CITATION: Ontario v. Imperial Tobacco Canada Limited, 2011 ONCA 525
DATE: 20110720
DOCKET: C52576

COURT OF APPEAL FOR ONTARIO

Goudge, Gillese and Juriansz JJ.A.

BETWEEN

Her Majesty the Queen in Right of Ontario

Appellant

and

Imperial Tobacco Canada Limited and The Ontario Flue-Cured Tobacco Growers' Marketing Board

Respondents

John Kelly and Lise G. Favreau, for the appellant

Alan Mark and Orestes Pasparakis, for Imperial Tobacco Canada Limited

William V. Sasso, for The Ontario Flue-Cured Tobacco Growers' Marketing Board

Ronald G. Slaght, Q.C. and Peter J. Osborne, for the intervener Her Majesty the Queen in Right of Canada

Heard: February 17, 2011

On appeal from the judgment of Justice R.C. Gates of the Superior Court of Justice dated July 26, 2010.

Juriansz J.A. (Dissenting in part):

OVERVIEW

[1] The issue in this appeal is whether the motion judge erred by staying the application brought by Her Majesty the Queen in Right of Ontario in the Superior Court because he concluded an arbitration process should be followed. The appeal raises again the scope of the exceptions to the general rule stated in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 that "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator."

[2] The application brought by Ontario in the Superior Court has to do with a settlement of litigation between Imperial Tobacco Canada Limited ("ITCAN") on one side and the governments of Canada and the provinces on the other. The governments had brought an action against ITCAN and its subsidiaries for their role in the smuggling of tobacco across the Canada-U.S. border between January 1, 1985 and December 31, 1996. The parties entered into a Comprehensive Settlement Agreement (the "Agreement") dated July 31, 2008. Under the Agreement, ITCAN agreed to pay up to $350 million to the governments in annual payments over 15 years in exchange for a release from future actions, the terms of which I will discuss in detail later in these reasons.

[3] Subsequently, on December 2, 2009, the Ontario Flue-Cured Tobacco Growers' Marketing Board (the "Tobacco Board") and four tobacco farmers commenced a $50 million class action against ITCAN on behalf of growers and producers who were required to sell tobacco through the Tobacco Board between 1986 and 1996. The

Tobacco Board claims on its own behalf and on behalf of growers and producers the difference between the lower export price paid by ITCAN to the Tobacco Board for tobacco exported from Canada and the higher price that should have been paid for tobacco for domestic use, in respect of tobacco which was first exported from Canada and then smuggled back into Canada.

[4] Claiming to rely on provisions of the Agreement, ITCAN gave notice on March 29, 2010 that, commencing April 30, 2010, it would pay the settlement funds due to Ontario under the Agreement into an escrow account pending the resolution of the class action. Ontario brought an application for declarations that ITCAN was not entitled to withhold annual payments to Ontario, which the motion judge dismissed so that the arbitration process in the Agreement could be followed.

[5] Ontario has appealed the motion judge's decision to this court, arguing that the dispute between Ontario and ITCAN does not fall within the arbitration clause, or in the alternative, that this court should determine its application in any event to avoid a multiplicity of proceedings and the possibility of inconsistent results.

[6] I would dismiss the appeal and uphold the motion judge's stay of Ontario's application and confirm his referral of the parties to the arbitrator so that the arbitration process set out in the Agreement may be followed.

FACTUAL CONTEXT

The Release in the Comprehensive Agreement

[7] The Agreement is central to the resolution of the issues. The Agreement is made between Canada and the provinces on one side and ITCAN and its Affiliates on the other.

[8] Section 15 of the Agreement deals with the release. The terms "Releasing Entities", "Released Entities" and "Released Claims" are important to understanding s. 15. The Agreement defines those terms as follows:

> (a) "Releasing Entities" means: "Her Majesty in Right of Canada and in Right of the Provinces and includes for greater certainty the Canada Revenue Agency and the Canada Border Services Agency."
>
> (b) "Released Claims" include, *inter alia*, "all civil claims that may be allowable to the Releasing Entities" relating to or arising out of the smuggling of tobacco or any failure on the part of ITCAN to pay taxes, duties, excise, customs or excise taxes or duties or amounts payable on account of smuggled or imported tobacco.
>
> (c) "Released Entities" include ITCAN and related companies.

[9] Section 15 provides that the Releasing Entities absolutely and unconditionally fully release and forever discharge the Released Entities from the Released Claims. Section 15 does not stop there, however. It goes on to provide that if a Releasing Entity does bring a Released Claim against a Released Entity, the release may be pleaded as a complete defence and may be relied upon as a complete estoppel to dismiss the claim.

[10] Because of its importance, I set out s. 15 in full:

> RELEASE
>
> 15. The Releasing Entities hereby, without any further action on the part of such Releasing Entities, absolutely and unconditionally fully release and forever discharge, the

> Released Entities from the Released Claims. Without in any way limiting the generality of the foregoing, the Releasing Entities further agree that:
>
> (a) in the event that a proceeding, claim, action, suit or complaint with respect to a Released Claim is brought by Releasing Entity against a Released Entity, this release may be pleaded as a complete defence and reply, and may be relied upon in such a proceeding as a complete estoppel to dismiss the said proceeding; and
>
> (b) in the event of (a), the Releasing Entity that initiated the proceeding shall be liable for all reasonable costs, legal fees, disbursements and expenses incurred by the Released Entity as a result of such proceeding.

The Right to Escrow Payments in Section 7 of the Agreement

[11] Section 7 of the Agreement gives ITCAN additional rights in the event that it incurs monetary liabilities "in any way relating to, arising out of or in connection with any Released Claims or Claims Over". If ITCAN does incur such monetary liabilities, it has the right to reduce the amount of the payments it must make to the government concerned under the Agreement. In addition, upon ITCAN learning of the existence of any claim that might give rise to such liabilities, it has the right, after giving 30 days' notice, to begin paying any funds due to a government under the Agreement into an escrow account.

[12] In my view, as this case turns on contrasting the rights of ITCAN under s. 7 with its rights under s. 15, I examine those rights carefully. Section 7 provides:

> Without prejudice to any other rights or remedies as provided in paragraphs 15, 16, 17, 18 and 19 of this Agreement, in the event that monetary liabilities (including all fees, expenses and disbursements on a full indemnity scale) are incurred by Released Entities in any way relating to, arising out of or in

> connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity (and for the avoidance of doubt including such Government's crown-controlled corporations or crown agencies) (a "Responsible Government"), the amount of the Payment due in the fiscal year in which the monetary liabilities are incurred, and Payments due in subsequent fiscal years, shall be reduced by such amounts incurred. Upon learning of the existence of any claim, action, suit, or proceeding that could give rise to such liabilities, ITCAN may, upon giving 30 days' notice to the Responsible Government, begin paying any funds which are then or thereafter due into an interest-bearing escrow account, up to the amount claimed in such claim, action, suit, or proceeding pending its resolution. The amount by which the Payments shall be so reduced or escrowed shall not exceed the then-remaining Responsible Government's share of the Payments (as set out in Schedule "C" hereto).

[13] Certain features of s. 7 must be noted. First, while s. 15 provides ITCAN the right to assert a defence to certain claims, s. 7 provides ITCAN the right to reduce or escrow the payments it must make under the Agreement if faced with certain claims. Second, s. 7 applies to a broader range of claims than does s. 15. While both sections apply to claims brought by a "Releasing Entity", s. 7 also applies to claims made by "an Entity claiming through or on behalf of a Releasing Entity", a term which includes a government's crown-controlled corporations and crown agencies. Third, s. 7 applies to give ITCAN the right to reduce or escrow payments regardless of whether it has or asserts a defence to the claim under s. 15. This is clear because s. 7 applies when ITCAN actually incurs monetary liabilities, a situation that could not arise if it had a defence under s. 15.

