Released: June 28, 1991

No. CWC 91 217
Chilliwack Registry

1991 CanLII 824 (BC SC)

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
ALBERT A. ROY and **EDWARD G. BELCHER**	
PETITIONERS	**REASONS FOR JUDGMENT**
A N D:	**OF THE HONOURABLE**
DONALD E. BOYCE, RONALD M. JONES, PETER M. McDONALD, JOHN J. BROWN	**MR. JUSTICE FRASER**
RESPONDENTS	

Gordon D. Taylor, Esq. — **Counsel for the Petitioners**

Frederick H. Herbert, Q.C. — **Counsel for the Respondents**

Date and place of hearing: — **June 24, 1991 at Chilliwack, British Columbia.**

The petitioners seek relief in connection with an agreement they made with the respondents, including an order that the agreement has been validly terminated, that the rights of the respondents under the agreement were never validly assigned and that all mineral claims which are the subject matter of the

agreement are their property.

What is before me is an application by the respondents for an order pursuant to Section 15 of the *Commercial Arbitration Act,* S.B.C. 1986, c. 3, that this proceeding be stayed.

The agreement was made on 19th August 1986. In it, the petitioners granted to the respondents an option to purchase some mineral claims in the Westminster Mining Division. The agreement follows the familiar design, in which the owners of mineral claims grant an option to promoters, in return for the services of the promoters in developing the properties and, if these efforts are successful, a share in the ultimate rewards.

Upon the execution of the agreement, the petitioners signed and delivered appropriate documentation to transfer title to the respondents. The agreement called for the respondents to deposit these documents with an escrow agent to be chosen by the respondents and "acceptable to" the petitioners.

The respondents did not set up the escrow. They contend that this omission is immaterial because they exercised their option to purchase and thus the protection afforded to the petitioners by the escrow structure (return of the documentation to the petitioners if the option was not exercised) became irrelevant.

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I make no comment on this contention, because of the conclusion I have arrived at.

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The respondents agreed to complete a production feasibility study, to carry out exploration and development work on the property, to carry out the assessment work necessary to maintain the claims in good standing and so forth.

The agreement has a termination clause. The petitioners assert that the agreement has been terminated because the respondents failed to satisfy this part of the clause:

> "ll. TERMINATION
>
> 11.01 This agreement shall terminate ...
>
> (b) in the event that, on or before December 3l, 1990, the Optionees do not commence equipping and preparing the Property for Commercial Production;"

Aside from the standard form affidavit of the petitioner Albert A. Roy deposing that the allegations of the petition are true, there is no evidence one way or the other on termination. The form of Mr. Roy's affidavit allows room for the inference that it is based on hearsay evidence. For the respondents, there is no evidence at all. Their intention is to dispute the allegations of

non-performance.

Similarly, although there is a suggestion that at least one of the respondents has brought in a company known as "Blue Mountain" to participate, the nature of its involvement, in particular whether it has been assigned rights under the agreement, is not in evidence. The petitioners do not know whether any respondent has made an assignment. They are concerned that their rights under a first refusal provision may not have been honoured and that their contractual right to have shares in a company issued to them may have been triggered but not honoured.

In brief, they see both the claims and the situation slipping away from them.

There are two provisions in the agreement for arbitration. One is included in the termination clause; the other is a free standing clause, the relevant words of which are:

> "14. ARBITRATION
>
> 14.01 Any controversy or claim arising out of or in relation to this agreement or any breach hereof shall be settled by [arbitration]. The arbitration shall be settled in accordance with the *Commercial Arbitration Act* of the Province of British Columbia and a decision of

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> the arbitrator or arbitrators shall be binding upon each of the parties hereto."

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The applicable parts of section 15 of the *Act* provide:

> "15. (1) Where 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, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), 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."

With the passage of the *Commercial Arbitration Act,* British Columbia adopted standard form legislative language in place in many jurisdictions. The wording of section 15 appears to take away the discretion of a superior court of plenary jurisdiction to deflect an arbitration to which the parties have agreed. A rigorous example of the exclusionary effect is to be

found in **Lonrho Ltd. (U.K.) v. Shell Petroleum Co. Ltd. (U.K.)**, a decision of the High Court of Justice of England, Chancery Division, of 3l January, 1978, which is apparently reported only in a publication known as **Court Decisions On New York Convention 1958.** In that case, the fact that some but not all of the defendants were bound by arbitration clauses was held to be no bar

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to the right of the defendants who were bound to invoke the arbitration clause. Brightman, J. said that it was "a pity" that the court was not given a discretion in the matter. He held that the effect of the comparable United Kingdom legislation "is to deprive the court of any discretion whether a claim ... should be arbitrated or litigated", unless the agreement is null or void, or that it is inoperative, or that it is incapable of being performed, or that there is in fact no dispute between the parties. He concluded "I am compelled to order a stay. The section is mandatory ...."

