Date: 2025 06 06
Docket: S-1-CV-2024-000361

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MID-WEST DESIGN & CONSTRUCTION LTD.

Plaintiff

-and-

INUVIALUIT REGIONAL CORPORATION and INUVIALUIT DEVELOPMENT CORPORATION CONSTRUCTION LTD.

Defendants

MEMORANDUM OF JUDGMENT

INTRODUCTION

[1] The Plaintiff, Mid-West Design & Construction Ltd. [Mid-West] filed a statement of claim against Inuvialuit Regional Corporation and Inuvialuit Development Corporation [IRC/IDCC] for amounts owing pursuant to a construction contract.

[2] IRC/IDCC allege the construction contract contains an arbitration agreement and have brought an application to stay the action in favour of arbitration, pursuant to s 8 of the *Arbitration Act* [the *Act*].

[3] This application was heard concurrently with an application for a stay in S-1-CV-2024-000360 pertaining to a different construction project involving the same parties and the same contractual terms [the 360 Action]. The decision in the 360 Action will mirror the reasons in this decision, to the extent the issues overlap.

OVERVIEW

[4] In January of 2020 IRC/IDCC engaged Mid-West to perform exterior construction work on a 17-unit apartment building in Inuvik. IRC/IDCC allege the parties agreed to the Canadian Construction Documents Committee [CCDC] 2-2008 Stipulated Price Contract [the Exterior Contract]. This is a commonly used contract template for construction projects across Canada. There are dispute resolution provisions in general condition 8 [GC 8] of the Exterior Contract [the Dispute Resolution Provisions]. The Exterior Contract was not signed by either party.

[5] There is a dispute between the parties relating to the payment of holdback amounts to Mid-West, which is the subject of the court action. IRC submits this is a dispute which triggers the Dispute Resolution Provisions and the parties are therefore required to proceed to arbitration.

[6] Mid-West raises a series of arguments in opposition to the stay application:

> (a) the Exterior Agreement is not enforceable because it was not signed and there was no meeting of the minds on the general conditions, including the Dispute Resolution Provisions;
>
> (b) even if the Exterior Agreement is enforceable, it does not contain a valid arbitration agreement;
>
> (c) if there is a valid arbitration agreement, there is not a dispute which triggers the Dispute Resolution Provisions;
>
> (d) if the Dispute Resolution Provisions are triggered, the Defendants have waived their right to the arbitration process by failing to take steps as required in the Dispute Resolution Provisions.

[7] For the reasons that follow, I grant the IRC/IDCC's application to stay the proceedings.

LEGAL FRAMEWORK

[8] Section 8 of the *Act* states:

> 8. (1) If a party commences court proceedings in a court in the Northwest Territories in respect of a matter that a party to the court proceedings believes is the subject of an arbitration agreement, the party may, before submitting their first

> response on the substance of the dispute, apply to that court to stay the court proceedings.
>
> (2) In an application under subsection (1), the court shall make an order staying the court proceedings unless it determines that
>
> > (a) the court proceedings are not in respect of any matter that is the subject of an arbitration agreement;
> > (b) a person against which an arbitration agreement is sought to be enforced entered into the arbitration agreement while under a legal incapacity;
> > (c) the alleged arbitration agreement does not exist, is void or is unenforceable; or
> > (d) the dispute is not capable of being the subject of arbitration under the laws of the Northwest Territories.

[9] This provision allows a party who meets certain criteria to request a stay of proceedings, in favour of arbitration. In *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 [*Peace River*] the Supreme Court of Canada articulated a two-stage analysis common to this type of arbitration provision (para 83). In that case the court was considering s 15 of the BC *Arbitration Act.* In my view the two-stage decision-making framework from Peace River also applies to s 8 of the NWT *Act*.

[10] In the first stage, the Applicant must establish the technical prerequisites for a mandatory stay of proceedings are met:

> (i) an arbitration agreement exists;
> (ii) court proceedings have been commenced;
> (iii) the court proceedings are in respect to a matter that one of the parties believes is subject to an arbitration agreement; and,
> (iv) the party applying for the stay does so before responding to the substance of the dispute.

