Top arbitration cases of 2023: Key lessons for Canadian in-house counsel

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Introduction

Arbitration continues to prove a popular form of dispute resolution across Canada for a variety of disputes. While arbitration has numerous benefits compared to court litigation, a key advantage, especially in Canada, continues to be the relative speed and efficiency of the process compared to litigation.

The Advocates' Society has highlighted "the endemic delays plaguing the delivery of civil and family justice across Canada" in the court system. It also noted that "this crisis pre-dates the COVID-19 pandemic, but was also exacerbated by it." Indeed, the lengthy waits for motion hearings (over a year in Toronto for a two-hour motion, for example) and trial dates are now putting access to timely justice at risk. Only time will tell whether current remedial steps will prove effective, or whether the current timeframes for litigation are now the "new normal."

However, arbitration is not a panacea. As the cases in this publication show, occasionally parties will still seek the assistance of the courts, whether to make orders in support of the arbitration or to exercise their supervisory jurisdiction over arbitrations taking place in their jurisdictions. The circumstances in which the courts should exercise their supervisory jurisdiction are set out in statute, but the interpretation and application of those rules, and where the limits lie, are a matter of considerable judicial (and practitioner) interpretation and debate.

Even within the arbitration community, there is considerable debate and disagreement as to where the limits of court supervision should be and how interventionist we want the courts to act. Too little supervision and arbitration becomes a law unto itself with risks of miscarriages of justice; too much intervention risks offending the parties' choice to arbitrate in the first place.

The risks of the former were highlighted starkly in the recent English case of Nigeria v Process & Industrial Developments Limited (P&ID). In this case, a US$11-billion award handed down by a highly esteemed tribunal (including a former UK Supreme Court judge) was set aside due to fraud, bribery and unconscionable behaviour by P&ID's lawyers (including obtaining Nigeria's privileged materials). However, generally speaking, arbitration users won't want immaterial procedural decisions to potentially jeopardize an award. Successful parties should not face proceedings where the arbitral award's merits are re-litigated before a court (absent an agreed upon right of appeal), nor wait years to enforce an award due to spurious applications to set aside the award.

Some litigants have not helped the courts, cloaking merits appeals as thinly disguised applications to set aside an award on jurisdictional grounds or due to a lack of procedural fairness, all to get around an award's finality. That in turn has led the courts to, often correctly, treat such applications with circumspection. At the same time, perhaps unfairly, there can be an unjustified reluctance to find genuine circumstances to set aside an award. This is possibly due to concern about encouraging unmeritorious applications, and possibly due to the need to be seen to be "arbitration-friendly" by upholding awards.

However, as the P&ID case shows, supporting arbitration as a robust and fair dispute resolution process equally requires the court not only to abstain from intervening where it is unnecessary, but to step in where the circumstances warrant it to preserve the integrity of the process. However, one side's procedural discretion will be another side's fundamental procedural unfairness. Where the fine line is drawn is a careful balancing exercise. It is one that practitioners will continue to argue about (and that courts will continue to grapple with) for a long time to come, maybe even longer than the time it takes to obtain a trial date before a Canadian court.

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Ismail v First York Holdings Inc

Ontario Court of Appeal confirms doctrine of separability cannot save an arbitration agreement contained in a contract that was void from the beginning and never legally binding.

Facts

Mr. Ismail and Mr. Abied began doing business together through First York Global Holdings Inc. (FYGH). They entered into two share purchase agreements with arbitration clauses. Mr. Ismail appointed Mr. Abied as his attorney with authority to sign agreements on his behalf. Three agreements were signed and executed by Mr. Abied on behalf of both parties:

- A FYGH Purchase of Business Agreement (the FYGH Purchase Agreement).
- A Shareholders' Agreement regarding the purchase by Mr. Ismail of 20 per cent of the shares of FYGH.
- A Purchase of Business Agreement of 20 per cent of the shares of another company, National Trade of Canada (National Trade) by Mr. Ismail (the NT Agreement).

National Trade was never incorporated. Mr. Ismail brought an oppression remedy application alleging that the NT Agreement was represented to be part of the entire transaction, but Mr. Abied claimed it was a separate business venture to be incorporated. A case management judge converted the application to an action with several claims, which led to a motion to stay the claims due to the existence of an arbitration clause contained in the NT Agreement. The motion judge refused to stay the action in favour of arbitration on the basis that the stay motion was based on the arbitration clause in the NT Agreement only and that agreement never legally existed.

Decision

The Ontario Court of Appeal dismissed the appeal. The Court concluded that the NT Agreement did not amount to a valid contract as National Trade was never incorporated, the shares never existed and there was therefore no consideration for the agreement. As the NT Agreement was never a legally binding contract (as opposed to a voidable contract) due to lack of subject matter and consideration, the arbitration agreement contained within it could not exist. The agreement to arbitrate cannot "survive" where there was no contract to survive from.

The Court also rejected Mr. Ismail's attempt to rely, in the alternative, on the arbitration agreement contained in the FYGH Purchase Agreement on the basis that the motion for a stay was based on the arbitration clause in the NT Agreement only.

Analysis

The doctrine of separability is a fundamental concept in arbitration. In short, it allows an arbitration agreement/clause contained in a main contract to be separated and to survive even in circumstances where there might be a basis to challenge the validity of the main contract. The justification for the doctrine is that unless the basis for challenging the validity of the main contract also directly impugns the parties' agreement to arbitrate, the arbitration agreement should be preserved and the parties' choice of arbitration respected notwithstanding any challenge to the validity of the main contract. Were this not the case, any challenge to the validity of the main contract would risk undermining the arbitration agreement.

In Ontario, the doctrine of separability is reflected in subsection 17(2) of the *Arbitration Act, 1991,* which provides that "[i]f the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid." However, this case suggests that while the doctrine of separability may protect an arbitration clause in a voidable contract, it does not extend to preserve an arbitration clause in a contract that was never legally binding.

Ismail v First York Holdings Inc, 2023 ONCA 332

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Link 427 General Partnership v His Majesty the King

Ontario Superior Court confirms that arbitral tribunals lack jurisdiction to order third-party discovery, such that an order must be sought from the Court.

Facts

Link 427 brought a motion before the Arbitrator to require two non-party former Crown employees to attend examinations for discovery. The parties had incorporated the *Ontario Rules of Civil Procedure* into their arbitration agreement.

The Arbitrator granted the motion. Link 427 then moved before the Ontario Superior Court of Justice to enforce the Arbitrator's order. It purported to do this under subsection 29(4) of the *Arbitration Act, 1991* (the Act), which empowers the Court to make orders and give directions with respect to the taking of evidence for an arbitration.

