COURT OF APPEAL FOR ONTARIO

CITATION: Baffinland Iron Mines LP v. Tower-EBC G.P./S.E.N.C., 2023 ONCA 245
DATE: 20230413
DOCKET: C70663 & M53567

Zarnett, Thorburn and Copeland JJ.A.

BETWEEN

Baffinland Iron Mines LP and Baffinland Iron Mines Corporation

Applicants (Appellants/Responding Parties)

and

Tower-EBC G.P./S.E.N.C.

Respondent (Respondent/Moving Party)

Kent Thomson, Sean Campbell, Anisah Hassan, Maureen Littlejohn, Anthony Alexander and Trevor May, for the appellants

Ira Nishisato, Hugh Meighen, Erin Peters and Stéphanie Gagné, for the respondent

Heard: January 12, 2023

On appeal from the judgment of Justice Laurence A. Pattillo of the Superior Court of Justice, dated April 11, 2022, with reasons reported at 2022 ONSC 1900.

Zarnett J.A.:

A. INTRODUCTION

[1] When an arbitration agreement provides that an award made under it may be appealed on a question of law, a party dissatisfied with the award may appeal on such a question to the Superior Court of Justice as of right. But when no such

appeal is provided for in the arbitration agreement, a party may only appeal an award on a question of law with leave of that court, and only "[i]f the arbitration agreement does not deal with appeals on questions of law": *Arbitration Act, 1991*, S.O. 1991, c. 17, ss. 45(1) and (2) (the "*Arbitration Act*").[1]

[2] In other words, the *Arbitration Act* contemplates three different scenarios regarding appeals to the court on questions of law. The arbitration agreement may expressly provide for, be silent on, or preclude such appeals. In the first scenario there is an appeal as of right; in the second, there is an opportunity to appeal but only with leave; and in the third, there is no appeal or right to seek leave to appeal at all.

[3] The central issue in this case is whether the arbitration agreement between the appellants (collectively "BIM") and the respondent ("TEBC") denies BIM the opportunity to seek leave to appeal on errors of law it says underpin an award exceeding $100 million made against it by the majority of a three-member arbitration tribunal. In BIM's submission the existence of consequential questions of law is highlighted by the fact that the dissenting member of the tribunal would have deducted about $54 million from the award because of what he described to

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[1] When the arbitration agreement is silent about appeals on questions of law, leave will only be granted if the court is satisfied that the importance to the parties of the matters at stake justifies an appeal and determination of the question(s) of law at issue will significantly affect the rights of the parties: *Arbitration Act*, ss. 45(1)(a) and (b).

be his "several disagreements [with the majority] about the law of Ontario which governs the contractual relations between TEBC and BIM".

[4] The arbitration agreement did not positively provide that a party could appeal from an award. But, asserting that the arbitration agreement did not address appeals at all, and therefore did not deal with appeals on questions of law, BIM sought leave to appeal to the Superior Court on legal questions including those it contends drove the divergent results reached by the majority and the dissent.[2]

[5] The application judge dismissed the request for leave to appeal. He held that the arbitration agreement dealt with appeals − it precluded them by saying that disputes would be "finally settled" by arbitration and by incorporating the Rules of Arbitration of the International Chamber of Commerce ("ICC Rules"), including the rule stating that parties agreed to carry out any award and waived any form of recourse. BIM could not, for that reason alone, obtain leave to appeal, as the precondition to seeking it under s. 45(1) of the *Arbitration Act* was not met. As a result of that finding, the application judge did not address BIM's submissions that the questions of law it sought to raise otherwise met the test for leave to appeal.

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[2] BIM also challenged the award on jurisdictional grounds under s. 46 of the *Arbitration Act*. The application judge dismissed that challenge, and this court dismissed a motion for leave to appeal from that aspect of the application judge's decision on December 5, 2022.

