is made for the determination of a cause of action or an issue previously and finally decided by another adjudicator is the doctrine of abuse of

process. This tool was described in the majority decision of ***Toronto (City)***, *supra*, as follows:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659, at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007:
>
> > ... abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

And:

> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
> > The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).
> >
> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, *Franco v. White* (2001), 53 O.R. (3d) 391 (C.A.); *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.); and *Bjarnarson v. Government of Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications

> recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-25).
>
> 38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

[50] While the Manitoba Court of Appeal disagreed with the application judge as to his choice of the standard of review, the Court of Appeal dismissed the appeal, finding that the decision of the second arbitrator was incorrect and unreasonable. The Court of Appeal had this to say regarding the doctrine of *res judicata*:

> **28** The doctrine of *res judicata* reflects the fundamental premise that there must, at some point, be an end to litigation. The broad concept was developed to deal with the problems of unfair relitigation, consistency of result and finality. See Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham: LexisNexis Canada Inc., 2010) at 1; and *R. v. Mahalingan*, 2008 SCC 63 at paras. 14-16, [2008] 3 S.C.R. 316. It has been variably described as lying "at the heart of the administration of justice" (*Toronto (City)* at para. 15); as a "fundamental principle of our system of justice" (*R. v. Van Rassel*, [1990] 1 S.C.R. 225 at 238); and as "a cornerstone of the justice system in Canada" (Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Markham: LexisNexis Canada Inc., 2004) at 4).
>
> **29** The doctrine is generally treated as part of the law of estoppel and, while the doctrine of *res judicata* in its broadest sense applies to the entire matter flowing between the parties, an estoppel can also apply to a single issue which may arise between two parties. Issue estoppel is a form of *res judicata*.
>
> **30** Most recently in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, the Supreme Court of Canada stated (at para. 91):

> As a species of *res judicata*, issue estoppel is conceptually related to the doctrines of cause of action estoppel, collateral attack, and abuse of process (Lange [2010], at pp. 1-4). Both individually and together, these doctrines are of fundamental importance to the finality principle -- they are "not merely . . . technical rule[s]" but rather, "g[o] to the heart of a system of civil justice that strives for the truth of the matter [and] recognizes that perfection is an unattainable goal and finality is a practical necessity" (*Revane v. Homersham*, 2006 BCCA 8, 53 B.C.L.R. (4th) 76, at para. 17).

31 The application of issue estoppel to any particular case is a two-step process. First, the tribunal must decide whether that same question has been decided, whether the judicial decision which is said to create the estoppel was final and whether the parties to the judicial decision were the same persons as the parties to the proceedings in which the estoppel is raised. If the preconditions are not met, then at law, issue estoppel will not apply. If the preconditions are met, the tribunal must still determine whether, as a matter of discretion, issue estoppel ought to be applied. In the case at bar, I am dealing with a decision at the first step of that two-step process. The Second Arbitrator held that the decision of the First Arbitrator was not a final one and, therefore, the doctrine did not apply. His reasoning with respect to the principle of abuse of process was the same; that it was not a final decision.

32 In *Toronto (City)*, Arbour J. discussed the similarities and differences between abuse of process by relititgation and issue estoppel. She summarized the applicability of the doctrine of abuse of process stated (at para. 42):

> The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. ...

33 In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 19, [2001] 2 S.C.R. 460, Binnie J. noted that the doctrines supporting the finality of court decisions apply equally to judicial or quasi-judicial decisions made by administrative officers or tribunals, and stating (at para. 21):

> These rules were initially developed in the context of prior court proceedings. They have since been extended, with some necessary modifications, to decisions classified as being of a judicial or quasi-judicial nature pronounced by administrative officers and tribunals. In that context the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided.

[51] Applying the criteria set out in ***Loewen***, I am satisfied that:

(i) The parties are the same in both the 2013 leave application and in the present application;

(ii) The matters in dispute and specifically the grounds supporting the 2013 leave application are virtually identical to the first three grounds noted above in paragraph 7 a) - c) in I-Net's present leave application;

(iii) The object of the proceedings brought by the 2013 leave application and the object of I-Net's present leave application are to seek leave to appeal the finding of the arbitrator made in the preliminary award, which established that the CSA standard applied to the construction of the towers and the foundations;

(iv) The decision of the application judge in the 2013 leave application was a final decision, which was not to grant leave to appeal the decision.

