IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Yukon Energy Corporation* v. *Chant Construction Company Inc.,* 2007 YKSC 22

Date: 20070423
S.C. No. 06-A0070
Registry: Whitehorse

BETWEEN:

YUKON ENERGY CORPORATION

PLAINTIFF

AND

CHANT CONSTRUCTION COMPANY INC.

DEFENDANT

Before: Mr. Justice L.F. Gower

Appearances:

John P. Landry and Blair M. Shaw — Appearing for the Plaintiff
Gregory D.M. Stirling — Appearing for the Defendant

REASONS FOR JUDGMENT

INTRODUCTION

[1] Chant Construction Company Inc. ("Chant") has applied for a stay of the within action pursuant to s. 9 of the *Arbitration Act*, R.S.Y. 2002, c. 8 (the "*Act*"), and the inherent jurisdiction of this Court, in order to allow the parties to proceed to arbitration of their disputes pursuant to the dispute resolution provisions in a Design-Build Agreement between them (the "DBA").

[2] The global issue on this application is whether, to use the language of s. 9 of the *Act*, "there is no sufficient reason why the matter should not be referred" to arbitration. I prefer to restate that without the double negative: Is there any sufficient reason why the

matters in dispute should not be arbitrated? There are also a number of sub-issues arising, which I will set out shortly, after a brief overview of the facts.

FACTUAL OVERVIEW

[3] Yukon Energy Corporation (“YEC”) and Chant entered into the DBA on April 11, 2001, for the purpose of constructing a hydroelectric transmission line between the Village of Mayo and Dawson City (the “project”). Section 10 of the DBA contains dispute resolution provisions, which set out the procedure for settlement of disputes between the parties as to the “interpretation, application or administration” of the DBA or any failure to agree where agreement between the parties is called for. The general process is as follows:

> a) The parties are to initially attempt to resolve their differences with the assistance of the project consultant.
>
> b) If a dispute is not resolved by the project consultant, the parties are required to:
>
> > i) appoint a project mediator;
> >
> > ii) make all reasonable efforts to resolve their dispute by negotiation; and
> >
> > iii) request the project mediator to assist the parties to reach agreement on any unresolved dispute.
>
> c) If a dispute is not resolved by mediation, after termination of the mediated negotiations, either party may refer the dispute to be finally resolved by arbitration.

d) If notice to arbitrate is not given within the stipulated time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution which they have agreed to use.

[4] Project construction started in the spring of 2001 and was originally expected to be completed in November 2002, however that target was not achieved. During the course of the project, a number of disputes arose between Chant and YEC which were not resolved in the first instance by findings of the project consultant. In approximately February 2003, the conflicts between the parties resulted in a stop-work order being put in place. For about two months, Chant was not allowed on the construction site. In about April 2003, the project consultant, Ian Hayward, fell ill, was hospitalized and never returned to the job.

[5] A Supplemental Agreement was made between the parties on May 22, 2003, and a Total Completion Agreement was made on January 16, 2004. These two agreements included clauses confirming that it was the intention of the parties to continue to apply the dispute resolution process under the DBA. However, notwithstanding their contractual commitments in that regard, between May 2003 and August 2006, Chant and YEC attempted to resolve their disputes by an informal dispute resolution process outside the DBA, which included numerous meetings, discussions and correspondence between the parties and their counsel.

[6] The project was substantially completed on September 5, 2003, by which time the transmission line became operational and provided hydroelectric power to Dawson City. Total completion was achieved as of January 16, 2004.

[7] For reasons I will discuss later, between December 2005 and August 2006, YEC commenced a total of five legal actions (collectively the "third party actions") against a number of subcontractors and professionals it had retained to assist with the project (the “consultants”).

[8] On August 4, 2006, Chant served on YEC a “Notice to Appoint a Project Mediator”, pursuant to the dispute resolution provisions of the DBA. YEC responded with a letter on August 28, 2006, which included the following statements:

> “By letter dated August 4, 2006, your client has purported to appoint a Project mediator, Roger Kerans, pursuant to section 10 of the Design Build Agreement (the “DBA”), subject to our client's approval. In our view, the only efficient and effective means of achieving a resolution of all claims at this late date is through the Courts.
>
> Some of Chant's claims seek to attribute liability to YEC on the basis of acts or omissions of, or information originating with, consultants or contractors retained by YEC. While our client generally considers Chant's claims to be without merit, if any of Chant's claims are determined to be meritorious, which is not admitted, the responsibility and liability for such claims would flow through to YEC's consultants and contractors. For this reason, it would be futile for YEC to address Chant's claims without the involvement of its consultants and contractors. YEC's consultants and contractors cannot be compelled to participate in the former dispute resolution process under the DBA - - a contract to which only YEC and Chant were parties."

[9] On August 31, 2006, YEC commenced the within action against Chant.

ISSUES

[10] There are a number of issues and sub-issues arising in this application:

1. Do the disputes between the parties fall within the terms of the arbitration clause in the DBA?
2. Does the arbitration clause remain effective and operative?

a) Have the condition precedents been fulfilled?

b) Has the arbitration clause expired?

3. Is there any sufficient reason why the matters in dispute should not be referred to arbitration?

    a) Is there an interconnection between those facts and issues Chant seeks to arbitrate and the facts and issues which are the subject of the third party actions?

    b) What is the impact of multiplicity of proceedings and the risk of inconsistent findings?

    c) Are the issues sufficiently complex that they should be decided by a court?

    d) What procedural difficulties could face YEC if it is forced to arbitrate?

4. Is YEC estopped from litigating the disputes?

ANALYSIS

[11] I wish to preface my remarks here by acknowledging that I found this to be a close and difficult case. I have been greatly assisted by the able submissions of counsel and, at times, I have borrowed liberally from those submissions.

1. Do the disputes between the parties fall within the terms of the arbitration clause in the DBA?

[12] It may be useful at this stage to identify the various third party consultants with a brief description of the type of work they performed for the project. All were retained by YEC and none had any contractual relations with Chant:

1. B.C. Hydro International Limited (“BCHIL”) – performed preliminary engineering and cost estimating; produced final report September 25,

2000, along with 13 volumes of material (referred to collectively as the "BCHIL Report").