Decision

The Court refused to enforce the Arbitrator's procedural order. Citing well-established jurisprudence, the Court held that the Arbitrator did not have the jurisdiction to make an order to compel third-party discovery. The two former Crown employees were strangers to the arbitration agreement and thus they were not bound by its terms, so the Arbitrator had no jurisdiction over them. Since the Arbitrator had no jurisdiction to make the order, the Court declined to enforce it against the non-party former employees.

Analysis

The Court's decision is a reminder that an arbitral tribunal has no inherent jurisdiction, and thus cannot compel a non-party to do anything unless the Act says otherwise. Even where the parties incorporate court rules into their arbitration agreement (as the parties did in this case), those provisions granting a court power over non-parties do not enlarge an arbitral tribunal's jurisdiction, which is based entirely on the parties' consent to arbitrate. Further, subsection 29(4) does not say the court can enforce an arbitral tribunal's order that a third-party participate in discovery. Rather, it empowers the court to "make orders and give directions" about the taking of evidence for an arbitration. The appropriate course of action would have been for the Arbitrator, or Link 427, to seek the court's assistance and ask the court to make such an order.

This was the approach taken and validated by the Alberta Court of Appeal in *Jardine Lloyd Thompson Canada Inc v SJO Catlin*, 2006 ABCA 18. In that case, the Court of Appeal concluded that under Alberta's *International Commercial Arbitration Act*, an arbitral tribunal could seek assistance from the court to obtain discovery evidence from third parties, even though it could not itself compel a non-party to submit to examinations for discovery. Although that case was decided in the international context, its reasoning applies with full force to arbitrations under the Act and other provincial domestic arbitration statutes.

At the end of the day, the arbitral tribunal controls its process. The tribunal could, in principle, prevent a party from using any third-party discovery evidence it obtains. Furthermore, any application for court assistance in support of an arbitration will be strengthened by the fact that the order sought has the tribunal's blessing. It is thus best practice to ensure that the party seeking the court's assistance and the arbitral tribunal are on the same page.

Link 427 General Partnership v His Majesty the King, 2023 ONSC 2433

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Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc

Ontario Court sets aside award due to reasonable apprehension of bias arising from arbitrator's failure to disclose multiple appointments.

Facts

Canada Inc., were engaged in a dispute concerning the termination of a master franchise agreement (the Agreement). The Agreement contained an arbitration clause and specifically noted that the "arbitrator must be either a retired judge, or a lawyer experienced in the practice of franchise law, who has no prior social, business or professional relationship with either party." An Arbitrator was ultimately selected and, following a lengthy arbitration process, the Applicants were ordered to pay $10 million in damages for wrongful termination.

Prior to releasing their decision, the Arbitrator wrote to the parties to advise that the Final Award was completed. In this note, they inadvertently copied a lawyer from the Respondents' law firm who was not involved in the Aroma arbitration. After repeated inquiries from the Applicants regarding why this lawyer was copied on the matter, the Arbitrator disclosed that, prior to the release of their decision, they were engaged by the Respondents' law firm in an unrelated and ongoing matter (the Other Sotos Arbitration). The Applicants filed an application to set aside the Final Award and Cost Awards based on reasonable apprehension of bias and/or the cumulative effect of the alleged improprieties.

The Decision

The Ontario Superior Court of Justice found that there was a reasonable apprehension of bias. As a result, it set aside the

Arbitrator's awards and directed that a new arbitration be conducted by a new arbitrator. Pursuant to the UNCITRAL Model Law on International Arbitration (the Model Law), which is adopted as Schedule 2 of Ontario's *International Commercial Arbitration Act, 2017*, an arbitral award may be set aside where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the Model Law. Specifically, Article 18 of the Model Law requires parties to be treated with equality and given a full opportunity to present their case.

The Court affirmed the principle that where an arbitrator's conduct gives rise to a reasonable apprehension of bias, Article 18 is violated. Similarly, the Court noted that Article 12 of the Model Law provides that an arbitrator "shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence." This obligation continues from the time of appointment and throughout the arbitral proceeding. Moreover, this duty must be met "without delay."

The Court also relied on the 2020 UK Supreme Court decision in *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48. The UKSC noted that most arbitrations are private (in contrast to public judicial proceedings), such that parties may have no way of knowing whether their arbitrator is appointed on more than one case concerning the same or overlapping subject matter. This puts a premium on frank disclosure.

In addition to Article 12, the Superior Court relied on the 2014 *IBA Guidelines on Conflicts of Interest in International Arbitration* (the IBA Guidelines), citing them as an authoritative reference for assessing a reasonable apprehension of bias. The IBA Guidelines use a traffic-light framework for determining when doubts regarding an arbitrator's impartiality and independence must be disclosed: a red list for justifiable doubts, an orange list for potential doubts and a green list for no apparent or actual conflicts. In reviewing the IBA Guidelines, the Court noted the determination of whether a reasonable apprehension of bias exists is "extremely fact specific."

With this framework in mind, the Court considered whether the Arbitrator's failure to disclose his role in the other arbitration at issue gave rise to a reasonable apprehension of bias. The Court found that the answer to this question "comes down to context," but that these particular circumstances gave rise to a reasonable apprehension of bias. The Court reviewed initial correspondences between the parties regarding potential arbitrators and concluded that it was very important to the parties (and particularly to the Applicants, who were not based in Canada) that the selected arbitrator not have any professional or personal relationship with either party or their counsel (though there is no suggestion that the Arbitrator knew this). Moreover, the fact that the Arbitrator was the sole arbitrator in both engagements (as opposed to being part of a panel) weighed in favour of disclosure. The Arbitrator's failure to disclose the other arbitration for 15 months while the parties' arbitration was ongoing would give rise to a reasonable apprehension of bias.

Analysis

An arbitrator's failure to disclose any facts or circumstances that could reasonably raise justifiable doubts about their impartiality may inherently create such doubts about their impartiality. The fact that an arbitrator is appointed to two or more arbitrations by the same lawyer or law firm does not in and of itself give rise to a reasonable apprehension of bias.

However, the failure to disclose these related appointments could give rise to justifiable doubts about the arbitrator's impartiality. The purpose of disclosure is to enable the parties to assure themselves that there is no legitimate concern and to ensure transparency on the part of the arbitrator. The disclosure obligation is ongoing, and while the acceptance of multiple appointments may not constitute justifiable doubts as to an arbitrator's impartiality or independence, the failure to disclose such multiple appointments may do so.

An appeal of this decision was heard before the Ontario Court of Appeal on December 6, 2023. It will likely further clarify the scope of an arbitrator's duty to disclose multiple appointments.

