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The Summary Judgment Exception to the Stay of Proceedings in Favour of Arbitration

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Cases Considered:

Balancing Pool v. TransAlta Utilities Corporation, 2009 ABQB 631

A recent decision by Chief Justice Neil C. Wittmann resolves two outstanding issues with respect to the summary judgment exception to stays of court proceedings that is found in section 7(2)(e) of the*Arbitration Act*, R.S.A. 2000, c. A-43. The first question was whether the exception was available in the absence of a motion for summary judgment contemporaneous with the stay application. The second was that of the appropriate test for determining if the dispute was a proper one for summary judgment. The Chief Justice's answers to these two issues nicely balances public policy in favour of enforcing arbitration agreements with public policy in favour of resolving disputes in the most just and expeditious manner possible. His answer to the first question increases the circumstances under which the summary judgment exception can be considered by a court. His answer to the second proposes a tough standard to meet, thus narrowing the basis on which a court should exercise its discretion to refuse a stay.

The plaintiff in this action is the Balancing Pool. It was established in 1999 by the Alberta government to help manage certain assets, income and expenses arising from the restructuring of Alberta's electric industry. The defendant, TransAlta Utilities Corporation, is a power generation company that most Albertans are familiar with. The Balancing Pool plays a prominent role in managing the Power Purchase Arrangements (PPA) of several major thermal electric power plants. The PPAs were auctioned in 2000 and provided successful buyers with the rights to formerly regulated generating capacity.

The Balancing Pool sued TransAlta for more than $600,000 that it alleged was due under the parties' PPA and a related Notional Reserve Quantities Agreement (NRQA). TransAlta did not defend against this action, but instead sought a stay of the action, primarily on the basis of section 7(1) of the*Arbitration Act*. There was an arbitration clause in both of the agreements. Chief Justice Wittmann does not quote the arbitration clause in the PPA, but he does set out the relevant provisions in the NRQA:

> *7.1* Either Party may, by notice to the other, require the issue to be addressed by senior officers of the respective Parties who shall endeavour within a period of 10 business days from the date of the notice to resolve the matter in dispute. In the

> event the senior officers are unable to reach a satisfactory resolution of the dispute within the aforesaid 10 business day period, then either Party may, by written notice, submit the dispute to arbitration to be conducted in accordance with the Alberta Arbitration Act, provided that, …
>
> *7.3 Submission to Arbitration*
> All disputes with respect to this Agreement shall, upon expiration of the ten (10) day period in Section 7.2, be forwarded to and resolved by binding arbitration in accordance with the Arbitration Act S.A. 1991, c. A-43.1 (the "Arbitration Act"), by a board of arbitrators in accordance with the following provisions …
> (emphasis added)

The first issue dealt with by Chief Justice Wittmann was whether arbitration is mandatory or optional under these provisions. The Balancing Pool argued that the language was permissive, relying on the use of the word "may" in 7.1, and that it was therefore entitled to go ahead with its court action. The issue is one of interpretation. Parties are free to agree that arbitration will be an optional method for resolving any disputes. The question was whether these parties did. In answering this question, Chief Justice Wittmann followed a short line of cases that all held that the use of the word "may" is permissive only in the sense that either party may or may not choose to invoke the arbitration process. Once one party invokes the arbitration process, however, arbitration is mandatory. TransAlta invoked the arbitration process and therefore arbitration was mandatory. Chief Justice Wittmann looks only to the precedents and "the plain and ordinary meaning of the clause" (at para. 30), but other reasons support his conclusion on this issue. It is doubtful that parties would want to be obliged to arbitrate all disputes. Parties might have all sorts of disputes, but only ones they saw as serious would rise to the level of something one or both of them would want to take to an adversary process. What the parties' clause 7.1 provided was that if a party wanted to fight over a dispute, then arbitration was their only option.

