Canadian College of Construction Lawyers

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2022 BCSC 2273

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Secondary Topic:
III. Building Contract
Jurisdiction:
British Columbia
Authors:
Chris Ruskin, Adam Way and Farina Alibhani

Case Comment: Centurion Apartment Properties Limited Partnership v Loco Investments Inc.

In the recent decision, *Centurion Apartment Properties Limited Partnership v Loco Investments Inc.*, 2022 BCSC 2273, the British Columbia Supreme Court examine two critical issues that commonly arise in claims for recovery of pure economic loss. First, the court considered whether there was a relationship of sufficient proximity between the owner and engineer, with whom it had no contract, to establish a duty of care. Second, the court considered the enforceability of a limitation of liability clause in the engineer's contract that limited its total liability to its fees for services.

In addressing these issues, the court had the opportunity to revisit the leading cases that have considered recovery for pure economic loss and the necessary proximity analysis. As we discuss below, the court's decision highlights the importance of the parties' contractual arrangements to the proximity analysis and the reluctance of courts to allow tort law to be used as a means of circumventing the strictures in parties' freely negotiated contracts.

The Parties and their Contractual Arrangements

The plaintiff, Centurion Apartment Properties ("Danbrook"), formerly known as 1113407 B.C. Ltd. ("111 Ltd."), was the current legal owner of a high-rise rental apartment building in Langford, British Columbia (the "Building"). The Building was constructed in 2017 to early 2019.

Danbrook, together with the other plaintiffs, its parent Centurion Apartment Properties Limited Partnership ("Centurion LP"), and Centurion LP's general partner, Centurion Apartment Properties GP ("Centurion GP"), sought recovery from the defendants for losses arising from dangerous defects in the structural design of the Building.

The defendants, Loco Investments Inc. ("Loco"), 111 Ltd., and DB Services of Victoria Inc. ("DB Services") were related companies. 111 was set up as a wholly owned subsidiary of Loco to own the land and Building (once constructed). 111 held the lands and the Building as bare trustee for Loco.

There were three contracts that organized the parties' contractual arrangements. We briefly review each of these contracts, and the relevant provisions contained within each, below.

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The DB Services Contract

111 entered into a standard form CCDC14 "Design-Build Stipulated Price Contract" with DB Services for the design and construction of the Building (the "DB Services Contract"). The DB Services Contract included two notable clauses.

1. A clause making DB Services, as the design-builder, "fully responsible to the Owner for acts and omissions of Other Consultants, Subcontractors, Suppliers and of persons directly or indirectly employed by them as for acts and omissions of persons directly employed by the Design-Builder" (GC 3.4)

A clause requiring DB Services to obtain professional liability insurance with limits not less than $1 million per claim and with an aggregate of not less than $2 million, along with a clause limiting DB Services' liability to the Owner for claims arising from the design services to the insurance limits when covered by such insurance (GC 11.1 and 12.3).

The Purchase and Sale Agreement

The plaintiff Centurion LP also entered into a purchase and sale agreement (the "APS"), pursuant to which it agreed to purchase the lands and the Building from Loco. The APS also included a an option for Centurion LP to purchase all of the issued and outstanding shares of 111. Centruion LP exercised this option and 111 eventually changed its name to Danbrook, as noted above.

Pursuant to the APS, Centruion LP obtained various representations and warranties from Loco including that the Building would be safe, habitable, and ready for occupancy and would comply with basic safety standards.

The Trilogy Contract

Finally, there was the contact between Trilogy and DB Services with respect to Trilogy's structural design services on the project.

DB Services and Trilogy entered into a contract (the "Trilogy Contract") for the provision structural engineering services in connection with the design and construction of the Building. The parties had worked together in the past and entered into very similar contractual arrangements. Importantly, the Trilogy Contract included a clause stipulating its maximum liability "whether in contract or tort" to the amount of fees paid to it for the design services on the project.

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Duty of Care Analysis – Trilogy and the Plaintiffs

The court first considered whether there existed a duty of care between Trilogy and the Plaintiffs. Following the Supreme Court of Canada's decision in *Maple Leaf Foods*[1], the first step in this analysis required the court to consider whether there was a relationship of sufficient proximity between the parties.

The court rejected the argument that the duty of care could be established based on an existing or analogous category. While there were elements that supported a finding of proximity and the recognition of a duty of care (such as the supply of a negligent design), there were aspects of the relationship that did not. Given this, the court undertook a full duty of care analysis, noting that it is the nature of the particular relationship that must be examined.

With this, the court turned to the parties' contractual arrangement.

As outlined above, Danbrook (then 111), DB Services, and Trilogy ordered their relationship by way of contracts. Indeed, in the court's view, the parties considered and allocated the very risk at issue in this proceeding (design defects in the Building) through the contractual terms. Once again, relying on the Supreme Court's comments in *Maple Leaf Foods*, the court reiterated that "courts must be careful not to disrupt the allocations of risk reflected, even if only implicitly, in relevant contractual arrangements".

The court found that the plaintiffs had made available to them adequate contractual protection within their respective commercial relationships from the risk of loss against DB Services. The plaintiffs anticipated the very risk that occurred and addressed that risk in the DB Services Contract. Specifically, Danbrook placed the responsibility of the Building's proper design entirely on DB Services, requiring that DB Services obtain professional liability insurance and stipulated that DB Services indemnify it with respect to the negligent performance of the design services.

DB Services, in turn, entered into the Trilogy Contract which contained standard terms and conditions that the parties were familiar with. There was no contractual relationship between any of the plaintiffs and Trilogy.

The court concluded that, through this contractual matrix, the plaintiffs had available to them adequate protection via the DB Services Contract and the APS. In the circumstances, a finding of a duty of care between the plaintiffs and Trilogy would disrupt the allocation of risk reflected in the contractual arrangement made amongst the parties.