[14] Additionally, s. 7 introduces the term “Responsible Government”. It provides ITCAN with the right to set off against the annual payments it makes under the agreement monetary liabilities:

> [I]n any way relating to, arising out of or in connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity (and for the avoidance of doubt including such Government’s crown controlled corporations or crown agencies) (a ‘Responsible Government’).

[15] The parties seem to take this phrase as defining “an Entity claiming through or on behalf of a Releasing Entity” to be a Responsible Government. They therefore identify the question disputed as whether the Tobacco Board is a Responsible Government. I digress to explain why I am uncomfortable with the short form terminology used by the parties. I think it is preferable to state the question as whether the Tobacco Board is “an Entity claiming through or on behalf of a Releasing Entity”, and not whether it is a Responsible Government.

[16] I say so because additional references to Responsible Government in s. 7 cast doubt on the parties’ characterization of the dispute. Section 7 goes on to provide for ITCAN giving 30 days’ notice to the Responsible Government of its intention to set off its monetary liabilities. Section 7 also provides that the amount of money that ITCAN places in escrow “shall not exceed the then-remaining Responsible Government’s share of the payments (as set out in Schedule “C” hereto).” The Entity claiming through or on behalf of a Releasing Entity does not have a share of the payments and does not get

notice that such payments are being placed in escrow. The payments under Schedule "C" are made to Canada and the provinces.

[17] These additional references to Responsible Government lead me to think that the term Responsible Government may refer to the government responsible for the "Entity claiming through or on behalf of a Releasing Entity" and not the Entity itself. That is why I prefer to articulate the question as whether the Tobacco Board is an Entity claiming through or on behalf of a Releasing Entity, and not whether the Tobacco Board is itself a Responsible Government. However, in my review of the parties' documents, I need quote their language referring to the Tobacco Board as potentially a Responsible Government.

Actions Taken by the Parties

[18] Relying on s. 7 of the Agreement, ITCAN served notice on March 29, 2010, alleging that the claims by the Tobacco Board arise out of and are in connection with the "Released Claims", and that the Tobacco Board and the Farm Products Marketing Commission are "Responsible Governments", and that commencing with the annual payment due on April 30, 2010, ITCAN would pay the funds due to Ontario into an escrow account up to the amount of $50 million, which is the amount claimed in the class action brought by the Tobacco Board.

[19] On April 30, 2010, Ontario commenced an application pursuant to Rules 14.05(3)(d) and (h) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 for declarations that:

> (a) the claim in the class action commenced by the Tobacco Board, on its own behalf and on behalf of growers and producers who sold tobacco through the Tobacco Board for the years 1986 to 1996 against ITCAN, is not a "Released Claim" by a "Responsible Government" for purposes of the Agreement;
>
> (b) the Notice served by ITCAN on March 29, 2010, under s. 7 of the Agreement, is therefore invalid, and ITCAN is not entitled to withhold payments owing to Ontario pursuant to the Agreement; and
>
> (c) ITCAN is required to pay to Ontario any payment due to Ontario on April 30, 2010, and annually thereafter, together with interest on any overdue payments at the interest rate prescribed under Part XLIII of Regulations of the *Income Tax Act*, R.S.C. 1985, c. 1.

[20] ITCAN responded to Ontario's application on June 16, 2010, by bringing a motion to dismiss or, alternatively, permanently stay Ontario's application on the basis that the matters raised in the application are subject to arbitration under the Agreement. The arbitration process is dealt with in ss. 32 to 36 of the Agreement.

The Arbitration and Dispute Resolution Provisions

[21] Section 32 of the Agreement provides that "[i]t is the intention of the Parties to settle consensually, by negotiation or agreement, any disputes with respect to performance, procedure and management arising out of this Agreement."

[22] Section 33 provides for the delivery of a notice of dispute by ITCAN or Canada only. It reads:

> Any notice of dispute shall be delivered by ITCAN or Canada (as the case may be) to the other in writing and shall be dealt with in the first instance for Canada by the Director General,

> Excise and GST/HST Rulings Directorate, Legislative Policy and Regulatory Affairs Branch, Canada Revenue Agency and for ITCAN by the Vice President of Law, or equivalent, who shall promptly discuss and attempt to resolve the dispute.

[23] The Agreement does not contain any provision for the giving of notice by or to Ontario or any of the provinces or by or to any of ITCAN's Affiliates or other Released Entities.

[24] Section 34 is the heart of the arbitration provisions. It provides that a dispute that remains unresolved 90 days after the date of the notice of dispute may be referred to arbitration. Section 34 provides:

> Any dispute between the Parties to this Agreement arising out of or relating to this Agreement or any breach, clarification, or enforcement of any provision of this Agreement or any conduct contemplated herein, that remains unresolved 90 days after the date of the notice of dispute, may be referred to arbitration in accordance with the *Commercial Arbitration Code* (the "Code"), being a schedule to the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.). Arbitrations shall be with a sole arbitrator. The Parties will select a mutually agreeable arbitrator within 30 days of the delivery of the notice of dispute who shall serve as arbitrator in respect of any disputes hereunder, unless and until he or she becomes unable or unfit to act as arbitrator (in which case the Parties shall immediately appoint a successor arbitrator within 30 days). If the Parties are unable to agree on the arbitrator, he or she shall be appointed, upon the request of a Party, by the court or other authority specified in article 6 of the Code.

[25] I emphasize that s. 34 refers to any dispute "between the Parties to this Agreement" that arises out of or in relation to the Agreement, "or any breach, clarification, or enforcement of any provision of this Agreement or any conduct contemplated herein".

[26] Section 35 gives the arbitrator under the Agreement all the jurisdiction of a Superior Court judge of a province to grant both legal and equitable remedies.

[27] Section 36 requires that arbitration proceedings remain confidential and prohibits the parties from disclosing the nature and scope of the proceedings to any third party. No amicus curiae or "friend of the court" briefs may be filed in the arbitration proceedings. The arbitrator shall provide the rules of the proceeding. The arbitrator's award shall be exclusively enforceable in the Federal Court, and any action to compel arbitration shall be commenced in the Federal Court.

Notice of Arbitration

[28] ITCAN served a Notice of Arbitration (the "Notice") dated June 15, 2010 on Canada under s. 34 of the Agreement. The Notice refers to the class action commenced by the Tobacco Board, and sets out ITCAN's position that the class action falls within the application of s. 7 of the Agreement and Ontario's position that it does not. The relief the Notice seeks from the arbitrator are declarations that:

> (a) the Tobacco Board's action is a Released Claim by a Releasing Entity or a Responsible Government, as defined by the Agreement;
>
> (b) ITCAN may, starting April 30, 2010, pay fines owing to Canada under the Agreement, up to $50,000,000, into an interest-bearing escrow account pending resolution of the Tobacco Board's action, in accordance with s. 7 of the Agreement; and
>
> (c) the amount of funds owing to Canada, starting on April 30, 2010, shall be reduced by the amount of monetary liabilities incurred by ITCAN in any way relating to, arising

> out of or in connection with the Board Action, in accordance with s. 7 of the Agreement.

[29] The Notice also states that it constitutes a "notice of dispute" for the purposes of the arbitration clause. Neither ITCAN nor Canada nor Ontario has delivered a separate notice of dispute under s. 33 of the Agreement.

[30] As noted, ITCAN's response to Ontario's court application was to move for a stay.

Decision of the Motion Judge

[31] On July 26, 2010, the motion judge granted an interim stay of Ontario's application pending the conclusion of the arbitration. He issued supplementary reasons dated September 20, 2010, stating that it would be up to the arbitrator "to control his/her own process including the issue of who should have standing to participate as well as to rule on the issues between the parties."

ISSUES

[32] The issue in this appeal is whether the motion judge erred by staying Ontario's application so that the arbitration process in the Agreement could be followed. This will require a consideration of the following two questions:

> (1) Whether the case falls within the exceptions to the general rule of systematic referral to an arbitrator; that is, whether Ontario's challenge to the arbitrator's jurisdiction is based "solely on a question of law" or on a question of "mixed law and fact" where the "questions of fact require only superficial consideration of the documentary evidence in the record"; and

(2) Whether referring the parties to arbitration gives rise to a multiplicity of proceedings and a risk of inconsistent findings, and if so whether the court has a residual discretion to decline ordering a stay.

