SUPREME COURT OF NOVA SCOTIA

Citation: *The Roy Building Limited v. Install-A-Flor Limited*, 2024 NSSC 139

Date: 20240508
Docket: 525196
Registry: Halifax

Between:

The Roy Building Limited, a body corporate

Applicant

v.

Install-A-Flor Limited, carrying on business as Floors Plus Commercial

Respondent

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	April 25, 2024, in Halifax, Nova Scotia
Written Decision:	May 9, 2024
Counsel:	W. Harry Thurlow, Michael Gallagher and Sarah Dobson, for the Applicant William L. Mahody, K.C. and Shane McCracken, for the Respondent

By the Court:

INTRODUCTION

[1] By Notice of Application in Court filed July 7, 2023 the Applicant, The Roy Building Limited (The Roy) applies pursuant to s. 49 of the *Commercial Arbitration Act*, 1999, c. 5 (the *Act*) to set aside an award granted by an arbitrator on a number of grounds. The Respondent, Install-A-Flor Limited (Floors Plus) through their Notice of Contest filed August 14, 2023 asks for a dismissal, with costs.

[2] Evidence was led by way of three uncontested affidavits:

1) Michael M. Gallagher's affidavit sworn October 27, 2023 and filed November 1, 2023;

2) Shane McCracken's affidavit sworn and filed November 17, 2023; and

3) Mr. Gallagher's affidavit sworn and filed April 16, 2024.

[3] Mr. Gallagher is The Roy's co-counsel and Mr. McCracken is Floors Plus's co-counsel. Mr. Gallagher's initial affidavit provides the Court with extensive exhibits including all of the materials and exhibits filed in the arbitration, the pre and post-hearing submissions along with the award. Mr. McCracken's affidavit attaches six interim directions decided by the arbitrator.

BACKGROUND

[4] The affidavit evidence establishes a record for the Court which is encapsulated in the following uncontested background.

[5] Floors Plus and The Roy entered into a CCDC-17 Stipulated Price Contract (the Contract). Under the Contract, Floors Plus agreed to perform certain work, service and supply with respect to the flooring and tile installation for the Roy Building, located at 1650 Granville Street, Halifax, Nova Scotia (the Project). The construction manager hired by The Roy for the Project was EllisDon. The Contract was awarded following a competitive tendering process administered by EllisDon on behalf of The Roy.

[6] Following an extensive pre-bid process involving several addendums and clarifications issued on behalf of The Roy, Floors Plus submitted an irrevocable bid to The Roy on March 23, 2017.

[7] On April 6, 2017, Floors Plus received a post-tender request for bid clarification from EllisDon on behalf of The Roy. This formal post-tender, pre-award request directed that Floors Plus remove an amount from the base bid amount as it was to be covered off in the "floor levelling & prep allowance".

[8] On April 11, 2017, Floors Plus submitted a revised quotation making the above noted changes, noting "as its [sic] included in the Prep Allowance".

[9] As a result of the tendering process defined in the RFP documents, the bid submitted by Floors Plus and the post-tender request for bid clarification on April 14, 2017, the Contract was awarded to Floors Plus by EllisDon on behalf of The Roy.

[10] At an April 14, 2017 meeting in which the revised bid of Floors Plus was accepted by The Roy, the term "allowance" was explicitly used to describe the pre-populated floor levelling and preparation amounts mandated by Addendum 3 to the RFP.

[11] Following the acceptance of the Floors Plus bid, Floors Plus commenced some of the work under the Contract. Finalization of the Contract was delayed owing to decisions by The Roy with respect to certain finishes and design features.

[12] The post-award decisions required to finalize the Contract did not address the pre-populated amounts for floor levelling and preparation or the corresponding scope of work. Neither did the post-award decisions indicate any intention to depart from the agreed-upon allowance premising the Floors Plus bid, the revised bid, and the Contract award.

[13] In finalizing the total Contract price in the post-award period, The Roy and EllisDon referred to the revised bid submitted by Floors Plus on April 11, 2017, which adjustment was made at the direction of The Roy "as its [sic] included in the Prep Allowance".

[14] As a result of the departure of the person (Jared Moore) conducting the tendering process on behalf of EllisDon and The Roy, the drafting of the Contract was completed by someone unfamiliar with the tendering process. A cash allowance

referrable to floor preparation was not incorporated into the Contract. This led to the dispute regarding whether or not a cash allowance was agreed to in the Contract.

[15] The parties ultimately agreed to participate in an arbitration. In the lead up to the arbitration there were six interim directions (dated April 27, June 14, June 27, September 5, September 9 and September 27, 2022) by the arbitrator, Augustus M. Richardson, K.C., C. Arb. The hearing took place February 17, 20, 21 and 22, 2023 and the award was issued by Mr. Richardson on June 7, 2023 (the Award).

[16] Floors Plus consistently took the position that the parties intended to and did in fact agree to the cash allowance as part of the tendering process and the Contract award. Their position was expressly advanced in arbitration closing submissions:

> 224. The evidence of Moore on what was intended by EllisDon in generating Addendum 3 is not evidence of the subjective intention of one of the partis in entering the Contract. It is evidence of what the third party hired by the Roy to conduct the RFP process and award the Contract intended in generating and conducting the RFP process and awarding the Contract.
>
> 225. Respectfully, the evidence of Moore should be considered as the most credible and relevant evidence in this matter of what was objectively intended by the parties.
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> 226. There has been no evidence whatsoever put forward to suggest that the intention of EllisDon to establish a cash allowance for floor levelling and preparation work in generating Addendum 3 was departed from at any point prior to entering into the Contract. Although there were considerable negotiations on other aspects of the Contract, the parties did not seek to further define or deviate from the agreed upon cash allowance.
>
> 227. The lack of any evidence that speaks to any such negotiations occurring is evidence of the objective intention of the parties that the intended allowance was not deviated from.

