IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Elton v. 10 Star Events Inc.,* 2018 BCSC 1974

Date: 20181106
Docket: S189789
Registry: Vancouver

Between:

Justin Elton

Petitioner

And

10 Star Events Inc.

Respondent

Before: The Honourable Madam Justice DeWitt-Van Oosten

Reasons for Judgment

Counsel for the Petitioner:	Jeffrey D. Horswill Todd M. Shikaze
Counsel for the Applicant Daniel Buller:	John Zeljkovich Matthew N.E. Cowper
Place and Date of Hearing:	Vancouver, B.C. November 2, 2018
Place and Date of Judgment:	Vancouver, B.C. November 6, 2018

[1] These *Reasons for Judgment* were delivered as oral reasons. They have since been edited for release to the parties and publication.

I. OVERVIEW

[2] Daniel Buller and Justin Elton jointly own 10 Star Events Inc. ("10 Star"), a federally incorporated business that provides marketing and sales services to predominantly one client.

They are each a 50% shareholder and director of the corporation.

[3] The business relationship between the two men has broken down, resulting in arbitration under their shareholder agreement. The arbitration proceedings are in their infancy. The parties have not yet selected an arbitrator. Nor has there been an exchange of documents in the arbitration proceedings.

[4] After the arbitration commenced, Mr. Elton filed a Petition seeking an "investigation" of 10 Star under s. 229(1) of the *Canada Business Corporations Act*, R.S.C. 1984, c. C-44 (*CBCA*).

[5] Mr. Buller has not filed a response to the Petition. Instead, he brought an application for a stay pursuant to s. 15(1) of the *Arbitration Act*, R.S.B.C. 1996, c. 55.

[6] Submissions on whether a stay is required were heard in Vancouver Chambers on November 2, 2018. Judgment was reserved.

II. ISSUES

[7] Under s. 15(1) of the *Arbitration Act*:

> If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement <u>in respect of a matter agreed to be submitted to arbitration</u>, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
>
> [Emphasis added.]

[8] It is common ground that the Petition constitutes "legal proceedings" within the meaning of s. 15(1).

[9] The parties also agree that although 10 Star is the only named respondent in the Petition, Mr. Buller is entitled to respond to the claims advanced in the Petition because of his status as a shareholder of the corporation. As such, Mr. Elton does not argue that Mr. Buller has no standing to request a stay. He accepts for the purposes of s. 15(1) of the *Arbitration Act* that Mr. Buller is a party to the "legal proceedings".

[10] The issue for me to decide is whether the Petition is "in respect of a matter agreed to be submitted to arbitration".

[11] If so, then s. 15(2) of the *Arbitration Act* requires a stay, unless the Court determines that the arbitration agreement is "void, inoperative or incapable of being performed". No such argument has been advanced in this case.

[12] If the Court finds that the test for a stay has been satisfied, Mr. Elton argues in the alternative that the Petition seeks an "interim measure of protection" as contemplated under s. 15(4) of the *Arbitration Act*. As such, allowing it to proceed on that basis would not be "incompatible" with the arbitration agreement.

III. FACTUAL BACKGROUND

A. Shareholder Agreement

[13] A shareholder agreement between Mr. Buller, Mr. Elton and 10 Star was executed on June 24, 2015.

[14] Among other things, the agreement defines the roles, responsibilities and obligations of the shareholders and directors of the corporation. Indeed, the agreement was developed for this specific purpose:

> … the SHAREHOLDERS have agreed to enter into this Agreement for the purposes of recording the manner in which the affairs of the Corporation shall be conducted and to provide for their respective obligations with respect to the Corporation.

[15] Mr. Elton is the president of 10 Star, with "management of the business, brand identity, corp[orate] culture and policy", as well as "day-to-day sales, pitch presentations and client development".

[16] Mr. Buller is vice-president, with "oversight" of "legal & administrative" matters, as well as "finance & corporate policy & governance". He is also responsible for managing all "processes & reporting, asset & cash flow to budget management".

[17] Both men agreed, under the shareholder agreement, to exempt 10 Star from an annual requirement to appoint an auditor for the corporation.

[18] The agreement contains an arbitration clause that governs disputes between the shareholders:

> **5.11 Disputes**
>
> This Agreement shall be governed by the laws of the Province of British Columbia. <u>Any disputes arising between the SHAREHOLDERS as a result of this Agreement</u> shall be settled at first attempt by Mediation, and if unable to be determined then by arbitration in accordance with the rules of the Commercial Arbitration Act, and judgment upon the award rendered may be entered in any court having jurisdiction thereof.
>
> [Emphasis added.]