ANALYSIS

The General Rule and the Exceptions

[33] The arbitration statute that applies in this case, as stipulated by the Agreement, is the *Commercial Arbitration Code* (the "Code"). The Code is a schedule to the federal *Commercial Arbitration Act*, R.S.C. 1985, c. 17. The Code is based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985 (the "Model Law"). The Code simply restates the Model Law and any additions or substitutions to the Model law are in italics. References to "Canada", "Parliament", and to the "Code" are italicized. Except for these adaptations to customize it for Canada, the Code replicates the Model Law.

[34] The Model Law itself was modeled after the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 U.N.T.S. 3, Can. T.S. 1986 No. 43 (entered into force June 1959) (the "New York Convention").

[35] In the discussion that follows, I will refer to the Code as the Model Law. Doing so emphasizes that international jurisprudence is helpful in the interpretation and application of the statute. In *Dell Computer*, Deschamps J. reviewed the international law and paid considerable attention to the international consensus in rejecting the interventionist approach and adopting the general rule of systematic referral to arbitration.

[36] The rule of systematic referral to arbitration rests on art. 8(1) of the Model Law, which requires courts to refer any matter subject to an arbitration agreement to arbitration subject to limited exceptions. The article provides:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. [Emphasis added.]

[37] Article 8(1) operates in conjunction with art. 16(1), which provides in part: "The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement."

[38] Pursuant to arts. 8(1) and 16(1), a court should not itself rule on the scope of an arbitration agreement, but should leave the issue to the arbitrator. Deschamps J. laid down the general rule in *Dell Computer* "that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator".

[39] Deschamps J. did, however, carve out two exceptions to the rule of systematic referral to the arbitrator: A court may depart from the rule of systematic referral to arbitration if the challenge to the arbitrator's jurisdiction is based solely on a question of law, or on a question of mixed law and fact where the question of fact requires only superficial consideration of the documentary evidence in the record.

[40] These exceptions must be carefully applied. Deschamps J. immediately added that "even when considering one of the exceptions, the court might decide that to allow the

arbitrator to rule first on his or her competence would be best for the arbitration process." Before applying an exception, the court "must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding."

[41] More recently, in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, the Supreme Court confirmed the application of the *Dell Computer* framework in cases in which the arbitration statute reflects the provisions of the New York Convention and the Model Law. Binnie J., writing for the majority, said at para. 29:

> [A]bsent legislated exception, any challenge to an arbitrator's jurisdiction over Ms. Seidel's dispute with TELUS should first be determined by the arbitrator, unless the challenge involves a pure question of law, or one of mixed fact and law that requires for its disposition "only superficial consideration of the documentary evidence in the record".

[42] Thus, it is necessary to begin the analysis by characterizing Ontario's challenges to the jurisdiction of the arbitrator. Do Ontario's challenges involve pure questions of law, or questions of mixed fact and law that require only superficial consideration of the documentary evidence in the record for their disposition?

Ontario's first challenge: that it is not a party to the arbitration agreement

[43] Ontario bears the burden of establishing that its challenge to the arbitrator's jurisdiction is based solely on a question of law, or on a question of mixed law and fact where the question of fact requires only superficial consideration of the documentary evidence in the record.

[44] Ontario first argues that the arbitration provisions of the Agreement apply only to disputes between ITCAN and Canada, and not to disputes between ITCAN and Ontario. Ontario advances this argument, not as an exception to the systematic rule of referral, but submits that the court can and should decide whether the dispute between Ontario and ITCAN is arbitrable before deciding whether to grant a stay.

[45] I do not agree. The argument that a party is not subject to the arbitration agreement is simply one species of challenge to the arbitrator's jurisdiction. The general rule of systematic referral applies, unless on only superficial consideration of the documentary evidence in the record or on a pure question of law, the applicant establishes it is not a party to the arbitration agreement.

[46] Ontario points out that s. 33 of the Agreement provides for the delivery of a notice of dispute only by ITCAN or Canada. Ontario also argues that when the arbitration and dispute resolution provisions are read in the context of the entire Agreement, it is clear that the parties to the Agreement did not intend to authorize Canada to act as agent for and on behalf of the provinces in resolving disputes between ITCAN and one of the provinces.

[47] Ontario submits that this demonstrates that none of the other parties to the Agreement have the right to have a dispute dealt with under s. 33. It follows, Ontario submits, that none of the other parties to the Agreement are able to refer an unresolved dispute to arbitration under s. 34. Therefore, Ontario would have the court conclude that s. 34's arbitration provision does not apply to Ontario.

[48] Canada, as intervener, supports Ontario's position. Canada and Ontario both submit that Canada has no interest in the dispute between ITCAN and Ontario, as Canada will receive all of its settlement funds due to it under the Agreement. Therefore, Canada has no reason to engage in arbitration with ITCAN.

[49] On the other hand, there is much to support the argument that the arbitration provision does apply to Ontario. The provision is broadly worded and states quite plainly that "[a]ny dispute between the Parties to this agreement…may be referred to arbitration." Section 1 of the Agreement defines "Parties" as ITCAN and the Governments. "Governments" is defined to mean Canada and the provinces. The title of the Agreement states that it is made between ITCAN and the Queen in right of Canada and "The Province listed on the signature pages attached hereto". The Agreement was executed by the Attorney General of Ontario immediately below the sentence that reads "[t]his Agreement constitutes a valid and binding agreement of the Province of Ontario and is enforceable in accordance with its terms". Section 28 of the Agreement provides that it is "binding upon the Parties". In s. 3 of the Agreement, each government warrants that it has obtained all approvals and authorizations to execute the Agreement and make it binding upon it. Each government further warrants that the Agreement constitutes a legally binding obligation of the government and is enforceable against it in accordance with its terms. There is no doubt that Ontario is a party to the Agreement.

[50] While Ontario is a party, it cannot give any notice under the Agreement. Nor can any of the other provinces. Nor can any of ITCAN's Affiliates or any of the other

Released Entities. The Agreement has a detailed definition of “Affiliate” and its definition of “Released Entity” includes the 48 tobacco corporations listed in Schedule B.

[51] Despite the involvement of all these entities, s. 38 provides that “All notices under this Agreement” (emphasis added) shall be made to ITCAN or to Canada at specified addresses. Nowhere in the Agreement does it provide for the provinces to directly receive notice from ITCAN or any of the Affiliates on any matter. Nor does it make any provision for any Affiliate to give or receive notice.

[52] The central role of Canada in the administration of the Agreement is made apparent by several provisions. For example, s. 39 provides “[a]ll payments shall be made to Canada”. Section 5 is more specific. It provides that “ITCAN shall pay to Canada, for Canada, and on behalf of and as agent for the Provinces…” the settlement funds provided for in the Agreement. Sections 10 and 11 provide that ITCAN shall provide certain certificates “to Canada for Canada, and as agent for and on behalf of the Provinces” each year.

[53] In short, ITCAN can point to many features of the Agreement to support its submission that it is structured so that the two corresponding parties are ITCAN and Canada, thus avoiding the need for any entity to deal with a multiplicity of parties. Certainly, the fact that Canada receives and distributes the settlement funds and various documentation as agent for the provinces can be taken to suggest that Canada administers the Agreement, including the arbitration provisions, on their behalf.

[54] Ontario, relying on *Bell Canada v. The Plan Group* (2009), 252 O.A.C. 71 (C.A.), submits that the interpretation of the Agreement is a pure question of law, and the court should determine that it is not a party to the arbitration clause. In my view, Ontario misreads *Bell Canada*.