[17] The Roy also led considerable evidence on the tendering process and the Contract award in relation to the interpretation of the Contract. They made submissions on how the arbitrator should deal with the surrounding circumstances in his interpretation of the Contract. For example, The Roy's reply to Floors Plus closing submissions read in part:

> 46. The important problem with paragraph 225 [of Gallagher Affidavit, Exhibit N] is that it pinpoints the wrong time in the process. The important time for assessing intentions is at the time of contract finalization. The parties' intentions can evolve and change numerous times during negotiations between RFP and final

> contract. Often, that time period involves major changes. In this case, design, style and prices were changed during this very period. Mr. Moore was no longer involved with the project two months before the Contract was finalized. His evidence is therefore of limited value. The last significant involvement he had in correspondence was confirmation that The Roy required a firm price.
>
> […]
>
> 50. At paragraphs 227-236 [of Gallagher Affidavit, Exhibit N], Floors Plus argues that the lack of documented negotiations over floor prep and leveling pricing suggests the intention that it be an allowance was not deviated from. Putting aside the lack of evidence that any such intention or agreement existed, this section is rife with parole evidence. What was said or not said about intentions is not relevant to interpretation of an unambiguous contract drafted later. Objective evidence of intentions is found in the June 29, 2017 email exchange between Mr. Moore and Simon Wilbee. There is no evidence that a "Cahs Allowance" as defined under the CCDC 2017 stipulated Price Contract was ever discussed, let alone intended by any party at anytime.

[18] Further, The Roy advanced the position at the arbitration that the tendering process was applicable in the contractual interpretation by questioning the qualifications of the expert proposed by Floors Plus. In particular, The Roy argued that the expert should not be considered qualified to opine in relation to the application or interpretation of Canadian flooring contracts due to the American expert's unfamiliarity with the Canadian procurement law theory of Contract A/Contract B.

[19] In the 103-page Award, Mr. Richardson concluded that the surrounding circumstances of the tendering process and the resulting Contract (including the April 14, 2017 award of the Contract) established the intention of the parties to incorporate a cash allowance for floor preparation in the Contract.

BASIS FOR THE APPLICATION TO SET ASIDE THE AWARD

[20] The Roy brings this Application to set aside the Award on the basis that the arbitrator breached the *Act* and the arbitration agreement between the parties. They assert that the arbitrator failed to adhere to the principles of natural justice and procedural fairness. Furthermore, The Roy submits that the Award is fundamentally flawed and demonstrates a manifest unfairness to The Roy in contravention of s. 49 of the *Act*.

[21] Section 49 of the *Act* reads as follows:

Setting aside by court

49 (1) On the application of a party, the court may set aside an award on any of the following grounds:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid or has ceased to exist;

(c) the award deals with a matter in dispute that the arbitration agreement does not cover or contains a decision on a matter in dispute that is beyond the scope of the agreement;

(d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, where the agreement did not deal with the matter, was not in accordance with this Act;

(e) the subject-matter of the arbitration is not capable of being the subject of arbitration pursuant to the law of the Province;

(f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to the case of another party or was not given proper notice of the arbitration or of the appointment of an arbitrator;

(g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement;

(h) an arbitrator committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;

(i) the award was obtained by fraud.

(2) Where clause (1)(c) applies and it is reasonable to separate the decisions on matters covered by the arbitration agreement from the impugned decisions, the court shall set aside the impugned decisions and allow the other decisions to stand.

(3) The court shall not set aside an award on grounds referred to in clause (1)(c) if the applicant has agreed to the inclusion of the matters in dispute, waived the right to object to its inclusion or agreed that the arbitral tribunal has power to decide what matters in dispute have been referred to it.

(4) The court shall not set aside an award of grounds referred to in clause (1)(h) if the applicant had an opportunity to challenge the arbitrator on those grounds pursuant to Section 15 before the award was made and did not do so or if those grounds were the subject of an unsuccessful challenge.

(5) The court shall not set aside an award on a ground to which the applicant is deemed, pursuant to Section 6, to have waived the right to object.

(6) Where the ground alleged for setting aside the award could have been raised as an objection to the jurisdiction of the arbitral tribunal to conduct the arbitration, the court may set the award aside on that ground if the court considers the failure of the applicant to make an objection in accordance with Section 19 justified.

(7) When the court sets aside an award pursuant to this Section, the court may remove an arbitrator or the arbitral tribunal and may give directions concerning the conduct of the arbitration.

(8) Instead of setting aside an award pursuant to this Section, the court may remit the award to the arbitral tribunal and give directions concerning the conduct of the arbitration.

GUIDING LAW AND APPLICATION

[22] The parties did not agree that the Award could be appealed; therefore, pursuant to s. 48(1) of the *Act*, no right to appeal exists. This means that there is no review of whether the decision can be sustained under the law chosen by the parties.

[23] In *Sharecare Homes Inc. v. Cormier*, 2010 NSSC 252, Associate Chief Justice Smith (as she then was) held that non-statutory tribunals are reviewable for want of jurisdiction and breaches of natural justice, but that those remedies are now codified in the *Act*:

> [51] …Issues of jurisdiction and breaches of natural justice are now codified, however, by the *Commercial Arbitration Act* and, in particular s. 49 of that *Act*. Any relief that the Applicant may seek must be found in the provisions of the *Commercial Arbitration Act*.
>
> [Emphasis added]

[24] Accordingly, pursuant to s. 49 of the *Act* the Court may exercise its discretion and grant relief by setting aside the Award.

[25] As counsel confirmed, apart from *Sharecare*, there is scant Nova Scotia caselaw referrable to s. 49. Nevertheless, set aside provisions (structured similarly to those under the *Act*) elsewhere in Canada have been considered to be narrow and not an alternative route for parties to raise concerns that are properly appeal grounds.

