

CITATION: Tedescon Infrastructure Ltd. v. The County of Simcoe, 2026 ONSC 3548
COURT FILE NOS.: CV-25-00736983-0000 and CV-25-00737129-0000
DATE: 20260703

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: TEDESCON INFRASTRUCTURE LTD., Applicant

AND:

THE CORPORATION OF THE COUNTY OF SIMCOE, also known as THE
COUNTY OF SIMCOE, Respondent

AND RE: THE CORPORATION OF THE COUNTY OF SIMCOE

AND:

TEDESCON INFRASTRUCTURE LTD., Respondent

BEFORE: Akazaki J.

COUNSEL: *Jeremy Sacks*, for Tedescon Infrastructure Ltd.

Paul Conrod and Faren Bogach, for the Corporation of the County of Simcoe

HEARD: May 5, 2026

REASONS FOR DECISION

OVERVIEW

Arbitral Award for Review by the Court

- [1] The construction law arbitrator in this case held that Tedescon, a road works contractor, rightly refused to return in the spring of 2023 unless the County released past due holdbacks and disallowed charges. He found that the County of Simcoe's contract administrator had incorrectly reduced or disallowed the value of the payment out of bias in favour of the County. He then held that the County was also right to treat Tedescon's refusal to remobilize back to the site as abandonment of the project. Abandonment cleared the County's way to hire a replacement contractor and pursue damages against Tedescon.
- [2] The arbitrator did credit Tedescon for the value of work that the biased administrator had incorrectly disallowed. However, instead of stopping at the finding that the County owed Tedescon for those amounts and for unpaid holdbacks, he further held Tedescon liable for damages for failing to perform the remainder of the contract. After setting off the County's

liability as of the work stoppage, the arbitrator awarded the County a net sum of \$511,243.13, inclusive of HST.

- [3] This outcome defied the binary logic that Tedescon's work stoppage could not legally be both justified and unlawful. After the release of the award, Tedescon felt, once again, that it had been treated unfairly. Tedescon applied to set aside and reverse the outcome of arbitral award, relying on ss. 45 and 46 of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "Act").
- [4] Tedescon argued the arbitrator's award violated two grounds listed under s. 46(1):
 - a. Ground 3: "the award ... contains a decision on a matter that is beyond the scope of the agreement"
 - b. Ground 6: "the applicant was not treated equally and fairly"
- [5] In the alternative, Tedescon sought leave to appeal the award pursuant to s. 45(1) on a question of law. The County raised a preliminary objection to this request, arguing that the words "final and binding" in the arbitral agreement excluded any right of appeal under s. 45(1).
- [6] Both aspects of Tedescon's application and appeal took aim at two main points. First, it complained of numerous calculation or data entry errors in the accounting for damages, including the theory that the County's own accounting methods would have resulted in its net liability to Tedescon. Second, it pointed to the legal incompatibility between Tedescon's repudiation or breach of an obligation to perform, and its justified work stoppage for non-payment of past-due amounts.
- [7] The County brought its own counterapplication. It sought leave to appeal the award on the basis that the Arbitrator committed an error of law by allowing Tedescon to recover or be credited for damages, including for work already performed, if it had abandoned the contract.

Background and Context

- [8] The arbitration concerned a 2020 contract for reconstruction of approximately 2 km of Simcoe Road 21. The contract was a unit rate contract based on quantities performed or supplied. The value of the contract was about \$10 million. The Ontario Provincial Standards for Roads and Public Works General Conditions of Contract (OPSS.MUNI 100), dated November 2019, applied. The project entailed traffic control, road widening, and installation of municipal services. The County appointed Tatham Engineering as project designer and contract administrator.
- [9] During the project, Tedescon submitted to Tatham claims for compensation and extensions of time resulting from delays and change orders. Tatham rejected numerous claims and

requests for extensions. On March 10, 2022, Tedescon initiated arbitration of these issues. The parties appointed Duncan Glaholt, a senior construction lawyer, on April 11, 2022. The project continued, and the arbitration proceeded in a parallel timeline.

- [10] On April 6, 2023, Tedescon served notice of default on the County in respect of 80 alleged breaches of the agreement, as well as a claim that the contract administrator failed to act with impartiality.
- [11] On April 17, 2023, Tedescon delivered notice to the County and Tatham that it was suspending work pursuant to OPSS.MUNI 100 General Condition 7.10 (GC 7.10), until the Country resolved the breaches.
- [12] On April 19, 2023, the County countered with a letter instructing Tedescon to withdraw the notice of suspension and to remobilize to the site by May 1, 2023. The letter also stated that if Tedescon did not return to resume work by that date, the County would consider Tedescon to have abandoned the contract. The County also filed a claim with Intact Insurance as the issuer of the performance bond for the contract.
- [13] Tedescon did not return to work by the May 1, 2023, deadline. It stood by its right to suspend work pursuant to the agreement. On June 19, 2023, the County notified Tedescon that it considered Tedescon had abandoned the project. On June 30, 2023, the County awarded a contract to Georgian Paving to replace Tedescon and to complete the work.
- [14] The arbitrator's award consisted of a lengthy Partial Award setting out the procedural history, issues in dispute, adjudication of numerous line items resulting in the controversies with Tatham, legal analysis of each party's main theories of the other's breach, and accounting of competing damage claims. He delivered a brief Final Award after inviting submissions on unresolved matters. Both the Partial Award and the Final Award were later amended and supplemented by an addendum, after multiple rounds of post-hearing submissions. Tedescon argued that the revisions were prompted by its counsel's attempts to correct the arbitrator's math, including the transposition of correct figures from the adjudicated line items to the charts summarizing the calculations. Both parties had tendered spreadsheets for the arbitrator to use. Tedescon's counsel intimated that the arbitrator may not have used them.
- [15] On the role of Tatham, the arbitrator held that Tedescon had a right to suspend work under GC 7.10 because of Tatham's preferential treatment of the County. He also found: "But this right was a right to stop work or terminate the contract, not to abandon the contract."
- [16] On the nature of the work stoppage by Tedescon, the arbitrator found that between April 6 and 17, 2023, Tedescon decided to treat its 2022-23 winter mobilization as final. This amounted to abandonment of the contract. He also held that the County, by replacing Tedescon with another contractor, accepted Tedescon's repudiation of the contract. That acceptance brought the parties' unperformed mutual obligations to an end and entitled the non-repudiating party, the County, to damages.