[52] In my view, both cause of action estoppel and issue estoppel apply respecting the first three grounds of appeal outlined in paragraph 7 above.

[53] Insofar as issue estoppel is concerned, the same question or questions were being decided in the 2013 leave application, that is whether leave should be granted to appeal the decision of the arbitrator based on the submission that the arbitrator erred in law in his interpretation of the SPC and incorrectly applied the legal principles of contract interpretation.

[54] It is clear that the decision of the application judge was final and the decision involved the same parties in which the estoppel is raised. As noted in ***Loewen***, the authorities indicate that even where the criteria are present, the court maintains a

residual discretion to refuse to apply the doctrine where the result is unjust (see ***Danyluk***).

[55] In my view, applying the doctrine in this case does not lead to unfairness or an injustice. An issue, once decided, should not be re-litigated. As pointed out in ***Danyluk***, "Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided." (see para. 18)

[56] While it would have been helpful if the reasons for decision given by the application judge were more extensive, that does not change the fact that the first three grounds of appeal advanced by I-Net have already been reviewed and dismissed by this court.

[57] The court has an inherent and residual discretion to prevent any abuse of the court's process. On the basis of the decisions noted above, it is my view that granting leave to appeal I-Net's first three grounds of appeal would amount to an abuse of the court's process. The issues and submissions raised by I-Net have already been advanced and dismissed and to grant leave would be contrary to the principle of finality crucial to the proper administration of justice.

[58] I-Net submitted that the reasons of the Court of Appeal motions' court judge opened the door to in effect, revisit the issues addressed before the application judge based on the following paragraphs of the reasons for decision of the Court of Appeal judge:

> **16** It is true that rules that impose finality on litigation can cause unfairness to litigants, such as I-Net, who may have a valid claim but are prevented from advancing that claim by the operation of those rules.
>
> . . .

> **18** Finally, in this case, the prejudice or injustice to I-Net is very limited. The arbitrator's preliminary award now at issue is just that - an award on a preliminary question. **The arbitration will proceed to a final award and I-Net, if it still feels aggrieved, can apply for leave to appeal that award to the Court of Queen's Bench under s. 44(2) and to this court under s. 48 of the *Act*.** [emphasis added by I-Net]

[59] I am not satisfied that the statement made by the Court of Appeal motions' court judge in paragraph 18 of her decision can be interpreted to mean that the issues raised respecting the preliminary award could be re-litigated. The issue of whether the preliminary award finally disposed of an issue in dispute between the parties was not before the Court of Appeal and no submissions were made in that regard. The sole issue for determination was whether the Court of Appeal had jurisdiction to grant leave to hear an appeal from the application judge's decision. That motion was dismissed.

[60] The words used by the Court of Appeal motions' court judge cannot be interpreted to impact the present decision as to whether the doctrines or law of *res judicata* or abuse of process apply. In my view, her statement is simply an indication that I-Net will still have an opportunity to apply for leave to appeal the Award to this court pursuant to s. 44(2) of the ***Act***, and to the Court of Appeal under s. 48 of the ***Act***.

[61] Both parties made extensive submissions about whether the first three grounds of appeal advanced by I-Net raised questions of law and met the other pre-conditions set out in s. 44(2) of the ***Act***. Given my ruling on the application of the doctrine of *res judicata* and the law of abuse of process, it is unnecessary to address those issues. Deciding those issues would lead to exactly what the Supreme Court of Canada has

stated should be avoided, namely: Duplicative litigation, potential inconsistent results, undue costs and inconclusive proceedings.

[62] The next three grounds of I-Net's application for leave to appeal (sub-paras. 7 d), e) and f) above) relate to the award of damages made by the arbitrator. I will deal with each ground.

[63] The ground set out at sub-para. 7 d) which I-Net submits amounts to a question of law is framed as follows:

> Once he [the arbitrator] had determined that the measure of damages was for the foundations only, in then awarding damages themselves which exceeded the cost to remediate the foundations.

[64] At page 22 of the Award the arbitrator set forth the general principles relating to the calculation of damages for breach of contract. The arbitrator then went on to review the evidence and apply the law to the facts of the case.

