

Court of Queen's Bench of Alberta

Citation: Suncor Energy Products Inc. v. Howe-Baker Engineers, Ltd., 2010 ABQB 310

Date: 20100507
Docket: 0901 13205
Registry: Calgary

Between:

Suncor Energy Products Inc.

Applicant

- and -

Howe-Baker Engineers, Ltd.

Respondent

**Reasons for Judgment
of the
Honourable Mr. Justice G.C. Hawco**

Introduction

[1] This is an application by Suncor Energy Products Inc. ("Suncor") to strike an arbitration proceeding commenced by Howe-Baker Engineers, Ltd. ("Howe-Baker") on the ground that the attempt by Howe-Baker to commence an arbitration by way of Notice to Arbitrate is statutorily barred.

[2] Howe-Baker maintains that the Court should not interfere with the arbitration process and dismiss Suncor's application.

Facts

[3] Suncor entered into two contracts with Howe-Baker in 2004 for the engineering, fabrication and shipping of equipment for use at Suncor's Genesis refinery near Sarnia, Ontario. Both contracts were prepared using the same format and contained identical terms and conditions. The products which were agreed to be supplied will be referred to as "Units".

[4] Under the contracts, Howe-Baker was entitled to invoice Suncor. The invoices were to be paid within 30 days of receipt. Howe-Baker did issue invoices and certain payments were received. As of November 21, 2005, Howe-Baker had invoiced and had been paid slightly over \$37 million on both contracts. However, some \$4.2 million had been held back by Suncor pursuant to a completion hold-back provision under the contracts.

[5] The contracts provided that all disputes between the parties were to be resolved through a specified dispute resolution procedure. This procedure described a three-step mechanism: negotiation, followed by mediation, followed by arbitration.

[6] Between November 21, 2005 and July 18, 2006, Suncor received a number of further invoices in the amount of approximately \$2.3 million from Howe-Baker for work performed under the contracts. Suncor refused to pay those invoices on the basis that Howe-Baker had breached the contracts by failing to properly perform the work and by causing Suncor delays and consequent damages.

[7] A number of letters were sent by Howe-Baker to Suncor in June and September 2006 demanding payment of the \$2.3 million which had been incurred up to that time. On October 6, 2006, Suncor replied that the invoices were not being paid because Suncor considered that Howe-Baker had failed to properly perform its contractual obligations, outlining in some detail its complaints. Mr. Jay Thorton, the writer, closed with these statements:

When it became apparent CBI was not properly performing its contractual obligations, Suncor began withholdings in accordance with the contract terms. To date, Suncor has withheld approximately US\$6.3 million. This sum represents a fraction of the loss suffered by Suncor due to CBI's failure to properly perform and therefore Suncor will be looking to CBI for compensation well beyond this initial withholding. Suncor does not feel that it should bear the full brunt of the over-run, and that CBI should take accountability of its performance and bear its share of the cost over-run.

[8] A meeting was held between the representatives of both parties on May 30, 2007. No resolution was reached.

[9] On July 12, 2007, Howe-Baker wrote Suncor offering to settle the dispute for a certain sum and concluded by stating if no definitive agreement was reached by the parties before July 27, 2007, Howe-Baker would have "no choice but to serve Suncor with a formal Notice of Dispute". A draft Notice of Dispute was attached.

[10] On August 17, 2007, Suncor responded in some detail to Howe-Baker's letter of July 12 and concluded by stating:

Suncor will retain the amounts currently withheld and has no interest in proactively pursuing further amounts from CBI given the extensive time, cost and effort such a

process would require from both sides along with its potential impact on the working relationship of Suncor and the CBI family in future. This, as an end-point to the current dispute, would represent a significant more fair result for CBI under the circumstances. However, should CBI seek payment of some or all of the withheld amounts, you may deliver your Notice of Arbitration to Suncor's office in Calgary, Attention: J. Thornton, Senior Vice-president, Business Integration, fully recognizing that such a notice will undoubtedly be met by a claim by Suncor for additional compensation from CBI to more accurately reflect the extent of loss caused by CBI's failure to perform its contracts.