[6] BIM appeals and requests that this court: (i) reverse the application judge's decision about the arbitration agreement precluding appeals on questions of law; (ii) grant leave to appeal on the questions BIM raises; and (iii) send the appeal itself back to be determined by the Superior Court.

[7] TEBC moved to quash BIM's appeal on the basis that there is no right to appeal to this court from a denial of leave to appeal by a judge of the Superior Court. If the motion to quash failed, TEBC maintains that the application judge's decision that BIM was not permitted to seek leave to appeal should be upheld and argues that, in any event, BIM's proposed grounds of appeal do not meet the test for leave to appeal.

[8] We heard the motion to quash first and dismissed it with reasons to follow. Below, I provide those reasons, explaining why BIM's appeal falls within the narrow category of cases in which a refusal to grant leave to appeal by a Superior Court judge may be appealed directly to this court.

[9] We reserved our decision on the appeal itself. I explain below why I would dismiss BIM's appeal. In brief, the application judge made no reversible error in correctly concluding that the arbitration agreement precluded appeals to the court on any question, including questions of law.

B. BACKGROUND

[10] BIM and TEBC entered into two virtually identical contracts in 2017 that provided for TEBC to perform earthworks for BIM's construction of a railway to transport ore from its mine on Baffin Island, Nunavut, to a nearby port.

[11] The contracts were primarily Fédération Internationale des Ingénieurs-Conseils ("FIDIC")[3] standard form construction contracts which the parties modified in respect of certain matters. The dispute resolution provisions of the contracts, which included provisions that constituted their arbitration agreement, were not modified from the FIDIC form.

[12] The dispute resolution provisions of the contracts provided three pathways to resolution of a dispute. Either party was entitled to refer a dispute to a Dispute Adjudication Board ("DAB"), which the contracts deemed not to be an arbitration. In some circumstances, the DAB's decision would be "final and binding". The contracts also provided that a dispute could be settled amicably. If there was a dispute that was neither the subject of a final and binding decision of a DAB nor had been settled amicably, such dispute was to be "finally settled" by arbitration. Section 20.6 of the contracts provided:

> Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and

[3] A global organization of consulting engineers.

> binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:
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> (a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
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> (b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, and
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> (c) the arbitration shall be conducted in the language for communications defined in Sub-Clause 1.4 [*Law and Language*].

[13] Also germane is ICC Rule 35(6), which the application judge found had been incorporated into the contracts. It provides:

> Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.

[14] The dispute that gave rise to the arbitration award at issue arose from BIM's 2018 termination of the contracts due to delays. It is common ground that the dispute was not the subject of a final and binding decision by a DAB, nor of an amicable settlement.

[15] TEBC commenced the arbitration in 2018, and filed a statement of claim in 2019, challenging BIM's right to terminate the contracts and claiming damages arising from the termination. The arbitration of that dispute took place pursuant to the ICC Rules before a three-member tribunal: Marc Goldstein (the Tribunal President), John Keefe (the arbitrator nominated by TEBC) and the

Honourable Ian Binnie (the arbitrator nominated by BIM). It concluded with a December 9, 2020 majority award by Messrs. Goldstein and Keefe and a partial dissent of the same date by Mr. Binnie, with a final award on costs in May 2021.

C. THE APPLICATION JUDGE'S DECISION

[16] The application judge described the question of whether the contracts precluded an appeal on a question of law as the preliminary issue on BIM's application for leave to appeal under s. 45(1) of the *Arbitration Act*.

[17] The application judge accepted TEBC's argument that the parties had contracted out of all rights of appeal by s. 20.6 of the contracts, given its reference to disputes being finally settled by arbitration, as well as by virtue of the incorporation of ICC Rule 35(6) into the contracts.