[11] The competence-competence principle informs the approach in s 8. This principle gives precedence to the arbitration process and holds that "arbitrators should be allowed to exercise their power to rule first on their own jurisdiction": *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 [*Dell*], at para 70. The competence-competence principle is reflected in the *Act* more broadly, which is based on the *Uniform Arbitration Act* (2016) drafted by the Uniform Law Conference of Canada and represents a modern approach to arbitration legislation. The *Act* provides arbitrators the power to decide their own jurisdiction (s 24(1)). It also limits the ability of the court to intervene in matters governed by the *Act* (s 5).

These provisions reflect underlying policy goals of efficiency and respect for party autonomy and private agreements (*Peace River* at para 40-41).

[12] IRC/IDCC need only establish an "arguable case" that the prerequisites in s 8(1) are met. The Court in *Peace River* considered the arguable case standard at para 84:

> …there is room for a judge to dismiss a stay application when there is no nexus between the claims and the matters reserved for arbitration, while referring to the arbitrator any legitimate question of the scope of the arbitration jurisdiction. This avoids duplication and respects the competence-competence principle.

[13] In *Pokornik v SkipTheDishes Restaurant Services Inc*, 2024 MBCA 3 [*Pokornik*] the court made further comment about the arguable case standard in the context of a stay application under s 7 of the Manitoba Act, which is similar to s 8 of the NWT *Act*:

> The standard of proof under section 7(1) for an arguable case is lower than the usual civil standard. A moving party needs only to establish an arguable case that the prerequisites are met to engage the mandatory stay provision. In undertaking this analysis, the court should adopt a broad and liberal approach to the interpretation of arbitration agreements (see *Wardrop v Ericsson Canada Inc*, 2021 MBQB 183 [*Wardrop*]). If an arbitration clause is capable of two meanings, one of which provides for arbitration of the dispute in question, courts should favor that interpretation.

[14] If IRC/IDCC has met the arguable case standard under s 8(1), it is necessary to proceed to the second stage of the analysis under s 8(2), where the burden shifts to Mid-West to prove that one or more of the statutory exceptions identified in s 8(2) apply. Otherwise, the court must grant a stay.

[15] The mandatory nature of stay provisions across jurisdictions in Canada reflects "the presumptive validity of arbitration clauses and the principle of party autonomy". In this context, the court should dismiss a stay application on the basis of a statutory exception only in a "clear case" (*Peace River* at paras 88-89).

THRESHOLD ISSUE – EXISTENCE OF AGREEMENT

[16] Mid-West asserts that whether there is an enforceable arbitration agreement between the parties must be addressed as a threshold issue, prior to engaging with an analysis under s 8 of the *Act*.

[17] Mid-West relies on *ONE Lodging Holdings LLC v American Hotel Income Properties REIT (GP) Inc*, 2024 BCSC 2179 [*ONE Lodge Holdings*], where the

court considered the stay provisions under s 8 the British Columbia *International Commercial Arbitration Act (ICAA)*.

[18] In *ONE Lodge Holdings* at para 37, the court found that:

> where there is a dispute about the existence of an arbitration agreement on an application for a stay…the competence-competence principle is not engaged in the resolution of that dispute, and it must be decided by the court as a preliminary matter.

[19] It is important to note that the *ICAA* contains different language than the NWT *Act*. The *ICAA* states:

> 8(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first statement on the substance of the dispute, apply to the court to stay the proceedings. (emphasis added).

[20] The NWT *Act* states:

> 8(1) If a party commences court proceedings in a court in the Northwest Territories in respect of a matter that a party to the court proceedings believes is the subject of an arbitration agreement, the party may, before submitting their first response on the substance of the dispute, apply to that court to stay the court proceedings (emphasis added).

[21] The language in the *ICAA* provision may suggest the existence of an arbitration agreement is a prerequisite to bringing an application for a stay. In contrast, the NWT *Act* only requires that court proceedings be commenced and a party to the court proceedings believes the matter is subject of an arbitration agreement.

[22] The court in *ONE Lodge Holdings* recognizes this is not a settled area of the law and contemplates the possibility that the competence-competence principle does in fact apply at para 38:

> If the competence-competence principle is engaged on the question of whether there is an arbitration agreement, then the stay applicant must establish on the arguable case threshold that there is an arbitration article.

