## CASE SUMMARY

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# COURT STAYS PARTY'S OWN ACTION IN FAVOUR OF ARBITRATION

***Alberici Western Constructors Ltd. v. Saskatchewan Power Corp.***

The Saskatchewan Court of Queen's Bench has reaffirmed that arbitration, freely chosen by the parties to a construction contract, takes primacy over litigation. In *Alberici Western Constructors Ltd. v. Saskatchewan Power Corp*., the court was

faced with two conflicting Ontario decisions on point and followed the decision allowing a party to stay its own action in favour of arbitration.

In this case, the owner of the Boundary Dam, Saskatchewan Power Corporation ("SPC"), contracted with Alberici Western Constructors and Balzer's Canada Inc. ("AB Western") for the construction of a turbine island mechanical installation as part of the integrated carbon capture and sequestration demonstration project at the Boundary Dam. Three subcontractors were also involved in this litigation: Technical Heat Treatment Services Ltd., Grace Instrumentation Controls Ltd., and Safway Group.

The agreement between the General Contractor for the Project, AB Western, and the Owner, SPC, included ten schedules. Schedule 10 included a comprehensive clause regarding dispute resolution, requiring that any dispute between the parties be resolved exclusively by arbitration pursuant to the provisions of *The Arbitration Act, 1992*.

AB Western's subcontracts with Grace and Technical Heat contained a dispute resolution clause that required disputes between the subcontractor and the contractor to be decided by the same tribunal and in the same forum as disputes between the contractor and the owner.

During the course of the project, a significant dispute arose between AB Western and SPC. AB Western alleged that SPC refused to pay the amount outstanding, totalling $37,828,355.62, despite having substantially performed its obligations under the agreement. In addition, Technical Heat delivered two written notices of claim of lien for $2,336,302.04 and $5,780.25. Grace delivered a written notice of claim of lien in the amount of $1,246,328.04.

AB Western issued a Statement of Claim on April 25, 2014, naming SPC, Technical Heat, and Grace as defendants. Four days later, it also served a notice of arbitration on SPC, along with a copy of the issued Statement of Claim on SPC, but stated that it did not require a Statement of Defence to the Statement of Claim, as it wished to proceed by arbitration. Counsel for AB Western gave evidence that the action was commenced out of an abundance of caution, in the event that the arbitration failed to resolve all of the issues in dispute and AB Western might find itself statute barred from pursuing the unresolved portion of its claim in court.

SPC advised AB Western that its position was that the matter should be resolved through litigation and subsequently served and filed its Statement of Defence and Counterclaim. AB Western then applied to stay its own action, a relief opposed by SPC, which applied to strike and vacate the notice of arbitration served by AB Western.

Justice Elson, in the Saskatchewan Court of Queen's Bench, began with the general principle that "absent a compelling reason, parties with relatively equal bargaining power should generally be bound to resolve their disputes by the means they have freely chosen".

SPC relied on s. 8(1) of *The Arbitration Act, 1992*, to argue that AB Western was expressly prohibited from bringing such a motion. Section 8(1) reads:

> Subject to subsection (2), if a party to an arbitration agreement commences a proceeding with respect to a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

SPC highlighted that the phrase "on the motion of another party to the arbitration agreement" meant that the Legislature expressly limited the right to apply for a stay to a party other than the one that commenced the litigation. Each party relied on Ontario case law to support its position. SPC relied on *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation*; AB Western relied on Master Short's decision in *Advanced Construction Techniques Ltd. v. OHL Construction Canada*.

Holding that "the interpretation of s. 8 must be drawn from the context of the statute as a whole, as well as from its history", Justice Elson declined to follow *Penn-Co*., holding that "s. 8 should not be seen as a provision to determine standing as much as it sets out the circumstances in which a court is not merely empowered to direct a stay, but is obliged to do so".

Instead, Justice Elson adopted Master Short's ruling in *Advanced Construction*, where Master Short granted a lien claimant's motion to stay its own action in favour of arbitration. In that case, Master Short drew on the considerations set out in s. 6 of the *Arbitration Act, 1991* (s. 7 of the Saskatchewan statute) in exercising his discretion under s. 106 of the *Courts of Justice Act* to grant a stay.

Accordingly, Justice Elson rejected SPC's argument that AB Western was prohibited from applying for a stay under s. 8 of *The Arbitration Act, 1992* and held that it was appropriate for the court to consider the factors in s. 8 of *The Arbitration Act, 1992* when exercising discretion under s. 37 of *The Queen's Bench Act, 1998.*

SPC's argument that a stay of the present action would increase the risk of duplicate proceedings was also rejected. Justice Elson highlighted that the underlying theme of the current legislation is that arbitration, freely chosen, takes primacy over litigation. Section 8(1) of *The Arbitration Act, 1992* requires a court to direct a stay, subject to very few exceptions listed in s. 8(2). Since multiplicity of proceedings is not listed among the exceptions in s. 8(2), the court held that the possibility of multiple proceedings, multiple parties, or third-party actions did not preclude a stay.

SPC's next argument was that AB Western had reduced the value of the arbitration as a means of dispute resolution by issuing a Statement of Claim thereby taking away the feature of confidentiality. Justice Elson had "serious doubts that this concern is as significant" as SPC suggested, and rejected this argument, holding that although a Statement of Claim was a public record of the alleged material facts, it alone did not constitute a breach of the confidentiality clause. Although documents had been disclosed and made part of the public record as a consequence of the applications, SPC was hardly in a position to complain of any unfairness resulting from this. Had it agreed to arbitration, this issue would have been avoided altogether.

Justice Elson also rejected SPC's argument that the stay application had caused delay, as SPC had proceeded on the basis that the dispute would be adjudicated by way of litigation and served its Statement of Defence and Counterclaim. As AB Western had specifically informed SPC that it did not require a statement of defence, SPC's argument that it believed the matter would proceed by litigation was disingenuous.

SPC's final argument was that AB Western waived any right it has to invoke the arbitration clause by issuing a Statement of Claim. However, the Court noted that the cases relied on by SPC for this argument all predated modern arbitration legislation, which entrenched the primacy of arbitration over litigation. The Court found there was no evidence of the intention necessary to establish waiver. In fact, the letter by AB Western, dated April 29, 2014, was compelling evidence to the contrary.

Accordingly, the Court held there was no reason to disregard the dispute resolution process the parties freely chose when they entered into the agreement. AB Western's application for a stay of its own action was granted.

**Saskatchewan Court of Queen's Bench**

*March 6, 2015*

*Elson J.*