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Pre-emptive attack on arbitration succeeds

By Jonnette Watson Hamilton

Cases Considered:

Suncor Energy Products Inc. v. Howe-Baker Engineers, Ltd., 2010 ABQB 310

Instead of asserting an ordinary limitation period defence in the ordinary course of an arbitration proceeding, Suncor chose to attempt a pre-emptive attack in the Court of Queen's Bench, asking the court to assume jurisdiction and strike the arbitration proceedings that were barely underway. The court did so, rather than dismissing Suncor's application or requiring Suncor to respond to the request for arbitration so that the parties' arbitrator could decide the limitation period issue. It is this aspect of the judgment —the "who decides?" aspect — that I will focus on in this comment. The court's decision appears to undermine the legitimacy of domestic arbitration.

Facts

Suncor and Howe-Baker entered into two contracts in 2004 for the engineering, fabrication and shipping of equipment to be used in a Suncor refinery near Sarnia, Ontario. Both contracts included a Schedule J which provided for a three-step dispute resolution process: face-to-face negotiation, followed by mediation if necessary, and then followed by arbitration if necessary.

By the end of November of 2005, Howe-Baker had invoiced and had been paid slightly over $37 million on the two contracts. In the following eight months, Howe-Baker invoiced Suncor for a further $2.3 million for work performed under the contracts, but Suncor refused to pay those invoices, alleging that Howe-Baker had breached the contracts by failing to properly perform the work and by causing Suncor delays and consequent damages. Letters were exchanged in the fall of 2006, when Suncor made it clear it would not pay the invoices, and a face-to-face meeting was held in May 2007. An offer to settle was made by Howe-Baker in July 2007 and it was met by a detailed counter-offer by Suncor in August 2007. Then nothing happened until the end of February 2008, when Howe-Baker advised Suncor that it was formally requesting they proceed to the next step in the dispute resolution process, the mediation step, and attached its Notices of Dispute. A month later Suncor let Howe-Baker know that it would not be responding to Howe-Baker's Notices of Dispute and had received legal advice that Howe-Baker's claims were statute-barred. Nothing further happened for seventeen months. Then, in August 2009, Howe-Baker advised Suncor that it was continuing with the next step in the Dispute Resolution Process, submitted a request that the dispute be referred to arbitration, and delivered a list of proposed arbitrators. Suncor's September 2009 response to the request for arbitration was an application to the Court of Queen's Bench for an order to strike the arbitration proceeding on the ground that the claim that Howe-Baker wanted to arbitrate was barred, either by Alberta's *Limitations Act*, R.S.A. 2000, c. L-12 or by Ontario's *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

The Court's Jurisdiction to Strike the Arbitration Proceedings

The first issue that Justice Gerald C. Hawco addressed was whether the Court of Queen's Bench had jurisdiction to hear Suncor's application. As a first step, Justice Hawco indicated (at para. 17) that the court had jurisdiction because the issue of whether the arbitration had been commenced within the applicable time period was "a pure question of law." This is a reference to an important point made by the Supreme Court of Canada in *Dell Computer Corp. v. Union des Consommateurs*, [2007] 2 S.C.R. 801 at para. 84:

> First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause. (emphasis added)

The rule and exception to the rule laid down by the Supreme Court is quite simple: courts should systematically refer all challenges to an arbitrator's jurisdiction to the arbitrator unless the challenge is based on a question of law only. Leaving aside for a moment the question of whether a limitation period defence is a challenge to an arbitrator's jurisdiction (which it is not), the issue before Justice Hawco appears to be a question of mixed fact and law. In formulating that issue (at para. 17), he asks: "Did the limitation period for commencing an arbitration expire prior to Howe-Baker purporting to commence the proceedings?" Note the concluding sentence in the quote from *Dell* above: "the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause." Then consider what type of information someone would look at in order to answer Justice Hawco's question. You would look at the relevant limitations statute to determine the relevant limitation period if you were answering a question of law such as: What is the relevant limitation period, or, more generically, what is the correct legal test? However, to answer the question posed by Justice Hawco you would also look at the facts concerning what Howe-Baker knew and what they did. You would, in other words, ask whether the particular facts in the case before you satisfied the applicable legal test — something the Supreme Court in *Dell* said a court must not do. There was quite a lot of factual evidence concerning invoice numbers, money owed, dates, letters, meetings and notices admitted and discussed in this case (at paras. 3-15, 37-40 and 47-53) in order to determine when Howe-Baker's cause of action arose and when they commenced the arbitration proceedings. In *Dell*, the Supreme Court stated (at para. 85) that "[i]f the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts."