[18] The application judge rejected the argument that since the contracts used a phrase in relation to DAB decisions − "final and binding" − that has been recognized to preclude appeals but used a different phrase − "finally settled" − in relation to arbitration, the parties must have intended a different meaning for the latter. He considered both phrases to have the same meaning, precluding appeals. The application judge also rejected the argument that ICC Rule 35(6), whose language BIM acknowledged precluded appeals, was in conflict with s. 20.6 and was overridden by it. He held the provisions were not inconsistent.

[19] In light of his decision that the contracts precluded appeals, the application judge stated that he did not "intend to address BIM's submission in respect of its request for leave and, in particular, the alleged legal errors it has raised in respect of the Majority Award". He dismissed BIM's application for leave to appeal.

D. THE MOTION TO QUASH

[20] TEBC argued that there is no right to appeal to this court from the application judge's denial of leave to appeal. TEBC's argument had two planks − the absence from the *Arbitration Act* itself of any right to appeal from a denial of leave to appeal, and the general rule that there is no appeal to this court from a refusal of leave to appeal by the Superior Court.

[21] As noted above, the *Arbitration Act* provides when a party may seek leave to appeal an award to the Superior Court on a question of law, and also provides when a party may appeal as of right to that court on such a question. Sections 45(1) and (2) of the *Arbitration Act* provide in relevant part as follows:

> 45 (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
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> > (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
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> > (b) determination of the question of law at issue will significantly affect the rights of the parties.
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> (2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.

[22] If the Superior Court has decided an appeal, either because leave to appeal was granted by the Superior Court or because there was an appeal to that court as of right, s. 49 of the *Arbitration Act* provides for a further appeal, with leave, to this court. But, as TEBC emphasizes, that is a process available only when the Superior Court has entertained and decided an appeal − the *Arbitration Act* does not provide for an appeal to this court from a refusal by the Superior Court to grant leave to appeal and thus to entertain an appeal at all.

[23] TEBC places heavy reliance on *Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce* (1996), 29 O.R. (3d) 612 (C.A.), in which an appeal to this court from the refusal of a Superior Court judge to grant leave to appeal an arbitration award was quashed: at p. 626. The *Hillmond* court, at pp. 617-18, gave a number of reasons for doing so: the *Arbitration Act* does not grant a right of appeal from an order refusing leave to appeal; the appellant could not rely upon s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"), which provides for an appeal to this court from a final order of a Superior Court judge, as the refusal by the lower court to grant leave to appeal was an interlocutory order; and allowing an appeal from a refusal to grant leave to appeal defeats the object of arbitration by frustrating the legislated impediment to appeals.

[24] However, *Hillmond* was distinguished in *Denison Mines Ltd. v. Ontario Hydro* (2001), 56 O.R. (3d) 181 (C.A.). In *Denison,* the appellant had applied to a Superior Court judge for leave to appeal an arbitration award; leave to appeal was

refused. The appellant appealed the dismissal of its application for leave to this court. The respondent's motion to quash the appeal, relying on *Hillmond*, was dismissed.

[25] The court in *Denison* acknowledged the general rule that no appeal lies from an order granting or refusing leave to appeal. However, it also held that there was an established exception to that general rule where the appeal from the refusal to grant leave to appeal is premised on a submission that the judge refusing leave to appeal mistakenly declined jurisdiction to consider whether leave to appeal was warranted: at para. 8. The court went on to hold that in these circumstances the order declining leave to appeal is final within the meaning of s. 6(1)(b) of the *CJA*: at para. 21.

