SUPREME COURT OF NOVA SCOTIA

Citation: *Lorneville Mechanical Contractors Ltd. v. Clyde Bergemann Canada Ltd.*, 2017 NSSC 119

Date: 20170518
Docket: Hfx No. 439997
Registry: Halifax

Between:

Lorneville Mechanical Contractors Ltd.

Plaintiff
Defendant by Counterclaim

v.

Clyde Bergemann Canada Ltd., Northern Pulp Nova Scotia Corporation

Defendants

Docket: Hfx No. 446556
Registry: Halifax

Northern Pulp Nova Scotia Corporation

Plaintiff
Defendant by Counterclaim

v.

Clyde Bergemann Canada Ltd.

Defendant

LIBRARY HEADING

Judge: The Honourable Justice Ann E. Smith

Heard: March 29, 2017, in Halifax, Nova Scotia

Written Decision: May 18, 2017

Subject: Stay of action by lien claimant in favour of arbitration.

Summary: A subcontractor (Lorneville) filed a lien claim and action against a contractor (Bergemann) relating to unpaid amounts

owing to it. The contract between Lorneville and Bergemann provided for disputes to be resolved by arbitration.

Issues:

(1) Should the Lien Action brought by Lorneville, including Bergemann's counterclaim and cross-claim, be stayed pending arbitration between Bergemann and Lorneville?

(2) If the stay is granted, should the Court designate Michael Ryan, Q.C. as arbitrator, as requested by Lorneville?

(3) If the stay of the Lien Action is dismissed, should the Court consolidate the Lien Action and the Northern Pulp Action?

Result:

The lien action was stayed pursuant to s. 41(e) of the *Judicature Act*. Lorneville could not rely upon the *Commercial Arbitration Act*, SNS 1999, c. 5 to stay its own lien action. The disputes between Lorneville and Bergemann fell within the scope of the matters the parties had agreed should be arbitrated. The parties should attempt to agree on an arbitrator.

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Counsel: Colin D. Piercey and John Shanks for Lorneville Mechanical Contracts Ltd.
Ranjan K. Agarwal, Kevin Cromer; for Clyde Bergemann Canada Ltd.
Darlene Jamieson, Tammy Manning; for Northern Pulp Nova Scotia Corporation

By the Court:

INTRODUCTION

[1] The Plaintiff, Lorneville Mechanical Contractors ("Lorneville"), seeks an Order staying the within Builder's Lien action against Clyde Bergemann Canada Ltd. ("Bergemann") and Northern Pulp Nova Scotia Corporation ("Northern Pulp"). This Builder's Lien action (the "Lien Action") is brought by Lorneville as subcontractor against Bergemann as contractor and Northern Pulp as property owner. Lorneville says that its Lien Action should be stayed to allow for the arbitration of its dispute with Bergemann pursuant to an arbitration provision in its contract with Bergemann.

[2] Bergemann opposes the stay. It says that the parties' arbitration agreement is no longer binding because Lorneville failed to comply with it and that Lorneville has unduly delayed seeking a stay of its own action.

[3] Bergemann brings its own motion for a consolidation of this proceeding with its action against Northern Pulp in Hfx No. 439997 (the "Northern Pulp action").

[4] Northern Pulp takes no position on the stay motion, but opposes Bergemann's consolidation motion.

ISSUES

1. Should the Lien Action brought by Lorneville, including Bergemann's counterclaim and cross-claim, be stayed pending arbitration between Bergemann and Lorneville?

(a) Does Lorneville have standing under the Nova Scotia *Commercial Arbitration Act*, SNS 1999, c. 5 to apply for a stay of its own Lien Action?

(b) What is the scope of the Dispute Resolution provisions in the Subcontract and what are the claims advanced?

(c) Did Lorneville fail to comply with the Dispute Resolution provisions of the Subcontract?

(d) Did Lorneville and Bergemann agree to extend, suspend or waive the dispute resolution timelines of the Subcontract?

(e) Has Lorneville unduly delayed seeking a stay of the Lien Action?

(f) If Lorneville does not have standing under the *Commercial Arbitration Act* to stay the Lien Action, should the Court exercise its discretion to issue a stay pursuant to s. 41(e) of the *Judicature Act*?

2. If the stay is granted, should the Court designate Michael Ryan, Q.C. as arbitrator, as requested by Lorneville?

3. If the stay of the Lien Action is dismissed, should the Court consolidate the Lien Action and the Northern Pulp Action?

BACKGROUND

[5] The Lien Action concerns unpaid invoices submitted by Lorneville to Bergemann in relation to material and services provided to Bergemann at the Northern Pulp mill site in Abercrombie.

[6] In March 2014, Bergemann contracted with Northern Pulp for the supply and installation of an electrostatic precipitator (the "Purchase Contract"). In October 2014, Bergemann entered into a stipulated price subcontract (the "Subcontract") with Lorneville for the mechanical erection, piping installation, and insulation work at the Northern Pulp mill site.

[7] Lorneville performed services for Bergemann under the Subcontract starting in October 2014. On February 26, 2015, Lorneville received notice from Bergemann that it was terminating the Purchase Contract and the Subcontract effective February 27, 2015.

[8] Lorneville ceased work under the Subcontract and provided Bergemann with an invoice dated March 20, 2015. Lorneville and Bergemann raised concerns with Lorneville about the amount of the invoice and requested that Lorneville revise and resubmit it. Lorneville refused to adjust its invoice. From that point in time until approximately a year later, Bergemann and Lorneville attempted to negotiate a resolution of the dispute as to what Bergemann owed to Lorneville (the "Termination Payment").