[26] In *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 861 (appeal to SCC denied 2024 CanLII 542 (SCC)), the Ontario Court of Appeal overturned the decision by the application judge to set aside an arbitration award. As Justice Harvison Young explained:

> 2 Central to this appeal is the fact that the parties agreed that the decision of the arbitrator was to be final, subject only to appeals on questions of law under s. 45(2) of the *Arbitration Act*, 1991, S.O. 1991, c. 17 ("*Arbitration Act*"). The application judge erred by characterizing questions of mixed fact and law as extricable questions of law. Moreover, in characterizing the same arguments as breaches of procedural fairness falling under s. 46 of the *Arbitration Act*, the application judge effectively bootstrapped the substantive arguments. This court has recently emphasized the narrow basis for setting aside an arbitral award under s. 46 of the *Arbitration Act*, which is not concerned with the substance of the parties' dispute and is not to be treated as an alternate appeal route: *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254, 145 O.R. (3d) 481, at

> paras. 20-27, 40-44, leave to appeal refused, [2019] S.C.C.A. No. 202; *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2022 ONCA 769, at paras. 5, 40. [also recently denied leave to appeal by the Supreme Court of Canada 2023 CanLII 57195 (SCC)].

[27] *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2022 ONCA 769 is another example of the Ontario Court of Appeal overturning an application judge's decision to set aside an arbitration award. Justice Zarnett stated the following regarding the tight parameters that an application judge hearing a set aside application must work within:

> 5 As explained in *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254, 145 O.R. (3d) 481, leave to appeal refused, [2019] S.C.C.A. No. 202, s. 46(1)3 of the *Arbitration Act*, 1991 provides a narrow basis upon which a court may interfere with an arbitration award. It does not create a right of appeal, nor contemplate a review of the correctness or reasonableness of the arbitrator's decision. It requires that the court not interfere with the arbitrator's award as long as the issue decided was properly before the arbitrator.
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> 6 The application judge proceeded in a manner that s. 46(1)3 does not permit. The arbitrator said he decided the parties' dispute by interpreting the condominium's declaration. Whether he interpreted the declaration correctly or reasonably was irrelevant. Yet the application judge relabelled his decision as a purported interpretation that was "in effect" an amendment, because of her view that the result he arrived at could not be reached through a proper interpretive analysis. Under this approach, and contrary to that mandated by *Alectra*, only an award that resulted from an interpretation of the declaration that the court considered reasonable or correct would be immune from judicial intervention; anything else would "in effect" be an amendment beyond the jurisdiction of the arbitrator, and able to be set aside.

[28] Similarly, in *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254, the Ontario Court of Appeal again allowed an appeal and reinstated an arbitration award set aside by an application judge. As Justice Huscroft explained at para 41:

> [41] …It was for the arbitrator, not the court, to interpret and apply the substantive provisions of the PAMA, and it is of no moment whether the arbitrator did so reasonably or unreasonably, correctly or incorrectly. The decision was the arbitrator's to make. The application judge's conclusion that the arbitrator's interpretation of the agreement was both unreasonable and incorrect had the effect of converting s. 46(1)3 into an appeal on a mixed question of fact and law -- an appeal the parties deliberately chose not to establish.

[29] In my view, the above noted principles apply when considering s. 49 of the *Act*. Accordingly, the legislated set aside provisions do not provide a mechanism for review of the correctness or reasonableness of an arbitrator's interpretation of a disputed contract.

[30] The thrust of The Roy's argument is that the arbitrator failed to adhere to the principles of natural justice and procedural fairness. Our Court of Appeal has recently re-affirmed what is meant by these fundamental concepts. In *Saturley v. Nova Scotia (Securities Commission)*, 2024 NSCA 15, Chief Justice Wood noted:

> **Denial of Procedural Fairness**
>
> 24 Where an appellant raises an issue of procedural fairness, no deference is owed to the administrative decision maker. In *Jono Developments Ltd. v. North End Community Health Association*, 2014 NSCA 92, this Court outlined the approach to be taken:
>
> > [41] The reviewing judge correctly identified the principle that no standard of review analysis governs judicial review, where the complaint is based upon a denial of natural justice or procedural fairness. (See for example, *T.G. v. Nova Scotia (Minister of Community Services)*, 2012 NSCA 43, leave to appeal refused, [2012] S.C.C.A. No. 237, at para 90).
> >
> > [42] Instead, a court will intervene if it finds an administrative process was unfair in light of all the circumstances. This broad question, which encompasses the existence of a duty, analysis of its content and whether it was breached in the circumstances, must be answered correctly by the reviewing judge (see: *T.G. v. Nova Scotia (Minister of Community Services), supra*, at para 8; *Communications, Energy and Paperworkers Union of Canada, Local 141 v. Bowater Mersey Paper Co. Ltd.*, 2010 NSCA 19, para 28; *Nova Scotia (Community Services) v. N.N.M.*, 2008 NSCA 69, para 40; and *Kelly v. Nova Scotia Police Commission*, 2006 NSCA 27, para 21-33.

