

CANADA / JUDGMENT

Petrowest Corporation v. Peace River Hydro Partners

2020 BCCA 339

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 339 Petrowest Corporation v. Peace River Hydro Partners

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Petrowest Corporation v. Peace River Hydro Partners,

2020 BCCA 339

Date: 20201130

Docket: CA46638

Between:

Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd., and Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and Trans Carrier Ltd.

Respondents

(Plaintiffs)

And

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A., and Samsung C&T Corporation

Appellants

(Defendants)

Before:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated December 20, 2019 (Petrowest Corporation v. Peace River Hydro Partners, 2019 BCSC 2221, Vancouver Docket S189418).

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Place and Date of Hearing:

Vancouver, British Columbia

July 23, 2020

Written Submissions Received:

November 9, 19, 24, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 30, 2020

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Madam Justice Dickson

Summary:

The appellant challenged an order by the chambers judge dismissing an application for a stay of proceedings under section 15(2) of the BC Arbitration Act. The respondent debtor was placed in receivership under the supervision of the court-ordered respondent receiver. The receiver pursued claims under several agreements, which the appellants argued were subject to mandatory arbitration clauses. The judge found that section 15 of the Arbitration Act had been engaged, but that the court retained inherent jurisdiction pursuant to section 183 of the Bankruptcy and Insolvency Act to decline to order the stay, notwithstanding the mandatory language of the Arbitration Act. Held: appeal dismissed. The judge erred in finding that section 15 of the Arbitration Act was engaged and that an assessment of inherent jurisdiction was necessary. However, the appeal was dismissed because the receiver was not a party to the arbitration agreements, and the arbitration clauses became inoperable. Section 15 of the Arbitration Act was therefore not engaged, and the judge's refusal to order the stay was proper.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1.0 INTRODUCTION

- [1] The respondent Petrowest Corporation ("Petrowest") is in receivership. The court-appointed receiver is the respondent Ernst & Young Inc. The remaining respondents are affiliates of Petrowest. The receiver has assigned them into bankruptcy, and acts as their trustee in bankruptcy.
- [2] In their name and in its own, the receiver has commenced action against the appellants, claiming amounts allegedly owed under agreements between the respondents and appellants that include mandatory arbitration clauses. Is the receiver bound to arbitrate those disputes under the various contracts, or may the receiver proceed instead with this single action?
- [3] The agreements in question principally comprise subcontracts between Petrowest and its affiliates, and the appellant partnership, Peace River Hydro Partners ("PRHP"), to perform work under contracts between PRHP and BC Hydro relating to the construction of the Site C hydroelectric project. The remaining appellants are the partners of PRHP.
- [4] The appellants applied for an order staying this action pursuant to section 15 of the Arbitration Act, RSBC 1996, c 55 (the "Act"), on the ground that a resolution of the respondents' claims under the various agreements was subject to mandatory arbitration clauses in those agreements. By section 15 (as it then was):

15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.

- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
- [5] As of September 1, 2020, that legislation has been replaced by the Arbitration Act, SBC 2020, c 2. By section 7 of that Act:

Stay of court proceedings

7 (1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.

- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

- [6] The question turns on the effect, if any, of the appointment of the receiver and assignments into bankruptcy pursuant to the provisions of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 ("BIA"), on the application of section 15 of the Act to the claims brought in this proceeding.

2.0 OVERVIEW OF THE JUDGMENT BELOW

- [7] The chambers judge, Madam Justice Iyer, dismissed the application for a stay, and allowed the receiver to continue this action. Her reasons are indexed at 2019 BCSC 2221.
- [8] Contrary to arguments raised by the receiver, the chambers judge found that section 15 of the Act was engaged, and applied to these proceedings. In doing so, she considered three questions:
- (1) whether the receiver was a party to the arbitration agreements within the meaning of section 15(1); she concluded it was;
 - (2) whether the principal appellant had applied for the stay before filing a response or taking any other step in the proceeding, as contemplated by section 15(1); she found that it had; and
 - (3) whether the arbitration clauses were void, inoperative, or incapable of performance within the meaning of section 15(2); she concluded for the purposes of the application that they were not.
- [9] Having thus found that section 15 was engaged, the judge nevertheless concluded, notwithstanding section 15(2), that the court had discretion to decline a stay where section 183 of the BIA applies. She reasoned that section 183 empowered the court to exercise its inherent jurisdiction to control its own processes, including avoiding the operation of section 15 of the Act in appropriate circumstances.

