

CITATION: *Bot Construction et al. v. Minister of Transportation*, 2025 ONSC 6184

COURT FILE NO.: CV-25-00734456

DATE: 20251105

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
))
BOT CONSTRUCTION LIMITED,) *James A. LeBer and Eric A. F. Grigg*
BOT HOLDING LIMITED, BOT) for the Plaintiffs (Respondents)
CONSTRUCTION (CANADA))
LIMITED, CLARKSON)
CONSTRUCTION COMPANY)
LIMITED, BOT CONSTRUCTION)
(ONTARIO) LIMITED and BOT)
MANAGEMENT SERVICES LTD.)
))
Respondents (Plaintiffs))
))
– and –)
))
HIS MAJESTY THE KING IN) *William MacLarkey and Eric Wagner,*
RIGHT OF ONTARIO AS) for the Appellant (Defendant)
REPRESENTED BY THE)
MINISTER OF TRANSPORTATION)
))
Appellant (Defendant))
))
) **HEARD: August 21, 2025**

REASONS FOR DECISION

JOHN CALLAGHAN J.

[1] The appellant, His Majesty the King in Right of Ontario, as represented by the Minister of Transportation (“MTO”), appeals from an arbitral award of the Honourable Frank Newbould K.C. dated December 7, 2024.

[2] The MTO brings this appeal pursuant to its arbitration agreement with the respondents, the Bot Group of Construction Companies (“Bot”). There is no dispute that the agreement grants the parties full rights of appeal on issues of fact, law, and mixed fact and law.

[3] The arbitration arises from a highway construction project (the “Project”). MTO contracted with Bot to expand Highway 69 from two to four lanes near Sudbury, Ontario (the “Contract”). The Contract required Bot to blast approximately 1,000,000 cubic metres (m³) of Canadian shield rock. Blasted rock is used for constructing the road embankments and for other Contract purposes. At the end of construction, there remained significant blasted excess rock that Bot was required to manage during the Project and ultimately dispose of (the “Excess Rock”). Bot claimed that this Excess Rock was “unexpected”, entitling it to its costs in managing and disposing of the Excess Rock.

[4] The Arbitrator awarded Bot more than \$14 million for managing and disposing of the Excess Rock. He held that the Excess Rock was not contemplated in the Contract and that its quantity was not foreseeable at the time of tendering.

[5] MTO alleges that the Arbitrator ignored the evidence and contractual provisions that detail that Excess Rock was an included item in the Contract price, was the responsibility of Bot, and was not otherwise compensable.

[6] MTO also submits that the Arbitrator erred in concluding that there was no discernable explanation for the Excess Rock. MTO asserts that the Excess Rock was the result of Bot's subcontractor blasting below what is described as the pay line such that it generated the Excess Rock and that it was an operational decision of Bot to do so. If this fact had been correctly identified and analyzed, MTO states that the Arbitrator ought to have concluded that this was not compensable Excess Rock and that it was not outside the contemplation of Bot when it bid but rather within the expectation of Bot at that time.

[7] MTO further submits that in calculating any damages that the Arbitrator ignored Bot's admission that there was a simple arithmetic error made at the end of the project which overstated the claimable quantity of Excess Rock by about 38,000 m³. The quantity at issue was *not* 118,000 m³, but rather 80,000 m³.

[8] For the reasons that follow, I dismiss this appeal.

Background

[9] This arbitration arises out of a contract tendered by the MTO to expand Highway 69 some 11 kilometers. Bot was the successful bidder and entered the Contract on July 10, 2012.

[10] The Contract consists of a three-page agreement and several documents (the "Contract Documents"). The Contract Documents include the General Conditions of Contract ("GCs") and special provisions, which address specific issues. In this

appeal, much of the focus was on GC 4.02 and Special Provision 206, which is referred to as the “Rock Spec.”

[11] At a high level, the Project involved blasting solid rock along the path of the new highway (“rock excavation” or “rock cuts”). The blasted rock was to be hauled to where it was needed on the Project. At the outset, the ideal plan was to use all the blasted rock for onsite construction purposes as it was more efficient and less costly than moving the rock. Of course, this depended on the amount of rock blasted and the need for the rock on the Project. If the blasted rock is roughly equivalent to rock needed to further the project, then a project is known as a “balanced job”. As it happened, in the end, this was not a balanced job.

[12] In this case, there was Excess Rock beyond what the plans called for to make the roadbed, embankments, and fills. The Excess Rock became expensive to manage. Rather than using the Excess Rock in furtherance of the Project, Bot was required to manage large quantities of blasted rock while the project was ongoing. Unlike other excess material, there was no identified pre-approved site in the Contract Documents where this Excess Rock was to be used or otherwise disposed of. Eventually, MTO granted Bot permission to dump the Excess Rock at two interchanges of the highway, but this was much later and was not part of the project plan. It was the cost of managing the Excess Rock in the interim that was in issue in the arbitration.