[31] As to the content of the duty of procedural fairness, Wood, CJNS again referred to *Jono Developments* which relied heavily on an earlier decision of Cromwell, J.A. (as he then was):

> 26 In *Jono Developments*, the Court set out the principles to be applied in determining the content of the duty of fairness:
>
> > [52] I now turn to the content, or degree of procedural fairness that applies to the particular case. In *Kelly v. Nova Scotia Police Commission*, *supra*, Cromwell J.A. (as he then was) wrote:

> [20] Given that the focus was on the manner in which the decision was made rather than on any particular ruling or decision made by the Board, judicial review in this case ought to have proceeded in two steps. The first addresses the content of the Board's duty of fairness and the second whether the Board breached that duty. (...)
>
> [21] The first step -- determining the content of the tribunal's duty of fairness - must pay careful attention to the context of the particular proceeding and show appropriate deference to the tribunal's discretion to set its own procedures. The second step -- assessing whether the Board lived up to its duty -- assesses whether the tribunal met the standard of fairness defined at the first step. The court is to intervene if it is of the opinion the tribunal's procedures were unfair. In that sense, the court reviews for correctness. But this review must be conducted in light of the standard established at the first step and not simply by comparing the tribunal's procedure with the court's own views about what an appropriate procedure would have been. Fairness is often in the eye of the beholder and the tribunal's perspective and the whole context of the proceeding should be taken into account. Court procedures are not necessarily the gold standard for review.

[53] In *Baker, supra,* Justice L'Heureux-Dubé set out what have become the guiding principles to define the content of the duty:

> 21 The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". ...
>
> 22 ... I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. [Emphasis added]
>
> She then goes on to describe five non-exhaustive factors to consider, which can be summarized as follows:
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> 1. the nature of the decision being made and the process followed in making it;
>
> 2. the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates;"

> 3. the importance of the decision to the individual or individuals affected;
>
> 4. the legitimate expectations of the person challenging the decision; and
>
> 5. the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances.
>
> See *Baker, supra,* at para 23-28. In *Canada (Attorney General) v. Mavi*, [2011] 2 S.C.R. 504, Justice Binnie reiterated that this list is non-exhaustive (para 42).

[32] In the context of a construction labour arbitration, our Court of Appeal has weighed in on the test for reasonableness. In *Labourers International Union of North America Local 615 v. Stavco Construction Limited*, 2019 NSCA 53, Justice Fichaud extensively reviewed the reasonableness test to be applied to an arbitrator's analysis at paras. 50 – 85. At paras. 54 – 55 he cautioned against reweighing evidence:

> 54 In *Casino Nova Scotia/Casino Nouvelle Écosse v. Nova Scotia (Labour Relations Board),* 2009 NSCA 4, this Court explained when a tribunal's finding of fact may be set aside as unreasonable:
>
> > [44] A factual challenge on judicial review, under the reasonableness standard, **must establish that there was no evidence** capable of reasonably supporting the finding: *Lester (W.W.) 1978 Ltd. v. UAJAPPI, Local 740,* [1990] 3 S.C.R. 644, at p. 649; *Toronto Board of Education v. OSSTF, District 15,* [1997] 1 S.C.R. 487, at para. 44-51, 60, 78; *Dr. Q*, paras. 33-35, 38-41. **An applicant for judicial review may be hampered in satisfying his onus for a factual challenge when there is no transcript** of the oral testimony to the Board (see *Granite Environmental [International Union of Operating Engineers, Local 721 v. Granite Environmental Inc., 2005 NSCA 141],* paras. 85-86). The Board cited evidence that the security officers' activities involved no meaningful managerial or confidential functions. I refer to my earlier comments on the evidence and the Board's findings (above, paras. 9-16, 33-38). From the summaries of the evidence in the Board's decision, the exhibits and examination on the record, in my view, the Board's findings occupy the range of inferences that may reasonably be drawn from the evidence. The Casino would recalibrate the evidentiary scale. But **it is not the reviewing court's role to reweigh evidence**.
> >
> > [emphasis added]

> 55 Recently, in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2018] 2 S.C.R. 230, Gascon J. for the majority summarized:
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> > [55] ... When applied to a statutory interpretation exercise, reasonableness review recognizes that the delegated decision maker is better situated to understand the policy concerns and context needed to resolve any ambiguities in the statute (*McLean*, at para. 33). **Reviewing courts must also refrain from reweighing and reassessing the evidence** considered by the decision maker (*Khosa [Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339], at para. 64). At its core, reasonableness review recognizes the legitimacy of multiple possible outcomes, even where they are not the court's preferred solution.
> >
> > [emphasis added]

[33] The Court of Appeal went on to note that the reviewing court is to pay "respectful attention" to the arbitrator's reasons (para. 56). Returning to the standard of review, Justice Fichaud cautioned the reviewing court:

> 75 A party making a factual challenge under the reasonableness standard "must establish that there was no evidence capable of reasonably supporting the finding" (*Casino Nova Scotia, supra*, para. 44). Mr. Callegari's testimony was evidence that reasonably could support the finding.
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> 76 As Gascon J., for the majority, said in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General), supra*, para. 55, "[r]eviewing courts must also refrain from reweighing and reassessing the evidence considered by the decision maker". That is what the reviewing judge did, without a transcript to assist the endeavour.

[34] Later, at para. 90, the Court of Appeal expanded on the concept of reasonableness:

> 90 Reasonableness requires the reviewing court to consider whether the arbitrator's approach is a permissible application of the governing legal principles. If it is, the reviewing court must defer, despite that the judge may prefer a different outcome.