- [10] By section 183:

183 (1) The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

- [11] In deciding that the court should exercise that discretion in this case, the judge made this observation at para 60:

This case involves a significant amount of money in which the bankrupts' creditors have an interest. The difference in the cost and time involved of prosecuting the claim in court as compared to the multiple arbitration proceedings is substantial. The bankruptcy order was made in April 2018. It will not be possible to distribute the proceeds of the bankrupts' estates until these disputes are resolved. I agree that the inherent jurisdiction of the court should be used sparingly.

However, the significant cost and delay inherent in the multiple proceedings that would occur in this case as compared to judicial determination is unfair to the creditors and contrary to the objects of the BIA. The absence of any prejudice to the defendants is an important distinguishing factor.

3.0 ISSUES ON APPEAL

[12] The appellants accept the judge's three conclusions that led her to find that section 15 was engaged: that the respondent receiver was a party to the agreements, that PRHP had applied for the stay before filing a response or taking any other step in the proceeding, and that the arbitration clauses were not void, inoperative or incapable of performance. Their appeal focuses on the judge's interpretation of the BIA, and her conclusion that the court had inherent jurisdiction that gave it the discretion not to order a stay that was otherwise mandatory under section 15 of the Act. In the alternative, they submit that if the judge had the discretion to refuse a stay, she exercised it on wrong principles.

[13] The appellants rely also on section 72(1) of the BIA, an argument they did not raise in the court below. By that section,

72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

[14] They further raise the related ground, also for the first time, that the judge erred in law "by failing to undertake a paramountcy analysis as part of assessing whether there is a conflict between a mandatory provision of a provincial statute and the BIA". The judge recognized the potential application of the doctrine of paramountcy, but noted that it was not raised before her.

[15] The burden of proving that the doctrine applies is on the party relying upon it; see, for instance, *Orphan Wells Association v Grant Thornton Limited*, 2019 SCC 5 at para 66. In this case, the respondents would bear that burden, and have expressly declined to invoke the doctrine. They raised it neither here nor below, so the question is not properly before us.

[16] This is, potentially, a matter of some concern. If, as the judge found, section 15 of the Act is engaged, then her use of inherent jurisdiction through section 183 of the BIA as a tool for finding the discretion to decline to order a statutorily-mandated stay is problematic. As the Supreme Court of Canada put it in *Ontario v Criminal Lawyers' Association*, 2013 SCC 43:

[22] In spite of its amorphous nature, providing the foundation for powers as diverse as contempt of court, the stay of proceedings and judicial review, the doctrine of inherent jurisdiction does not operate without limits.

[23] It has long been settled that the way in which superior courts exercise their powers may be structured by Parliament and the legislature. As Jacob notes (at p. 24): " The court may exercise its inherent jurisdiction even in respect of matters which are regulated by statute or by rule of court, so long as it can do so without contravening any statutory provision" .

[Citations omitted; emphasis original.]

See also Residential Warranty Company of Canada Inc (Re), 2006 ABCA 293:

[20] Inherent jurisdiction is not without limits, however. It cannot be used to negate the unambiguous expression of legislative will and moreover, because it is a special and extraordinary power, should be exercised only sparingly and in a clear case.

[Citations omitted; emphasis added.]

[17] The barrier thus raised by section 15 of the Act (assuming it is engaged) to the exercise of inherent jurisdiction via section 183 of the BIA was not considered in either Pope & Talbot Ltd (Re), 2009 BCSC 1552, or Industrial Alliance Insurance and Financial Services Inc. v Wedgemount Power Limited Partnership, 2018 BCSC 970, on which the judge relied. Pope & Talbot itself relied on Madam Justice Topolniski's use of inherent jurisdiction in Residential Warranty Company of Canada Inc (Re), 2006 ABQB 236, aff'd 2006 ABCA 293. But as the excerpt from the appeal decision quoted in para 16 above suggests, that litigation did not concern arbitration agreements or statutorily-mandated stays. There, the court used its inherent jurisdiction to grant a charge to the trustee for fees, not to avoid the operation of a statute.