[9] Meanwhile, on April 23, 2015, in order to preserve its rights under the *Builders' Lien Act*, 2004, c. 14, Lorneville filed a claim for lien against Bergemann as contractor and Northern Pulp as property owner. On June 4, 2015, Lorneville

commenced the Lien Action against Bergemann and Northern Pulp. Lorneville granted extensions to both Bergemann and Northern Pulp to file defences to allow the parties to attempt to negotiate a resolution of all or part of the dispute between Lorneville and Bergemann.

[10] Despite the commencement of the Lien Action, Lorneville and Bergemann continued to attempt to resolve the dispute arising from the termination of the Subcontract. Despite *bona fide* attempts to do so, the parties were unable to resolve all issues in dispute. There was, however, a partial settlement of matters relating to the payment of certain of Lorneville's subcontractors who had also filed lien claims against the Northern Pulp mill site relating to services and materials which had been provided to Lorneville for the project. The agreement between Lorneville, Bergemann and Northern Pulp provided for the direct payment of these subcontractors by Bergemann.

[11] On December 21, 2015, Northern Pulp commenced the Northern Pulp action claiming that Bergemann breached the Purchase Contract by "purporting to terminate the contract and walking away from the Project." Northern Pulp claims damages for breach of the Purchase Contract, lost profits and revenue as well as punitive damages.

[12] In its defence and counterclaim, Bergemann denies that it breached its contracts with Northern Pulp. Bergemann says that it was entitled to terminate its supply and installation contract with Northern Pulp as a result of *force majeure* relating to weather conditions and the performance of its subcontractors, including Lorneville. Bergemann has not brought a third party claim against Lorneville.

[13] Following a direct payment to Lorneville from Northern Pulp in the amount of $620,137.50 and the payment by Northern Pulp into Court the amount of $1,047,485.98, the claim for lien and *lis pendens* in the Lien Action were vacated by Consent Order issued on February 1, 2016. By March, 2016 it was clear to the parties that negotiations would be of no further benefit and negotiations ceased.

[14] On March 29, 2016, Lorneville provided a Notice of Arbitration to Bergemann.

(a) Does Lorneville have standing under the Nova Scotia *Commercial Arbitration Act,* SNS 1999, c. 5 to apply for a stay of its own Lien Action?

[15] Counsel for Bergemann contends that s. 9 of the Nova Scotia *Commercial Arbitration Act*, 1999, c. 5 precludes the Court's consideration of this stay motion. Section 9 provides:

> 9(1) Where a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> (2) The court may refuse to stay the proceeding pursuant to subsection (1) only in the following cases:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid;
>
> (c) the subject-matter of the dispute is not capable of being the subject of arbitration pursuant to the law of the Province;
>
> (d) the motion to stay the proceeding was brought with undue delay;
>
> (e) the matter in dispute is a proper one for default or summary judgment.
>
> (emphasis added)

[16] A line of older cases from Ontario provided that identical provisions in the Ontario *Arbitration Act*, 1991, SO 1991, C. 17 are to be interpreted as precluding the party who commences its lien action from having that action stayed. More recent case law, also from Ontario, has determined that a party who starts a lien action is not precluded by the *Arbitration Act* from moving for a stay of its lien action, in reliance upon the Court's inherent jurisdiction to grant a stay. Apparently, there are no Nova Scotia decisions on point. One of the "newer" cases from Ontario is *Advanced Construction Techniques Ltd. v. OHL Construction Canada*, 2013 CarswellOnt 18456 ("*Advanced*"). In *Advanced*, Master Short for the Ontario Superior Court of Justice interpreted ss. 6 and 7 of Ontario's *Arbitration Act*, which mirror s. 9 of Nova Scotia's *Commercial Arbitration Act*, as follows:

> 201 Section 7 does not say that the court cannot stay an action on a plaintiff's motion but rather says that in the case of a defendant's motion the court shall stay the action to permit the arbitration to proceed.
>
> […]
>
> 203 […] the Court's power to stay an action is not limited to that found in the *Arbitration Act*, 1991.

> 204 The *Courts of Justice Act*, at section 106 provides:
>
> A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.
>
> […]
>
> 211 The Act encourages parties to resort to arbitration and requires them to hold to that course. Once they have agreed to do so, it entrenches the primacy of arbitration over judicial proceedings by directing the court, generally, not to intervene. There are strong public policy reasons in favour of holding parties to their agreement to arbitrate.
>
> […]
>
> 217 I therefore do not accept the submission that the plaintiff cannot, in appropriate circumstances, effectively move for the interim stay of a portion of a Construction Lien action. I hold that a plaintiff can move to have its own lien action stayed to permit a contractual arbitration to take place. […]
>
> (emphasis added)

[17] Master Short found that s. 106 of the *Courts of Justice Act* gave the Court the discretionary jurisdiction to stay litigation in those circumstances and that s. 7 of the Ontario *Arbitration Act* did not preclude such application from succeeding.

[18] Six years earlier, in *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation*, 2007 CarswellOnt 6556 ("*Penn-Co*") Pierce J. of the Ontario Superior Court of Justice had found that a plaintiff had no standing to apply for a stay of its own proceeding by virtue of the wording of s. 7 of the Ontario *Arbitration Act*.