[55] In *Bell Canada*, Blair J.A. noted at para. 20 that "[t]he historical view is that the interpretation of a contract is a question of law, and reviewable on the standard of correctness. However, the standard of appellate review in matters of contractual interpretation is not as straightforward as it once appeared to be…" He generally approved of the comments of Steel J.A. at para. 36 of *Prairie Petroleum Products Ltd. v. Husky Oil Ltd.* (2008), 295 D.L.R. (4th) 146 (Man. C.A.):

> The proper interpretation and application of the principles of contractual interpretation is a question of law. A trial judge's determination of the factual matrix, consideration of extrinsic evidence and consideration of the evidence as a whole is a question of fact. Finally, the application of the legal principles to the language of the contract in the context of the relevant facts, or a question involving an intertwining of fact and law, is a question of mixed fact and law.

[56] It must be remembered that the issue Blair J.A. discussed in *Bell Canada* was the standard of review to be applied on an appeal of a trial judge's interpretation of a contract and not whether the interpretation of the contract itself involved a question of mixed fact and law per se. That perspective led him to comment that Feldman J.A.'s conclusion in *Casurina Limited Partnership v. Rio Algom Ltd.* (2004), 181 O.A.C. 19 (C.A.), at para. 34, that "[t]he construction of a written instrument is a question of mixed fact and law" did not mean that a deferential standard of appellate review must always be applied to the

interpretation of a contract. The view Blair J.A. expressed in *Bell Canada* is that contractual interpretation is an exercise that "generally falls much more towards the error of law end of the *Housen* spectrum" once the issues relating to the factual matrix of the contract have been resolved or are not in dispute.

[57] In my view, the interpretation of a contract, especially where the determination of the surrounding factual matrix is significant to its meaning, should be regarded as a question of mixed fact and law for the purposes of the general rule of systematic referral to arbitration. The very purpose of art. 8 (1) of the Model Law is to give the arbitrator the jurisdiction to determine disputes about the existence and scope of the arbitration agreement. This seems to be the view that Sharpe J.A. adopted in *Dancap Productions Inc. v. Key Brand Entertainment, Inc.* (2009), 246 O.A.C. 226 (C.A.).

[58] In this case, as the above review of the Agreement makes plain, what the parties intended by the language of the Agreement, viewed objectively, in the circumstances in which the Agreement was made can only be assessed after a careful review of the surrounding factual matrix. The comments of Sharpe J.A. in *Dancap* at para. 40 about the arbitration clause in that case could equally be made about the Agreement in this case:

> The determination of the scope of [the agreement] and the arbitration clause will require a thorough review of the parties' complex contractual discussions, understandings, expectations and arrangements, an inquiry that clearly calls for much more than a "superficial consideration of the documentary evidence in the record." I conclude, therefore, that on this record, the motion judge erred in refusing to stay Dancap's action on account of the arbitration clause.

[59] Returning to this case, it is worth repeating that the arbitration provision applies to any dispute "between the Parties to this Agreement" that arises out of or in relation to the Agreement "or any breach, clarification, or enforcement of any provision of this Agreement or any conduct contemplated herein". Ontario's application in the Superior Court is replete with questions about the Agreement. It seeks declarations about what is or is not a Released Claim by a Responsible Government "for the purposes of the Comprehensive Agreement"; it seeks a declaration that ITCAN is not entitled to withhold payments "pursuant to the Comprehensive Agreement"; and it seeks a declaration that ITCAN is required to make the payments "under the Comprehensive Agreement".

[60] While the ultimate determination of Ontario's challenge that it is not a party to the arbitration clause will be up to the arbitrator, this language must be considered in the context of this court's conclusion in *Canadian National Railway Company v. Lovat Tunnel Equipment Inc.* (1999), 174 D.L.R. (4th) 385, at para. 20, approving of Blair J.'s statement in *Onex Corp. v. Ball Corp*. (1994), 12 B.L.R. (2d) 151 (Ont. Gen. Div.), at p. 160 that "where the language of the arbitration clause is capable of bearing two interpretations, and one of those interpretations fairly provides for arbitration, the courts should lean towards honouring that option".

[61] I conclude that whether Ontario is subject to the arbitration provisions involves a question of mixed fact and law. I also conclude that Ontario has not established that that question can be determined on only a superficial consideration of the documentary evidence in the record. Very much to the contrary, a superficial consideration of the

documentary evidence in the record indicates that it is arguable that the arbitration provision applies to Ontario. It is for the arbitrator, in deciding on his or her own jurisdiction, to determine the matter conclusively.

Ontario's second challenge: that ss. 7 and 15 of the Agreement are not subject to the arbitration clause

[62] Ontario argues that disputes about the application of ss. 7 and 15 of the Agreement could not have been intended to be arbitrable for two main reasons: (1) s. 15 requires that the question about whether the Tobacco Board's class action is a "Released Claim" is to be determined by a court with jurisdiction over the action; and (2) since s. 7 also requires a determination of whether the claim is a "Released Claim", any determination in relation to the validity of a notice provided by ITCAN under s. 7 must also be made by the Superior Court.

[63] It is not necessary to evaluate these contentions and their tacit premises because my reasoning regarding Ontario's first challenge applies to this challenge as well. These questions, assuming that the dispute raises them, are not questions of law alone. The scope of the arbitration clause and whether it applies to ss. 7 and 15 of the Agreement requires a careful review of the factual matrix surrounding the making of the Agreement. It is important to understand the process of negotiation of the Agreement, the respective roles of Canada and each of the provinces, the reasons for the Agreement's unique structure, the process by which Canada acts as agent for the provinces and the context surrounding the Releasing Provisions.

[64] It is the arbitrator's function to consider and determine the questions Ontario raises, on a complete record.

Conclusion

[65] I conclude that Ontario's challenges to the arbitrator's jurisdiction do not involve pure questions of law or questions of mixed law and fact that can only be decided on a superficial review of the evidence in the record. As such, the exceptions to the general rule of systematic referral to arbitration do not apply. Ontario, however, advances another argument.

Will a stay order in favour of arbitration lead to a multiplicity of proceedings and risk of inconsistent results?

[66] Ontario advances the additional argument that the court possesses a residual discretion to decline to refer parties to arbitration in order to avoid a multiplicity of proceedings and a risk of inconsistent results and that this court should exercise that discretion in this case. First I explain why I conclude that the court does not possess such discretion under the Model Law. Second, if I am incorrect, I explain why, in this case, there is no appreciable risk of multiple proceedings and inconsistent results that would warrant exercising such residual discretion.

[67] Ontario cites a number of decisions1 that do indeed state that the court has the discretion to decline to refer a matter to arbitration in order to avoid a multiplicity of

1 *Penn-Co Construction Canada (2003) Ltd. v. Constance Lake First Nation*, [2007] O.J. No. 3940 (Sup. Ct.), aff'd [2008] O.J. No. 4523 (C.A.); *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*,

proceedings and risk of inconsistent results. These cases say that it is preferable, where there are claims subject to the arbitration agreement as well as claims against other parties that are plainly not subject to the arbitration agreement, to have all claims determined under the umbrella of a single proceeding before the court.

[68] The wrinkle is that all the cases Ontario cites are cases decided under Ontario's domestic *Arbitration Act, 1991*, S.O. 1991, c. 17. Section 7 of that Act gives the court considerable latitude to refuse a stay of proceedings in favour of arbitration. Section 7 expressly addresses the situation in which the arbitration agreement deals with only some of the matters in respect of which the court proceeding was commenced.

[69] By contrast, the Model Law, which is adopted by both Ontario's *International Commercial Arbitration Act*, R.S.O. 1990, c. I-9 and the federal *Commercial Arbitration Code* that applies in this case, does not have an equivalent provision. The lack of an equivalent provision is perhaps understandable in the context of international arbitration. International arbitration may well raise issues not found in domestic arbitration cases. For example, in international arbitration, the likelihood of multiple proceedings and inconsistent results could arise if the courts of different states adopt an interventionist approach and take jurisdiction. I pause to note that this case involves the federal government and all ten provinces, and many of the Released Entities in Schedule B of the Agreement are foreign companies. If the courts of the jurisdictions where some parties are located adopt an interventionist approach, it seems to me that there would be an

---

[2007] O.J. No. 4917 (Sup. Ct.); *Radewych v. Brookfield Homes (Ontario) Ltd*., [2007] O.J. No. 2483 (Sup. Ct.), aff'd [2007] O.J. No. 4012 (C.A.).

elevated risk of inconsistent results. The Model Law on international arbitration was designed to avoid this very prospect.