[11] Suncor heard nothing from Howe-Baker for six months. On February 27, 2008, Suncor received correspondence from Howe-Baker stating that the purpose of the letter was to advise Suncor of Howe-Baker's formal request to proceed to the next step of the Dispute Resolution process. Howe-Baker went on to state:

Therefore, in accordance with Article 26 of the Agreements, enclosed are Notices of Dispute for both agreements.

The contractual requirements regarding "face to face" negotiations for dispute resolutions have been met, and therefore the parties are required to move directly to mediation. Enclosed is Howe-Baker's list of proposed Referees in order of preference...

[12] On March 28, 2008, Suncor advised Howe-Baker that it would not be responding to the Notices of Dispute as the claims referenced in the Notices of Dispute were statute barred pursuant to the *Limitations Act* of Alberta.

[13] Suncor heard nothing further from Howe-Baker for the next 17 months. On August 13, 2009, Suncor received correspondence requesting that the disputes described in the Notices of Dispute delivered in February 2008 by Howe-Baker be referred to arbitration.

[14] On August 18, 2009, Howe-Baker delivered a list of proposed arbitrators to Suncor. Suncor responded to this on August 21, 2009 affirming its position that Howe-Baker's limitation to commence an arbitration had expired.

[15] The materials for this application were filed on September 4, 2009.

Issues

- A. Does the Court have jurisdiction to hear the application?
- B. What is the applicable limitation period governing Howe-Baker's commencement of an arbitration?
- C. Did Howe-Baker commence an arbitration within the applicable limitation period?

Answers

- A. The Court does have jurisdiction to hear the application.

- B. The applicable limitation period is two years from the time when Howe-Baker knew or ought to have known that it had a claim.
- C. Howe-Baker did not commence an arbitration within the applicable limitation period.

Reasoning

A. Jurisdiction

[16] The preliminary issue in these proceedings is, of course, whether the Court has jurisdiction to hear the matter or whether it should direct the parties to arbitration and let the arbitration panel decide the limitation question.

[17] While an arbitration panel may well have the jurisdiction to determine whether the arbitration has been commenced within the applicable time period, the issue is a pure question of law: Did the limitation period for commencing an arbitration expire prior to Howe-Baker purporting to commence the proceedings?

[18] As discussed briefly by Blair, JA in *The Plan Group v. Bell Canada*, 2009 ONCA 548, at para. 82, the application is not a question regarding the jurisdiction of an arbitrator, but rather a question of whether there *is* an arbitration within which the arbitrator may or may not exercise a jurisdiction.

[19] Our Court of Appeal in *Autoweld Systems Ltd. v. CRC-Evans Pipeline International, Inc.*, 2009 ABCA 366, also dealt with this issue. At para. 2, it stated:

The first named appellant argues that the chambers judge should have submitted the issue of arbitrability itself to the arbitrator, but we are satisfied that the very existence, as opposed to the scope, of the arbitration clause falls within the exception in *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, [2007] SCC 34, at para. 84. Where there is a pure question of law on a threshold issue the Chamber judge is not compelled to send it to the arbitrator.

[20] Howe-Baker argued that section 7 of the *Arbitration Act*, RSA 2000, c.A-43 applied and that I should refuse to hear Suncor's application. Section 7 provides, in part:

7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.

(2) The court may refuse to stay the proceeding in only the following cases:

...

(e) the matter in dispute is a proper one for default or summary judgment.

[21] I am not at all satisfied that section 7 is applicable in this case. The preliminary issue is whether there is anything to be submitted to arbitration. Suncor does not seek to oust the jurisdiction of an arbitrator. It maintains that there is nothing to be submitted. On the reasoning

set forth above in *The Plan Group* and *Autoweld Systems*, I am satisfied that this Court is the appropriate forum to determine the issue of whether there is a dispute to be submitted to arbitration.

B. Limitation

[22] The contracts provide that the rights of the parties shall be governed by the law of the Province of Ontario, and that the parties shall attorn to the jurisdiction of the courts of the Province of Alberta.

[23] The contracts further state that in the event of any dispute or controversy arising, the dispute resolution procedure set forth in Schedule J to the contracts shall apply.

[24] Article 4.3 of Schedule J states that provisions of the *Arbitration Act* of Alberta shall apply to all arbitration proceedings.

[25] Section 51(1) of the *Arbitration Act* provides that:

The law with respect to limitation periods apply to an arbitration as if the arbitration were an action in the matter in dispute in the arbitration or a cause of action.