[26] The key distinction between these two authorities is that in *Denison*, unlike in *Hillmond*, the judge had dismissed the leave to appeal application holding that the parties' arbitration agreement precluded appeals − the parties had contracted out of any right of appeal − and that s. 45(1) was not available as a route to seek leave to appeal. She had not gone on to consider the grounds on which leave to appeal was sought, as she in effect considered herself to be without jurisdiction to do so based on her interpretation of the appeal provisions of the arbitration agreement. The appeal to this court from that decision was premised on the

application judge's interpretation, and therefore her declining of jurisdiction, being mistaken.[4]

[27] The case at bar is indistinguishable from, and is governed by, *Denison*. As in *Denison*, here the application judge interpreted the arbitration agreement as precluding appeals, rendering s. 45(1) of the *Arbitration Act* unavailable to BIM. Given his interpretation of the arbitration agreement, he did not consider whether the grounds of appeal raised by BIM were deserving of leave. He therefore declined to exercise any jurisdiction to consider whether leave to appeal should be granted. The main point of BIM's appeal to this court is its contention that the application judge misinterpreted the arbitration agreement as precluding appeals and therefore mistakenly declined jurisdiction to consider whether leave to appeal should be granted under s. 45(1).

[28] TEBC argues that *Denison* is distinguishable because there the parties had agreed not to argue the grounds for leave until the application judge decided whether the arbitration agreement precluded appeals, whereas here the parties argued the grounds for leave at the same hearing that they argued whether the contracts precluded appeals.

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[4] In a subsequent hearing, the court concluded that the application judge had been wrong to find that the arbitration agreement precluded appeals on questions of law and returned the matter to the Superior Court to determine the leave to appeal application on its merits: *Denison Mines Ltd. v. Ontario Hydro* (2002), 58 O.R. (3d) 26 (C.A.).

[29] It is not germane how many issues the parties put before the application judge − what is germane is that the application judge declined to exercise any jurisdiction to consider whether BIM's grounds were deserving of leave to appeal, having decided, as a preliminary issue, that the contracts precluded appeals, which made s. 45(1) of the *Arbitration Act* unavailable. On the authority of *Denison*, an appeal on the question of whether he mistakenly declined jurisdiction lies to this court.

[30] The motion to quash was therefore dismissed.

E. THE APPEAL

[31] BIM argues that the application judge's interpretation of the arbitration provisions of the contracts is subject to appellate review on a standard of correctness, given that the provisions are standard form: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 24. BIM also argues that, in any event, no deference is owed to the application judge's interpretation because it is the product of extricable legal errors: *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 53.

[32] BIM's argument that the application judge's interpretation is incorrect and that it is tainted by extricable legal error are based on the same premise, that the application judge misconstrued and misapplied two principles of contractual

interpretation: the principle that presumes consistent expression and the principle that apparently inconsistent terms are to be reconciled in accordance with the express priority provided by the parties' agreement.

[33] In my view, regardless of the route taken to arrive at the standard of review, BIM's argument ultimately fails because the application judge's interpretation was correct. It did not result from a misconstruction or misapplication of either principle.

(1) The Presumption of Consistent Expression

[34] BIM argues that the application judge failed to properly apply the contractual principle known as the presumption of consistent expression. According to that principle, it is presumed that language in a contract is used consistently, with the same words meaning the same thing and, by corollary, the use of different words indicating an intention to refer to different things: *Healy v. Gregory* (2009), 75 C.C.P.B. 178 (Ont. S.C.), at para. 79; Kim Lewison, *The Interpretation of Contracts*, 4th ed. (London, U.K.: Smith & Maxwell, 2007), at pp. 244-45.

[35] BIM submits that the contracts used the phrase "final and binding" in relation to some decisions of the DAB but did not use that exact phrase for arbitration decisions, instead using "finally settled". "Final and binding" is terminology which has been held to preclude appeals from an arbitration award*: Labourers' International Union of North America, Local 183 v. Carpenters and Allied Workers Local 27* (1997), 34 O.R. (3d) 472 (C.A.), at pp. 479-80. Therefore, BIM submits

that applying the presumption of consistent expression requires giving "finally settled" a different meaning.