[35] Recently, in *Howley v. Cape Breton University Board of Governors*, 2023 NSSC 34, Justice Smith drew on Nova Scotia Court of Appeal and more recent Supreme Court of Canada authority in confirming that the duty of procedural fairness is context-specific:

> 123 With respect to the duty of procedural fairness, this Court notes the comments of Fichaud J.A. in *C.E.P., Local 141 v. Bowater Mersey Paper Co.,* 2010

> NSCA 19 NSCA, that although the reviewing judge does not conduct a standard of review analysis for procedural fairness, the judge must still determine the content of the duty of fairness and then determine whether that duty was breached:
>
> > [32] Though the reviewing judge does not conduct "standard of review" analysis for procedural fairness, the judge must still determine the content of the duty of fairness. That duty does not just replicate the courtroom model. The duty's content is context specific and depends on various factors, including the tribunal's delegated room to manoeuvre that is contemplated by its governing statute, the nature of the tribunal's decision and the decision's importance to the parties: *Bell Canada v. Canadian Telephone Employees Association*, [2003] 1 S.C.R. 884, at para 21-31; *Imperial Oil Ltd. v. Quebec (Minister of the Environment)*, [2003] 2 S.C.R. 624, at para 31-32; *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, at para 79; *Moreau-Bérubé*, para 74-75; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para 21-28; *Kelly*, para 21-33; *Creager*, para 25, 100-107; *Nova Scotia v. N.N.M.*, para 40-98 and authorities there cited.
>
> 124 The Supreme Court of Canada in *Vavilov* further clarified the content of the duty of procedural fairness, confirming that it is context-specific, with reference to that Court's decision in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.):
>
> …

ANALYSIS AND DISPOSITION

[36] It is with s. 49 of the *Act* and the guiding authorities (as outlined above) that I approach the issues raised in this Application in Court.

[37] At the outset of the Award, the arbitrator clearly outlined the dispute that he was directed to resolve:

> [3] … At the issue is the item “Prep by Floor” for a total of $300,000.00. Floors Plus says that the figure of $300,000.00 was not like the others in the schedule. It says it was intended and understood by the parties to be a cash allowance, not a fixed price. The Roy for its part says it was a fixed or lump sum price in what was a stipulated price contract. Floors Plus’s claim – being the difference between what The Roy says was the price of $300,000.00 and what Floors Plus says was the total cost for the work of floor preparation – is $457,458.87 plus HST.

[38] The procedures leading to the issuance of the Award were extensive. Several pre-hearing conferences occurred, procedural orders were issued and pre-hearing affidavit evidence was exchanged. Detailed pre-hearing briefs were filed. The

hearing was conducted over four days. Although a transcript is not available (the arbitration was not recorded), the parties have confirmed and the affidavit exhibits demonstrate that there was detailed cross-examination of several witnesses and decisions on various motions. From reading the briefs (attached to the affidavits), it is clear that there were extensive closing and reply briefs. The Roy and Floors Plus each led considerable evidence (and made very lengthy pre and post hearing submissions) regarding the pre and post bid tendering process, focused on whether the parties agreed to a cash allowance for floor preparation.

[39] The Award is 103 pages and provides a detailed assessment leading to Mr. Richardson's conclusion on the contractual interpretation issue:

> [315] …I have concluded that the price for floor levelling and preparation in Addendum 3 is to be interpreted as being intended by EllisDon (and hence The Roy), and understood by Floors Plus, to be a cash allowance that was subject to adjustment once better information became available.

[40] The Roy submits that the Award is based on a legal theory which was not raised by either party in their submissions (and is incorrect). The Roy says that it was not given an opportunity to respond to the arbitrator's theory that a tender based Contract A/Contract B analysis governed the interpretation of the written agreement.

[41] In their submissions The Roy argues that neither party raised this theory in pre or post hearing submissions. They maintain that no mention was made of Contract A/Contract B by the arbitrator, nor did he provide notice or an opportunity to respond to this theory. Furthermore, the Roy says that the reasoning contained in the Award represents a repeated failure to apply the law of Nova Scotia to contractual interpretation which resulted in a manifest unfairness to The Roy and also contravenes the procedures mandated by the *Act*.

[42] The Roy maintains that the decision is sound ("and reading it you would think that The Roy would win the case") up until para. 266. The Roy says that from paras. 266 – 275 that the decision "takes a complete left turn". At the outset of this section (paras. 266 – 268) the Adjudicator states:

> [266] First, in the case of construction contracts arising from RFPs there are in fact two contracts. The first (Contract A) arises on the acceptance by the owner of a bid (or tender) submitted by a contractor in response to an RFP. The acceptance of that tender creates an obligation on the parties to enter into the formal construction contract (Contract B) outlined in the tender documents: *The Queen (Ontario) v. Ron Engineering* 1981 CanLII 17 (SCC), [1981] 1 SCR 111.

[267] Second, the existence of this space in time between Contract A and Contract B anticipates and allows for changes or amendments to Contract A that are seen by the parties as necessary; or, for example, to deal with issues that the parties were aware of at the time of tender but could not fix a price for because information as to, for example, the cost of materials to be chosen by the owner was not yet available. Hence Contract B will in normal course incorporate both the terms and conditions of Contract A, and any subsequent changes or amendments that the parties agreed to after entering Contract A. As was observed by Antonio, J. in *ASC (AB) Facility Inc. v. Man-Shield (Alta) Construction* 2018 ABQB 130 at para. 11

> "The CCDC2 [stipulated price contract] is a standard form commercial contract, developed with widespread industry input and designed to balance the interests of the commercial parties. It essentially governs process, while the parties negotiate the substantive terms. They may vary the procedural terms if they wish. Therefore, the CCDC is different from the consumer-oriented "take it or leave it" standard form contracts contemplated in *Ledcor Construction Ltd v. Northbridge Indemnity Insurance Co*, 2016 SCC 37 at para. 25. See also *Sabean v. Portage La Prairie Mutual Insurance Co,* 2017 SCC 7."

[268] That being the case, in my view the approach to be taken when interpreting such a contract is that laid down in Sattva Capital, supra, wherein the interpretation of the words used can be assisted by the factual matrix in existence at the time the parties entered into the contract. Factors such as the purpose of the contract, its genesis and the factual background can all play a role. The interpretation should also take into account the need to interpret commercial contracts in accordance "with sound commercial principles and good business sense:" Hall, *Canadian Contractual Interpretation, supra* at p. 55.