[1] *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35

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As the court put it, any potential relationship of proximity between Trilogy and Danbook was "negated" by virtue of the "multipartite contractual arrangement between and among Danbrook, DB Services and Trilogy". In the result, the court found that there was no proximity between Trilogy and the plaintiffs to found a duty of care.

Enforceability of Trilogy's Limitation of Liability

Given the presence of third party claims as between the defendants, Trilogy and its employees also applied for a declaration that any liability they may have to any party seeking contribution and indemnity was limited to the amount of fees paid to Trilogy in respect of the Building,

The court found that there is nothing inherently unreasonable or sinister about a limitation of liability clause in a freely negotiated contract, particularly in circumstances where the parties are sophisticated and capable of organizing their commercial affairs by allocating risk in a manner different from that which would otherwise be provided by law. This was not a situation where there was an imbalance of power or where issues of unfairness or unconscionability were being alleged.

The court granted the declaration sought by Trilogy. It also noted that deciding this issue at an early stage would assist the parties as they moved forward with the action.

Conclusion

This decision highlights the importance of the parties' contractual matrix to the duty of care analysis. In claims of pure economic loss, owners may not be able to circumvent the contractual protections and limitations they have negotiated, when seeking to bring claims against parties further down the chain of construction, such as design professionals.

The court's decision also reminds us that limitation of liability clauses will be enforced, particularly where the parties are sophisticated and there is no imbalance of power. In addition, courts seem increasingly open to making these sorts of determinations at an early stage of the litigation, which may open the door for more applications of this nature.

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2022 ONSC 3485

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CanLii Reference:
2022 ONSC 3485

ONTARIO

Jason Annibale

Kyle Lambert

The Skeptical Arbitrator, Claims of Bias, and the Search for Truth: *Dufferin v. Morrison Hershfield*

In their article, "Arbitrator Questioning: Sphinx or Skeptic?", Duncan Glaholt and Markus Rotterdam consider what constitutes appropriate arbitrator intervention with specific regard to witness questioning.[1] They conclude that arbitrators questioning witnesses on material points and other streamlining measures are warranted where such measures provide clarity and efficiency.

This conclusion was put to the test in *Dufferin v. Morrison Hershfield*[2] ("Dufferin"). In this court application, Justice Woodley considered whether the arbitrator, Stephen Morrison, demonstrated a reasonable apprehension of bias when questioning witnesses. Justice Woodley found that Morrison had not done so. More than that, Her Honour found that Morrison was an engaged arbitrator who "worked tirelessly… to determine the truth of the issues before him."[3]

Background

The application was brought by two joint venture partners: Dufferin, one of Canada's largest heavy civil construction companies, and Aecon Construction and Materials Limited, Canada's largest public infrastructure contractor. Their joint venture, RapidLINK, was the design-builder selected by The Regional Municipality of York ("**the Owner**") for the VivaNEXT Yonge Street Bus Rapidway Design-Build Project (the "**Project**"). RapidLINK subcontracted with Morrison Hershfield ("**MH**") for the Project's design.

RapidLINK came to claim against the Owner some $149 million for extras and delay. This claim included those of MH as against RapidLINK. RapidLINK and the Owner mediated and ultimately settled their dispute for the Owner's payment to RaidLINK of $63 million. As part of the settlement, RapidLINK assumed all liability for MH's claims.

Following its settlement with the Owner, RapidLINK denied MH's claims. MH accordingly commenced the arbitration against RapidLINK for $33 million. At RapidLINK's suggestion, the parties selected Morrison as arbitrator.

The arbitration was a complex proceeding. The parties delivered over 20 total affirmative, reply and surrebuttal witness statements, 16 total expert reports, and over 2,600 pages of evidence. After 14 hearing days, and RapidLINK having consumed its allotted chess clock time, RapidLINK brought an application to remove Morrison for bias. The initial application alleging bias was before Morrison, who dismissed it. In response, RapidLINK brought the court application.

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[1] Canadian College of Construction Lawyers Journal 2016, pp 81-104.
[2] *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485 (CanLII).
[3] *Dufferin*, para 167.

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The Application

RapidLINK sought Morrison's removal on the grounds that he,

- made repeated statements of position (rather than asking questions) and examined RapidLINK's witnesses in a manner suggesting that he had pre-judged their evidence;
- advocated positions favourable to MH, sought admissions from RapidLINK's witnesses, and engaged in cross-examination; and
- failed to demonstrate a balance and proportionate approach to witnesses of both sides.

MH countered that Morrison's interventions were fair, reasonable, and specifically targeted to permit witnesses to fully explain their positions.

The Law – Reasonable Apprehension of Bias

The bar for proving reasonable apprehension of bias is a high one. The applicant must show that the reasonable, informed, right-minded person would, viewing the matter realistically and practically – and having thought the matter through – would conclude that it is more likely than not that the decision-maker would not decide fairly.[4]

In addition to this primary test, Justice Woodley added the following observations about reasonable apprehension of bias from the jurisprudence:

- the threshold for finding real or perceived bias is high;
- the presumption of impartiality is high;
- the inquiry is objective, requiring a realistic and practical view of all the circumstances from the perspective of the reasonable person;
- evidence of bias, beyond mere suspicion, is required; and
- when considering bias, whether actual or perceived, context matters.[5]

[4] *Dufferin*, paras 109-110.
[5] *Dufferin*, para 112.

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Justice Woodley observed that when evaluating context, there is a difference between alleged bias in private arbitration and in civil litigation. In private arbitration, the decision-maker is chosen by the parties, the proceedings are typically confidential, and the parties are free to establish which rules and procedures will govern their arbitration, including whether the arbitrator can question witnesses directly. In the arbitration between RapidLINK and MH, the parties specifically agreed that the arbitrator could question witnesses.

The Court's Decision

Justice Woodley denied RapidLINK's application, finding no reasonable apprehension of bias. In doing so, Her Honour brought great focus to Morrison's conduct in the context of his appointment and the arbitration process.