[19] In *Alberici Western Constructors Ltd. v. Saskatchewan Power Corp.*, 2015 SKQB 74 ("*Saskatchewan Power*"), Justice Elson of the Saskatchewan Court of Queen's Bench held that the plaintiff general contractor which sought to stay its own lien action in favour of arbitration could not rely on s. 8 of the Saskatchewan *Arbitration Act*, which like the Nova Scotia *Commercial Arbitration Act* and the Ontario *Arbitration Act*, referred to a stay motion of "another party" to the arbitration agreement.

[20] Justice Elson found that "it was obvious" that a stay motion pursuant to s. 8 of the Saskatchewan *Arbitration Act* could not be brought by the plaintiff.

[21] Justice Elson stated his preference for Master Short's analysis in *Advanced* over Justice Pierce's reasoning in *Penn-Co*:

> 41 In my view, the analysis carried out by Master Short is to be preferred to that relied upon by *SaskPower* from the decision in *Penn-Co*. It necessarily follows that I cannot accept *SaskPower*'s argument that s. 8 precludes AB Western from applying to the court for a stay of proceedings. That said, it is obvious that such an application cannot be considered under s. 8, or any other provision of *The Arbitration Act*, 1992. Rather, it can only be considered as an application for the court to exercise its discretion in favour of a stay under s. 37 of *The Queen's Bench Act*, 1998. Even so, I also agree with Master Short that it is appropriate for the court to consider the factors in s. 8 of *The Arbitration Act*, 1992 when exercising discretion under s. 37.
>
> (emphasis added)

[22] Elson J. observed that, absent a compelling reason, parties with relatively equal bargaining power should "generally be bound to resolve their disputes by the means they have freely chosen." (para. 24) Elson J. continues:

> This observation is not a new one. It applied prior to the current legislation coming into effect in 1993, when the court's authority to grant a stay of court proceedings was considerably less limited than it is presently. See *Boychuck Construction (Saskatchewan) Ltd. v. St. Paul's Roman Catholic Separate School District No. 20* (1966), 56 D.L.R. (2d) 722 (Sask. Q.B.) and *Parsons & Whittemore Pulpmills Inc. v. Foundation Co. of Canada Ltd.* (1970), 73 W.W.R. 300 (Sask. C.A.).
>
> 25 Considering that the new legislation, in Saskatchewan and elsewhere, has narrowed the court's ability to intervene, the above observation is now reinforced and considerably sharper. Authorities supporting this proposition include *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531 (S.C.C.) [*Seidel*], *Hopkins v. Ventura Custom Homes Ltd.*, 2013 MBCA 67, [2013] 9 W.W.R. 481 (Man. C.A.) [*Hopkins*] and *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722, 103 O.R. (3d) 467 (Ont. C.A.) [*Momentous.ca*], aff'd 2012 SCC 9, [2012] 1 S.C.R. 359 (S.C.C.).
>
> 26 In *Hopkins*, the Manitoba Court of Appeal, speaking through Beard J.A., discussed the principles relating to the interpretation of arbitration clauses. In doing so, reference was made to the general attitude courts have adopted in the treatment of these clauses, at para. 59:
>
> > 59 While the foundational principles are clear, in recent years, courts of all levels have recognized the many benefits of consensual contractual arbitration and have adopted a broad-minded attitude to the applicability and interpretation of such clauses. This is consistent with, and in keeping with, the amendments to the arbitration legislation across Canada and internationally. Geoff R. Hall, in his text "Canadian Contractual Interpretation Law", 2d ed. (Markham: LexisNexis Canada Inc., 2012), states (at pp. 227-28):

> The courts have repeatedly held that arbitration clauses are to be given a large and liberal interpretation. The position in Québec is the same as in common law Canada. This approach has an unabashed policy goal: it furthers the modern trend of comity being extended by the judiciary to private dispute resolution procedures which have been adopted by the parties. **It also reflects the policy embodied in the modern Arbitration Acts that directs the court's [*sic*] not to interfere in arbitrations.** Such an approach is different from that which prevailed in an earlier era, in which the courts jealously guarded their jurisdiction and tended to interpret arbitration provisions narrowly. Cases from that era are now not followed.
>
> (emphasis of Elson J.)

[23] Elson J. notes that the "new" Saskatchewan arbitration legislation adopted the legislative model of Alberta and Ontario. As noted above, s. 9 of the Nova Scotia *Commercial Arbitration Act* is identical to s. 7 of the Ontario *Arbitration Act*. Elson J. observes that the purpose and significance of the new *Arbitration Act* in Ontario was discussed by Blair J. in *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (Ont. Gen. Div.) at paras. 8 and 9:

> 8 *The Arbitration Act, 1991* came into effect on January 1, 1992. It repealed the former *Arbitrations Act*, R.S.O. 1980 c. 25, and enacted a new regime for the conduct of arbitrations in Ontario. This new regime is more sophisticated than that of the former Act and more consistent with international commercial arbitration practices. It is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so.
>
> 9 In this latter respect, the new Act **entrenches the primacy of arbitration proceedings over judicial proceedings,** once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene, and by establishing a "presumptive" stay of proceedings in favour of arbitration.
>
> (emphasis of Elson J.)

[24] I conclude that Lorneville cannot rely upon s. 9 of the *Commercial Arbitration Act* to stay the Lien Action, but that it is not precluded from requesting the Court to exercise its discretion in favour of a stay pursuant to the *Judicature Act*. I will consider that request after reviewing the other issues in dispute.

