Court File Number 39547

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

PEACE RIVER HYDRO PARTNERS, ACCIONA INFRASTRUCTURE CANADA INC., SAMSUNG C&T CANADA LTD., ACCIONA INFRAESTRUCTURAS S.A., and SAMSUNG C&T CORPORATION

Appellants

(Appellants)

- and -

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 NUNORTHERN 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

(Respondents)

FACTUM OF THE RESPONDENTS,
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 NUNORTHERN 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.

(Pursuant to Rules 36 and 42 of the *Rules of the Supreme Court of Canada*)

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I. OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The core question on this appeal is whether a court-appointed receiver should be required to participate in and fund multiple arbitrations out of the proceeds of the estates of insolvent debtors, at the expense of creditors, when the same disputes can be resolved in a single court action without prejudice to any of the defendants, who have already undertaken to defend.

2. A court-ordered receivership is intended to preserve and realize on an insolvent person's assets for the benefit of its creditors. The receiver is an officer of the court, expected to realize on the debtor's assets and distribute the proceeds to the security holders and other creditors in accordance with their claims,[1] by ensuring the proper administration of the estate of the insolvent person and dealing with assets in a commercially reasonable manner. The policy behind receiverships favours a single control model, to maximize returns for the benefit of all creditors.[2]

3. Allowing the respondents' claim against the appellants to proceed in one court action avoids an inefficient and inequitable result, and is supported by the facts, law and policy in this case.

4. As a matter of law, a receiver is not a party to a debtor's agreement to arbitrate, unless the receiver has adopted or performed and is thus bound by the underlying agreement. Suing to recover outstanding receivables owed under an agreement does not bind a receiver to perform the agreement. It is wrong to state, as the appellants do, that the receiver has stepped into the shoes of the other respondents in respect of this action. The receiver is not the agent of those respondents and s 15 of the *Arbitration Act*[3] at issue is simply not engaged.

5. For the same reason, there is no need to examine the doctrine of separability or consider any implied disclaimer by the receiver. Further, the doctrine of separability *can* be applied to permit a receiver to disclaim an arbitration agreement.

6. Even if s 15 of the *Arbitration Act* is engaged, this case engages the court's statutory or

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[1] Frank Bennett, *Bennett on Receiverships*, 4th ed (Toronto: Thomson Reuters Canada Limited, 2021) at 6 [Bennett] [Respondents' Book of Authorities ("**RBOA**"), Tab 7].
[2] *Sam Lévy & Associés Inc v Azco Mining Inc*, 2001 SCC 92 at para 67 (*sub nom Eagle River International Ltd, Re*) [*Eagle River*].
[3] RSBC 1996, c. 55, as amended [*Arbitration Act*].

inherent jurisdiction under the *Bankruptcy and Insolvency Act*[4] to refuse a stay of proceedings in favour of arbitration. Permitting a stay of proceedings would require the receiver to engage in multiple arbitrations and litigation, with different rules applying between different sets of counterparties. Facts and argument would be repeated in different forums, before different decision makers, creating piecemeal decisions and a serious risk of conflicting outcomes, all at the expense of creditors and contrary to the fundamental purposes of receivership and the *BIA*.

7. In any event, and fully dispositive of the appeal, the appellants have already taken a step in these proceedings by undertaking to defend and agreeing to proceed in this litigation.

8. The decisions below, which allowed the court action to proceed, were sound in the result and ought not be interfered with.

B. Statement of Facts

9. The appellants' statement of facts contains errors and omissions in relation to the insolvency of Petrowest Corporation ("**Petrowest**") and its affiliates[5] (the "**Petrowest Affiliates**", and, together with Petrowest, the "**Petrowest Respondents**") and the facts, all of which are critical to this Court's consideration of this appeal. The respondents restate the facts here.

1. The Parties

10. The respondent, Petrowest, is the parent corporation of each of the Petrowest Affiliates.[6]

11. The respondent, Ernst & Young Inc. ("**EY**" or the "**Receiver**"), is the court-appointed

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[4] RSC 1985, c B-3 [*BIA*].

[5] 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 NuNorthern Tractor Rentals, Petrowest GP Ltd. as general partner of Petrowest Civil Services LP, Petrowest Construction LP, and Petrowest Services Rentals LP, and Trans Carrier Ltd. are collectively referred to herein as the "**Petrowest Affiliates**".

[6] *Petrowest Corporation v Peace River Hydro Partners*, 2019 BCSC 2221 at para 3 [*BCSC Reasons*] [Appellants' Record ("**AR**"), Vol I, Tab 2 at 10].

receiver and manager of the assets of Petrowest and the Petrowest Affiliates.[7] EY is also the trustee in bankruptcy of the Petrowest Affiliates. Petrowest is not bankrupt.[8]

12. Petrowest, together with the appellants, Acciona Infrastructure Canada Inc. ("**Acciona Canada**") and Samsung C&T Canada Ltd. ("**Samsung Canada**"), were the partners in the appellant partnership, Peace River Hydro Partners ("**PRHP**").[9]

13. The appellant, Acciona Infraestructuras S.A. ("**Acciona S.A.**"), is the parent corporation of Acciona Canada; the appellant, Samsung C&T Corporation, is the parent corporation of Samsung Canada.[10]

2. The Agreements

14. On or about December 17, 2015, Petrowest, Acciona Canada and Samsung Canada entered into a general partnership agreement to form PRHP (the "**GP Agreement**").[11]

15. On the same date, Petrowest, Acciona S.A. and Samsung C&T Corporation entered into a guarantee and cross-indemnity agreement (the "**GCI Agreement**").[12]

16. Thereafter, PRHP contracted with the British Columbia Hydro and Power Authority for work related to the Site C Clean Energy Project in northeastern British Columbia (the "**Project**").[13]

17. PRHP entered into a subcontract with the respondent, Petrowest Civil Services LP, in connection with the Project (the "**Subcontract**").[14]

18. Various purchase orders were also issued by PRHP for work by the Petrowest Affiliates on the Project. Some of the purchase orders incorporated PRHP's general terms and conditions (the "**PRHP Terms and Conditions**"); others did not.[15]

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[7] *BCSC Reasons*, *ibid* at para 1 [AR, Vol I, Tab 2 at 10].
[8] Affidavit of Cassie Riglin, sworn May 23, 2019 ("**Riglin Affidavit**"), at para 9, Exhibit "C" [AR, Vol XI, Tab 11 at 2889, 2922].
[9] *BCSC Reasons*, *supra* note 6 at para 3 [AR, Vol I, Tab 2 at 10].
[10] Riglin Affidavit at paras 16-17 [AR, Vol XI, Tab 11 at 2890].
[11] *BCSC Reasons*, *supra* note 6 at paras 3-4, 6 [AR, Vol I, Tab 2 at 10-11].
[12] *BCSC Reasons*, *ibid* at paras 3-4 [AR, Vol I, Tab 2 at 10-11].
[13] *BCSC Reasons*, *ibid* at para 1 [AR, Vol I, Tab 2 at 10].
[14] Riglin Affidavit at para 29 [AR, Vol XI, Tab 11 at 2894].
[15] *BCSC Reasons*, *supra* note 6 at paras 4 and 55 [AR, Vol I, Tab 2 at 10-11 and 22]; Affidavit of

19. The GP Agreement, the GCI Agreement, the Subcontract, and the PRHP Terms and Conditions (collectively, the "**Agreements**") each contained dispute resolution clauses carrying with them the potential for arbitration, albeit with different sets of arbitration rules (the "**Arbitration Clauses**").

20. On or about August 10, 2017, Acciona Canada purported to terminate Petrowest as a partner in PRHP, ultimately taking the position that "… all of the rights, title, benefits and interests of Petrowest in and to PRHP and under and pursuant to the [GP Agreement] shall terminate …." On September 11, 2017, PRHP wrote to the Receiver and reiterated its position that Petrowest had been terminated as a partner in PRHP on August 10, 2017.[16]

3. The Receivership, Bankruptcy and Civil Claim

21. On August 15, 2017, the Court of Queen's Bench of Alberta (the "**Alberta Court**") granted an order pursuant to s 243(1) of the *BIA*, appointing the Receiver over the assets, property and undertakings of Petrowest and the Petrowest Affiliates (the "**Receivership Order**").[17]

22. On April 3, 2018, EY assigned the Petrowest Affiliates into bankruptcy. As already stated, Petrowest was never assigned or petitioned into bankruptcy, and is not bankrupt.[18]

23. On August 29, 2018, the Receiver commenced this action in the Supreme Court of British Columbia (the "**BC Court**"). The Receiver seeks to recover invoiced amounts owed to Petrowest and the Petrowest Affiliates pursuant to the Agreements.[19] Because of the number of agreements and parties involved, the action involves at least fifteen distinct claims by various parties.[20]

Suzanne Boe, sworn December 7, 2018 ("**Boe Affidavit**") at paras 13, 21, Exhibits "1A"–"29B", Exhibits 112A"–"231B" [AR, Vol III-X, Tab 9 at 96, 100, 115-405, 1255-2693].

[16] Second Affidavit of Cassie Riglin, affirmed September 20, 2019 ("**Second Riglin Affidavit**") at paras 3-4, Exhibits "A" & "B" [Appeal Record of the Respondents "**RR**", Vol I, Tab 2 at 19, 21, 26]; Affidavit of Terrence Halliday, sworn December 10, 2018 ("**Halliday Affidavit**"), Exhibit "E" (GP Agreement, s 23.4.3(c)(B)) [AR, Vol XI, Tab 10 at 2763-2764].

[17] *BCSC Reasons*, *supra* note 6 at paras 1, 7 [AR, Vol I, Tab 2 at 10, 11]; Riglin Affidavit at para 2, Exhibit "A" [AR, Vol XI, Tab 11 at 2889, 2899].

[18] Riglin Affidavit at para 9, Exhibits "B" & "C" [AR, Vol XI, Tab 11 at 2889, 2917 & 2922].

[19] *BCSC Reasons*, *supra* note 6 at para 8 [AR, Vol I, Tab 2 at 11].

[20] Notice of Civil Claim entered August 29, 2018 [Notice of Claim] [RR, Vol I, Tab 1 at 1-9].

24. On August 30, 2018, the respondents served the appellants with the notice of civil claim.[21]

25. On September 11, 2018, counsel for the appellants confirmed that they accepted service on behalf of PRHP as of August 31, 2018. They also advised that they were seeking instructions as to whether they were being retained by the other appellants. Counsel requested that the appellants not be noted in default while steps were taken to clarify the scope and terms of their retainer.[22]

26. On September 12, 2018, the respondents, via their counsel, agreed not to note the appellants in default, provided that the appellants' counsel confirmed which parties they had been retained to accept service on behalf of by September 28, 2018.[23]

27. In a letter dated September 28, 2018, counsel for the appellants advised:

> We have been retained by all the defendants in the above noted action **and we undertake to file a defence in due course**. We propose October 31 as a date.[24]

28. Respondents' counsel agreed to the due date for a defence of October 31, 2018.[25]

29. On October 31, 2018, the appellants' counsel advised that the defence would be provided "very shortly", but requested a further extension to November 7, 2018 "as a precaution to finalize filing materials".[26]

30. On November 1, 2018, the respondents agreed to the proposed extension.[27]

31. The appellants did not meet their extended deadline of November 7, 2018 to defend the action. Instead, on that date, their counsel wrote to counsel for the respondents to request a stay of proceedings in favour of arbitration. No application materials were served at that time.[28]

32. On November 8, 2018, the respondents' counsel advised that the appellants were in default of their obligation to defend the action by November 7, 2018, and stated that the respondents did

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[21] Riglin Affidavit at para 25, Exhibit "G" [AR, Vol XI, Tab 11 at 2893-2894, 2939].
[22] Riglin Affidavit at para 25, Exhibit "H" [AR, Vol XI, Tab 11 at 2893-2894, 2942].
[23] Riglin Affidavit at para 25, Exhibit "I" [AR, Vol XI, Tab 11 at 2893-2894, 2945].
[24] *BCSC Reasons*, *supra* note 6 at para 20 [AR, Vol I, Tab 2 at 14]; Riglin Affidavit at para 25, Exhibit "J" [AR, Vol XI, Tab 11 at 2893-2894, 2948] [*emphasis added*].
[25] Riglin Affidavit at para 25, Exhibit "K" [AR, Vol XI, Tab 11 at 2893-2894, 2951].
[26] Riglin Affidavit at para 25, Exhibit "L" [AR, Vol XI, Tab 11 at 2893-2894, 2954].
[27] Riglin Affidavit at para 25, Exhibit "M" [AR, Vol XI, Tab 11 at 2893-2894, 2957].
[28] Riglin Affidavit at para 25, Exhibit "N" [AR, Vol XI, Tab 11 at 2893-2894, 2960].