Aroma Franchise Company Inc et al v Aroma Espresso Bar Canada Inc et al, 2023 ONSC 182

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Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc

Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited

Ontario Court of Appeal determines that courts should generally decline jurisdiction to assess the enforceability of an arbitration clause, even in employment agreements.

Facts

The parties entered into an initial distribution arrangement under which Husky Food would import, distribute, and market JH Whittaker's products in Canada. The parties sought to negotiate a formal, long-term, exclusive distribution agreement. JH Whittaker sent a draft containing an arbitration clause providing for arbitration seated in Wellington, New Zealand. Husky Food responded with a "slightly" revised version of the agreement, and stated that this version had been "signed off". No changes were made to the arbitration clause, but the main body of the distribution agreement also contained a non-exclusive jurisdiction clause in favour of the courts of Wellington.

A dispute arose prior to the parties actually signing the distribution agreement. Husky Food commenced a claim in Ontario in which it specifically pleaded that the parties had "reached an agreement on all material terms" of the unsigned agreement. Relying on the arbitration clause, JH Whittaker sought to stay the court proceedings on the basis that the dispute was the subject of an arbitration agreement. Husky Food opposed the stay motion, submitting that the parties never agreed to arbitrate disputes, relying on the inconsistent non-exclusive jurisdiction clause in favour of the courts of Wellington.

The motion judge granted the stay, and Husky Food appealed.

Decision

The Court of Appeal noted that the Supreme Court of Canada's decision in *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41, reaffirmed the competence-competence principle, which gives precedence to the arbitration process. Broadly speaking, this principle means that an arbitral tribunal is competent, in the first instance, to determine whether it has jurisdiction. Pursuant to competence-competence, a court should normally allow an arbitrator to exercise this competence before any court review.

However, the Court noted that the competence-competence principle is not absolute. The Supreme Court in Peace River affirmed that a court may resolve a challenge to an arbitrator's jurisdiction (including the arbitration agreement's existence or validity) if the challenge involves pure questions of law or questions of mixed fact and law that require only superficial factual consideration. However, where questions of fact alone are in dispute, or where the court would have to look deeper into the factual record to decide the matter, the court should normally stay the proceeding in favour of arbitration.

The Court of Appeal confirmed that the framework for assessing whether there was an arbitration agreement for the purposes of seeking a stay was that adopted by the Supreme Court in *Peace River*. This involves a two-step analysis. First, the moving party must meet the technical prerequisites for a stay in favour of arbitration. The moving party bears the burden at this first step. Second, if the technical requirements are met, the burden shifts onto the party opposing the stay to establish whether any statutory exceptions apply to the mandatory stay of court proceedings.

There are typically four technical prerequisites at the first step that the stay applicant has to establish. These are:

1. An arbitration agreement exists.
2. Court proceedings have been commenced by a "party" to the arbitration agreement.
3. The court proceedings are in respect of a matter that the parties agreed to submit to arbitration.
4. The party applying for a stay in favour of arbitration has done so before taking any "step" in the court proceedings.

If all the technical prerequisites are met, the mandatory stay provision is engaged. The court should then move on to the second component of the analysis, which concerns whether the statutory exceptions to granting a stay apply on the basis that the arbitration agreement is "void, inoperative or incapable of being performed."

The Court clarified that to satisfy the first step, the party seeking a stay must only establish an "arguable case" that the technical prerequisites are met. At the second step, the party seeking to avoid the stay must show that a statutory exception applies on the higher "balance of probabilities" standard.

The Court of Appeal was satisfied that JH Whittaker had established an arguable case that the dispute was subject to an arbitration agreement, and Husky Food had not suggested that any of the statutory exceptions applied. As such, the appeal was dismissed, and the stay of the Ontario proceedings was continued in favour of arbitration.

Analysis

This decision strikes a reasonable balance between respecting the competence-competence principle and establishing a certain minimum burden on the party seeking a stay: showing an "arguable case" that there is an applicable and binding arbitration agreement.

Without that burden, spurious allegations of disputes being subject to arbitration would trigger a mandatory stay of court proceedings. This would lead to wasted time and increased costs by referring such spurious jurisdictional or validity questions to an arbitral tribunal (perhaps to have a court subsequently overturn the arbitral tribunal's decision should it accept jurisdiction). Allowing a spurious allegation of a binding arbitration agreement to proceed, and staying court proceedings in order to enable this, would be damaging to the reputation of arbitration as a dispute resolution mechanism and risk opening up the arbitration process to abuse.

The Ontario Court of Appeal's approach is largely consistent with the practice other arbitration-friendly jurisdictions have adopted, such as Hong Kong and England. It will be interesting to see if the Ontario courts maintain the "arguable case" test in circumstances where the court is actually able to determine, in a summary fashion, whether an arbitration agreement exists on a balance of probabilities.

Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited, 2023 ONCA 260

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Russian Federation v Luxtona Limited

Ontario Court of Appeal confirms that parties may introduce fresh evidence in a de novo consideration of an arbitral tribunal's preliminary jurisdictional decision, but the failure to raise such evidence before the arbitral tribunal may be relevant to the weight the Court should assign that evidence.

Facts

In a contractual dispute that was subject to arbitration, the Russian Federation brought an application before the Ontario Superior Court of Justice under Article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), enacted as Schedule 2 of Ontario's *International Commercial Arbitration Act, 2017*, to set aside the arbitral tribunal's preliminary decision on jurisdiction. The arbitral tribunal had ruled in favour of Luxtona and concluded that it had jurisdiction. In the application, a procedural issue arose as to whether Russia could file fresh expert evidence relating to Russian law.

Justice Dunphy of the Commercial List ruled that Russia could file the fresh evidence. However, Justice Dunphy subsequently left the Commercial List and Justice Penny was assigned to the matter.

In the context of determining additional evidentiary issues respecting the new evidence, Justice Penny determined that he was not bound by Justice Dunphy's prior interlocutory ruling. He directed re-argument on the fresh evidence issue. Departing from Justice Dunphy's decision, Justice Penny concluded that Russia could not file the fresh evidence as of right. Russia could only do so if it could meet the stringent test set out in *Palmer v The Queen*, [1980] 1 SCR 759 or bring itself within one of the exceptions to the principle that court review is conducted based on the record before the tribunal below. Justice Penny declined to admit the fresh evidence.

Russia appealed this decision to the Divisional Court. A panel of the Divisional Court held that Justice Penny had jurisdiction to revisit Justice Dunphy's interlocutory hearing. The Court concluded that an application under Article 16(3) of the Model Law is a hearing *de novo*. Accordingly, the parties can, as of right, introduce evidence (including expert evidence) relevant to the jurisdictional issue that was not before the arbitral tribunal. The Court of Appeal for Ontario granted Luxtona leave to appeal the Divisional Court's decision.