[65] The calculation of damages and the limits placed upon the calculation of damages as well as the issue of mitigation generally do not raise a pure question of law. The calculation of damages requires an examination of the factual elements of the damage claim and in my view involves a question of mixed fact and law, rather than a question of law alone. (see ***Lukás v. United Airlines***, 2009 MBCA 111, 245 Man.R. (2d) 292 and ***Vandal v. Pommer***, 2013 MBCA 76, [2013] M.J. No. 293 (QL))

[66] This proposed ground of appeal, as framed, requires the court to examine the factual elements of the damage claim and in my view, involves questions of fact and mixed fact and law and is not a question of law. Determining whether the damages awarded exceed the cost to remediate the foundations requires the court to examine

the facts and evidence heard by the arbitrator. Accordingly, leave to appeal on this ground is denied.

[67] The ground set out at sub-para. 7 e) relied upon by I-Net as an error of law is submitted to be that the arbitrator required the applicant to pay $680,000 of damages for something that may never happen and therefore it is submitted that he erred in law in not stipulating that the $680,000 for potential damages was only to be paid upon proof of remediation.

[68] I am not satisfied that awarding damages based on evidence filed at the arbitration relating to the potential cost of remediating the foundations or repairing the foundations of 18 of the towers amounts to a question of law. Subject to satisfying the required onus of proof, it is common for a claimant to seek damages based upon evidence of the estimated cost to remediate or repair work that has alleged to have been done in a deficient or defective manner without actually proceeding with the work or providing proof of reconstruction or remediation.

[69] The law is clear that while the calculation and assessment of the damages in a case may be difficult, the trier of fact must do the best he can in the circumstances. (see ***Vickar v. M.J. Roofing & Supply Ltd.***, 2016 MBCA 77, [2016] M.J. No. 228 (QL), at paras. 52 and 53)

[70] In my view, the award of damages relating to the 18 sites where the towers are standing is a discretionary award of damages based on the evidence led at the arbitration and involved findings of fact and findings of mixed fact and law and the proposed ground does not raise a question of law. The arbitrator correctly stated the

legal principles relating to an award of damages for breach of contract. The arbitrator's application of the law to the evidence to arrive at the quantum of damages is a question of mixed fact and law. Accordingly, the application for leave respecting this ground (7 e)) is denied.

[71] I-Net's third ground relating to damages (sub-para. 7 f) above) is stated as follows:

> ... the arbitrator erred in law in his December 5, 2015 addition to his Award, and his December 7, 2015 addition to his Award, in holding RST (PST) and GST were to be added to the Award, when:
>
> i. GST is paid only by the end user of a product or service and in the case of BCN, as an operator of a commercial network, the GST is a business input cost and fully refundable;
>
> ii. RST (PST) does not apply to real property but only to "tangible personal property" under *The Retail Sales Tax Act*;

[72] I-Net submits that GST is a business input cost and fully refundable and that costs of goods and services must first be incurred before GST is levied. Further, I-Net alleges that PST does not apply to real property but only to "personal property" under ***The Retail Sales Tax Act***, C.C.S.M. c. R130. Accordingly, I-Net submits that awarding GST and PST on the full amount of damages amounts to an error of law.

[73] BCN acknowledges that paragraph 4.2 of the SPC provides that no value added taxes were payable by BCN to I-Net. According to BCN, the evidence before the arbitrator was that paragraph 4.2 of the SPC was included on the understanding that since BCN was operated by and for the benefit of the first nations people, that no taxes were payable. Subsequent rulings obtained from tax authorities indicated that taxes

were payable on the construction project and that paragraph 4.2 was amended to include a provision for payment of taxes.

[74] BCN submits therefore that any award of damages must include payment of applicable PST and GST. Further, BCN submits that I-Net has failed to identify an error of law to support the leave application.

[75] Whether the award of damages should include payment of PST and GST, involves issues of interpretation of the SPC and the interpretation of the governing statutes.

[76] There is nothing in the Award to indicate that the arbitrator reviewed and considered the applicable legislation to determine whether PST or GST was payable or not. There is no reference in the Award to ***The Retail Sales Tax Act*** or the federal ***Excise Tax Act*** R.S.C., 1985, c. E-15. There was also no analysis by the arbitrator as to whether one or both the PST and GST were payable by BCN at law.

[77] On the basis of the material that has been filed in support of the application for leave, the question as to whether PST and GST is payable raises questions of contractual interpretation and statute interpretation. As noted above, contractual interpretation is generally a mixed question and not a legal question. However, this ground for appeal raises the issue as to whether the arbitrator, in adding PST and GST to the damages correctly applied the principles of contractual interpretation. Issues relating to the application of the principles of contractual interpretation and statutory interpretation are normally characterized as a legal question (see ***Teal Cedar*** and

Sattva). Accordingly, in my opinion, I-Net has satisfied the first pre-condition to grant leave on this ground for appeal.