not agree to a stay of proceedings.[29]

33. On December 7, 2018, counsel for the appellants transmitted to counsel for the respondents an unfiled application for a stay of proceedings and unsworn supporting affidavits.[30]

34. On May 17, 2019, the appellants filed an application for a stay of proceedings (the "**Stay Application**"), relying on s 15 of the since-repealed *Arbitration Act*.[31] The appellants did not apply to lift the stay of proceedings in the receivership, nor did they take steps to initiate arbitration.[32]

35. The chambers judge at the BC Court heard the Stay Application on October 2, 2019.

36. The appellants contended that the Receiver could not recover amounts owed under the Agreements while also asserting that it was not bound by the Arbitration Clauses.[33]

37. The respondents submitted that pursuant to the Receivership Order, the Receiver was authorized to sue to recover amounts owed by the appellants, but that the Receiver was not a party to nor bound by the terms of the Agreements.[34]

38. The respondents further contended that the BC Court had the jurisdiction under the *BIA* to disrupt private agreements, including the Arbitration Clauses, and ought to allow the action to proceed given the complexities and expense of otherwise undertaking at least four potential arbitral proceedings, at the expense of the creditors of Petrowest and the Petrowest Affiliates.[35]

39. Alternatively, the respondents contended that (a) the Arbitration Clauses were inoperative and incapable of being performed, and (b) based on their counsel's undertaking to file a defence, the appellants had taken a step in the proceedings that precluded them from subsequently bringing an application to stay the action.[36]

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[29] Riglin Affidavit at para 25, Exhibit "O" [AR, Vol XI, Tab 11 at 2893-2894, 2964].
[30] Riglin Affidavit at para 25, Exhibit "P" [AR, Vol XI, Tab 11 at 2893-2894, 2967].
[31] Notice of Application entered on May 17, 2019 [AR, Vol II, Tab 7 at 69].
[32] Riglin Affidavit, Exhibit "A" at paras 8-9 [AR, Vol XI, Tab 11 at 2905-2906].
[33] *BCSC Reasons*, *supra* note 6 at para 10 [AR, Vol I, Tab 2 at 12].
[34] *BCSC Reasons*, *ibid* at para 10 [AR, Vol I, Tab 2 at 12].
[35] *BCSC Reasons*, *ibid* at para 10 [AR, Vol I, Tab 2 at 12].
[36] *BCSC Reasons*, *ibid* at paras 20, 31 [AR, Vol I, Tab 2 at 14, 16].

4. The Chambers Judgment

40. On December 20, 2019, the chambers judge issued written reasons for judgment, dismissing the Stay Application.[37]

41. The chambers judge assumed that none of the Arbitration Clauses were void, inoperative or incapable of performance under s 15 of the *Arbitration Act*, despite that issue having been raised by the respondents.[38]

42. The chambers judge also found that with the exception of the Arbitration Clause in the PRHP Terms and Conditions, the Arbitration Clauses each contained mandatory provisions.[39]

43. In the context of other arguments raised, the chambers judge found that all the respondents, including Petrowest, are in bankruptcy,[40] and as a consequence thereof, the Receiver is a party to the Agreements.[41] The chambers judge also found that the appellants had not taken a step in the action prior to making the Stay Application.[42]

44. However, the chambers judge ultimately concluded that the court has the jurisdiction to decline a stay,[43] and that this jurisdiction should be exercised in favour of the respondents given:

(a) the agreement of the parties that overriding the Arbitration Clauses would promote the efficient and inexpensive resolution of the claims;[44]

(b) the significant cost and delay inherent in the multiple arbitrations that would occur in this case, as compared to judicial determination, which would be unfair to creditors and contrary to the objectives of the BIA;[45] and

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[37] *BCSC Reasons*, *ibid* [AR, Vol I, Tab 2 at 9].
[38] *BCSC Reasons*, *ibid* at paras 31-34 [AR, Vol I, Tab 2 at 16-17].
[39] *BCSC Reasons*, *ibid* at paras 32-33 [AR, Vol I, Tab 2 at 17].
[40] *BCSC Reasons*, *ibid* at para 16 [AR, Vol I, Tab 2 at 13].
[41] *BCSC Reasons*, *ibid* at para 17-19 [AR, Vol I, Tab 2 at 13-14].
[42] *BCSC Reasons*, *ibid* at paras 20-27 [AR, Vol I, Tab 2 at 14-15].
[43] *BCSC Reasons*, *ibid* at paras 35-42 [AR, Vol I, Tab 2 at 17-19].
[44] *BCSC Reasons*, *ibid* at para 56 [AR, Vol I, Tab 2 at 22].
[45] *BCSC Reasons*, *ibid* at para 60 [AR, Vol I, Tab 2 at 23].

(c) the absence of any evidence of prejudice to the appellants by allowing the action to proceed.[46]

45. In reaching those conclusions, the chambers judge expressed her agreement with the proposition that s 183 of the *BIA* confers power on a court to control its own processes in order to promote the objects of the *BIA*, which include the fair, practical, efficient and relatively inexpensive mechanism for asset recovery and distribution of the estate.[47]

46. The chambers judge held as follows:

> 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 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.[48]

5. The Appeal Judgment

47. On January 15, 2020, the appellants filed a notice of appeal to the Court of Appeal of British Columbia (the "**Court of Appeal**"). The appeal was heard on July 23, 2020.

48. On October 28, 2020, the Court of Appeal wrote to counsel to request written submissions on the doctrine of separability, and the question, "Can the receiver disclaim the arbitration agreements while suing on the main agreements?" The parties responded with written submissions.

49. On November 30, 2020, Grauer JA of the Court of Appeal issued written reasons for judgment, concurred in by Bennett JA and Dickson JA, dismissing the appeal.

50. The Court of Appeal reached the same result as the chambers judge, although for different reasons. The Court of Appeal concluded that s 15 of the *Arbitration Act* did not leave room for the

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[46] *BCSC Reasons, ibid* at para 58 [AR, Vol I, Tab 2 at 23].
[47] *BCSC Reasons, ibid* at paras 35-41 [AR, Vol I, Tab 2 at 17-18].
[48] *BCSC Reasons, ibid* at para 60 [AR, Vol I, Tab 2 at 23] [*emphasis added*].

exercise of inherent jurisdiction.[49] Moreover, the Court of Appeal disagreed with the chambers judge on the issue of statutory discretion, reasoning that if the *BIA* granted discretion to avoid arbitration proceedings, it would create a conflict between federal and provincial legislation, requiring a paramountcy analysis.[50]

51. The Court of Appeal nevertheless concluded that a court-appointed receiver is not a "party" to a debtor's arbitration agreements for the purpose of s 15 of the *Arbitration Act*,[51] noting that a receiver acts as an officer of the court, not as an agent of the debtor.[52]

52. Further, the Court of Appeal held that the Receiver could disclaim the Arbitration Clauses based on the doctrine of separability, and that s 15 is not engaged when a receiver has been appointed and disclaims the arbitration agreements.[53] Relying on *Uber*,[54] the Court of Appeal confirmed that arbitration agreements are autonomous and juridically independent contracts.[55] As a result, in the Court of Appeal's view, an arbitration agreement may be terminated or deemed invalid irrespective of the validity or efficacy of the main contract to which the arbitration agreement relates.[56] The Court of Appeal held that the Receiver had the power to avoid arbitration agreements as a result of its particular powers and position.[57] However, a receiver must exercise proper discretion as an officer of the court whenever it exercises the power to avoid agreements.[58]

53. The Court of Appeal's reliance on the doctrine of separability flows from its assumption, without reasons, that the Receiver adopted the Agreements for the purpose of suing on them.[59]

II. RESPONDENTS' POSITION ON APPELLANTS' QUESTIONS

54. The respondents submit that the appeal should be dismissed, with costs. Contrary to the

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[49] *Petrowest Corporation v Peace River Hydro*, 2020 BCCA 339 at paras 16-18 [*BCCA Reasons*] [AR, Vol I, Tab 4 at 34-35].
[50] *BCCA Reasons*, *ibid* at paras 20-22 [AR, Vol I, Tab 4 at 35-36].
[51] *BCCA Reasons*, *ibid* at para 45 [AR, Vol I, Tab 4 at 40].
[52] *BCCA Reasons*, *ibid* at para 44 [AR, Vol I, Tab 4 at 40].
[53] *BCCA Reasons*, *ibid* at para 29 [AR, Vol I, Tab 4 at 37].
[54] *Uber Technologies Inc v Heller*, 2020 SCC 16 at para 221 [*Uber*].
[55] *BCCA Reasons*, *supra* note 49 at para 51 [AR, Vol I, Tab 4 at 41].
[56] *BCCA Reasons*, *ibid* at paras 50-55 [AR, Vol I, Tab 4 at 41-42].
[57] *BCCA Reasons*, *ibid* at para 55 [AR, Vol I, Tab 4 at 42].
[58] *BCCA Reasons*, *ibid* at para 38 [AR, Vol I, Tab 4 at 39], citing Frank Bennett, *Bennett on Receiverships*, 3rd ed (Toronto: Carswell, 2011) at 17 [Bennett #2] [RBOA, Tab 6].
[59] *BCCA Reasons*, *ibid* at paras 39 and 55 [AR, Vol I, Tab 4 at 39, 42].

appellants' submissions, this action should not be stayed because:

(a) a court-appointed receiver is not bound by a contract of a debtor unless the receiver has adopted or performed the contract, *which has not occurred* in this case. The Receiver, which has court-ordered authority to seek recovery of amounts owed to the Petrowest Respondents, and is the only party with any authority to do so, is not bound by the Arbitration Clauses;

(b) unlike other arbitration legislation in Canada, s 15 of the *Arbitration Act* does not apply to non-parties to an arbitration agreement and therefore, by its terms, does not apply to the Receiver, who is not a party to the Agreements;

(c) there was no need for the court to consider the doctrine of separability or to find that the Receiver had implicitly disclaimed the Arbitration Clauses. But, even if the Receiver was bound by the Agreements (which is denied), the doctrine of separability could be applied and the Receiver could exercise its court-authorized power to disclaim the Arbitration Clauses;

(d) further, or in the alternative, in the context of a receivership, the court has the authority to disrupt or interfere with contracts of a debtor, pursuant to its statutory jurisdiction under sections 183(1) and 243 of the *BIA*. In this case, there are strong policy reasons, consistent with the purposes of a receivership and the objectives of the *BIA*, for the court to find that the Arbitration Clauses are inoperative and incapable of performance, such that the courts below correctly dismissed the appellants' Stay Application pursuant to s 15(2) of the *Arbitration Ac*t; and

(e) in any event, by undertaking to file a defence in this action, the appellants took a step in the proceedings before applying for a stay, and thus, the respondents are not entitled to a stay of proceedings pursuant to s 15 of the *Arbitration Act*.

III. STATEMENT OF ARGUMENT

A. The Standard of Review

55. The respondents agree that questions of law, including questions of statutory interpretation

as are in issue here, are reviewable on a standard of correctness.[60]

B. The Petrowest Respondents are in Receivership, and Therefore Not Bound by the Arbitration Clauses

1. The Petrowest Respondents are in Receivership

56. The appellants misstate a critical aspect of this litigation, both with respect to the facts and the law: the Petrowest Respondents are in receivership, in accordance with the Receivership Order granted pursuant to s 243(1) of the *BIA*, and s 13(2) of the *Judicature Act*, RSA 2000, c J-2. The appellants' submissions are founded on the false premise that a receiver steps into the shoes of the debtor and is therefore the same party as the debtor.[61] However, the Receiver is a separate entity in these proceedings and is not the same as the Petrowest Respondents.