(b) What is the scope of the Dispute Resolution provisions and what are the claims being advanced?

[25] At the outset, it is important to note that the onus is on a party opposing a stay to show why the court action should proceed. In *Self v. Abridean Inc., et al*, 2001 NSSC 91, Robertson J. stated as follows:

> [9] Generally the courts have found that where matters in dispute in litigation are inextricably bound to matters which the parties have agreed to arbitrate, the courts will not intervene in the arbitration process. The onus of showing that the case is not a fit one for arbitration falls upon the party resisting the stay of proceeding.
>
> [10] In *Stokes-Stephens Oil Co v. McNaught*, [1918], 44 D.L.R. 682 (S.C.C.) the court considered an arbitration clause which provided for the arbitration of "any dispute, difference or question between the parties hereto…touching…the construction, meaning or effect of these presents or anything herein contained or the rights or liabilities of the parties…". The court held as follows:
>
> > I think the parties to this agreement intended at the time it was entered into that all questions that might arise between them touching the subject matter of the contract should be settled without proceeding before the courts. (p.683)
> >
> > Once the conclusion is reached that the agreement for arbitration is wide enough to embrace the claims presented in the action, it is the *prima facie duty of the court to allow the agreement to govern…and the onus of shewing that the case is not a fit one for arbitration is thrown on the person opposing the stay of proceedings*.
> >
> > (emphasis added) (pp.690-691)
> >
> > The parties have agreed to determine that they will have arbitrators to decide their claims, instead of resorting to the ordinary courts of the land. *It is our duty, therefore, to act upon that agreement.* It is highly desirable…that "where an arbitration of any sort has been agreed to between the parties those claims should be held to apply."
> >
> > (emphasis added) (pp.692)
>
> [11] In *Bakorp Management Limited v. Pepsi-Cola Canada Ltd.*, [1994] O.J. No. 873 (Gen.Div.) the court interpreted s.7 of the Ontario *Arbitration Act*, S.O. 1991, c.17 and commented:
>
> > Clearly the Court should act with great caution before interfering with an arbitration, especially when agreed to between two such experienced parties with immense financial resources … where matters in dispute in litigation are inextricably bound up with matters which the parties have agreed to arbitrate, the Courts will refuse to permit such multiplicity of proceedings and will stay the litigation. (at p. 12)

> Section 7 of the Ontario Act is worded practically the same as section 9 of the Nova Scotia Act.

[26] In *Carillion Construction v. Imara (Wynford Drive) Ltd*., 2015 ONSC 3658 the Ontario Court of Justice similarly afforded primacy to arbitration over litigation where parties have agreed to resolve disputes by arbitration. Master Albert stated that the contractual definition of "dispute" should be given a "broad" and inclusive interpretation:

> 40 The Court of Appeal in *Mantini v. Smith Lyons LLP* applied a three-step analysis to determine whether an action ought to be stayed under section 7 of the *Arbitration Act*, 1991. First, the court interpreted the contractual arbitration clause in the context of the agreement as a whole. Second, the court analyzed the claims to determine whether they fell within the parameters of the types of disputes that could be arbitrated. Third, the court assessed whether any of the enumerated exceptions applied. I would add to this analysis a fourth step: consideration of the discretionary exceptions found in the *Arbitration Act*, 1991 at sections 6&3 and 7(5), which the court in *Mantini* did not need to consider once it had determined that all of the issues in dispute in the court proceedings fell within the arbitration clause.
>
> …
>
> 49 The dispute that Imara describes in its notice to arbitrate identified issues of delay, completion, negligence in the context of performing the contracts and payment for services and materials supplied. Applying the court's approach in the cases of *Mantini*, *supra*, and *Denison Mines*, *supra*, and giving the contractual definition of "dispute" a broad and inclusive interpretation, I find that the dispute falls within the scope of the issues that the parties agreed could be arbitrated.
>
> (emphasis added)

[27] In *Black & MacDonald Ltd. v. Degrémont Ltée.*, 2009 NSSC 85 Coady J. commented on the interpretation of arbitration clauses as follows at para. 8:

> [18] According to Drafting ADR and Arbitration Clauses for Commercial Contracts, a Canadian text by Wendy Earle (Toronto: Carswell, 2005), arbitration clauses can be classified as either universal, specific, or universal with exceptions.

[28] In *Black & MacDonald*, the contract between the parties provided that "any dispute" was to be referred to arbitration. Coady J. found that a plain reading of the arbitration clause suggested that the parties intended that all financial disputes were to be arbitrated.

[29] The Subcontract between Lorneville and Bergemann contains an arbitration clause, as follows:

> 8.2.5 By giving a Notice in Writing to the other party, not later than 10 Working Days after the date of termination of the mediated negotiations under paragraph 8.2.4, either party may refer the dispute to be finally resolved by arbitration under the Rules of Arbitration of Construction disputes as provided in CCDC 40 in effect of the time of bid closing….

[30] Part 8 of the Subcontract provides for an expedited dispute resolution process. Articles 8.1.1 and 8.1.2 provide:

> **PART 8 DISPUTE RESOLUTION**
>
> **SCC 8.1 INTERPRETATION AND INSTRUCTION OF THE CONTRACTOR**
>
> 8.1.1 The *Contractor*, in the first instance, shall decide on questions arising under the *Subcontract* and interpret the requirements therein. Such decisions shall be given in writing. The *Contractor* shall use the *Contractor's* powers under the *Subcontract* to enforce its faithful performance by both parties hereto.
>
> 8.1.2 Differences between the parties to the *Subcontract* as to the interpretation, application or administration of the *Subcontract* or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by decisions of the *Contractor* as provided in paragraph 8.1.1, shall be settled in accordance with the requirements of Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION.

