Date: 2025 08 14
Docket: S-1-CV 2024 000 135

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NIHTAT CORPORATION, NIHTAT GWICH'IN COUNCIL and NIHTAT ENERGY LTD.

Plaintiffs

-and-

GRANT SULLIVAN, JOZEF CARNOGURSKY, ABC CORPORATION, JOHN DOE and JANE DOE

Defendants

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] The Defendants, Grant Sullivan and Jozef Carnogursky, have applied for a stay of proceedings pursuant to s 8 of the *Arbitration Act*.

[2] On May 13, 2024, Nihtat Corporation (Nihtat), Nihtat Gwich'in Council and Nihtat Energy Ltd. filed a Statement of Claim in this matter (the Action). The Action overlaps in part with a Notice of Arbitration issued by Sullivan against Nihtat on April 16, 2024.

[3] The Notice of Arbitration relates to a dispute pursuant to a shareholder agreement between Nihtat, Nihtat Energy Ltd (NEL) and Sullivan (shareholder agreement).

[4] The Action raises numerous issues between the Plaintiffs, Sullivan and Carnogursky, including issues relating to the shareholder agreement.

[5] On May 17, 2024, an Arbitrator was appointed to adjudicate the dispute raised in the Notice of Arbitration (the Arbitration). Nihtat brought a preliminary motion before the Arbitrator seeking to terminate the Arbitration so that all issues between the parties may be dealt with in the Action.

[6] In a partial arbitral award dated July 2, 2024, the Arbitrator determined that he has jurisdiction over the dispute and declined to terminate the Arbitration (the Partial Award).

[7] Nihtat applied to have the Partial Award set aside. Their application was dismissed in a recent decision of this court, *Nihtat Corporation v Sullivan & Nihtat Energy Ltd*., 2025 NWTSC 58. As such the Arbitration is set to proceed.

[8] In the Action the Plaintiffs allege that the Defendants:

(a) created NEL without the knowledge or authorization of the other directors or officers of Nihtat;

(b) caused shares in NEL to be issued to Sullivan and entered the shareholder agreement without the knowledge of the other directors; and

(c) took other actions without proper authorization, including entering into a Management Services Agreement whereby Sullivan became President and Chief Executive Officer of NEL and executing a Transfer of Business Agreement under which certain energy projects and other assets owned by Nihtat were transferred to NEL.

[9] The Plaintiffs also seek to commence a derivative action on behalf of NEL against Sullivan and Carnogursky, although during the hearing of this application counsel for the Plaintiffs indicated they were not planning to pursue this.

[10] The Defendants rely on s 8 of the *Arbitration Act* and seek to have a portion of the Action stayed in favour of arbitration. My understanding is the Defendants view a stay as a permanent remedy. Further, the Defendants request that the remainder of the action be held in abeyance, which they clarified to be a temporary stay, pending decision in the Arbitration.

LEGAL FRAMEWORK

[11] Section 8 of the *Arbitration Act* allows a party who meets certain criteria to request a stay of proceedings in favour of arbitration:

> 8. (1) If a party commences court proceedings in a court in the Northwest Territories in respect of a matter that a party to the court proceedings believes is the subject of an arbitration agreement, the party may, before submitting their first response on the substance of the dispute, apply to that court to stay the court proceedings.
>
> (2) In an application under subsection (1), the court shall make an order staying the court proceedings unless it determines that
>
> > (a) the court proceedings are not in respect of any matter that is the subject of an arbitration agreement;
> >
> > (b) a person against which an arbitration agreement is sought to be enforced entered into the arbitration agreement while under a legal incapacity;
> >
> > (c) the alleged arbitration agreement does not exist, is void or is unenforceable; or
> >
> > (d) the dispute is not capable of being the subject of arbitration under the laws of the Northwest Territories.

[12] In *Peace River Hydro Partners v Petrowest Corp*, (*Peace River*) the Supreme Court of Canada articulated a two-stage analysis common to this type of arbitration provision (para 83). In that case the court was considering s 15 of the BC *Arbitration Act*. In my view the two-stage decision-making framework from *Peace River* also applies to s 8 of the NWT *Arbitration Act*.

[13] In the first stage, the Defendants must establish the technical prerequisites for a mandatory stay of proceedings are met by showing:

> (i) an arbitration agreement exists;
>
> (ii) court proceedings have been commenced;
>
> (iii) the court proceedings are in respect to a matter that one of the parties believes is subject to an arbitration agreement; and,
>
> (iv) the party applying for the stay does so before responding to the substance of the dispute.

[14] The *Arbitration Act* is based on the *Uniform Arbitration Act* (2016) drafted by the Uniform Law Conference of Canada and represents a modern approach to arbitration legislation, which is informed by the competence-competence principle. This principle gives precedence to the arbitration process. It holds that "arbitrators should be allowed to exercise their power to rule first on their own jurisdiction": *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34 (*Dell)* at para 70.