[78] Further, in my view, I-Net has satisfied the other conditions set forth in s. 44(2) of the ***Act*** as the issue of whether PST and GST should be added to the damages awarded are of importance to the parties in the matters at stake and will, at least arguably, significantly affect the rights of the parties. The damages awarded are significant and the taxes payable, if any, add GST at 5% and PST at 8% on some or all of the damages awarded.

[79] The applicant must only establish the ground for which leave is sought has arguable merit. I am satisfied this issue raises a question of law that has some hope of success and therefore raises a question of arguable merit. Since I-Net has met the pre-conditions, leave is granted to I-Net on the following question:

> Did the arbitrator err in law in applying the principles of awarding damages by finding that both PST and GST were payable by I-Net on the damages awarded?

BCN'S APPLICATION FOR LEAVE

[80] BCN's application for leave to appeal raises 15 grounds which BCN submits raises questions of law. Paragraph 9 above lists the grounds.

[81] The first question to determine is whether BCN's grounds for appeal raise questions of law.

[82] For the reasons that follow, I am satisfied that only two of the grounds for appeal raise questions of law, 9 g) and 9 n) noted above. Each of the grounds will be dealt with separately.

(A) Did the arbitrator err in law in finding that the standard by which I-Net was required to construct the structures was CSA-37-01 calculated using reliability classification lll rather than CSA-37-01 calculated using reliability classification l?

[83] BCN submits that since the arbitrator made the finding in the preliminary award that I-Net was obligated to construct the towers and foundations to the CSA standards that the applicable CSA standard was CSA-37-01 using a reliability classification l. The arbitrator accepted the expert testimony that the towers and foundations should have been designed and built to reliability class l. However, he found as a fact that the Manufacturer Load Analysis in the site surveys clearly specified class lll (see p. 7 Award). Further, the arbitrator found that "BCN agreed to accept Reliability Class lll as the standard for the build when it signed those same site surveys."

[84] In my view, the findings of the arbitrator involved the consideration of the evidence as a whole which is a question of fact and the application of the legal principles to the language of the contract in the context of the relevant facts which is a question of mixed fact and law.

[85] In my view, the first ground seeking leave to appeal the Award is not a question of law, and accordingly, leave to appeal is denied on this ground.

(B) Did the arbitrator err in law in finding that Ashmede Asgarali or any other representative of BCN knew or ought to have known that the structures were to be constructed to CSA-37-01 using reliability classification lll?

[86] This finding by the arbitrator was based on his review of the evidence given by a number of witnesses. Determining whether a party knew or ought to have known a fact necessarily requires a consideration of the evidence which is a question of fact.

The application of a legal principle in the context of the relevant facts is a question of mixed fact and law.

[87] In my view, this finding by the arbitrator is a question of fact.

[88] A finding of fact in the complete absence of any evidence, constitutes an error of law. (see ***Domo Gasoline Corp. Ltd. v. 2129752 Manitoba Ltd.***, 2014 MBQB 87, 305 Man.R. (2d) 177; ***Society of Specialist Physicians and Surgeons of British Columbia v. The Society of General Practitioners of British Columbia***, 2007 BCSC 1385, 161 A.C.W.S. (3d) 812, at paras. 19-21 and 40-41)

[89] BCN did not submit that this finding of fact was based on a complete absence of any evidence. Rather, BCN submitted that the evidence cannot logically and reasonably lead to the conclusion that BCN knew of and appreciated the distinction between reliability classifications as set out in CSA standard 37-01 BCN submits that the arbitrator's inferences are nothing more than speculation and not logically or reasonably based on the evidence.

[90] While BCN argued vigorously that the grounds for appeal raised by I-Net amounted to questions of fact and not questions of law, when it came time for BCN to make its submissions regarding whether its grounds for appeal amounted to questions of law or questions of fact or questions of mixed fact and law, BCN submitted that its questions were indeed questions of law.

[91] In determining whether grounds amount to a question of law, the court is required to review each of the grounds in a consistent manner bearing in mind, as I have noted above, that circumstances in which a question of law can be extricated from

findings of fact will be rare. In my opinion, this ground for appeal does not raise a question of law.