[19] 10 Star's main client is sensitive to adverse publicity. The shareholder agreement contains a

confidentiality clause that the parties emphasize carries significant importance in their business dealings:

> **5.01 Confidentiality**
>
> The existence as well as the terms and conditions of this Agreement, and any information exchanged among the Parties (including their respective representatives or advisors) in connection with their investment and shareholdings in the Company and/or received from any Party and/or the Company's representatives pertaining to the business and the operation of the Company (all such information collectively "Confidential Information"), shall be kept strictly confidential by each Party …
>
> Without limiting the generality of the foregoing, the term Confidential Information shall include in particular:
>
> (a) Any information regarding this Agreement, any trade secrets, projects, processes, financial or confidential information of the Company or any information provided by its clients …

B. Arbitration Proceedings

[20] On or about June 1, 2018, Mr. Elton started arbitration proceedings against Mr. Buller. He makes a number of allegations in the arbitration, including that Mr. Buller has:

- removed, withheld, concealed, destroyed, manipulated and fabricated corporate records and financial documents;
- failed to keep regular, accurate or balanced accounts for 10 Star;
- refused to cooperate with the efforts of others to bring the corporation's financial records and accounts practices "into repair";
- perpetrated a fraud through the purchase of a truck trailer for the corporation (the "Megatron" transaction);
- withheld or refused to provide copies of corporate accounts;
- submitted misleading documents to 10 Star in relation to the Megatron transaction;
- maintained an inappropriate interest in a company that 10 Star contracted with;
- deployed corporate employees and assets to the benefit of other companies; and,
- inappropriately monitored and downloaded emails from Mr. Elton and other employees.

[21] Mr. Elton seeks damages for allegedly fraudulent conduct; breach of privacy; detinue and spoliation (arising from the withholding and manipulation of corporate records); and breach of contract. He also seeks an order from the arbitrator forcing Mr. Buller to sell his shares in 10 Star to effect a "corporate divorce", and costs.

[22] Mr. Buller has made a counterclaim in the arbitration, alleging that Mr. Elton has inappropriately diverted corporate opportunities of 10 Star to another company.

C. Petition

[23] As noted, the Petition seeks an order under s. 229(1) of the *CBCA* directing an investigation into 10 Star.

[24] The Petition also requests various other orders under ss. 230–231 of the *CBCA* in support of the investigation, including the appointment of an inspector. Among other things, Mr. Elton asks that the inspector be empowered to enter any premises in which 10 Star carries on business, and to examine anything and make copies of any document or record found on the premises.

[25] He also requests that the inspector have authority to compel the directors of 10 Star to produce documents; compel third parties to produce documents; conduct a hearing and examine persons under oath; compel attendance at any such hearing; and, Mr. Elton seeks a requirement that the inspector produce an interim and final report containing his or her findings.

[26] The factual foundation put forward in support of the sought-after investigation is summarized at para. 13 of the Petition:

> (a) Mr. Buller historically had sole control over the administrative aspects of 10 Star's business including: the purchase of assets; the historic company accounts and accounting; the current company accounts and accounting; the company mail; the company information technology system; the company bank accounts; key employee credit cards; and company financial records.
>
> (b) Mr. Buller has acted so as to ensure that 10 Star's financial records are incomplete, inaccurate, unreliable and unverifiable. Mr. Buller has caused this state of disarray by using his position of control over 10 Star's finances and records to remove, conceal, withhold, alter and falsify financial records. These actions prevent Mr. Elton, 10 Star staff and 10 Star's external accountants from understanding the financial state and history of the company.
>
> (c) As particularized below, Mr. Buller has used his position of control at 10 Star to steal material sums of money for himself, and on at least one occasion has attempted to cover his misappropriation with false documents that he provided as authentic. Until Mr. Buller submitted the falsified document, and 10 Star staff were fortunate enough to spot a discrepancy, the state of the company records were such that the staff were unaware of, and could not determine, that money was missing.
>
> (d) The inability of Mr. Elton to understand the financial state and history of 10 Star is thus of greater consequence than a simple lack of accurate information. Mr. Buller and his personal company have spent or received, or have been reimbursed for, millions of dollars purportedly relating to 10 Star business over the years. Mr. Buller directed many of these payments through his personal accounts or his personal holding corporation. There is a small amount of information relating to some of these transactions, and on that information certain of them appear to be fraudulent. There is a total absence of supporting records for many more transactions, and as such their legitimacy cannot possibly be determined. This makes it impossible for

Mr. Elton or 10 Star's accountants to not only understand the financial history of the company, but also to determine whether the financial dealings of Mr. Buller were legitimate or fraudulent, or where otherwise oppressive.

(e) Mr. Elton has attempted to have 10 Star's financial records reconciled and re-created without court assistance. This is not only necessary to determine fraud, but also to bring 10 Star into compliance with its legal obligations, including section 230 of the *Income Tax Act*, under which it is an offence to fail to keep financial records. Mr. Buller has frustrated these efforts. 10 Star has exhausted its ability to reconcile, recreate, assess and verify its accounts without assistance from the court, and thus the appointment of an investigator under section 229 of the *Canada Business Corporations Act* is necessary.

IV. PARTIES' POSITIONS

[27] Mr. Buller says the Petition raises matters that are front and centre in the arbitration, with a specific focus on his conduct as shareholder and director in managing the financial and corporate governance affairs of 10 Star.

[28] From his perspective, disputes over the way in which he has managed (or allegedly mismanaged) his assigned areas of corporate responsibility with 10 Star are logically disputes that have "arise[n] between the SHAREHOLDERS as a result of [the shareholder agreement]".

[29] Mr. Buller argues that to grant the relief sought in the Petition, this Court will invariably be required to assess and comment on factual matters that go to one or more issues within the jurisdiction of the arbitrator.

[30] Moreover, Mr. Elton seeks to have an inspector exercise many procedural powers available to the arbitrator. Under the *Arbitration Act*, an arbitrator has the power to order the production of documents (s. 5(1)); examine the parties to the arbitration under oath (s. 6(1)); issue subpoenas (s. 7(1)); and, order that non-party witnesses give their evidence under oath (s. 8(1)).