[13] The blasting process is not a precision science. The intent is to blast the rock to the required depth to make a stable and safe roadway. It was anticipated at the outset of the tender process that there would be some Excess Rock. While the exact amounts were not agreed upon, by the end of the Project, there was significantly more blasted rock than anticipated.

[14] While it is agreed that Bot used a highly skilled blasting subcontractor, MTO contends that there ought not to have been as much Excess Rock as there was at the end of the Project, and it was the job of Bot and its blasting subcontractor to ensure this. MTO further asserts the Rock Spec did not warrant a quantity of Excess Rock or that Bot would be compensated for dealing with the excess.

[15] The Contract sets out the work to be performed and provides for an order of precedence for the various Contract Documents. Germane to this appeal, the Rock Specs take precedence over “Contract Drawings” or the GCs. However, the precedent clause only applies where there is a “conflict or inconsistency”. There is a general warranty that Bot may rely on the Contract Documents. Where there is a change in the character of the work, a change order may be requested.

[16] The Rock Spec provide that 1) “[a]ny excess rock material remaining after constructing the rock embankments shall be managed as specified in the Contract Documents, as part of the work of rock excavation”, 2) such management through “[d]umping over the sides of embankments” is permitted once the embankments have been completed and measured for payment, and 3) the “hauling” of rock that is not used for the work is “deemed to be included in the payment for the work under the item of Rock Excavation, Grading”.

[17] GC 4.02 addresses “Excess Materials”, which provides:

GC 4.02 Management of Excess Materials

.01 The Owner shall identify in the Contract Documents the materials to be moved within or removed from the Working Area, and any characteristics of those materials which shall necessitate special materials management and disposition.

.02 The Owner shall be responsible for any additional costs of removal, management, and disposition of any material not identified in the Contract Documents, or where conditions exist that could not have been reasonably foreseen at the time of tendering.

[18] Reference was also made to the design contract between AECOM and MTO (the “Design Contract”). AECOM had been retained by MTO to not only design the Project but also to be the contract administrator, being MTO’s agent on site (“CA”). According to the Design Contract, AECOM was to ensure that the Contract Documents would identify “locations for the disposal of surplus materials”. The Contract Drawings did provide locations where certain surplus or excess material could be disposed of, but there was none identified for the Excess Rock.

Arbitrator’s Decision

[19] The Arbitrator made numerous findings of fact, provided an analysis of the Contract, and applied that analysis to the facts. What follows is a brief description of the decision.

[20] The Contract was preceded by a bid process in which Bot was the successful bidder to construct the four-lane expansion of Highway 69 over 11.2 kilometers. The work included the preparation of a new roadbed, placement of asphalt paving, and the construction of two bridge structures. The Contract Documents provided that the work required the excavation of 660,312 m³ of earth, blasting and excavation of 967,758 m³ of solid rock, and the construction of 1,029,494 m³ of roadway embankments.

[21] The crux of this case concerns rock excavation, which was a separate item in the bid process. The rock excavation work was set out in Tender Items 4 Rock

Excavation (Grading) and Tender Item 6 Rock Embankment, which were required to be performed in the manner prescribed by the Rock Spec. Excavated rock was intended to be used on the Project, including crushed rock for the bed of the roadway and larger pieces for embankments.

[22] Bot subcontracted the drilling and blasting work to Castonguay Blasting Ltd. (“Castonguay”), a specialized drilling and blasting contractor. Castonguay was one of a few contractors in Northern Ontario capable of taking on a project of this size.

[23] Bot’s bid involved 283 bid items and was in the amount of \$54,795,000. Bot’s bid for the rock excavation work included a unit rate for Castonguay’s drilling and blasting work.

[24] The Rock Spec required a Rock Material Management Plan (“RMMP”) to be submitted to the CA five days prior to undertaking rock excavation or rock embankment work. It was to be updated monthly. Among other things, the RMMP was to show the quantity of blasted rock and the surplus. The first RMMP was created using the bid information and the stipulated formula, defined as the Bulking Factor. The first RMMP contained an error in that it showed 431 m³ of surplus rock. This was corrected by the CA to 4,445 m³. The RMMP was updated as the Project progressed.