[70] The question of the existence and scope of a court's discretion to decline to refer parties to arbitration under the Model Law to avoid the possibility of multiple proceedings has been considered by the courts of appeal in Alberta and British Columbia. Before turning to those cases, it is worth recalling that art. 8(1) of the Model Law provides that a court "shall…refer the parties to arbitration…unless it finds that the agreement is null and void, inoperative or incapable of being performed".

[71] In *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 85 Alta. L.R. (2d) 287 (C.A.), a distributor brought an action against a licensor and others. The agreement the distributor had with the licensor contained an arbitration clause. The licensor sought a stay of the action on the ground that the dispute should be referred to arbitration. The trial judge refused to stay the court proceedings for the reason that the action added parties that were not part of the arbitration agreement and part of the claim alleged liability outside the contract. The Alberta Court of Appeal allowed the licensor's appeal and directed the distributor and licensor to arbitration while allowing the action to proceed against the other defendants. Kerans J.A., writing for the unanimous court said:

> [47] The power to grant or withhold a reference under the International Commercial Arbitration Act is very limited…For the purpose of argument, I accept the possibility (albeit I suspect very slim) of two suits at the same time, and even contradictory findings. Nevertheless, that is the method chosen by the parties. The Act directs me to hold them to their bargain. Section 2(1) of the International Commercial Arbitration Act makes the Convention part of the law of

> Alberta. It says that the Convention "applies in the Province." The Convention Article II s. 3 provides that:
>
> 3. The court of a Contracting State … shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed. [Emphasis in original.]
>
> [48] The learned chambers judge relied upon the qualifying words. He held that an inconvenient reference was an "inoperative" one. I do not agree. It may not operate conveniently, but it cannot be said to be inoperative. The view taken by the learned chambers judge adds a gloss to the word that it cannot, in all the circumstances, reasonably bear.
>
> …
>
> [51] In modern commercial disputes, it is almost inevitable that many parties will be involved and very unlikely that all parties will have an identical submission. The problem of multiple parties, which drove the decision of the chambers judge here, will exist in almost every case. There is no question that proliferation of litigation is a possibility…In any event, the [Model Law] cannot reasonably be taken as having abandoned any attempt at arbitration when this problem arises.

[72] The British Columbia Court of Appeal dealt with a similar issue in *Prince George (City) v. McElhanney Engineering Services Ltd.*, [1995] B.C.J. No. 1474 (C.A.), leave to appeal refused, [1995] S.C.C.A. No. 467. The City of Prince George had brought an action against a construction company for delay in construction, breach of contract and negligent work. The City's contract with the construction company had an arbitration clause. The City also sued the engineering consultant on the project for damages in the design and supervision of construction of the work done by the defendant construction company. The City had no arbitration agreement with the engineering consultant.

[73] The construction company brought a motion to stay the City's action against it so that the dispute between it and the City could be arbitrated. The motion judge refused the application on the basis that: (1) the arbitration clause was inoperative or incapable of being performed because the City's action raised broader issues against the engineering consultant that were interrelated with the arbitrable issues between the City and the construction company; and (2) there was a risk of multiple proceedings and inconsistent results.

[74] The construction company's appeal was allowed by the British Columbia Court of Appeal, which directed a stay of the proceedings against the construction company in favour of arbitration. The City's action against the engineering consultant could proceed. Cumming J.A., writing for the court, canvassed international and Canadian decisions as well as the literature, before concluding at para. 37 that:

> These authorities establish that, as a general principle, the mere fact that there are multiple parties and multiple issues which are inter-related and some, but not all, defendants are bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause.

[75] The authors cited by the court included M.J. Mustill & S.C. Boyd, *The Law and Practice of Commercial Arbitration in England*, 2d ed. (London: Butterworths, 1989), who state at 464-65 that "…the fact that issues in the arbitration overlap issues in proceedings between parties who are not bound by the arbitration agreement does not make the agreement 'inoperative'", and J.B. Casey, *International and Domestic Commercial Arbitration* (Carswell, 1993) who states at 4-14 that "[i]t is not sufficient to

say that because the court action raises issues outside the scope of the arbitration agreement per se, or because the action involves some parties that are not parties to the arbitration agreement, that the agreement should be considered 'inoperative'."

[76] While the question has not been decided by the Court of Appeal for Ontario, it was considered by Campbell J. of the Ontario High Court in *Boart Sweden A.B. v. N.Y.A. Stromnes A.B.* (1988), 41 B.L.R. 295 (Ont. H.C.). Campbell J. allowed an application for a stay of proceedings pending arbitration where there were multiple issues and multiple parties, not all subject to the arbitration agreement. Campbell J. said at 302-303:

> Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract.
>
> …
>
> To deal with all these matters in a single proceeding in Ontario instead of deferring to the arbitral process in respect of part of the action and temporarily staying the other parts of the action, would violate that strong public policy.
>
> It would also fail to give effect to the change in the law of international arbitration which, with the advent of art. 8 of the Model Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators even more than under the previous law of international arbitration.
>
> …
>
> I conclude that nothing in the nullity provisions of art. 8 prevents this Court from giving effect to the clear policy of deference set out in the article.

> *To conclude otherwise would drive a hole through the article by encouraging litigants to bring actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in Court, thus defeating the policy of deference to the arbitrators.* [Emphasis in original.]

[77] These Canadian decisions are consistent with international jurisprudence under the Model Law. For example, Cumming J.A. in *Prince George* cited *Lonrho Ltd. (U.K.) v. Shell Petroleum Co. (U.K.)* (1978) 4 Y.B. Comm. Arb. 320 (New York Convention). Two other decisions that have noted and stressed the different extent of curial intervention the courts can exercise under the Model Law or New York Convention rather than under domestic arbitration statutes when faced with applications to stay court proceedings in the face of an arbitration agreement are *Car & Cars Pty. Ltd. v. Volkswagen AG (Germany)* (2009), 34 Y.B. Comm. Arb. 783 (SIAC) and *ABI Group Contractors Pty. Ltd. v. Transfield Pty. Ltd.* (1999), 24 Y.B. Comm. Arb. 591 (New York Convention).

[78] This jurisprudence interpreting the Model Law prompts me to conclude that the court possesses no residual discretion outside the parameters of art. 8(1) of the Model Law to decline to stay court proceedings in the face of an arbitration agreement involving the Model Law to avoid multiple proceedings. Rather, the parties to the arbitration agreement must be held to their bargain.

[79] In any event, I am satisfied that in this case there is no appreciable possibility of a multiplicity of proceedings. I reach that conclusion on a cursory review of the Agreement and the documents in the record. I stress that it is not the court's function to interpret the

Agreement and these documents. That is a matter for the arbitrator. However, in order to assess Ontario's argument it is necessary to take a preliminary view of these matters. The preliminary view leads me to conclude that Ontario has not established any real prospect of a multiplicity of proceedings or a risk of inconsistent results.

[80] Ontario argues that the question whether the Tobacco Board is a Releasing Entity will arise before both the arbitrator in the arbitration and the court in the class action, and the question could be answered differently. In my view, the question will not arise in both venues, and if it did, there is no appreciable risk it would be answered differently.

[81] First, on my preliminary reading of the Agreement, the Tobacco Board does not fit within the definition of a Releasing Entity. The Tobacco Board is not Her Majesty the Queen in Right of Ontario. No other part of the definition could conceivably apply. I consider it extremely unlikely that the Tobacco Board would be found to be a Releasing Entity by the arbitrator or by the court (assuming the court could be and was called upon to address the issue).