> Once arbitration is mandatory, section 7 of the *Arbitration Act* becomes relevant:
>
> 7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> (2) The court may refuse to stay the proceeding in only the following cases:
> …
>
> > (e) the matter in dispute is a proper one for default or summary judgment.
> > (emphasis added)

Under section 7(1), a court must stay an action in favour of arbitration when the plaintiff is a party to an arbitration agreement and the defendant has invoked the arbitration process, as did TransAlta in this case. The court has no choice under section 7(1). There are, however, five

exceptions in section 7(2), which lists the circumstances under which a court does have the discretion to stay or not stay an action. The Balancing Pool argued - strenuously - that the exception in section 7(2)(e) applied in this case, i.e., that the dispute was a proper one for summary judgment.

Summary judgment is provided for in Rules 159 - 164 of the Alberta Rules of Court, Alta. Reg. 390/1968. Rule 159 sets out when summary judgment is available:

> 159(1) In any action in which a defence has been filed, the plaintiff may, on the ground that there is no defence to a claim or part of a claim or that the only genuine issue is as to amount, apply to the court for judgment on an affidavit made by him or some other person who can swear positively to the facts, verifying the claim or part of the claim and stating that in the deponent's belief there is no genuine issue to be tried or that the only genuine issue is as to amount.
> . . .
> (3) On hearing the motion, if the court is satisfied that there is no genuine issue for trial with respect to any claim, the court may give summary judgment against the plaintiff or a defendant. (emphasis added)

As Chief Justice Wittmann noted (at para. 56), the Rule 159(1) precondition that "a defence has been filed" must be ignored in applying section 7(2)(e) of the *Arbitration Act*. A defendant who has invoked an arbitration process must apply for a stay of a court action at the earliest possible time, because one of the other exceptions in section 7(2) is that of undue delay on filing a motion to stay the court action.

As Rule 159(3) states and numerous Alberta court decisions have held, in order to obtain a summary judgment the party seeking it must show there is "no genuine issue for trial." In this case, the Balancing Pool argued that the amount TransAlta owed was calculable by using a perfectly clear formula set out in the NRQA and the calculated Ancillary Active Clearing Price. TransAlta argued that two pre-arranged trades had inflated the clearing price shown in the Ancillary Active Clearing Price.

As I mentioned at the beginning of this post, the first issue with respect to the summary judgment exception was whether that exception was available in the absence of a motion for summary judgment at the same time as the stay application was made. J. Brian Casey and Janet Mills, the authors of*Arbitration Law of Canada: Practice and Procedures* (Juris Publishing, 2005), asserted at pages 238-239 that "[t]he only way for the court to determine if the matter is a proper one for default or summary judgment is for the party claiming this to actually move for default or summary judgment as a cross-motion at the time the moving party moves to stay the proceedings," citing *Ottawa Rough Riders Inc. v. Ottawa (City)* (1995), 44 C.P.C. (3d) 27 (Ont. Gen. Div.) as their authority. Chief Justice Wittmann pointed out (at para. 37) that *Ottawa Rough Riders Inc.* did not support the authors' assertion. There was a cross-motion for summary judgment at the same time as the motion for a stay, but the Ontario court interpreted their equivalent of section 7(2)(e) "to mean that a matter is a proper one for summary judgment if a successful motion for summary judgment is or could be brought in respect of the matter."

(emphasis added). *Ottawa Rough Riders Inc.* does not, therefore, support a requirement for a contemporaneous application for summary judgment. Subsequent Ontario cases, such as *Smith Estate v. National Money Mart Co.*, [2008] O.J. No. 2248 at para. 140 (Ont. S.C.), have explicitly held that it is not necessary that a motion for summary judgment actually be made in order for the exception to be available. Chief Justice Wittmann agreed, holding (at para. 45) that "the absence of a cross-motion for summary judgment is not fatal to the application of the exception."

Of course, as Chief Justice Wittmann also noted, it is more difficult to apply the *Arbitration Act*'s summary judgment exception when a summary judgment application has not been brought. The issue is really one of timing. As already noted, stay applications must be brought before the court without undue delay. A motion for summary judgment, on the other hand, is usually brought quite a bit later in the proceedings, often after discoveries, and more information is available on the record.