[25] As the work progressed, Bot’s surveyors and the CA’s surveyors would survey the work performed using contractually stipulated or otherwise agreed upon methods to arrive at a reconciled, actual quantity of work performed. The result of the reconciliation was a plan quantity payment, or “PQP”, adjustment. The PQP adjusted quantity was then used to determine how much Bot, as the contractor, was entitled to be paid in its monthly payment applications.

[26] By late 2013, Bot was asking the CA if it could dump the Excess Rock at a Ministry of Natural Resources waste dump. There was no approval given by the CA to do so. The CA did not acknowledge there was Excess Rock, even at a point when it was estimated to be as much as 75,000 m³.

[27] As the work progressed, it was apparent that there was Excess Rock in large quantities with nowhere to put the rock.

[28] By March 2014, Bot was seeking a change order. It proposed to dump the Excess Rock at MTO's quarry sites. The CA and MTO refused.

[29] Bot began thinking there was a design flaw which accounted for what it believed was unanticipated Excess Rock. It was determined that the CA's designer had made undisclosed modifications to drawings that had "removed the most expensive part of the work to be done". This accounted for a portion of the Excess Rock.

[30] In December 2014, the CA provided the first direction to Bot that it could process the Excess Rock to be used at a gate entrance. The work was to the benefit of MTO. It was a direction given by way of "Instruction Notice" and not a change order and was done at Bot's expense. It was not until March 2015 that a further Instruction Notice was given that the Excess Rock could be stockpiled at two interchanges. The stockpile operations were completed on September 7, 2015. At the conclusion of the Project, the two rock stockpiles were surveyed by each of Bot and the CA. The CA's figure for the volume of excess rock was 117,675 m³ while Bot's surveyed figure was 118,171 m³.

[31] Bot and Castonguay claimed costs incurred in managing the Excess Rock. While there was an issue taken with Castonguay's ability as a sub-contractor to claim

against MTO, the Arbitrator's ruling permitting that claim was not an issue on this appeal.

[32] The Arbitrator framed the issue in dispute as to whether the Excess Rock to be managed was reasonably foreseeable at the time of tendering and, if not, whether there was a change in the condition of the work. The Arbitrator found that there was some 118,000 m³ of Excess Rock that was not expected at the time of the tender.

[33] The Arbitrator further found that Castonguay drilled the absolute minimum required to achieve the desired rock cut. In doing so, he rejected MTO's submission that Castonguay overdrilled, thereby creating excess rock. The Arbitrator further accepted the evidence of Castonguay that it was not aware of the extent of what is called "standalone shatter", which is ordinarily not present but was present in long stretches on this job. This created a portion of the excess. The Arbitrator noted that there was no challenge to this explanation in cross-examination. He concluded that the documents provided with the tender did not disclose the standalone shatter that was to be drilled on the job. There was an issue as to the amount of Excess Rock created by the standalone shatter. An expert report by Hatch Engineering was ruled to be inadmissible. The Arbitrator determined that the Excess Rock caused by the standalone shatter was not determinative as to whether the Excess Rock was something to be expected at the time of the tender.

[34] The Arbitrator rejected MTO's arguments that Bot erred in the amount of overbreak in its bid and RMMP because it made miscalculations which accounted for the Excess Rock. Bot understood this to be a balanced job, which, as mentioned, meant there would be little surplus rock. This was accepted by the Arbitrator because, in part, it was not challenged in cross-examination.

[35] The Arbitrator then considered the design of the Project by AECOM. As already noted, the Design Contract specified that surplus materials, including rock, were to be disposed of at designated sites. While the Contract Documents provided disposal sites for earth and swamp material, the Contract Documents did not provide any disposal sites for Excess Rock. The Arbitrator concluded that AECOM, as the designer of the project, did not anticipate the Excess Rock as it did not account for it in its design and provided no sites for the Excess Rock to be disposed of.

[36] MTO argued that the Excess Rock was calculable at the time of the tender. The MTO advanced calculations by Mr. Wood, who was said to be an expert in this area. However, his evidence was undermined by errors. The Arbitrator commented that Mr. Wood acknowledged that he did not know how much Excess Rock should have been expected.

[37] The Arbitrator found that the bid documents did not include an amount for the management and disposal of Excess Rock. He referenced GC 4.02.01, which provides that where there is surplus material the owner will designate a site for disposal. As noted, the Contract Drawings provided no such site to accommodate the Excess Rock. Further, he referenced GC 4.02.02 which provides where material is not identified in the Contract Documents, or where conditions exist that could not have been reasonably foreseen at the time of tendering, then the additional cost is at the MTO's expenses. In short, he concluded the Excess Rock was neither identified or anticipated at the time of tendering and, thus, was not part of the bid price.