[23] *Peace River* is clear the existence of an arbitration agreement is a technical prerequisite and should be assessed on an arguable case standard. The existence of an arbitration agreement has also been treated as a technical prerequisite in appellate cases decided after *Peace River* such as *Pokornik* at paras 25–33 and *Husky Food*

Importers & Distributors Ltd v JH Whittaker & Sons Limited, 2023 ONCA 260 at paras 19–31.

[24] In my view, the existence of an arbitration agreement does not need to be proven as a precondition to applying for a stay under the *Act*. The validity or enforceability of the Exterior Contract should be considered in the context of the s 8 analysis, to which the competence-competence principle applies. IRC/IDCC only has to prove an arguable case that an arbitration agreement exists.

REQUIREMENTS UNDER 8(1)

[25] IRC/IDCC's evidence is that on January 16, 2020, IDCC and Mid-West entered into the Exterior Contract. The work was to be completed by July 15, 2020.

[26] Although the Exterior Contract was unsigned by the parties, IRC/IDCC assert that all terms and conditions were agreed upon, and that the parties acted in a manner consistent with the Exterior Contract and intended it to be binding on the parties. Further, IRC/IDCC point out that in their Statement of Claim, Mid-West specifically states the parties agreed to the Exterior Contract. IRC/IDCC urges the court to take this into account.

[27] Mid-West denies agreeing to the Exterior Contract and says the agreement between the parties was limited to certain essential terms, being:

(i) Price;
(ii) Project Scope;
(iii) Progress payments to be made at certain times;
(iv) 10% holdback from progress payments until substantial completion;
(v) Process for payment of the holdback amount, applying GC 5.5-5.9.

("Essential Terms").

[28] IRC/IDCC submits that Mid-West's Essential Terms argument is disingenuous and intended to circumvent the Dispute Resolution Provisions. They argue that Mid-West offered no compelling evidence to support their position.

[29] For a contract to be binding and enforceable, there must be a meeting of the minds between the parties. The accepted test is whether a reasonable objective observer, in light of all the material facts, would infer from the words or conduct of the parties that the parties had intended to contract, and the essential terms of the contract can be determined within a reasonable degree of certainty. (*Ron Ghitter*

Property Consultants Ltd v Beaver Lumber Company Limited, 2003 ABCA 221 at para 9). This test was applied in *Matic v Waldner,* 2016 MBCA 60 at para 57:

> there are three requirements for a binding contract - the intention to contract; the essential terms of the contract have been settled; and the terms are sufficiently certain. Whether the three requirements are met in any case is to be determined from the perspective of the objective reasonable bystander.

[30] The evidence before the court on this issue is scant. IRC/IDCC assert that the parties agreed to the Exterior Contract and rely on the fact that the work was completed as contemplated in the contract. IRC/IDCC relies on affidavit evidence from Mr. Manav Brar, a Financial Controller at IDCC. The extent of his evidence about the Exterior Contract is that the parties entered into it in January 2020 and an unsigned copy is produced as an exhibit to his affidavit. There is no specific evidence about the process of negotiation between the parties or an explanation by IRC/IDCC why the contract was not signed.

[31] Mid-West acknowledges the Exterior Agreement contained in Mr. Brar's affidavit was the subject of discussion between the parties but denies it was agreed upon. Mid-West relies on affidavit evidence from Mr. Shane Sundquist, who is the Operations Manager. Mr. Sunquist states that the parties had an oral agreement for the Essential Terms and that additional terms, including the Dispute Resolution Provisions, were never fully negotiated and for that reason the Exterior Contract was never signed by the parties.

[32] Mr. Sundquist was cross-examined on his affidavit and admitted that he did not come onto the project until 2022 and was not part of the negotiation of the Exterior Agreement or alleged verbal agreement on the Essential Terms. He was not able to say with any specificity what occurred in January of 2020. At the time he became involved in the project the exterior work had been completed and Mid-West had been paid, except for the holdback.

[33] The two affidavits are the extent of the evidence regarding a meeting of the minds on the Exterior Contract.