Justice Woodley found that Morrison was selected for his expertise, education and experience.[6] Her Honour noted that, prior to the oral opening statements, Morrison had,

- already heard and determined two motions;
- received all evidence-in-chief, rebuttal, reply witness statements, and opening arguments; and
- "read ahead".[7]

Justice Woodley found that there was no question that Morrison had informed himself of the case on the full record available and conducted his questioning accordingly.

Her Honour focused heavily on the arbitration's transcripts, finding as follows:

> The transcripts do not read like an ordinary court proceeding. The Arbitrator purposefully and intentionally prepared questions for every witness. The Arbitrator intervened whenever evidence or testimony caused him to question the nature, effect, or reliability of that evidence or testimony regardless of whether the witness was called for the Applicants or the Respondent. **Contrary to the position of the Applicants, it is my view on reading the transcripts, that the Arbitrator's interventions were intended to ensure "a fair and independent process" and to enable the parties to provide their "full answer and defence" and not otherwise.**

[6] *Dufferin*, para 115.
[7] *Dufferin*, para 116.

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> ... contrary to the Applicants' submissions that the Arbitrator's impugned conduct was focused on the Applicants' witnesses, I found it necessary to re-trace and re-read the portions involving the questioning by the Arbitrator to determine which party had called a specific witness being questioned or queried by the Arbitrator. Having completed this task, **I found no significant difference in the Arbitrator's approach to any of the witnesses**.
>
> The Arbitrator was engaged and asked incisive questions of most, if not all, witnesses called to testify. The length of his questions often depended on the answers provided and were not (in my view) dependent on whether the witness was called by the Applicants or the Respondent.[8]

Justice Woodley's careful examination of the arbitration record, grounded her conclusion that, quite apart from having no reasonable apprehension of bias, Morrison properly sought truth as a well-prepared, expert, and skeptical arbitrator:

> Having reviewed and considered the interactions between the Arbitrator and counsel and the witnesses at trial, I am struck by the Arbitrator's preparedness for each witness and each day of hearing. The Arbitrator's questions and comments evidence that he is a truly a subject matter expert who seeks to find the truth. In his pursuit of the truth, the Arbitrator asked many questions of many witnesses but in my view did not become an advocate for either party. Instead, he positioned himself between the parties and poked and prodded each witness to ensure that both parties had a fulsome hearing, were granted an opportunity to explain their evidence, and had provided the Arbitrator with all information within their knowledge relevant to the proceeding.[9]

Takeaways

Putting aside the obvious challenge of establishing a reasonable apprehension of bias on the part of arbitrators, *Dufferin* confirms that arbitrators can and should in the normal course take an active role in the arbitration process. Parties involved in arbitration should be prepared for active, precise and even pointed questioning from their arbitrators. Mere discomfort resulting from an arbitrator's questioning does not mean an arbitrator is biased. Such discomfort may mean the arbitrator is actually doing their job.

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[8] *Dufferin*, paras 123-125 (emphasis added).
[5] *Dufferin*, para 165.

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Don Lucky

Jack Kent

In *Peace River Hydro Partners v Petrowest Corp.* (2022 SCC 41), the Supreme Court of Canada considered whether and in what circumstance a contractual agreement to arbitrate should give way to public interest in the orderly and efficient resolution of a court-ordered receivership under s. 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 ("BIA").

Ultimately, the majority of the Court decided that a party seeking to avoid arbitration must establish, on a balance of probabilities, that a stay in favour of arbitration would compromise the integrity of the parallel insolvency proceedings (Para 8).

Although the court's decision was highly fact specific, the Supreme Court of Canada provided guidance on numerous issues relating to arbitration, including:

a) The principle of competence-competence;
b) The analytical framework for stay of proceedings in favour of arbitration;
c) Who is party to arbitration agreements;
d) What constitutes a step within a proceeding under section 15(1) of the Arbitration Act;
e) Whether the doctrine of separability applies;
f) Definitions and examples of each of "void, inoperable, and incapable of being performed" under section 15(2) of the Arbitration Act; and
g) The relevant factors to determine whether an arbitration clause is inoperable in insolvency proceeding.

BACKGROUND

The dispute centered around the various partners of Peace River Hydro Partners, which was a partnership formed to build a hydroelectric dam in northeastern British Columbia.

The appellants are two members of the partnership and their parent corporations ("**Peace River**"). The respondent, Petrowest Corporation ("**Petrowest**"), is the third member of the partnership and a construction company who subcontracted certain portions of the work.

Multiple agreements and purchase orders govern the contractual relationship between the parties. Except for some purchase orders, the agreements

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contain different arbitration clauses relating to different disputes and stipulate different procedures.

In August of 2017, Petrowest entered receivership. Approximately a year later, Petrowest's court-appointed receiver brought a civil claim against Peace River to collect funds allegedly owing to Petrowest for performance of the work subcontracted under the agreements.

THE LOWER COURT DECISIONS

The British Columbia Supreme Court (*2019 BCSC 2221*) determined that it had "inherent jurisdiction" flowing from s. 183 of the BIA to override arbitration agreements. Section 183 of the BIA states:

> *Courts vested with jurisdiction*
>
> **183 (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:
>
> . . . . .
>
> **(c)** in the Provinces of Nova Scotia and British Columbia, the Supreme Court; . . . .
>
> ...

The trial judge determined that this "inherent jurisdiction" could be exercised either through section 15(2) of the *Arbitration Act* or the BIA could prevail over the *Arbitration Act* on the principle of paramountcy (Para 25). Section 15 of the *Arbitration Act* states:

> ***Arbitration Act - Stay of proceedings***
>
> **15** (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, 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.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines

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that the arbitration agreement is void, inoperative or incapable of being performed.

The Chambers judge went on to exercise her "inherent jurisdiction" to dismiss the stay application.