2. Power Systems Solutions Inc., Paul Kos, William J. Bergman and Edwin R. Simpson – assisted YEC in preparation of request for proposals (“RFP”) for the project, pre-qualification of bidders, preparation of tender documents and evaluation of bids received.
3. Terra Remote Sensing Inc. – digitally photographed potential transmission line route between Mayo and Dawson City and provided digital terrain elevation model.
4. Christopher R. Burn and Charlotte Mougeot – provided information on soil conditions along proposed transmission line route, including permafrost and terrain investigations.
5. Windrush Investments Ltd. and Ian Hayward (carrying on business as Windrush Engineering) – selection of the final base case for the RFP and preparation of related documents.
6. Ian Hayward International Ltd. (“IHI Ltd.”) – served as the project engineer.
7. Ian A. Hayward – served as the project consultant until April 2003.

[13] Chant's claims are generally as follows:

1. Alleged acts or omissions of YEC's staff, Windrush, Ian Hayward or IHI Ltd. delayed Chant in the performance of its work and caused losses, including, without limitation, trespasses on First Nations lands, drawings issues and schedule impact damages;

2. Alleged changes and extras to the project’s scope of work also gave rise to delay and loss; and
3. YEC allegedly sent a letter to Chant's surety, the Guarantee Company of North America, which negligently misrepresented the status of the project and resulted in the withdrawal by that surety of its bonding facility. As a consequence of the loss of the bonding, Chant says it was unable to bid on several other projects and lost potential profits of approximately $6,000,000. I will refer to this as the “surety claim”.

These claims total $20,830,866, including the $6,000,000 for the surety claim.

[14] YEC's claims against Chant fall into general categories of:

1. Design and construction deficiencies in the project;
2. Acts or omissions of Chant which caused delay in the project, including, without limitation, trespasses on First Nations lands and drawings issues;
3. Indemnification for any liabilities of YEC to third parties, for which Chant is responsible; and
4. Chant's failure to supply equipment, materials and services for which YEC has paid Chant under the DBA.

The total amount of YEC's claims against Chant are estimated to be approximately $9,513,711.

[15] YEC's claims against Chant and the third party consultants also include negligence, negligent misrepresentation, breach of fiduciary duty, unjust enrichment and *quantum meruit*.

[16] Section 10.1.1 of the DBA states:

> “Differences between the Parties to the Agreement as to the interpretation, application or administration of the Agreement or any failure to agree where agreement between the Parties is called for ("disputes"), which are not resolved in the first instance by findings of the consultant . . ., shall be settled in accordance with the requirements of this Section.”

[17] In *Dawson (City)* v. *TSL Contractors Ltd.*, 2002 YKSC 59, Veale J. dealt with a similarly worded arbitration clause, and described it as "very broad" in scope. However, there is some division in the case law as to whether the scope of an arbitration clause should ultimately be determined by the courts or by the arbitral tribunal receiving the referral.

[18] The DBA adopted the “Rules for Mediation and Arbitration of Construction Disputes” published by the Canadian Construction Documents Committee. Section 10.2 of those Rules is entitled “Ruling on Jurisdiction” and it simply states “The arbitrator may rule on the arbitrator's jurisdiction.” I find that the use of the word “may” here is somewhat ambiguous, as it does not definitively and exclusively give that power to the arbitrator.

[19] In *Cityscape Richmond Corp.* v. *Vanbots Construction Corp.*, [2001] O.J. No. 638, Trafford J., of the Ontario Superior Court of Justice, dealt with an arbitration clause which was similar to s. 10.1.1. of the DBA and referred to “Differences between the parties . . . as to the interpretation, application or administration of a contract . . .”. At para. 21, he gave the clause “a large, liberal and remedial interpretation”, finding that it was of sufficient scope to cover all of the disputes between the parties:

> “The word “... interpretation ...” is self-explanatory. The word “... administration ...” may refer to those parts of the contract with headings using the term “administration”. The word “... application ...” is best interpreted to cover not only the scope of the contract itself, but also the execution of the work pursuant to the contract.”

Interestingly however, the case is distinguishable as the *Arbitration Act* there specifically empowered the arbitral tribunal to decide questions of its own jurisdiction.

[20] In *Dawson (City)* v. *TSL Contractors Ltd.*, 2003 YKCA 3, the Yukon Court of Appeal, relying on *Heyman* v. *Darwins Ltd.*, [1942] 1 All E.R. 337 (H.L.), stated at para. 14, that the exact scope of the arbitration clause in that case:

> " . . . is a matter, in the first instance, for the arbitrator to decide. I think that result flows certainly from the judgment of Mr. Justice Hinkson in a case referred to in *Prince George (City)* v. *McElhanney Engineering Services Ltd*., *supra*, namely, *Gulf Canada Resources Ltd.* v. *Arochem International Ltd*. (1992), 66 B.C.L.R. (2d) 113 (C.A.)." (my emphasis)

[21] Curiously, in *Heyman* v. *Darwins Ltd.*, cited above, Lord Porter held, at p. 393, that it is the court which must determine whether the arbitrator has jurisdiction:

> "The court to which an application to stay is made is put in possession of the facts and arguments and must in such a case make up its mind whether the arbitrator has jurisdiction or not as best it can on the evidence before it. Indeed, the application to stay gives an opportunity for putting these and other considerations before the court that it may determine whether the action shall be stayed or not. The difficulty does not lie as a rule in deciding what tribunal is to determine the arbitrator's jurisdiction – that must generally be the function of the court, but it lies rather in finding what are the factors to be taken into consideration in deciding whether the arbitral contract remains in force or not." (my emphasis)

[22] In the *Gulf Canada* case, cited above, Hinkson J.A. held, at paras. 43 and 44, that if it is arguable that a dispute falls within the term of an arbitration clause, then any final determination as to the scope of such a clause should be made by the arbitral tribunal and not by the court. Only where it is "clear" that the dispute is outside the terms of the arbitration agreement, should a court reach any final determination as to such a matter. On the other hand, as I will discuss later, *Gulf Canada* dealt with legislation

which was specifically intended to limit “judicial intervention” in arbitrations (see para. 19) and in that sense is distinguishable from the Yukon context.