[31] Mr. Buller argues that he and Mr. Elton committed themselves to arbitration as a means of resolving their disputes as shareholders. They did so, at least in part, to assist in preserving confidentiality for the business affairs of the corporation's predominant client, who is particularly sensitive to publicity. From Mr. Buller's perspective, the Court should give effect to their commitment and not intervene.

[32] It is Mr. Elton's position that the relief sought in the Petition is qualitatively different from the claims put forward in the arbitration and resolution of the Petition does not require an adjudication of any matters before the arbitrator.

[33] As explained in his application response:

> The Petition asks the Court merely that it find that it <u>appears</u> that 10 Star's financial records

> are in disarray, and that it appears that there has been fraud and that, as a result, an order appointing an inspector to conduct an investigation of 10 Star's financial affairs pursuant to s. 229 of the *CBCA* be granted …
>
> Elton brought his Petition so that he could be provided unknown information relating to 10 Star's financial position. This is necessary and, in fact, supports the Arbitration by allowing Elton to determine whether there are claims that should properly be included in the Arbitration that are not currently, and to provide reliable records on which to base 10 Start's valuation for the purpose of the ordered share sale that both he and Buller have sought. Elton has exhausted the private means available to him for obtaining the information sought through the Petition, and Buller has frustrated Elton's efforts.
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> [Emphasis in the original.]

[34] In making his argument, Mr. Elton relies heavily on the decision of the Ontario Superior Court of Justice in *Pandora Selected Partners, LP v. Strategy Real Estate Investments Ltd.*, [2007] O.J. No. 993 (Ont. S.C.J.).

[35] In that case, an inspector's role under the *CBCA* was defined as inquisitorial, not adjudicative, and the court held that the powers given to an inspector are not intended to be a substitute for the powers, including discovery, that are available in an arbitration. These are profoundly different proceedings, with different objectives and outcomes. A *CBCA* investigation generates a report on the financial records and transactional history of a company. It remains up to the arbitrator to make findings of fact arising out of this information, if fed into the arbitration. It is also up to the arbitrator, not the inspector, to determine liability between the parties to the arbitration and resultant awards.

[36] Mr. Elton argues that the relief sought in the Petition provides an important statutory protection for shareholders, including relief beyond the jurisdiction of an arbitrator. Granting a stay would effectively deprive Mr. Elton of his ability to access a remedy that is otherwise available to him at law. In the absence of clear language in the shareholder agreement ousting the availability of s. 229(1) of the *CBCA*, Mr. Elton says the Court should not remove this safeguard from him.

[37] Alternatively, if the Court finds that the matters raised in the Petition fall within the scope of the arbitration agreement, Mr. Elton argues he is nonetheless entitled to pursue a *CBCA* investigation as an "interim measure of protection" within the meaning of s. 15(4) of the *Arbitration Act*.

V. LEGAL PRINCIPLES and ANALYSIS

A. Whether a stay is required under the *Arbitration Act*

[38] The test for a stay of legal proceedings pending the completion of arbitration was affirmed by the Court of Appeal in *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379 at para. 26:

> Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then … the stay should be granted and those matters left to be determined by the arbitral tribunal.
>
> [Emphasis in the original.]

[39] Although *Sum Trade Corp.* addressed s. 8(1) of the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, rather than s. 15(1) of the *Arbitration Act*, the triggering threshold for a stay is the same in both provisions.

[40] See also: *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.); *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.); and *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97.

[41] To decide whether a dispute falls within the terms of an arbitration agreement, the Court must analyze: (a) the nature of the disagreement; (b) the words of the arbitration clause; and (c) the terms of the contract between the parties, as a whole, within its factual context: *St. Pierre* at para. 21.

[42] As a general rule:

> … the courts have taken a deferential approach to a challenge to an arbitrator's jurisdiction, giving precedence to the agreement between the parties to arbitrate and allowing the arbitrator to determine, at first instance, whether a particular dispute is arbitrable.
>
> *St. Pierre* at para. 24. See also *Maher v. Morelli Chertkow*, 2003 BCSC 48 at para. 14.

[43] It is only where "it is clear that the dispute is outside the terms of the arbitration agreement" that a stay should be denied: *Gulf Canada* at paras. 39–40.

[44] Applying this framework to the case before me, I am satisfied on a balance of probabilities that the matters raised in Mr. Elton's Petition fall within the terms of the arbitration agreement. At the very least, it is arguable that such is the case.

[45] I agree with counsel for Mr. Buller that the nature of the disagreements underlying the Petition, which form the factual basis for the requested relief under ss. 229–231 the *CBCA*, involve substantially the same allegations that are put forward in the arbitration.

[46] The arbitration claims are grounded in Mr. Buller's conduct as a shareholder and director of 10 Star, within the areas of corporate responsibility and authority that are assigned to him under the shareholder agreement. Mr. Elton seeks damages in the arbitration for fraudulent conduct in Mr. Buller's role, breach of privacy, wrongfully withholding and manipulating the corporation's financial records, and breach of contract.

