

CITATION: Bombardier Inc. v. Alstom Rail Sweden AB, 2025 ONSC 3679
COURT FILE NO.: CV-23-00707333-0000
DATE: 20250620

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: BOMBARDIER INC., Plaintiff

AND:

ALSTOM RAIL SWEDEN AB, Defendant

BEFORE: AKAZAKI J.

COUNSEL: Jennifer Teskey and Nadine Tawdy, for the Plaintiff

Ira Nishisato, Hugh Meighen, and Benedict Wray, for the Defendant

HEARD: May 15, 2025

REASONS FOR DECISION

OVERVIEW

- [1] Bombardier has sued Alstom Sweden for breach of a provision in a 2017 share purchase agreement for adjustment of the sale price for Swedish corporate tax losses that had not been settled. That agreement was a corporate reorganization while the defendant Alstom entity was a Bombardier company and took place before that entity was absorbed by the Alstom group of companies in a multi-company acquisition in 2020. Disputes arising from the 2020 transaction are now in arbitration before the International Chamber of Commerce (“ICC”).
- [2] Alstom Sweden moves for an order staying Bombardier’s action, pending the ICC arbitration. It says the issue of the tax loss adjustment has been specifically reserved for the arbitral panel.
- [3] Bombardier responds that Alstom Sweden is not a party to the arbitration and that the tax loss claim under the 2017 agreement was either separate from or carved out of the 2020 agreement. It further relies on a provision in the 2017 agreement irrevocably submitting the parties to the exclusive jurisdiction of this court.
- [4] The Supreme Court of Canada settled the principles governing the stay motion in favour of arbitration in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41. The general principle, described as *competence-competence*, imports the precedence given to arbitration after Canada and its provinces joined treaties and adopted the *UNCITRAL Model Law on International Commercial Arbitration*. A core element of this principle is

that arbitrators should be allowed to rule first on their own jurisdiction: *Peace River*, at para. 39.

[5] At paras. 76-86, the Supreme Court mapped out a two-stage analysis for motions to stay civil actions in favour of arbitration agreements. For Alstom to succeed in the motion, it must first satisfy the technical prerequisites. Once it does so, the burden shifts to Bombardier to bring the case into a statutory exception.

[6] The Supreme Court, in para. 83 of *Peace River*, laid out the following four technical prerequisites for staying an action in favour of arbitration:

1. an arbitration agreement exists,
2. court proceedings have been commenced by a “party” to the arbitration agreement,
3. the court proceedings are in respect of a matter that the parties agreed to submit to arbitration, and
4. the party applying for a stay in favour of arbitration does so before taking any “step” in the court proceedings.

[7] The standard of proof for this first stage is lower than the ordinary civil standard. The applicants need only establish an arguable case that the prerequisites have been met: *Peace River*, para. 84. The rationale for this standard is to leave it open for the arbitral panel to take jurisdiction over the subject matter, unless the dispute clearly does not belong in arbitration.

[8] There can be no dispute that BI is a party to the 2020 agreement containing the arbitration clause, and that Alstom has brought the motion before taking steps in the proceeding apart from bringing the motion. The first and third prerequisites remain controverted here.

[9] BI submits that Article 8(1) of the UNCITRAL Model Law adopted by the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5, provides an exception where the court finds that the arbitration agreement is “inoperative” (underline added):

(1) 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.

[10] BI relies on an interpretation of “inoperative” as “have become inapplicable to the parties and their dispute”: *Peace River*, paras. 138-40. Closer examination of the Supreme Court’s interpretation of “have become inapplicable” implies a change in circumstance, such as frustration or bankruptcy. The word “inoperative” appears in a series between the phrases, “null and void” and “incapable of being performed,” with all three describing “the

agreement.” Since the Model Law presupposes the existence of an agreement to arbitrate, the three descriptors have no application if there is no subsisting agreement. Reducing the issue to its logical elements, an exception requires the subject matter first to be included. A reason not to include a dispute against Alstom because Alstom is not subject to the agreement is covered by BI’s first-stage argument, and it does not belong in the second stage. The meaning of “inoperative” urged by BI repeats its point that the 2020 agreement does not apply to Alstom Sweden because it is not a party.

- [11] The stay motion therefore boils down to the first and third prerequisites, whether an arbitration agreement exists and whether the subject matter of the action was one the parties agreed to submit to arbitration. In the context of this motion, these prerequisites are substantially related. I have concluded that Alstom Sweden has made an arguable case to satisfy the prerequisites. Since the statutory exception does not apply, the action will be stayed because of the arbitration agreement.
- [12] Before I turn to the two prerequisites at issue, I will set out the background facts necessary to complete the analysis.