- [17] The arbitrator made numerous specific findings on the individual disputes by Tedescon and the County on work and quantities. The instant applications did not concern these individual items, beyond Tedescon's contention that the arbitrator made repeated errors when he tallied or calculated the subtotaled amounts.
- [18] The arbitrator apportioned 25% of the responsibility for Tedescon's abandonment on the County, to reduce the County's damages by that amount. On this point, Tedescon submitted that he had applied the 25% factor to the wrong figure, thereby reducing the discount to the County's damages.
- [19] Initially, the arbitrator awarded the County \$451,845.77 plus HST, and Tedescon \$414,872.93 plus HST, for a net award to the County of \$42,972.84 plus HST. After further submissions, he awarded the County a net amount of \$511,243.13, inclusive of HST.¹ He also awarded \$6,000 to the County in respect of an adjournment but required the parties to bear their own costs of the overall arbitration.

Decision and Issues

- [20] Both applications must be dismissed.
- [21] In arriving at this conclusion, I have first rejected Tedescon's s. 46 grounds, based on jurisdiction and fairness. The jurisdictional question did not authorize the court to consider the substance or the merits of the arbitral decision. Whatever the basis for Tedescon's complaints about the arbitrator's math or data entry, they did not give rise to any issues regarding the fairness of the process or the impartiality of the arbitrator.
- [22] The parties' agreement to resolve their dispute by "final and binding" arbitration implicitly excluded any recourse to an appeal under s. 45(1). That contractual wording denoted the parties' intention not to pursue the dispute beyond the arbitration.
- [23] Had I not dismissed Tedescon's application for leave to appeal, I would have granted leave and allowed the appeal in part.
- [24] The arbitrator erred on an extricable question of law, by holding that Tedescon had repudiated the contract. For the work stoppage to have amounted to abandonment and repudiation, the refusal to continue must have been associated with an unmet demand for payment before it was due. By holding Tedescon in breach for a justified work stoppage, the arbitrator failed to consider a required element of fundamental breach amounting to repudiation: that Tedescon had to have breached the agreement. I would therefore have set aside the arbitrator's award for the County's damages claim and awarded Tedescon the

¹ Because of the outcome of this proceeding, I need not retrace the calculation corrections resulting in the late-hour swing of \$462,683.82 in the County's favour.

past due amounts for unpaid holdbacks, unpaid quantities for extra supplies of labour and materials (“Extras”), and damages for delay expenses.

- [25] I would not have granted leave to appeal the calculation issues, because the accounting of damages or set offs did not entail pure questions of law.
- [26] Because the County’s provisional application for leave to appeal turned on the same issue of repudiation, I would have granted leave but dismissed the appeal.
- [27] I will now start with my consideration of Tedescon’s s. 46 arguments.

SECTION 46 – JURISDICTION AND FAIRNESS

- [28] Paragraphs 46(1)3 and 46(1)6 of the *Act* deal with jurisdiction and fairness, respectively.
- [29] On s. 41(6)3, Tedescon submitted that the arbitrator ignored admissions by the County and made findings against Tedescon that were inconsistent with the County’s closing submissions and evidence led by both parties. By doing so, it acted beyond the scope of the arbitration agreement. Tedescon argued the arbitrator’s award exceeded the scope of the Agreement to Arbitrate, because para. 7 d) stated:

d) the Award shall be based solely upon the pleadings, the evidence led by the parties, and legal submissions offered at the conclusion of the evidentiary hearing.

- [30] This argument amounted to an extrapolation of s. 46(1)3 beyond its intended application as a check on jurisdiction to deal only with the dispute the parties submitted in the arbitral agreement. Tedescon’s point required the court to review the substance of the award, to determine whether the decision followed the parties’ pleadings, evidence, and submissions. The court’s power under Ground 3 cannot entail such a review: *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254, 145 O.R. (3d) 481, at para. 43, leave to appeal refused, [2019] S.C.C.A. No. 202; *Smyth v. Perth and Smiths Falls District Hospital*, 2008 ONCA 794, 92 O.R. (3d) 656, at para. 17. The jurisdictional question that Ground 3 addresses must be whether the arbitrator’s award decided a dispute the parties put before him.
- [31] The scope of the “Dispute” circumscribed by the Agreement to Arbitrate, dated April 11, 2022, was vague at best. In the first two paragraphs, it simply described “A dispute” arising from the road reconstruction contract and referred to the process as an “*ad hoc* arbitration.” The pivotal moment in the parties’ relations on which much turned occurred a year into the arbitration, in April 2023. Because of the expansive nature of the issues in the arbitration, Ground 3 is difficult to apply without requiring the court to venture into the substance of the award.