(C) Did the arbitrator err in law in finding that there was an agreement between BCN and I-Net that geotechnical reports for each site need not be obtained?

[92] The analysis of this finding is no different than the previous finding outlined above. There is no doubt that the applicable CSA standard required geotechnical reports and that the engineer stamping the drawings required for construction of the towers and their foundations would have been required to review geotechnical reports in order to approve the drawings.

[93] The arbitrator found at page 31 of the Award regarding the geotechnical reports:

> There is a general agreement that a prerequisite to any remediation of the foundations is the completion of a geotechnical report for each site. Counsel for I-Net argues that this cost should be excluded from the calculation of damages since BCN "knowingly waived" having geotechnical reports included in the specifications of the SPC. While there is no record of BCN specifically refusing to pay for geotechnical reports, I am satisfied that both BCN, through Mr. Asgarali and Mr. Pellerin, and I-Net were aware that geotechnical reports were necessary for the foundations to comply with the CSA standard. Both parties also knew that these reports would add significantly to the cost of the project. As neither seemed willing to absorb the cost, BCN and I-Net seemed to reach a tacit agreement to replace the use of geotechnical reports with a notation on the drawings that the foundations were designed based on the assumption of "normal dry soil" conditions.
>
> The folly of the decision to forego the geotechnical reports at the time is evident by the fact that the experts all call for their use as part of the resolution of this problem. Had I-Net built the foundations to the standard specified in the site surveys, BCN would not now have a claim against I-Net. However, since I-Net failed to construct the foundations in a manner consistent with the agreement, and both parties agree that these reports are required, the cost of geotechnical reports must be included in the calculation of damages.

[94] My first observation in reading the arbitrator's decision regarding the geotechnical reports is that the finding set forth in this ground for appeal is inconsistent

with the finding made by the arbitrator. His finding was that BCN and I-Net were aware that geotechnical reports were necessary for the foundations to comply with the CSA standard. The arbitrator goes on to say that the parties reached "a tacit agreement" to replace the use of geotechnical reports with a notation on the drawings assuming "normal dry soil" conditions. In assessing damages, the arbitrator goes on to find that the cost of geotechnical reports must be included in the calculation of damages.

[95] The finding made by the arbitrator regarding the "tacit agreement" was a finding of fact made on the basis of the evidence adduced at the arbitration and in my view this ground of appeal does not raise a question of law.

(D) Did the arbitrator err in law in finding that the remediation of the foundations, as proposed by Michael Maendel, was established to a civil standard of proof, i.e., on the balance of probabilities?

(E) Did the arbitrator err in law in failing to find that I-Net had not provided evidence that met the civil standard of proof to establish the cost of the remediation for the foundations?

(F) Did the arbitrator err in law in finding that the preliminary structural condition assessment prepared by Michael Maendel was an appropriate basis for the remediation of the foundations?

[96] As noted above, the calculation of damages and the limits placed upon the calculation of damages as well as the issue of mitigation generally do not raise a pure question of law. (see ***Lukás*** and ***Vandal***)

[97] Grounds (D), (E) and (F) require an examination of the factual elements of the damage claim and in my view involve questions of mixed fact and law, rather than questions of law alone.

[98] In this case, the arbitrator reviewed extensive evidence regarding the damages claimed and accepted that "I-Net produced credible evidence that remediation, rather than full replacement of the foundations is possible." (at p. 31 Award)

[99] The arbitrator also stated at p. 33 of the Award that he preferred the evidence of Mr. Maendel that remediation is a viable option.

[100] I am not satisfied that these grounds raise questions of law and leave to appeal on these grounds is therefore denied.

(G) Did the arbitrator err in law in failing to consider that I-Net bore the burden of proof to propose a method of remediation of the foundations based on the principle of mitigation?

[101] BCN submits that the Supreme Court of Canada in ***Michaels v. Red Deer College***, [1976] 2 S.C.R. 324, re-stated the legal principle for the assessment of damages for breach of contract at p. 330:

> … The primary rule in breach of contract cases, that a wronged plaintiff is entitled to be put in as good a position as he would have been in if there had been proper performance by the defendant, is subject to the qualification that the defendant cannot be called upon to pay for avoidable losses which would result in an increase in the quantum of damages payable to the plaintiff. …

[102] And regarding mitigation, at p. 331:

> … If it is the defendant's position that the plaintiff could reasonably have avoided some part of the loss claimed, it is for the defendant to carry the burden of that issue, …

[103] At p. 332, the court quotes from Cheshire and Fifoot's, *Law of Contract*, 8th ed. (1972) as follows:

> But the burden which lies on the defendant of proving that the plaintiff has failed in his duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who is often innocent of blame.