[34] Mid-West was aware of the terms proposed by IRC/IDCC in the Exterior Contract and went ahead to complete the work on the exterior of the building. Other than the Sundquist affidavit, they have not produced any evidence to support their Essential Terms argument.

[35] In the 360 Action, Mid-West admits agreeing to the CCDC 2-2008 Stipulated Price Contract, with the very same terms, for work on the interior of the building [the Interior Contract]. Despite agreeing to the Interior Contract, they did not sign it.

IRC/IDCC argues this should weigh in favour of finding the Exterior Agreement valid and enforceable. I do not find this persuasive. Agreeing to the Interior Contract in 2022 does not have particular relevance to what Mid-West's intentions were in 2020 in regard to the Exterior Contract.

[36] I have considered the fact that Mid-West admitted to agreeing to the Exterior Contract in their statement of claim, but I do not give this much weight, considering either party has the ability to amend their pleadings in the future and pleadings do not constitute evidence.

[37] On the facts available, I find there is at least an arguable case that the Exterior Contract, including the Dispute Resolution Provisions, was agreed to by the parties.

Are the Dispute Resolution Provisions an arbitration agreement?

[38] The Dispute Resolution Provisions are designed to address disputes in a staged manner by negotiation, mediation, and then arbitration:

> (i) Matters are first referred to the Consultant (in this case, Sanayut Consulting) under GC 2.2. If a dispute remains after referral to the Consultant, the Dispute Resolution Provisions in GC 8 are engaged.
>
> (ii) 8.2.3 requires the parties to make reasonable attempts to resolve the dispute by negotiation.
>
> (iii) If negotiation is not successful, 8.2.4 requires mediation.
>
> (iv) If mediation is terminated, either party may refer to arbitration under 8.2.6.
>
> (v) If mediation is terminated and no arbitration is requested by either party, the matter can then proceed to court for resolution, under 8.2.7.

[39] 8.2.6 states:

> By giving a Notice in Writing to the other party and the Consultant, not later than 10 Working Days after the date of termination of the mediated negotiations under paragraph 8.2.5, either party may refer the dispute to be finally resolved by arbitration under the Rules for Arbitration of Construction Disputes as provided in CCDC 40 in effect at the time of bid closing. The arbitration shall be conducted in the jurisdiction of the Place of the Work. (emphasis added).

[40] Mid-West argues that the language in 8.26 should be interpreted as an option to mediate rather than a requirement due to the use of the word "may", and as such it is not an arbitration agreement.

[41] Mid-West relies on the case of *Millennial Construction Ltd. v 1021120 AB Ltd*, 2005 ABQB 533 [*Millennial*], where the court considered a provision identical to 8.2.6 and held that the parties were not required to arbitrate. In *Millennial*, a lien claim was filed, a defence was filed and then a significant period of time passed. The defendant brought a successful motion for security for costs. When those costs became due, the plaintiff, for the first time, sought to initiate arbitration. Unlike the circumstances in *Millennial*, in this case there have been no active steps taken in the litigation beyond the filing of the claim. As such, *Millennial* is distinguishable on its facts.

[42] IRC/IDCC argues that 8.2.6 is indeed an arbitration agreement and rely on cases such as *Bondfield Construction Company Limited v London Police Services Board et al*, 2013 ONSC 4719 [*Bondfield*] and *Brock University v Stucor Construction Limited*, 2002 CarswellOnt 5728, which both considered language identical to 8.2.6. In *Bondfield* at para 20, the court found that having a staged approach to dispute resolution does not mean there is no arbitration agreement:

> The preliminary dispute resolution techniques leading up to the binding arbitration do not, in my view, alter the character of the dispute resolution provisions of the Contract. The intention of the parties is that disputes will be resolved ultimately by binding arbitration.

[43] In *Malcolm Drilling Company Inc v The Graham-Aecon Joint Venture*, 2021 BCSC 1136 at para 38, the court quoted from *Arbitration Law of Canada: Practice and Procedure*, 3rd ed. (Huntington, NY: Juris, 2017) at 124:

> . . given the strong policy considerations weighing in favour of arbitration, courts now tend to construe clauses in a manner that gives effect to an intention to arbitrate where possible and appropriate. Seemingly permissive language such as "may" is not necessary determinative of a clause's enforceability. The use of the word "may" in an arbitration agreement, as opposed to "shall" is not necessarily proof of the parties' intentions to create a non-binding arbitration agreement. Rather, the arbitration agreement must be read as a whole to ascertain the true meaning and effect of the clause.