[82] Second, the dispute between Ontario and ITCAN has to do with the application of s. 7 of the Agreement and not s. 15. It is s. 15 that provides ITCAN with a defence to a claim brought by a Releasing Entity. Section 7 recognizes that entities may still bring claims against ITCAN that result in actual monetary liabilities, but allows ITCAN to set those liabilities off against the payments it must make under the Agreement. Both Ontario and ITCAN, in their documents that I review below, characterize their dispute

not as whether the Tobacco Board is a Releasing Entity, but rather whether it is a Responsible Government.

[83] As I explained earlier, I prefer to characterize the question as whether the Tobacco Board is an Entity claiming through or on behalf of a Releasing Entity, but in reviewing the parties' documents, I need quote their language.

[84] In the notice dated March 29, 2010 that ITCAN served on Canada under s. 7 of the Agreement, I see no claim that the Tobacco Board is a Releasing Entity or that s. 15 applies. The notice refers to the class action commenced by the Tobacco Board, sets out that the regulations made under the *Farm Products Marketing Act*, R.S.O. 1990, c. F-9 required that the Tobacco Board obtain the prior written consent of the Farm Products Marketing Commission before commencing any civil proceeding, and then claims that "[b]oth the Commission and the Board are Responsible Governments within the meaning of section 7 of the Comprehensive Agreement" (emphasis added).

[85] Similarly, ITCAN's Notice of Arbitration dated June 15, 2010 does not mention s. 15 of the Agreement at all. Rather, as set out above, ITCAN claims in the Notice the right to start setting off payments to Canada on behalf of Ontario because "[t]he amount of funds owing to Canada, starting on April 30, 2010, shall be reduced by the amount of monetary liabilities incurred by ITCAN in any way relating to, arising out of or in connection with the Board Action, in accordance with s. 7 of the Agreement." This language specifically contemplates that ITCAN may incur monetary liabilities as a result of the Tobacco Board's action, which will proceed regardless.

[86] I recognize that the Notice of Arbitration does say that "the Board Action is a Released Claim made by a Releasing Entity or a Responsible Government". I do not take this to be a claim that the Tobacco Board is a Releasing Entity. When the Notice is read as a whole, it is clear to me that ITCAN, while it uses the composite term found in s. 7, is asserting its position that the Board's action is made by a "Responsible Government", (i.e. an Entity claiming through or on behalf of a Releasing Entity).

[87] Ontario seems to have understood full well that ITCAN's position is that the Tobacco Board is a Responsible Government, because its application in the Superior Court seeks a declaration that the Tobacco Board's class action "is not a 'Released Claim by a Responsible Government' for purposes of the Comprehensive Agreement…" (emphasis added).

[88] Thus, it seems to me that the question in dispute between Ontario and ITCAN is whether the Tobacco Board is an "Entity claiming through or on behalf of a Releasing Entity", not whether it is a Releasing Entity itself.

[89] That question is for the arbitrator to decide, not the court. I do observe, however, that the Tobacco Board has not a whit of interest in whether or not it is found to be an "Entity claiming through or on behalf of a Releasing Entity". The Tobacco Board's interest is in obtaining the damages it claims in the class action it has brought on behalf of itself and the growers and producers. The Tobacco Board's right to damages would be unaffected by a finding that it is an "Entity claiming through or on behalf of a Releasing Entity". Whether or not it is such an Entity, the Tobacco Board can still press ahead with

its class action, and if successful, can enforce any judgment it obtains against ITCAN. The only consequence of the Tobacco Board being such an Entity is that ITCAN can set off the money it pays to the Tobacco Board as damages against the annual payments it makes to Canada on behalf of Ontario.

[90] Thus, as I see it, there is no likelihood of multiple proceedings and a risk of inconsistent results. The Tobacco Board's class action will proceed and be determined in the Superior Court. The Superior Court will determine whether ITCAN has incurred monetary liabilities to the Tobacco Board. The arbitrator will determine whether ITCAN can set off those monetary liabilities against the payments it makes to Canada on behalf of Ontario under the Agreement. The arbitrator will also decide whether ITCAN is entitled to begin paying the monies it may set off into an interest-bearing escrow account until the Superior Court has determined the class action.

[91] On my reading of the documents, the issue whether the Tobacco Board is a Releasing Entity is not part of the dispute. If that issue is raised, the question of where and by whom it is decided may have to be addressed. Wherever it is addressed, I see scant likelihood that the Tobacco Board would be found to be a Releasing Entity.

[92] For these reasons, I conclude that no possibility of a multiplicity of proceedings or a risk of contradictory findings exists in this case.

Additional Considerations

[93] Ontario alleges that ITCAN did not properly comply with the arbitration and dispute resolution provisions and that as a result, the Notice of Arbitration is invalid. As

such, Ontario argues that there was no arbitration process to which the dispute could be referred by the motion judge.

[94] Whether ITCAN complied with the arbitration and dispute resolution provisions is not a question that this court needs to decide. This argument is part and parcel of Ontario's overall challenge to the arbitrator's jurisdiction. If necessary, the arbitrator can address this issue, as well as the many procedural questions that Ontario raised on this appeal.

[95] I have read the reasons of my colleague Goudge J.A. but I am not dissuaded from the result I would reach or the reasoning supporting it. I agree with him that the arbitrator cannot determine the rights of the Tobacco Board. If my colleague is correct that whether the Tobacco Board is a Releasing Entity is a live issue before the arbitrator, the arbitrator's ruling will not be binding on the Tobacco Board in the class proceeding. ITCAN has not pleaded the Release as a defence in the class action, i.e. that the Tobacco Board is a Releasing Entity. If it does eventually raise that defence in the class action, the merits of that defence will ultimately be determined by the Superior Court hearing the class action.

[96] A decision by the arbitrator as to whether the Tobacco Board is a Releasing Entity, would be binding on Ontario and ITCAN, but not on the Tobacco Board. Such a decision would resolve the current dispute between Ontario and ITCAN, namely whether ITCAN can begin to pay the annual payments due to Ontario into an escrow account. As well, such a decision may affect disputes that might arise in the future between Ontario and

ITCAN, such as what eventually happens to the escrowed funds. Such a decision, though, would not be binding on the Tobacco Board in the class action.

[97] The Tobacco Board does have an interest in whether the Release of ITCAN by Ontario applies to its class action. However, no one puts forward that the Tobacco Board is a party to the arbitration agreement and must arbitrate, and so I don't see Sharpe J.A.'s comment in *Dancap*, on which Goudge J.A. relies, as applying. The Tobacco Board did not bring the application stayed by the motion judge, Ontario did. The Tobacco Board's class action will proceed and its rights will be determined by the court in that class action whether Ontario's application is stayed or whether the arbitrator proceeds. Consequently, the Tobacco Board does not require that Ontario's application proceed in order to have the court decide its interests. The extraordinary step of declining to stay Ontario's action is not necessary to protect the Tobacco Board's rights.

[98] The fact that a preliminary view of the issue, on a cursory review of the record, makes it doubtful the arbitrator could find the Tobacco Board to be a Releasing Entity lends additional reason for staying Ontario's application.

[99] I add a couple of further observations. First, declining to stay Ontario's application does not necessarily lead to greater efficiency. Because the Agreement, as Goudge J.A. agrees, must be interpreted in the light of the factual matrix in which it was negotiated, the court hearing Ontario's application will have to admit evidence of that factual matrix. Since allowing Ontario's application to proceed does not prevent the arbitration from proceeding, the parties may have to call evidence about the factual matrix in two separate

proceedings. As I see it, it would be more efficient to stay Ontario's application, recognizing that the issues between Ontario and ITCAN will be resolved by arbitration as they agreed, and awaiting the determination of the Tobacco Board's rights in the class action.

[100] Second, I note that the parties provided that the federal *Commercial Arbitration Act* applies to arbitrations under their Agreement, and chose the Federal Court as the forum in which applications to name an arbitrator must be brought. The approach my colleague takes opens the door to any of the courts in the home jurisdiction of any of the many parties to the Agreement to assert the right to make binding interpretations of the Agreement.