57. Court-appointed receivers are appointed to enhance the debtor's estate and facilitate realization for the benefit of all creditors.[62] As the appellants admit,[63] title to a debtor's property does not vest in the receiver.[64] A receiver is a separate legal entity with powers provided by the receivership order authorizing the receiver's appointment.[65] As the Court of Appeal recognized, a court-appointed receiver acts as an officer of the court rather than as an agent for the debtor.[66]

58. It follows that the Receiver must be treated separately from the Petrowest Respondents. Court-appointed receivers do not step into the shoes of the debtor. Indeed, as a matter of law, a receiver is not bound by the debtor's pre-receivership agreements.[67] Upon appointment, a court-appointed receiver has the option, but is not obligated, to perform any of the debtor's ongoing contracts. Courts have considerable jurisdiction to suspend private contractual rights where it is

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[60] *Housen v Nikolaisen*, 2002 SCC 33 at para 8 [*Housen*].
[61] Factum of the Appellants, PRHP, Acciona Canada, Acciona S.A. and Samsung Canada, at paras 30(b), 54, 61, 62 and 92 [Appellants' Factum].
[62] Bennett, *supra* note 1 at 8.
[63] Appellants' Factum, *supra* note 61 at para 59.
[64] Bennett, *supra* note 1 at 273; Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed (Toronto: Irwin Law, 2015) at 514 [Wood] [RBOA, Tab 20]; Thomas Robinson, *Kerr and Hunter on Receivers and Administrators*, 21st ed (London: Sweet and Maxwell, 2020) at 8-0, 8-3, 8-13 [Kerr & Hunter] [RBOA, Tab 17].
[65] Bennett, *ibid* at 52-54.
[66] *BCCA Reasons*, *supra* note 49 at paras. 42 and 44; Bennett, *ibid* at 269-273, 298.
[67] Bennett, *ibid* at 558; Wood, *supra* note 64 at 552-53.

appropriate and in the best interests to resolve insolvency proceedings, including in the context of receiverships.[68] Only if the receiver elects to perform does the receiver assume the burdens of the contract.[69] Here, the Receiver has not performed any of the Agreements;[70] the Receiver is merely seeking to recover payment for past performance of the Agreements by the Petrowest Respondents.

59. Receivers are generally granted the power to prosecute proceedings in the debtor's name, and must diligently exercise the power to defend, institute or continue proceedings for the benefit of all creditors and the debtor.[71] The receiver must commence and continue proceedings, because receivership generally suspends the powers of the directors and officers of the debtor corporation.[72] In other words, a receiver is expressly authorized to commence proceedings by advancing claims *through* the debtor.[73] Here, the Receiver advances claims through the Petrowest Respondents.

60. The Receivership Order authorizes the Receiver to "cease to perform any contracts of the [Petrowest Respondents]", initiate and prosecute proceedings in relation to the Petrowest Respondents, and take any steps reasonably incidental to the exercise of those powers as deemed necessary or desirable.[74]

61. As is the case in most insolvency proceedings, and as is set out in the template receivership order used by the courts in most Canadian jurisdictions including Alberta,[75] the Receivership Order provides for a stay of proceedings against the Petrowest Respondents. Specifically, pursuant to paragraph 9, all rights and remedies against the Petrowest Respondents or affecting the assets,

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[68] *Eagle River*, *supra* note 2; *Re Nortel Networks Corporation et al*, 2015 ONSC 1354 [*Nortel*]; *Pope & Talbot Ltd (Re)*, 2008 BCSC 1000 [*Pope & Talbot #1*]; *Pope & Talbot Ltd (Re)*, 2009 BCSC 1552 at paras 119-121 [*Pope & Talbot #4*]; *Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership*, 2018 BCSC 970 [*Wedgemount*] at para 31, aff'd 2018 BCCA 283.
[69] Bennett, *supra* note 1 at 561.
[70] Appellants' Factum, *supra* note 61 at para 100.
[71] Bennett, *supra* note 1 at 327-330.
[72] Bennett, *ibid* at 276. See also Kerr & Hunter, *supra* note 64 at 3-8.
[73] Kerr & Hunter, *ibid* at 9-14.
[74] Riglin Affidavit, at para 3, Exhibit "A" [AR, Vol XI, Tab 11 at 2889, 2899].
[75] See e.g., the Alberta Court template receivership order, Court of Queen's Bench of Alberta, Commercial Practice Templates and Forms, Receivership Order Template, available online: <https://albertacourts.ca/qb/areas-of-law/commercial/templates-and-forms>[Template Receivership Order].

property or undertakings of the Petrowest Respondents were stayed and suspended.[76] The stay of proceedings is rooted in the Court's general statutory jurisdiction pursuant to s 243 of the *BIA*.

2. The Bankruptcy of the Petrowest Affiliates is Irrelevant Because No Assets Have Vested in the Receiver as Trustee in Bankruptcy

62. The fact that the Receiver also serves as bankruptcy trustee for the Petrowest Affiliates (but not for Petrowest) is irrelevant and does not impact whether the Receiver is a party to the Arbitration Clauses. If a receiver assigns a debtor into bankruptcy, the receiver retains control over causes of action vested in the debtor until the claims of security holders are satisfied.[77] Indeed, claims by secured parties generally fall outside the scope of bankruptcy proceedings.[78]

63. The appellants have nevertheless repeatedly conflated and confused the concepts of receivership and bankruptcy in their submissions to the lower courts and in their factum filed on this appeal.[79] To confirm, Petrowest and the Petrowest Affiliates are in receivership. The Petrowest Affiliates are also bankrupt; Petrowest is not. EY is the Receiver in relation to the Petrowest Respondents, and is also the trustee in bankruptcy in relation to the Petrowest Affiliates. EY has brought this action solely in its role as the Receiver.

64. Thus, the appellants' assertion that the Receiver is an assignee or successor of the Petrowest Respondents and is therefore bound by the Arbitration Clauses[80] is incorrect in both fact and law.

65. Even though the Petrowest Affiliates are in bankruptcy and receivership, none of the assets of the Petrowest Affiliates (including contracts and contractual rights) will vest in the trustee in bankruptcy unless and until all secured creditors have been paid out in full. That *has not occurred* here; the claims of secured creditors of the Petrowest Respondents remain outstanding .[81]

66. Petrowest itself is not bankrupt. None of its assets have vested in the Receiver.[82] The

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[76] Riglin Affidavit, at para 3, Exhibit "A" [AR, Vol XI, Tab 11 at 2889, 2899].
[77] Bennett, *supra* note 1 at 328-29.
[78] Wood, *supra* note 64 at 43-44.
[79] See e.g., Appellants' Factum, *supra* note 61 at paras 18, 30(a), 30(b), 48-54, 62, 65, 96.
[80] Appellants' Factum, *supra* note 61 at paras 46-54.
[81] Bennett, *supra* note 1 at 328-29, Wood, *supra* note 64 at 43-44.
[82] Bennett, *ibid* at 276; Wood, *ibid* at 514.

appellants admit this point,[83] yet confuse the issue in their factum.[84]

67. The appellants incorrectly point to s 71 of the *BIA* to argue that the property of the Petrowest Respondents has vested in EY as trustee in bankruptcy.[85] Section 71 is subject to the rights of secured creditors and has no application here, where the secured creditors of the Petrowest Affiliates have not been paid in full (such that none of the assets of the Petrowest Affiliates have vested in their trustee in bankruptcy), and where Petrowest is not bankrupt. Assets of a debtor do not vest in a receiver, nor is a receiver a "statutory assignee" or "successor in interest" of a debtor in receivership, as the appellants incorrectly assert.[86]

68. None of the Agreements or contractual rights at issue (as property of the Petrowest Affiliates[87]) have vested in the Receiver as a result of EY's role as trustee in bankruptcy of the Petrowest Affiliates.

3. A Receiver is Not Bound by the Contract of a Debtor unless it Adopts or Performs it

69. The appellants complain that party autonomy must be preserved by holding parties to their bargain to arbitrate. However, that argument fails to recognize that the Receiver is not a party to the Agreements, and the appellants' own admission that there were no remaining obligations for the Receiver to perform on the Agreements.[88]

70. A receiver is *not bound* by existing contracts of the debtor, nor is the receiver personally liable for the performance of those contracts entered into before receivership unless the receiver has adopted or performed the contracts.[89]

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[83] Appellants' Factum, *supra* note 61 at para 59.
[84] Appellants' Factum, *ibid* at paras 52, 54.
[85] Appellants' Factum, *ibid* at para 50; *BIA*, *supra* note 4, s 71.
[86] Bennett, *supra* note 1 at 328-39; Wood, *supra* note 64 at 514.
[87] The Honourable L W Houlden, The Honourable G B Morawetz & J P Sarra, *The 2021 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters Canada Limited, 2021) at F§98, p 477 [RBOA, Tab 11].
[88] Appellants' Factum, *supra* note 61 at para 100.
[89] Bennett, *supra* note 1 at 558; Kevin P McElcheran, *Commercial Insolvency in Canada*, 4th ed (Toronto: LexisNexis Canada Inc., 2019) at ¶4.204 [McElcheran] [RBOA, Tab 14]; *New Skeena Forest Products Inc, Re*, 2005 BCCA 154 at paras 16-17 [*New Skeena*]; *Wedgemount*, *supra* note 68 at para 43.

71. If a receiver does nothing, that is, neither affirms nor disclaims a contract or does not continue to order goods or request services under an existing contract, the receiver is not liable for performance, including payments.[90] In order to fix a receiver with liability, the receiver must expressly or by implication on the facts affirm the contract.[91]

72. On the other hand, a receiver *is* bound by contracts that it *has* adopted or performed.[92] This Court need not be concerned that a receiver is *never* bound by an arbitration clause in a contract entered into by the debtor prior to the receivership. The jurisprudence and other authorities are clear that a receiver is not bound by existing contracts of the debtor, nor is the receiver personally liable for the performance of those contracts entered into before receivership, *unless the receiver has adopted or performed the contracts*.[93] As noted in *Bennett on Receiverships*:

> *On Trade Contracts* – On a court appointment, the receiver is not bound by existing contracts nor is the receiver liable for their performance unless the receiver continues to perform them. The receiver must exercise proper discretion in either adopting existing contracts or disclaiming them.[94]

73. In this case, the Receiver is not bound by any of the Agreements, or the Arbitration Clauses therein, because the Receiver has not adopted or performed any of them. As the appellants must admit,[95] there is no evidence, nor any assertion, that the Receiver or the Petrowest Respondents have continued to perform services pursuant to the Agreements, nor is there any other conduct to indicate adoption or performance thereof by the Receiver.

4. The Receiver Has Not Adopted or Performed the Agreements by Seeking Recovery

74. While the Court of Appeal assumed that "the receiver has adopted the contracts", it did not

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[90] Bennett, *ibid* at 559, 561; *Pope & Talbot Ltd (Re)*, 2009 BCSC 17 [*Pope & Talbot #2*], cited in *Bank of Montreal v Grafikom Limited Partnership*, 2009 CanLII 55117, 2009 CarswellOnt 6162 (ONSC) at para 42 [*Grafikom*].
[91] *Pope & Talbot #2*, *ibid* at paras 14-15, citing *New Skeena*, *supra* note 89.
[92] Bennett, *supra* note 1 at 327, 434, 558, 561, 563, 565; *New Skeena*, *ibid* at paras. 16-17; *Wedgemount*, supra note 68 at para 43; *Pope & Talbot #2*, *ibid*; McElcheran, *supra* note 89 at ¶4.204.
[93] Bennett, *ibid* at 558; *New Skeena*, *ibid* at paras 16-17; *Wedgemount*, *ibid* at para 43; *Pope & Talbot #2*, *ibid*; McElcheran, *ibid* at ¶4.204.
[94] Bennett, *ibid* at 21.
[95] Appellants' Factum, *supra* note 61 at para 100.

consider that point.[96] If that was a finding of the Court of Appeal, it was made without a factual basis and is an error in law.[97]

75. Similarly, there is no support for the appellants' assertion that the Court of Appeal must have accepted that the Receiver was a party to the Agreements.[98] Indeed, the appellants admit that the "Receiver had no performance obligations remaining" under the Agreements,[99] and further, that "the Receiver acts as a nominee plaintiff."[100]

76. The appellants purport to rely on three cases in this regard. The first is a 1988 decision of the Federal Court of Canada in *Aero Trades (Western) Ltd (Receiver of) v Canada*. In that case, the parties agreed that the receiver (a privately appointed receiver who was thus appointed as agent of the debtor) had performed work and services under the contract in issue *after* the receivership order was granted, thus adopting it.[101] The court's finding that the "receiver and manager assumed the benefit and burden of the contract" did not arise from the receiver having sued on behalf of the debtor, but because the receiver had *already assumed and performed* the contract at issue.