BACKGROUND

- [13] The plaintiff is Bombardier Inc. (“BI”), the iconic Québec snowmobile company, now the parent of a group of companies manufacturing of a diverse range of transportation products, including business jets and rail equipment. The defendant is Alstom Rail Sweden AB (“Alstom Sweden”), a Swedish company formerly part of the BI group but acquired by the Alstom group in 2020. The precise post-2020 placement of Alstom Sweden within the Alstom group requires some explanation, by traversing the two share purchase agreements.

The 2017 BAHS SPA

- [14] In 2017, BI sold its direct subsidiary, Bombardier Aerospace (Holdings) Sweden AB (“BAHS”) to an indirect subsidiary, Bombardier Transportation Sweden AB (“BT Sweden”). The sale-purchase agreement for this transaction was called the BAHS SPA. In doing so, BI moved BAHS three pegs down the parent-subsiary hierarchy.
- [15] BTUK was the holding company for BI’s global rail transportation business. It now included BAHS among its holdings, nicknamed the “Blizzard Group.”
- [16] Under s. 2.3 of the BAHS SPA, the buyer BT Sweden was to satisfy the purchase price by a defined amount and later adjust it on account of disputed tax losses for taxation years 2013 to 2017, inclusive. The tax loss dispute was still pending before the Swedish authorities.

The 2020 Blizzard SPA

- [17] In 2020, BUK sold the Blizzard Group to Alstom Holdings, effectively by selling BTUK. Alstom Holdings is a holding company controlled by Alstom S.A., a publicly traded French company designing and manufacturing rail rolling stock and signalling solutions.
- [18] The sale-purchase agreement for this 2020 transaction was called the Blizzard SPA. After this transaction, BT Sweden renamed itself “Alstom Rail Sweden AB” → Alstom Sweden, who is the defendant.

The Tax Rulings

- [19] In 2021, the Swedish Administrative Court of Appeal ruled in BAHS’ favour with respect to claimed 2013-15 tax losses. In 2023, the Swedish tax authority granted reassessments for the 2016-17 disputed tax losses in conformity with the appellate ruling. BI continued to be active in the prosecution of the dispute and appeal, because it stood to benefit from the ability to readjust the 2017 purchase price.
- [20] After these successful tax rulings, BI sent Alstom S.A. a notice of adjustment of the purchase price under the BAHS SPA, for an amount totalling \$24,462,275.64 under the adjustment formula. When Alstom S.A. refused to pay, BI brought this action against Alstom Sweden.

Bombardier’s Ontario Action

- [21] BI laid claim to an adjustment arising from the tax rulings in favour of BAHS, now a subsidiary of Blizzard Group member Alstom Sweden. Its lead argument for suing in court was that the BAHS SPA was a separate agreement between BI and an entity that is not a party to the Blizzard SPA. Pursuant to s. 5.2 of the BAHS SPA, the parties irrevocably and unconditionally submitted and attorned to the courts of Ontario to determine all issues.
- [22] BI’s alternative argument was that s. 17.1 of the Blizzard SPA stated that all tax sharing agreements or arrangements that may have existed among the members of the Blizzard Group and any of BUK or its affiliates (other than members of the Blizzard Group) shall terminated on the completion date. However, this termination clause was “without prejudice to any rights and obligations relating to Pre-Completion Tax Periods.” Bombardier relies on this carve-out as saving the 2013-17 tax loss adjustments under the BAHS SPA from being axed by the Blizzard SPA.

Blizzard Arbitration

[23] In ICC Case No. 26982/SP, Alstom S.A. and Alstom Holdings has claimed against BI and BUK. The Alstom parties' core claim in the arbitration is that BI and BUK improperly accelerated short-term collection of receivables and delayed execution of payables, to inflate the purchase price of the Blizzard SPA. In the Request for Arbitration, the claimants also raised the issue of warranties in the agreement regarding Swedish taxes:

252. Alstom specifically reserves its rights to bring a claim against BI in respect of the tax indemnity set out in Clause 17.3 of the SPA and the tax warranties set out at Paragraph 30 of Schedule 4 of the SPA.

[24] Because this reserved Alstom's right to claim on the tax warranties, the application of para. 252 appears rather tenuous. However, I took this to buttress the point that BI could either add the tax loss issues in the pending arbitration or start a new arbitration.