- [32] Tedescon's main point on this issue arose from the arbitrator's accounting in the Partial Award. He did not give credit to the contractor's holdbacks withheld by the county. After raising this, he stated in his Final Award that he had considered the holdbacks "on an overall cash basis." Tedescon argued that neither side had submitted such an accounting method to him, and that it was ultimately an opaque element of the arbitrator's reasoning that made no sense. The jurisdictional issue arising from the agreement to arbitrate cannot deal with questions of faulty reasoning or of methodology in assessing the relative indebtedness.
- [33] Even if these arguments could be entertained on a Ground 3 analysis, Tedescon has misconstrued the arbitrator's consideration of the holdbacks on a "cash basis." This accounting issue arose at various places in the partial and final awards, as amended after submissions. The arbitrator credited Tedescon with \$13,556,460.54, consisting of the \$12,509,737.25 adjusted contract price and the \$1,046,723.29 award for extra supplies improperly disallowed by the County's contract administrator, Tatham Engineering. After deducting \$9,413,674.07 in payments by the County, this made \$4,142,786.47 "net available" for the County's completion of the "abandoned Tedescon contract." Neither party had used the term, "cash," to describe the accounting. In the context of the award, the term was simply a label to describe a front-loaded recognition of the accrued contract price including the holdback.
- [34] The arbitrator included the holdbacks in the contract price and set them off the County's damages. In principle, there was nothing wrong with this approach, provided the set-off could result in a net award in Tedescon's favour, should the County's claim for damages be reduced or disallowed. I would not give effect to Ground 3 of s. 46(1).
- [35] On Ground 6, Tedescon argued that the arbitrator breached his duty of fairness to the parties by committing obvious mathematical mistakes, ignoring admissions by the County, and not determining the matter based on the arguments of the parties. Tedescon's factum presented a side-by-side analysis employing the methodology from charts in the County's final arbitral submissions and inserting the corrected dollar amounts into an analogous set of charts that the arbitrator could have calculated, were it not for various data entry errors. Applying the corrected award figures to the County's method, according to this analysis, yielded a net award to Tedescon of \$751,994. This did not amount to an admission by the County that it owed that amount to Tedescon. Rather, it required replacement of several line items in the award calculations with parts of the County's figures and charts.
- [36] Tedescon cited the following extract from a decision of the High Court of Justice, Business and Property Courts of England and Wales, Commercial Court (QBD) in *Ducat Maritime v. Lavender Shipmanagement*, [2022] EWHC 766 (Comm), at para. 40:

It appears to me, however, that a gross and obvious accounting mistake, or an arithmetical mistake of the $2 + 2 = 5$ variety made in the award, may well represent a failure to conduct the proceedings fairly, not because it represents an extreme illogicality but because it constitutes a departure from

the cases put by both sides, without the parties having had an opportunity of addressing it.

- [37] It also relied on *Wang v. Takhar*, 2019 ONSC 5535, at paras. 73-81, for the simple proposition that unclear or inadequate reasons could amount to a breach of procedural fairness.
- [38] The County's response to this argument was that the arbitrator was free to employ whatever methodology he chose to arrive at the damages assessment.
- [39] The arbitrator did express some frustration with the repeated submissions on these calculation and tabulation points. Indeed, it was part of Tedescon's argument that counsel had submitted several rounds of corrections requests, with new mistakes made during each round. In the Amended Final Award, the arbitrator reported his last attempt and found a "\$0.08 calculation error in the County's favour."² Nevertheless, the court's power to upend an arbitral award on fairness grounds cannot be used to delve into the tabulation of a construction dispute.
- [40] I could not discern from the arbitrator's reasons a level of opacity or confusion that would suggest unfairness amounting to a deprivation of natural justice. In fact, his lengthy reasons meticulously reported every step and piece of evidence in detail. As my analysis of the appeal will demonstrate, the outcome may have appeared unjust because of the illogical dual finding that Tedescon's demobilization was both justified and unlawful. However, that error of law did not amount to lack of fairness. That the error cannot be appealed will also seem unjust. I will address that point next.

LEAVE TO APPEAL – WHETHER AVAILABLE

- [41] The County submitted that the arbitration agreement in this case contained wording precluding any recourse to an appeal, namely the phrase, "final and binding."³
- [42] All appeals to courts are creatures of statute: *R. v. Meltzer*, [1989] 1 S.C.R. 1764, at p. 1773. In the previous iteration of the *Act*, s. 16(1) permitted appeals to Divisional Court, but only if the agreement provided for appeals.⁴ The current 1991 *Act* provides a right of appeal to Superior Court with leave, on a question of law:

² That finding might lead one to question whether the arbitrator used the spreadsheets or manually calculated the sums.

³ That argument could not have precluded the s. 46 grounds discussed above, because s. 3 did not permit contracting out of s. 46.