77. Alternatively, the appellants cite two American cases. But neither of those decisions supports the point, either. The non-signatory to the contract in each case was not a court-appointed officer in an insolvency context. Further, the non-signatories were noted to have *exercised their rights* under the contract, or *knowingly embraced* the contract; in other words, had *adopted or performed* the contract.[102]

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[96] *BCCA Reasons*, *supra* note 49 at para 39 [AR, Vol I, Tab 4 at 39].
[97] *Housen*, *supra* note 60 at para 8; *R v H (JM)*, 2011 SCC 45 at para 25.
[98] Appellants' Factum, *supra* note 61 at para 29.
[99] Appellants' Factum, *supra* note 61 at paras 99-100.
[100] Appellants' Factum, *supra* note 61 at para 64, citing Bennett #2, *supra* note 58 at 259.
[101] [1988] 5 WWR 252, 19 FTR 248 (FC) at para 2, s 6 [*Aero Trades*] [ABOA, Tab 5], rev'd on other grounds, [1989] 1 WWR 723, 1988 CanLII 7194 (FCA) [ABOA, Tab 4].
[102] Appellants' Factum, *supra* note 61 at para 68. In *Tepper Realty Co v Mosaic Tile Co*, 259 F supp 688 (SD NY 1966) at 690-692 [ABOA, Tab 61], the issue was whether the arbitration clause in issue was incorporated into the contract, where the contract did not specify the names of the parties thereto; in *Griswold v Coventry First LLC*, 762 F (3d) 264 (3rd Cir 2014) at 273 [ABOA, Tab 16], the court stated that "The presumption in favor of arbitration does not extend, however,

78. A receiver is not bound by contracts of a debtor, even if the receiver has not disclaimed the contracts, *unless the Receiver has adopted or performed the contracts*. Silence does not amount to affirmation.[103] A receiver has a reasonable period of time in which to make an election whether to affirm or disclaim a contract.[104] A contract that has not been expressly disclaimed is not deemed to be "adopted" or "performed",[105] as the Court of Appeal seemed to suggest.[106]

79. There are strong policy reasons for this approach.[107] The adoption of an agreement by the receiver imputes the receiver with personal liability for the performance of the agreement;[108] thus receivers may be reluctant to take on receiverships where by doing so, they will be imputed with liability for agreements they do not choose to adopt, effectively increasing the cost of receiverships.[109] Further, the decision of a receiver not to assume a contract impacts the potential recoveries of the creditors, including as a result of the economic viability of the business as a going concern sale by the receiver.[110]

80. A receiver has an obligation to exercise its court-ordered power to recover outstanding accounts receivable owed to the debtor, including by commencing legal proceedings, so as to distribute the proceeds of the debtor's estate to its creditors.[111] Further, as noted above,[112] the court-appointed receiver is the only party with authority to do so. Contrary to the appellants'

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to non-signatories to an agreement; it applies only when both parties have consented to and are bound by the arbitration clause", and the motion to compel arbitration was denied (at 275).

[103] *Grafikom, supra* note 90 at para 42, citing *Pope & Talbot #2*, *supra* note 90 at para 17, citing in turn *New Skeena*, *supra* note 89 "it is well settled law that, in the absence of an affirmation, express or implied, a court-appointed receiver is not bound by existing contracts made by the debtor." See also *Pope & Talbot #1*, *supra* note 68 at para 32.

[104] Bennett, *supra* note 1 at 557; *Pope & Talbot #2, ibid* at para 22.
[105] *Grafikom, supra* note 90 at para 42, citing *Pope & Talbot #2, ibid* at para 17.
[106] *BCCA Reasons, supra* note 46 at para 39 [AR, Vol I, Tab 4 at 42].
[107] See *Pope & Talbot #2*, *supra* note 90 at paras 1, 6, 18-19, 22.
[108] Though the receiver is entitled to an indemnity from the assets of the debtor.

[109] *Grafikom, supra* note 90 at para 47.
[110] McElcheran, *supra* note 89 at ¶4.205 and ¶4.206.
[111] McElcheran, *ibid* at ¶4.203; *BIA*, *supra* note 4 s 243(1)(a).
[112] Bennett, *supra* note 1 at 276; see also Kerr & Hunter, *supra* note 64 at 3-8.

assertion,[113] that exercise of the receiver's court-ordered power does not, and cannot, constitute adoption or performance of a contract pursuant to which such accounts receivable are owed. It would be an absurd result if, in seeking to fulfil its court-authorized obligations to recover funds owing to a debtor, a receiver were deemed to have adopted all of the contracts of the debtor on which those funds were owed, thereby binding the receiver to performance of all further obligations owed on any such contracts.

81. On the same basis, repudiation (or disclaimer) of a contract does not destroy rights of action accrued as a result of prior breaches.[114] Once an obligation to make payment on a contract has accrued, it remains enforceable.[115] It follows that a receiver's efforts to recover funds owed on a contract to an insolvent debtor, including by suing the party that owes those funds, cannot constitute adoption or performance of the contract.

82. There can be no assumption that the Receiver adopted the Agreements.[116] The Receiver sued on the Agreements due to the appellants' breach of their obligations to pay the Petrowest Respondents for services performed and materials provided by the Petrowest Respondents, accrued prior to termination of the Agreements, and prior to the receivership. As the appellants admit,[117] payment is not conditional upon further performance by any of the respondents.

C. Since the *Arbitration Act* Does Not Apply to the Receiver, There is No Need to Consider the Doctrine of Separability

1. The Arbitration Act Does Not Apply to Non-Parties to Contracts

83. Contrary to the appellants' unsupported assertion,[118] the wording of the *Arbitration Act* itself confirms it does not apply to a receiver who is not a party to the contract containing an

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[113] Appellants' Factum, *supra* note 61 at para 62.
[114] GHL Fridman, *The Law of Contract*, 6th ed. (Toronto: Thomson Reuters Canada Limited, 2011) at 601 [RBOA, Tab 10]; SM Waddams, *The Law of Contracts*, 7th ed (Toronto: Thomson Reuters Canada Limited, 2017) at 634 [Waddams] [RBOA, Tab 19], citing *Hyundai Heavy Industries Co Ltd v Papadopoulos*, [1980] 2 All ER 29 at 45, [1980] 1 WLR 1129 (House of Lords) (per Lord Fraser of Tullybelton) [RBOA, Tab 4].
[115] Waddams, *ibid* at 634.
[116] *BCCA Reasons*, *supra* note 46 at paras 39, 55 [AR, Vol I, Tab 4 at 39].
[117] Appellants' Factum, *supra* note 61 at para 100.
[118] Appellants' Factum, *ibid* at para 4.

arbitration clause (and by extension, to a receiver who has not adopted or performed the contract).

84. Pursuant to s 1 of the *Arbitration Act*, an arbitration agreement is "a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration."[119] Section 15 of the *Arbitration Act* applies 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."[120] The Receiver is not a party to any of the Agreements, and so none of the terms of the Arbitration Clauses contained therein include agreements to submit disputes between the Receiver and the appellants to arbitration.

85. Canadian arbitration statutes adopt one of two types of provisions regarding stays of proceedings in favour of arbitration. Some provincial domestic arbitration statutes use the same or substantially similar language to the *Arbitration Act*, providing that a stay of proceedings is available only when a *party* to the arbitration agreement commences legal proceedings.[121] By contrast, several other domestic arbitration statutes state that a stay is available "where a party to a submission or a person claiming through or under that party commences legal proceedings."[122]

86. The legislative history of British Columbia's domestic arbitration legislation highlights this textual distinction. Prior to reforms introduced in 1986, British Columbia's domestic arbitration legislation contained the wider language that captured persons claiming through or under a party.[123] That broader form of stay provision originated in England's *Arbitration Act, 1889* and is used throughout the common law world.[124] However, in 1986, the Legislature of British Columbia changed the scope of the stay provision by removing the broader wording, revealing a change in

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[119] *Arbitration Act*, *supra* note 3 s 1 [*emphasis added*].
[120] *Arbitration Act*, *ibid* s 15.
[121] *Arbitration Act*, RSA 2000, c A-43, s 7(1); *The Arbitration Act, 1992*, SS 1992, c A-24.1, s 8(1); *The Arbitration Act*, CCSM, c A120, s 7(1); *Arbitration Act, 1991*, SO 1991, c 17, s 7(1); *Arbitration Act*, RSNB 2014, c 100, s 7(1).
[122] The same or substantially similar language is used in *Arbitration Act*, RSNS 1989, c 19, s 7; *Arbitration Act*, RSNL 1990, c A-14, s 4(1); *Arbitration Act*, RSPEI 1988, c A-16, s 6; *Arbitration Act*, RSNWT 1988, c A-5, s 10(1); *Arbitration Act*, RSNWT (NU) 1988, c A-5, s 10(1); *Arbitration Act*, RSY 2002, c 8, s 9.
[123] *Arbitration Act*, RSBC 1979, c 18, s 6; *Commercial Arbitration Act*, SBC 1986, c 3, s 15 [*CAA*].
[124] V Priskich, "Binding non-signatories to arbitration agreements–who are persons 'claiming through or under' a party?" (2019) 35:3 *Arbitration International* 375, at 376 [RBOA, Tab 16]; *Arbitration Act, 1889* (52 & 53 Vict. c. 49) [RBOA, Tab 22].

language that is presumed to be deliberate and should be given effect.[125] In addition, the predecessors to the *Arbitration Act*[126] and the *International Commercial Arbitration Act*[127] were enacted concurrently, and the Legislature chose to expressly include those claiming "through or under a party" only in the latter statute. This substantive difference in comparable provisions enacted at the same time supports an inescapable inference that the *Arbitration Act* addressed a narrower class of litigants.[128] The broader language has continued to exist since 1986 in British Columbia's *International Commercial Arbitration Act*, RSBC 1996, c 233.[129]

87. Not only did the Legislature of British Columbia remove the broader language of "through or under" from its domestic arbitration legislation in 1986, it also *added* a provision to bind persons claiming through or under a party in specific circumstances. Where a party to an arbitration agreement dies, the Legislature found it necessary to expressly bind the deceased party's personal representatives to the deceased party's arbitration agreements.[130] This further shows that the 1986 amendments deliberately narrowed the class of litigants bound by arbitration agreements and therefore subject to a presumptive stay of court proceedings in favour of litigation.

88. Further, the appellants' assertion that the stay provision of British Columbia's domestic arbitration legislation was amended in 1988 to make arbitration less "judicially intrusive" has no relevance to this issue; the narrower wording was maintained, through to the *Arbitration Act*.[131]

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[125] R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed (Toronto: LexisNexis Canada Inc., 2014), at 662 [*Sullivan*] [RBOA, Tab 18].
[126] *CAA*, *supra* note 122.
[127] *International Commercial Arbitration Act*, SC 1986, c 14.
[128] Sullivan, *supra* note 125 at 418-22.
[129] See *International Commercial Arbitration Act*, RSBC 1996, c 233, s 2(1), which defines "party" to include those persons claiming through or under a party to an arbitration agreement.
[130] *CAA*, *supra* note 127, s 3; *Arbitration Act*, s 3.
[131] Appellants' Factum, *supra* note 61 at paras 37-38. See s 7, "arbitration agreement" and s 11 of the *Miscellaneous Statutes Amendment (No. 2) Act*, SC 1988, c 46, which maintains the narrower language of the 1986 amendment to the predecessor to the *Arbitration Act*. See also s 15 of the *CAA*, "commercial arbitration agreement", and s 15. In both the 1988 amendment and its predecessor, s 15 applies to parties to an arbitration agreement; the amendment did not broaden that language.