1. EXISTENCE OF AN ARBITRATION AGREEMENT

[25] BI's lead argument is that Alstom Sweden is not a party to the Blizzard SPA. Instead, the BAHS SPA conferred exclusive jurisdiction on this court. Therefore, there is no arbitration agreement that meets the first element of the *Peace River* criteria. BI also submits that all of Alstom's arguments address other points while ignoring this threshold issue.

[26] In response, Alstom Sweden argues four points, on an "arguable case" standard:

1. S. 17.1 of the Blizzard SPA terminated the BAHS SPA and extinguished BI's claim against Alstom Sweden.
2. Even if s. 17.1 did not extinguish the claim, the preserved rights and obligations brought BI's claim within the Blizzard SPA.
3. Alstom Sweden is subject to the Blizzard SPA arbitration clause as an Affiliate, as specifically stated in s. 17.1.
4. BI is estopped from denying the arbitral tribunal's jurisdiction.

[27] To get to the nub of BI and Alstom Sweden's dispute of this prerequisite, it is necessary to go through Alstom Sweden's first three points. Those points require the court to focus on the precise wording of s. 17.1 (underline added):

17.1 *Tax Sharing Agreements*. All tax sharing agreements or arrangements that may exist between the members of the Blizzard Group and any of the B Seller or its Affiliates (other than the members of the Blizzard Group) and (without prejudice to any rights and obligations relating to Pre-Completion Tax periods) all rights and obligations thereunder shall terminate as of the Completion Date.

- [28] I cannot read s. 17.1 as having extinguished the basis for BI's suit. I agree that it terminated any tax sharing agreement contained in s. 2.3 of the BAHS SPA. The plain and clear meaning must be that any tax sharing arrangements with BI and other non-Blizzard entities terminate, in the sense that they are no longer in operation. The carve-out for contractual rights and obligations from pre-completion tax periods emphasizes the prospective operation of s. 17.1 in terminating the agreements while preserving disputes over past tax years.
- [29] In further support of its extinguishment argument, Alstom Sweden argued that the Blizzard SPA's Schedule 13 definition of "Other Net Debt Assets" included a lump sum of €200 million as representing the "deferred tax assets consisting of carry forward and other tax attributes." This amount is included in the "Actual Net Debt Amount" deducted from the "Calculated Purchase Price" in s. 6.1. Alstom Sweden argued that this lump sum benefited BI by reducing a deduction from the base purchase price. I cannot construe this feature of the Blizzard SPA as absorbing BI's claim as described in the Ontario statement of claim. Without determining the issue, the deferred tax assets appear to encompass non-contingent assets such as undepreciated capital.
- [30] There is no arguable case that the termination of the BAHS SPA affects the survival of the obligations to adjust the 2017 purchase price. This result does, however, make Alstom Sweden's next two points more persuasive or at least arguable.
- [31] BI argued that s. 2.3 of the BAHS SPA was not a "tax sharing agreement or arrangement," typically used to consolidate or allocate tax responsibility and benefits among corporate affiliates. Rather, it was an adjustment of purchase price in a share purchase agreement. Therefore, BI contended, s. 17.1 did not apply to the claim described in the Ontario action.
- [32] Because of the inter-company nature of the agreement, I cannot conclude that s. 2.3 was a simple share purchase provision. Any purchase and sale can feature a post-closing adjustment. Between arms-length parties, it is simply a bargain to deal with an unknown quantity at the time of closing to ensure the price correctly reflects the value of the shares.
- [33] However, a provision in a share purchase agreement between parent and subsidiary for price adjustment based on a future tax contingency could have any number of purposes, including adjusting the cost base for the transaction for inter-company accounting and public disclosures. The adjustment provision might not so much reflect the commercial efficacy or value of the transaction, because it is between a parent and a subsidiary. Because a lawsuit between affiliates would be unlikely, the adjustment could operate like an allocation – a *sharing* – instead of a commercial post-closing benefit or liability.