Clause 8.1.2, applying as it does to the "interpretation, application or administration of the Subcontract, or any failure to agree where agreement between the parties is called for" provides for a very broad range of disputes able to be arbitrated. I find that the amount of the Termination Payment is such an issue.

[31] Bergemann argues that the existence of the counterclaim in the Lien Action and the Northern Pulp action itself, provides a basis to refuse the stay of the Lien Action.

[32] I do not agree. A plain reading of the description of disputes in Article 8.1.2 suggests that the parties intended all disputes to be resolved by arbitration, including those issues raised by Bergemann in its counterclaim against Lorneville and its cross-claims against Northern Pulp.

[33] A review of the pleadings in the Lien Action, including the counterclaim and cross-claim, reveals the matters in dispute among the parties are as follows:

> **Lorneville Lien Action**
>
> - non-payment of invoiced amounts for materials and services supplied under the subcontract (ie the Termination Payment)
>
> **Bergemann Counterclaim against Lorneville**
>
> - delay of performance under the Subcontract
> - breach of implied covenant of good faith in the Subcontract
> - intentional interference with Bergemann's contractual relation with Northern Pulp through a refusal by Lorneville to complete the Subcontract
> - unjust enrichment by Lorneville on account of an overpayment under the Subcontract by Bergemann
> - indemnification from Lorneville for damages owed to Northern Pulp under the Northern Pulp Action

[34] I agree with counsel for Lorneville that all of the claims between Lorneville and Bergemann in the Lien Action relate to issues of performance and the amount of the Termination Payment. These matters are "disputes" within the meaning of Article 8.1.2. Bergemann's claim for indemnity from damages owed to Northern Pulp will be determined on the basis of whether there were breaches of the Subcontract.

[35] The determination of whether Bergemann breached its contract with Northern Pulp as a result of Lorneville's alleged breach of the Subcontract is a separate matter. The Northern Pulp action will determine the breaches if any, of the contracts between Northern Pulp and Bergemann.

[36] I conclude that the existence of the counterclaim in the Lien Action, does not provide a basis to refuse a stay of the Lien Action.

[37] Section 8.2.10 of the Subcontract provides that:

> Should any dispute or portion of any dispute between the *Contractor* and *Subcontractor* relate to a dispute between the *Owner* and the *Contractor*, such dispute or portion thereof as between the *Contractor* and *Subcontractor* shall be disposed of at the same time in the same proceedings and by the same Arbitration Board as is appointed to resolve the dispute between the *Owner* and the *Contractor*.

[38] The Subcontract clearly contemplates that a dispute between the owner (Northern Pulp) and contractor (Bergemann) will be resolved by arbitration. I agree with counsel for Lorneville that in the circumstance where Northern Pulp and Bergemann have a dispute before the Court, it would be unfair to deprive Lorneville of its right to have its dispute with Bergemann resolved by arbitration.

[39] Bergemann relies upon the decision of the Alberta Court of Queen's Bench in *Millennial Construction Ltd. v. 1021120 Alberta Ltd.*, 2005 ABQB 533 and the decision of the Ontario Superior Court in *Tricin Electric Ltd. v. York Region District School Board*, 2009 CarswellOnt 2452 (SupCt) to support its argument that Lorneville has failed to comply with the dispute resolution provisions of the Subcontract and therefore the procedures and conditions required to trigger mandatory arbitration have not been met. However, a review of these two cases shows that the decisions of each Court turned on the questions of the scope of the arbitration clauses and the matters sought to be arbitrated.

[40] In *Millennial* the Court refused a plaintiff's request to stay its own builder's lien action after the defendant had defended the action and won a security for costs award against the plaintiff. The Court applied provisions of the Alberta *Arbitration Act* to an arbitration agreement described in terms somewhat similar to the dispute resolution provisions of the Subcontract. The Court found that the contractual language did not make arbitration mandatory.

[41] At paragraphs 13 and 14, the Court stated:

> In this case, the contractual language used does not make arbitration mandatory…Section 8.2.7 provides that if a notice to arbitrate is not given under section 8.2.6 within the required time, the dispute may be referred to the courts. That is what has occurred, and as the Master pointed out, the parties are well down the litigation trail…It may well be that arbitration would have been expeditious and effective for the lien claimants in this case, but Millennial [sic *Millennial*] has gone far beyond the mere protection of its lien before this court.
>
> …The answer lies, not simply in whether the contract is an arbitration agreement as defined, but with whether the matter in dispute is "to be submitted to arbitration under the agreement", as set out in section 7(1). If the contractual language does not make arbitration mandatory, the matter in dispute does not meet this qualification, and section 7 does not apply. Such is the situation in this case. The steps that would have led to arbitration under the contract were never undertaken, and arbitration remains an incomplete option.
>
> (emphasis added)

[42] The dispute resolution provisions in the Subcontract do not contain a provision similar to Section 8.2.7 considered by the Court in *Millennial*. Also, the circumstances of the case are very different than those before the Court in this case. In *Millennial* a lien claim was filed, a defence was filed and then a significant period of time passed. The defendant brought a successful motion for security for costs. When those costs became due, the plaintiff, for the first time, sought to initiate arbitration.