[44] In this context and considering the text of 8.2.6, a reasonable interpretation of the word "may" is that any party is entitled to refer a dispute to arbitration and when that occurs, the arbitration "shall" be conducted. Based on this interpretation, there is an arguable case that the language in 8.2.6 constitutes an agreement to arbitrate.

Are the court proceedings in respect to a matter that one of the parties believes is subject to an arbitration agreement?

[45] The issue in this court proceeding is payment of the holdback amount to Mid-West. IRC/IDCC argues that the holdback claim is plainly a contractual dispute. IRC/IDCC's right to retain and Mid-West's right to be paid a holdback is provided for in GC 5.5-5.9 of the Exterior Contract and if there is disagreement about payment, it should be considered under the Dispute Resolution Provisions.

[46] Mid-West says this is not a "dispute" as defined in the Exterior Contract. Mid-West points to GC 8.1.1 of the Exterior Contract, which defines disputes as:

> Differences between the parties to the Contract as to the interpretation, application or administration of the Contract or any failure to agree where agreement between the parties is called for.

[47] Mid-West performed the work as set out in the Exterior Agreement, and sent invoices to IRC/IDCC, which were paid, less the 10% holdback amount. There is no evidence of a dispute regarding the work performed or the invoices submitted. Mid-West says IRC/IDCC certified substantial completion on June 21, 2022 and that the building has been at 85% occupancy or greater since March 12, 2024. Mid-West argues that IRC/IDCC cannot, under the terms of the Exterior Agreement, dispute the release of the holdback once substantial completion is certified and occupancy granted. Based on this, they say payment of the holdback amount does not constitute a "dispute" as defined in 8.1.1.

[48] In response, IRC/IDCC argues that under GC 5.5, Mid-West must apply for payment of holdback funds and meet the contractual requirements for payment to be triggered. Whether these obligations have been met are arguably matters relating to the "interpretation, application, and administration" of the Contract.

[49] I accept that matters relating to payment of a holdback are arguably disputes within the meaning of the Exterior Contract and IRC/IDCC believes this to be the case. I therefore find there is an arguable case that the matters in the court proceeding are subject to an arbitration agreement.

Has the stay application been filed before responding to the substance of the dispute?

[50] The final technical prerequisite under s 8(1) is for IRC/IDCC to apply for a stay before responding to the substance of the dispute in the court proceeding. This

application was brought before the court prior to the IRC/IDCC filing a statement of defence. As such, this final prerequisite is met.

Conclusion on s 8(1)

[51] The requirements at the first stage of the s 8 analysis have been met. The court must therefore order a stay of proceedings unless statutory exceptions set out in s 8(2) are present

EXCEPTIONS under 8(2)

[52] Under s 8(2) the onus shifts to Mid-West to prove on a balance of probabilities that one of the exceptions applies.

[53] Mid-West says the Exterior Contract does not exist as there was no meeting of the minds, and alternatively, if it does exist, the Exterior Contract does not contain an agreement to arbitrate or the agreement has been waived. These are all potential exceptions to a mandatory stay pursuant to s 8(2)(c) of the *Act*.

[54] A court should dismiss a stay application on the basis of a statutory exception only in a clear case:

> A clear case is, for example, one in which the party seeking to avoid arbitration has established on a balance of probabilities that the arbitration agreement is void, inoperative, or incapable of being performed. Where the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable) the matter should be resolved by the arbitrator

Peace River at 89

[55] Sections 8(1) and 8(2) have some overlap in that they both permit consideration of the existence of an arbitration agreement. I have already addressed the parties' positions on the existence of the agreement under the s 8(1) analysis. I have concluded there is an arguable case that the Exterior Agreement was entered into and that it contains an arbitration agreement. Given this, it is difficult to conclude that Mid-West has met their burden of proving a "clear case" that the agreement does not exist.