89. The significance of the Court of Appeal's decision must be viewed in light of this important textual distinction.

90. A reference to persons claiming "through or under" a party to an arbitration agreement connotes a broader scope than the *Arbitration Act*'s reference to a party alone. The choice of narrower wording embodied in the *Arbitration Act* should be given effect, as the Court of Appeal of Alberta held in *Kaverit Steel & Crane Ltd. v. Kone Corp*.[132] There, the court concluded that while the arbitration legislation before it "could have" captured claims advanced by those claiming through or under a party to an arbitration agreement, it did not, and it was therefore necessarily narrow in scope.[133]

91. As to whether a court-appointed receiver should be considered a party, or instead as a person claiming through or under a party, the law on this point is clear. A court-appointed receiver is an *independent* legal entity appointed as an officer of the court to take control of a debtor's business.[134] As the receiver is not bound by the debtor's contracts, and the debtor's property does not vest in the receiver, there is no basis for concluding that the receiver is the same "party" as the debtor.[135] The appellants' assertions to the contrary are incorrect, and are founded in their confusion of the role of a receiver with that of a trustee in bankruptcy.[136]

92. The *Arbitration Act* expressly excludes the type of language that would capture court proceedings prosecuted by a receiver on behalf of a debtor. Accordingly, in the context of the *Arbitration Act*, a receiver is *not* bound by a debtor's arbitration agreements. This the only logical interpretation of the *Arbitration Act* that gives effect to its legislative history.

2. Reliance on the Doctrine of Separability or Implicit Disclaimer is Unnecessary

93. As a receiver's court-ordered power to collect and recover outstanding receivables owed to an insolvent debtor does not constitute adoption or performance of a contract, there was no need for the Court of Appeal to consider the doctrine of separability in relation to the Arbitration

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[132] *Kaverit Steel and Crane Ltd v Kone Corporation*, 1992 ABCA 7 at para 16 [*Kaverit Steel*].
[133] *Kaverit Steel*, *ibid* at para 17.
[134] Bennett, *supra* note 1 at 269 and 298.
[135] Bennett, *ibid* at 273; Wood, *supra* note 64 at 514.
[136] Appellants' Factum, *supra* note 61 at paras 18, 30(a), 30(b), 48-54, 61, 62, 65, 96.

Clauses, or to conclude that the Receiver had implicitly disclaimed them.

94. As set out above, the respondents agree with the Court of Appeal[137] that s 15 of the *Arbitration Act* is not engaged when a receiver is appointed over a party to a contract containing an arbitration agreement, and the receiver has not adopted or performed that contract. In that situation, the receiver is not bound by, nor a party to, that arbitration agreement. Further, the wording of the *Arbitration Act* confirms that s 15 only applies to parties to arbitration agreements; it does not apply to parties claiming *through or under* a party to an arbitration agreement.[138]

95. While the appellants admit that the doctrine of separability has been used to preserve the main agreement if the arbitration agreement is invalid,[139] and the Receiver has the court-ordered power to cease to perform contracts,[140] this appeal need not be determined on either point.

96. As the Receiver has not adopted or performed the Agreements, it is not bound by them (nor by the Arbitration Clauses therein).[141] Accordingly, there was no need for the Court of Appeal to engage the doctrine of separability regarding the Arbitration Clauses, or for the Court of Appeal to find that the Arbitration Clauses were implicitly disclaimed by the Receiver.

97. The Court of Appeal erred in assuming, without any explanation or reasons, that the Receiver had adopted or performed the Agreements and was thus bound by them. Absent that error, this Court need not consider the doctrine of separability in order to resolve this appeal.

98. But, if the Receiver *had* adopted or performed the Agreements and was thus bound by them, the Court of Appeal did not err in applying the doctrine of separability. While the appellants assert that the Court of Appeal's decision turns the doctrine of separability on its head,[142] the decision is a straightforward application of this Court's reasoning in *Uber Technologies Inc v Heller*,[143] albeit in the distinct context of a receivership.

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[137] *BCCA Reasons*, *supra* note 49 at para 29 [AR, Vol I, Tab 4 at 37].
[138] *Arbitration Act*, *supra* note 3, s 1. See paragraphs 83 to 92.
[139] Appellants' Factum, *supra* note 61 at para 81.
[140] Riglin Affidavit at para 2, Exhibit "A" at para 3(c), [AR, Vol XI, Tab 11 at 2901]; see also Template Receivership Order, *supra* note 75, at para 3(c).
[141] *Grafikom*, *supra* note 90 at para 42, citing *Pope & Talbot #2*, *supra* note 90 at para 17, citing in turn *New Skeena*, *supra* note 89. See also, *Pope & Talbot #1*, *supra* note 68 at para 32.
[142] Appellants' Factum, *supra* note 61 at para 85.
[143] *Uber*, *supra* note 54.

99. The doctrine of separability is a "conceptual and practical cornerstone" of arbitration law.[144] The doctrine holds that an arbitration agreement is a self-contained contract, "autonomous and juridically independent from the main contract in which it is contained."[145] As the Court of Appeal recognized, the doctrine is often 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."[146] However, separability also applies to preserve the "validity *of the underlying contract*, notwithstanding the invalidity, illegality, or termination of an associated arbitration clause."[147]

100. *Uber* expressly recognized that separability may operate to invalidate an arbitration clause while preserving the main agreement. The majority there held that "the unconscionability of [an] arbitration clause can be considered separately from that of the contract as a whole."[148] For the same reason, an arbitration agreement may be disclaimed independent of the contract as a whole, where the context so allows.

101. Receivership is one such context. A court-appointed receiver authorized by court order to disclaim any contracts of the debtor[149] may cease to perform arbitration agreements. Thus, in a situation where a receiver adopted a debtor's pre-receivership contract (which did not occur here), the doctrine of separability could apply to an arbitration agreement within the contract, and the receiver would have the court-authorized power to disclaim it. As an officer of the court, a receiver could not refuse performance arbitrarily, but it would not be an arbitrary exercise of the receiver's authority where pursuing arbitration would prejudice a receiver's ability to maximize recovery for

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[144] Gary B Born, *International Commercial Arbitration*, vol. I, *International Arbitration Agreements*, 3rd ed (Netherlands: Kluwer Law International, 2021) ch 3 at 376 [Born] [RBOA, Tab 8], cited with approval in *Uber*, *ibid* at para 221, per Côté J. (dissenting but not on this point).
[145] AJ Jan Van den Berg, ed, *Yearbook Commercial Arbitration 999 - Volume XXIVa* (ICCA & Kluwer Law International, 1999) at 176 [RBOA, Tab 21], as quoted in Born, *ibid* at 350.
[146] *BCCA Reasons*, *supra* note 49 at para 53.
[147] Born, *ibid* at 351 [*emphasis added*]. See also *BCCA Reasons*, *supra* note 49 at para 54 [AR, Vol I, Tab 4 at 41], citing *EJR Lovelock Ltd v Exportles*, [1968] 1 Lloyd's Rep 163 (CA) [RBOA, Tab 2]**.**
[148] *Uber*, *supra* note 54 at para 96.
[149] Riglin Affidavit at para 2, Exhibit "A" at para 3(c), [AR, Vol XI, Tab 11 at 2901]; see also Template Receivership Order, *supra* note 75, at para 3(c).

a debtor's estate.[150]

102. Here, the Receiver has not expressly disclaimed the Agreements. There was no need to do so; as the appellants confirm, the Receiver had no performance obligations remaining.[151] In fact, the appellants purported to terminate Petrowest from the GP Agreement prior to the receivership.[152]

103. Further, as the Receiver has not adopted or performed the Agreements, it still can expressly disclaim the Agreements—and such disclaimer would not prohibit the Receiver from suing to recover the outstanding amounts owed by the appellants to the Petrowest Respondents for the work the Petrowest Respondents performed and the services they provided under the Agreements.[153]

104. Here, the Receiver was appointed with the court-ordered power to cease to perform any of the Petrowest Respondents' contracts.[154] Where arbitration would require multiple proceedings, at significant cost to the creditors of the Petrowest Respondents contrary to the objectives of the *BIA*,[155] the Receiver has the authority to refuse performance of the Arbitration Clauses, without disclaiming the Agreements themselves, *but only if it were necessary to do so because the Receiver had adopted or performed and was thus bound by the Agreements*. Here, the Receiver has not adopted or performed the Agreements; there are no obligations remaining for the Receiver to perform. The Receiver is not bound by the Agreements, and thus there is no need for the Receiver to disclaim the Arbitration Clauses pursuant to the doctrine of separability.

D. Further, or in the Alternative, this Court Has Jurisdiction to Find the Arbitration Clauses to be Inoperative or Incapable of Being Performed

1. Introduction

105. In the circumstances where the Petrowest Respondents are in receivership, the chambers judge correctly concluded that the BC Court had the jurisdiction to find that the Arbitration Clauses

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[150] Wood, *supra* note 64 at 552-53; Bennett, *supra* note 1 at 558-559.
[151] Appellants' Factum, *supra* note 61 at para 100.
[152] Second Affidavit of Cassie Riglin, affirmed September 20, 2019 ("Riglin Affidavit No. 2"), at paras 3-4 and Exhibits "A" and "B" [RR, Tab 2 at 22-31].
[153] See paragraphs 78 to 82.
[154] Riglin Affidavit at para 2, Exhibit "A" at para 3(c), [AR, Vol XI, Tab 11 at 2901].
[155] *BCSC Reasons*, *supra* note 6 at para 60 [AR, Vol I, Tab 2 at 23].

were inoperative or incapable of being performed, and thus that the BC Court should dismiss the Stay Application.[156] Indeed, the appellants concede the court has the discretion to determine whether the Arbitration Clauses were void, inoperative or incapable of being performed.[157]

106. This jurisdiction allows this Honourable Court to conclude that, in these circumstances, the Arbitration Clauses are inoperative or incapable of being performed. This determination (1) is consistent with the court's statutory jurisdiction pursuant to ss 183(1) and 243 of the *BIA*; (2) is consistent with the court's inherent jurisdiction pursuant to the *BIA*; (3) is consistent with the court's jurisdiction pursuant to s 243 to disrupt private contracts, as confirmed by this Court;[158] (4) does not conflict with the *Arbitration Act*, as that Act expressly contemplates that the court can deny a stay where an arbitration agreement is inoperative or incapable of being performed; and (5) does not give rise to the *BIA* abrogating or superseding the substantive provisions of the *Arbitration Act*, as per s 72(1) of the *BIA*, and thus does not create a conflict between federal and provincial law, nor does it engage the doctrine of paramountcy. The respondents address each point below.

107. Before doing so, in response to the appellants' reference to the competence-competence principle,[159] the respondents note that where a challenge to an arbitrator's jurisdiction is based solely on a question of law, or a question of mixed law and fact requiring only superficial consideration of the facts, that challenge must be resolved by the court.[160] This case involves a pure question of law: the intersection between the *BIA* and the *Arbitration Act*. Thus, the courts' consideration of this matter respects the competence-competence principle.[161]

2. Statutory Jurisdiction in Receivership: Sections 183(1) and 243 of the *BIA*

108. Canadian superior courts have broad jurisdiction pursuant to sections 183(1) and 243 of the *BIA*.[162]

109. Section 243 came into force in 2009 and authorized the court to appoint a national receiver.

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[156] *BCSC Reasons*, *ibid* at para 49 [AR, Vol I, Tab 2 at 21].
[157] Appellants' Factum, *supra* note 61 at para 40.
[158] *Eagle River*, *supra* note 2.
[159] Appellants' Factum, *supra* note 61 at paras 42-43.
[160] *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at paras 84-85; *Seidel v TELUS Communications Inc*, 2011 SCC 15 at paras 4, 29.
[161] *Ibid.*
[162] *BIA*, *supra* note 4, ss 183(1) and 243.

It grants the court broad authority to appoint a receiver to do a wide range of activities, including "any other action the court considers advisable", if the court considers it to be just or convenient to do so.[163] That broad statutory authority authorizes the court to grant broad relief to authorize a receiver to perform its obligations to enhance and facilitate the preservation and realization of the assets of the debtor, for the benefit of all of the creditors.[164] It is necessarily broad and flexible.