⁴ See *Arbitrations Act*, R.S.O. 1980, c. 25, s. 16(1); *Arbitrations Act*, R.S.O. 1990, c. A.24, s. 16(1).

45 (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

[43] The first sentence of s. 45(1) has been interpreted as requiring express or implied exclusion of appeals, failing which the limited right exists: *Denison Mines Ltd. v. Ontario Hydro* (2002), 58 O.R. (3d) 26 (C.A.), at para. 4. The statutory authority for this reading appears in s. 3, which provides that the parties may agree to exclude any provision in the Act “expressly or by implication.” This provision reflects the primacy of party autonomy in modern arbitral jurisprudence: *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 SCR 144, at para 52. Although an implied waiver of appeal may appear “heretical” as an ouster of court jurisdiction, in the arbitral canon the procedural agreement, interpreted according to the private law of contract, presumptively governs.⁵

[44] The County’s position on this issue required review of two separate documents: GC 3.14 of the road works contract and the arbitral agreement the parties signed with the arbitrator. GC 3.14 did not expressly or impliedly exclude the availability of appeals. The arbitral agreement stated the arbitration was “final and binding.”

[45] GC 3.14.01.03 stated that “The parties shall be bound by the decision of the arbitrator”.

[46] GC 3.14.01.04 provided:

The rules and procedures of the *Arbitration Act, 1991*, S.O. 1991, c. 17, as amended, shall apply to any arbitration conducted hereunder except to the extent that they are modified by the express provisions of subsection GC 3.14, Arbitration.

[47] GC 3.14.02.01 then stated:

The following provisions are to be included in *the agreement to arbitrate* and are subject only to such right of appeal as exist where the arbitrator has exceeded his or her jurisdiction or have otherwise disqualified him or herself:

⁵ I. J. Plotkin and M. P. Mancini, “Inspired by Vavilov, Made for Arbitration: Why the Appellate Standard of Review Framework Should Apply to Appeals from Arbitral Awards,” 2021 2-1 *Canadian Journal of Commercial Arbitration* 1, 2021 CanLIIDocs 13807, at pages 33-34.

a) All existing actions in respect of the matters under arbitration shall be stayed pending arbitration;

b) All outstanding claims and matters to be settled are to be set out in a schedule to the agreement. Only such claims and matters as are in the schedule shall be arbitrated; and

c) Before proceeding with the arbitration, the Contractor shall confirm that all matters in dispute are set out in the schedule.

[emphasis added]

[48] The Agreement to Arbitrate contained the following paragraphs:

2. A dispute has arisen between the Claimant and the Respondent in relation to or arising from the Contract which the parties have agreed to resolve by final and binding ad hoc arbitration (“Dispute”).

3. The Claimant and the Respondent hereby affirm their submission of their Dispute to final and binding arbitration pursuant to the Contract and the *Arbitration Act, 1991*, S.O. 1991, c. 17.

[underlining added]

[49] Relying on *Denison Mines*, the application judge in *Peters v. D’Antonio*, 2016 ONSC 7141, at para. 34, opined that the phrase “final and binding” may be insufficient to exclude a right of appeal. I read *Denison Mines* differently. The factual scenario in *Denison Mines* was logically the reverse of the instance case. It was common ground in *Denison Mines*, as noted in para. 2, that the original 1977 Sale Agreement defining the substance of the arbitration precluded an appeal by operation of the words “shall be finally settled.” However, the 1992 arbitration agreement was silent on appeals. At para. 16 of *Denison Mines*, Sharpe J.A. held that the arbitration agreement prevailed and, by negative application, provided recourse to an application for leave to appeal under s. 45(1). In her dissent at para. 19, Abella J.A. (as she then was) gave priority to the Sale Agreement and held the parties’ intention “was to have arbitral finality.” The issue in *Denison Mines* turned on the relative legal effect of two agreements. All three judges on the panel agreed the Sale Agreement’s language precluded an appeal.

[50] Unlike the opposed provisions between the Sales Agreement and the arbitration agreement in *Denison Mines*, it is not necessary to agonize over the priority of the agreements between Tedescon and the County. GC 3.14.02.01 expressly contemplated a separate arbitral agreement to govern the procedures of the arbitration. It allowed the parties to set their own procedure for the arbitration, including its finality. The Agreement to Arbitrate appeared to be a boilerplate document produced by the arbitrator in his practice. Nevertheless, the parties were at liberty to modify its terms before executing it. In the absence of a right of appeal under GC 3.14, there was no conflict between the two documents. If the twice-

occurring phrase, “final and binding,” denoted an exclusion of the s. 45(1) appeal right, this court cannot entertain the applications for leave to appeal.