Because the limitation period defence raised by Suncor was not a challenge to the arbitrator's jurisdiction, Justice Hawco had to do more than merely decide the matter was a pure question of law. He referenced two cases: *The Plan Group v. Bell Canada*, 2009 ONCA 548 and *Autoweld*

Systems Ltd. v. CRC-Evans Pipeline International, Inc., 2009 ABCA 366 to make the point (at para. 18-19) that the exception in *Dell* was not limited to challenges to an arbitrator's jurisdiction but extended to any "threshold" issue.

The *Plan Group* decision, a 215 paragraph decision, concerned an agreement for joint projects for the delivery of cable services to customers in the Greater Toronto Region. The agreement contained a two-step dispute resolution process consisting of good faith discussions followed by resort to arbitration if necessary. The arbitration clause also included a provision that "[f]ailure to file a notice of arbitration within twelve (12) months after the occurrences supporting a claim constitutes an irrevocable waiver of that claim." The stated issue was fairly simple: what was required to commence the arbitration? Bell took the position that in order to commence the arbitration the Plan Group had to deliver a written notice of request for arbitration to Bell and the Arbitration and Mediation Institute of Ontario Inc., under whose rules the arbitration was to be conducted. The Plan Group argued that no notice of arbitration needed to be filed with the Institute for the arbitration to be commenced. The real issue lurking behind the question of when the arbitration was commenced was whether it was commenced in time to meet the 12 month limitation period that was imposed by the arbitration agreement itself.

Justice Hawco relies upon a very short passage in the majority judgment of Justice Blair that is a response to a point raised in the dissent of Justice Gillese. Justice Gillese raised, as a preliminary matter, the question of whether the issues should have been referred to the arbitrator for determination, based on the principles set out in *Dell*. Justice Blair gives this preliminary matter short shrift, basically stating (at para 81) that the parties are sophisticated commercial parties that were represented by sophisticated commercial counsel who did not ask the court to deal with that preliminary matter. But then Justice Blair offered another reason "in any event," stating (at para 82): "I do not see the application (and the appeal) as raising a question regarding the jurisdiction of the arbitrator, but rather a question of whether there is an arbitration within which the arbitrator may or may not exercise a jurisdiction."

In *Plan Group,* the limitation period was in the arbitration agreement itself and it limited the availability of the arbitration process it created. It was not part of the general law of the province, as was the limitation period defence raised by Suncor in this case. The point was that in *Plan Group,* the built-in limitation was, at least arguably, a threshold issue.

The 2009 Alberta Court of Appeal *Autoweld Systems* decision that Justice Hawco also referred to came before the courts in the way these issues usually do. A chambers judge was asked to stay court proceedings in favour of arbitration under section 7 of the *Arbitration Act*, R.S.A. 2000, c. A-43 and declined to do so. The respondent denied that there was an arbitration agreement that covered the dispute. In a very short decision for the unanimous Court of Appeal, Justice Frans Slatter stated (at para 2):

> The . . . appellant argues that the chambers judge should have submitted the issue of arbitrability itself to the arbitrator, but we are satisfied that the very existence, as opposed to the scope, of the arbitration clause falls within the exception in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 at para. 84. Where there is a pure question of law on a threshold issue the chambers judge is not compelled to send it to the arbitrator. (emphasis added)

In *Autoweld Systems*, the Court of Appeal expanded the exception to the general rule in *Dell*. Courts could assume jurisdiction for themselves on all issues categorized as "threshold issues,"

and not merely issues that challenged an arbitrator's jurisdiction. The question then becomes, not is this a challenge to the arbitrator's jurisdiction, but the broader question of is this a threshold issue? The contract sued upon in *Autoweld Systems* did not include an arbitration clause. That certainly seems like a threshold issue, as arbitrators have no jurisdiction except by the agreement of the parties.