[43] The Roy takes umbrage with the above, noting as follows in their brief:

29 The Arbitrator opened the door to such an interpretation by relying – principally and heavily – on the concept of "Contract A/Contract B" theory in *The Queen (Ontario) v. Ron Engineering*, 1981 CanLII 17 (SCC) ("*Ron Engineering*"). The Arbitrator commenced his analysis by introducing the concept as what he felt was the first principle when interpreting <u>any</u> construction contract which arose after an RFP.

30 The parties did not raise *Ron Engineering*, nor the legal concept of "Contract A/Contract B" in any substantive way throughout the entirety of the Arbitration process. None of the briefing offered by either party contains any reference to the "Contract A/Contract B" legal concept, nor *Ron Engineering*. The Arbitrator provided no indication that the legal concept of "Contract A/Contract B", nor anything raised in *Ron Engineering* were in some way relevant to his analysis of the case.

[44] For the reasons that I will explain, I find this argument to be without foundation.

[45] Once again, the arbitrator had a single task; to determine whether the $300,000 line item for "prep by floor" was a fixed price quantum or a cash allowance placeholder subject to adjustment based on the floor preparation work actually required. The only issue determined by the arbitrator was whether the surrounding circumstances of the tendering process set out in the evidence established the intention of the parties to agree to a cash allowance in the Contract. Having taken nearly 100 pages to set out his review of the evidence, this is what the arbitrator concluded on the key issue:

> [313] The obvious question by March 2017 would have been who was to do the work necessary to enable a floor finisher to do its own work, and at what price. As both Mr Moore and Mr Wilbee testified, RFP addendums are intended to address questions raised by bidders during the tender process, or to amend or provide more information as it comes in. Addendum 3 answered the question of 'who' was to do the necessary concrete work by enlarging the scope of work of the flooring finisher to include floor levelling in addition to preparation. And it answered the question of 'price' by saying that *EllisDon* had estimated that the cost of doing that work would be (in total) $300,000.00.
>
> [314] Was that cost intended and agreed by the parties to be fixed, as The Roy argues? Or was it, as Floors Plus argues, intended and agreed to be an allowance that would be subject to revision in the event EllisDon's estimate proved wrong?
>
> [315] There are several reasons why I have concluded that the price for floor levelling and preparation in Addendum 3 is to be interpreted as being intended by EllisDon (and hence The Roy), and understood by Floors Plus, to be a cash allowance that was subject to adjustment once better information became available.
>
> [316] First, there is the testimony of Mr Moore, the author of the addendum. His testimony was clear. The figure was intended to be an allowance because there was not enough information at the time to permit floor finishers to bid on their normal scope of work The figure was an estimate of what it would cost to perform the work that Precision Concrete should have done in addition to the floor preparation ordinarily expected of a floor finisher, with the intention being that the price would be negotiated and fixed once the necessary information became available.
>
> [317] Second, and by extension, it was an estimate on the part of EllisDon, and estimates almost by definition, are not fixed prices.
>
> [318] Third, it is difficult (though not of course impossible) to accept that a contractor might agree to a fixed price for work it was to do that was based on inadequate information and prepared by someone whose interests were in conflict with it, and who would not bear any risk in the event the number was wrong.

[319] Fourth, and following from the third, the situation – a bid being requested where some of the necessary information would not be available until later – was precisely the kind for which cash allowances under a CCDC 17 had been developed. To interpret the figure as a fixed price would in my mind require some evidence to explain why a contractor would agree to perform work at a cost set by someone else where there was insufficient information as to the actual cot of the work and the number that was provided was based on information internal to that other party but not provided to the contractor.

[320] Fifth, there is the fact that both Mr Moore and Ms Gibson expressly used the word 'allowance' in the tender process. Neither Mr Reznick nor Mr Wilbee explained why the word would have been used at all if EllisDon had intended the figure to be a fixed price rather than an allowance. It is true that the word did not appear in Addendum 3. But it did appear in Mr Moore's email to Ms Gibson on April 6, 2017 during the tender process when he asked Floors Plus to remove the cost of sloping tile because it was "to be covered off in the floor levelling & prep allowance." Mr Moore attached the word 'allowance' to – and so defined – the item "floor leveling & prep," which was the line item added by hm to Addendum 3. That combination supports Mr Moore's testimony at the hearing – and his earlier email to Ms Gibson in December 2018 – that the figure was intended by him to be an allowance, not a fixed price.

[321] I note too that in the April 6, 2017 email Mr Moore used the word "price" again and again for various items. So, for example, he asked to be provided with an "alternate *price*" for laundry closets, large format tiles, for shower drains, and so on. But when it came to floor levelling and preparation he did not call it a "floor levelling & prep *price*." He called it an allowance. If the word 'allowance' had the meaning of a fixed price (as suggested by Mr Wilbee) then the unanswered question is why Mr. Moore did not use "price" instead of "allowance," as he had done with other items in that same email. I note too that this email was copied at the time to both Mr Porter and Mr Clark. Had there been any concern or question about Mr. Moore's reference to the cost of floor levelling and preparation being an allowance one would have expected an objection or request for clarification. No such evidence was provided.