[43] Unlike the circumstances in *Millennial*, in this case there have been no active steps taken in the litigation beyond the exchange of pleadings.

[44] The decision in *Tricin* is also distinguishable from the case before this Court. As was the case in *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation*, 2007 CarswellOnt 6556, the Court in *Tricin* was considering a stay motion in the context of multiple lawsuits. The scope of the dispute in the lien action, as framed by the plaintiff, was taken outside the scope of what the parties agreed would be allowed to go to arbitration.

[45] This is made clear by the Court at para. 12:

> As the defendant correctly observes, however, there are three lawsuits arising from this dispute. The litigation between the parties raises several issues outside of those contemplated by the terms of the CCA S-1 Revised and therefore the ambit of the arbitration clause. These issues include the validity and timeliness of the lien, whether there is a binding agreement outside of the construction contract, the entitlements under a bond, allegations of negligence against the consultant and of breach of trust against the principals of the general contractor. However likely a resolution of the primary dispute over the power and lighting extra may obviate the necessity of litigating the remaining issues, at present there are a multiplicity of proceedings and issue.

[46] Lorneville was required by the provisions of the *Builders' Lien Act* to name Northern Pulp as a defendant, as owner of the mill site. This does not expand the action beyond the scope of the claims allowed to be arbitrated. The commencement of the Lien Action was a necessary step to preserve Lorneville's lien rights. It was protected in doing so both by Article 8.3 of the Subcontract and s. 33B of the *Builders' Lien Act*.

[47] Article 3 of the Subcontract provides:

> **SCC 8.3 RETENTION OF RIGHTS**

> 8.3.1 It is agreed that no act by either party shall be construed as a renunciation or waiver of any rights or recourses, provided the party has given the *Notices in Writing* required under Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION and has carried out the instructions as provided in paragraph 8.1.3 of SCC 8.1 – INTERPRETION AND INSTRUCITON OF THE CONTRACTOR.
>
> 8.3.2 Nothing in Part 8 of the Subcontract Conditions – DISPUTE RESOLUTION shall be construed in any way to limit a party from asserting any statutory right to a lien under applicable lien legislation of the jurisdiction of the *Place of the Work* and the assertion of such right by initiating judicial proceedings is not to be construed as a waiver of any right that party may have under paragraph 8.2.5 of SCC 8.2 – NEGOTIATION, MEDIATION AND ARBITRATION to proceed by way of arbitration to adjudicate the merits of the claim upon which such a lien is based.

Section 33B of the *Builders' Lien Act* provides:

> 33B Notwithstanding the *Arbitration Act*, the *Commercial Arbitration Act* or the *International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction, where the contract or subcontract of a lien claimant contains a provision respecting arbitration, the taking of any step described in Section 33A does not constitute a waiver of the lien claimant's rights to arbitrate a dispute pursuant to the contract or subcontract. 2004, c. 14, s., 17.

[48] In *Penn-Co* the matters in dispute between the parties were also outside the scope of the contractual arbitration clause. Both the motion decision and the Court of Appeal decision make this clear.

[49] Pierce J. states as follows at para. 29:

> 29 Certain claims Penn-Co makes against Constance Lake fall outside the ambit of "interpretation, application or administration of the Contract," and beyond the scope of what the parties agreed was arbitrable. These include claims:
>
> - that Constance Lake failed to enforce the mediation settlement of 2004;
> - that it negligently permitted the architect and consultant to resign from the project without immediately replacing them;
> - that it failed to instruct them to assist the plaintiff in pursuing the mediation settlement;
> - that Constance Lake should pay aggravated, punitive, and exemplary damages.
>
> The subject matter of these claims is not arbitrable under Ontario Law.

[50] The Court of Appeal in *Penn-Co* similarly notes that the dispute as framed by the plaintiff involved claims which could be arbitrated but other claims which clearly could not be arbitrated. The Court stated at para. 7:

> The dispute as defined by the appellant's statement of claim involved not only claims that might have been arbitrated under the agreement but also other claims and other parties that plainly could not be arbitrated. In these circumstances it was open to the motions judge to conclude that the desirability of having all aspects of the appellant's dispute with the respondents and other parties resolved under the umbrella of a single proceeding prevailed over the appellant's claim to have one part of the dispute arbitrated. We see no error of principle that would entitle us to interfere with her assessment that hiving off one portion of the dispute for arbitration would not be in the interests of justice.

The perils of "hiving off one portion of the dispute" for arbitration do not arise in the within case. Lorneville does not claim anything in the Lien Action outside the scope of the Termination Payment. I find that the issues raised by Bergemann in the counterclaim fall within the scope of the arbitration clause. The matters in dispute between Lorneville and Bergemann all fall within the scope of "disputes" as defined in the Dispute Resolution provisions of the Subcontract.

(c) Did Lorneville fail to comply with the Dispute Resolution provisions of the Subcontract?