- [51] The County relied on *Baffinland Iron Mines LP v. Tower-EBC G.P./S.E.N.C.*, 2023 ONCA 245, 480 D.L.R. (4th) 426, at paras. 41-44, for the proposition that the word “final” implies exclusion of appeal. The Court of Appeal found that the interpretive aid of consistent uses of such language in the case law “pulled in favour of” the application judge’s determination that “final and binding” excluded appeals. This construction conformed to a line of authority interpreting “final” and its derivations as expressing an end to the dispute process.
- [52] Despite the weight of authority interpreting “final” similarly, the decisions all required principled contractual interpretation. In *Denison Mines*, the majority prioritized the arbitral agreement that was silent on appeals over the underlying contract that expressed arbitral finality. However, it still interpreted “final” as an end to the dispute. At paras. 36-37 of *Baffinland*, Zarnett J.A. prefaced his reasoning with a reminder of the Supreme Court of Canada’s guidance in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 47, which in turn cited *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, that all contractual interpretation requires a practical approach with the overriding concern of determining “the intent of the parties and the scope of their understanding”.
- [53] Tedescon argued that *Baffinland* was distinguishable. The application judge in that case had found the clause requiring disputes to be “finally settled” in accordance with the Rules of Arbitration of the International Chamber of Commerce (“ICC Rules”) as precluding appeal. Art. 36(5) of the ICC Rules contained a waiver of any appeals. He found that “finally settled” was functionally equivalent to “final and binding,” used in another part of the same provision in connection with a reference to a Dispute Adjudication Board: see *Baffinland*, at paras. 16-19.
- [54] At para. 39 of *Baffinland*, the Court of Appeal for Ontario went a step further than the application judge by stating that both “finally settled” and “final and binding” meant “no further recourse by way of appeal.” The conclusion that the differently worded phrases were found equivalent meant the impact of Art. 36(5) became immaterial to the ultimate task of interpreting the parties’ intentions.
- [55] The phrase, “final and binding”, would convey a meaning ousting the right of appeal under s. 45(1) unless the two agreements, read together, carried a different meaning. Because GC 3.14 was part of a provincial standard form and the arbitral agreement was the arbitrator’s office precedent, the interpretive task entailed somewhat of a “battle of forms” scenario. These were the issues stirring the mud, to some extent:
1. The operative introduction to GC 3.14.02.01 appeared to limit appeals to jurisdictional errors or other disqualification. The phrase “and are subject only to such right of appeal as exist” linked that narrow scope of appeal right to the “provisions” in paragraphs a), b), and c), to be included in an agreement to arbitrate. Whatever that restriction of the right of appeal meant, the qualifying words, “as exist,” did not imply an intention to

confer a right of appeal. At best, the General Conditions were silent on appeals from arbitrations under GC 3.14.

2. The Agreement to Arbitrate did not contain the three paragraphs required by GC 3.14.02.01. Nor did it append a schedule listing all outstanding claims and matters to be settled. Had the parties followed this requirement, perhaps the schedule of issues could have provided grounds for scrutiny under s. 46(1)3. However, the only result of this omission was that the scope of the arbitrator's jurisdiction was framed as broadly as the claims the parties put before him.
3. The Agreement to Arbitrate described the Dispute in the past tense, "has arisen." However, the words "ad hoc" suggest capturing disputes that have not yet arisen, such as the work stoppage or abandonment in 2023. The parties clearly continued to raise new issues, particularly the 2023 matters, during the arbitration.
4. GC 3.14.01.03 incorporated the rules and procedures under the *Act*, including s. 45.
5. Paras. 2-3 of the Agreement to Arbitrate affirmed submission of the Dispute to "final and binding" arbitration pursuant to the Contract and the *Act*.

[56] None of these points provided cause to disturb two essential facts: GC 3.14 envisaged a separate arbitral agreement, and the Agreement to Arbitrate included the wording "final and binding." At the time of execution, the scope of the arbitration concerned typical construction disputes over change orders, quantities, and payment delays. A standard arbitral agreement in that context would indeed contemplate exclusion of appeal routes, because the subject matter would be dominated by factual and discretionary decision-making and the need to restore or reset the parties' relations in an ongoing project. The parties continued the arbitration under this form of agreement, even after questions of fundamental breach changed the stakes from items in Scott Schedules to liability for the remaining value of the contract. After Tedescon issued the 2023 suspension notice, the parties amended their pleadings afresh to join issue on the legal ramifications of Tedescon's decision to remain demobilized after the winter season. The parties did not renegotiate the "final and binding" language in the arbitral agreement.

[57] Had s. 3 of the *Act* provided only for express exclusion of an appeal right under s. 45(1), the "final and binding" wording would have been insufficient to oust the right. However, all the appellate authorities have interpreted the phrase as implicitly excluding a recourse to appeal. While I am not strictly bound by these authorities on an issue of contract interpretation, I cannot reach a contrary conclusion when the surrounding circumstances of the arbitral agreement, as signed in 2022, made barring appeals appropriate for a dispute over quantities, change orders, and construction delays.

[58] The 2023 work stoppage, as dramatic as it was, did not provide ex-post justification for imposing a new, less effective, meaning to the words "final and binding". The parties implicitly agreed to continue the arbitration with the 2022 procedure. I am therefore bound to conclude that neither party could apply for leave to appeal from the decision.