Decision

The Court of Appeal dismissed the appeal. The Court rejected Luxtona's argument that the Divisional Court erred in not referring to the competence-competence principle, which allows an arbitral tribunal to rule on its own jurisdiction in the first instance. The Court commented that the competence-competence principle serves two purposes:

1. "Resolves a legal loophole whereby an arbitral tribunal that finds itself lacking jurisdiction would, ipso facto, lose its ability to make a ruling to that effect."

2. "Promotes efficiency by limiting a party's ability to delay arbitration through court challenges to the tribunal's jurisdiction."

The Court noted that the competence-competence principle is best understood as "a rule of chronological priority" rather than allowing arbitrators to be the sole judge of their own jurisdiction. It thus does not require that any special deference be paid to an arbitral tribunal's determination of its own jurisdiction made in the first instance. The Court also reviewed international authorities demonstrating that the competence-competence principle does not limit the fact-finding power of a court assessing an arbitral tribunal's jurisdictio.

Russian Federation v Luxtona Limited

Because the court retains final say over jurisdictional matters, it must not be limited in its fact-finding ability, and is not limited to the record before the arbitral tribunal. In other words, an application to set aside a preliminary jurisdictional decision under Article 16(3) of the Model Law is a hearing *de novo*, not a review of or appeal from the tribunal's decision. However, the Court introduced a significant caveat: "While there is no need to strictly apply the *Palmer* test, where a party has participated fully in the arbitration, its failure to raise a piece of evidence before the tribunal may be relevant as to the weight the court should assign that evidence."

Analysis

In this decision, the Court of Appeal confirms that an application to set aside a preliminary jurisdictional decision under Article 16(3) is a hearing *de novo*, such that fresh evidence on the jurisdictional issue can be filed by the parties as of right.

It helpfully prevented a potential abuse of the competence-competence principle. The principle does not create any special deference in favour of the arbitral tribunal's determination of its own jurisdiction; it merely preserves the tribunal's authority to make that determination in the first instance.

This authority is subject to the framework set out in D*ell Computer Corp v Union des consommateurs*, 2007 SCC 34, which applies to motions to stay court proceedings in favour of arbitration. In those circumstances, the Supreme Court ruled that a court may exceptionally address the jurisdictional issue in the first instance when doing so would require the court to decide only a question of law, or a question of mixed fact and law necessitating only a superficial review of the factual record.

However, parties should take care in seeking to adduce fresh evidence on an application under Article 16(3) of the Model Law or its domestic equivalent, subsection 17(8) of the *Arbitration Act, 1991* (and analogous provisions in other provincial domestic arbitration statutes). This is particularly so where they have participated fully in the arbitration, given the Court of Appeal's comments as to the weight that evidence may carry

To avoid this potential issue, parties should carefully consider the evidence put before the arbitral tribunal and ensure that, wherever possible, all relevant evidence as to jurisdiction is advanced. Not only will this enhance the prospects of a correct jurisdictional determination before the arbitral tribunal, thus reducing the possibility of having to bring a jurisdictional challenge in the first place, it will ensure such evidence receives proper weight in any hearing de novo under Article 16(3) (or in an application to set aside an arbitral award on jurisdictional grounds under Article 34(2)(a)(iii)).

Newtech Waste Solutions inc. c. Asselin, 2022 QCCS 3537

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Vidéotron c 9238-0831 Québec Inc (Caféier-Boustifo)

Quebec Court of Appeal dismisses motion for referral to arbitration as untimely.

Facts

This case arises in the context of a class action proceeding. Vidéotron appealed from a judgment refusing its request to modify the composition of the class to exclude persons who had entered a contract containing an arbitration clause (the Motion).

On April 23, 2018, Caféier-Boustifo filed an application for authorization to institute a class action against Télébec, Bell Canada, Vidéotron and Cogeco Connexion Inc. in relation to allegedly abusive contract termination clauses in telecommunications services contracts.

Before the hearing on the authorization to institute the class action, both Bell and Cogeco filed motions for declinatory exception (preliminary motions) on the basis that their contracts contained arbitration clauses. The Superior Court granted the motions and declined jurisdiction over them and their clients.

At the time, unlike Bell and Cogeco, the Télébec and Vidéotron contracts did not include an arbitration clause. On October 3, 2018, Vidéotron amended its contracts to include an arbitration clause. However, it did not file a declinatory exception motion at that time.

The class action was eventually authorized against Télébec and Vidéotron, and Boustifo filed its motion to institute its proceeding on January 28, 2021. After a case management conference, in which Vidéotron announced its intent to ask for a modification of the class, Vidéotron filed its Motion on December 8, 2021.

On January 27, 2022, the Superior Court of Quebec dismissed the Motion on the grounds that it was untimely. The Court observed that Vidéotron could have presented its Motion as soon as it amended its contracts to add an arbitration clause. Vidéotron offered no explanation to justify its failure to comply with the 45-day time limit, set out in Article 622 of the Quebec Code of Civil Procedure (CCP), for referral to arbitration after the filing of the motion to institute proceedings.

Decision

The Court of Appeal rejected all grounds of appeal. Although the Motion related to the modification of the class, the Court considered it as a motion challenging the court's *rationae materiae* jurisdiction.

The Court confirmed that the Motion could have been presented as early as the hearing contesting the class action authorization. Considering that it was presented only after the class action was authorized, and after the filing of the motion to institute proceedings, Vidéotron should have complied with the 45-day delay set out in Article 622 of the CCP.

Although the absence of jurisdiction can generally be raised at any stage of the proceedings, Article 622 provides that where the jurisdiction arises from an arbitration agreement, the court is only obliged to decline jurisdiction if the motion for referral is raised within 45 days of the motion to institute proceedings (or within 90 days where the dispute has a foreign element), unless it finds that the arbitration agreement is null and void.

Although the time limit in Article 622 of the CCP is not absolute, any extension must be justified, and the Court found that Vidéotron failed to meet that burden.

Vidéotron c 9238-0831 Québec Inc (Caféier-Boustifo)

Analysis

This case emphasizes the need to file motions invoking lack of jurisdiction *rationae materiae* (in this case because of the existence of an arbitration clause) at the earliest opportunity.

The Court of Appeal cited cases establishing that this is a matter of public order as it prevents a case from being wrongly brought before the court. Thus, in the context of a class action proceeding, this type of motion could be presented at the authorization stage. This is consistent with case law in other provinces wherein a stay in favour of arbitration is generally invoked in the context of the class certification motion. If not done at this stage, the time limit set out in Article 622 of the CCP applies based on the statutory interpretation principle that the legislator has not spoken for no reason.