[15] The Defendants need only establish an "arguable case" that the requirements in s 8(1) are met. The Court in *Peace River* considered the arguable case standard at para 84:

> …there is room for a judge to dismiss a stay application when there is no nexus between the claims and the matters reserved for arbitration, while referring to the arbitrator any legitimate question of the scope of the arbitration jurisdiction. This avoids duplication and respects the competence-competence principle.

[16] If the Defendants meet the arguable case standard under s 8(1), it is necessary to proceed to the second stage of the analysis under s 8(2), where the burden shifts to the Plaintiffs, who must prove that one or more of the statutory exceptions identified in s 8(2) apply. If no exceptions apply, the court must grant a stay.

[17] The mandatory nature of the stay provision reflects the presumptive validity of arbitration clauses and the principle of party autonomy. In this context, the court should dismiss a stay application on the basis of a statutory exception only in a "clear case" (*Peace River* at paras 88 and 89).

ANALYSIS

[18] The technical prerequisites under s 8(1) of the *Arbitration Act* have been established. The court has already appointed an arbitrator and confirmed his jurisdiction to hear issues as set out in the Notice of Arbitration. Although Nihtat raises issues about the validity of the arbitration agreement, there is an arguable case that it exists. The parties agree that there is overlap between the Arbitration and the Action. Further, the Defendants have applied for a stay before responding to the substance of the dispute in the Action.

[19] I must then consider the statutory exceptions under s 8(2). The Plaintiffs must prove a clear case that one of the following exceptions exists:

> (a) the court proceedings are not in respect of any matter that is the subject of an arbitration agreement;
>
> (b) a person against which an arbitration agreement is sought to be enforced entered into the arbitration agreement while under a legal incapacity;

> (c) the alleged arbitration agreement does not exist, is void or is unenforceable; or
>
> (d) the dispute is not capable of being the subject of arbitration under the laws of the Northwest Territories.

[20] The Plaintiffs argue that the exceptions under either 8(2)(a) or 8(2)(c) apply.

[21] In regard to s 8(2)(a), the Plaintiff's position is that because the arbitration agreement does not encompass all issues between the parties, a stay should not be available. In my view, whether the arbitration agreement encompasses all issues in the Action is not the test. In *TELUS Communications Inc. v Wellman*, where the court explicitly states that the mandatory stay applies "if at least one matter in the proceeding is dealt with in the arbitration agreement" (para 63). There is overlap between the Arbitration and the Action, and the parties acknowledge this. As such, I cannot find that the exception in s 8(2)(a) applies.

[22] In terms of the validity of the arbitration agreement under s 8(2)(c), the court in *Peace River* offers some guidance at para 136:

> An arbitration agreement will be considered void only in the rare circumstances where it is "intrinsically defective" (and therefore void *ab initio*) according to the usual rules of contract law, including when it is undermined by fraud, undue influence, unconscionability, duress, mistake, or misrepresentation.

[23] There is insufficient evidence to prove a clear case that the arbitration agreement is void at this stage. In fact, I have already found there is an arguable case that an arbitration agreement exists. Further, matters relating to whether an arbitration agreement is void should generally be decided by an arbitrator (*Dell* at para 70). The question of whether an arbitration agreement exists can be decided by a court if it is a pure question of law, or mixed fact and law, where the facts only need superficial consideration (*Dell*, paras 84-85). That is not the case here.

[24] Given this courts' recent decision confirming the arbitrator's jurisdiction, the Plaintiff's proposed solution of terminating the arbitrator's jurisdiction and proceeding with the Action is no longer available.

[25] What the court is left to consider is how to address the potential for overlap between the Action and Arbitration, knowing the Arbitration will proceed.

[26] This raises the question of what the best remedy is to protect the fairness of the proceedings, with due consideration to judicial economy. This requires

consideration of options such as a partial stay, where non-arbitral issues could proceed through the Action while the arbitral issues are arbitrated.

[27] The Plaintiff's own submission is that a partial stay would be ineffective as this will result in a multiplicity of proceedings and lead to the potential for inconsistent results in the two forums. It is their position that Jozef Carnogursky has a central role in all issues and his involvement cannot be bifurcated from the arbitral issues.

[28] The Defendants Sullivan and Carnogursky submit that all the arbitral issues should be stayed permanently and that most of the non-arbitral issues in the action should be held in abeyance pending the outcome of the Arbitration. The Defendants differ slightly on which portions of the claim they think should be held in abeyance but rely on the same legal principles in making their arguments.