[23] On balance, I conclude that if it is arguable that the arbitration clause in question is broad enough in scope to include a given dispute, then the initial determination on that point should be left to the arbitral tribunal. However, circumstances may require the final determination of the jurisdiction of the arbitral tribunal to be made by the court, such as on an application for a stay of proceedings pursuant to s. 9 of the Yukon *Arbitration Act,* or where this question is put to the court pursuant to s. 11(2) of the *Act.*

[24] Having said that, I find that YEC's claims against Chant, including those for negligence, negligent misrepresentation, breach of fiduciary duty, unjust enrichment and *quantum meruit* are *within* the scope of the arbitration agreement. In my view, those claims all arise out of the contractual relations between the parties and are all differences between the parties “as to the interpretation, application or administration” of the DBA. On the other hand, I would not say the same of Chant's claim against YEC for negligent misrepresentation and interference with its contractual relationship with its surety, as that likely constitutes a separate tort outside the four corners of the DBA. However, the point may still be arguable and therefore is one which should initially be determined by the arbitral tribunal, if a stay is granted.

2. *Does the arbitration clause remain effective and operative?*

a) *Have the condition precedents been fulfilled?*

[25] YEC argued that the arbitration clause in the DBA is ineffective because there were certain conditions precedent in that provision which remain unfulfilled. For example, it was contemplated in the DBA that the parties would attempt to resolve their

disputes in the first instance by taking matters up with the project consultant. However, Chant argued that, since the consultant was not involved in the project after April 2003, and YEC took no steps to retain a new project consultant, it was impossible or impractical to have him resolve disputes in the first instance. YEC conceded this point, but responded that there was no evidence that Chant had submitted its claims to the project consultant for decisions as they arose *prior* to April 2003. Whether that is the case or not, the simple fact of the matter is that there was no project consultant in place after April 2003 and it was exclusively YEC's responsibility under the DBA to ensure that such a consultant was appointed. It may be that YEC felt that replacing Mr. Hayward after his hospitalization was not practical or realistic, but the fact that there was no project consultant after that time deprived Chant of the opportunity, in theory, to pursue dispute resolution under the DBA.

[26] YEC further argued that no formal mediation has taken place under the DBA and no written notice of termination of mediation has been given. While that is true, Chant attempted to obtain an agreement with YEC on the appointment of the project mediator by serving its notice to that effect on August 4, 2006. The response from YEC was clearly an indication that it was more interested in pursing court action than mediation. Accordingly, Chant invoked its right under the DBA to refer the disputes to arbitration.

[27] In these circumstances, I agree with Chant that YEC cannot rely upon the non-fulfillment of any conditions precedent as a bar to the referral of disputes to arbitration, where those preliminary steps were prevented by the acts or omissions of YEC. In any event, I also agree with Chant that this issue (whether the non-fulfillment of the

preliminary steps in the dispute resolution process is a bar to arbitration) is a matter to be determined by the arbitral tribunal and not this Court, if a stay is granted.

b) *Has the arbitration clause expired?*

[28] Clause 1.13 of the DBA provides that the term of the DBA ends on the date that all of the following three conditions are fulfilled:

> "a) [Chant] and YEC have performed all obligations required under the [DBA];
>
> b) The Certificate of Total Completion has been issued in accordance with Subsection 7.8; and
>
> c) The warranty period described in Subsection 14.3 has expired."

[29] Chant submits that, while the second and third conditions have been fulfilled, the first has not. I agree. Indeed, the main thrust of Chant's claims against YEC, with the possible exception of the surety claim, is that YEC has *not* met its obligations under the DBA. YEC attempted to argue that, as the transmission system has now been operational for approximately three years, there is no expectation that either YEC or Chant will be performing any further obligations under the DBA. However, that submission ignores the fact that it is those very obligations which are the bases for the respective cross claims by the parties.

3. Is there any sufficient reason why the matters in dispute should not be referred to arbitration?

[30] As I understood the submissions of counsel, this is the central issue in this application. However, this global question has several components, which I will set out shortly as sub-issues.

[31] I begin by noting that it is YEC which bears the onus of persuading me that, pursuant to s. 9 of the *Arbitration Act*, "there is no sufficient reason why the matter

should not be referred" to arbitration: see *Morton* v. *Asper*, [1988] M.J. No. 424 (Man.Q.B.), at p. 7; and *Central Investments & Development Corporation et al*. v. *Miller Associates Ltd. et al.* (1982), 133 D.L.R. (3d) 440 (P.E.I.S.C.) at p. 443.

[32] I also agree with Chant's counsel that courts have consistently emphasized the desirability of enforcing contractual obligations, including agreements to submit disputes to arbitration: see *The Sea Pearl* v. *Seven Seas Dry Cargo Shipping Corp.,* [1982] F.C.J. No. 196 (C.A.); and *The Eleftheria,* [1969] 2 All E.R. 641. However, there may still be cases where, given sufficiently strong reasons, it would not be reasonable or just, in the circumstances, to enforce such contracts. Indeed, as submitted by YEC, the contractual requirement to arbitrate, rather than submit disputes to the courts, was historically considered unenforceable as it purported to oust the jurisdiction of the courts. The statutory compromise reached in England, and adopted in a number of Canadian jurisdictions, including the Yukon, is to permit court actions to proceed, *despite* an agreement to arbitrate, subject to a discretion in the court to stay such actions if the dispute is one which could more appropriately be resolved by arbitration: *Russell on the Law of Arbitration*, 18th ed. (London: Stevens & Sons Limited) 1970 at 137.

[33] Veale J., in *Dawson (City)*, cited above, at para. 10, referred to the Yukon *Arbitration Act* as providing courts with “a wide jurisdiction” to consider whether there are sufficient grounds to refuse a stay of proceedings.