The second question with respect to the summary judgment exception was that of the appropriate test for determining if the dispute was, as section 7(2)(e) puts it, "a proper one for default or summary judgment." Chief Justice Wittman first turned to a dictionary definition of "proper" and noted (at para. 51) that the *Canadian Oxford Dictionary* (Oxford University Press, 1998), defines the word "proper" as meaning "accurate, correct." To be a proper, accurate and correct matter for summary judgment required proof that the summary judgment application would succeed. Chief Justice Wittmann therefore concluded (at para. 47) that the test is whether, based on the evidence before the Court, a summary judgment motion would be successful, if brought.

Other tests had been put forward by other courts and Chief Justice Wittmann canvassed some of these. In *Smith Estate v. National Money Mart Co.*, *supra* at para. 143, Perell J. held that "the Court should be satisfied that the motion for summary judgment "appears to have a high prospect of success and that it is not being used as a device to avoid the agreement to arbitrate" (emphasis added). A "high prospect of success" test is less demanding that Chief Justice Wittmann's "would be successful" test. On the other hand, in *Apotex Inc. v. Virco Pharmaceuticals (Canada) Co.*, [2007] O.J. 4817 (S.C.J.) at para. 19, Pattillo, J. set out a somewhat more demanding, and certainly more categorical, test:

> [I]t is my view that the discretion granted to the court to refuse to grant a stay of an action in respect of the summary judgment exception should only be exercised in the simplest and clearest of cases where it is readily and immediately demonstrable on the record that the responding party to the proposed summary judgment motion has no basis whatsoever for disputing the claim or claims of the moving party (emphasis added).

This test was approved of in *Sehdev v. Colours by Battistella Inc.*, 2008 ABQB 248 at para. 25 by Strekaf, J., who went on to put it in her words as follows: "[S]uch discretion should only be exercised in the clearest cases where it is plain and obvious that the matter is a proper one for default or summary judgment." Chief Justice Wittman's test requires the court to conclude that a summary judgment application would succeed, but it would appear that perhaps some argument

could be made and some analysis could be undertaken in reaching that conclusion. Perhaps success need not be "readily and immediately demonstrable" or "plain and obvious."

Somewhat surprisingly, a recent Ontario Court of Appeal decision that commented on the appropriate test was not referred to. In *MDG Kingston Inc. v. MDG Computers Canada Inc.*, 2008 ONCA 656, Feldman J.A. approached the issue a little differently. She relied upon the wording of Ontario's equivalent of Alberta's section 7(2)(e) which refers to the dispute being "a proper one for default or summary judgment." She also referred to the purpose of section 7(2)(e), stating (at para. 37):

> The purpose of s. 7(2) of the Arbitration Act is to provide a limited exception to the mandatory requirement that courts enforce arbitration clauses and not take jurisdiction where the parties have legitimately agreed to arbitrate their disputes. One of those exceptions arises when one party defaults and there is therefore no need to enlist an arbitrator to make any findings. Another is where the case is properly one for summary judgment, i.e., there are no genuine issues for trial, and therefore, as with a default situation, there are no issues that require the assistance of an arbitrator. (emphasis added).

In other words, the claim had to be so clear that no further adjudication of any factual issue would be necessary. The "no issues that require the assistance of an arbitrator" test is, at least as it is worded, more deferential to the arbitration process. However, it is the same, or at least similar to, the "no genuine issues to be tried" test for summary judgment itself. Chief Justice Wittman's formulation is to be preferred, because it does not just repeat the test for summary judgment but tells the parties how well, if not how quickly, they must meet that test.

Applying that test, Chief Justice Wittman held (at para. 58) that, on the record before him, there was a genuine issue for trial. That meant an application for summary judgment, if brought on that same record, would not succeed. As a result, the exception in section 7(2)(e) of the *Arbitration Act* did not apply. Therefore, section 7(1) did apply and the Balancing Pool's action was stayed in favour of the arbitration commenced by TransAlta.

Chief Justice Wittmann opened the door of section 7(1)(e) exceptions a little wider in not requiring a contemporaneous motion for summary judgment. However, he made it difficult to cross over the threshold by requiring the person opposing the stay application to prove on the evidence available that a summary judgment application would be successful. Thus, he managed to balance two public policies that often pull in opposite directions. Opening the door a little wider makes it more likely that disputes will be resolved in the most just and expeditious manner possible. Requiring proof of a successful summary judgment application is demanding, thereby favouring the enforcement of arbitration agreements.