[29] The Defendants are requesting a stay of proceedings against all parties, not just those that are parties to the Arbitration. In *Ts'kw'aylaxw First Nation v Graymont Western Canada Inc.*, 2018 BCSC 2101 (*Ts'kw'aylaxw)*, the court discussed the rationale for a stay of proceedings in such circumstances. At paragraphs 31 to 33, the court stated in part:

> [31] In circumstances where the plaintiff advances claims against multiple parties, some of whom are not parties to the arbitration agreement, a stay of the proceedings as a whole is the appropriate remedy if the claims against the various parties are sufficiently intertwined, and if such a stay would be consistent with the principle of judicial economy…
>
> [32] A stay of proceedings as a whole allows the claim to proceed to arbitration in a manner consistent with the parties' wishes, allows the arbitrator to make all necessary findings of fact and, should there be any issues extant at the conclusion of the arbitration, still preserves the court's jurisdiction to consider those issues if necessary …
>
> [33] It is clear that the claim by the plaintiffs against the Province is inextricably related to the claim against Graymont. Indeed, counsel for the plaintiffs conceded that to be the case. To permit the action against the Province to proceed in the circumstances would be to endorse multiple proceedings and create the risk of inconsistent decisions, which ought to be avoided …

[30] The approach in *Ts'kw'aylaxw* is also endorsed in *Kwon v Vanwest College Ltd*., 2021 BCSC 545 (*Kwon)*. In *Kwon*, a counterclaim advanced claims against non-parties to the arbitration agreement. The claims were intertwined with arbitral issues. The court found that to permit the claim against the non-parties to an arbitration to proceed would be to endorse multiple proceedings and the risk of inconsistent decisions. The proceedings were stayed until the arbitration proceedings had concluded.

[31] The Plainitffs rely on *Bains and 10031670 Manitoba Ltd. v Tworek et al*, 2024 MBKB 111 (*Bains)* and *Russell Breweries Inc. v Patrola*, 2014 BCSC 800 (*Russell Breweries*) in support of their argument that this court should refuse to stay proceedings when the parties have not agreed to arbitrate all issues.

[32] In *Bains*, the court essentially found that the parties had entered into a fraudulent agreement, and as such there was not an arguable case that an arbitration agreement existed, and the application failed at the first stage of the *Peace River* framework. This case is distinguishable on the facts.

[33] The Court in *Russell Breweries* took the approach of determining the pith and substance of the claims, rather than specifically considering the various issues. This analytical framework has been rejected by the British Columbia Court of Appeal in *Davidson v Lyra Growth Partners, Inc.*, 2024 BCCA 133 wherein the court said in the absence of statutory exclusions (equivalent to s 8(2) of the NWT *Arbitration Act*) there is no residual discretion to refuse a stay of matters arguably reserved for arbitration (para 58).

[34] In regard to Jozef Carnogursky's standing to seek a stay as a non-party to the arbitration agreement, counsel for Mr. Carnogursky referenced *UNCANU Manufacturing Corp v Calgary (City)*, 2015 ABCA 22 which confirms that a stay is available to a non-party. This approach has also been applied by the Ontario Court of Appeal in *Novatrax International Inc. v Hägele Landtechnik GmbH*, 2016 ONCA 771 wherein the court identified three factors to be considered when determining whether to stay an action that is not subject to arbitration pending the outcome of arbitration. Those factors are: 1) whether the issues in the arbitration are substantially the same as the issues in the action; 2) whether the defendant has satisfied the court that continuing the action would work an injustice on him or her;

and 3) whether the defendant has satisfied the court that staying the action would not cause an injustice to the plaintiff (para 52).

[35] In my view, Mr. Carnogursky does have standing to bring this application. The Plaintiff's claims for relief in the Action arise out of the same transactions and occurrences and raise common questions of fact and law as the Arbitration. Any potential prejudice to the Plaintiffs arising from the associated delay in the Action is minimal, in my assessment. Conversely, there is some risk of injustice to the Defendants in letting the Action proceed parallel to the Arbitration.

[36] I have considered whether a partial stay of proceedings is appropriate in this case. On these facts, a partial stay will be ineffective due to the interconnected nature of the issues. All parties, including the Plaintiff, agree on this point.

[37] This leaves the option of staying the Action in its entirety while the Arbitration proceeds. In my view, this is the correct outcome applying s 8 of the *Arbitration Act*, and the most practical remedy to prevent a multiplicity of proceedings and promote judicial economy.

[38] A stay is not a dismissal, rather it holds the proceedings in abeyance until the arbitrator does the work that the parties agreed should be arbitrated: *Clayworth v Octaform Systems Inc*, 2020 BCCA 117 at para 57.

[39] For arbitral issues, if there are outstanding matters after the arbitration is concluded, or the arbitrator ultimately determines that the arbitration agreement did not exist, the parties may apply to lift the stay and proceed with the Action.

[40] For non-arbitral issues, the stay will remain in place until the Arbitration is concluded, at which time the parties may proceed with the Action.

CONCLUSION

[41] The prerequisites under s 8(1) have been met and the Plaintiffs have not established that a statutory exception under 8(2) applies. Therefore, the mandatory stay provision in s 8 of the *Arbitration Act* is engaged.

[42] Given that the issues raised in the Arbitration and the Action are intertwined, the appropriate remedy is to stay the Action in its entirety pending the outcome of the Arbitration.

K. L. Taylor
J.S.C.

Dated in Yellowknife, NT this
14th day of August, 2025

Counsel for the Plaintiffs:	Jessica Buhler
Counsel for the Defendant, Grant Sullivan:	Alyssa Holland
Counsel for the Defendant, Jozef Carnogursky:	Toby Kruger

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MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE K.L. TAYLOR