110. The broad statutory authority pursuant to s 243(1) creates a plenary and open-ended jurisdiction, which yields to any specific statutory provision that narrows it, and is part of the court's residual statutory jurisdiction (as compared to inherent jurisdiction or discretion).[165] As stated in *DGDP-BC*, "the very wide wording of s 243(1)(c) of the *BIA* … has been interpreted to give supervising judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise."[166]

111. Courts have generally held that s 243(1) of the *BIA* alleviates any need to resort to inherent jurisdiction in the receivership context, as it allows courts to authorize any action by the receiver that it considers advisable.[167]

112. In addition, as recognized by the chambers judge, s 183 of the *BIA* invests the court 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…."[168] She concluded that s 15(2) of

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[163] *BIA*, *ibid*, s 243.
[164] *Robert F Kowal Investments Ltd v Deeder Electric Ltd*, 1975 CanLII 681, 1975 CarswellOnt 123 at para 19 (Ont CA) [RBOA, Tab 5]; *Re Winmil Holidays Co*, 1984 CanLII 3090, 1984 CarswellBC 569 at para 32 (CA), cited in *Hamilton Wentworth Credit Union Ltd v Courtcliffe Parks Ltd*, 23 OR (3d) 781, 1995 CanLII 7059 (Ont Ct (Gen Div)) at para 18 (Ont Ct (Gen Div)) [*Hamilton Wentworth*] [RBOA, Tab 3], cited in *Wedgemount*, *supra* note 68 at para 39.
[165] *DGDP-BC Holdings Ltd v Third Eye Capital Corporation*, 2021 ABCA 226 at para 17 [*DGDP-BC*], citing *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 at para 64, (*sub nom Ted Leroy Trucking Ltd, Re*) [*Ted Leroy*].
[166] *DGDP-BC*, *ibid* at para 20, citing *Third Eye Capital Corporation v Dianor Resources Inc*, 2019 ONCA 508 at paras 57-58 [*Dianor Resources*].
[167] *Business Development Bank of Canada v Astoria Organic Matters Ltd*, 2019 ONCA 269 at paras 61-65; *Dianor Resources*, *ibid* at paras 51-53. See also *Kingsway General Insurance Company v Residential Warranty Company of Canada Inc (Trustee of)*, 2006 ABCA 293 at para 37 [*Residential Warranty CA*].
[168] *BCSC Reasons*, *supra* note 6 at para 37 [AR, Vol I, Tab 2 at 17].

the *Arbitration Act* did not prevent the court from exercising its discretion to determine whether to refuse to stay proceedings where s 183 of the *BIA* applied.[169]

113. The chambers judge relied on *Wedgemount.*[170] In that case, BC Hydro applied to stay a receiver's application for a declaration that a contract could not be terminated, on the basis that the court had no jurisdiction to hear it, due to an arbitration clause in the contract. Butler J. dismissed BC Hydro's application and held that the receiver had the jurisdiction to bring the application pursuant to the powers granted to the receiver under sections 243(1)(b) and (c) of the *BIA* and the terms of the receivership order.[171] He held that the court had the *inherent* jurisdiction to consider the receiver's application, relying on *Pope & Talbot* [*Pope & Talbot #3*], *Pope & Talbot* [*Pope & Talbot #4*] and *Hayes*.[172] Butler J. found that the receiver's application was necessary to facilitate the preservation and realization of assets for the benefit of all creditors, noting that is the purpose of a receivership.[173]

114. In *Pope & Talbot #3*, Walker J. noted that the *BIA* confers jurisdiction on superior courts to disrupt private contractual rights where it is appropriate and in the best interests to resolve the insolvency proceedings.[174] Walker J. reiterated this in *Pope & Talbot #4*[175] (which the chambers judge also relied on)[176] and referred to s 183 of the *BIA*, which empowers the court to exercise its "inherent jurisdiction to control its own processes in order to promote the objectives of the *BIA*."[177]

115. Walker J. further noted that the decision in *Hayes* (in which the court overrode an arbitration clause in the circumstances where judicial resolution of the dispute was less expensive and more expeditious than arbitration, could be done within certain time restraints, and the issues

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[169] *BCSC Reasons*, *ibid* at para 41 [AR, Vol I, Tab 2 at 18].
[170] *Wedgemount*, *supra* note 68.
[171] *Wedgemount*, *ibid* at para 38.
[172] *Wedgemount*, *ibid* at para 47, referring to *Pope & Talbot Ltd (Re)*, 2009 BCSC 1014 [*Pope & Talbot #3*], *Pope & Talbot #4*, *supra* note 68 and *Hayes Forest Services Limited (Re)*, 2009 BCSC 1169 [*Hayes*].
[173] *Wedgemount*, *ibid* at para 39, referencing *Hamilton Wentworth*, *supra* note 164 at para 18.
[174] *Pope & Talbot #3*, *supra* note 172 at paras 149-150; referred to in *Wedgemount*, *ibid* at para 48.
[175] *Pope & Talbot #4*, *supra* note 68 at paras 118-131, referenced at *BCSC Reasons*, *supra* note 6 at para 38 [AR, Vol I, Tab 2 at 17-18].
[176] *BCSC Reasons*, *ibid* at para 38 [AR, Vol I, Tab 2 at 17-18].
[177] *Pope & Talbot Ltd #4*, *supra* note 68 at para 126, referenced at *BCSC Reasons*, *ibid* [AR, Vol I, Tab 2 at 17-18].

were appropriate for judicial determination)[178] confirms the broad discretion of court in proceedings pursuant to the *Companies' Creditors Arrangement Act* [*CCAA*][179] to "decide a dispute … under a [c]ontract … despite the provincial statutory authority and the terms of the [c]ontract,"[180] and referenced *Skeena Cellulose Inc v Clear Creek Contracting Ltd* in holding that the broad discretion of the court to sanction the affecting of contractual rights has become common in *CCAA* proceedings.[181] The court noted that this approach is not confined to *CCAA* proceedings.[182] Walker J. referenced the text *Commercial Insolvency in Canada* where the author explained that this authority is rooted in the stay of proceedings in an insolvency process.[183]

116. Walker J. thus stayed the operation of an alternative dispute resolution clause.[184] He adopted *Fiber Connections* in finding that the resolution of the Pope & Talbot insolvency could not be "held hostage" by purported rights where there is no economic benefit to the party asserting them.[185]

117. Consistent with these authorities, the chambers judge correctly determined that the court's exercise of its inherent jurisdiction to refuse a stay may function in one of two ways in this case: by rendering the arbitration clause "incapable of being performed" or "inoperative" within the meaning of s 15(2) of the *Arbitration Act*, or alternatively, if s 15(2) does not admit of that interpretation, that there could be a conflict between provincial and federal laws so that the principle of paramountcy would require the federal law to prevail. With respect to the latter, the chambers judge noted that the issue was neither argued nor necessary to decide (as set out below, the respondents agree).

118. The respondents submit, however, that there was no need for the chambers judge to rely

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[178] *Hayes*, *supra* note 172. See also *Luscar Ltd v Smoky River Coal Ltd*, 1999 ABCA 179 at paras 67-72 [*Smoky River ABCA*].
[179] *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended [*CCAA*].
[180] *Hayes*, *supra* note 172 at para 22, referenced in *Wedgemount*, *supra* note 68 at para 47.
[181] 2003 BCCA 344 at para 37, referenced in *Pope & Talbot #4*, *supra* note 68 at paras 129-130.
[182] *Pope & Talbot #4*, *ibid* at para 131.
[183] *Pope & Talbot #4*, *ibid* at para 131, citing Kevin P McElcheran, *Commercial Insolvency in Canada* (Markham, Ontario: LexisNexis Canada Inc., 2005) at 4.
[184] *Pope & Talbot #4*, *ibid* at para 140.
[185] *Pope & Talbot #4, ibid* at para 136, citing Campbell J. at para 39 of *Fiber Connections Inc v SVCM Capital Ltd*, 2005 CanLII 63760 (Ont SCJ), leave to appeal to ONCA granted, 2005 CanLII 15454 (Ont CA), appeal abandoned August 5, 2005 [*Fiber Connections*].

on inherent jurisdiction.[186] The court's authority to reach that conclusion under s 15(2) of the *Arbitration Act* is also founded in its residual statutory jurisdiction[187] pursuant to sections 183(1) and 243 of the *BIA*.

3. Inherent Jurisdiction Pursuant to the *BIA*

119. As a result of the court's statutory jurisdiction under s 243 of the *BIA*, there was no need for the chambers judge to rely on inherent jurisdiction in this case.[188] A court exercising discretion under a statute, or a court relying on statutory jurisdiction, is in a position distinct from that of a court relying on its inherent jurisdiction.[189] In any event, the chambers judge reached the correct result and did not err in dismissing the Stay Application.

120. This Court has approved Madam Justice Jackson and Professor Sarra's hierarchical approach to the court's authority in insolvency cases.[190] Specifically, courts first rely on statutory interpretation prior to invoking judicial discretion. It is only where broad statutory authority is unavailable that inherent jurisdiction is a potential source of authority.[191] The authors note the distinction between the courts' exercise of judicial discretion conferred by statute, as compared to inherent jurisdiction.[192]

121. Inherent jurisdiction has been used where it is necessary to promote the objects of the *BIA*, where there is no other alternative available, and to accomplish what justice and practicality require, to further fairness and efficiency in legal process and to prevent abuse.[193]

122. The *BIA* expressly preserves a court's equitable and ancillary powers. Accordingly,

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[186] I H Jacob, "The Inherent Jurisdiction of the Court" (1970), 23:1 *Current Legal Problems*, at 23-25 [Jacob] [RBOA, Tab 13]; Madam Justice Georgina R Jackson & 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 Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Canada Limited, 2008) ch 3 at 3 [Jackson & Sarra] [RBOA, Tab 12].
[187] *DGDP-BC*, *supra* note 165 at para 17.
[188] *BCSC Reasons*, *supra* note 6 at para 59 [AR, Vol I, Tab 2 at 23], *DGDP-BC*, *ibid* at para 17.
[189] Jacob, *supra* note 186 at 23-25; Jackson & Sarra, *supra* note 186 at 3.
[190] Jackson & Sarra, *supra* note 186.
[191] *Ted Leroy*, *supra* note 165 at para 65; Jackson & Sarra, *ibid* at 19-20 and 32.
[192] Jackson & Sarra, *ibid* at 27-29.
[193] *Residential Warranty CA*, *supra* note 167 paras 20-21, 37, cited in *BCSC Reasons*, *supra* note 6 at para 44 [AR, Vol I, Tab 2 at 19].

inherent jurisdiction is maintained and available as an important but sparingly used tool, to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*.[194]

123. There are two preconditions to a court exercising its inherent jurisdiction pursuant to the *BIA*: (a) the *BIA* must be silent on the point or not have dealt with it exhaustively; and (b) after balancing the competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction cannot be used to negate the unambiguous expression of legislative will.[195] In the context of the *BIA*, which, pursuant to s 243, allows a court to direct a receiver "to take such other action that the court considers advisable", inherent jurisdiction allows the court to do not only what justice dictates, but practicality demands.[196]

124. Although the respondents submit it was unnecessary for the chambers judge to rely on inherent jurisdiction, as she had the statutory jurisdiction to found her decision, the chambers judge properly applied these preconditions. She concluded:

> 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.[197]

125. As stated above, the chambers judge purported to exercise her inherent jurisdiction to find that it rendered the Arbitration Clauses "incapable of being performed" or "inoperative" within the meaning of s 15(2). That exercise of inherent jurisdiction is consistent with the law, and involved no contravention of legislative will.[198]

4. Courts Have Broad Jurisdiction in Insolvency to Disrupt Private Contracts and Avoid a Multiplicity of Proceedings

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[194] *Re Residential Warranty Co of Canada, Inc*, 2006 ABQB 236 at para 26 [*Residential Warranty QB*], aff'd *Residential Warranty CA, ibid*.
[195] *Residential Warranty QB, ibid* at para 26; *Samji (Re)*, 2013 BCSC 2101 at para 20; *Residential Warranty CA, ibid* at para 20, referring to *Baxter Student Housing Ltd v College Housing Co-operative Ltd*, [1976] 2 SCR 475, 1975 CanLII 164 (SCC).
[196] Jackson & Sarra, *supra* note 186 at 24, citing *Residential Warranty QB, ibid* para 27.
[197] *BCSC Reasons, supra* note 6 at para 60 [AR, Vol I, Tab 2 at 23].
[198] *BCSC Reasons, ibid* at para 42 [AR, Vol I, Tab 2 at 19]; *Residential Warranty QB, supra* note 194 at para 26; *Samji, supra* note 195 at para 20; *Residential Warranty CA*, at para 20.