The British Columbia Court of Appeal (2020 BCCA 339) did not address whether the chambers judge had the discretion to refuse to grant a stay. Instead, it relied on the doctrine of separability (which permits arbitration clauses to be treated as "self-contained contract collateral to the containing contract"), to permit the receiver to disclaim an otherwise valid arbitration agreement (Para 30). Accordingly, the Receiver was either not a party to the arbitration agreement or had disclaimed the arbitration agreements rendering them inoperative or incapable of being performed within the meaning of s. 15(2) (Paras 30 to 31).

Competence-Competence

Competence-Competence is a principle that gives precedence to the arbitration process and holds that "arbitrators should be allowed to exercise their power to rule first on their own jurisdiction" (Para 39).

Although the Court reiterated that Canadian law has generally adopted the principle of competence-competence, this principle is not absolute and courts may determine jurisdiction "if the challenge involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record" (Para 42). The Court also confirmed that courts have "particular expertise" with these questions and allowing the courts to decide permits the matter to be resolved with finality (Para 42).

Given that only a superficial consideration of the evidentiary record was required, the Court determined it had jurisdiction to determine jurisdiction. This result is not surprising and it will be a unique case that requires a detailed review of the evidentiary record at this early stage of proceedings.

Analytical Framework for Stay of Proceedings in Favour of Arbitration

There are two parts to stay provisions in provincial arbitration legislation across the country: technical prerequisites and statutory exceptions.

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A. Technical Prerequisites

First, there are four technical prerequisites in section 15(1) of the Arbitration Act, which the party seeking the stay needs to demonstrate an "arguable" or "prima facie" case. These prerequisites are: (a) an arbitration agreement exists, (b) court proceedings have been commenced by a "party" to the arbitration agreement, (c) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration, and (d) the party applying for a stay in favour of arbitration does so before taking any "step" in the court proceeding (Para 80). The parties only disagreed on the second and fourth prerequisite.

i. A Receiver is a Party to an Arbitration Agreement

For the second technical prerequisite (court proceedings commenced by a "party"), the Receiver relied on the Court of Appeal's analysis to argue that a court-appointed receiver cannot be a party to the arbitration agreement because it is a separate legal entity from the debtor with fiduciary duty to the appointing court (Para 101).

The Court rejected this argument because it would violate basic principles of contract law to permit a receiver to enforce a contract on a debtor's behalf while avoiding the debtor's burdens (i.e. the obligation to arbitrate) and would be inconsistent with both statutory interpretation and the central purpose of the Arbitration Act. As a result, a receiver may become bound by arbitration agreements in accordance with the ordinary principles of contract law (Para 118).

ii. A Request for an Extension of Time is not a "Step"

For the fourth technical prerequisite (was a "step" taken in a court proceeding), the Receiver argued that Peace River's letter requesting an extension of time to file a defence constitutes a step in the proceedings.

The Court articulated the proper question as "whether the party should be held impliedly to have affirmed the correctness of the proceedings and its willingness to go along with a determination of the court instead of arbitration" (Para 98). In the Court's view, requesting an extension of time did not constitute a "step".

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B. Statutory Exceptions

The second component is the statutory exceptions to a mandatory stay of court proceedings (i.e. "void, inoperable or incapable of being performed"), which the party opposing the stay needs to demonstrate on a balance of probabilities (Para 88). If not, the court must grant a stay.

i. Doctrine of Separability

As noted above, the doctrine of separability permits arbitration clauses to be treated as self-contained contract collateral to the containing contract. A preliminary issue is whether a receiver can unilaterally disclaim an arbitration agreement rendering it "void, inoperable or incapable of being performed".

The Supreme Court of Canada disagreed with the Court of Appeal decision because it would be contrary to text and intent of s. 15 and "diminishes the presumptive enforceability and overall predictability of arbitration agreements, which was the reason for Canada ratifying the New York Convention and for British Columbia adopting the Model Law" (Para 123). The Court strongly disagreed that a court appointed receiver should have this power by stating that "[g]iven the clear expression of legislative will in favour of arbitral jurisdiction embodied in the *Arbitration Act*, the enforceability of an otherwise valid arbitration agreement should not be subject to the whims of any single party, even a court-appointed receiver" (Paras 124, 168).

ii. Void

Arbitration agreements are *void* when they are "intrinsically defective" according to the usual rules of contract law, such as when they are "… undermined by fraud, undue influence, unconscionability, duress, mistake, or misrepresentation" (Para 136). The parties agreed that these issues were not present in this case.

iii. Incapable of Being Performed

Arbitration agreements are *incapable of being performed* "…where the arbitral process cannot effectively be set in motion" due to impediments beyond the parties' control (Para 144).

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These could include physical impediments such as the non-availability of the specified arbitrator, the dissolution of the chosen arbitration institution, or political circumstances at the seat of arbitration. These could also include legal impediments such as the subject matter of a dispute is expressly covered by legislation. The parties also agreed that these issues were not present in this case.

iv. Inoperable

Arbitration agreements are *inoperable* when they "have ceased for some reason to have future effect" or "have become inapplicable to the parties and their disputes" (Para 138). Examples include frustration, discharge by breach, waiver or subsequent agreement between the parties.

As any statutory exception, the exception will be interpreted narrowly with the party seeking to avoid arbitration "bearing a heavy onus of showing it applies" (Para 139). Inconvenience, multiple parties, intertwining of issues with non-arbitrable disputes, increased cost, and delay, will not alone be sufficient to find an arbitration agreement inoperable.

Despite the potential hurdles, the Court determined s. 183(1) (confirming a court's jurisdiction in bankruptcy and insolvency matters may be exercised concurrently with civil matters) and s. 243(1)(c) (permitting a court to take any action it considers advisable or just and convenient) of the BIA provide a statutory basis to find an arbitration agreement inoperative (Paras 146 to 149).