[38] He went on to find there was a change in the character of the work because of the unexpected quantities of rock. He found that not all the Excess Rock could be accounted for and that it was not Bot's obligation to do so but rather Bot was only required to show that the rock was unexpected at the time of the tender. He

concluded that MTO was responsible for any additional cost of removal, management, and disposition of the Excess Rock.

[39] The Arbitrator then calculated the damages. He accepted the evidence that managing the Excess Rock involved not just the storage and disposal of the rock, but also that the Excess Rock constantly had to be moved to allow the Project to progress.

[40] The damages were assessed in three tranches. Claim No. 1 addressed the increased cost to perform the rock excavation and rock embankment work in light of the Excess Rock. He calculated this claim to be \$8,560,650, being the mid-point of the expert opinions. It was argued by MTO that there ought to be a discount of this amount by 32%, as the volume of rock was not 118,000 m³ but 80,000 m³. This was rejected as the damage calculation was not predicated on unit costs, but the actual costs incurred by Bot to deal with the Excess Rock.

[41] Claim No. 2 was Castonguay's claim. The Arbitrator accepted the claimed amount of \$1,015,704, an amount which appears not to have been meaningfully contested as MTO made no submissions in its closing as to the requested amount.

[42] Claim No. 3 addressed several incurred costs including moving the rock, equipment charges, and delay costs. The Arbitrator assessed this claim at \$4,880,670. In doing so, he reviewed the expert evidence and made several factual findings, which he applied to arrive at the final amount. Again, a requested discount was rejected as the calculation of damages was not arrived at via a unit price, but actual costs incurred.

Issues

[43] In its factum, MTO sets out the following issues to be considered on this appeal:

- (i) What is the standard of review of the Award?
- (ii) Did the Arbitrator err in interpreting the Contract by framing the question on liability simply as whether Bot expected 118,000 m³ of Excess Rock?
- (iii) In any case, did the Arbitrator ignore key evidence and contractual provisions relied on by the MTO?
- (iv) Did the Arbitrator err in his quantification of damages?
- (v) If the Award, or parts of it, are set aside, should the matter be remitted back to the Arbitrator?

Standard of Review

[44] This appeal is pursuant to s. 45(3) the *Arbitration Act, 1991*, S.O. 1991, c. 17. The agreement between the parties permits an appeal on questions of fact, mixed fact and law, and law. As this is a statutory appeal under the *Arbitration Act*, the appeal follows the normal appellate standard: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 37; *Continental Casualty Company v. Chubb Insurance Company of Canada*, 2022 ONCA 188, 22 C.C.L.I. (6th) 1, at paras. 46-47.

[45] Questions of law are reviewable on the standard of correctness, and all other findings are not to be disturbed unless they constitute a palpable and overriding error: *Houson v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 5, 8.

[46] The parties take no issue with the Arbitrator’s finding that the agreement was a standard form contract used by MTO, which was not subject to negotiation: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 4; *Ontario (Transportation) v. J & P Leveque Bros. Haulage Ltd.*, 2025 ONCA 573, at para. 13.

[47] As to when correctness applies to an appeal of a standard form contract, *Ledcor*, at para. 46, sets out the following three criteria that must be present:

- 1) “the appeal involves the interpretation of a standard form contract”;
- 2) “the interpretation at issue is of precedential value”; and
- 3) “there is no meaningful factual matrix specific to the particular parties to assist the interpretation process”.

[48] If those three criteria are not met then the ordinary appellate standard for contracts interpretation applies as set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633; *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293, 135 O.R. (3d) 241, at paras. 21, 41, leave to appeal refused, [2016] S.C.C.A. No. 249. In *Sattva*, at para. 50, it was held that contractual interpretation involves issues of mixed fact and law, “as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix”.

[49] Findings of fact are owed deference and may not be overturned absent a palpable and overriding error. A finding of mixed fact and law may only be overturned where there is an extricable question of law. Extricable questions of law include legal errors involving 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”: *Deslaurier*, at para. 19, citing *Sattva*, at para. 53.

[50] The Supreme Court of Canada in *Hydro-Québec v. Matta*, 2020 SCC 37, [2020] 3 S.C.R. 595, at para. 33 described the standard as follows:

Absent a palpable and overriding error, an appellate court must refrain from interfering with findings of mixed fact and law made by the trial judge An error is *palpable* if it is plainly seen and if all the evidence need not be reconsidered in order to identify it, and is *overriding* if it has affected the result.

[Citations omitted. Emphasis in original.]