[47] From the summary at para. 13 of the Petition, it is clear that these same allegations form the basis for the request for a *CBCA* investigation. For example, the Petition alleges that Mr. Buller has used "his position of control" over 10 Star's finances and records "to remove, conceal, withhold, alter and falsify financial records". The Petition also alleges that Mr. Buller has used his "position of control" to steal money and to "cover his misappropriation with false documents that he provided as authentic".

[48] The "position of control" spoken of in the Petition arises out of, and is directly linked to, Mr. Buller's delineated responsibilities and areas of operational authority under the shareholder agreement. The factual foundation offered in support of a *CBCA* investigation is Mr. Buller's alleged mismanagement and abuse of his corporate powers with 10 Star, including for the purposes of wrongful self-gain.

[49] The overlap between the subject matter of the arbitration proceedings and the matters raised in the Petition is obvious. Indeed, in an affidavit filed in support of the Petition, Mr. Elton acknowledges this reality:

> I understand that there is overlap between the arbitration proceedings and this Petition and that I raised many of the issues in the arbitration that I have raised in this Petition. These include:
>
> (a) Mr. Buller's apparent Megatron purchase price fraud;
>
> (b) the lost or withheld financial records;
>
> (c) Mr. Buller's surreptitious email monitoring;
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> (d) Mr. Buller's deployment of 10 Star employees and assets on behalf of other companies; and
>
> (e) Mr. Buller's apparent interest in MetaVrse.
>
> [Emphasis added.]

[50] In his written response to the application for a stay, Mr. Elton also acknowledges that a primary purpose of the Petition is to gather information in support of the claims he has made in the arbitration, including the possible addition of other wrongful acts conducted by Mr. Buller in exercise of his responsibilities under the shareholder agreement:

> Elton brought his Petition so that he could be provided unknown information relating to 10 Star's financial position. This is necessary and, in fact, supports the Arbitration by allowing Elton to determine whether there are claims that should properly be included in the Arbitration that are not currently, and to provide reliable records on which to base 10 Star's valuation for the purpose of the ordered share sale that both he and Buller have sought. Elton has exhausted the private means available to him for obtaining the information sought through the Petition, and Buller has frustrated Elton's efforts.
>
> [Emphasis added.]

[51] In an affidavit filed October 26, 2018, Mr. Elton deposes:

> By 2017, it was apparent that the financial records of 10 Star were incomplete, inaccurate and unreliable … By April or May of 2018, it became apparent that on at least one occasion, Mr. Buller had used his position at 10 Star to steal a material sum of money from 10 Star, or used 10 Star to steal from the company's client …
>
> It was clear to me that I had to sever my relationship with Mr. Buller …
>
> To bring our dispute to a head, I thus brought two legal proceedings: by way of arbitration, a claim for damages and an order that Mr. Buller sell me his shares; and in the court, I brought a petition seeking an investigation of 10 Star's affairs to determine whether there were other claims that should be added to the arbitration proceeding …
>
> [Emphasis added.]

[52] The October 2018 affidavit goes on to say that the "purpose of the petition is to get access to the financial information [Mr. Elton does not] know about". Once he has a "complete picture of 10 Star's finances", he will decide whether "there are other claims to pursue or not, and can more accurately assess the value of [his] shareholding in the company". [Emphasis added.]

[53] The arbitration clause of the shareholder agreement has been crafted using broad language. Arbitration is the parties' elected method of resolution for "[a]ny disputes arising between the SHAREHOLDERS as a result of [the] Agreement". [Emphasis added.]

[54] I accept Mr. Buller's assertion that the broad wording, at least in part, was informed by a desire to keep any claims or controversy that arises under the shareholder agreement out of court, so as to not compromise the desire of 10 Star's main client to avoid publicity.

[55] Mr. Elton has not challenged this proposition. To the contrary, in an affidavit filed in support of the Petition, he acknowledges that "10 Star's major client is extremely sensitive to publication of its business affairs and contracts. It has imposed strict confidentiality obligations on 10 Star and its directors and officers".

[56] Mr. Elton accepts that the claims made in the arbitration fall within the jurisdiction contemplated under clause 5.11. Indeed, he was the person who initiated the arbitration proceedings.

[57] In their substance, the particularized allegations made in the Petition are the same as the ones asserted in the arbitration. They have simply carried over from the arbitration into the Petition. Instead of forming the bases for a damages claim and "corporate divorce", they now function as the supporting factual context for court-ordered relief under the *CBCA*. Moreover, an explicit purpose of the request for an investigation is to assist Mr. Elton in advancing his position before the arbitrator.

[58] In my view, given the linkage, the disputes underlying the Petition fall squarely within the ambit of clause 5.11. They are disputes that arise "as a result of" the shareholder agreement.

[59] On this point, I have found the decision of the Court of Appeal in *ABOP LLC v. Qtrade Canada Inc.*, 2007 BCCA 290 dispositive.

[60] In that case, the appellant ABOP brought a petition alleging that the business of the respondent Qtrade had been conducted in a manner that was "oppressive and unfairly prejudicial" to ABOP, contrary to the *CBCA*. The Chambers Judge stayed the petition, on grounds that the parties had agreed under a share purchase agreement to have such matters addressed through arbitration: *Qtrade* at para. 1.