[34] *Gulf Canada*, cited above, is a case involving an application for a stay of proceedings pursuant to s. 8 of the *International Commercial Arbitration Act*, S.B.C. 1986, c. 14. Prior to that legislation, the *Arbitration Act* of British Columbia contained a

provision much like s. 9 of the Yukon *Arbitration Act*. However, Hinkson J.A. noted, at para. 19, that 1986 legislation was enacted "with a view to limiting judicial intervention" in international commercial arbitrations. Specifically, s. 8(2) of the *International Commercial Arbitration Act* states:

> " … the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed."

[35] *Gulf Canada* was applied in *Prince George (City)* v. *McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.), where Cumming J.A., after extensively reviewing Hinkson J.A.'s decision in *Gulf Canada*, confirmed, at para. 62, that it is only where a party establishes that the prerequisites of s. 8 of the *International Commercial Arbitration Act* have clearly *not* been met, should a court refuse a stay. "If it is arguable whether the prerequisites have been met, then the stay should be granted and the issue can be resolved in the arbitration."

[36] The result, as noted by Veale J. in *Dawson (City)*, cited above, at para. 6, is that "court decisions after the 1986 legislation must be read with some care as the discretion provided in the present Yukon *Arbitration Act* has been curtailed in British Columbia."

[37] That proposition was echoed by Hall J.A. in *Dawson (City)*, in the Yukon Court of Appeal, where he stated at para. 11:

> "It is suggested that because the Yukon Statute is what I might call an earlier type of statute, a form of legislation which has been overtaken by amended legislation in both the United Kingdom and in British Columbia, that the task facing Veale J. was one that afforded him a rather wider jurisdiction than would be the case if one were dealing today, say, in British Columbia, with such an application. A case that perhaps is illustrative of the modern or current approach is a case that is referred to in the joint book of authorities, *Prince George (City) v. McElhanney Engineering Services*

> *Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.). Counsel for the appellant referred us to the case of *Intertec International Technische Asistenz G.M.B.H. et al v. Neptune Bulk Terminals et al*, [1985] 5 W.W.R. 231 (B.C.C.A.), a case decided under the earlier legislative regime. As I said, that regime is no longer extant in British Columbia." (my emphasis)

[38] I respectfully agree with the implicit conclusion of the Yukon Court of Appeal in *Dawson (City)* that the cases decided under the more modern legislation (e.g. the *International Commercial Arbitration Act*, S.B.C. 1986, c. 14 and the *Commercial Arbitration Act*, S.B.C. 1986, c. 3) are less helpful to jurisdictions with the earlier type of legislation, such as the Yukon, which preserves a wider discretion for the courts to determine whether it should stay court actions in order to allow arbitration.

[39] In the end, the Court of Appeal in *Dawson (City)* said, at para. 13, that "it comes down to assessing each individual case to determine what is an appropriate order to best meet the ends of justice".

[40] As I said earlier, the parties raised a number of sub-issues here which are each relevant in determining whether there is any sufficient reason why the matters in dispute should not be referred to arbitration. These are as follows.

a) *Is there an interconnection between those facts and issues Chant seeks to arbitrate and the facts and issues which are the subject of the third party actions?*

[41] As I noted above, YEC retained a variety of consultants to assist it in assembling the information and materials deemed necessary to put the project out to tender. YEC has now commenced third party actions against those consultants and, in each case, seeks indemnity and contribution from them, in the event that YEC is found liable to Chant. In two of those actions, the defendants have raised the Yukon *Contributory Negligence Act* and have alleged, in part, that any injury, loss or damage which may

have been suffered by YEC is as a result of the negligence of Chant. Further, YEC's action against IHI Ltd., Windrush and Ian A. Hayward alleges that those defendants are also liable to YEC for failing to take appropriate steps to prevent Chant from breaching its obligations to YEC under the DBA – effectively, that those defendants failed to properly “police” and correct, in a timely way, Chant's breaches of its obligations to YEC as the project progressed.

[42] Accordingly, YEC submits that there is a significant overlap in the issues as between YEC and Chant and YEC's third party actions, and that there will be much evidence that is common to both. I agree. Indeed, the letter from Chant's counsel to YEC's counsel of September 2, 2004, in speaking of the competing cross claims between their respective clients, made the observation that it was “apparent that many of the claims overlap.” Then, after referring specifically to the Hunker Creek claim, the letter continued:

> “This is but one example of many cases involving various overlapping issues whereby facts in relation to one claim cannot be looked at in isolation but must be considered in the context of other related claims.”

[43] I am also cognizant here, although I will say more about this later, of the extent to which, if a stay were granted, allowing arbitration to proceed, that YEC could be required to prove its case a second time over in prosecuting the third party claims. If the YEC/Chant disputes are arbitrated, the findings of that arbitral tribunal on any given claim would not be binding upon any third party. Further, if YEC is found liable to Chant in any respect, then YEC, in prosecuting its related third party claims for indemnity, would have to prove that Chant suffered damage and loss, since that is the first element in its cause of action against each third party, in order to make its claim over.

b) *What is the impact of multiplicity of proceedings and the risk of inconsistent findings*?

[44] I acknowledge that, generally speaking, the fact that there may be multiple parties and multiple issues or a risk of inconsistent findings does not preclude the granting of a stay: *Prince George (City)*, cited above; *Boart Sweden Ab* v. *Nya Stromnes Ab,* [1988] O.J. No. 2839 (S.C./H.C.J.); *Nanisivik Mines Ltd.* v. *F.C.R.S. Shipping Ltd.* (C.A.), [1994] F.C.J. No. 171 (C.A.); *Dawson (City)*, cited above; and *Alford* v. *Yukon*, 2006 YKSC 29.

[45] On the other hand, the risk of multiplicity of proceedings involving the same or related issues has been described as a "strong ground" for refusing a stay of proceedings: Mustill & Boyd, *The Law and Practice of Commercial Arbitration in England*, 2d ed. (London: Butterworths, 1989) at 477-8; *Alford* v. *Yukon*, cited above, at para. 27; *Fluor Canada Constructors Ltd.* v. *Lethbridge (City)* (1989), 44 B.L.R. 258 (Alta. Q.B.) at 273-3.