[104] BCN submits that the arbitrator failed to apply the correct burden of proof based on the principle of mitigation. BCN submits this is a question of law and seeks leave to appeal on that issue.

[105] I-Net agrees that this ground raises a question of law and submits that the arbitrator considered the correct legal principle and there is no basis to grant leave in the circumstances.

[106] Consideration of this ground involves a determination as to whether the arbitrator directed his mind to the onus of proof relating to mitigation of damages and specifically whether he applied a wrong principle of law in doing so.

[107] In my view, the arbitrator reviewed all of the evidence to make findings regarding mitigation and ultimately found that I-Net produced credible evidence that remediation could be accomplished and that he preferred the evidence of Mr. Maendel that remediation is a viable option. Those findings are findings of fact and mixed fact and law. However, the question of whether the arbitrator applied the correct legal principle to the issue of mitigation is a question of law.

[108] The determination of this issue significantly affects the rights of the parties. BCN is a non-profit corporation that seeks to complete the installation of the work required to bring internet access to remote areas of the province of Manitoba. The assessment of damages significantly affects whether BCN will be able to correct the deficiencies and put BCN in the position it would have been had the contract been completed.

[109] Determining whether the matters at stake justify an appeal involves a consideration of the importance of the matters raised in the application. I am satisfied

the legal issue of applying the correct burden of proof to determine mitigation is an important matter that addresses the very foundation of the damages awarded in the arbitration.

[110] The test to grant leave is whether the ground raises a question of law that has arguable merit. I am satisfied this ground has arguable merit and the pre-conditions set forth in s. 44(2) of the ***Act*** have been met. Accordingly, leave to appeal is granted on this ground.

(H) Did the arbitrator err in law by making an award that did not put BCN in the position it would have been had the SPC with I-Net been completed according to its terms?

(I) Did the arbitrator err in law in failing to properly consider and apply the responsibility assumed by I-Net for the design and construction of the structures, as a turnkey project, including the obligation to construct to the CSA-37-01 standard?

[111] Applying the principles noted above, these two grounds of appeal raise questions of mixed fact and law and are not questions of law. Ground (H) is a general statement of the law in awarding damages for breach of contract. That principle was identified by the arbitrator and applied to the facts of the case. That involves a question of mixed fact and law.

[112] Ground (I) raises a question of mixed fact and law. The arbitrator did review the principles of contractual interpretation and applied those principles to the facts of the case to determine I-Net's duty to design and construct the towers and the foundations to the applicable CSA standard.

[113] Accordingly, leave to appeal on grounds (H) and (I) is denied.

(J) Did the arbitrator err in law in finding that Charlie Clark as construction manager was not in a fiduciary relationship with BCN?

(K) Did the arbitrator err in law in interpreting provisions of the SPC to limit the legal and fiduciary obligations of Charlie Clark as construction manager?

(M) Did the arbitrator err in law in failing to consider and apply the obligations of honest performance related to the contract entered into by Charlie Clark with BCN whereby Clark agreed to represent BCN as its construction manager?

[114] BCN did not add Charlie Clark as a respondent in these proceedings. Since these grounds impact Mr. Clark and he was not present or represented at the hearings, it is not appropriate to make a ruling on these three grounds.

[115] Counsel for BCN undertook to file a motion to amend the notice of application and include Charlie Clark as a respondent. That motion should be returnable before me as the case management judge.

(L) Did the arbitrator err in law in failing to consider and apply the obligations of honest performance as it related to I-Net in purportedly discharging its obligations under the SPC?

[116] BCN submits that the arbitrator failed to consider the common law duty established in the Supreme Court of Canada decision of ***Bhasin v. Hrynew***, 2014 SCC 71, [2014] 3 S.C.R. 494 (QL), at paras. 72-92, in which the court made reference to the principle of common law that parties have an obligation to perform contracts honestly. BCN submits that the arbitrator ignored evidence regarding the promises made by I-Net to perform the contract in accordance with the applicable standard and specifically relating to I-Net making representations regarding the class lll reliability classification in the CSA standard.