[101] Finally, I express my view that permitting parties to bring applications such as Ontario's to court would not be best for the arbitration system. As Kerans J.A. observed in *Kaverit Steel* and as is manifest in the international jurisprudence, modern commercial disputes involve many parties. Allowing parties to resort to the court system in the face of an arbitration agreement simply by including in the proceeding non-parties to the agreement will provide encouragement for others who seek to evade their arbitration agreement. Such an approach will not only diminish the competence-competence principle but will result in added cost, complexity and delay to the arbitration process.

CONCLUSION

[102] It is arguable that the dispute between ITCAN and Ontario is a dispute that falls within the arbitration agreement and that Ontario is a party to that agreement. According

to the general rule, this matter should be referred to arbitration unless there are exceptions to justify the court retaining jurisdiction over the matter. No such exceptions exist in this case. The challenge to the arbitrator's jurisdiction is based on a question of mixed law and fact. The question of fact cannot be determined based solely on a superficial review of the evidence in the record.

[103] Furthermore, there are no real concerns about a multiplicity of proceedings or a risk of inconsistent findings in this case. While Ontario named the Tobacco Board as a party to its application, the application is not necessary to determine the Tobacco Board's rights.

[104] For these reasons, I would conclude that the motion judge did not err in ordering a stay of Ontario's application in favour of arbitration. Accordingly, I would dismiss the appeal and refer the matter to the arbitrator to rule on his or her own jurisdiction.

"R.G. Juriansz J.A."

Goudge J.A.:

[105] I have had the benefit of reading the clear and comprehensive reasons for judgment of my colleague Juriansz J.A., and I agree with much of what he writes. However, I part company with him on several important issues. As a result, I reach a different conclusion. For the reasons that follow I would allow the appeal in part.

[106] I begin with a brief review of the chronology, using the same short form references as my colleague.

[107] On December 2, 2009, the Tobacco Board commenced its class action against ITCAN. The Tobacco Board is a corporation without share capital established by regulation under the *Farm Products Marketing Act*, R.S.O. 1990, c. F.79. It entered into annual agreements with tobacco manufacturers including ITCAN which, among other things, set the prices paid by ITCAN to tobacco growers for the tobacco they sold to ITCAN. The Tobacco Board's class action is brought on behalf of tobacco growers against ITCAN claiming $50,000,000 damages because ITCAN paid less than contract prices to the growers for their tobacco. Ontario is not a party to the class action and will not receive any of the amounts claimed therein if the action is successful.

[108] On March 29, 2010, ITCAN gave notice to Canada in accordance with s. 7 of the Agreement that, commencing April 30, 2010, it would pay into escrow the funds then or thereafter due to Ontario under the Agreement, up to $50,000,000, pending resolution of the class action. The notice sets out ITCAN's position that the claim in the class action is a Released Claim and the Tobacco Board is a Responsible Government.

[109] On April 30, 2010, Ontario commenced an application, to which ITCAN and the Tobacco Board are parties, seeking a declaration that the claim in the class action "...is not a 'Released Claim' by a 'Responsible Government' for the purposes of the Agreement" [emphasis added].

[110] The application also seeks relief consequent upon the declaration, namely that ITCAN is not entitled to withhold payments to Ontario owing under the Agreement, and that ITCAN is required to make those payments.

[111] On June 15, 2010, ITCAN served a Notice of Arbitration on Canada under s. 34 of the Agreement seeking a declaration in almost identical terms to that in the Application, namely that the claim in the class action "is a Released Claim by a Releasing Entity or Responsible Government as defined by the Agreement". Similarly it also seeks relief consequent upon the declaration, namely that ITCAN may pay up to $50,000,000 into escrow pending resolution of the class action, and that what it owes under the Agreement is reduced correspondingly.

[112] On June 16, 2010, ITCAN brought a motion to stay the application brought by Ontario on the basis that the matters raised in the application are subject to arbitration.

[113] Both Ontario and the Tobacco Board opposed the stay. They sought to have the application proceed, arguing that the arbitrator's jurisdiction under the Agreement does not extend to the question placed before the court by the application.

[114] On July 26, 2010, the motion judge granted the stay of the application, saying that the arbitration process should be followed.

[115] This is the appeal from that order.

[116] To reiterate the language in the declaration sought in the application, the question is whether the Tobacco Board's claim in the class action is a Released Claim by a Responsible Government for the purposes of the Agreement. Because of the definition of "Released Claim" in the Agreement, this requires scrutiny of whether the claim in the class action is a civil claim allowable to a Releasing Entity, namely the Tobacco Board. It also requires scrutiny of whether the Tobacco Board is a Responsible Government. And both analyses must be done for the purposes of the entire Agreement.

[117] I therefore do not agree with my colleague that the question before the court that ITCAN says is subject to arbitration can be confined to whether the Tobacco Board is an Entity claiming through or on behalf of a Releasing Entity. Nor do I agree that it can be confined to the purposes of s. 7 of the Agreement.

[118] That said, this is clearly a case that engages the principles in *Dell*. ITCAN says the question raised for the court in the application is subject to arbitration. Both Ontario and the Tobacco Board challenge the arbitrator's jurisdiction to deal with that question. This engages the rule of systemic referral to arbitration referred to in *Dell*, requiring the arbitrator to be the one to resolve these challenges, unless the *Dell* analysis permits an exception allowing the court to do so.

[119] My colleague has ably set out the principles applicable in the *Dell* analysis. In describing this legal framework I would only add the following from para. 32 of *Dancap*

Productions Inc. v. Key Brand Entertainment Inc., (2009) 246 O.A.C. 226 (C.A.). It was decided by this court after *Dell* and in light of the principles *Dell* sets out:

> It is now well-established in Ontario that the court should grant a stay under art. 8(1) of the Model Law where it is "arguable" that the dispute falls within the terms of an arbitration agreement. In *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.), at para. 21, Charron J.A. adopted the following passage by Hinkson J.A. in *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (B.C.C.A.), at paras. 39-40, as "the proper approach" to art. 8(1):
>
> > it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.
> >
> > Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal. [Emphasis added.]

[120] I agree with my colleague that in this case, the *Dell* analysis turns on a careful examination of the distinctions between s. 7 and s. 15 of the Agreement.

[121] I begin with s. 7. It is useful to reproduce it here for ease of reference:

> Without prejudice to any other rights or remedies as provided in paragraphs 15, 16, 17, 18 and 19 of this Agreement, in the

> event that monetary liabilities (including all fees, expenses and disbursements on a full indemnity scale) are incurred by Released Entities in any way relating to, arising out of or in connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity (and for the avoidance of doubt including such Government's crown-controlled corporations or crown agencies) (a "Responsible Government"), the amount of the Payment due in the fiscal year in which the monetary liabilities are incurred, and Payments due in subsequent fiscal years, shall be reduced by such amounts incurred. Upon learning of the existence of any claim, action, suit, or proceeding that could give rise to such liabilities, ITCAN may, upon giving 30 days notice to the Responsible Government, begin paying any funds which are then or thereafter due into an interest-bearing escrow account, up to the amount claimed in such claim, action, suit, or proceeding pending its resolution. The amount by which the Payments shall be so reduced or escrowed shall not exceed the then-remaining Responsible Government's share of the Payments (as set out in Schedule "C" hereto).

[122] This section provides ITCAN with two separate rights. The first arises where ITCAN learns of an action that could give rise to its monetary liability that is "in any way relating to, arising out of, or in connection with any Released Claims or Claims Over made by a Releasing Entity or an Entity claiming through or on behalf of Releasing Entity". If that precondition is met, ITCAN has the right, on notice, to begin to escrow the Payments then or thereafter due to the Responsible Government up to the amount claimed in the action, pending the resolution of that action.

[123] As applied to the present circumstances, if the Tobacco Board's action against ITCAN meets the precondition, ITCAN's right to escrow arises. It would be entitled to begin to pay into escrow the Payments then and thereafter due to the credit of Ontario up to the maximum of $50,000,000. Those funds would remain in escrow until the Tobacco

Board's action is resolved. However, if the circumstances permit ITCAN to exercise this s. 7 escrow right, that can have no impact whatsoever on the Tobacco Board, on the presentation of its class action, or its right to fully recover from ITCAN if its action succeeds.