- [59] This legal outcome will reanimate Tedescon's sense of injustice. As I already signalled in the Overview, the arbitrator did make a basic legal error. But for that error, the arbitration should have concluded with an award of damages to Tedescon for the value of the unreleased holdbacks and the wrongly disallowed value of the Extras: the very issue that had provoked and justified the work stoppage. Tedescon's s. 46 complaints about jurisdiction and unfairness about the accounting methodology and the totting-up of Tedescon's credits against the County's damages were the incidental artefacts of a damages assessment flowing from an incorrect finding that Tedescon had abandoned the contract.
- [60] The unavailability of appeal is the outcome the parties implicitly covenanted to follow. The parties to an erstwhile typical mid-contract construction dispute were free to reconsider the adequacy of the procedural agreement, once the contract terminated with each party blaming the other for its demise. Either party could have insisted that the Arbitration Agreement did not apply to the fundamental breach issue. The courts' interpretation of s. 3, in relation to s. 45(1), was well known. Instead of carving out a right of appeal for the new issue, they agreed to exchange fresh arbitral statements or pleadings incorporating the issue into the existing arbitration.
- [61] Had the Agreement to Arbitrate not included wording implicitly excluding appeal, I would have granted leave to both parties. The matters in the arbitration were sufficiently important to the parties to satisfy the first element in the s. 45(1) test.
- [62] The second part of the test required the issue on appeal to be limited to a question of law that would significantly affect the parties' rights. The only exception to this conclusion would have been to deny leave to appeal on the calculation issues, because they were not pure questions of law.
- [63] I would then have granted Tedescon's appeal and dismissed the County's.
- [64] I will turn next to Tedescon's application for leave, in the event my ruling on the finality issue is incorrect.

LEAVE TO APPEAL – APPLICATION BY TEDESCON

- [65] Tedescon's president, Mr. Fred Tedesco, described how the mistreatment by the County's contract administrator made him decide not to order his forces to return to the site unless the company received immediate payment for the unpaid Extras. It was a difficult time for the company. The arbitrator found that Tedescon had been underfunded by \$1,046,723.29 in unpaid Extras supplied to the project and had incurred \$468,806.41 because of delays. The County also withheld the holdbacks even though they had come due for release.
- [66] From the County's perspective, recognition of a damages claim that not only set off Tedescon's claims but required Tedescon to pay for most of the cost of the replacement contractor must be considered important. The arbitration occurred during a municipal

works project that had already been delayed. Millions of dollars of ratepayers' funds were in issue. Whatever the stakes in the outcome, the arbitration was important to the County.

- [67] The narrower and more nuanced point was the question of law that would significantly affect the parties' rights. Despite Tedescon's attempt to cast the tabulation or calculation issues as questions of law, I agree with the County's submission that the assessment of damages in a construction payment dispute is a, in substance, a question of fact incapable of forming grounds for appeal under s. 45(1). The only salient issue requiring review of the choice or formulation of principle was the arbitrator's conclusion that Tedescon became liable to pay damages for the County's extra expenses to retain a replacement contractor.
- [68] Questions of law are "about what the correct legal test is": *Sattva*, at para. 49, citing *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35. An interpretation of a contract's meaning is a question of mixed fact and law: *Sattva*, at para. 52. However, the interpretation of a standard form contract is an exception to that rule and can be considered a question of law: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 SCR 23, at para. 34. The General Conditions of the provincial contract used for municipal procurement of public works contractors was such a standard form contract.
- [69] Beyond the effect of the suspension of work provision in GC 7.10, the arbitrator's application of the principles pertaining to repudiation and abandonment could entail a question of law, if it concerned "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": *Sattva*, at para. 53.
- [70] As recognized by the Supreme Court in *Sattva*, at para. 42, the reviewing court's task in appellate review and leave to appeal can often entail the same distillation process. I will next consider whether the arbitrator's conclusion about the repudiation or abandonment was based on an extricable question of law. If it did, then the effect on the rights of the parties in the arbitration will be both straightforward and significant.

REPUDIATION BY TEDESCON (OR BY THE COUNTY?)

- [71] The first point that leapt from the page of the arbitral award was the incompatibility of the arbitrator's conclusions that:
- a. the County's contract administrator's conduct amounted to a breach of contract by the County justifying Tedescon's work stoppage under GC 7.10, and
 - b. Tedescon's decision to issue the work suspension notice at the time of remobilization in the spring of 2023 amounted to abandonment of the project and repudiation of the contract.

- [72] The arbitrator concluded the parties could both have breached the agreement, with legal consequences to flow separately. The proof of this logic was his attribution of 25% responsibility to the County for Tedescon's abandonment of the contract, resulting in a reduction of the County's post-completion damages by that percentage. He found grounds for the apportionment of fault in Tatham's conduct in provoking the work stoppage.
- [73] To support this apportionment, the arbitrator had earlier cited *Arcamm Electrical Services Ltd. v. Avison Young Real Estate Management Services LP*, 2024 ONCA 925, at paras. 34-45, as supporting this apportionment for comparative fault. In *Arcamm*, the Court of Appeal declined to apply a contributory negligence model to contract law. However, "fairness, equity and justice" required a reduction in the plaintiff's damages where the plaintiff's conduct increased those damages. At para. 45, Gillese J.A. stated that damages in contract cases can be apportioned based on fault, so that the plaintiff's damages should be reduced to recognize the effect of the plaintiff's conduct in increasing them.
- [74] I did not read into *Arcamm* a departure from the basic law of damages, regardless of the legal theory of liability, that a successful claimant is entitled to the loss attributable to the breach: *Andrews v. Grand & Toy Alberta Ltd.*, 1978 CanLII 1 (SCC), [1978] 2 SCR 229, at 242. Tatham's conduct resulting in unpaid liabilities to Tedescon had nothing to do with the County's damages beyond having provoked the work stoppage. If Tedescon was justified in stopping the work, there could have been no breach. If it was unjustified, the County's damages could only be reduced by its conduct (or that of Tatham) after the abandonment.
- [75] Justification for stoppage and abandonment are two sides of the same coin. It must land on one side or the other. On review of the arbitrator's review of the law, the binary nature of the issue ought to have been clear:
- a. Citing *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, at para. 40, he underlined the following portions:

Repudiation, by contrast, occurs "by words or conduct evincing an intention not to be bound by the contract. It was held by the Privy Council in *Clausen v. Canada Timber & Lands, Ltd.* [1923 CanLII 430 (UK JCPC), [1923] 4 D.L.R. 751], that such an intention may be evinced by a refusal to perform, even though the party refusing mistakenly thinks that he is exercising a contractual right" (S. M. Waddams, *The Law of Contracts* (4th ed. 1999), at para. 620). Contrary to rescission, which allows the rescinding party to treat the contract as if it were void *ab initio*, the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each (party) has a right to sue for damages for *past or future breaches*" (emphasis in original); *Cheshire, Fifoot and Furmston's Law of Contract* (12th ed. 1991), by M. P. Furmston, at

p. 541. If, however, the non-repudiating party accepts the repudiation, the contract is terminated, and the parties are discharged from future obligations. Rights and obligations that have already matured are not extinguished. Furmston, *supra*, at pp. 543-44.

- b. He cited *D & M Steel Ltd. v. 51 Construction Ltd.*, 2018 ONSC 2171, 89 C.L.R. (4th) 140, at para. 54, for the proposition that “if the contractor demands payment before it is due under the contract or if a contractor refuses to proceed unless paid this may be conduct that evidences an intention no longer to be bound by the terms of the contract amounting to a fundamental breach or repudiation of the contract.” The arbitrator included the following sources as further support: *Cornelis Grey Construction Inc. v. Folz*, 2018 ONSC 647, 81 C.L.R. (4th) 307, at para. 41; *The Gatti Group Corp. v. Zuccarini*, 2020 ONSC 2830, 7 C.L.R. (5th) 306, at para. 118.
- c. He cited *JP Reno Inc. v. Warner et al.*, 2024 ONSC 2935, at para. 20, and *Gem in Niagara Homes Inc. v. Dewling et al.*, 2018 ONSC 3500, 91 C.L.R. (4th) 307, at para. 28, “for the proposition [...] that the subjective intentions of the contractor [...] are irrelevant” (although in both instances the courts stated, “are not determinative”, instead of “irrelevant”).

[76] Apart from the subtle discrepancy on the last point, favouring the County when corrected, the arbitrator could not be faulted for referring to the above jurisprudence for guidance.⁶ The County had put Tedescon’s repudiation in play. The arbitrator was bound to consider it. The arbitrator’s reasoning on the repudiation issue then pivoted on the following determination that Tedescon had breached the agreement by refusing to work unless it was paid:

237. This testimony brings the case within the scope of Justice Perell’s decision in *D&M Steel Ltd. v. 51 Construction Ltd.*, 2018 ONSC 2171. If a contractor refuses to proceed unless paid, this can be sufficient proof of intention to no longer be bound by the terms of the contract and, consequently, a fundamental breach, or overall repudiation of the contract.

238. That is what occurred here. Mr. Tedesco found himself in this position for numerous reasons, not all apparently related to this project, but including a reluctance to throw good money after bad and the loss of key employees. It remains unclear how many of these reasons were caused solely by Tatham’s preferential treatment of the County.

[77] The flaw in this reasoning was that the courts have treated contractors’ refusal to work unless paid as repudiation or fundamental breach in cases where the contractors were *not* entitled to make the demand. In the cases cited by the arbitrator, the contracts were

⁶ As described below, he appeared to have omitted the importance of the word “mistakenly” in the extract from *Guarantee Co.*

stipulated or fixed price contracts in which the owners' payments were not due until completion of a phase or the whole project: *D&M Steel*, at paras. 12, 18; *Cornelis*, at para. 38; *Gatti Group*, at paras. 105-6; *Gatti Group*, at paras. 107, 118. In *D&M Steel*, at para. 54, Perell J. cited *Gokdenz Construction Ltd. v. Dalakis*, 2011 ONSC 7135, 14 C.L.R. (4th) 303, at para. 33, in which a demand for payment before it was due combined with a threat to halt delivery of concrete constituted repudiation.