- [34] Thus, a price adjustment could very well be construed as a form of sharing, in terms of a built-in reallocation to maximize the benefits to the combined organization. If this seems to be too loose an interpretation to constitute an agreement, it may be that BI has ignored the word “arrangement” in s. 17.1. Even if s. 2.3 was not, strictly speaking, an agreement to share or allocate tax responsibilities or benefits, the fact that an adjustment resulting from a tax ruling could result in a financial adjustment between affiliates could, arguably, be an “arrangement.” The arbitral panel could arguably reach this conclusion. I will now proceed to the third point Alstom Sweden raised.
- [35] It is true that Alstom Sweden was not party to the Bizzard SPA. That agreement listed the named parties and their roles at the outset. Alstom Holdings was the “Buyer.” Alstom Sweden (or BT Sweden) was not listed as a party. BI argues that the analysis of the existence of a relevant arbitral agreement ends here.
- [36] Alstom Sweden claims to be an unnamed party to the agreement by virtue of being an “Affiliate,” as defined in Schedule 13:
- Affiliate means, in relation to any undertaking, any subsidiary or holding company of that undertaking, and any subsidiary of any such holding company, and any other undertaking directly or indirectly Controlling, Controlled by, or under direct or indirect common Control with such undertaking, in each case from time to time.
- [37] “Affiliate” appears many times in the agreement in different contexts. Sometimes, provisions require a named party to require its Affiliate to perform an obligation. Otherwise, an Affiliate can shelter under a party’s protection from liability. The question here is the application of s. 17.1 to Alstom Sweden’s rights and obligations for prior tax periods surviving the termination of existing tax sharing agreements.
- [38] One very probable reading of the section is that tax sharing agreements between BI and Alstom Sweden (*qua* BT Sweden) terminate, but the rights and obligations for pre-completion tax periods survive within the Blizzard SPA. Since s. 17.1 specifically preserves these rights and obligations, the benefits of the Swedish tax rulings become part of the named parties’ rights or obligations. Indeed, if s. 17.1 terminated the BAHS SPA while incorporating the rights and obligations in respect of past tax years, it is more than arguable that the Blizzard SPA governs the surviving relation between BI and Alstom Sweden. For example, if the tax rulings require a net payment from Alstom Sweden to BI, then BI must claim this from the buyer Alstom Holdings as the direct counterparty to BI as the seller.
- [39] For the fourth argument, estoppel, Alstom Sweden relies on the fact that BI wrote its first letter in 2021 to the parent Alstom S.A. entity and not to Alstom Sweden. While I need not address this issue, I doubt that one could construe from the formal notice-giving act an intention to give up rights against Alstom Sweden. It is arguable, in the sense that the arbitral panel could consider it. However, this formal factor does not appear to be sufficient

on its own for the Blizzard SPA to be an agreement governing the liability of Alstom Sweden.

- [40] Based on the second and third points raised by Alstom Sweden, I must conclude there is an arguable case that, despite the termination of the BAHS SPA, the rights and obligations arising from the need to adjust the tax losses from prior years became incorporated into the Blizzard SPA. The fact that Alstom Sweden was not a named party to the Blizzard SPA would not be determinative, because any tax sharing agreement or arrangement in the BAHS SPA only survives to the extent the agreement between Alstom Sweden and BI was incorporated into the Blizzard SPA as an obligation of an “Affiliate” of the buyer in the Blizzard SPA.

2. SUBJECT MATTER OF THE ACTION AND ARBITRATION AGREEMENT

- [41] The above analysis makes it almost obvious that the court proceedings are in respect of a matter that the parties agreed to submit to arbitration, on an “arguable case” standard.
- [42] If an arbitral panel takes jurisdiction over BI’s tax loss claim against Alstom Sweden, on the basis that s. 2.3 of the BAHS SPA was a tax sharing agreement or arrangement incorporated into s. 17.1 of the Blizzard SPA, the subject matter of the action comes squarely within the agreement containing the arbitration agreement. If an arbitral panel concludes that the price adjustment provision was not a tax sharing agreement or arrangement, the result could be that the panel disclaims jurisdiction, and the Ontario action can be reactivated.
- [43] Alstom Sweden has therefore established at least an arguable basis for the four prerequisites for a stay. Because I have ruled out the statutory exception, the *competence-competence* principle requires the court to stay the proceeding in favour of an arbitral ruling of the scope of the panel’s jurisdiction under the Blizzard SPA.

CONCLUSION

- [44] This action is hereby stayed, until further order of the court. I need not determine whether the trigger for lifting the stay will be the conclusion of the current arbitration or a separate one commenced by BI for the purpose of the price adjustment claim, or of a jurisdictional ruling in either arbitral procedure. The conditions for lifting the stay, if required, should become self-evident.
- [45] On May 12, 2025, I ordered the sealing of the court file, to allow the parties to file redacted motion materials. That order shall continue until further order of the court.

[46] If the parties are unable to settle the costs of the motion, counsel may contact my judicial assistant with a schedule for exchange of bills of costs and submissions. If a formal order is required, counsel may confer and send one in for my consideration.

Akazaki J.

Date: June 20, 2025