126. In the context of an insolvency, the court has clear statutory jurisdiction pursuant to s 243 of the *BIA* to disrupt private contractual rights of a counter-party that is a significant debtor to the insolvent party to the contract. It was a proper exercise of that jurisdiction for the chambers judge to find that the Arbitration Clauses were inoperative or incapable of being performed within the meaning of s 15(2) of the *Arbitration Act*, to avoid what would otherwise require an impractical, inefficient and unfair multiplicity of proceedings contrary to the objectives of the *BIA*.[199]

127. In *Bennett on Receiverships*, Bennett confirms that "[t]he receiver has the jurisdiction under s 243(1)(c) of the *BIA* which confers jurisdiction on the receiver to seek an order varying the contract."[200]

128. In *Eagle River*, this Court confirmed that s 183 of the *BIA* confers broad jurisdiction to disrupt private contractual rights unless the trustee's claim is in relation to a "stranger" to the bankruptcy.[201] This Court cited I. F. Fletcher, *Insolvency in Private International Law*, where the author stated:

> [P]rivate contractual arrangements between parties cannot prevail over the exercise of bankruptcy jurisdiction, which belongs to the realm of public policy, serving a wider spread of interests including, ultimately, those of society at large.[202]

129. In *Eagle River*, Binnie J. adopted a "single control" model that favours litigation involving an insolvent company to be dealt with in one jurisdiction. Thus, a choice of forum clause in an insolvency situation should be taken in account, but is not binding or controlling.[203]

130. Binnie J. held that a creditor who was not a stranger to the bankruptcy had the onus to establish that multiple jurisdictions should be available for claims:

> … Single control is not necessarily inconsistent with transferring particular disputes elsewhere, but a creditor (or debtor) who wishes to fragment the proceedings, and who cannot claim to be a "stranger to the bankruptcy", has the burden of demonstrating "sufficient cause" to send the trustee scurrying to multiple

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[199] *BCSC Reasons*, *ibid* at para 42 [AR, Vol I, Tab 2 at 19].
[200] Bennett, *supra* note 1 at 563.
[201] *Eagle River*, *supra* note 2 at para 67, cited in *Pope & Talbot #3*, *supra* note 172 at para 150.
[202] *Eagle River*, *ibid* at para 67, citing IF Fletcher, *Insolvency in Private International Law* (Oxford: Clarendon Press, 1999), at 47, fn 73.
[203] *Eagle River*, *ibid* at paras 26-27, 63-68, cited in *Nortel*, *supra* note 68 at para 22; also cited in *Arrangement relatif à Bloom Lake*, 2021 QCCS 3402 at paras 52-57.

jurisdictions.[204]

131. *Eagle River* was upheld in the *CCAA* proceedings in *Nortel*[205] where Newbould J. noted that *Eagle River* involved a *BIA* proceeding, but referred to a decision in a winding-up context. In *Eagle River*, Binnie J. noted that both contexts involve "the same public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse", and that s 188(1) of the *BIA* ensures orders made by a court pursuant to s 183 can and will be enforced across Canada.[206]

132. Newbould J. saw no reason why the principles in *Eagle River* should not be applicable in a *CCAA* proceeding, noting the principle expressed by this Court that the harmonization of insolvency law common to the *BIA* and *CCAA* is desirable to the extent possible.[207] Indeed, Newbould J. considered the reasons of Deschamps J. in *Ted Leroy*, where she held:

> While insolvency proceedings may be governed by different statutory schemes, they share some commonalities. The most prominent of these is the single proceeding model. The nature and purpose of the single proceeding model are described by Professor Wood in *Bankruptcy and Insolvency Law:*
>
> > They all provide a collective proceeding that supersedes the usual civil process available to creditors to enforce their claims. The creditors' remedies are collectivized in order to prevent the free-for-all that would otherwise prevail if creditors were permitted to exercise their remedies. In the absence of a collective process, each creditor is armed with the knowledge that if they do not strike hard and swift to seize the debtor's assets, they will be beat out by other creditors.[208]

133. Newbould J. held in *Nortel* that departure from a forum selection clause might be justified if (1) circumstances have arisen outside of what was reasonably contemplated when the parties agreed to the clause; and (2) frustration of some clear public policy.[209] He noted that the insolvency of Nortel's parent company was a significant change in circumstances that was not contemplated by the parties at the time they contracted, and that it follows from *Eagle River* that "public policy in this country at least precludes a forum selection clause from being controlling in an insolvency

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[204] *Nortel*, *ibid* at para 23, citing *Eagle River*, *ibid* at para 76.
[205] *Nortel*, *ibid*.
[206] *Eagle River*, *supra* note 2 at para 27, referring to *Stewart v LePage* (1916), 53 SCR 337 1916 CanLII 626 at 345, cited in *Nortel*, *ibid* at para 22.
[207] *Nortel*, *ibid* at para 24, citing *Eagle River*, *ibid* and *Ted Leroy*, *supra* note 165 at para 22.
[208] *Nortel*, *ibid*, citing *Ted Leroy*, *ibid*.
[209] *Nortel*, *ibid* paras 26-27, citing *Expedition Helicopters v Honeywell Inc*, 2010 ONCA 351.

situation," noting that a method that results in the most expeditious and fair determination of claims was clearly in the interests of all stakeholders in that *CCAA* process.[210]

134. As held in *Nortel*, the process for resolving claims should not become more expensive or complicated than the circumstances permit or the claims merit, and should allow for a timely resolution and preservation of the debtors' resources as much as reasonably possible.[211]

135. Finally, the *Law and Equity Act* also gives courts in British Columbia a broad equitable jurisdiction to avoid a multiplicity of proceedings.[212] Where not exercised contrary to a statute, nothing precludes the exercise of equitable jurisdiction to supplement a statute and effect a statutory object.[213] Avoiding a multiplicity of proceedings accords with the *Law and Equity Act*.

136. The fundamental principles of the single control model apply here. In all respects that are relevant to this appeal, the Arbitration Clauses are akin to a forum selection clause; they are contractual agreements for disputes to be resolved in a specific forum. Here, the circumstances have changed since the Agreements were entered into; the Petrowest Respondents are insolvent and in receivership. Public policy precludes the Arbitration Clauses from being controlling in this insolvency situation.[214] As was the case in *Nortel*, "a method that results in the most expeditious and fair determination of claims is clearly in the interests of all stakeholders."[215] Aside from the Arbitration Clauses, nothing prevents the claims in this action from being determined in litigation.

137. As in *Nortel*, granting the appeal and thus, the Stay Application, would result in a multiplicity of proceedings in different forums, causing overlap and an obvious risk of inconsistent findings of facts.[216] It would require the Receiver to fund several different arbitrations, with different sets of arbitration rules and different parties, as well as litigation,[217] to resolve the Petrowest Respondents' claims. Funds from the estates of the Petrowest Respondents that would

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[210] *Nortel, ibid* paras 26-27.
[211] *Nortel, ibid* at para 35.
[212] *Law and Equity Act*, RSBC 1996, c 253, s 10; *Son v Kim*, 2009 BCSC 776, at para 41.
[213] *United Used Auto & Truck Parts Ltd v Aziz*, 2000 BCCA 146 at para 18, cited in Jackson & Sarra, *supra* note 186 at 26-27.
[214] *Nortel*, *supra* note 68 at para 22, citing *Eagle River*, *supra* note 2 at paras 26-27. See also *Pope & Talbot #4*, *supra* note 68 at para 136, citing *Fiber Connections*, *supra* note 185 at para 39.
[215] *Nortel, ibid* at paras 26-27.
[216] *Nortel, ibid* at para 34.
[217] Riglin Affidavit, *supra* note 8 at paras 31-32 [AR, Vol XI, Tab 11 at 2895].

otherwise be distributed to their creditors would instead be expended by the Receiver to fund multiple arbitrations, to the detriment of those creditors.[218] This approach would be impractical, inefficient, duplicative of time and resources, and expensive. The significant repetition of evidence and arguments, with possible contradictory results, would be at the cost of the creditors that the receivership is intended to benefit. In short, arbitration proceedings in this case would be the very antithesis of the *BIA* objectives of efficiency and fairness.[219]

138. Consistent with the principles stated above, the chambers judge was therefore correct in finding that she had the jurisdiction[220] to dismiss the Stay Application on the grounds of the significant cost and delay inherent in the multiple proceedings that would occur if the Stay Application were granted, as compared to judicial determination. As the chambers judge found:

> To a much greater extent than in other areas of the law, a bankruptcy court requires flexibility to balance the interests of the various stakeholders involved and fashion pragmatic solutions to unanticipated problems that may arise in the course of the insolvency proceedings.[221]

139. The chambers judge held that granting the Stay Application would be "unfair to the creditors and contrary to the objects of the *BIA*", particularly where there was an absence of any prejudice to the appellants.[222] Importantly, the chambers judge stated:

> The parties agree that overriding the Arbitration Clauses would promote the efficient and inexpensive resolution of their dispute. A single judicial process will be faster and less expensive than four arbitrations and a possible court case. No one has suggested that the issues are not appropriate for judicial determination.[223]

140. Further, there is no evidence of any prejudice to the appellants if dismissal of the Stay Application is upheld.[224] The appellants (being debtors of the Petrowest Respondents, and

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[218] Riglin Affidavit, *ibid* at para 33 [AR, Vol XI, Tab 11 at 2895].
[219] *Nortel*, *supra* note 68 at paras 26-27.
[220] The respondents submit the chambers judge had statutory jurisdiction, and that it was unnecessary to resort to inherent jurisdiction. See *DGDP-BC*, *supra* note 165 at para 17.
[221] *BCSC Reasons*, *supra* note 6 at para 47 [AR, Vol I, Tab 2 at 20].
[222] *BCSC Reasons*, *ibid* at paras 53-60 [AR, Vol I, Tab 2 at 21-23].
[223] *BCSC Reasons*, *ibid* at para 56 [AR, Vol I, Tab 2 at 22].
[224] Nor did the appellants assert any prejudice before the BCSC. See *BCSC Reasons*, *ibid* at paras 58-60 [AR, Vol I, Tab 2 at 23].

therefore, not "strangers" to the receivership)[225] have not demonstrated sufficient cause to send the Receiver scurrying to multiple arbitral *and* litigation jurisdictions to seek recovery of the outstanding amounts owed by the appellants to the insolvent Petrowest Respondents.[226]

5. There is no Conflict with the *Arbitration Act*

(a) The *Arbitration Act* and the *BIA* Apply Harmoniously

141. Exercising the court's jurisdiction in insolvency matters to find that the Arbitration Clauses are inoperative or incapable of being performed does not conflict with s 15 of the *Arbitration Act*. Section 15 expressly authorizes the court to dismiss an application for a stay in favour of arbitration on that basis. As a result, the dismissal of the Stay Application does not result in the *BIA* abrogating or superseding any substantive provisions of the *Arbitration Act* that might otherwise engage s 72(1) of the *BIA*, and there is no conflict between federal and provincial law to be resolved through the doctrine of paramountcy.