To the same effect is the decision of the United States Court of Appeals, Third Circuit in **Rhone Mediterranee Compagnia Francese Di Assicurazioni E. Riassicurazoni v. Lauro**, 712 F. (2d) 50 (1983).

I have been referred to authority that courts should not officiously or lightly thwart the agreement of parties to

arbitrate. Cases have been cited to me which hold that the onus of proof is on the petitioners here to show that the arbitration agreement is null and void, or inoperative; and that the standard of proof in such case is strict. I need not comment on this jurisprudence, since the petitioners have not contended otherwise.

The petitioners say that since the agreement "terminated" on 3lst December 1990, the arbitration clause cannot now be invoked, because it does not survive the agreement. This is, I think, another way of saying that the clause is inoperative.

The case which has been cited in support of this proposition is **Twentieth Century Fox Corporation Limited v. Broadway Theatres Limited** {1951} 1 W.W.R (N.S.) 785 (Sask. C.A.). The headnote to the report is misleading, in that it attributes to the court certain holdings made only by Procter, J.A. There was a four - judge coram. All four arrived at the same result but three of the four held simply that a company which was not a party at all to an agreement was not bound by the arbitration clause in it. There is suggestive language in the reasons of Procter, J.A., to the effect that the question of the existence or non-existence of a contract is something that should be decided initially by a court before an arbitration can take place pursuant to the alleged contract. It is apparent from the brief judgment of Gordon, J.A. that the three did not choose to concur in the more elaborate reasons of Procter, J.A.

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The question thus becomes not whether the reasons of Procter, J.A. are authoritative but whether they are right. In support of their analysis, the petitioners cite **Parkhill Bedding v. Inter'l Molders** {1961} 26 D.L.R. (2d) 589 (Man. C.A.), as different but analogous. The issue in **Parkhill** was whether the company was a successor employer, so that the collective agreement entered into between the union and the company alleged to be the predecessor company was binding on Parkhill.

The legislation provided that "any new employer to whom passes the ownership of the business of an employer who has entered into a collective agreement" was bound by the collective agreement. Freedman, J.A. found that, in order to determine whether ownership of the business had passed, the appropriate tribunal would have to consider matters outside the ambit of the ***Labour Relations Act*** of Manitoba, such as the law of bankruptcy, the effect of an assignment in bankruptcy upon the contracts of workmen, the powers of a trustee in bankruptcy to sell and so on. He found these to be collateral matters going to jurisdiction such that the court was entitled to substitute its own different conclusion on **certiorari**. He did not suggest that it was wrong for the Labour Relations Board of Manitoba to embark upon the enquiry, only that the court had the power to review those aspects of the Board's decision which went beyong the ambit of the empowering legislation.

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An arbitrator who has apparent status created by contract cannot bootstrap himself or herself into jurisdiction which is not there. If that happens, this Court will review the award. That does not translate into the proposition that if there is a threshold issue on status, a Court must rule on that issue

prior to the commencement of arbitration. That proposition would strangulate the intent of the ***Commercial Arbitration Act.*** Generally speaking, the nod must go to arbitration first, litigation second.

The thrust of the ***Commercial Arbitration Act*** is unambiguously toward viability of arbitration. This internationally shared legislation was not in place when **Twentieth Century Fox** was decided. I conclude that the decision of Procter, J.A., insofar as it applies to the facts of this case, should not be followed. As well, I regard the case as distinguishable, in that it was utterly clear that no agreement ever existed.

In this case, it is common ground that an agreement was made. The petitioners wish to block arbitration on the basis that a condition precedent to the continuing existence of the contract, clause ll.01 (b), was not met. Whether this allegation is sound is a matter of evidence. It and the other claims made by the petitioners appear to me to be controversies or claims arising out

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of or in relation to the agreement, in the words of clause 14.01. Even if the respondents had conceded that the agreement was at an end, for one reason or another, it seems to me that the arbitration clause is not dead on the expiry date but only dormant, with respect to matters which occurred while the agreement was in effect.

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This proceeding is stayed.

The respondents will have the costs of this application, payable forthwith after assessment, on Scale 3.

"G.P. Fraser"

G.P. FRASER, J.

28 June, 1991

Chilliwack, B.C.

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