A party may be relieved from this default limitation if proper justifications and explanations are provided to the court's satisfaction. Clearly, these explanations are not for a court to infer and must be specifically made out. That was not the case in this matter.

While this case was specific to class actions in Quebec, there is a risk, in all jurisdictions and for many types of claim, that a party might be deemed to have waived its right to arbitrate a dispute if it does not promptly seek a stay of court proceedings brought in breach of an arbitration agreement. As such, a party wishing to rely on its right to have any dispute resolved through arbitration should seek a stay of court proceedings promptly and before taking any substantive step in the court proceedings.

Link 427 General Partnership v His Majesty the King, 2023 ONSC 2433

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Mattamy (Downsview) Limited v KSV Restructuring Inc. (Urbancorp)

Ontario Court sets aside arbitral award, finding procedural fairness violation where arbitrator refused to admit evidence filed with consent.

Facts

The Applicant, Mattamy, held a 49 per cent stake in the landholding company that owned the Downsview Project lands in Toronto. In the context of proceedings under the *Companies' Creditors Arrangement Act*, Mattamy acquired Urbancorp's majority 51 per cent share in that landholding company.

The transaction gave rise to several disputes. One was over the alleged entitlement by an entity in the Urbancorp group, to a consulting fee under a co-ownership agreement pertaining to the Downsview Project (the COA).

One of the parties' main disagreements was the meaning of "Gross Receipts" as defined in the COA, which was relevant to calculating the consulting fee. Specifically, they disagreed on whether Gross Receipts included the purchase price of residential condominium units that had been sold, but where the deal had not closed as of the Transfer Date (another defined term). Urbancorp argued these sale proceeds were included; Mattamy argued they were not.

At the hearing, the Arbitrator raised three questions the parties did not canvass in their pre-hearing submissions or evidence. All the questions pertained to the Gross Receipts issue. One of them was: "[W]hat do the ASPE [accounting standards for private enterprises] require for the sale of residential condominium units?" It was uncontested that the Arbitrator raised these three sub-issues for the first time during the hearing; neither party raised them in their materials. The Arbitrator agreed to adjourn the hearing so the parties could lead additional evidence and submissions on these new points.

Included in the new evidence that Mattamy sought to adduce was an affidavit attaching excerpts from the Real Property Association of Canada's handbook entitled "Recommended Accounting Practices for Real Estate Investment and Development Entities Reporting in Accordance with ASPE" (the Handbook). Although Urbancorp objected to some of the evidence, it did not object to the Handbook excerpts.

The Arbitrator scheduled a case conference to address the evidentiary issues. Before the case conference, Mattamy advised Urbancorp that if it maintained its objection to some of the evidence, Mattamy would bring a motion for leave to admit the contested evidence. The Arbitrator refused to hear a formal motion. Instead, he said he would decide the evidentiary issue at the case conference. He allowed the parties to make written and oral submissions.

The Arbitrator struck all references to the Handbook in the affidavit despite admitting other evidence related to the ASPE revenue recognition policy. The Arbitrator did not provide written reasons for his ruling. He nevertheless acknowledged Urbancorp's consent to the Handbook's inclusion. However, he apparently stated that he had a "mind of his own.

The Arbitrator rendered an award granting Urbancorp the full amount it claimed as consulting fees ($5.9 million).

Decision

Mattamy brought an application before the Ontario Superior Court of Justice (Commercial List) to set aside the award. It argued the Arbitrator exceeded his jurisdiction and violated procedural fairness in refusing to admit the Handbook excerpts into evidence despite Urbancorp's consent.

The Court granted Mattamy's application, set aside the award and removed the Arbitrator. It disagreed with Mattamy that the Arbitrator exceeded his jurisdiction. Although the questions he raised on his own motion invoked points the parties had not, they fell within the larger rubric of the parties' dispute over the consulting fees under the COA.

However, the Court found that the Arbitrator's unprompted decision to exclude the Handbook violated procedural fairness and denied Mattamy a fair opportunity to present its case. First, the Handbook was relevant to the new issues the Arbitrator raised. Second, the Court rejected Urbancorp's argument that the evidence from the Handbook was merely corroborative such that its exclusion did not materially impact Mattamy's rights. Third, the Court likewise rejected the argument that the Handbook's exclusion was immaterial since the Arbitrator's decision did not hinge on the additional evidence and submissions the parties filed. Absent reasons for the decision to exclude the Handbook evidence, the Court found the Arbitrator's decision appeared "arbitrary" and "unfair to Mattamy" amounting to a procedural unfairness to Mattamy and "a failure of natural justice.

Analysis

This decision offers several interesting analysis points.

First, it provides an important reminder that although arbitral tribunals enjoy broad procedural discretion, and courts will generally defer to an arbitral tribunal's discretionary procedural decisions, that discretion is not unfettered. All procedural rulings must obey the fair and equal treatment standard contained in section 19 of the *Arbitration Act, 1991* (and similar provisions in other domestic and international arbitration legislation across Canada).

Second, the Arbitrator's choice to address the evidentiary issue at a case conference, rather than by formal motion, merits some discussion. In principle, the Arbitrator was entitled to direct that the evidentiary issue be addressed in this way. This falls squarely within an arbitrator's procedural discretion. Furthermore, using the vehicle of a case conference rather than a formal motion will often be appropriate. Indeed, one way in which arbitration (often) outshines the courts in efficiency is by doing away with "motion practice." All litigators know motions, especially purely procedural motions, tend to increase costs and delay final resolution. In that regard, the Arbitrator's inclination to deal with the matter at a case conference is commendable, again, in principle.

That said, sometimes the case conference format (i.e., no evidence or ability to cross-examine) may be inappropriate. In all cases, the procedure chosen must provide each party with a sufficient opportunity to present their case and respond to the opposing party's case (as well as any issues the arbitral tribunal raises of its own motion).

In this case, the Court could not satisfy itself that the procedure was appropriate. Since the Arbitrator gave no reasons, other than to say he had a "mind of his own," the Court could not confirm Mattamy enjoyed procedural fairness. On the contrary, based on the record, the Court considered the decision arbitrary and unfair. In that respect, arbitral tribunals may take some guidance from the Court. When faced with an opaque and unreasoned decision about material procedural issues, a court might feel compelled to err on the side of caution and grant a remedy.

Mattamy (Downsview) Limited v KSV Restructuring Inc (Urbancorp), 2023 ONSC 3013

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Mattamy (Downsview) Limited v KSV Restructuring Inc. (Urbancorp)

Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc

Alberta Court of King's Bench determines that, by enforcing warranties in a subcontract to which it was not a party, the owner became subject to the subcontract's arbitration clause.