[26] It is clear that the phrase “the law with respect to limitation(s)” in Section 51(1) of the *Arbitration Act* means the applicable limitations legislation. See Bensler, J in *Babcock and Wilcox (Canada) Ltd. v. Agrium Inc.*, [2003] A.J. No. 1524 at para. 22, wherein she states:

Section 51(1) of the *Arbitration Act* means arbitration is equivalent to litigation for the purposes of limitations periods, and the law of limitations periods applies identically to arbitration.

[27] See also Leacock, Master in *Penhold (Town) v. Boulder Contracting Ltd.*, [2009] A.J. No. 1296 at para. 6, where he stated:

The issues for determining the applicable limitation period for an arbitration are the same as determining the applicable limitation period for a cause of action in a civil matter.

[28] The *Limitations Act* of Ontario, 2002, S.O. 2002, c. 24, s. 4 provides:

Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

[29] Section 5 provides:

5. (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

...

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

[30] Under Section 3(1) of the Alberta *Limitations Act*, R.S.A. 2000, c. L-12, a remedial order must be sought within two years of the date on which the claimant knew, or ought to have known, that it had a claim.

[31] In either case, Howe-Baker had two years from the date when its claim arose or from the date when a reasonable person would have known that a claim had arisen, within which to pursue its claim, by arbitration or by litigation. Since the contracts provided for an arbitration process to be used, that would mean it would have two years from the date the claim arose to commence the arbitration proceedings.

[32] Howe-Baker has argued that Section 11 of the Ontario act applies. That section states:

11(1) If a person with a claim and a person against whom the claim is made have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation periods established by sections 4 and 15 do not run from the date the agreement is made until,

(a) the date the claim is resolved;

(b) the date the attempted resolution process is terminated; or

(c) the date a party terminates or withdraws from the agreement.

[33] Their reasoning is that since the contracts provided for a dispute resolution procedure, the parties have agreed: "to have an independent third party resolve the claim". Since it was not until March 28, 2008 when Suncor issued a letter stating that they would not be responding to the Notices of Dispute, that is when the limitation period began.

[34] With respect, I cannot accept this reasoning and no authority has been cited supporting it. In my respectful view, Section 11 of the Ontario act speaks to agreements which have been made after a claim has arisen and the parties, in an attempt to resolve it, have referred it to a third party for resolution. It is in the nature of a stand-still agreement. The agreement to which Section 11 refers is not the original contract reached between the parties, which has a dispute resolution process as part of the overall agreement. It is that agreement reached when a claim has arisen to have the matter referred to a specific third party with a view to resolving that particular claim.

[35] To negate the effect of a *Limitations of Actions Act* by agreement would require much more specific language in the contract itself.

C. Commencement of Arbitration Proceedings

[36] In determining whether Howe-Baker did commence arbitration within the two-year period, it is necessary to determine firstly, when the claim arose and then to look at when the process which purported to commence the arbitration was initiated.

(i) When the claim arose

[37] Suncor has argued that under the contracts, Howe-Baker's claims arose within 30 days of receipt of the invoices from Howe-Baker. Suncor says that the various invoices for which Howe-Baker seeks payment were rendered between November 21, 2005 and June 20, 2007. Indeed, the majority of the amount claimed by Howe-Baker (being \$4.2 million) related to completion holdbacks for which a claim arose much earlier than the date of the invoices relating to those holdbacks, which was June 20, 2007. Nevertheless, Suncor argues that even if one takes the date of the last invoices (June 20, 2007) the claims arose 30 days later, which was July 20, 2007.

[38] Certainly, as a result of discussions and correspondence (particularly Suncor's letter of March 1, 2006), Howe-Baker was well aware that Suncor was taking issue with the delays and cost overruns which it attributed to Howe-Baker. On October 6, 2006 there could be no doubt that Suncor was not paying Howe-Baker any of the \$6.3 million which Howe-Baker claimed was owing to it under the contracts.