[36] To consider this argument, it is useful to begin with the Supreme Court's recognition that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction": *Sattva*, at para. 47. The primary concern of contractual interpretation is to give effect to the intent of the parties by reading the contract as a whole, giving the words used their ordinary and grammatical meaning, in light of the factual matrix where that is relevant: *Sattva*, at paras. 47, 57.[5]

[37] Accordingly, although the presumption of consistent expression may in some cases be helpful in illuminating the parties' intention, it is important not to treat the presumption as a dominating technical rule of construction that overwhelms the interpretation of a contract based on the ordinary and grammatical meaning of its text.

[38] The presumption of consistent expression should not, therefore, be seen to bar the use of differently worded but mutually reinforcing phrases which can only be understood to have the same meaning. A contractual draftsperson may use

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[5] The factual matrix generally plays less of a role in the case of standard form contracts and even when it does it is usually not case specific*: Ledcor,* at paras. 27-32. Neither party pointed to any elements of the factual matrix that in this case should affect the meaning of the words used in the dispute resolution provisions of the contracts.

multiple expressions that mean the same thing to ensure that there is no doubt about a point. As the English Court of Appeal has noted, a draftsperson may “try to obliterate the conceptual target by using a number of phrases expressing more or less the same idea": *Interactive E-Solutions JLT & Anor v. O3b Africa Ltd.*, [2018] EWCA Civ 62, [2018] B.L.R. 167, at para. 24. There can be more than one way to say appeals are precluded. Indeed, as BIM fairly concedes, ICC Rule 35(6) precludes appeals. Yet it does not use the exact phrase “final and binding”. Where the ordinary meaning of different words or phrases is clearly the same, the presumption cannot be applied to force a different meaning on one set of the words or phrases.

[39] I agree with the application judge that the presumption does not require “finally settled” to have a different meaning from “final and binding”. The ordinary and grammatical meaning of “finally settled” by arbitration, when situated in the context of the contracts’ dispute resolution provisions, clearly means no further recourse by way of appeal, in the same way as “final and binding” would.

[40] Indeed, the interpretive assistance that comes from the presumption of consistent expression in this case leads to that exact conclusion. It is important to recall that the presumption has two aspects − the same words are to be given the same meaning while different words are to be given different meanings. Here, the two phrases “final and binding” and “finally settled” contain the same word − “final” or “finally” − accompanied by an additional word − “binding” in one case and

“settled” in another. In these circumstances the presumption pulls toward giving the word “final” or “finally” the same meaning, unless the additional word suggests a material modification to the meaning. For example, in *Healy*, the court rejected an argument that different meanings had to be given to contractual references to the “commuted value of benefits” and the “commuted value of any contracts”, with only the former referring to the present value of retirement benefits payable. The court focussed on the consistent use, in the documents to be interpreted, of the words “commuted value” even though they appeared in different phrases. The consistent use of those words conveyed the meaning of a pension based methodology: at paras. 80-81. The use of additional words in the two phrases did not materially modify that meaning.

[41] The same approach applies here. It is apparent from the reasoning in *LIUNA* that the phrase “final and binding” in an arbitration agreement precludes appeals because of the word “final”, and that a different phrase that contains “final” will convey the same meaning as long as the additional words do not materially modify it. The court in *LIUNA*, at p. 480, relied on *Yorkville North Development Ltd. v. North York (City)* (1988), 64 O.R. (2d) 225 (C.A.), where, at p. 227, this court surveyed how courts in other Commonwealth jurisdictions have interpreted analogous expressions and excerpted the following passages:

> The words here are "final and binding", but I am unable to perceive any material difference between those words and the words "final and conclusive". In my view the

> important word for present purposes is "final", and I think it is intended to mean, and should be construed as meaning, final in the sense of admitting of no further disputation [*Re McCosh's Application*, [1958] N.Z.L.R. 731 at p. 734 (Sup. Ct.)].
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> This case [*Cushing v. Dupuy,* [(1880), 5 App. Cas. 409]] appears to me to be clear authority for the view that where a decision of a court is made "final", this excludes any right of appeal which would otherwise have existed. [Emphasis added.]