[124] The second right s. 7 gives to ITCAN arises if and when an action against ITCAN succeeds in monetary liability against it that meets the precondition, (that is, being "in any way relating to, arising out of, or in connection with a Released Claim or Claim Over by a Releasing Entity or an Entity claiming through or on behalf of a Releasing Entity"), ITCAN then has the right to reduce its present and future Payments required under the Agreement, by the amount of the monetary liability.

[125] As applied to the present circumstances, if the Tobacco Board's action succeeds against ITCAN, thus imposing a $50,000,000 liability on it, and if the precondition is met, ITCAN can reduce its present and future Payments due to the credit of Ontario by $50,000,000. ITCAN's escrowed funds would be returned to it. If the Tobacco Board's action failed or if it succeeded but the monetary liability thereby imposed on ITCAN did not meet the precondition, ITCAN's escrowed funds would be paid out to the credit of Ontario. However, like ITCAN's escrow right, any exercise by ITCAN of its s. 7 right to reduce Payments can have no impact whatsoever on the Tobacco Board or the prosecution its class action or its right fully to recover from ITCAN if its action succeeds.

[126] In summary, the answer to the question raised in the application has the consequence, for the purposes of s. 7, of determining whether, in the circumstances,

ITCAN has a right to pay into escrow or a right to reduce its payments. Ontario has a significant stake in both questions. The Tobacco Board has none.

[127] On the other hand, s. 15 is quite different. It is also helpful to reproduce it:

> The Releasing Entities hereby, without any further action on the part of such Releasing Entities, absolutely and unconditionally fully release and forever discharge, the Released Entities from the Released Claims. Without in any way limiting the generality of the foregoing, the Releasing Entities further agree that:
>
> > (a) in the event that a proceeding, claim, action, suit or complaint with respect to a Released Claim is brought by Releasing Entity against a Released Entity, this release may be pleaded as a complete defence and reply, and may be relied upon in such a proceeding as a complete estoppel to dismiss the said proceeding.

[128] This section gives Released Entities an absolute and unconditional release by the Releasing Entities from the Released Claims. It also gives the Released Entities the right to rely on that release as a complete defence to any action that meets the condition of being an action brought by a Releasing Entity with respect to a Released Claim.

[129] As applied to the present circumstances, if the Tobacco Board's action is found to meet the precondition, ITCAN has a complete defence to it.

[130] In summary, the answer to the question raised in the application has the consequence, for the purposes of s. 15, of determining whether, in the circumstances, ITCAN has a complete defence to the Tobacco Board's action. The Tobacco Board has a significant stake in that question.

[131] I now turn to the challenges to the arbitrator's jurisdiction raised by Ontario and the Tobacco Board in response to ITCAN's motion to stay the application because the question raised for the court is subject to arbitration.

[132] My colleague deals first with Ontario's challenge that the arbitration provisions of the Agreement apply only to disputes between ITCAN and Canada. Ontario says these provisions do not apply at all to disputes between ITCAN and Ontario. It argues that the arbitrator therefore has no jurisdiction to decide the question raised by the application.

[133] For the reasons given by my colleague, I agree that this argument fails. I agree with him that the argument that a party is not subject to the arbitration provisions of the Agreement is simply one species of challenge to the arbitrator's jurisdiction. In this case, the argument raises a question of mixed fact and law, namely whether in light of the factual matrix in which the arbitration provisions of the Agreement were negotiated, these provisions extend to disputes between Ontario and ITCAN. Determining the necessary facts cannot be done on the basis only of a superficial consideration of the documentary evidence in the record. This challenge to the jurisdiction of the arbitrator must be addressed first by the arbitrator.

[134] Ontario also challenges the jurisdiction of the arbitrator to decide the question posed to the court because it says the dispute set out in the application does not fall within the arbitration provisions of the Agreement. Ontario argues that the Agreement requires that the question in the application, posed for s. 7 purposes, be answered by the

same forum as is required when it is posed in the s. 15 context, namely the court rather than arbitration.

[135] Finally, Ontario challenges the arbitrator's jurisdiction because it says two parties to the legal proceeding, namely Ontario and the Tobacco Board, are not parties to the arbitration provisions of the Agreement. The Tobacco Board joins in this challenge on the basis that it is a party to the legal proceeding, has a vital interest in the question before the court, but is not a party to the Agreement or its arbitration provisions.

[136] In my view, these remaining challenges must be analysed separately, first in the context of s. 7 of the Agreement and then in the context of s. 15, to determine if the challenges must be dealt with first by the arbitrator or whether the application can proceed.

[137] First section 7. Ontario's challenge based on the nature of the dispute is that the Agreement requires that the question of whether the claim in the class action is a Released Claim by a Responsible Government must be answered for s. 7 purposes in the same forum as for s. 15 purposes. That is clearly a question of mixed fact and law. A determination of the factual matrix in which the Agreement was negotiated is clearly required. A superficial consideration of the documentary evidence is not enough.

[138] Turning to the challenge based on not being parties to the arbitration provisions, the question raised in the application, when posed in the s. 7 context, affects only Ontario and ITCAN. Whether the Tobacco Board is a party to the arbitration provisions in the Agreement is irrelevant to the arbitrator's jurisdiction over the question posed in the s. 7

context. In addition, as I have indicated, whether Ontario is a party to the arbitration provisions of the Agreement is an issue that must be dealt with first by the arbitrator. This is so just as much so for the question raised in the application for s. 7 purposes as it is for the question of whether Ontario is a party to the arbitration provisions at all.

[139] In summary, I would conclude that, for the purposes of s. 7, the challenges to the arbitrator's jurisdiction to resolve the question raised in the application must fail. To that extent the application was properly stayed.

[140] However, I reach a different conclusion when the context is changed to s. 15. I need deal with no more than the challenge to the arbitrator's jurisdiction raised by both Ontario and the Tobacco Board, that the Tobacco Board is not a party to the Agreement or its arbitration provisions.

[141] As was said in *Dancap*, where it is clear that a party to the legal proceedings is not a party to the arbitration agreement, the court can reach a final determination rather than require that the arbitrator first determine a jurisdictional challenge brought on that basis. In the language of *Dell*, when no more than a superficial examination of the documentary evidence is required to determine this challenge, the court can do so rather than require the arbitrator to do so first.

[142] Here, no one contends that the Tobacco Board is a party to the Agreement and its arbitration provisions. A superficial review of the record is enough to reach that conclusion. There is equally no doubt that the Tobacco Board is a party to the legal proceedings that ITCAN seeks to stay in favour in arbitration. Nor is there any doubt that

the Tobacco Board has a vital interest in the question raised by the application, for the purposes of s. 15. The answer could provide ITCAN with a complete defence to its action, or could eliminate that possibility. The application directly implicates the Tobacco Board's rights, not just those of Ontario and ITCAN. The arbitrator cannot resolve that question posed by the application because the Tobacco Board is not a party to the Agreement or its arbitration provisions. The arbitrator has no jurisdiction to determine the Tobacco Board's rights. The question asked of the court must, for the purposes of s. 15, be determined in a forum in which the Tobacco Board has the right to participate. Hence the application should not be stayed in preference to arbitration so far as the question is posed for the purposes of s. 15.

[143] I would therefore dismiss the appeal so far as the application seeks the declaration for the purposes of s. 7. I would allow the appeal and lift the stay so far as the declaration sought is for the purposes of s. 15.

[144] Ontario has been only partially successful on appeal. The Tobacco Board succeeded in its main argument. I would therefore award Ontario significantly less in costs than it sought, and the Tobacco Board most of what it sought. Both are awarded costs on a partial indemnity basis fixed at $7,000 each, inclusive of disbursements and applicable taxes.

RELEASED: JUL 20 2011 ("S.T.G.")

"S.T. Goudge J.A."
"I agree. E.E. Gillese J.A."