After referring to *Plan Group* and *Autoweld Systems*, however, Justice Hawco does not discuss whether the situation before him is analogous to that in either of those two cases. He does not decide if he is faced with a threshold issue. I would submit that he was not. The limitation period Suncor relied upon was part of general provincial law, not part of the arbitration agreement itself that conditioned the availability of arbitration, as it was in *Plan Group*. The limitation period defence that Suncor relied upon, even if successful, would not make the arbitration agreement in Schedule J of the contracts between it and Howe-Baker disappear. That there was an arbitration agreement was not denied, as it had been in *Autoweld Systems*.

A limitation period defence is just that, a defence to a claim that merely says the claim is brought too late to be maintained. As J. Kenneth McEwan and Ludmila B. Herbst state in *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Canada Law Book, looseleaf) at 3:20:20, in noting that statutory time limits must be raised as a defence in the proceedings:

> It does not go to the jurisdiction of the court or arbitral tribunal; it merely provides the defendant or respondent with a defence to the claim made by the plaintiff or claimant. If the defence is disputed, that is a dispute which the arbitrator must decide and on which they must make an award.

It is true that under Rule 109 of the current Alberta Rules of Court, Alta. Reg. 390/68, limitation periods are the type of defence that must be specifically pleaded in court proceedings. However, the same is true of a number of types of defences, including those based on performance, release, payment, statute of frauds, fraud or any fact showing illegality. Should a court take jurisdiction over all cases when one of these defences is raised to allege that a claim cannot be maintained, rather than compelling the arbitration that the parties agreed to? Does a requirement that a defence be specifically pleaded if it is alleged the claim cannot therefore be maintained raise a defence to a "threshold" level?

Even assuming that an issue is a threshold issue and a question of law only, a court is merely not compelled to send a matter to the arbitrator to be decided. It might send the matter to the arbitrator for his decision in the first instance, or it might decide the matter itself. However, Justice Hawco did not discuss whether or how he should exercise his discretion. Suncor's court action was begun expressly and solely for the purpose of asking the court to stop the arbitration proceedings that had begun. It did not exist before the request for arbitration was sent to the company. Should the courts be encouraging such proceedings? Is it encouraging a multiplicity of proceedings? Is it damaging to the legitimacy of arbitration?

Finally, and still on the issue of whether the court had jurisdiction to hear Suncor's application, Justice Hawco did not discuss the authority or basis on which Suncor made its application. Its application was the opposite of the usual application that brings these types of questions before the courts, i.e., an application to the courts under section 7 of the *Arbitration Act* to stay court proceedings, as in *Autoweld Systems*. The *Plan Group* matter came before the courts under the

equivalent of section 6 of Alberta's *Arbitration Act*. Section 6 limits a court's interference in arbitration by providing that:

> 6. No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
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> (a) to assist the arbitration process;
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> (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
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> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
>
> (d) to enforce awards.

In the face of the section 6 general prohibition, some statutory basis for Suncor's application should have been found before that application's merits were dealt with. Where would a court's ability to strike an arbitration proceeding be located if not in the *Arbitration Act* and its section 6?

In summary, I would submit that the court was wrong to assume jurisdiction over the limitation period defence itself. It should have refused to hear Suncor's application and insisted Suncor respond to the request for arbitration for any one or more of four reasons. First, the limitation period defence is not a question of law only, but a question of mixed fact and law and therefore to be determined by the arbitrator under the principles set out in *Dell*. Second, a limitation period defence is not a threshold issue. It is not a challenge to the arbitrator's jurisdiction and it is not a denial of the existence of the arbitration agreement. Third, even if the court could assume jurisdiction, this was not an appropriate case for it to do so. And, finally, there did not appear to be any statutory or other basis for Suncor's application or for the court's ability to strike an arbitration proceeding.