Determining whether an Arbitration Clause is Inoperable in Insolvency Proceedings

The following non-exhaustive list of factors were articulated by the Court to consider when deciding whether the arbitration clause is inoperative:

(a) Effect of arbitration on the integrity of the insolvency proceeding

The court should balance party autonomy with the need for the orderly and efficient resolution of insolvency proceedings (Para 155). If the process is compromised, the arbitration may be inoperable.

This was the determinative factor in this case. Enforcing the arbitration agreement would compromise the orderly and efficient resolution of the receivership proceedings because there are at least four different arbitrations

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involving seven different sets of counterparties, some claims are not subject to the arbitration, and there is a serious risk of conflicting outcomes (Paras 174 to 178)

(b) Relative prejudice to the parties from the referral of the dispute to arbitration

The court should override the parties' agreement to arbitrate their dispute only where the benefit of doing so outweighs the prejudice to them (Para 155). Since Peace River had not demonstrated any prejudice and conceded that the single judicial proceeding would be most efficient and cost-effective route, the court found that arbitration would compromise the receivership proceedings.

(c) Urgency of resolving the dispute

This factor confirms that courts should prefer the more expeditious procedure. As stated above, this factor weighed in favour of court proceedings because the parties agreed that a single judicial proceeding would be the most efficient and cost-effective route.

(d) Applicability of a stay of proceedings under bankruptcy or insolvency law

Although the court did not consider this factor, the court contemplated that bankruptcy or insolvency legislation may impose a stay that precludes any proceedings, including arbitral proceedings, against the debtor. If such a stay applies, the debtor cannot rely on an arbitration agreement to avoid the bankruptcy or insolvency; the agreement becomes inoperative.

CONCLUSIONS

In conclusion, parties should be aware that arbitration agreements in court-ordered receiverships may be inoperable if they impact the orderly, efficient and expedient receivership process. Although this case was highly fact-dependent, the court has provided a roadmap and relevant factors for other parties to assess this issue in future proceedings.

Timing is Everything: How Best to Protect your Interests when Liening Condominium Projects

Avli BRC Developments Inc v BMP Construction Management Ltd
2023 ABCA 147

LU #164 [2023]

Primary Topic:
IX. Construction and Builders Liens
Jurisdiction:
Alberta
Author:
Catriona Otto-Johnston, Rose LLP

CanLii Reference:
2023 ABCA 147

ALBERTA

Catriona Otto-Johnston

Nearly four years after liens were registered on a Calgary condominium project, the Alberta Court of Appeal has dismissed the owner's appeal, and in doing so, has confirmed the liens are valid.

In 2019, Avli BRC Developments Inc. ("Avli"), constructed a condominium building in Calgary. Avli hired BMP Construction Management Ltd. ("BMP") as general contractor. BMP in turn hired various subcontractors to construct the building. A dispute arose between Avli and BMP resulting in unpaid invoices and BMP and several of its subcontractors registering liens. All of the liens were filed in time. There were no disputes over the amounts being claimed. Rather, Avli raised several novel arguments challenging the validity of the liens. The Court of Appeal's decision in *Avli BRC Developments Inc v BMP Construction Management Ltd*, 2023 ABCA 147 upholds the Chambers Justice's finding, which in turn upheld the Applications Judge's decision that the liens were valid.

Procedural History

The liens were registered in late 2019. The lien claimants thereafter commenced actions to preserve and pursue their liens. In April 2021, the parties appeared before the Applications Judge to determine, amongst other things, the validity of the liens. In his detailed decision in *Avli BRC Developments Inc v BMP Construction Management Ltd*, 2021 ABQB 412, Applications Judge Robertson dismissed Avli's arguments, finding the liens were valid. Our office wrote an article about this decision in the Canadian College of Construction Lawyers Legal Update No. #160.

Avli appealed the Applications Judge's decision to a Justice in Chambers, which was heard in a half-day special chambers application in December 2021. The Chambers Justice dismissed the appeal from the bench. Avli appealed the decision to the Court of Appeal. The appeal was heard in April 2023 with reasons issued May 5, 2023, dismissing Avli's appeal.

Avli's Arguments

Avli argued that the subcontractor liens were invalid for a variety of reasons. The two main arguments were as follows: (1) lien claimants who liened only the condominium additional plan sheet (the "CS") liened the wrong interest and as such these liens were invalid; and (2) liens against individual units were only valid to the extent of the work actually performed on those specific units rather than the project as a whole.

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Liens Against the CS Only – Valid or Not?

In October 2019, Avli registered the condominium plan. This resulted in creation of the condominium corporation (the "CC"). After registration, Avli owned all of the units and, as a result, all of the common property. However, Avli failed to constitute an interim condominium board as required by the *Condominium Property Act* (the "CPA"). Avli also did not advise BMP or the subcontractors that the condominium plan had been registered. Avli argued that liens against the CS were invalid because the CC had not requested the work be done. However, there was no CC because Avli failed to set it up. Further, BMP and its subcontractors continued to work on the project without any knowledge that the CC had been created.

The Applications Judge found Avli controlled the CC and that Avli, as "acting CC", requested the work be done. He also held Avli, as CC, adopted the pre-incorporation contract for work done before the plan was registered such that it was a post-incorporation contract. In doing so, the Applications Judge relied on the Supreme Court of Canada's decision in *Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*, 2020 SCC 29 ("*Crystal Square*").

On appeal to the Chambers Justice, Avli argued it wore different hats as developer and owner, which resulted in Avli having separate and distinct obligations under both the *Builders' Lien Act* (the "BLA") and the CPA. Avli argued that it did not control the CC and did not request, as CC, that the subcontractors continue to perform work on the project. Avli argued the Applications Judge erred in finding Avli was fully in control of the CC, and as such, the test set out in *Crystal Square* had not been met. Avli relied on its separate roles as developer and owner, saying the mere creation of the CC, controlled in the interim by Avli, did not, on its own, constitute ratification of the construction contract. The Chambers Justice pointed out, however, that Avli did not require the work be stopped or disavow the contract when the CC was created. Rather, work continued, and Avli, in both of its capacities, knew that it continued. In the Chambers Justice's view, continuation of the work was a manifestation of the adoption and ratification of the contract.