[18] This court has previously found that section 183 of the BIA preserves an equitable jurisdiction that can give rise to discretion. But that, too, must give way to legislative will: Re United Used Auto & Truck Parts Ltd (2000), 16 C.B.R. (4th) 141 (BCCA), at para 18:

The origins of the receivers' jurisdiction are located in the equitable jurisdiction of the Court of Chancery and while that jurisdiction cannot be exercised contrary to a statute nothing precludes its exercise to supplement the statute and effect a statutory object.

[19] That leaves for consideration an alternative analysis founded upon statutory discretion arising under the BIA: see, for instance, Madam Justice Georgina R. Jackson and Dr. Janis Sarra: "Selecting the Judicial Tool to Get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in J.P. Sarra, ed., Annual Review of Insolvency Law 2007 (Toronto: Carswell, 2008) 41 at 73:

It is only where broad statutory authority is unavailable that inherent jurisdiction needs to be considered as a possible judicial tool to utilize in the circumstances.

[20] It seems evident, however, that even if such broad statutory authority were found here, the result would be a conflict between federal and provincial law to the extent that section 15 of the Act applies. This would run into the prohibition raised by section 72(1) of the BIA, and would ultimately fall to be resolved through the doctrine of paramountcy: see *GMAC v TCT Logistics Inc*, 2006 SCC 35 at para 51.

[21] The chambers judge recognized this potential, at least as an alternative, at para 42 of her reasons:

Alternatively, if s. 15(2) does not admit of that interpretation, there could be a conflict between provincial and federal laws, so that the principle of paramountcy would require the federal law to prevail. That question was raised, but not answered, in *Luscar*, at paras. 73-75. As the issue was not argued before me, and it is not necessary to decide it here, I will not address it further.

[Emphasis added.]

[22] The issue was also not argued before us, and so there is little point to undertaking the necessary statutory analysis.

[23] While supporting the judge's findings as to inherent jurisdiction and discretion even though they decline to invoke the doctrine of paramountcy, the respondents nevertheless take a step backwards along the chain of reasoning. They assert that the judge erred in concluding that section 15 of the Act was engaged, so that it is unnecessary to consider the questions of inherent jurisdiction and discretion. They allege three errors, any one of which, if corrected, would support the result the judge reached even if her jurisdictional conclusion is wrong. These arise out of the three questions discussed above.

[24] The respondents say, first, that the receiver was not a party to the agreements within the meaning of the Act, and is not bound by the arbitration clauses. They say, second, that PRHP took a "step in the proceeding" before applying, and so is not entitled to the stay. Finally, they maintain that with the appointment of the receiver, and on other grounds including the purported termination of Petrowest's partnership in PRHP, the applicable arbitration clauses became inoperative.

[25] It is apparent that if the respondents are correct in relation to any one of those three propositions, then the result is sustainable even if it turns out that the judge's conclusion as to jurisdiction (inherent or otherwise) and discretion is not.

[26] Accordingly, I turn to the question of whether section 15 of the Act is engaged in the circumstances of this case.

4.0 IS SECTION 15 OF THE ACT ENGAGED?

4.1 Overview

[27] As this court observed in *Clayworth v Octaform Systems Inc*, 2020 BCCA 117:

- [21] The general rule in British Columbia on a stay application under s. 15 is that the court proceedings should be stayed whenever the applicant makes out an arguable case that the parties have agreed that the dispute is one that is to be resolved by arbitration.
- [22] The legislative history of s. 15 indicates a legislative intention to limit the power of the courts to intervene where the parties have agreed that a matter should be submitted to arbitration. When the British Columbia Legislature modernized the Arbitration Act in 1986 (Commercial Arbitration Act, S.B.C. 1986, c. 3), courts were given a broad jurisdiction to refuse to stay civil proceedings in favour of arbitration. Two years later, s. 15 was amended by S.B.C. 1988, c. 46, s. 11 to limit the grounds upon which a court could refuse to grant a stay of proceedings: see the joint dissenting judgment of Justices LeBel and Deschamps in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, at paras. 104-107.

[Emphasis added.]