The Rest of the Case

Although Justice Hawco's decision that he could and should decide the limitation period issue raised by Suncor is the most interesting aspect of this case, I will briefly recount the balance of the decision for sake of completeness. The issue was: "Did the limitation period for commencing an arbitration expire prior to Howe-Baker purporting to commence the proceedings?" Justice Hawco dealt with four sub-issues under that general question.

The first sub-issue concerns the applicable limitation period. The two contracts between Suncor and Howe-Baker provided that the rights of the parties would be governed by the law of the Province of Ontario, that the parties would attorn to the jurisdiction of the courts of the Province of Alberta, and that the *Arbitration Act* of Alberta applied to all arbitration proceedings. Justice Hawco does not decide whether Alberta's *Limitations Act* or Ontario's *Limitations Act*, 2002 sets out the applicable statutory time limit. He looks at both and decides (at para 31) that under either statute Howe-Baker had two years from the date when its claim arose, or from the date when a reasonable person would have known that a claim had arisen, to commence arbitration proceedings.

As a second sub-issue, Howe-Baker had argued that section 11 of the Ontario *Limitations Act* applied to postpone the start of the two year limitation period. That section provides:

> 11(1) If a person with a claim and a person against whom the claim is made have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation periods established by sections 4 and 15 do not run from the date the agreement is made until,
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> (a) the date the claim is resolved;
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> (b) the date the attempted resolution process is terminated; or
>
> (c) the date a party terminates or withdraws from the agreement. (emphasis added)

Howe-Baker argued that the parties had agreed to have an independent third party resolve their claim because their two contracts had agreed to arbitration. If section 11(1) of the Ontario *Limitations Act* applied, then the two year period would not have begun until May of 2008, when Suncor said it would not respond to Howe-Baker's Notices of Dispute.

Justice Hawco rejects this argument without citing any authority. He concludes (at para. 34) that section 11 only applies to agreements made after disputes have arisen, not before. It only applies to agreements in the nature of stand-still agreements. (In Alberta, a standstill agreement is usually found in cases where an statement of claim has been issued but not served within the time limited by the *Alberta Rules of Court* and it "stops the clock" with respect to procedural matters while the parties pursue settlement discussions: *Dewindt v. Sandalwood Homes Ltd.*, 2002 ABQB 316 at para. 34; *McAndrews v. Hames* 2005 ABQB 556 at para 55.)

For the third sub-issue, Justice Hawco looks at when Howe-Baker's claim arose. Giving the benefit of the doubt to Howe-Baker, he decided (at para 41) that Howe-Baker did not discover, and should not have discovered, that it had a cause of action until Suncor made it clear they would not pay Howe-Baker's invoices. That date was October 6, 2006.

The fourth sub-issue involved the question of when the arbitration proceedings were commenced. Justice Hawco did not ask when the three-step dispute resolution process crafted by the parties in Schedule J to their contracts commenced. He did not accept Howe-Baker's argument that their February 2008 Notices of Dispute commenced the arbitration proceedings because they commenced the process that inevitably led to arbitration if the parties could not settle the dispute themselves or with the help of a mediator. Instead of seeing the dispute resolution process as one integrated process, he saw it as "three separate and distinct procedures – negotiation, mediation and arbitration, if all else fails" (at para. 46). Howe-Baker therefore had to request arbitration in a manner authorized by Alberta's *Arbitration Act* in order to start the separate and distinct arbitration process. This they did not do until August of 2009, well beyond the two year limitation period. Howe-Baker's claim was therefore statute-barred.

The end result was that the arbitration proceedings commenced too late by Howe-Baker were struck by the court.

Conclusion

I am not a fan of commercial arbitration in all circumstances, as readers of my previous ABlawg posts on the topic will know. However, this case involves a contract dispute between two large commercial entities and there appears to be no reason why the limitation period defence should not have been heard and decided by an arbitrator agreed to — and paid for by — the parties. Why should the courts allow Suncor to multiply proceedings by starting an action in a court system funded by taxpayers to get rid of the arbitration proceedings that the parties had agreed to? It may well be that Howe-Baker's claim was statute-barred, but the parties' arbitrator should have determined that issue.