The Chambers Justice dismissed Avli's appeal. Avli appealed. In its factum, Avli discussed the Supreme Court of Canada's decision in *Crystal Square* at some length, likely because it was central to the Application Judge's decision and the queries of the Chambers Justice during the special chambers application. Interestingly, the Court of Appeal does not mention *Crystal Square*. Instead, the Court focused on the curative provision of the BLA, noting that since none of the units had been sold at the time the liens were registered and there was no interim board of directors of the CC, Avli was in control of the CC. As such, it was "open to the applications judge to validate the respondents' liens against all the condominium units" [para 16], and there was no basis for the Court of Appeal to intervene.

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Given the importance placed on *Crystal Square* in the lower Court decisions, it would have been helpful to hear the Court of Appeal's views on pre- and post-incorporation contracts in the context of condominium corporations. However, the closest the Court of Appeal comes to addressing the issue of post-incorporation contracts is in paragraph 14 where it says, out of an "abundance of caution…lien claimants may also register their liens against the Additional Sheet though it might, as occurred here, raise an issue under s. 78(1)(b) of the *Condominium Property Act*…about whether the condominium corporation requested the work (particularly that done pre-incorporation) or agreed to be bound by the terms of the pre-incorporation construction contract".

How Many Units Must One Lien Claimant Lien?

In this case, some lien claimants only liened one individual unit. Before both the Applications Judge and the Chambers Justice, Avli argued these lien claimants were limited in their recovery to the value of the work actually performed on that individual unit, a fraction of what was owed. The Applications Judge disagreed, citing the common purpose doctrine and related case law, finding that "…subject to evidence of prejudice, the validity of the registration against land in respect of which there is a common purpose, including some geographical proximity, does not invalidate the lien because of the error in respect of not registering against all of the land on which work was done" [para 141]. Having found no prejudice, the Applications Judge held the liens could be "saved" under Section 37 of the BLA and as such were valid as against the entire project. Avli made the same arguments before the Chambers Justice, attempting to distinguish the authorities relied on by the Applications Judge. The Chambers Justice was not persuaded.

In dismissing Avli's appeal, the Court of Appeal did not specifically address the common purpose doctrine. Rather, they focused on the curative section of the BLA and lack of prejudice, finding it was "…open to the applications judge to validate the respondents' liens against all the condominium units pursuant to s. 37 of the *Builders' Lien Act*. The applications judge's findings that (i) the respondents' liens were in substantial compliance with s. 34 of the *Builders' Lien Act*; and that, (ii) no person was prejudiced by the respondents' failures to comply with the requirements of s. 34, were supported by the record" [para 16].

What Does it all Mean?

In its decision, the Court of Appeal says this litigation "could have been avoided had [the lien claimants] registered their liens against the certificates of title for all the condominium units", which it says is the "standard

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approach… for lien claimants seeking to secure payment for their work against condominium common property" [para 14]. Whether this truly is the "standard approach" is debatable. Regardless, this statement is over-simplistic and fails to recognize that liening every unit on a project is not always practical given the expense and short timelines to lien.

If a lien claimant is owed a significant amount of money, you would obviously go to the cost and effort to register liens against all units and, out of an abundance of caution, the CS. However, this advice might change where a lien claimant is owed a smaller amount. In that case, it would be impractical and cost-prohibitive to lien every unit. In *Avli*, it would have cost nearly $2,400 to register liens against every unit and the CS. It would have cost another $1,600 to pull title to each of those units, which a prudent lien claimant would do twice: once when preparing the liens for registration and once afterward, to confirm the liens are registered. In *Avli*, two of the liens were less than $20,000; not a lot of money to litigate over, but an important debt to those parties. If a lien claimant is self-represented, which is not uncommon, it would be onerous for them to determine the legal descriptions to all titles and prepare and file liens against those titles, all within either 45 or 60 days (depending on whether the BLA or the *Prompt Payment and Construction Lien Act* applies).

The takeaway from the *Avli* decisions is that the best practice when liening a condominium project is to lien as many units as might be necessary to satisfy the debt in the event the units have to be sold to pay the lien. This too has practical issues in that you will not always know what other liens, and in what amounts, might be registered after yours. However, to avoid arguing over lien validity (and years of protracted litigation), it is prudent to lien multiple units, or, if the circumstances justify it, each and every unit in the building, as well as the CS, to maximize the chance of recovery.

Arbitrating Lien Claims

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ONTARIO

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Introduction

Arbitration is becoming more and more prevalent as a means to resolve construction industry disputes, including claims under the *Construction Act*. Many standard form contracts in use in Canada now provide for a tiered dispute resolution process culminating in arbitration following unsuccessful negotiation and mediation. Under some contracts, parties agree to make arbitration mandatory, others make arbitration voluntary. Under the CCDC 2, for example, parties must arbitrate once one of the parties refers the matter to arbitration, while the OAA 600 – 2021, makes arbitration subject to mutual agreement after the dispute arose.

Arbitration has been defined as a process in which two or more parties submit a dispute to a neutral third person or persons and contract with each other to be bound by that person's determination of their dispute: D.W. Glaholt, M. Rotterdam, *The Law of ADR in Canada: An Introductory Guide*, 3rd ed. (Toronto: LexisNexis, 2022) at p. 64.

The power of an arbitrator, or arbitration panel, to decide a dispute must be granted to the arbitrator by the parties to the arbitration. You must agree to arbitrate. You can agree before a dispute arises, or after a dispute arises, but you must agree.

Arbitrators make final and binding decisions which are enforced as a judgment of the court. Unlike court decisions, however, arbitration decisions are not published. Arbitrations do not take place in public. Although evidence in an arbitration is often transcribed, just like it is at a trial, none of this evidence is available to the public.