[51] The decision of Muise J. in *IWK Health Centre v. Northfield Glass Group Ltd*, 2016 NSSC 281 (*"IWK Health Centre"),* concerned the issue of alleged delay in following the timelines in an arbitration clause between IWK and Northfield. IWK sought the appointment of an arbitrator in its dispute with Northfield, a general contractor for a construction project. Northfield alleged that delay by IWK, both before and after signalling its intention to arbitrate, acted as a bar to arbitration. Muise J. found that IWK's approach to the dispute, which fell outside the strict timelines of the dispute resolution agreement, was an accommodation on its part and did not preclude IWK from pursuing a dispute resolution process in the contract between the parties. The comments of Muise J. at paragraphs 88-92 of his decision are apt to this case:

> [88] IWK's lawyers conducted themselves in a professional manner, understanding and respecting the situation the lawyers for Northfield and Intact found themselves in. As a result, they, in my view, were appropriately flexible and cooperative in their dealings with those lawyers. They did all they could to attempt

> to resolve outstanding issues without having to resort to the courts. In my view, that is an approach that ought to be commended and encouraged.
>
> [89] It is also consistent with the direction in Paragraph 8.2.3 of the Trade Contract that "[t]he parties shall make all reasonable efforts to resolve their dispute by amicable negotiations". Paragraph 8.2.3 is placed between the consultant and mediation provisions. That suggests that it envisioned much tighter timelines than occurred in this case. However, in my view, IWK's approach complied with the spirit of the requirement to attempt to resolve disputes amicably.
>
> [90] If such accommodation related delay were to result in IWK losing its right to mandatory ADR it would cause lawyers in the future to take an inflexible and uncooperative approach. In addition, it would reward Northfield, which was responsible for the bulk of the delay and received the benefit of IWK's accommodating approach. In my view, both of those would be undesirable results and contrary to public policy.

[52] As was the case in *IWK Health Centre*, the Subcontract contained a clause (8.2.2) that provided that "the parties shall make all responsible efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents to facilitate these negotiations." I agree with counsel for Lorneville that it would be perverse for the Court to fail to give primacy to the arbitration clause in favour of litigation on the basis that the parties did not adhere to the timelines set out in the dispute resolution provisions.

(d) Did Lorneville and Bergemann agree to extend or suspend or waive the dispute resolution timelines of the Subcontract?

[53] The two parties mutually agreed to enter into a period of negotiation which was conducted over several months, and which included a face-to-face meeting in the U.S.A. on September 28, 2015. In advance of that meeting counsel for Lorneville wrote to counsel for Bergemann confirming that Lorneville agreed to an extension of time for Bergemann to file a defence to the Lien Action to October 9, 2015.

[54] Counsel for Lorneville also stated:

> In the interim, I am advised by my client that Lorneville and Clyde Bergemann continue to engage in reasonable efforts to resolve their dispute through amicable negotiations in accordance with SCC 8.2. Lorneville confirms its understanding that while amicable negotiations are proceeding, any time lines and in particular, any time lines with respect to referring the matter to arbitration under the terms of the Stipulated Price Subcontract are held in abeyance.

> In connection therewith, I understand that our clients have arranged to meet in person on September 28, 2015 to further those discussions.
>
> I confirm Lorneville's understanding that those discussions are considered to be without prejudice and off the record. Should Clyde Bergemann disagree with this characterization of the discussions for the upcoming meeting of September 28, 2015, please advise me forthwith.
>
> (emphasis added)

[55] Lorneville received no written reply to this letter from Bergemann or its counsel. At no time prior to the filing of the within motion did Bergemann advise that it took issue with Lorneville's characterization of the negotiations as holding the timelines to refer the dispute to arbitration in abeyance.

[56] Also, it was only after Lorneville filed the within motion that Bergemann took the position that it considered its May 5, 2015 correspondence to Lorneville (advising that it had reviewed Lorneville's March 20, 2015 final invoice and that there were "numerous items that were problematic") to be a "decision" pursuant to Section 8.1.1 of the Subcontract. Bergemann now says that that correspondence constituted a "Rejection Letter" and a "decision" within the meaning of Article 8.21.1. Bergemann says that Article 8.2.1 required Lorneville to provide it with Notice in Writing of the dispute within seven working days of receipt of the May 5, 2015 correspondence, which Lorneville failed to do.

[57] I find that instead of treating the dispute over Lorneville's final invoice and Bergemann's rejection of it as an event triggering the cascade of timelines established in successive provisions of the Subcontract, the parties mutually agreed to engage in what both parties agreed were *bona fide* negotiations undertaken to resolve or refine the issues in dispute. These negotiations were in the spirit of Article 8.2.2 of the Subcontract which provides:

> The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents to facilitate these negotiations.

[58] I determine that by its conduct Bergemann implicitly agreed to waive the strict timelines of the dispute resolution provisions of the Subcontract while the parties engaged in good faith negotiations.

(e) Has Lorneville unduly delayed seeking a stay of the Lien Action?

[59] Lorneville filed the Lien Action on June 4, 2015. It moved for a stay on September 1, 2016, nearly 15 months later, and over five months after it delivered its Notice of Arbitration.

[60] Counsel for Lorneville argues that to the extent that there was any delay in providing its Notice of Arbitration, that was a function of the negotiations between Lorneville and Bergemann and also the negotiations between Northern Pulp and Bergemann.

[61] Part 8 of the Dispute Resolution provisions of the Subcontract sets out detailed timelines for certain actions to take place. These timelines are short which reflect the need, recognized by the parties, that disputes which arise while construction is underway need to be resolved quickly so as not to cause undue delay or shut down the construction.

[62] In the circumstances before the Court, the negotiations between Lorneville and Bergemann occurred after February 27, 2015 when the Subcontract was at an end. Mr. Haq, who was the President of Bergemann at that time, agreed that after that date Bergemann made no request to Lorneville to provide any additional services.