Facts

Husky was the beneficiary of the subcontractor's warranties under a construction contract between Husky's contractor and Technip, the subcontractor. The central issue in this case was whether Husky, a third-party beneficiary of a subcontract, could litigate contractual warranties in its favour when the contract required "all disputes" under the subcontract to be arbitrated instead.

Husky argued it was not required to arbitrate these sub-contractual warranties because it was not subject to the subcontract's arbitration clause. Husky was not a party to that subcontract, was not referred to in the subcontract's arbitration clause and was advancing a claim in negligence that fell outside the scope of the subcontract's arbitration clause.

Technip argued that arbitration was required because Husky chose to enforce its third-party rights under the subcontract and such rights could only be enforced through arbitration. Technip argued that Husky "cannot sever the benefit of the contract from its associated burden."

Decision

The first instance Application Judge found that the dispute resolution provisions of the contract, including arbitration, applied only to the general contractor and subcontractor, not to Husky. Husky was able to enforce the subcontract's warranties, but was not subject to the subcontract's dispute resolution clause.

On appeal, the Alberta Court of King's Bench reached a different conclusion. It held that:

1. Husky was required to arbitrate its contractual warranty claims.
2. Husky was not required to arbitrate its negligence claims, as they did not arise out of the subcontract.

The Court's decision hinged upon the wording of the subcontract's arbitration clause. That clause stated that "[A]ll disputes arising out of or in connection with the present Purchase Order shall be finally settled" by arbitration. By contrast, other dispute resolution clauses – such as a mandatory mediation clause – referred to disputes "between the parties" to the subcontract. The Court held that, in using the language "all disputes," the arbitration provision contemplated a wider scope of disputes than those "between the parties," including those disputes arising out of Husky's enforcement of its warranty rights.

The Court rejected Husky's concern that the arbitration requirement was "foisting an arbitration" on a non-party to a contract. Rather, the court held that Husky's right to the contractual warranty only existed in tandem with the obligation to arbitrate. A third-party, the Court said, cannot take the benefit of an agreement while avoiding the procedural burdens associated with that agreement.

Further, the Court explored a number of additional considerations for recognizing a third-party right subject to arbitration, including its consistency with the whole of the agreement and commercial efficacy concerns. The Court recognized the inconsistency in having all disputes arising from the contract be resolved through arbitration while carving out a specific exception only for Husky as a third-party against the subcontractor. Additionally, the Court recognized that the arbitration requirement did not impose an undue inconvenience or burden on Husky as the contract specified that the arbitration was to take place in Calgary.

Finally, the court found that Husky's negligence claim was not caught by the arbitration provision as this claim did not arise from the contract.

Analysis

The ABKB's decision highlights that much depends on the scope and wording of a contract and in particular its arbitration clauses. The wider the arbitration clause, the likelier the clause may encompass non-parties to the contract. Key, however, is that Husky intended to enforce the subcontract's warranties but avoid the subcontract's arbitration clause; the Court held that non-parties to a contract who attempt to enforce that contract's benefits may subject themselves to that contract's arbitration clause.

Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc, 2023 ABKB 545

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Tidan Inc c Trria Design Inc

Quebec Superior Court upholds arbitrator's jurisdiction to authorize derivative claims.

Facts

This case arose from an arbitration between Tidan and Trria. Together, they owned iQuartier, a Quebec numbered company. All three companies signed a unanimous shareholder agreement, which contained an arbitration clause that provided, in part, that:

> *… any dispute which might arise as to the interpretation or the application of this agreement must be referred to arbitration in front of a sole arbitrator … to the exclusion of the courts. …*

In 2022, Trria commenced arbitration against Tidan, claiming oppression. Tidan challenged seven of Trria's ten claims before the Arbitrator on the basis that they sought relief for damages allegedly suffered by iQuartier, not by Trria itself, and were thus derivative claims. Like other Canadian jurisdictions, Quebec's *Business Corporations Act* requires a party wishing to bring a derivative action to first seek leave of the "court." The statute defines the "court" as the Superior Court of Quebec. On this basis, Tidan argued that the seven derivative claims were not arbitrable.

The Arbitrator disagreed. He found that he had jurisdiction to consider the issue and determined that the seven derivative claims should proceed in the arbitration. Tidan challenged the Arbitrator's decision.

Decision

The Superior Court upheld the Arbitrator's decision. In doing so, it deferred to the principle – as stated in Article 622 of the Quebec Code of Civil Procedure (CCP) – that courts will generally not intervene on issues that are captured by the parties' arbitration agreement.

Relying on the "competence-competence" principle – that an arbitral tribunal has the jurisdiction, in the first instance, to determine its own jurisdiction – the Court found that the Arbitrator had correctly taken on the challenge presented by Tidan. Nevertheless, it re-assessed the question of jurisdiction and agreed that the Arbitrator had correctly found he had jurisdiction to authorize the claims.

In this assessment, the Court drew an analogy to oppression claims generally, which are also described in Quebec law by reference to a "court." It is well established that non-derivative claims for oppression remedies are arbitrable, despite the fact that arbitrators are not "courts." Thus, it follows that the word "court" should receive an equally broad interpretation in the context of derivative claims. This is particularly true in cases where, as here, the parties have agreed to a broadly worded arbitration clause.

On this basis, the Court declined to limit the authorization power for derivative actions to only the Superior Court, finding that nothing in the parties' agreement would permit the Court to limit the scope of the arbitration or to intervene on certain claims or remedies.

Analysis

In 2004, the Quebec Court of Appeal held that an arbitrator could not authorize a derivative action, because it involved a determination of legal capacity and the rights of third parties (see *Acier Leroux Inc c Tremblay*, [2004] QJ 2206). This approach has since been watered down, though the 2004 case can also be distinguished by the narrow arbitration agreement at issue in that case.

Tidan marks the most recent step in recognizing that arbitrators have the power to authorize derivative actions. The Court repeatedly raised the question, and notably refused to answer outright, whether such a power existed. However, by refusing to overrule the Arbitrator's jurisdictional analysis, the Court in *Tidan* tacitly approved the authorization of derivative actions by an arbitrator – at least where a broadly worded arbitration agreement exists to reflect the parties' preference of arbitration over the courts.

Although the Court's reasoning is a positive for parties looking to maximize the scope of their arbitration agreements, it does give rise to some questions. For one, the Court's jurisdiction is a question of law – in this case, a question of statutory interpretation. The Quebec *Business Corporations Act*'s definition of "court" is arguably exhaustive; it reads, "'court' means the Superior Court of Quebec." At first blush, it is difficult to see why the scope of the parties' arbitration agreement should have any bearing on the meaning that the legislature meant to attribute to a statutory provision.