Arbitration looks and feels a lot like litigation. There are still pleadings, hearings, rulings, and evidence, but the arbitrator and the parties have almost unlimited scope to shape the proceeding to the parties' needs. Provided that each party is given an equal opportunity to make its case and meet the case made against it, parties can work with the arbitrator to make the proceedings as efficient as possible for the kind of dispute in question.

Most arbitration clauses are of the "final and binding" type, which means that unless the arbitrator exceeds his or her jurisdiction, or does something very wrong, the arbitration "award" is final and binding and enforceable without appeal. Some arbitration clauses allow for limited rights of appeal

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on errors of law. If the arbitrator sticks to his or her jurisdiction, however, and does a reasonable job of determining and applying the applicable law to the facts as presented by the parties, the chances of overturning an award on appeal are slim to none.

Arbitration can be cheaper than litigation, but not always. You must work with the other side and your arbitrator to make that happen. Arbitration is much more adaptable than litigation. With a little co-operation from the other side and a little assistance from your arbitrator, arbitration can be made to fit the case, instead of fitting the case to the arbitration. Usually the shorter the arbitration, the cheaper it is for the parties. Too short, however, and the parties may not feel they got an opportunity to make their cases or respond to the case made out against them. Too long, and the parties will wonder why they chose arbitration over litigation.

The parties are free to make their own rules or adopt one of the many existing rules already in place. The CCDC, for example, publishes Document 40 – Rules for Arbitrations and Mediations. These are very useful as a guide. In addition, the Ontario *Arbitration Act, 1991* provides access to Ontario's courts in aid of arbitrations.

The choice of arbitrator is important. You want an arbitrator (or panel) that is experienced. The fact that an arbitrator is chosen for his or her subject matter expertise will be a consideration in the court's review of their conduct of the arbitration. Courts will give such arbitrators considerable latitude in establishing the facts of the case: see *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485.

There are two types of experience: subject matter expertise and process expertise. Subject matter expertise means working knowledge about your industry and the sources of disputes in that industry. Process experience means working knowledge of dispute resolution, including how trials work, how pre-trial processes work, how evidence works, how counsel work, and, most importantly, how to write a good, binding award based on the law and facts of the case that does real justice among the parties. Usually, this experience is found in former judges and senior lawyers. This experience can also sometimes be found in senior engineers with several completed, litigated claims in their CVs. With a sole arbitrator, you need both kinds of experience in one person. With a three person "arbitral tribunal" the chair should have strong "process" experience, and the two other appointees can add the "subject matter" expertise.

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Arbitrability of Lien Claims

Lien claims can be arbitrated. Neither s. 4 nor s. 5 of the *Construction Act* preclude the arbitration of lien claims. Section 62(6)(b) of the Act expressly contemplates joinder in a lien action of persons with perfected liens whose lien actions are stayed by reason of an order under the Ontario *Arbitration Act, 1991*.

In *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257, the Ontario Court of Appeal held that the *Construction Lien Act* anticipates that some issues will be resolved by arbitration and expressly accommodates arbitration. The court held that in light of the strong commitment made by the legislature to the overall policy of commercial arbitration through the adoption of the *International Commercial Arbitration Act* and the *Model Law*, it would require very clear language to preclude arbitration, and the court found no such language in the Ontario Act. The court further held that no distinction should be made in this regard between domestic and international arbitration or, for that matter, between domestic and interprovincial arbitration.

The Supreme Court of Canada, in *Desputeaux c. Éditions Chouette (1987) inc.*, 2003 SCC 17, held that parties have virtually unfettered autonomy in identifying disputes that may be subject of arbitration proceeding, pretty much ending the debate on arbitrability in Canada. There are therefore few if any things that an arbitrator cannot decide between parties to an arbitration agreement.

As discussed above, an arbitrator's power to decide a dispute flows from an agreement by the parties to give the arbitrator that power. Therefore, there will likely be no issues where no parties other than the arbitrating parties are affected by the arbitration.

However, things become complicated when one tries to bind non-parties, or, in a lien context, even complete strangers to the construction contract involving the arbitration clause, such as a mortgagee for example.

In any given case, there may be ten lien claimants and no dispute about the amount of holdback to be shared. Two of the ten lien claimants go into an arbitration with the owner and the general contractor, and an arbitral award determines the size of their liens and therefore their right to participate with

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the other eight lien claimants, who are not parties to the arbitration.

In another example, an owner and general contractor agree to arbitrate. The mechanical and electrical subcontractors join the arbitration. The arbitrator's finding on the amount of holdback as between owner and general could not be binding upon other subcontractors, who might argue that it should be more. The parties to the arbitration might agree to the amount of holdback, but why would that bind the other subcontractors who did not participate in the arbitration? These issues become important when it comes to staying proceedings in favour of arbitration.

Stay Issues

Where parties to a lien action have agreed to have disputes arbitrated, an application for an order directing the parties to proceed with the arbitration should generally succeed and the arbitral issues incorporated into the lien proceeding should be stayed until the completion of the arbitration.

There are two bases for stays, s. 7 of *the Arbitration Act, 1991* and s. 106 of the *Courts of Justice Act*. Section 7 of *the Arbitration Act, 1991.* The reason both provisions are important in an arbitration context is that s. 106 is available to both the plaintiff and the defendant, while s. 7 is available only to "another party", i.e., not the party that commenced the action.

Another important distinction is the mandatory language in the *Arbitration Act* compared with the discretionary language in the *Courts of Justice Act*. Where the applicant for a stay moves under s. 7, the stay of the court action must be granted, subject to certain limited exceptions. Where the applicant for a stay is also the plaintiff in court and therefore has to move under s. 106, i.e., where a party seeks to stay its own proceeding, the stay is discretionary.

As pointed out above, things become more complicated when multiple parties and multiple issues are involved.