[61] The wording of the *Qtrade* arbitration agreement was broad in scope, consistent with the language used in the case at bar:

> **7.1 Binding Arbitration.** If any dispute or difference between the parties arises concerning this Agreement, the parties will first attempt in good faith to resolve the matter. Any dispute or difference between the parties concerning this Agreement which cannot be settled by the parties will be referred to and finally resolved by arbitration under the *Commercial Arbitration Act* (British Columbia) in accordance with the Domestic Commercial Arbitration Rules of Procedure of the British Columbia International Commercial Arbitration Centre in effect from time to time. The place of arbitration will be Vancouver, British Columbia.
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> At para. 4. [Emphasis added.]

[62] The *Qtrade* Chambers Judge found that the petition was framed as an oppression claim under the *CBCA*. The relief sought was based in contractual rights said to arise under the share purchase agreement: at para. 12. Among other things, the petitioner sought a declaration of oppressive conduct against Qtrade shareholders and directors, and asked to have the share purchase agreement enforced: at para. 12.

[63] Within this context, the Chambers Judge determined that the dispute between the parties, as framed in the petition, was a dispute related to the agreement and, as such, fell within the ambit of the arbitration clause.

[64] More importantly, this was so even though two of the remedies sought in the petition fell within the exclusive jurisdiction of this Court and could not be addressed by an arbitrator:

> [22] Having reviewed the agreement and the petition I conclude the following: First, the dispute between the parties is a dispute related to the Agreement. It is the different interpretations of the Agreement and the different interpretations as to the consequence of the transfer of ownership of ABOP that give rise to the dispute. That, in my view, is clearly founded in the Agreement. Secondly, the only aspect of the petition which requires a resolution by the court, rather than by an arbitrator, is the request in the petition for a finding of oppression and a request for the appointment of a receiver or receiver manager of the

> assets of Qtrade.
>
> [23] I agree that the latter two concerns are within the exclusive jurisdiction of the court. However, in my view, a request for the finding of an oppression and an oppression remedy that is not available to be provided by an arbitrator does not mean that the matter should necessarily be resolved by the courts, rather than by arbitration. Here, for whatever reason, the parties entered into an Agreement which gave the petitioner rights that it likely would not have had considering its limited shareholding in the ordinary course of the operation of the company. The parties clearly negotiated an Agreement which provided the petitioner certain rights and provided for an arbitration clause. It is abundantly clear to me that the dispute between the parties relates to their different interpretations of the Agreement. They have clearly agreed that any dispute over their interpretation of the Agreement is to be dealt with by arbitration. Simply put[,] in oppression relief[,] claims should not automatically oust the jurisdiction of the arbitration clause the parties agreed to.
>
> [24] Additionally, in my view, a stay of the proceeding at this stage does not oust the review of this matter by the courts or deprive the plaintiff ultimately of the oppression relief it requests. An arbitrator can and should, as the parties have agreed, adjudicate on the respective rights of the parties. That is what the parties agreed to when they consented to the arbitration clause in the agreement. Once the arbitrator has done his work, if there is still a dispute between the parties which requires the additional relief requested in the petition, the oppression relief, under the federal *Business Corporations Act*, then that matter can be pursued in the Courts at that time. Much of the work would then be done. A stay that is requested by the respondent does not, in my view, end the oppression action. It would simply hold it in abeyance until the arbitrator did the work that the parties agreed he or she should do if the parties had a dispute or came to an impasse which could not be resolved.
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> As excerpted in 2007 BCCA 290 at para. 12. [Emphasis added.]

[65] On appeal, ABOP argued that the Chambers Judge erred in finding the petition was "in respect of a matter agreed to be submitted to arbitration" within the meaning of s. 15(1) of the *Arbitration Act*. The Court of Appeal disagreed:

> [20] I agree with the finding of the judge that the dispute centres on the shareholders agreement and the interpretation thereof by the parties …
>
> [21] ABOP submits that the "wish" was not so broad as to drive all of its complaints into arbitration. It points out that the petition alleges oppression and requests the appointment of a receiver. It suggests the stay ousts the jurisdiction of the courts with respect to those matters and cites *James E. McCage Limited and others, In the Matter of*, [2000] NICh 4, in support. Girvan J., at paragraphs 36 to 38 discussed the tension between an arbitration concerning the business of the company and a court petition with respect to winding up. He found it requires "very clear and specific words" to find that parties "agreed that a party should be debarred from pursuing a statutory remedy…."
>
> [22] In the case at bar the situation is not comparable to *McCage*. There is no suggestion in the case at bar that ABOP is "debarred from pursuing" any statutory claim or remedy. In the instant case the judge simply held that the fact there are two "concerns" that are court matters "does not mean that the [entire] matter should necessarily be resolved by the courts, rather than by arbitration." He added:
>
>> [23] … Simply put[,] in oppression relief[,] claims should not automatically oust the jurisdiction of the arbitration clause the parties agreed to.
>>
>> [24] … Once the arbitrator has done his work, if there is still a dispute between

> the parties which requires the additional relief requested in the petition, the oppression relief, under the federal *Business Corporations Act*, then that matter can be pursued in the Courts at that time. …

> [23] Counsel for Qtrade made the following submission with which I agree:
>
> > The arbitrator will make all the necessary findings of fact and come to a decision on the issues before him. If he finds in favour of Qtrade then there will be no foundation for an oppression action. If he finds in favour of ABOP it can carry on with the oppression petition to the court.
>
> [24] As pointed out in *Wine Inns*, this might cause some procedural complexity. However, that cannot form the basis for the determination of this case. To paraphrase *Maher*, I find no "proper reason" why the courts should not "give effect to that wish", the parties' agreed-to wish being for arbitration to resolve disputes arising out of the shareholders agreement. <u>The involvement of the courts might well be delayed, or not required at all with respect to the two non-arbitrable issues being pursued by ABOP, but its jurisdiction has not been ousted</u>.
>
> Per Thackray J. [Emphasis added.]