On the other hand, the Supreme Court of Canada has directed courts to read legislation in a manner that favours broader arbitrability. In *Desputeaux v Éditions Chouette (1987) Inc*, 2003 SCC 17, the Court held that a provision in the Copyright Act granting concurrent jurisdiction to the provincial Superior Courts and the Federal Court did not exclude arbitral tribunals. The jurisdiction-conferring provision in *Desputeaux* was different than the one before the Court in this case, but the Supreme Court's reasoning arguably translates to the present context.

It will be interesting to see whether future decisions follow the ruling in *Tidan*, or whether Quebec's Court of Appeal decides to weigh in, again.

Tidan Inc c Trria Design Inc, 2023 QCCS 1746

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Tidan Inc c Trria Design Inc

Angophora Holdings Limited v Ovsyankin

Alberta Court determines sanctions against Russia not grounds to stay enforcement of arbitral award.

Facts

Angophora and Retemmy Finance Ltd. (Retemmy) were both Russian-based companies and shareholders in a third, Cypriot-based corporate entity, Grooks Global Limited (Grooks), subject to a Shareholders Agreement (the SA). Mr. Ovsyankin, a resident of Russia, was the guarantor for Retemmy's obligations under the SA. Angophora was successful in obtaining an LCIA arbitration award for approximately $59 million against Mr. Ovsyankin (the Award). The arbitral tribunal found that Retemmy had committed various breaches of the SA causing significant diminution in the value of Grooks. Mr. Ovsyankin failed in attempting to set aside the Award in England.

Angophora sought and received a Reciprocal Enforcement Order from the Alberta courts enforcing the Award in Alberta (the REO). Mr. Ovsyankin did not appeal the REO. Angophora was subsequently issued a Writ of Enforcement to allow for the seizure and sale of various condominiums in Alberta owned by Mr. Ovsyankin and his spouse (the Writ).

As a result of the war in Ukraine, and subsequent to the granting of the REO, the Government of Canada issued the *Special Economic Measures (Russia) Regulations* to restrict Canadians from dealing with property or providing financial services to a list of designated entities and people (the Russian Sanctions). Those designated entities included third parties controlled by a designated entity. In reliance on the Russian Sanctions, Mr. Ovsyankin made an application for a stay of the REO and a dismissal of the Writ, arguing that their enforcement would result in breaches of the Russian Sanctions due to the relationship between Angophora and Gazprom Bank JSC (Gazprom), a designated entity under the Russian Sanctions.

Decision

The Alberta Court of King's Bench refused the stay and refused to dismiss the Writ allowing Angophora to seek enforcement of the Award against Mr. Ovsyankin in Alberta.

The Court applied the standard three-part test, set by the Supreme Court of Canada in *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, to the question of whether to stay the REO. In accordance with that test, the Court first determined whether there was a serious issue to be tried regarding whether Gazprom controlled Angophora and whether any transfers of proceeds delivered to Angophora pursuant to the REO and the Writ could constitute a breach of the Russian Sanctions. Given that the injunction as sought would amount to a final determination of the matter, the standard to be met on the first step in the three-part test was whether there was a strong *prima facie* case.

The Court accepted that Mr. Ovsyankin had proven there was a strong *prima facie* case that Angophora was a designated entity under the Russian Sanctions based on its control by Gazprom. However, in considering the second element of the stay test – whether Mr. Ovsyankin would suffer irreparable harm – the Court dismissed the stay application and allowed Angophora to proceed with enforcing the Award. The Court noted in considering irreparable harm that the Russian Sanctions were not intended to provide a means for debtors to avoid enforcement and found that the stay, which would only serve to delay enforcement of what was a final judgment against Mr. Ovsyankin, would not prevent irreparable harm. Given the negative finding on irreparable harm, consideration of the third part of the test (the balance of convenience) was not necessary. The Court nonetheless found that it would be contrary to public interest to allow a debtor to use the Russian Sanctions as Mr. Ovsyankin had proposed.

Angophora Holdings Limited v Ovsyankin

The Court did issue a cautionary note, finding that because there was a *prima facie* case that a designated entity under the Russian Sanctions did control Angophora, any Canadian entity would have to exercise caution in distributing proceeds to them. That caution, while not final on the issue of whether the Albertan entity conducting the enforcement could deliver any proceeds under the Writ, is highly likely to discourage any such distribution. While the Court limited the likelihood of delivery of proceeds to Angophora, in upholding the REO issued to enforce the Award, it did respect the finality of that Award and allowed Angophora to take all other steps to enforce against Mr. Ovsyankin's real property in Alberta.

Analysis

Successful enforcement of the Award in Alberta is subject to Angophora's future ability to transfer the proceeds in the event the Russian Sanctions are amended or lifted, or if Angophora is able to show, despite the prima facie case, that Gazprom does not "control" it pursuant to the Russian Sanctions. However, by refusing the stay, the Court prevented Mr. Ovsyankin from avoiding enforcement of what is, without the impact of the Russian Sanctions, a final arbitral award.

This is consistent with the general approach of Canadian courts to uphold and enforce those awards.

Angophora Holdings Limited v Ovsyankin, 2022 ABKB 711

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Buffalo Point First Nation et al v Cottage Owners Association

Manitoba Court finds a party's bad faith is no basis for an arbitral tribunal to exceed its jurisdiction and rewrite a settlement agreement.

Facts

Buffalo Point First Nation leased land to individuals represented by the Buffalo Point Cottage Owners Association (the Association). The leases were for the development of cottages on the land, into which the cottagers invested substantial sums of money in reliance on their long-term leases. The dispute between the parties arose when Buffalo Point unilaterally changed the agreed service fee structure to a tax mechanism, which was more costly to the cottagers. In 2015, the parties reached a settlement that dispensed with the main arbitration and all related litigation. Under the settlement:

1. An agreement providing for binding mediation of disputes over annual fees charged by Buffalo Point was terminated.
2. Buffalo Point was to enact a Taxpayer Representation Council Law, including a provision requiring the parties to submit to binding mediation for the settlement of disputes over Buffalo Point's budget expenditures.
3. The Arbitrator would retain jurisdiction to implement the settlement in the event of any remaining remedial issues or for any necessary clarification. Sanctions.

The parties subsequently disagreed about how to give effect to the Taxpayer Representation Council Law. The Taxpayer Representation Council Law was submitted to Buffalo Point's Tax Commission for approval, as required by the *First Nations Fiscal Management Act.* The Commission refused to approve the Taxpayer Representation Council Law with the binding mediation mechanism called for by the settlement agreement.

The matter was heard by the Arbitrator who, among other things, amended the settlement agreement to remove binding mediation and replace it with "expedited advisory mediation." In their reasons, the Arbitrator commented that the "good faith" performance of the settlement agreement was at stake. In the Arbitrator's view, Buffalo Point was obligated to act in good faith in the realization of the settlement agreement.