[51] The palpable and overriding error standard is a high bar. In *Benhaim v. St-Germain*, 2016 SCC 48, [2016] 2 S.C.R. 352, at para. 38, the Supreme Court cited *Canada v. South Yukon Forest Corporation*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46 for the following proposition:

Palpable and overriding error is a highly deferential standard of review “Palpable” means an error that is obvious. “Overriding” means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall. [Citations omitted.]

[52] The Ontario Court of Appeal in *Farsi v. Da Rocha*, 2020 ONCA 92, 444 D.L.R. (4th) 197, leave to appeal refused, [2020] S.C.C.A. No. 92, used equally emphatic language that for an error to be reviewable, the error must not only be

obvious but must be so obvious and impactful that the error altered the outcome of the decision. At para. 35, the Court of Appeal described the test as follows:

A palpable and overriding error is one that is clearly wrong, unreasonable, or not reasonably supported on the evidence: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 110. The Supreme Court recently explained in *Salomon v. Matte-Thompson*, 2019 SCC 14, 432 D.L.R. (4th) 1, at para. 33, “[w]here the deferential standard of palpable and overriding error applies, an appellate court can intervene only if there is an obvious error in the trial decision that is determinative of the outcome of the case”.

[53] Appellate deference to findings of fact includes the reasonable inferences drawn from those facts by the Arbitrator. As the Supreme Court noted “appellate courts do not ‘rehear’ or ‘retry’ cases. They review for error”: *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 52.

[54] The Arbitrator was not required to address every fact or resolve every factual dispute that may be raised by a party. A failure to make a factual finding warrants appellate intervention only where it “gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion”: *Van de Perre v. Edwards*, 2001 SCC 60, [2001] 2 S.C.R. 1014, at para. 15.

[55] Finally, an appeal is not an opportunity to reweigh the evidence. The parties retained a very experienced Arbitrator with years of experience adjudicating contract cases. Where ambiguities exist in the reasons which may give rise to varying

interpretations, the appeal court is entitled to presume that the Arbitrator applied the relevant test appropriately. As the Supreme Court noted in *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 79:

Where ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error. [Citations omitted.]

[56] Of course, the applicable review standard will be dictated by the issue under consideration. I agree with Bot that much of what was argued by MTO was the Arbitrator’s application of the facts as they applied to the Contract. As such the exercise involved the application of “contractual interpretation to a unique set of circumstances”, which does not have much precedential value: *Ledcor*, at paras. 41-43 and 48. As such, as in most cases, the issues on this appeal involve matters of mixed fact and law and are, absent an extricable question of law, reviewable on the standard of palpable and overriding error.

Analysis

[57] The oral argument of MTO did not neatly follow the issues set out in its factum, which have been restated in the issues section above.

[58] Rather, its argument proceeded on the basis that the Arbitrator did not interpret the Contract in accordance with *Sattva*. It asserted that he failed to give meaning to the Rock Spec but rather focused on GC 4.02, which is of lower precedent in the Contract Documents. As such, I will address these issues in the way the argument was presented to me.

[59] I accept that the Arbitrator was correct to approach the contractual interpretation having regard to the commercial purpose of the Contract. Given the warranty that Bot could rely on the terms of the Contract and the fact that GC 4.02.02 referenced conditions that “could not have been reasonably foreseen at the time of tendering”, it was reasonable for the Arbitrator to consider what was reasonable at the time of tendering, which was part of the factual matrix. In my view, the Arbitrator correctly had regard to the factual matrix when interpreting the words of the Contract.

[60] The Arbitrator’s fundamental factual finding was that the Excess Rock was unanticipated and could not have been reasonably foreseen at the time of tendering. The Arbitrator therefore began by considering if the Contract Documents addressed the issue of the unanticipated Excess Rock. He found that the Rock Specs did not address rock at the level of the Excess Rock.

[61] The Arbitrator’s analysis may be seen in two parts. First, he made a factual finding that the Excess Rock was unanticipated. This finding of fact is to be accorded deference unless it was arrived at by the Arbitrator having made a palpable and overriding error. Next, the issue was whether the Contract Documents addressed the Excess Rock and as submitted by MTO, whether the Contract required Bot to manage Excess Rock at its own expense. That is, did the Contract include an obligation that Bot would manage the Excess Rock as part of its contractual obligations?

[62] Dealing with whether the Excess Rock was expected, MTO argued that the Arbitrator made several errors in finding the Excess Rock was unanticipated. First, it said the Excess Rock was foreseeable. It further submitted that the Arbitrator miscalculated the amount of Excess Rock. It asserted that the Excess Rock that

should have been expected was 38,000 m³ and, as a result, the Excess Rock was not 118,000 m³, as found by the Arbitrator, but 80,000 m³. These are all findings of fact which may only be interfered with if the Arbitrator made a palpable and overriding error that would have altered the outcome of his decision.