[42] The same point is made in J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed. (Huntington, N.Y.: JurisNet, 2017), at p. 483:

> By using the word “final” the implication is that the parties intended to oust all rights of appeal. It is difficult to understand what those words could otherwise mean in the arbitration context. It is also difficult to understand how parties could have consciously chosen those words, yet at the same time intended there to be appeal rights. By making the process “final and binding,” the parties must be taken to have intended to oust the jurisdiction in the court insofar as an appellate function is concerned. [Emphasis added.]

[43] As an interpretative aid, the presumption of consistent expression in this case pulled in favour of exactly what the application judge did − give a consistent meaning to the repeated word “final” (or “finally”) when it was used with “binding” and when it was used with “settled”. In each phrase it carried the meaning of “admitting of no further disputation”, “exclud[ing] any right of appeal which would otherwise have existed”, or “oust[ing] all rights of appeal”. Just as in *Re McCosh’s Application* where a proper consideration of the meaning of “final” led the court to interpret “final and binding” as having the same meaning as “final and conclusive”

in terms of precluding appeals, the same result follows with regard to the phrase “finally settled” in the case at bar. Settled, like conclusive or binding, reinforces the meaning of final − it does not alter it.

[44] This is especially so since the presumption pulled in favour of consistent meaning being given to the word “settled”. Section 20.6 states that “[u]nless settled amicably” the parties can bring a dispute (that is not the subject of a final and binding DAB decision) to arbitration, where it will be “finally settled”. The meaning conveyed is that amicably settled disputes have been resolved such that further recourse beyond the settlement is not available. When the word is used in the context of a dispute being finally settled by arbitration, the word settled reinforces the same intent − that no further recourse regarding the dispute, beyond the arbitration award, is available.

(2) The Priority of Terms

[45] BIM also submits that the application judge erred in not applying the principle that apparently inconsistent terms in a contract are to be reconciled in accordance with the priority of terms to which the parties have expressly agreed: *Fuller v. Aphria Inc.*, 2020 ONCA 403, at para. 62.

[46] The application judge found that ICC Rule 35(6) was part of the contracts. Although BIM concedes that its wording would preclude appeals, BIM submits that s. 1.5 of the contracts dictated the priority to be given to different documents that

together formed the contracts. It provided that, for the purposes of interpretation, the “General Conditions of the Contract”, which included s. 20.6, had priority over “any other document” forming part of the contracts, such as the ICC Rules.

[47] BIM’s argument presupposes, however, that s. 20.6 of the contracts is apparently inconsistent with ICC Rule 35(6). Before the interpretive principles concerning reconciling apparently inconsistent terms are to be applied, the terms must be apparently inconsistent in the sense, for example, of one appearing to say “yes” while the other appears to say “no” to the same question: *Fuller*, at para. 58. The application judge, however, held the terms were not inconsistent, and there was no error in that finding. As noted above, s. 20.6 of the contracts was properly interpreted to preclude appeals, just as the wording of ICC Rule 35(6) does. To the question of whether appeals are permitted, both provisions give the same answer: no, they are precluded.

F. CONCLUSION

[48] For these reasons the appeal is dismissed. I conclude that the application judge made no reversible error and reached the correct interpretation that the arbitration agreement contained in the contracts dealt with appeals on questions of law by precluding them. As a result, leave to appeal was not available to BIM under s. 45(1) of the *Arbitration Act*. Like the application judge, I would also decline

to consider whether the grounds of appeal raised by BIM would otherwise have warranted granting leave to appeal.

[49] If the parties are unable to agree on costs of the motion to quash and the appeal, they may make written submissions not exceeding three pages each. The submissions of TEBC shall be delivered within ten days of the release of these reasons and BIM's submissions shall be delivered within ten days after receipt of those of TEBC.

Released: April 13, 2023 "B.Z."

"B. Zarnett J.A."
"I agree. Thorburn J.A."
"I agree. Copeland J.A."