Generally speaking, s. 138 of the *Courts of Justice Act* tasks the courts with avoiding a multiplicity of proceedings. The question therefore arises as to if and when courts should enter a stay to prevent a multiplicity of proceedings that might arise when a dispute (or aspects of it) is both litigated and arbitrated. Courts have generally held that the prospect of a multiplicity of pro-

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ceedings in and of itself is not a valid reason for refusing to refer the parties to arbitration.

However, until recently, courts have sometimes refused to stay an action in the face of numerous proceedings raising various issues, among them the validity and timeliness of liens, which were outside the scope of the agreement to arbitrate. See, for example, *Tricin Electric Ltd. v. York Region District School Board*, 2009 CarswellOnt 2452 (S.C.J.).

Similarly, courts have refused to stay proceedings between a general contractor and an owner-developer where the general contractor would have been required to contemporaneously or subsequently relitigate many of the same issues in court with subcontractors and sub-subcontractors who had registered liens. In *Carillion Construction Inc. v. Imara (Wynford Drive) Ltd.*, 2015 ONSC 3658 (Master), an owner/developer had waited seven months after the action was started before applying for a stay, resulting in a large quantity of lien claimants being added. The court held that having started its own action, the owner/developer had waived arbitration and was estopped from invoking it. If the stay had been granted, there would still have been over 50 liens claims left in court, which the general contractor/construction manager would have had to respond to. In those circumstances, being forced to participate in the arbitration and also litigate the same issues in court with the subcontractors would have constituted unfair treatment of the general contractor/construction manager. The distinguishing factor in that case, however, was the absence of a harmonized arbitration process among all levels of contractors on the project. Had there been such a process, the court would likely have granted the stay:

> 33 In *Cityscape Richmond Corp. v. Vanbots Construction Corp., 2001 CarswellOnt 217,* twenty-five consolidated lien claim actions were before the court by way of a construction lien reference. Delay was a significant issue. Master Sandler had already commenced the reference. When Cityscape applied under the *Arbitration Act, 1991* for an order requiring the parties to proceed to arbitration Justice Trafford stayed the court litigation.
>
> 34 The facts in *Cityscape* are distinguishable in a significant way. At paragraph 21 of the decision Justice Trafford noted that the primary contract required the general contrac-

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> tor, Vanbots, to include similar arbitration clauses in its sub-contracts with the sub-trades. The arbitration process was harmonized for all levels of contractors working on the project. On that basis, Justice Trafford concluded, Vanbots could invoke the arbitration clauses with its sub-trades to avoid a proliferation of legal proceedings and the arbitrator could hear all of the disputes together. The arbitration would cover the issues in dispute in all twenty-five construction lien claims that were before the court in the reference. Justice Trafford ordered that all disputes between Cityscape and Vanbots arising under the contract be arbitrated together and include all disputes raised in Vanbots' statement of claim and proposed third party claims in the lien reference, as well as all issues raised in Cityscape's defence and counterclaim in the lien action.

The Supreme Court of Canada and the Ontario Court of Appeal have now clarified the availability of arbitration where multiple proceedings would result. In *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, the Supreme Court of Canada ruled that when arbitrable and non-arbitrable matters are combined in a single court proceeding, under s. 7(5) of the Ontario *Arbitration Act, 1991*, the motion judge cannot refuse to stay the court proceeding in respect of the matters dealt with in the arbitration agreement. Commenting on this case, the Ontario Court of Appeal held that *Wellman* expressly overturned earlier case law on the interpretation of s. 7(5) in which courts refused a stay and allowed the action to proceed on the basis that only some of the litigants were bound by an arbitration clause and the claims were so closely related that it would be unreasonable to separate them.

In *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONSC 12 (S.C.J.), the court summarized this new line of cases as follows:

> The most recent pronouncements from the Supreme Court of Canada in *TELUS Communications Inc v Wellman*, 2019 SCC 19, as discussed in subsequent Court of Appeal decisions such as *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2020 ONCA 612 (CanLII) and 2021 ONCA 360 (CanLII) mandate that civil litigation be stayed pending arbitration

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> even where a multiplicity of proceedings may result. The policy favouring respect for the parties' right to choose their dispute resolution process overwhelms the statutory policy to guard against the inefficiency of multiplicity "as far as possible".

Therefore, it is now clear that unless a basis to refuse the stay exists under s. 7(2) of the statute, the unreasonableness of bifurcating the proceedings under s. 7(5) on its own does not authorize the court to refuse the mandatory stay of the proceeding: *Star Woodworking Ltd. v. Improve Inc.*, 2021 ONSC 4940. Cases like *Tricin Electric*, mentioned above, are therefore no longer good law.

What is less clear is how all of this would look in practice in a complex lien proceeding with multiple parties. In the above example where an owner and general contractor agree to arbitrate, the mechanical and electrical subcontractors join the arbitration and the arbitrator makes a finding on the amount of holdback as between owner and general, what happens with the other subcontractors who did not participate in the arbitration?

It seems that there are two ways to address these issues. The first is the one taken by the parties in *Cityscape*. Parties on any given project should ensure that a harmonized arbitration process among all levels of contractors on the project is in place.

A second way would be to refer the matter to the chosen neutral under s. 58(1)(b) and turn the whole process into a reference, thus giving the "arbitrator" all the jurisdiction, powers, and authority of the court to try and completely dispose of the action and all matters and questions arising in connection with the action. If that route is taken, of course, parties must be aware that their dispute is now subject to the *Construction Act* rather than the *Arbitration Act, 1991*, with all that entails. Instead of getting an award under the *Arbitration Act, 1991* parties would get a report under the *Construction Act*, which would mean, among other things, that appeals would be governed by s. 71 of the *Construction Act* rather than the much more limited options available under ss. 45 and 46 of the *Arbitration Act, 1991*. Also, once a motion is made to the Superior Court to oppose confirmation of the report, nothing is confidential any longer. In other words, while references do offer jurisdictional advantages, many of the core reasons why parties choose arbitration are lost.

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