[322] There is too the fact that the revised quote that was provided by Floors Plus to EllisDon on April 11, 2017 in effect again links the word 'allowance' to floor preparation. This quote was the topic of a telephone call between the parties on April 14, 2017. Ms Gibson's evidence was that the word was used by representatives of both EllisDon and The Roy. Given that the word does appear in the quote, and given the importance of the issue of floor levelling and preparation to the work of flooring installation, it strikes me as more likely than not that it would have been that it would have been mentioned as such during that call. I appreciate that Mr Wilbee took the position that his understanding of the word would have then and always been that it was a fixed amount (like the allowance provided by a parent to a child). That may have been what Mr Wilbee thought the word meant, but in the construction industry and in the November Contract 'price' and

> 'allowance' have different meanings – the first is fixed, the second is contingent. And the fact remains that this phone call ended up with The Roy accepting the revised quote and hence the use of the word 'allowance'.
>
> [323] Finally, there is the fact that the $100,000.00 and the $200,000.00 in Addendum 3, when compared to the values provided by Floors Plus for the other line items in its tender, stand out as founded figures in a forest of exact (either to the cent or to the dollar) figures. The former looks like an estimate, while the latter look like actual calculated prices. Mr Clark, when pulling the material together to prepare Appendix K (Schedule of Values) for the November Contract appears to have missed this anomaly. There was certainly no evidence to suggest he asked anyone abut it.
>
> [324] I was accordingly satisfied on the evidence and as a matter of interpretation that when the tender of Floors Plus was accepted by The Roy on April 14, 2017 the parties understood and agreed that the price for floor levelling and preparation was a cash allowance. The figure was used ore as a place holder so that all flooring contractors would bid using the same base number. The understanding and intent of both at that time was that in the event a tender was accepted, and once better information became available, the parties would then negotiate and agree upon a fixed price for floor levelling and preparation. [161]

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[161] Unfortunately, this part of the procedure spelled out in GC 4.1 was frustrated by The Roy's refusal to accept that the $300,000.00 was an allowance rather than a fixed price.

[46] In my view, the above paras. – especially when read in context with the entirety of Mr. Richardson's decision – and given all of the evidence that was before him, establishes that the adjudicator did not consider a novel theory of liability.

[47] With respect to Contract A/Contract B, our Court of Appeal nicely summarized the concept in *Rhyno Demolition Inc. v. Nova Scotia (Attorney General),* 2006 NSCA 16. Justice Freeman stated at para. 17:

> 17 Tendering disputes are customarily considered in light of *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111 in which Estey J. developed the Contract A/Contract B framework in circumstances relevant to those in the present matter. Contract A arises when the offer contained in a tender call is accepted by a tenderer by submitting a compliant bid. Each tender submitted in response to the call creates a separate Contract A between each tenderer and the tender caller. There is only one Contract B, which is the contract awarded when a successful tender is accepted, terminating all the Contract A's. Many of the terms of Contract A are implied obligations of fairness imposed upon the party calling for tenders. Tenders must comply with the terms of

> the tender call. The contract awarded as Contract B must be consistent with the terms required by the tender. Most relevant to the circumstances of the present appeal circumstances is the duty not to accept an informal (non-compliant) tender; this is to ensure that the contract as awarded is in accordance with the terms of the tender call. (See *Maritime Excavators (1994) Ltd. v. Nova Scotia (Attorney General)* (2000), 183 N.S.R. (2d) 236; *Best Cleaners & Contractors Ltd. v. Canada* (1985), 58 N.R. 295 at p. 299.)

[48] While I recognize The Roy's complaint that the within situation does not purely amount to a tendering dispute, I nevertheless fail to understand (in light of all of what was argued before the adjudicator) how they could have been surprised by his reference to this concept and the seminal case of *Ron Engineering.*

[49] I find no support for the suggestion that The Roy would have raised additional arguments and evidence if they were aware that the arbitrator would pick up on the potential application of Contract A/Contract B. Indeed, given my review of the affidavit exhibits, it is apparent that a significant portion of the evidence and submissions in the arbitration were focused on how the surrounding circumstances of the tendering process should impact the interpretation of the Contract.

[50] For example, there was significant evidence led on the surrounding circumstances of the April 14, 2017 Contract award. From the materials it is clear that both parties made repeated references to their contract obligations as of mid-April, 2017.

[51] The record clearly establishes that The Roy was on notice that Floors Plus took the position that as of April 14, 2017, the revised bid had been accepted through the award of the Contract, and the intention of the parties formed as to the implementation of the cash allowance. Floors Plus also took the position that there was no evidence to support there being any deviation from the intention reflected in the agreement to award the Contract, which agreement was acted under extensively and up until the execution of the Contract document on November 15, 2017. The Roy explicitly argued in their submissions to the arbitrator that the April 14 Contract award date should not be considered in establishing the intention of the parties. The Roy clearly had the opportunity to speak to how the April 14, 2017 agreement to award the Contract and commence work on the Project should be considered as part of the interpretation of the Contract.

[52] Furthermore, The Roy squarely raised the potential application of Contract A/Contract B theory when they argued before the arbitrator that the American expert should not be considered qualified to opine on the Contract in light of his

unfamiliarity with the potential application of the Contract A/Contract B theory in relation to the Contract.

[53] Given all of the above, the reader should be able to readily understand that within the impugned paras. complained about by The Roy, the adjudicator overtly addressed the interpretative approach set forth by the Supreme Court of Canada (*Sattva Capital*), given the "factual matrix in existence at the time the parties entered into the contract."

[54] In my view, Contract A/Contract B theory is commonly seen as the starting point in a dispute regarding tendering process and contract. Accordingly, it should be no surprise when the adjudicator refers to this theory in a dispute related to a Contract which involved a tendering process. Indeed, it bears repeating that potential application of the theory was expressly put in issue by The Roy. As the Supreme Court of Canada in *Martel Building Limited v. Canada,* 2000 SCC 60 explained:

> Any discussion of the duties or obligations arising from the tender process must begin with reference to *The Queen in Right of Ontario v. Ron Engineering & Construction (Eastern) Ltd.*

[55] On balance I am of the emphatic view that the arbitrator's application of Contract A/Contract B theory in considering whether the surrounding circumstances of the tendering process established the intention of the parties to implement a cash allowance for floor preparation did not result in procedural unfairness as contemplated by the *Act* or given the Canadian case law and commentary on set aside powers.