[56] Further, matters relating to whether an arbitration agreement exists should generally be decided by an arbitrator (*Dell* at para 70). The question of whether an arbitration agreement exists can be decided by a court if it is a pure question of law, or mixed fact and law, where the facts only need superficial consideration (*Dell*, paras 84-85). This deference to arbitral jurisdiction is applied in cases such as *Peace River* and *Spark Event Rentals Ltd v Google LLC*, 2024 BCCA 148.

[57] In the present case, the existence of an agreement is a question of mixed fact and law and requires more than a superficial consideration of the facts. As such, the decision should fall to an arbitrator.

[58] The remaining arguments raised by Mid-West are contingent on a finding that an agreement exists. Specifically, (i) whether there is a "dispute" as defined in the Exterior Agreement and (ii) whether IRC/IDCC waived their right to arbitration by failing to follow the processes and timelines in GC 8.

[59] I have considered these issues in the foregoing analysis of s 8(1) and concluded there is an arguable case that the issues arising in the court action qualify as a "dispute" pursuant to the Exterior Contract. Mid-West has not established a clear case that there is no dispute.

[60] In terms of the waiver argument, a determination on this issue will require interpretation of GC 8 and a decision regarding the arbitrator's jurisdiction in light of those provisions and the actions taken by the parties. Mid-West has not established a clear case that the arbitration agreement has been waived or voided due to IRC/IDCC's failure to provide "Notice in Writing" pursuant to 8.2.6. Additional findings of fact are required. Furthermore, there is an outstanding issue regarding which of the parties bears the onus to initiate an arbitration under GC 8.

[61] Section 24 of the *Act* clarifies that an arbitrator may determine their own jurisdiction:

> 24. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration, including whether
>
> (a) the arbitral proceedings are in whole or in part in respect of a matter that is not the subject of an arbitration agreement;
>
> (b) a person against which the arbitration agreement is sought to be enforced entered into the arbitration agreement while under a legal incapacity;
> (c) the arbitration agreement does not exist or is void or unenforceable; or
> (d) the dispute cannot be the subject of arbitration under the laws of the Northwest Territories.

[62] The *Act* also specifically recognizes that an arbitrator may rule on whether any statutory exceptions under s 8(2) apply:

> 8(4) If the court stays the court proceedings in whole or in part without making a finding concerning the existence of a circumstance described in paragraphs (2)(a)

> to (d), an arbitral tribunal is not precluded from determining whether the circumstance exists.

[63] The matter should proceed to arbitration. The *Act* permits the issues raised by Mid-West to be dealt with as a preliminary matter resulting in a partial award, at the arbitrator's discretion.

CONCLUSION

[64] IRC has established an arguable case that the technical requirements of s 8(1) are met, and therefore a stay of proceedings must be granted unless Mid-West proves on the balance of probabilities that a statutory exception applies under s 8(2).

[65] The potential exceptions identified by Mid-West relate to the validity or enforceability of the arbitration agreement. The case law is clear there is a preference for an arbitrator to decide such issues. Allowing an arbitrator to decide matters relating to the validity and enforceability of the arbitration agreement gives due respect to arbitral jurisdiction and the competence-competence principle.

[66] A stay is not a dismissal, as confirmed by the court in *Clayworth v Octaform Systems Inc*, 2020 BCCA 117 at para 57. If the arbitrator finds the agreement to be non-existent or unenforceable, or there are other unresolved issues upon conclusion of the arbitration process, it is open to Mid-West to apply to lift the stay.

[67] I therefore order the following:

a) IRC/IDCC's application is granted and the action is stayed.

b) Costs of the application are awarded to IRC/IDCC. If the parties cannot agree on costs they may request the matter be set down for a further hearing.

K.L. Taylor
J.S.C.

Dated in Yellowknife, NT this
6th day of June, 2025

Counsel for the Plaintiff: B. MacArthur-Stevens and M. Folk
Counsel for the Defendants: J. Evans

S-1-CV-2024-000361

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

MID-WEST DESIGN & CONSTRUCTION LTD.

Plaintiff

-and-

INUVIALUIT REGIONAL CORPORATION and INUVIALUIT DEVELOPMENT CONSTRUCTION LTD.

Defendants

MEMORANDUM OF JUDGMENT OF
THE HONOURABLE JUSTICE K.L. TAYLOR