[46] In addition, s. 12 of the *Judicature Act*, R.S.Y. 2002, c. 96, states as follows:

> "The Court in the exercise of its jurisdiction in every cause or matter pending before it has power to grant and shall grant either absolutely or on any reasonable terms and conditions it considers just any remedies whatsoever that any of the parties thereto may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the cause or matter, so that as far as possible all matters so in controversy between the parties respectively may be completely and finally determined and all multiplicity of legal proceedings concerning any such matters avoided." (my emphasis)

[47] This principle was applied in *Palmers Corrosion Control Ltd.* v. *Tyne Dock Engineering Ltd. and another*, [1997] EWCA Civ. 2776 (20 November 1997) (C.A.),

where the English Court of Appeal, in considering the English equivalent of s. 9 of the Yukon *Arbitration Act*, concluded that, at p. 5, Q.L.:

> ". . . the paramount consideration [was] . . . the multiplicity of proceedings and the consequent risk of injustice through inconsistent findings."

The Court of Appeal further held that it was an error of principle by the chambers judge not to have placed this consideration "at the forefront of his analysis in approaching the exercise of his discretion."

[48] In *Intertec Internationale Technische Assistenz, G.m.b.H., et al.* v. *Neptune Bulk Terminals Ltd.*, [1981] 5 W.W.R. 231, the British Columbia Court of Appeal was dealing with s. 6 of the *Arbitration Act*, R.S.B.C. 1979, c. 18. That *Act* preceded the amendments in 1986 which created the more restrictive legislation referred to in *Prince George (City)* and *Gulf Canada*, cited above. Section 6 of the 1979 *Act* was identical to s. 9 of the Yukon *Arbitration Act*. There, the plaintiff's claim arose from the collapse of machinery installed at its bulk terminal facility by a group of European defendants. Claims were also advanced against a number of Canadian defendants, including engineers, fabricators, repairers and financiers involved in the project. The European defendants sought a stay of proceedings based on a mandatory arbitration clause contained in their contract with the plaintiff. Nemetz C.J.B.C., delivering the judgment of the British Columbia Court of Appeal, acknowledged that, while the prevention of duplication of proceedings is not a conclusive ground for refusing a stay "it is an important consideration". He further quoted the judgment of Lord Denning M.R. in *Taunton-Collins* v. *Cromie*, [1964] 1 W.L.R. 633, [1964] 2 All E.R. 332 (C.A.) at p. 333 where he said:

> "It seems to me most undesirable that there should be two proceedings in two separate tribunals . . . to decide the same questions of fact. If the two proceedings should go on independently, there might be inconsistent findings. The decision of the official referee might conflict with the decision of the arbitrator. There would be much extra cost involved in having two separate proceedings going on side by side; and there would be more delay."

On the facts in *Intertec*, Nemetz C.J.B.C. concluded, at p. 233 W.W.R., that there was ample reason not to refer the matter to arbitration and that such "would be an undesirable result, costly and not in the interest of justice".

[49] I accept the submission of YEC's counsel that, in jurisdictions having legislation identical or similar to s. 9 of the Yukon *Arbitration Act*, courts have almost invariably exercised their discretion against ordering a stay of proceedings, in circumstances where there exists a real risk of multiplicity in proceedings: *Taunton-Collins*, cited above; *New Brunswick Telephone Company Limited* v. *John Maryon International Limited et al.*, [1976] N.B.J. No. 157 (S.C.); *Fluor Canada*, cited above; *Rosedale Motors Inc.* v. *Petro-Canada Inc.* (1998), 42 O.R. (3d) 776 (Gen. Div.); *Morton* v. *Asper*, cited above; *Philips Electronics Ltd.* v. *Westinghouse Canada Inc.* (1984), 27 B.L.R. 54 (Ont. H.C.); *Central Investments*, cited above; *Alliance Cash Register Ltd.* v. *Tokyo Electric Co. Ltd. et al.* (1980), 28 O.R. (2d) 122 (H.C.J.); and *Niagara South Board of Education* v. *H.G. Acres Ltd. et al.* (1972), 29 D.L.R. (3d) 551 (H.C.).

[50] Indeed, it appears to be exceedingly rare, under the Yukon form of legislation, for a court to order a stay in the face of a risk of multiple proceedings. One of the few examples is *Dawson (City)*, cited above. However, that case is distinguishable on the ground that the decisions of both the chambers judge and the Court of Appeal were heavily influenced by the fact that the arbitration proceedings there had proceeded

along for several months and were virtually ready for hearing at the time the City of Dawson filed its writ of summons and statement of claim. The steps taken in preparation for the arbitration hearing including the exchange of pleadings, discovery of documents, examinations for discovery, the exchange of expert reports, numerous hearings before and rulings by the arbitrator, and two adjournments of the arbitration itself. While the Court of Appeal recognized that there was a possibility of inconsistent findings, it held, at para. 16, that this consideration:

> ". . . is rather outweighed by the circumstances that there has been here a considerable body of time, effort and money expended, as I have observed, in getting the arbitration process ready for hearing."

Dawson (City) is also distinguishable on the ground that it involved only three parties, whereas the present case involves some ten third party consultants, besides YEC and Chant.

[51] Finally, I agree with the submission of YEC's counsel that the cases cited by Chant, where a stay had been granted in the face of potential multiplicity of proceedings, were all decided under legislative regimes which expressly eliminate the discretion afforded by the Yukon *Arbitration Act*, notably *Prince George (City)*, cited above; *James* v. *Thow*, 2005 BCSC 809; *Boart Sweden*, cited above; and *Nanisivik Mines*, cited above.

[52] Chant argued that it is largely speculative at this time whether, or the extent to which, a multiplicity of proceedings would in fact result if a stay is granted. Further, that if YEC is not found liable to Chant in the arbitration, then presumably none of the third party actions, with the possible exception of part of the IHI, Windrush and Hayward action, would proceed. In short, Chant submits that granting a stay of the within action

would not necessarily *result* in a multiplicity of actions and that refusing a stay would not necessarily *avoid* a multiplicity of actions.