[63] The Arbitrator's finding was based on his analysis of the evidence proffered by the parties. He expressly rejected much of MTO's evidence. First, he rejected the evidence of Mr. Noble who testified that the 118,000 m³ was foreseeable. He found his evidence was not consistent with his approval to move Excess Rock during the Project. He also rejected the evidence of Mr. Wood, who used what is known as the bulking factor to calculate that it was always anticipated that there would be Excess Rock in the amount of 38,000 m³. The Arbitrator specifically stated he could put little reliance on Mr. Wood's evidence.

[64] There is no reason to interfere with the credibility findings of the Arbitrator in rejecting the evidence of Mr. Noble and Mr. Wood. These were findings that the Arbitrator was entitled to make, and which are to be accorded deference. I see no evidence that was overlooked, misconceived, or forgotten by the Arbitrator that would warrant intervention.

[65] The MTO submits that the Arbitrator failed to consider evidence that Castonguay overdrilled, which caused the Excess Rock. It asserts that "the rock had to come from somewhere" and that it was Bot's obligation to show it did not come from beyond the paylines. In other words, it must be assumed that it was the sub-contractor's means and methods or negligence that caused the Excess Rock. It says this is supported by the evidence of Bot regarding overdrilling. However, this is contrary to the express finding of the Arbitrator. The Arbitrator accepted that Castonguay had as its "objective to keep [its] drilling to the absolute minimum

required to achieve the desired rock cut”. The Arbitrator expressly found that there was “no evidence that Castonguay did anything other than that”. The import of this finding is that Castonguay did what was required and no more. As Bot points out, the Arbitrator was alive to the fact that the rock generated from this normal and expected drilling was not Excess Rock. In other words, it was not the operational means of Castonguay that was at issue in this case. As such, the amount of rock could not have been reasonably foreseeable at the time of tendering. This finding is entitled to deference, and there is no evidence that was overlooked, misconceived, or forgotten by the Arbitrator that could be said to alter that conclusion. As such, the overdrill explanation proffered by MTO was rejected.

[66] Instead, the Arbitrator accepted that the Excess Rock was because of known and unknown causes. One known cause was that a representative of the CA made undisclosed alterations and edits to the drawings that made the calculation of Excess Rock through what is called “standalone shatter” inaccurate. While this was not causative of all the Excess Rock, it was a factor. However, the Arbitrator also had regard to Mr. Noble’s evidence for MTO that this was to be a balanced job and that the design of the Project did not anticipate the ultimate Excess Rock as it provided for no disposal sites. In this regard, I see no issue with the Arbitrator’s reference to the Design Contract in which AECOM was to designate disposal sites for surplus material on the projects it designed, including this one. Disposal sites were set up for other surplus material but not for this amount of Excess Rock.

[67] Rather, a disposal site for the Excess Rock at the interchanges was only resorted to by the CA much later and not in furtherance of the Contract or Contract Drawings. This reasonably supported the Arbitrator’s conclusion that the Contract did not account for or anticipate and was not designed to account for or anticipate

this Excess Rock and therefor Bot could not have anticipated the Excess Rock when it bid. The failure to identify areas to place the surplus Excess Rock supported the Arbitrator's conclusion that, when the Project was designed and was put out for bid, the Excess Rock was not anticipated and would have not assisted the bidders. There is no palpable and overriding error in this finding. Moreover, the finding grounded the contract analysis in that the Arbitrator was rightly focused on whether the Contract addressed this quantity of Excess Rock and, if so, which party would be responsible for its management and disposal. The factual matrix that underpinned the Contract included what the parties knew or what was reasonably capable of being known when the bid occurred: *Royal Bank of Canada v. Peace Bridge Duty Free Inc.*, 2025 ONCA 54, 175 O.R. (3d) 371, at para. 25. Thus, the finding that the Contract did not provide disposal sites for Excess Rock was a relevant consideration by the Arbitrator.

[68] With these fundamental facts, the Arbitrator addressed the terms of the Contract. In examining the decision as it relates to the Contract terms, the analysis begins as one of correctness given the finding of the Arbitrator that this is a standard form contract: *J & P Leveque Bros. Haulage*, at para. 13. However, as noted in *Ledcor*, the standard of review is not necessarily correctness, particularly if there is no precedential value to the issue being considered. In many instances, that is the case here.