Buffalo Point appealed the Arbitrator's decision on the ground that it was beyond the Arbitrator's jurisdiction under the settlement agreement.

Decision

Applying a standard of correctness for these questions of law, the Manitoba Court of King's Bench held that the Arbitrator exceeded their jurisdiction by substantially amending the settlement agreement rather than interpreting it or making an order that could be considered either remedial or a clarification under the settlement agreement.

Analysis

The Court dealt with two key issues: the applicable standard of review, and the scope of the Arbitrator's jurisdiction to make revisions to the settlement agreement.

The substantive issue before the Court was, in the first place, a matter of construing the settlement agreement – particularly the provision which granted the Arbitrator jurisdiction over matters related to the agreement itself. Although the traditional *Sattva* framework required a reasonableness standard of review for arbitral awards, the Court held that the *Vavilov* framework demanded a standard of correctness.

Buffalo Point First Nation et al v Cottage Owners Association

The question of the Arbitrator's jurisdiction was characterized as a question of law, despite the fact that the scope of that jurisdiction was a question of contractual interpretation. It is unclear from the Court's reasons whether it relied on this characterization in applying the *Vavilov* framework and applying a standard of correctness. This is consistent with the majority of lower court decisions, and the only intermediate appellate court decisions, addressing the issue. The Supreme Court of Canada has yet to weigh in (although three concurring justices have signalled their view that *Vavilov* overtakes *Sattva* such that the appellate standard of review applies to appeals from arbitral awards).

The Court found that the Arbitrator's changes to the settlement agreement amounted to a significant rewrite of the settlement agreement by introducing new concepts alien to the negotiated bargain. The Court disagreed that the case of *Churchill Falls (Labrador) Corp v Hydro-Québec*, 2018 SCC 46, which recognized that Quebec courts have sometimes required contracting partners to make slight changes to their contracts, afforded the Arbitrator jurisdiction to substantively modify the settlement agreement on the grounds of good faith:

> *With respect, I disagree that the effect of Churchill Falls is to open the door for an arbitrator to rewrite the key provisions of the Settlement based on his finding Buffalo Point was not acting in good faith. The Arbitrator's reservation of jurisdiction remains the key starting and controlling source of his power.*

Putting aside the scope of the dicta in *Churchill Falls* and its relevance outside of Quebec, the Court was mindful that the Arbitrator's jurisdiction was expressly limited by the arbitration agreement contained in the settlement agreement. Making amendments to the settlement agreement (even if otherwise legitimate) fell outside the Arbitrator's limited jurisdiction to deal with any remaining remedial issues or provide clarification of the terms of the settlement agreement.

Buffalo Point First Nation et al v Cottage Owners Association, 2023 MBKB 141

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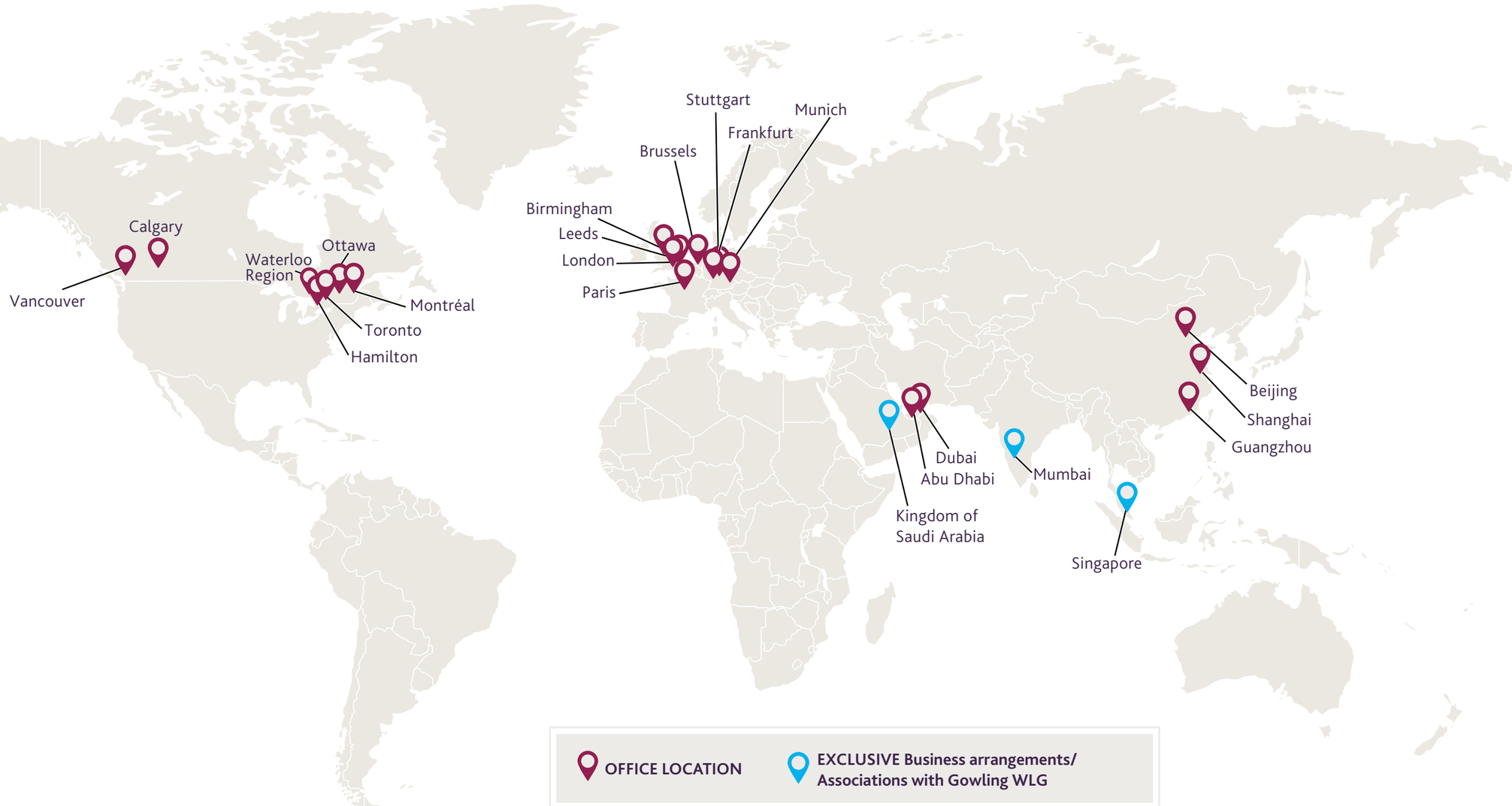

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