- [28] Those limited grounds include the threshold questions of whether the legal proceedings are brought by a party to an arbitration agreement against other parties to that agreement, and whether the agreement is determined to be void, inoperative, or incapable of being performed. In the context of this case, those grounds tend to merge. Just as the Supreme Court of Canada in *Seidel* had to consider a mandatory arbitration agreement in the context of conflicting legislative intent as expressed in the British Columbia Business Practices and Consumer Protection Act, SBC 2004, c 2, so the agreements here must be considered in the context of the BIA.
- [29] For the reasons that follow, I conclude that section 15 of the Act is not engaged when a receiver has been appointed under the provisions of the BIA and disclaims the arbitration agreements. Accordingly, although I follow a different route from that travelled by the judge, I arrive at the same result. I would therefore dismiss the appeal.

4.2 Is the receiver bound by the arbitration agreements?

- [30] It is not disputed that this involves questions of law, reviewable on a correctness standard.
- [31] The approach of the appellants is based, essentially, on the proposition that the litigation commenced by the receiver against the appellants on the subcontracts is in no meaningful way distinguishable from such litigation commenced directly by the respondents pre-insolvency. In my view, as we shall see, that proposition is not sustainable.
- [32] With respect to the requirement of section 15(1) of the Act that the legal proceedings be commenced by a party to an arbitration agreement against other parties to the agreement, the appellant argues that the receiver is such a party. The judge agreed:

- [15] Under the receivership order, the Receiver has the power to receive and collect all amounts owing to Petrowest and the Petrowest Affiliates, and to exercise all remedies Petrowest and the Petrowest Affiliates could otherwise exercise in order to collect those amounts. The Receiver also has the power to initiate and prosecute any proceedings in relation to Petrowest and the Petrowest Affiliates and their property.
- [16] The Receiver is also the trustee in bankruptcy of Petrowest and the Petrowest Affiliates. When a bankruptcy order is made, s. 71 of the BIA provides that the trustee acquires the debtor's property of the debtor, including its contractual rights:
71. On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.
- [17] That means that the Receiver acquired the contractual rights of Petrowest and the Petrowest affiliates to sue on the Agreements through the bankruptcy order. In that sense, the Receiver is a party to the Agreements.
- [18] The plaintiffs argue that the Receiver is not a party to the contracts, relying on *New Skeena Forest Products Inc., Re v. Don Hull & Sons Contracting Ltd*, 2005 BCCA 154 and *Industrial Alliance Insurance and Financial Services Inc. v Wedgemount Power Limited Partnership*, 2018 BCSC 970 ("Wedgemount"). Both cases are distinguishable on the basis that neither involved situations where the receiver was also the trustee in bankruptcy, a fact that the Court of Appeal expressly noted in *New Skeena* at para. 16. Further, in neither of those cases was the receiver seeking to enforce contractual claims. The receiver in *New Skeena* was disclaiming a contract (para. 2). In *Wedgemount*, the court rejected the argument that the receiver's claim was under the contract, instead characterizing it as based on representations made by a party to the contract (paras. 45-46).
- [19] A receiver may apply to the court to break a material contract and, in that limited sense, may not be "bound" by the contract: *New Skeena* at para. 17, quoting Bennett on *Receiverships*, 2d ed (Toronto: Carswell, 1999) at 341. However, that does not mean that the receiver is not a party to the contract within the meaning of s. 15 of the Arbitration Act. In cases such as this, where the Receiver is suing on the Agreements in its own name as the trustee, it is a party to the Agreements for the purposes of s. 15.

- [33] The respondents assert that the judge erred by finding that Petrowest was in bankruptcy (it is not; it is in receivership, but all of its affiliates have been assigned into bankruptcy), and so her conclusion that the receiver was a party cannot stand. Accordingly, the respondents submit, one of the grounds upon which the judge distinguished this case from the New Skeena Forest Products and Wedgemount cases disappears: in relation to Petrowest, the receiver was not also its trustee in bankruptcy.
- [34] The respondents say that, unlike a trustee, the debtor's assets do not vest in the receiver, who must bring action in the debtor's name. Relying on Frank Bennett, Bennett on Receiverships, 3rd ed. (Toronto: Carswell, 2011) at pp 17, 215-217 ("Bennett"), they maintain that a court-appointed receiver is not bound by the contracts of the debtor corporation, and in particular, is not bound by, or a party to, the mandatory arbitration clauses. They point out that, as a result of the receivership and bankruptcies, only the receiver has the capacity to advance claims; the respondent companies do not.
- [35] They then argue that because the receiver is not a party to the arbitration agreements, the arbitration agreements are inoperable.
- [36] As I see it, the judge's factual error concerning the status of Petrowest is of no practical consequence, particularly given that all of the affiliates are in bankruptcy, even if Petrowest is not. Moreover, both receivership and bankruptcy come under the umbrella of the BIA, including, with respect to Petrowest, the Receivership Order pronounced by the Court of Queen's Bench of Alberta In Bankruptcy and Insolvency on August 15, 2017, pursuant to section 243(1) of the BIA. That order makes all proceedings subject to the supervision of the Court.
- [37] Unlike a solvent business suing on a contract, a receiver owes a fiduciary duty to all stakeholders, including secured and unsecured creditors as well as the debtor, and is a trustee and fiduciary of all the realization proceeds for all stakeholders: see Bennett at 231-232.
- [38] It is for this reason that, as the respondents point out, a receiver is not bound by the executory contracts of the debtor, and may disclaim them. As Bennett states at 17:

On a court appointment, the receiver is not bound by existing contracts nor is the receiver personally liable for the performance unless the receiver continues to perform them. The receiver must exercise proper discretion in either adopting existing contracts or disclaiming them.

- [39] Here, as the judge observed, the receiver has adopted the contracts and is suing on them. Does this make a difference? Can the receiver sue on the contracts yet disclaim the arbitration clauses? I think it can.

[40] It is important to note that this analysis is conceptually different from the approach the courts have taken to the breadth of section 11 of the Companies Creditors Arrangement Act, RSC 1985, c C-36 ("CCAA"). The judge referred to this provision when she considered the jurisdictional issue, observing at para 35 that section 11:

empowers the court to override an arbitration clause and the otherwise mandatory requirement in s. 15(2) of the Arbitration Act: *Luscar Ltd. v. Smoky River Coal Limited*, 1999 ABCA 179; *Hayes Forest Services Limited (Re)*, 2009 BCSC 1169; *Pope & Talbot Ltd. (Re)*, 2009 BCSC 1552.

[41] But the court-supervised restructuring process that takes place under the CCAA is very different from the process that receivers and trustees undertake under the BIA, and the discretion granted by section 11 of the CCAA is quite specific. The question here is not whether the court has the power to override an arbitration clause and the otherwise mandatory requirement of section 15(2) of the Act; rather, the question is whether the arbitration clause and requirements of section 15(2) are engaged at all. This focuses on the status and powers of the receiver/trustee, not on the powers of the court.

[42] I begin by noting that the power of the receiver to disclaim contracts illustrates the fundamental difference between the receiver/trustee (here, Ernst & Young Inc.) and the debtor/bankrupts (here, Petrowest and its affiliates). Unlike the debtor/bankrupts, the receiver is an officer of the court. Moreover, as Bennett points out (at 231), the receiver is not an agent of the debtor or any other parties, but "is a principal entrusted to discharge the powers granted to the receiver bona fide".

[43] Turning to the position of Petrowest, I observe that as a result of the receivership order, Petrowest had no capacity to claim against the appellants under their contracts. While, nominally, the claims remain those of Petrowest and its affiliates, only the receiver can commence action and move the claims forward (see Bennett at p 257). Thus, in clause 3(j), the receivership order empowered and authorized the receiver, among other things, "to initiate, prosecute and continue the prosecution of any and all proceedings with respect to the Debtors, the Property or the Receiver".

[44] In doing so, as we have seen, the receiver acts not as agent of the debtor (Petrowest), who has been legally paralyzed from acting, but rather acts in fulfilment of its own court-authorized and fiduciary duties, owed to all stakeholders. Petrowest, on the other hand, can do nothing.

[45] It follows, in my view, that the 'party' who commenced legal proceedings within the meaning of section 15(1) of the Act was not Petrowest, but was the receiver. This was accepted by the judge, who nevertheless found the receiver also to be a party to the arbitration clause. I respectfully disagree.

[46] As we have seen, and as the *New Skeena* case confirmed, the receiver is entitled to disclaim the debtor's executory contractual obligations. The respondents assert that nothing more is necessary to permit the receiver to avoid the effect of the arbitration clauses. The appellant

submits, however, and I accept, that this concept does not form a basis for allowing the receiver freedom to pick and choose among the terms of a contract the receiver seeks to enforce. The question is whether arbitration clauses can be treated differently in the particular circumstances we are considering.