142. The chambers judge's decision is consistent with this Court's favour of harmonious interpretations of federal and provincial legislation over interpretations that result in incompatibility. If a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to a construction which would bring about a conflict between the two statutes.[227]

143. Indeed, an exercise of jurisdiction to find that an arbitration agreement is inoperative or incapable of being performed is also recognized from the arbitration perspective. In *The Law and Practice of Commercial Arbitration in England*,[228] the authors contemplate that an arbitration agreement might be inoperative because the court has ordered that the arbitration agreement ceases to have effect. In *Arbitration Law of Canada: Practice and Procedure*, J. B. Casey states that an

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[225] *Eagle River*, *supra* note 2 at para 50.
[226] *Eagle River*, *supra* note 2 at para 76.
[227] *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at paras 64, 66 [*Redwater*], citing *Saskatchewan AG v Lemare Lake Logging*, 2015 SCC 53 at paras 21, 27 (per Abella J. and Gascon J.); *The Guarantee Company of North America v Royal Bank of Canada*, 2019 ONCA 9 at para 42 [*Guarantee Company*].
[228] Michael Mustill, Michael John Boyd & Stewart Crawford Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (London: Butterworths, 1989) at 464-465 [RBOA, Tab 15], cited in *MacKinnon v Instaloans Financial Solution Centres (Kelowna) Ltd*, 2004 BCCA 473 at para 35.

arbitration agreement may be inoperative because a court has declared it unenforceable.[229] Those authors state that "incapable of being performed" is an incapacity from something beyond the control of the parties, which has been held to include a party's insolvency proceedings.[230]

(b) There is No Conflict with Provincial Legislation, and Therefore No Need to Apply the Doctrine of Paramountcy

144. Although not the basis for its dismissal of the appeal, the Court of Appeal erred in finding that reliance on broad statutory authority under the *BIA* to dismiss the Stay Application would result in a conflict between federal and provincial law, to the extent that s 15 of the *Arbitration Act* applies. Grauer JA held that such a finding would be prohibited by s 72(1) of the *BIA*, and would ultimately fall to be resolved through the doctrine of paramountcy.[231]

145. However, s 72(1) of the *BIA* empowers a trustee in bankruptcy to rely on provincial statutes relating to property and civil rights in order to deal with the debtors' property for the benefit of creditors, provided those statutes do not conflict with the *BIA*.[232] Section 72(1) was enacted in 1949, primarily to recognize that provincial fraudulent transfer legislation was valid as dealing with property and civil rights, with the result that the trustee in bankruptcy should be able to rely on such provincial legislation to pursue recovery on behalf of the bankrupt estate.[233]

146. In other words, if s 15 of the *Arbitration Act* conflicted with the *BIA* (which is denied), then pursuant to s 72(1) of the *BIA*, the Receiver[234] would not be entitled to avail itself of the rights and remedies provided by the *Arbitration Act*. If s 15 does *not* conflict with the *BIA* (as the respondents assert), then s 72(1) entitles the Receiver "to avail himself of all rights and remedies"

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[229] J Brian Casey, *Arbitration Law of Canada: Practice and Procedure* 3rd ed (Huntington, New York: JurisNet, LLC, 2017) at 345 [RBOA, Tab 9].
[230] *Luscar Ltd v Smoky River Coal Ltd*, 1999 ABQB 202 at paras 30-33; aff'd on other grounds, *Smoky River ABCA, supra* note 178.
[231] *BCCA Reasons, supra* note 49 at paras 13-20 [AR, Vol I, Tab 4 at 34-35].
[232] *BIA*, *supra* note 4, s 72(1).
[233] *Robinson v Countrywide Factors Ltd*, [1978] 1 SCR 753, 1977 CanLII 175 (SCC).
[234] Pursuant to s 243(4), a receiver appointed pursuant to s 243(1) of the *BIA* is required to be a "trustee" as defined in s 2 of the *BIA* (meaning a person who is licensed or appointed under the *BIA*); thus s 72(1) of the *BIA* applies to the Receiver here.

under the *Arbitration Act*.[235]

147. Section 72(1) has also been interpreted by this Court to find that an interim receiver (pursuant to s 47 of the *BIA*, as it then was, and prior to the enactment of s 243 authorizing national receivers) was *subject to* provincial legislation, where that legislation did not conflict with the *BIA*. In *GMAC Commercial Credit Corp – Canada v TCT Logistics Inc*,[236] Abella J. applied s 72(1) to find that a labour relations board created by provincial legislation had the exclusive jurisdiction to determine if an interim receiver was liable as a successor employer, and that a bankruptcy court had no jurisdiction to make a declaration about or immunize the receiver from such liability. Abella J. noted that per s 72(1), "unless there is a conflict with the [*BIA*], any legislation relating to property and civil rights is deemed to be supplemental to, not abrogated by the [*BIA*]."[237] Further, the effect of s 72(1) is that the *BIA* is not intended to extinguish legally protected rights unless those rights are in conflict with the *BIA*.[238] Abella J. found no conflict between s 47(2) of the *BIA* (as it then was) and the provincial legislation, and held that s 47(2) did not permit the court to abrogate the union's right to seek relief at the labour relations board.[239] Therefore, in *GMAC*, there was no conflict between the federal and provincial legislation, when interpreted harmoniously.

148. The respondents note that the role of the union in *GMAC* is distinguishable from that of the appellants in the present case. Here, the appellants are significant debtors of the insolvent Petrowest Respondents.[240]

149. This is consistent with the respondents' position. There is no conflict between s 243 of the *BIA* and s 15 of the *Arbitration Act*; both statutes apply harmoniously in this case. Further, there is no prejudice to the appellants (nor was any asserted before the chambers judge).[241]

150. Pursuant to s 15(2) of the *Arbitration Act*, the chambers judge had express statutory authority to decline the Stay Application on the basis that the Arbitration Clauses were inoperative

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[235] *BIA*, *supra* note 4, s 72(1).
[236] 2006 SCC 35 [*GMAC*].
[237] *GMAC*, *ibid* at para 4 (per Abella J.).
[238] *GMAC*, *ibid* at para 47. See also *Guarantee Company*, *supra* note 227 at para 42.
[239] *GMAC*, *ibid* at para 51.
[240] Notice of Claim, *supra* note 20 [RR, Vol I, Tab 1 at 1-9].
[241] *BCSC Reasons*, *supra* note 6 at paras 58-60 [AR, Vol I, Tab 2 at 23].

or incapable of being performed.[242] That conclusion was properly made pursuant to the court's statutory and inherent jurisdiction, including under s 243 of the *BIA* and the court's authority to disrupt private contractual rights in the context of an insolvency, with regard to policy considerations and the fundamental purpose of the *BIA*. That approach recognizes and gives effect to the requirements of s 15 of the *Arbitration Act* while also upholding the fundamental principles of the *BIA*, resulting in the harmonious application of both statutes. There is no conflict that would offend s 72 of the *BIA* and similarly, nothing to engage the doctrine of paramountcy.

E. In any Event, Fully Dispositive of the Appeal is the Fact that the Appellants Took a Step in the Proceedings

151. When served with the notice of civil claim in these proceedings,[243] counsel for the appellants undertook to file a defence to the claim.[244] Relying on that undertaking, the respondents agreed not to note the appellants in default and granted the appellants two extensions of time to defend.[245] The appellants proposed dates for those extensions based on their undertaking to defend, stating that they were "finalizing materials for filing" and would file their defence "very shortly."[246] The appellants did not meet the agreed extended deadline to file their defence. Instead of honouring the undertaking to defend, the appellants instead filed the Stay Application.[247]

152. Section 15(1) of the *Arbitration Act* requires that parties apply to the court for a stay of legal proceedings "*before* filing a response… or *taking any other step* in the proceedings."[248] The test is objective; anything indicating an affirmation or willingness to have a dispute resolved by the court is a "step in the proceedings."[249] As a matter of law, if the appellants took any step in this action, they are not entitled to rely on s 15(1) of the *Arbitration Act*. Put another way, there is a threshold issue about whether the appellants attorned to the court's jurisdiction and waived the

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[242] *Arbitration Act*, *supra* note 3, s 15.
[243] Riglin Affidavit at para 25, Exhibit "G" [AR, Vol XI, Tab 11 at 2893-2894, 2939].
[244] *BCSC Reasons*, *supra* note 6 at para 20 [AR, Vol I, Tab 2 at 14]; Riglin Affidavit at para 25, Exhibit "J" [AR, Vol XI, Tab 11 at 2893-2894, 2948].
[245] Riglin Affidavit at para 25, Exhibits "H" -"M" [AR, Vol XI, Tab 11 at 2893-2894, 2942-2957].
[246] Riglin Affidavit at para 25, Exhibit "L" [AR, Vol XI, Tab 11 at 2893-2894, 2952-2954].
[247] Riglin Affidavit at para 25, Exhibit "N" [AR, Vol XI, Tab 11 at 2893-2894, 2961].
[248] *Arbitration Act*, *supra* note 3, s 15(1).
[249] *Larc Developments Ltd v Levelton Engineering Ltd*, 2010 BCCA 18 at para 16.

benefit of the Arbitration Clauses.[250] If they did, this issue is dispositive of this appeal in any event.

153. The chambers judge erred in concluding that the appellants had not taken a step in the proceedings, on the reasoning that the appellants did not rely on or invoke the Rules of Court.[251] The Court of Appeal found it unnecessary to consider the point.[252] The appellants' assertion that the respondents were required to seek leave to cross-appeal on this point is incorrect.[253]

154. The appellants did invoke the *Supreme Court Civil Rules* by undertaking to defend and seeking an extension of time from the respondents to do so. Rule 22-4(3) expressly contemplates such extensions for pleadings to be given by consent.[254] Nothing in s 15(1) of the *Arbitration Act* requires that such an agreement or any document be filed with the BC Court to constitute "any other step in the proceedings."[255] The appellants took a step in the proceedings by making a binding promise to file a defence and seeking the respondents' consent in accordance with the *Rules* to allow that defence to be filed. The purpose of the extension was not to decide whether to defend; the appellants communicated that they had elected to defend and would defend.[256]

155. As officers of the court, lawyers must scrupulously observe the terms of their undertakings and if they do not, the court has the power to summarily enforce the undertaking, pursuant to its inherent jurisdiction to control its own process.[257]

156. Further, the exchanges of correspondence between counsel clearly amounted to an enforceable agreement between the parties to not pursue arbitration.[258]

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[250] *Lafarge Canada Inc v Edmonton (City)*, 2013 ABCA 376 at para 39 [*Lafarge*].
[251] *BCSC Reasons*, *supra* note 6 at para 27; [AR, Vol I, Tab 2 at 15].
[252] *BCCA Reasons*, *supra* note 49 at para 58 [AR, Vol I, Tab 4 at 42].
[253] *Rules of the Supreme Court of Canada*, SOR/2002-156, r 29(3).
[254] *Supreme Court Civil Rules*, BC Reg 53/2021, r 22-4(3).
[255] *Arbitration Act*, *supra* note 3, s 15.
[256] *Dufferin Paving Co Ltd v George A Fuller Co of Canada*, 1934 CanLII 123, 1934 CarswellOnt 63 at para 6 (Ont CA) [RBOA, Tab 1]; See also *Fofonoff v C and C Taxi Service Limited*, 1977 CanLII 358, 3 BCLR 159 (SC) at para 14.
[257] *Willson v Angela Gibson Law Corp*, 2008 BCSC 1081 at paras 76 and 80; *Hudson v Foster et al*, 2010 ONSC 3417 at para 23; *R v Young*, 2015 ABQB 784 at para 15.
[258] *Citizens Trust Co v Luckman*, 1997 CanLII 2106, 1997 CarswellBC 1686 (SC), leave to appeal to BCCA refused, 1997 CanLII 4061 at paras 26-28, 37 BCLR (3d) 174 (BCCA) (Chambers); *Methanex New Zealand Ltd v Fontaine Navigation SA*, [1998] 2 FC 583, 1998 CanLII 9039 at paras 26, 52; *Bugg v Beau Exploration Ltd*, 2006 ABCA 201 at para 14.

157. Counsel for the appellants expressly undertook to file a defence in this action and secured two extensions of time to do so from the Receiver.[259] Whether by agreement under the *Rules*, solicitor's undertaking, or enforceable contract, that solemn and binding promise constituted a step in the proceedings that, once taken, could not be undone.

158. The respondents also relied on the appellants' undertaking and agreement in *foregoing* their rights under the *Rules*, now to their prejudice. Absent the appellants' promise to defend, the respondents were entitled to note the appellants in default. Instead, the respondents twice agreed to extend the time for the appellants to file their pleadings.[260]

159. Having taken a step in the proceedings per s 15(1) of the *Arbitration Act*, the appellants are precluded from applying for a stay of proceedings. By their conduct, the appellants have attorned to the court's jurisdiction and waived the benefit of the Arbitration Clauses.[261]

IV. SUBMISSIONS CONCERNING COSTS

160. The respondents seek costs of the proceedings in this Court and the courts below.

V. ORDER REQUESTED

161. The respondents request an Order dismissing the appeal and awarding the respondents costs of the proceedings in this Court and the courts below.

Dated at Calgary, Alberta this 9th day of November, 2021.

BENNETT JONES LLP

Kelsey Meyer

Kelsey Meyer, Ciara Mackey, Stephanie Clark and Paul Romaniuk

Counsel for the Respondents, Petrowest Corporation et al.

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[259] Riglin Affidavit at para 25 [AR, Vol XI, Tab 11 at 2893-2894].
[260] Riglin Affidavit at para 25, Exhibits "G" to "O" [AR, Vol XI, Tab 11 at 2893-2894, 2939-2964].
[261] *Lafarge*, *supra* note 250 at para 39.

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