[117] While there is no reference in the Award to the common law duty of performing contracts honestly and in good faith, the application of this duty raises a question of

mixed fact and law. As stated above, the arbitrator reviewed the evidence and specifically found that the parties agreed that the towers and the foundations would be designed to the CSA standard using a reliability class lll classification.

[118] Since I am not satisfied that this ground raises a question of law, the application for leave on this ground is denied.

(N) Did the arbitrator err in law in finding that BCN was required to complete the construction of the foundations as a prerequisite of payment?

[119] In the Award, the arbitrator awarded BCN $80,000 towards the cost of reconstructing the towers and foundations at each of the five sites where the original towers had been dismantled. That part of the Award was subject to a condition which states: "subject to the rebuilding being completed by the end of 2016." A similar condition was not imposed respecting the award of damages of $680,000 to remediate the foundations of the 18 towers that remain standing. BCN submits that imposing a condition that BCN was required to complete the construction of the foundations at the five sites as a prerequisite of payment is an error of law.

[120] In building contract cases, courts in Canada have typically applied the "cost of performance test" in measuring damages (see Harvin D. Pitch & Ronald M. Snyder, *Damages for Breach of Contract*, 2nd ed (Toronto: Thomson Reuters Canada Limited, 1989) vol 1 at 2-5.

[121] The two conditions often examined by the court in determining whether to award damages based upon the cost of performance are to determine whether the cost is reasonable and that the claimant genuinely intends to carry out the work to correct the deficiencies (see Harvin D. Pitch & Ronald M. Snyder, *Damages for Breach of Contract*,

2nd ed (Toronto: Thomson Reuters Canada Limited, 1989) vol 1 at 2-7; ***Michaluk v. McDiarmid Lumber Ltd.***, 2012 MBCA 42, 280 Man.R. (2d) 82 and ***Moryl (c.o.b. Hands-on Design Ltd.) v. Leslie***, 2012 MBQB 16, 2012 CarswellMan 59 (QL)).

[122] The arbitrator made reference to no legal authority permitting him to assess damages at the time of the arbitration and impose a condition that the towers be re-built by the end of 2016.

[123] In assessing damages and the cost of performance test, courts do examine whether the claimant genuinely intends to carry out the defective or deficient work and generally grant damage awards that are reasonable in the circumstances (see Harvin D. Pitch & Ronald M. Snyder, *Damages for Breach of Contract*, 2nd ed (Toronto: Thomson Reuters Canada Limited, 1989) vol 1 at 2-7 to 2-26). As noted above, the trier of fact does the best that he can to assess damages in the circumstances.

[124] The parties did not rely upon authorities to challenge or support the alleged error of law by the arbitrator.

[125] The question of whether, in assessing the damages, the arbitrator can impose conditions on the rebuilding of the towers during a certain time frame, is a question of law. If as a matter of law, such a condition can be imposed, then the exercise of discretion in imposing the condition is a question of mixed fact and law.

[126] In my view, ground (N) does raise a question of law. For the same reasons outlined above, I am also satisfied that the other pre-conditions set forth in s. 44(2) of the ***Act*** are met, as this issue is a matter at stake that justifies an appeal and the determination will significantly affect the rights of the parties. This issue alone amounts

to damages of $400,000 plus applicable taxes. This ground for appeal satisfies the threshold of having arguable merit.

(O) Did the arbitrator err in law in making an award that was not in accordance with the principles of law and equity and made findings of fact that were unreasonable or failed to make findings of fact that were reasonable?

[127] During oral submissions counsel for BCN acknowledged that this ground was a "catch all" and not a specific ground to seek leave to appeal. As a result, leave is not granted on this ground.

CONCLUSION

[128] For the reasons outlined above, leave to appeal is granted to I-Net on the following question:

> Did the arbitrator err in law in applying the principles of awarding damages by finding that both PST and GST were payable by I-Net on the damages awarded?

[129] Leave to appeal is granted to BCN on the following questions:

> (G) Did the arbitrator err in law in failing to consider that I-Net bore the burden of proof to propose a method of remediation of the foundations based on the principle of mitigation?
>
> (N) Did the arbitrator err in law in finding that BCN was required to complete the construction of the foundations as a prerequisite of payment?

[130] Since both parties had some measure of success in their respective leave applications, costs shall remain in the cause.

_____ J.