[56] Given all of the evidence and authorities, The Roy has failed to establish that the arbitrator inflicted a procedural unfairness on it by denying it the opportunity to present its case. The Roy was well aware of the issue to be determined including whether the surrounding circumstances of the tendering process established the intention of the parties to agree to a cash allowance in the Contract. Additionally, The Roy itself raised the potential application of the Contract A/Contract B theory and left it open to the arbitrator to determine how to apply that theory.

[57] The Roy also alleges that it was treated manifestly unfairly and unequally by the arbitrator because the Award was decided on the basis of an allegedly unargued legal theory, and that the Award should be set aside under s. 49(1)(f) of the *Act* on the basis of this procedural unfairness.

[58] During oral argument on the Application in Court, Mr. Thurlow confirmed that his client was no longer placing in issue their complaint that the arbitrator allowed a late filed document into evidence at the hearing. Accordingly, The Roy's sole complaint regarding the process is that the arbitrator did not permit discovery of the respondent's principal.

[59] Mr. Richardson received written submissions on this issue on August 19, 2022 from Floors Plus and a week later from The Roy. His ruling was provided in an interim procedural direction dated September 5, 2022. This is a detailed 12-page decision. As with the five other interim procedural directions and the Award, the arbitrator was alive to his responsibilities under the *Act*. For example, he began his analysis on his ruling with these observations:

> [19] First, this arbitration is conducted pursuant to the provisions of the *Commercial Arbitration Act*, SNS 199, c. 5 (the "Act").
>
> [20] Second, s. 21(1) of the Act obligates me to treat the parties "equally and fairly." Section 21(2) obligates me to ensure that each party "shall be given an opportunity to present a case and to respond to the case presented by the other parties. "Section 23(3) provides that an arbitrator "may determine the manner in which evidence is to be admitted."
>
> [21] Third, and pursuant to s. 33(1) of the Act, absent agreement of the parties, an arbitration under the Act "shall be conducted following the procedure set out in Schedule A to this Act."
>
> [22] Fourth, and subject to one exception, the parties here have not agreed on whether discovery of party and non-party witnesses is necessary or appropriate.[1]
>
> [23] Fifth, sections 7 and 8 of Schedule A deal with the "conduct of the arbitration." In general, I as arbitrator "may conduct the arbitration in the manner the arbitrator considers appropriate, but each party shall be treated fairly and shall be given full opportunity to present a case:" s. 7.
>
> [24] Sixth, the only reference to oral discovery in the entire Act and the three schedules annexed thereto is found in s. 8(b) of Schedule A. It provides that under Schedule A "the power of the arbitrator includes, but is not limited to …controlling or refusing discovery examinations."
>
> [25] Finally, I note the purpose of the Act as set out in s. 2 thereof:
>
> > 2 The purpose of this Act is to revise and update the law respecting commercial arbitration and thereby encourage and promote the use of arbitration as an alternative to court proceedings in resolving disputes between parties to a contract.

> [1] That exception is the concession of counsel for Floors Plus that it would be appropriate for there to be discovery of one non-party witness from Ellis Don.

[60] Mr. Richardson then addressed the issue of discovery. His decision provides fulsome, detailed reasons explaining his direction at para. 40:

> [40] For the above reasons I direct that:
>
> a. direct evidence of party witnesses shall be presented by way of affidavit evidence, subject to cross-examination if required (on prior notice) at the hearing;
>
> b. there shall be no pre-hearing oral discovery of party witnesses (unless the parties hereto afterwards agree to such discovery);
>
> c. at the request of The Roy, I will issue a subpoena (with the assistance of the court) for a discovery of an Ellis Don witness to be selected by The Roy, such discovery to take no more than six hours, with three hours being allotted to each of The Roy and Floors Plus; and
>
> d. subject to the above, there shall be no pre-hearing oral discovery of non-party witnesses, without prejudice to the right of Floors Plus or The Roy to re-apply for such discovery based on better or different supporting facts.

[61] Given my review of the above, there is no rationale for setting aside the arbitrator's discretionary ruling on discovery. Indeed, by raising the issue The Roy has prompted the Court to scrutinize one of the interim procedural directions. Having done so, I find that the arbitrator provided a procedurally fair vehicle to adjudicate the question. His decision demonstrates that he determined the issue in a thoughtful manner with appropriate reference to the *Act* and the competing arguments. With this in mind and given the direction from our Court of Appeal in *Labourers International Union of North America Local 615* and other guiding cases, I have no hesitation in leaving this interim procedural direction (and the Award) alone.

[62] For all the reasons set out above, The Roy has failed to establish that the Award was decided on the basis of an unargued legal theory. Furthermore, to satisfy the test under s. 49(1)(f), The Roy must show that the arbitrator "treated" The Roy "manifestly unfairly". This refers to the procedures followed by the arbitrator. In short, The Roy has failed to demonstrate that any procedure has been shown to be unfair, let alone manifestly unfair.

[63] Finally, The Roy argues that s. 49(1)(g) of the *Act* was breached, and the Award should be set aside because the arbitrator "failed to apply the law of Nova Scotia as required by the procedures set out in the *Act*".

[64] In my view, the concerns set out by The Roy under this ground all relate to alleged errors of law or mixed fact and law in the contractual interpretation exercise undertaken by the arbitrator, and do not go to the arbitration procedures employed or the procedural fairness. Reference to the within guiding caselaw quickly extinguishes this ground. In this regard, I am mindful of the repeated cautions by the Ontario Court of Appeal about not expanding the exceedingly narrow scope of set aside provisions.

[65] In all of the circumstances, I conclude that there was no procedural unfairness inflicted on either party by the arbitrator. The Roy was not denied the opportunity to present its case. There is absolutely no basis to invoke the statutory provisions for set aside. Accordingly, the Application is dismissed with costs to Floors Plus. If the parties cannot agree on costs I will receive written submissions within 30 days.

Chipman, J.