[53] In response, I firstly agree with YEC's counsel that it is more likely than not, given the twenty-two claims being advanced by Chant against YEC (not including the surety claim), that some will probably succeed and that this may trigger the need for YEC to prosecute its related third party claims. I recognize that, of the claims currently advanced by Chant in its claims summary, only seven or eight involve third parties. However, that is still a significant number and I would expect it to be highly unlikely that Chant would fail on every one of those in arbitration.

[54] Secondly, the outcome of YEC's claims against IHI, Windrush and Hayward will necessarily depend, in part, upon findings of fact in the YEC / Chant dispute. Therefore, if Chant's intended arbitration were to proceed, YEC would have to deal twice over in the courts with all of the facts and law relevant to those issues.

[55] Finally, if this stay is refused, YEC has indicated that it will seek to consolidate the third party actions with the YEC / Chant action, or alternatively seek an order that those actions and the Chant action be heard together. Given the general reluctance of courts to allow multiple proceedings, I would expect that any such application by YEC would probably succeed. Consequently, refusing a stay here will more likely than not avoid a multiplicity of actions.

[56] Chant also argued that it would not be in the interests of justice to refuse to stay this action based on the possibility of multiplicity of proceedings because:

1. That possibility was or ought to have been contemplated by YEC at the time it prepared the DBA; and

2. The dispute resolution provisions of the DBA could have been made binding on YEC's various consultants.

I found this argument very attractive, however, I was ultimately unpersuaded by it for the following reasons. First, the same argument could presumably be made in the many other cases where stays have been refused because multiple proceedings were likely. Second, I recognize the submission by YEC's counsel that, while in hindsight, it would have been prudent to include all parties under an arbitration clause, the reality is that such all encompassing clauses are uncommon because they are very difficult to negotiate. For example, BCHIL was the initial consultant which contracted with YEC in the early stages of the project. At that point, neither YEC nor BCHIL knew who the main contractor would be. Therefore, one might reasonably expect BCHIL to be reluctant to commit to an arbitration process, not yet knowing who the other main player in the project would be. Further, that problem would likely continue as YEC engaged the other consultants as the project moved forward, but prior to the hiring of the main contractor. In addition, Chant's argument here presumes that YEC could have obtained the agreement of all of the individuals and smaller subcontractors, in addition to the larger corporations, to submit to binding arbitration. However, if that arbitration were to be conducted under one large umbrella, those smaller players would be tied up with the larger players for some significant period of time, with all of the additional attendant expenses of doing so. Again, I would expect that negotiating such an umbrella arbitration agreement would, at the very least, be difficult, if not impossible.

[57] Finally, Chant argued that allowing the arbitration to proceed would result in a narrowing of the issues in the remaining third party actions. However, as I have already

noted, any findings made by an arbitral tribunal as between Chant and YEC would not be binding on the third parties. Therefore, whether issues would be narrowed or not remains somewhat speculative.

c) *Are the issues sufficiently complex that they should be decided by a court?*

[58] The existence of questions of law or questions of mixed law and fact is a factor which may support refusing a stay of proceedings: Mustill & Boyd, cited above; *Neptune Bulk*, cited above; and *New Brunswick Telephone*, cited above.

[59] On the other hand, the mere presence of legal questions does not necessarily mean that a matter cannot proceed to arbitration: see *Fluor* v. *Lethbridge*, cited above. Indeed, s. 11(2) of the Yukon *Arbitration Act* specifically authorizes an arbitrator to refer any question of law to a judge of this Court.

[60] Further, in *Irving Pulp & Paper Ltd.* v. *Babcock & Wilcox Ltd*., (1978) 93 D.L.R. (3d) 407 (N.B.C.A.), Hughes C.J.N.B, held, at para. 13, that concerns about questions of law arising "could be advanced in almost any dispute arising out of a contract", but that the real question:

> "… is whether the reasons advanced against staying proceedings are sufficient having regard to the fact that the parties have agreed to submit their dispute to arbitration. In *Stokes-Stephens Oil Co*. v. *McNaught* (supra) Anglin, J. commented at p. 558,9 on the effect of the involvement of questions of law in an arbitration, thus:
>
> > "If the sole matter to be dealt with by the arbitrators were a question of law, a stay of the action on that ground might be properly refused: Edward Grey & Co. v. Tolme & Runge, 31 Times .L.R. 137. But <u>where there are important questions of fact to be determined, . . . the amount of damage sustained by either party, the circumstance that important questions of law are also involved will not justify the refusal of a stay if the claims in the action be</u>

> otherwise proper for submission to arbitrators. Rowe Bros. v. Crosley Bros., 108 L.T. 11; Lock v. Army, Navy and General Assurance Association, 31 Times L.R. 297." (my emphasis)

[61] Having said that, Chant's claims summary described the contract documents as "a complex, prolix, ambiguous and, in some cases, contradictory compilation of documents and contractual terms." Thus, it would appear, in part, the disputes between YEC and Chant will involve questions concerning the construction of written agreements. In addition, YEC's claims against Chant in negligence, breach of fiduciary duty, unjust enrichment and *quantum meruit*, as well as Chant's surety claim against YEC will involve complex questions of mixed fact and law. Arbitration of these issues could involve numerous references to this Court, which may ultimately prove to be cumbersome, time-consuming and expensive: see *Fluor*, cited above, at p. 275; *Philips* v. *Westinghouse*, cited above, at p. 57-8; and *M. Loeb Ltd.* v. *Harzena Holdings Ltd.* (1980), 18 C.P.C. 245 (Ont.S.C./H.C.J.) at 249-50.