[39] As set forth above, following an attempt to reach an agreement on May 30, 2007, Howe-Baker advises Suncor that if no agreement was reached by July 27, they would serve Suncor a formal notice of dispute. Although it seems unlikely that Howe-Baker could have been left in any doubt, on August 17, 2007, Suncor's response was unequivocal – Suncor was not going to be paying Howe-Baker anything and invited Howe-Baker, should they wish to seek payment, they should deliver a notice of arbitration to Suncor's offices in Calgary.

[40] If one were to accept that each claim by Howe-Baker arose within 30 days of the original invoice date, and if one accepts that there is a two-year limitation date for commencement of any proceedings, then the claims for various invoices would have expired as early as November of 2007 with respect to the holdback completion of some \$4.2 million and on February 27, 2008, August 14, 2008 and August 18, 2008 with respect to the remaining approximately \$2 million which related to invoice numbers 69025, 69041, 70251, 68645 and 70250. The units had been delivered in November 2005 and the holdback of \$4.2 million having been made at that time, the claim for that amount could have been said to have arisen within 30 days of delivery, thereby arising sometime in December 2005. So, looking at when the claims arose from the wording of the contracts, it would appear they arose as early as December 2005 and August 18, 2006. The aggregate amount of those claims, including the completion holdback, was \$6,575,199.00.

[41] One may argue that the full claim of Howe-Baker did not really arise until October 6, 2006, when Howe-Baker was put on notice by Suncor that it was not going to pay the disputed invoices. The *Limitations Acts* of Alberta and Ontario are basically the same – a proceeding is not to be commenced after two years of the date when a claim has been (or reasonably ought to have been) discovered. It is, as I have said, arguable that it was not until Suncor made it clear to Howe-Baker that they were not going to pay the invoices that Howe-Baker “discovered” that it had a cause of action. It appeared during both counsels’ argument that there was agreement on this point. Giving the benefit of any doubt to Howe-Baker, I find that its “claim” under the *Limitations Act* of Ontario (and thereby under Section 51(1)) of the *Arbitration Act*), arose on October 6, 2006.

(ii) Commencement of the Arbitration Process

[42] The contracts provide in Schedule J for a three-step dispute resolution procedure: negotiation, to be followed by mediation, to be followed by arbitration. Suncor argues that to initiate the dispute resolution process, a party must serve a Notice of Dispute on the other party. If the matter is not resolved following this, the contract requires a separate, written Request to Arbitrate to commence an arbitration. Suncor looks to Article 4 of Schedule J to the agreements. That article states:

4.1 All disputes to be resolved by arbitration shall be resolved in accordance with the following procedures:

- (a) a party shall provide a written notice to the other party requesting that the dispute set forth in the Notice of Dispute be referred to arbitration.

[43] Howe-Baker, on the other hand, argues that its Notices of Dispute, delivered to Suncor on February 27, 2008, commenced the arbitration. That step was the formal commencement of the arbitration process as set out in Article 2.2 of Schedule J.

[44] Section 2.2 states:

2.2 Any party wishing to commence the dispute resolution procedures shall first provide a Notice of Dispute, in the form attached as Exhibit A, to the other party, which shall include the following:

- (a) identification of the *Agreement* and the parties;
- (b) a statement of the issue(s) in dispute;
- (c) a request that the dispute be resolved in accordance with the procedures set forth in this Dispute Resolution Procedure; and
- (d) a description of the claim being made and the relief or remedy being sought, including the amount of the claim, if any.

[45] Howe-Baker says that the Dispute Resolution Procedure is one integrated process. The filing of a Notice of Dispute should be considered to be analogous to the filing the Statement of Claim.

[46] With respect, I must disagree. In my view, the Dispute Resolution Procedure sets three separate and distinct procedures – negotiation, mediation and arbitration, if all else fails.

[47] The negotiation stage failed. The mediation stage did not take place. It would appear from Howe-Baker's letter of July 12, 2007 that the parties were in agreement that mediation would not work. Mr. Tom McCormick stated in that letter:

With both parties acknowledging the content of Schedule J, Dispute Resolution of the Purchase Agreement, we agree that mediation offers no foreseeable benefit to either party and that the stated process for binding arbitration is the only logical path forward.

[48] Notwithstanding that comment, Mr. McCormick went on to state that if there were no agreement reached by July 27, he would have no choice but to serve Suncor with a formal Notice of Dispute.