[66] Although not on all fours with *Qtrade*, the case before me is sufficiently similar that I find the Court of Appeal's ruling dispositive of Mr. Elton's primary argument.

[67] As explained, the alleged misconduct that forms the factual basis for the relief requested in Mr. Elton's Petition is substantially the same as the allegations put forward in the arbitration, and inextricably linked to Mr. Buller's performance of his corporate responsibilities under the shareholder agreement, as well as the allowable scope of his designated authority. The fact that the Petition seeks an investigation under the *CBCA*, a matter that falls within the exclusive jurisdiction of this Court, does not change this reality.

[68] More importantly, as made clear in *Qtrade*, it does not preclude the granting of a stay under the *Arbitration Act*.

[69] Mr. Elton argues that the arbitration clause is focused on the "settlement and determination of disputes". The Petition is an application for a court-ordered investigation under the *CBCA*. Under the shareholder agreement, the parties agreed to submit disputes to arbitration. However, they made no agreement about a court-based investigation. These are two different things.

[70] Respectfully, this argument puts form over substance and allows any party to an arbitration agreement to avoid application of the agreement by wording the impugned court action in language other than that used in the arbitration clause. The analysis required under ss. 15(1) and (2) of the *Arbitration Act* requires the Court to look behind the form of the impugned court proceeding and ask what lies beneath.

[71] Mr. Elton argues that this case involves a "unique stay application" because if Mr. Buller is successful, it will deprive Mr. Elton of a statutory protection that is specifically designed to assist

shareholders who are unable to pursue the full extent of their legal entitlements because of a lack of information. From his perspective, it defies common sense, and is inconsistent with good public policy, to hold that by virtue of clause 5.11 in the shareholder agreement, the parties "agreed to effectively forgo a core right that accompanies being a shareholder in a company incorporated under the *CBCA*".

[72] I disagree that Mr. Buller's stay application is "unique". The argument made here is not dissimilar in its substance from the one put forward in *Qtrade* and rejected. In the words of Thackray J.A., the "involvement of the courts might well be delayed [by virtue of the arbitration], or not required at all … but its jurisdiction has not been ousted": *Qtrade* at para. 24.

[73] Mr. Elton also argues that his Petition does not raise the same concerns that have justified stays of proceedings in other cases. The Petition does not: (a) seek to resolve substantive issues between the shareholders; (b) require a court to make findings of fact in respect of those issues; (c) ask for a determination of wrongdoing or liability; or (d) seek the imposition of an award (other than costs on the Petition).

[74] To direct an investigation under the *CBCA*, a court need only be satisfied that "it appears" one of the grounds enumerated in s. 229(1) has been satisfied. For example, that "the business of the corporation or any of its affiliates is or has been carried on with intent to defraud any person". If an inspector is appointed, the inspector's sole responsibility will be to conduct an investigation of 10 Star's financial affairs and produce a report for review by both parties. Mr. Elton submits that neither an investigation under s. 229(1), nor the work of an inspector, will interfere with the jurisdiction of the arbitrator or raise the potential for inconsistent findings.

[75] These are distinctions, he says, that should carry significant weight in the analysis under ss. 15(1) and (2) of the *Arbitration Act*. In *Pandora*, a case relied upon by Mr. Elton, the differences between an arbitration and a *CBCA* investigation were considered material on whether a stay was justified, pending arbitration. Mr. Elton encourages the Court to follow *Pandora*.

[76] In that case, arbitration proceedings had commenced within the context of a shareholder dispute. The parties that started the arbitration subsequently brought an action under Ontario's *Business Corporations Act*, R.S.O. 1990, c. B-16, seeking a declaration of oppressive and unfairly prejudicial conduct. Within the context of the latter action, they sought an interlocutory order "directing that an investigation be made of the business and financial affairs" of the company, as well as the appointment of an inspector: *Pandora* at para. 11. The main issue before the court was whether the ability to seek relief under Ontario's *Business Corporations Act* had "been supplanted" by the arbitration agreement between the parties.

[77] The Ontario Superior Court held that the arbitration agreement did not preclude the court

action:

> 19 An inspector under Part XIII of the *OBCA* is appointed with the powers set forth in the Court's orders and for those purposes is a Court officer. The inspector is a fact-finder but does not determine civil liability. The inspector's role is inquisitional. He or she is given fact-finding and information-gathering powers, but these powers are not intended to be a substitute for discovery in the ordinary course of litigation or, for that matter, arbitration … Arbitration has many of the hallmarks of litigation. It is an adversarial process resulting in the adjudication of a dispute. Arbitration has none of the hallmarks of an investigation conducted by a Court-appointed officer.
>
> 20 It is not the function of the Court on a stay application under Article 8 to reach any final determination as to the scope of the arbitration agreement and arguable disputes should be referred to arbitration … However, the Court continues to have some residual jurisdiction to decide if the alleged dispute comes within the terms of the agreement. In my view, the arbitration clause would need to have much more explicit language than it does to encompass the determination of the Respondent's statutory obligations and the Applicants' statutory remedies under the *OBCA*. I conclude that the Application before the Court is not a dispute that falls within the arbitration clause in the Subscription Agreements.
>
> 21 It may be that on the hearing of the Application, the Court will conclude that other remedies such as the appointment of a receiver are available to the Applicants in the arbitration and a Court-appointed inspector is unnecessary. However, that determination is for another day. The arbitration clause does not stand in the way of that hearing. The Ontario proceedings do not duplicate the claims in the arbitration, nor are they being used to circumvent the discovery process in the current arbitration. Rather, the sole purpose of these proceedings is to enforce, in the forum specified by the *OBCA*, the Applicants' statutory right to know the financial health of SREI. The purpose of the arbitration is entirely different. It is to adjudicate the Applicants' entitlement to compensation resulting from the Respondent's alleged breaches of the Subscription Agreements.
>
> [Emphasis added. Internal references omitted.]

[78] I find the ruling in *Pandora* inconsistent with the result affirmed by the Court of Appeal in *Qtrade*, decided two months later.

[79] In *Qtrade*, the party opposing the stay argued that to prevent a party to an arbitration agreement from pursuing a statutory remedy, such as a declaration of oppression and/or the appointment of a receiver, the arbitration clause must contain clear wording to that effect: at para. 21. This argument found favour in *Pandora*. It did not in *Qtrade*, an authority that is binding on me. See paras. 21–24 of *Qtrade*.

[80] In any event, I have found that the factual basis asserted by Mr. Elton in his Petition relies heavily on the claims made in the arbitration. Moreover, an acknowledged primary purpose of the Petition is to gather information in support of the arbitration proceedings. Had these features been present in *Pandora*, it appears from para. 21 of the Ontario judgment that they would have made a difference to the analysis.

[81] See also *Blind Spot Holdings Ltd. v. Decast Holdings Inc.*, 2014 ONSC 1760, where court

proceedings were stayed pending arbitration, including a request for an investigation into corporate affairs under Ontario's *Business Corporations Act*: at paras. 25–27.

[82] This is the same form of relief that was sought in *Pandora*. The arbitration agreement in *Blind Spot* was broad in scope: "If any dispute shall occur between the parties hereto relating to the interpretation or implementation of any of the provisions of this Agreement, such dispute shall be resolved by arbitration": at para. 10. The absence of language specifically referencing the invocation of statutory remedies, including remedies available under the provincial *Business Corporations Act*, did not stop the court from imposing a stay. The Ontario authorities appear divided on this issue.

[83] On the application record, as a whole, I am satisfied that the matters underlying the Petition filed in September 2018 are closely intertwined with the disputes that form the basis for the claims made by Mr. Elton in the arbitration proceedings, and grounded in roles and responsibilities delineated under the shareholder agreement. At the very least, it is arguable that such is the case.

[84] Accordingly, the criterion for a stay under s. 15(1) of the *Arbitration Act* have been met.

B. Whether the Petition seeks an "interim measure of protection"

[85] Mr. Elton has raised an alternative argument; that is, in light of the nature of the relief sought in the Petition, the Petition proceedings should be allowed to proceed under the authority of s. 15(4) of the *Arbitration Act*:

> It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the court to grant that measure.
>
> [Emphasis added.]

[86] In *African Mixing Technologies (PTY) Ltd. v. Canamix Processing Systems Ltd.*, 2014 BCSC 2130, this Court accepted, within the context of international arbitrations, that it has jurisdiction to grant interim relief, "even where the parties have agreed to submit their dispute to arbitration": at para. 55.

[87] As explained by Justice Bruce:

> [55] … The court has an inherent jurisdiction over interlocutory matters even where there is a comprehensive statutory or contractual scheme for resolving the dispute where no adequate alternate remedy exists within that scheme. In *Canadian Pacific*, McLachlin J. (as she then was) says at para. 5:
>
> > The governing principle on this issue is that notwithstanding the existence of a comprehensive code for settling labour disputes, where "no adequate alternative remedy exists" the courts retain a residual discretionary power to grant interlocutory relief such as injunctions, a power which flows from the inherent jurisdiction of the

> courts over interlocutory matters: *St. Anne Nackawic Pulp & Paper Co. v. Canadian Paper Workers Union, Local 219*, [1986] 1 S.C.R. 704, at p. 727. The "residual discretionary jurisdiction in courts of inherent jurisdiction to grant relief not available under the statutory arbitration scheme" was most recently affirmed by this Court in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, at paras. 41, 54, 57 and 67, and *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967, at para. 3.

> [56] The underlying principle established in *Canadian Pacific* is that the residual jurisdiction to grant interlocutory relief unavailable under the statutory or contractual scheme is not inconsistent with a system based on arbitration as a means of resolving disputes because such a residual authority does not undermine that system: *Canadian Pacific* at para. 7. This principle, in turn, is codified in s. 9 of the *ICAA*, which provides that, "[i]t is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure."
>
> [57] Regardless of where the dispute will ultimately be resolved, the forum selected for the final resolution of the dispute, and the applicable law, it is clear that the court has jurisdiction to grant an interim injunction pending final resolution of the dispute …
>
> [59] Whether the Court should exercise its jurisdiction to grant interim relief will depend upon a number of factors: (1) Whether the interlocutory relief claimed would pre-empt a final decision of an arbitrator: *Channel Tunnel* at 367-368; (2) Whether the relief claimed treads on the jurisdiction of the arbitrator to grant interim protective measures: *Vancouver Aboriginal Justice Centre* at paras. 34-36; (3) Whether the arbitration procedure provides for the interlocutory relief claimed: *Canadian Pacific* at para. 5; and (4) Whether the remedy sought is to preserve the status quo pending arbitration and not to give the plaintiffs the remedy they ultimately seek …
>
> [Emphasis added. Internal references omitted.]