[69] I am mindful that the Arbitrator is not required to reference every contract term or every fact that supports his findings or has been raised in argument. It is sufficient if the reasons make clear the basis for the decision having regard to the facts and argument below and that the reasoning of the Arbitrator logically leads to the result: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 SCR 3, at paras. 10-35; *Dovbush v.*

Mouzitchka, 2016 ONCA 381, 131 O.R. (3d) 474, at paras. 20-25. This is particularly so in this case where there were a voluminous number of Contract Documents. Here, the Arbitrator had due regard for the arguments of the parties and zeroed in on the appropriate governing Contract provisions.

[70] The Arbitrator did not ignore the Rock Spec. Rather, he found that the Rock Spec did not address the Excess Rock in question. He specifically referred to the bid documents referencing rock excavation (967,758 m³) and rock embankment (1,029,494 m³) quantities. It was reasonably anticipated at the time of tendering that there would be 4,445 m³ of surplus rock. He expressly found that the Excess Rock was in addition to what was set out in the Contract Documents or could be anticipated.

[71] Seeing nothing in the Rock Spec about any further rock quantities, the Arbitrator turned his attention to the GC and relied on GC 4.02 as the Rock Spec provided that “any excess rock... shall be managed as specified in the Contract Documents...”. Given the finding of fact that there was Excess Rock not identified in the Contract, the Arbitrator correctly looked to GC 4.02.02, which addressed both materials not otherwise addressed and conditions not reasonably foreseen at the time of tendering. The provision is disjunctive, and the Arbitrator correctly considered both scenarios.

[72] The Arbitrator concluded that the Rock Spec did not address the Excess Rock. He addressed MTO’s argument but found that, as presented, the MTO’s interpretation would not assist contractors in bidding for the work. This is consistent with my view of the Rock Spec, which provides how rock is to be excavated and used. It does not address rock surplus in the quantity of the Excess Rock or provide any ability for a bidder to meaningfully bid how to manage that amount of rock. In

this case, as described by Mr. Noble, this was to be a balanced job. Excess Rock of this quantity was not anticipated. This was supported by there being no identified site for the disposal of this amount of Excess Rock.

[73] I was directed to s. 206.01 of the Rock Spec, which provides general language that addresses “requirements for grading, including Earth and Rock excavation and embankment construction, ditching, wall control blasting and the management of excess and unsuitable material”. It refers to excess and unsuitable material that is anticipated, some of which may not be necessary for the Project, and which may be placed over the embankments. As noted, this was largely to be a balanced job with minimal additional rock, some 4,445 m³ at the outset. The section does not address unanticipated Excess Rock in the amounts identified by the Arbitrator. While the Rock Spec goes on to speak where anticipated surplus rock may be placed, it does not address rock in this quantity.

[74] MTO submitted that the Arbitrator failed to consider s. 206.07.08 of the Rock Spec, which provides that after the embankments are completed that rock may be dumped over the embankment, and that such costs are included in the payment for rock excavation pursuant to s.206.10.05. The section goes on to permit the dumping over the side of embankments of rock only with the written approval of the CA. This section simply provides that rock may be dumped over the embankments when the embankments are completed. It does not address when rock is in excess—and certainly not in the quantities in issue here. As such, the Arbitrator did not err as a matter of law in failing to address this section. The section does not address the fundamental issue whether the management of the unanticipated amounts of rock was to be the responsibility of Bot. Moreover, had this section been relevant, the CA

should have granted written approval to do so. But instead, after many months, the CA directed the Excess Rock to the interchanges, not the embankments.

[75] MTO also referred to s. 206.10.05, which refers to excavated rock not to be used for “other contract items” and that “hauling costs” for that rock was otherwise included in the “payment for the work”. It was argued that this section reflects the contractual intention that the management of the Excess Rock was included in the Contract. It was further argued that the Arbitrator’s failure to consider this argument is a reviewable error. I disagree.

[76] This provision addresses what was anticipated. Some surplus rock was anticipated. This Excess Rock was not anticipated, as found by the Arbitrator. As noted, where there was anticipated surplus rock, the CA was to give approval that the rock might be disposed of over the embankment. If that is the case, then the hauling costs were deemed to be within what was paid for the work. Here, no such approval was given, and this was not an issue of simply hauling the Excess Rock. Rather, Bot was continually moving and managing the Excess Rock as the job progressed because the Contract provided no designated site to dispose of this surplus and the CA refused to provide approval to do so.

[77] The failure to directly address s. 206.10.05 by the Arbitrator does not undermine the Arbitrator’s reasoning in his analysis. It follows that if the Excess Rock was not identified, if this was to be a balanced job, and if the CA never directed the Excess Rock over the embankment, there was no need for the Arbitrator to address this section.