[62] I find that the legal complexities here, though not necessarily determinative, are a factor which supports the resolution of the cross claims by a court.

d) *What procedural difficulties could face YEC if it is forced to arbitrate?*

[63] If YEC's disputes with Chant are arbitrated, because the findings from that arbitration would not be binding on any of the third parties, in order for YEC to make a given third party claim, it will first have to prove that Chant suffered a loss. Further, YEC would likely have to prove its allegations against the third parties by using Chant's witnesses, who are unlikely to be cooperative after the arbitration. If so, YEC's prospects of success will be unfairly prejudiced. In short, the evidence by which Chant hopes to prove its claims against YEC in arbitration will necessarily be the same

evidence by which YEC would advance its claims for the contribution and indemnity against the third parties in court, should Chant succeed. Therefore, YEC will probably have to prove the Chant allegations against the third parties a second time, after a lengthy arbitration has already occurred, resulting in a duplication of time and expense, and the potential for inconsistent outcomes.

[64] Finally, there is a significant risk that witnesses will become unavailable or unhelpful to YEC if legal proceedings are conducted in sequence. A number of YEC's consultants are already retired or semi-retired. Key witnesses for parties such as IHI Ltd. are sent on projects around the globe for months at a time, making the prospect of repeatedly obtaining their evidence in sequential legal proceedings remote, inefficient and costly. There is also the usual concern that such witnesses' memories will fade or fail over time.

[65] In response to these arguments, Chant simply says that procedural limitations are inherent in the arbitration process and do not constitute a sufficient reason to refuse a stay in this action. Further, as the parties have agreed to resolve their differences by arbitration, they must also live within any procedural shortcomings inherent or arising out of that agreement.

[66] In some respects, this argument is similar to Chant's point that YEC should have anticipated the possibility of a multiplicity of proceedings at the time that it prepared and executed the DBA. While I confess to having some sympathy for both arguments, I would also repeat the points in response that I made earlier.

[67] First, such an argument could presumably be made in any of the precedent cases where stays were nevertheless refused because of the risk of a multiplicity of proceedings and inconsistent findings.

[68] Second, the current suggestion that YEC should have anticipated the types of procedural difficulties it now faces is an exercise in retrospectivity, which perhaps is somewhat unfair to YEC, given the practical realities it faced at the time it entered into the various contracts with its consultants, and later the DBA.

[69] More importantly however, I accept that, on the facts, the principals of each of the parties, Edward Chant and David Morrison (YEC), genuinely intended to pursue an informal dispute resolution process from May 2003 until August 2006. However, there were various problems experienced along the way which prevented that informal process from bearing fruit. For example, there was delay by Chant providing a detailed summary of its claims to YEC. There was further delay resulting from an intervening Yukon Utilities Board hearing involving YEC, which commenced in April 2005. There was yet more delay in obtaining an agreement on an appropriate referee / mediator to facilitate the informal process. In November 2005, matters were further complicated when Chant refused to deliver to YEC a detailed report supporting its claims, which it commissioned from Revay and Associates. I have to say I remain puzzled by that refusal, especially given that s. 10.2.4 of the DBA requires the parties “to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents” in attempting to resolve their disputes by negotiations. In any event, YEC, in turn, maintained that it required production of the Revay report in order to perform its own internal risk assessment on the validity of Chant’s claims. All these problems were

coupled with the fact that Chant acknowledged having tens of thousands of documents relevant to its defence and counterclaims and YEC admitted to over one hundred thousand relevant documents.

[70] In that overall context, I can understand and accept the statements by David Morrison in his first affidavit that, in 2003, he did not raise with Mr. Chant the possibility that an informal dispute resolution process may not work because of the potential YEC third party claims. At that time, he said he was not thinking along those lines at all. Rather, he was expecting that YEC and its consultants would take a “team approach” to addressing and rebutting Chant's allegations. However, by 2005 Mr. Morrison was becoming concerned about the six-year limitation period in the Yukon *Limitation of Actions Act*, because YEC’s initial contract with BCHIL was made in December 1999. In addition, by virtue of a modified extended reporting endorsement in the project’s insurance policy, the last date upon which a claim could be reported to the insurer (London Guarantee Company) by any of the named insureds was September 15, 2006. As a result, YEC decided that it would commence its action against Chant and all of the third party consultants by that date, so that the consultants would be in a position to report the claims in a timely way and protect their insurance coverage under the policy.

[71] At para. 58 of that affidavit, Mr. Morrison stated as follows:

> “When I started down the path of trying to reach agreement with Chant on an informal process, I believed that such a process was in the interests of both parties, and had the prospect of saving time and money. Further to that belief, I had numerous meetings, telephone discussions and e-mails with Mr. Chant, all with a view to implementing an informal process to try and settle our differences. YEC did not want to start suing its own consultants, but I felt that we had no choice given how Chant's claims in its Claim Summary were framed, and given how the limitation dates and the

> Insurance Policy expiration date were becoming serious concerns. I did not at all like coming to the realization that an information mediation process without the third party consultants would not work, but I have nonetheless come to this conclusion."

[72] In my view, both Chant and YEC embarked down the path of trying to reach an informal dispute resolution process in good faith. No doubt they both believed that such a process was in their respective interests and had the prospect of saving time and money. Unfortunately, there were delays on both sides in moving that process forward. I do not find that either party was particularly at fault for the overall delay. Rather, it is my opinion that both Chant and YEC must roughly share equal responsibility in that regard. Therefore, to the extent that YEC found itself in the position of having to commence its various actions in order to avoid the limitation problems under the *Limitation of Actions Act* and its insurance policy, I find that it did so, at least in part, because of Chant's own acts and omissions.

[73] In these circumstances, I am unpersuaded by Chant's argument that YEC, in effect, made its bed and now has to lie in it.

4. Is YEC estopped from litigating the disputes?

[74] The basis of promissory estoppel is that, if a party makes a promise that it will not insist on its strict legal rights, knowing or intending that the other party will act on that promise, then if the other party does so act, a court of equity will not allow the first party to go back on that promise: see *Hastings Minor Hockey Assn.* v. *Pacific National Exhibition*, [1981] B.C.J. No. 1388 (C.A.).

[75] The promise, however, must be clear, unequivocal, precise and unambiguous: *Sales Promotion Service Inc.* v. *Ultramar Canada Inc.*, [1998] O.J. No. 1514 (Ont.C.A.) at para. 4.