[88] I accept that s. 15(4) of the *Arbitration Act*, which embodies language similar to the provision cited in para. 56 of *African Mixing Technologies*, codifies the inherent jurisdiction explained by Justice Bruce.

[89] At the same time, I also agree with the Ontario Superior Court in *International Steel Services Inc. v. Dynatec Madagascar S.A.*, 2016 ONSC 2810 at para. 38, where it was held that what is likely contemplated by this statutory language, is "an interim measure pending the ability of the arbitration process to deal with the issues". [Emphasis added.]

[90] See also *Bodnar v. Payroll Loans Ltd.*, 2009 BCSC 1205 at paras. 52–53, wherein Griffin J., as she then was, noted:

> An "interim measure of protection" pursuant to s. 15(4) is a narrow exception to the bar on taking "any other step in the [legal] proceedings" other than an appearance, pursuant to s. 15(1). While an "interim measure of protection" is not defined, its plain meaning in context of the entire section is that it is a step "interim" to the parties' dispute being decided by way of arbitration, and that is also "protective" of that party's rights in the dispute, pending the outcome of the arbitration. This is not a step that on its face appears to accept the court's jurisdiction and seeks to advance the party's position in the litigation generally.
>
> The wording of s. 15(4) is identical to that of s. 9 of the *International Commercial Arbitration*

> *Act*, R.S.B.C. 1996, c. 223. This language was interpreted by Bouck J. in *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.* (1994), 89 B.C.L.R. (2d) 132, 113 D.L.R. (4th) 116 (S.C.) to include "measures that conserve the subject matter of a dispute; measures to protect trade secrets and proprietary information; measures to preserve evidence; pre-award attachments to secure an eventual award and similar seizures of assets...." (cited with approval by Rowles J.A. in *R.(S.M.) v. B.(R.S.)*, 2003 BCCA 412, 41 R.F.L. (5th) 159 [In Chambers]).
>
> [Emphasis added.]

[91] On a reading of Mr. Elton's Petition, as a whole, it is my view that it seeks much more than an interim measure of protection "pending the ability of the arbitration process to deal with the issues".

[92] The Petition seeks an investigation of 10 Star; an order appointing an inspector; and a number of other orders explicitly intended to empower the inspector to conduct a comprehensive and far-reaching fact-finding inquiry into the corporation's financial affairs. This includes the power to compel third-party production and to conduct a "hearing, administer oaths and examine any person upon oath". It is invariable that during the course of any such enquiry, the inspector will review, gather information about, and making findings in respect of matters that will also be considered by the arbitrator in light of the nature of the claims raised by Mr. Elton in the arbitration.

[93] In my view, the breadth of the relief sought, and, more importantly, Mr. Elton's acknowledgement that a primary purpose of the enquiry will be to assess whether there are additional claims he can make in the arbitration, takes this Petition beyond what is contemplated by s. 15(4).

[94] The Petition is not focussed on restraining the disposal of 10 Star's assets; enjoining Mr. Buller in any way; or preserving evidence known to exist. Instead, I agree with counsel for Mr. Buller that on its face, it appears largely centered on advancing Mr. Elton's position in the arbitration by expanding the nature and scope of the claims made against Mr. Buller through the availability of additional information. As noted in *Bodnar* at paras. 52–53, this is not an appropriate application of s. 15(4) of the *Arbitration Act*.

[95] I decline to find that the relief sought in the Petition constitutes an "interim measure of protection".

[96] Mr. Elton should proceed through the arbitration, avail himself of the discovery process provided for under the *Arbitration Act*, as well as the other procedural and substantive powers of the selected arbitrator. If there are matters that cannot be addressed within that forum, for jurisdictional reasons or otherwise, consistent with the Chambers decision in *Qtrade*, affirmed on appeal, completion of the arbitration does not preclude Mr. Elton from accessing statutory relief

where appropriate:

> [24] … a stay of the proceeding at this stage does not oust the review of this matter by the courts or deprive the plaintiff ultimately of the oppression relief it requests … Once the arbitrator has done his work, if there is still a dispute between the parties which requires the additional relief requested in the petition … then that matter can be pursued in the Courts at that time. Much of the work would then be done. A stay that is requested by the respondent does not, in my view, end the oppression action. It would simply hold it in abeyance until the arbitrator did the work that the parties agreed he or she should do if the parties had a dispute or came to an impasse which could not be resolved.
>
> As excerpted in 2007 BCCA 290 at para. 12.

VI. DISPOSITION

[97] For the reasons provided, I grant a stay of the Petition pursuant to ss. 15(1) and (2) of the *Arbitration Act*, pending completion of the arbitration.

[98] Costs on the application shall be costs in the cause.

"DeWitt-Van Oosten J."