[49] Suncor's response to that letter was on August 17, 2007. In his letter, Mr. Mike Wyse of Suncor advised Mr. McCormick that Suncor would not be paying any of Howe-Baker's claim of \$6.3 million. He went on to state that should CBI (Howe-Baker) seek payment of some or all of the withheld amounts, he "... may deliver your Notice of Arbitration to Suncor's office in Calgary".

[50] On February 25, 2008, some seven months later, Howe-Baker enclosed two Notices of Dispute under both contracts and enclosed a list of proposed referees pursuant to the mediation provisions of Schedule J.

[51] A month later, Suncor responded by stating that it would not be responding to the Notices of Dispute and that it had received advice that the claims contained in the Notices of Dispute were statute-barred.

[52] Surprisingly, nothing took place for another 17 months. On August 13, 2009, Howe-Baker purported to: "continue with the next step of the Notice of Disputes" and requested that the disputes referred to in their February 25 letter be referred to arbitration.

[53] Article 2.1(c) of Schedule J states:

- (c) if the parties are unable to resolve the dispute by mediation pursuant to Article 3 of this Dispute Resolution Procedure, then the dispute shall be finally resolved by arbitration pursuant to Article 4 of this Dispute Resolution Procedure.

[54] As stated above, pursuant to Article 4.1, all disputes to be resolved by arbitration shall be resolved in accordance with the procedure set forth. This is, I believe, a separate and distinct procedure, to be invoked after the parties, for whatever reason, have not been able to resolve their dispute. It is to be commenced in a definitive manner. The party seeking arbitration shall provide a written notice to the other party requesting that the dispute be referred to arbitration.

[55] Section 23(1) of the *Arbitration Act* provides:

23(1) An arbitration may be commenced in any way recognized by law, including the following:

- (a) a party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement;
- (b) if the arbitration agreement gives a person who is not a party power to appoint an arbitrator, a party serves notice to exercise that power on the person and serves a copy of the notice on the other parties;
- (c) a party serves on the other parties a notice demanding arbitration under the arbitration agreement.

[56] Howe-Baker argues that, given the wording of Section 23(1), an arbitration may be commenced in ways other than as set forth in 23(1). I agree. However, in this case, by the agreement of the parties, if a dispute is to be resolved by arbitration, it shall be resolved in accordance with the provisions set forth. The agreement provides that a written notice shall be provided to the other party requesting that the dispute be referred to arbitration. Details are then set forth as to what follows the giving of notice to arbitrate.

[57] In Redfern and Hunter's book on Law and Practice of International Commercial Arbitration, 4th Ed., Sweet & Maxwell, 2004, at page 178, the authors state:

(b) Commencement of an arbitration

4-03 The commencement of an arbitration tends to go hand in hand with the establishment of the arbitral tribunal. It is a significant step, not merely as evidence of a real conflict between parties, but also in terms of any time-limits for the presentation of claims.

Time-limits

4-04 Time-limits in litigation or arbitration must always be considered with care. Failure to observe them may be fatal. Time usually starts to run against a claim from the date on which the cause of action arises. It may well be necessary to take some positive step

towards the appointment of an arbitral tribunal (such as the notification of a claim to arbitration or the service of a notice requiring the appointment of an arbitrator) in order to prevent a claim failing through lapse of time. Prescriptive time-limits are generally imposed by legislation.

[58] The issue of commencement of an arbitration was dealt with by the English Court of Queen's Bench in *Surrendra Overseas Ltd v. Government of Sri Lanka*, [1977] 2 All ER 481. Mr. Justice Kerr, at page 486, after analysing what was required to commence an arbitration said this:

For the purposes of limitation the commencement of arbitration must be clear and unequivocal.

[59] The Notices of Dispute filed by Howe-Baker did not commence the arbitration. They simply commenced the Dispute Resolution Procedures, which may or may not involve an arbitration. The Notices did not comply with either Section 23(1) of the *Arbitration Act*, nor did they comply with Article 4.1 of Schedule J.

[60] In the end result, the application of Suncor is allowed. The arbitration proceedings commenced by Howe-Baker are struck.

Heard on the 25th day of February, 2010.

Further Written Brief provided 5th March, 2010.

Dated at the City of Calgary, Alberta this 7th day of May, 2010.

G.C. Hawco
J.C.Q.B.A.

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