- [78] The treatment of work stoppages for non-payment of extracontractual payment demands as repudiation made perfect sense as unequivocal evidence that a contractor considered itself no longer bound an agreement requiring the contractor to complete the work before delivering an invoice. As the Supreme Court stated in the extracted paragraph from *Guarantee Co.*, repudiation can be inferred by such conduct even if the contractor *mistakenly* believes in the right to stop work under the agreement.
- [79] The principle of fundamental breach by repudiation is inapplicable, if the contractor is within its rights to stop work for the owner's non-payment of amounts *past* due. A contractor's work stoppage cannot constitute abandonment if there is a contractual right to stop work for the owner's default of interim or progress payments. Tedescon's invocation of a right to stop work could have been "words or conduct evincing an intention not to be bound by the contract", only if Tedescon's work stoppage was unjustified.
- [80] Here, the arbitrator's earlier determination "that Tedescon had the right to stop work under GC 7.10" because of Tatham's preferential treatment of the County meant that Tedescon was under no mistaken belief in its right to stop work. The award of \$1,046,723.29 for past due Extras that the County refused to pay because of Tatham's contract administration also meant Tedescon compounded the justification for the refusal to remobilize to the site.
- [81] Against the backdrop of these findings and the absence of any demand by Tedescon for extracontractual *advance* payment, the arbitrator left out a required element or a relevant factor of the legal test to establish abandonment or repudiation when the contractor refuses to work: a positive contractual obligation to continue the work rendering the refusal to return to work a breach. The principle of repudiation was inapplicable to Tedescon's contractually justified work stoppage to compel the County to pay the wrongly rejected payments for Extras. The arbitrator's reasoning was therefore guided by a clear an extricable error of law. The correct result would have been to award Tedescon for the past due amounts, including damages for delay attributed to Tatham, and to disallow the County's claim for damages.
- [82] In fact, as stated at the close of Tedescon's factum, the County was the party who hired a contractor to remove Tedescon's traffic control devices from the road. It was the County who hired Georgian to replace Tedescon while the contract remained in a legal holding pattern because of Tedescon's stoppage notification. Tedescon did not argue that the County was the one who repudiated the contract by hiring the replacement contractor, Georgian Paving. I therefore refrain from considering that question, although it would not take much legal imagination to identify the additional remedy available to Tedescon for the *County's* fundamental breach. For the purposes of leave to appeal, the narrow questions

are whether the arbitrator's conclusion that Tedescon abandoned and repudiated the contract entailed a question of law, and whether the conclusion was made in error. The answer to both questions must be affirmative.

- [83] Had an appeal route been available, I would have eliminated the County's damages claim and awarded Tedescon \$2,598,518.75, consisting of the following:

\$1,046,723.29 for unpaid quantities (Extras)

\$468,806.41 for cost to Tedescon for delays caused by County's administrator

\$1,082,989.05 for unpaid holdbacks

- [84] Tedescon was precluded from obtaining this outcome, because it contracted out of the right to seek leave to appeal under s. 45(1).

LEAVE TO APPEAL – APPLICATION BY THE COUNTY

- [85] The County's cross-application sought leave to appeal, in the event the court entertained Tedescon's application. The grounds for the proposed appeal were that the arbitrator credited Tedescon for the value of its work prior to the 2023 work stoppage. If the appeal were to succeed, the County claimed a variation of the award to remove the credit of \$1,046,723.29 for the unpaid Extras.

- [86] The County relied on a statement in Perell J.'s decision at paras. 53 and 88 of *D & M Steel*. However, for context, I insert para. 87, with underlining added:

[53] Contractor breach: if a contractor abandons the contract, repudiates the contract, fundamentally breaches the contract, or performs the contract in a way that it is so defective as to amount, in substance, to a failure or refusal to carry out the contract work, the owner is entitled to terminate the contract, to claim damages for breach of contract, and to be discharged from its obligations to pay including any obligation to pay on a *quantum meruit* or for work already performed.

...

[87] There was ample evidence to support [the Construction Lien Master's] finding that the parties agreed orally and by their conduct that there would be four progress payments and that payment was only required after the work for each phase was completed. It followed from this finding of fact that D & M Steel repudiated the contract when it demanded payment that it was not entitled to. It further repudiated the contract when it

abandoned the project before completing its work. Significant work remained to be done and the retarded pace of the work was imperilling the opening of the Temple's building which had been an important matter throughout the contract. D & M Steel was never discharged from performing its side of the contract bargain.

[88] It follows as a matter of straight-forward contract law, that the breaching party to a contract is not entitled to be paid under the contract nor is it entitled to advance a claim for *quantum meruit*. It is trite contract law that if there is a fundamental breach or repudiation of the contract, the innocent party is discharged from performance and the innocent party is entitled to claim damages for breach of contract.

[87] The issue here should stand or fall with the repudiation issue raised by Tedescon. A contractor's repudiation of an agreement before payment came due absolved the owner of payment for the value of work already performed. That result is a vestigial sharp edge of contract law, but it is legally sound. However, that principle did not apply here. Indeed, the arbitrator's finding that the County owed Tedescon \$1,046,723.29 for unpaid Extras ought to have anchored the legal reasoning that Tedescon could not have repudiated an agreement when it stopped work. Rather, Tedescon relied on the contract to stop work as leverage for obtaining the owed amounts.

[88] The County's application for leave therefore satisfied the second part of the s. 45(1) test, in that the question consisted of the same legal element of the repudiation analysis that was missing from the arbitrator's determination that Tedescon had abandoned the project and repudiated the contract. For the work stoppage to constitute repudiation, amounting to a refusal to be bound by the contractual performance obligation, the stoppage had to be unjustified. I would have granted leave, but I would also have dismissed the County's appeal.

CONCLUSION AND COSTS

[89] The two applications are hereby dismissed.

[90] If the parties cannot settle the costs of the applications, I will entertain the parties' submissions and bills of costs. With the submissions limited to three pages each, each party should outline its desired costs disposition of the two applications. They are due within 20 days hereof, to be filed *and* forwarded to my judicial assistant.

Akazaki J.

Date: July 3, 2026