[76] Further, there must be evidence from which it can be inferred that the promise of the party intended that the legal relations created by the contract would be altered as a result of the promise: *Maracle* v. *Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 (S.C.C.), at para. 13.

[77] Finally, a court must be satisfied that it would be unconscionable to allow the promising party to rely on its strict legal rights, having induced the other party to change its position as a result of the promise: *Manitoba Pool Elevators* v. *Gorrell*, [1998] M.J. No. 92 (Q.B.), at para. 21.

[78] Chant submits that YEC has, by its words and conduct, made promises and assurances that unresolved disputes would be settled in accordance with the dispute resolution provisions in the DBA and that it would not seek to litigate those disputes, other than as permitted under the DBA. Here, Chant refers to numerous representations made by YEC from 2001 through 2004 in various letters, in the 2003 Action Plan and Supplemental Agreement, and in the 2004 Total Completion Agreement. These representations were worded in different ways, but essentially all confirm that disputes between the parties would be resolved in accordance with the dispute resolution provisions of the DBA.

[79] Here, I agree with YEC's submission that Chant cannot satisfy the first part of the test. There is no question that YEC contractually committed itself in the DBA to a dispute resolution process which *could* result in an arbitration, if one party so elected. However, that same dispute resolution process *could* result in litigation, if neither party elected arbitration. Therefore, the various references to YEC's representations that it would resolve disputes under the DBA is strictly speaking, a neutral reference. I

acknowledge that, as disputes started arising during the course of the process, in the event the informal dispute resolution process failed, both YEC and Chant were operating under the assumption that arbitration would *likely* be the legal forum in which disputes would be resolved. However, YEC's position changed because of the manner in which Chant's claims were framed to impugn the conduct of YEC's consultants, coupled with the impending expiration of time limitations. In any event, in order for Chant to satisfy the first part of the test for estoppel, it has to prove that YEC made a clear, precise and unambiguous promise that it would never do anything but arbitrate, which YEC did not do.

[80] In his first affidavit, Edward Chant stated, at para. 34:

> "On August 16, 2005, I contacted Morrison to seek clarification of the nature of the dispute resolution process he had proposed in July 2005. In response, Morrison replied that "I don't' have a formal process in mind and I am not stuck on exactly what we proposed last but was thinking that you and I could talk about the best way to go forward. I think that we can talk about the pros and cons of using the arbitration process in the contract or finding some other way to go forward when we meet."

[81] Mr. Morrison, on the other hand, stated in his first affidavit, at para. 61:

> ". . . My view was (and is) that if the disputes were not going to be resolved through an agreed informal process, the only efficient, effective and fair means of achieving a resolution of all claims was through the Courts for the reasons explained below in this Affidavit. This is something that Mr. Chant and I had not discussed before, and had no reason to discuss, because we were both focussed exclusively for many months on trying to reach agreement on an informal process outside of the formal DBA provisions. We had not been discussing at all the "what if" scenario in the event that our efforts failed."

(To be clear, YEC's counsel clarified that Mr. Morrison's reference to "was (and is)" means that was his view as of August 2006, when the decision was made to sue Chant,

and continued to be his view when he swore his affidavit in October 2006. It was not intended to mean that it was always his view.) In addition, Mr. Morrison stated, at para. 73:

> "I did not make any assurances to Mr. Chant that YEC favoured arbitration over legal action during the number of months that we were attempting to reach agreement on an informal process outside of the DBA."

These assertions by Mr. Morrison were not denied by Mr. Chant.

[82] Furthermore, there is no evidence that Chant changed its legal position in reliance on YEC's representations in this regard. Nor is there any evidence that YEC intended that the legal relations created by the DBA would be altered as a result of its representations. In short, Chant never lost any of its rights throughout the course of its negotiations with YEC. To the extent that it hoped the DBA dispute resolution provisions would be engaged, it must also be taken to have known of the potential impact of s. 9 of the *Arbitration Act*, that is, to allow litigation to proceed in spite of those provisions.

[83] Finally, in all of the circumstances, including the risk of multiplicity of proceedings and inconsistent results, as well as the procedural difficulties YEC would be faced with if arbitration were to proceed, I do not find that it would be unconscionable for YEC to proceed with its litigation notwithstanding its representations to Chant.

CONCLUSION

[84] In summary, I conclude as follows:

1. The nature of the disputes, with the possible exception of the Chant surety claim, arguably fall within the scope of the arbitration clause.
2. The arbitration clause continues to be in effect:

a) to the extent that certain conditions precedent have not been fulfilled, those preliminary steps were prevented by the acts or omissions of YEC; and

b) the arbitration clause has not yet expired, since clause 1.13(a) of the DBA has not yet been fulfilled.

3. There is sufficient reason why the matters in dispute should not be referred to arbitration. YEC has met its onus in persuading me that, despite the desirability of enforcing its contractual obligations under the DBA, this Court has wide discretion under s. 9 of the *Arbitration Act* to consider the various factors which militate against a stay of the within action. Those factors include:

    a) an interconnection and overlap between the facts and issues between YEC and Chant and the facts and issues between YEC and its third party consultants;

    b) the risk of multiplicity of proceedings and inconsistent findings is a strong ground for refusing the stay and one which is widely supported by the case law;

    c) the complexity of the issues makes the case more suitable for resolution by a court than an arbitral tribunal; and

    d) were the arbitration to proceed, YEC could face significant and unfair procedural difficulties, such that it would not be in the interests of justice to stay the within action.

4. YEC is not estopped from opposing this application for a stay because:

a) it made no precise and unambiguous promise to Chant that it would never do anything but arbitrate;

b) YEC never intended to alter the legal relations with Chant created by the DBA, nor did Chant lose any of its rights under the DBA by relying on YEC's representations; and

c) in all of the circumstances, it is not unconscionable for YEC to oppose the application for the stay.

[85] Due to time constraints at the hearing of this application, the issue of costs was not addressed. Therefore, I prefer not to make any order in that regard. However, the parties may return before me to make further submissions on the point, if they are otherwise unable to agree.

[86] Finally, I once again express my appreciation to all counsel for their thoughtful and detailed submissions.

GOWER J.