[78] It was further argued by MTO that there was no payment provided in the Contract for rock that was excavated below the paylines, including for the

management, hauling, and disposal of Excess Rock. In particular, the MTO referred to the fact that the RMMP does not warrant the amount of Excess Rock. I do not interpret the Arbitrator as saying that the RMMP provides any warranty. Rather, in referencing the RMMP, the Arbitrator was addressing the factual issue that the Excess Rock was unanticipated at the time of tendering.

[79] I accept that the RMMP is a live document that is updated during construction. However, at the time of tendering, the Excess Rock was anticipated to be no more than 4,445 m³. The amount encountered on this Project was multiples of that amount. The Arbitrator correctly concluded that the Rock Spec did not address this quantity of rock, and the Contract certainly did not impose the obligation on Bot to absorb the cost of dealing with that amount of rock. As he found, the rock was not reasonably foreseeable at the time of tendering which is consistent with the RMMP at the start of the Project.

[80] Having found no provision in the Rock Spec, the Arbitrator correctly turned to the remaining Contract Documents. In that regard, this was not an issue of contractual precedence as there was no inconsistency or conflict. Rather, the Arbitrator turned to GC 4.02, which addresses unanticipated surplus material in the absence elsewhere in the Contract Documents, including the Rock Spec, which deals with the issue.

[81] As already referenced, GC 4.02 provides that MOT is responsible for any additional costs of removal, management, and disposal of any material not identified in the Contract Documents, or where conditions exist that could not have been reasonably foreseen at the time of tendering. The Arbitrator correctly found that this was the situation here.

[82] Finally, MTO argued that the Arbitrator did not reference the evidence of certain MTO witnesses. For example, The Arbitrator accepted Mr. Beatty testimony from Bot's evidence that the Contract "was meant to be a 'balanced job'". It was submitted that the Arbitrator did not address Mr. Thom's evidence that the "Rock Spec does not warrant that the quantities of 'cuts' and 'fills' will be 'balanced'". The Arbitrator was not called upon to resolve every factual discrepancy. His reasons clearly identify why he concluded that the Excess Rock was unanticipated and why he turned to GC 4.02.

[83] In conclusion, I see no error with the Arbitrator's analysis of the Contract, including the Rock Spec, his findings of fact or his application of the contract to the facts.

Damages

[84] On the issue of damages, MTO made several arguments that the damages are excessive. It submitted that the Arbitrator overcalculated the damages because the amount of Excess Rock was 80,000 m³ and not 118,000 m³. It was argued that there should have been a pro-rata reduction. It pointed out that the Bot bid was a unit price bid based on volume. MTO argues that the correct amount ought to be either remitted to the Arbitrator for recalculation or preferably to a new arbitrator.

[85] Neither Bot nor the Arbitrator addressed the damages as a unit cost claim. Rather, it was an assessment of the actual cost to manage the Excess Rock. The Arbitrator therefore rejected the pro-rata reduction proposed by MTO. He did so on the strength of the damage calculations as presented by the experts who assessed the actual costs Bot incurred in managing and disposing of the Excess Rock. As the Arbitrator found, the calculations presented by the experts did not turn on whether

the excess was 80,000 m³ or 118,000 m³ but rather the cost incurred by Bot. I see no issue with this approach

[86] As noted, the Arbitrator's analysis was supported by expert evidence. He went through the facts that impacted damages. For example, he noted that the refusal of the CA to acknowledge the Excess Rock and allow it to be disposed of meant that it had to be moved and, thus, had to be "double" and "triple" handled. Mostly, the Arbitrator concentrated on the experts' reports. For example, in the case of Claim No. 1, he took the median between the two experts. In Claim No. 2, being Castonguay's claim, he reviewed the expert opinion of the respondent and noted that MTO made no submissions on the amount of that claim. On Claim No. 3, being the movement and disposal of the Excess Rock, the Arbitrator specifically accepted MTO's expert's calculations but rejected the argument that the amount should be reduced by 32% for the reasons he already gave, being that the experts addressed the actual loss, not the unit price.

[87] In my view, there was no identifiable error of law in how the Arbitrator approached the damage calculation nor was there a palpable and overriding error in his analysis.

[88] Accordingly, there was no error, either of law, fact, or mixed fact and law in the Arbitrator's damage analysis.

Disposition

[89] The above reasons address issues i) to iv) raised by MOT. I need not address v) as I am not setting aside the award or any part of it.

[90] The appeal is dismissed.

[91] The parties are requested to consult and, if possible, agree on costs. If not, any party seeking costs shall upload submissions of no more than seven pages with a bill of costs within ten days from the release of this decision. Any party opposing a request may upload submissions of seven pages with its own bill of costs within ten days of receiving the request for costs.

Callaghan J.

Released: November 5, 2025