- [47] This raises for consideration the doctrine of separability, by which arbitration clauses have long been recognized as forming not simply a term of the contract, but an independent agreement. As the parties did not raise this doctrine in argument before us, we sought their further written submissions, which were duly filed.
- [48] The respondents maintain that the doctrine is irrelevant given the power of the receiver to disclaim contracts generally. I disagree for the reasons just discussed (para 46).
- [49] The appellants accept that the doctrine is relevant, but maintain that it does not permit the receiver to avoid the arbitration agreements in the contracts it seeks to enforce. I disagree for the following reasons.
- [50] The doctrine of separability has a long history in the jurisprudence; see *Harbour Assurance Co (UK) v Kansa General Assurance Co*, [1993] 3 WLR 42 (CA). See also the discussion of Justice Côté, dissenting (but not on this point), in *Uber Technologies Inc v Heller*, 2020 SCC 16 at paras 221-25; *James v Thow*, 2005 BCSC 809 at paras 82-99; *Strata Plan BCS 3165 v 1100 Georgia Partnership*, 2013 BCSC 1708 at para 120; *New World Expedition Yachts, LLC v FC Yachts Ltd*, 2011 BCSC 78 at para 13; *Tylon Steepe Homes Ltd v Pont*, 2009 BCSC 103 at para 33.
- [51] As Justice Côté put it in *Uber Technologies* at para 221:
- Put another way, an arbitration clause should be considered "autonomous and juridically independent from the main contract in which it is contained". [Citations omitted.]
- [52] This is also consistent with the terminology of the Act, which throughout uses the term "arbitration agreement": see the conclusion in *Gulak v Breckenridge*, 2015 BCSC 153 at paras 22-23.
- [53] Typically, the doctrine is employed to preserve the effect of an arbitration agreement and the jurisdiction of the arbitrator even where a party impugns the validity of the contract in which it is found. This was the case in *681210 Alberta Ltd v 133422 Alberta Ltd*, 2016 ABQB 407 (the "Gnumedia" case), on which the appellant relies to argue that the doctrine of separability does not assist the receiver. But as the court pointed out at para 44, the party seeking to avoid the arbitration agreements in *Gnumedia* was not a receiver, but was a creditor standing in the shoes of a contracting party by way of assignment. The case is accordingly akin to one where the dispute is between the parties who entered into the contract. In such a case, neither has the power that a receiver has to disclaim an executory agreement.

[54] The doctrine has also been employed to preserve the validity of the contract though the arbitration clause is found invalid: *E.J.R. Lovelock Ltd. v. Exportles*, [1968] 1 Lloyd's Rep. 163. The point is that the arbitration agreements are independent and separable. As Ralph Gibson LJ put it in *Harbour Assurance* at 49:

An arbitration clause--in ordinary terms--that is to say, without special words to ensure survival--is usually, and has been held to be, a self-contained contract collateral to the containing contract. As with any other contract, it must be construed according to its terms and with regard to the relevant factual situation.

[55] In my view, in the factual situation we are dealing with here, it is open to the receiver to disclaim the arbitration agreements notwithstanding that it has adopted the containing contracts for the purpose of suing on them. This flows from the receiver's particular powers and position, and the separability of the arbitration agreements.

[56] I conclude that section 15 of the Act is not engaged because, by exercising its power to commence these proceedings, the receiver has by that act disclaimed the arbitration agreements between Petrowest and affiliates and the appellants. Accordingly, the action has not been commenced by a party to the arbitration agreements within the meaning of section 15(1) of the Act, and in any event, due to the receiver's disclaimer, the arbitration agreements have become "void, inoperative or incapable of being performed" within the meaning of section 15(2).

[57] It follows that the judge's refusal to order the stay requested by the appellants was proper.

[58] Because of this conclusion, it is not necessary to consider further whether the judge had discretion under the BIA to decline to order the stay notwithstanding section 15, or whether, if so, such discretion was appropriately exercised; moreover, no conflict arises that could engage the principle of paramountcy. It is also unnecessary to consider whether the undertaking to file a response, given by the appellants' counsel to obtain an extension of time under the Supreme Court Civil Rules (and then breached), constitutes a step in the proceeding.

5.0 DISPOSITION

[59] For these reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Dickson"

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