[63] As noted by Muise J. in *IWK Health Centre*, concerns about delay do not arise where the work has ended:

> [91] In addition, the dispute in the case at hand arose several years after construction was completed. A dispute that arises in the course of construction requires immediate resolution in order to avoid unnecessary construction delays. That concern does not arise the case at hand.
>
> [92] For these reasons, in my view, the delay following the Notice of Claim in the case at hand does not preclude IWK from having the dispute handled through the ADR process in the Trade contract.

[64] The policy rationale embedded within the tight timelines of Section 8 of the Subcontract did not arise. There was no harm befalling the project because of delay. The argument that Lorneville unduly delayed seeking a stay of the Lien Action has no merit.

(f) Should the Court exercise its discretion to stay the Lien Action pursuant to s. 41(e) of the *Judicature Act*?

[65] Counsel for Lorneville urges the Court to exercise its discretionary jurisdiction to stay the Lien Action pursuant to s. 41(e) of the *Judicature Act*, R.S.N.S. 1989, C. 240.

[66] Further, counsel for Lorneville suggests that this Court should import the same considerations set forth in s. 9(2) of the *Commercial Arbitration Act* in determining whether to grant a stay of the Lien Action as did Master Short in *Advanced* and Elson J. in *Saskatchewan Power*.

[67] I note that Section 9(2) provides that the Court may refuse to stay the proceeding only in the following cases:

> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid;
>
> (c) the subject-matter of the dispute is not capable of being the subject of arbitration pursuant to the law of the Province;
>
> (d) the motion to stay the proceeding was brought with undue delay;
>
> (e) the matter in dispute is a proper one for default or summary judgment.

[68] Bergemann says that the Court should not import Section 9(2) considerations in exercising its inherent jurisdiction to stay the Lien Action. It argues that the legal test the Court must apply in considering a stay pursuant to s. 41(e) of the *Judicature Act* is the "*RHR MacDonald*" test applicable to interlocutory injunctions (*RHR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para. 46). The principles developed in *RHR MacDonald* require the party seeking relief to demonstrate both irreparable harm and that the balance of convenience favours granting the requested order.

[69] I note that neither Court in *Advanced* or *Saskatchewan Power* conducted an analysis of the *RHR MacDonald* factors.

[70] Bergemann says that there is no evidence that Lorneville will suffer any prejudice, much less irreparable harm if the Lien Action proceeds.

[71] I find that it is appropriate for this Court to consider the Section 9(2) factors for refusing a stay. These factors are not mandatory for this Court to consider, but they are helpful. The only relevant factors on the facts before the Court are (c) "the subject matter of the dispute is not capable of being the subject of arbitration pursuant to the law of the Province" and (d) "the motion to stay the proceeding was

brought with undue delay." I have determined that the issues raised in the Lien Action may be arbitrated. The law of Nova Scotia does not preclude these issues from being arbitrated. I have also determined that Lorneville did not unduly delay bringing the Lien Action.

[72] If I am wrong to import these factors when considering the Court's discretionary jurisdiction to stay an action, I find that Lorneville has nonetheless met the *RHR MacDonald* test. There is no question but that arguable issues are raised in the Lien Action. The low threshold to establish an arguable issue is met.

[73] Counsel for Lorneville contends that if the issues in dispute are not arbitrated, his client will suffer irreparable harm because it will lose the efficiencies of having the disputes arbitrated. He notes that the *Civil Procedure Rules* require more substantial documentary disclosure than would be required in arbitration and that his client would be forced into a lengthy process of civil litigation. While Bergemann argues that referring its disputes with Lorneville to arbitration will result in a multiplicity of proceedings and raises the spectre of possible inconsistent findings of facts, I do not agree. I note that if the factors in Section 9(2) are relevant to the exercise of the Court's inherent jurisdiction to stay an action, those factors do not list the risk of multiple proceedings as exceptions to deny a stay.

[74] I accept that Lorneville will suffer irreparable harm if it loses the right to have its issues with Bergemann able to be arbitrated in the manner the parties contracted would occur. Arbitration, freely chosen, should take primacy over litigation.

[75] The balance of convenience also favours Lorneville for the same reasons. Bergemann argues that it would be more convenient to have the Lien Action litigated, and moves to have that action consolidated with the Northern Pulp action. While it might be more convenient to Bergemann to have all its disputes with Lorneville and Northern Pulp "under one roof", that is not the sole consideration as to whether the balance of convenience falls in its favour. In light of my conclusions on the other arguments advanced by Bergemann, it should be clear that there is no reason why this Court should disregard the dispute resolution process the parties freely chose when they entered into their agreement. I find that, on the whole, the balance of convenience favours Lorneville and the grant of a stay.

[76] I conclude that the Lien Action should be stayed, and the disputes referred to arbitration.

2. If the stay is granted, should the Court designate Michael Ryan, Q.C. as arbitrator, as requested by Lorneville?

[77] I decline to appoint an arbitrator. I leave it to the parties to attempt to agree on an arbitrator in the manner provided for in the "Rules for Mediation and Arbitration of Construction Disputes" pursuant to Article 8.2.5 of the Subcontract.

3. If the stay of the lien action is dismissed, should the Court consolidate the Lien Action and the Northern Pulp Action?

[78] Bergemann's motion to consolidate the two proceedings is dismissed given the grant of the stay motion in the Lien Action.

COSTS

[79] Costs are payable by Bergemann to Lorneville in the amount of $2,000.00, within 30 calendar days of this decision. Costs are payable by Bergemann to Northern Pulp in the amount of $1,500.00 within 30 calendar days of this decision.

Smith J.