Date: 2025 08 14
Docket: S-1-CV-2024-000 237

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

NIHTAT CORPORATION

Applicant

-and-

GRANT SULLIVAN and NIHTAT ENERGY LTD

Respondents

MEMORANDUM OF JUDGMENT

OVERVIEW

[1] This is an application brought by Nihtat Corporation (Nihtat) to set aside the partial award of an Arbitrator pursuant to s 25(1) of the *Arbitration Act* SNWT 2022, c14 (the *Act*).

[2] The underlying dispute involves a shareholder agreement between the parties, in which Sullivan was granted share purchase options in relation to Nihtat Energy Ltd. (NEL). In November 2023 and January 2024 Sullivan attempted to exercise his share purchase options. Nihtat did not complete these transactions.

[3] On April 16, 2024, Sullivan issued a Notice of Arbitration against Nihtat and NEL in relation to the share purchase dispute. Arbitration is contemplated in Article 18 of the shareholder agreement, which states:

> 18.01 Resolution by Arbitration. If any dispute or controversy occurs between the parties hereto relating to the interpretation or implementation of any of the provisions of this Agreement, such dispute shall be resolved by arbitration. Such arbitration shall be conducted by a single arbitrator.

[4] On May 13, 2024, Nihtat, Nihtat Gwich'in Council and Nihtat Energy Ltd. filed a Statement of Claim under court file S-I-CV-2024-000-135 (the Action). The Action names both Sullivan and Jozef Carnogursky (Carnogursky) as defendants. The Action overlaps in part with the Notice of Arbitration. It raises numerous issues as between Nihtat, Sullivan, and Carnogursky, including issues relating to the shareholders agreement.

[5] On May 17, 2024, an Arbitrator was appointed to adjudicate the dispute raised in the Notice of Arbitration. Nihtat brought a preliminary motion before the Arbitrator seeking to terminate the arbitration so that all issues between the parties may be dealt with in the Action.

[6] In a partial arbitral award dated July 2, 2024, the Arbitrator determined that he has jurisdiction over the dispute and declined to terminate the arbitration (the Partial Award).

[7] Nihtat applies to have the Partial Award set aside. For the reasons that follow, I dismiss Nihtat's application and uphold the Partial Award.

BACKGROUND

[8] Nihtat is a corporation wholly owned by Nihtat Gwich'in Council. Carnogursky is a former president and director of Nihtat Gwich'in Council. Nihtat and Sullivan are the only shareholders of NEL. NEL did not make any submissions on this application.

[9] The Action brings a number of allegations against Sullivan and Carnogursky. Nihtat alleges that they created NEL without the knowledge or authorization of the other directors or officers of Nihtat, that Carnogursky caused shares in NEL to be issued to Sullivan, and that Carnogursky and Sullivan entered the shareholder agreement without the knowledge of the other directors. It is also alleged that they took other actions without proper authorization, including entering into a Management Services Agreement whereby Sullivan became President and Chief Executive Officer of NEL and executing a Transfer of Business Agreement under which certain energy projects and other assets owned by Nihtat were transferred to NEL. Nihtat also seeks to commence a derivative action on behalf of NEL against Sullivan and Carnogursky.

[10] In the Action, Nihtat claims Sullivan and Carnogursky engaged in wrongdoing such as oppression, breach of fiduciary duty, conversion and unjust enrichment, as well as conspiracy and knowing assistance.

[11] The parties agree that the only issues within the scope of the arbitration are the enforceability of the shareholder agreement and the share purchase options contained therein. Although Nihtat concedes that matters related to the shareholder agreement are arbitral issues, they are seeking a termination or stay of the arbitration in favour of the Action. Nihtat argues that having overlapping issues in two forums will result in a multiplicity of proceedings which could lead to inconsistent outcomes, and the arbitrator should decline jurisdiction over the dispute on this basis.

[12] Sullivan and Carnogursky have brought a separate application as Defendants in the Action, seeking to stay the Action pending the outcome of the arbitration. That application is the subject of a separate decision in *Nihtat et al v Sullivan et al*, 2025 NWTSC 59.

ISSUES

[13] The issues in this application are:

> (i) Did the Arbitrator err in law in his interpretation of 24(1) of the Arbitration Act?
>
> (ii) Specifically, did the Arbitrator err in finding that a multiplicity of proceedings is not a bar to arbitration in this case?

LEGISLATIVE FRAMEWORK

[14] Subsection 24(1) of the Act sets out guidance for an arbitrator when deciding on 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.

[15] The standard of review in this matter is correctness.

ARBITRATOR's DECISION

[16] In the Partial Award, the Arbitrator held that s 24(1) is a non-exhaustive list of considerations pertaining to jurisdiction, but that it does not require an arbitrator to decline jurisdiction if they are present. The arbitrator described s 24(1) as "a set of factors that a tribunal should consider when ruling on its own jurisdiction, not a mandate from the legislation to decline jurisdiction".

[17] The Arbitrator also found that the issue of whether there is a valid arbitration agreement requires findings of fact, and it is the Arbitrator who should hear the parties on this issue and make a determination.

[18] The Arbitrator considered the Alberta case law and legislation referenced by Nihtat in their submissions but found it was of little relevance to the question of jurisdiction before him.

[19] Further, the Arbitrator found that a resulting multiplicity of proceedings is not a bar to arbitration.

NIHTAT's APPLICATION

[20] Nihtat submits that the Arbitrator misinterpreted s 24(1). They argue that if any of the circumstances in s 24(1) are present, the arbitrator loses jurisdiction to determine the subject matter.

[21] In making this argument, Nihtat attempts to link s 24(1) with s 8 of the Act, which 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.

…

(5) If the court finds that one or more of the circumstances described in paragraphs (2)(a) to (d) exists in respect of all or some of the matters in the court proceedings, then, in respect of those matters,

(a) the court proceedings continue;
(b) no person may commence arbitral proceedings in respect of the dispute; and
(c) if a person has brought arbitral proceedings in respect of the dispute, the arbitral proceedings are terminated and anything done in the arbitral proceedings is without effect.

[22] Section 8(2) is a mandatory stay provision. It requires a court to stay proceedings unless the prescribed criteria are met. Subsection 8(5) then confirms that if circumstances identified in s 8(2) are present, the court has jurisdiction and an arbitration cannot proceed.

[23] Nihtat argue that s 24(1) identifies circumstances where there is a mandatory termination of the arbitrator's jurisdiction and that this is supported by the language in 8(5), and the two provisions must be read together. In other words, the arbitrator is required to decline jurisdiction when the enumerated scenarios in s 24(1)(a)-(d) are present.

[24] Nihtat focuses on s 24(1)(a) and submits that an arbitrator loses jurisdiction when "the arbitral proceedings are in whole or in part in respect of a matter that is not the subject of an arbitration agreement". Nihtat says that in this case s 24(1)(a) is triggered because decisions on arbitrable issues will affect the outcome of non-arbitrable issues. They argue that all the issues between the parties are too intertwined to reasonably be separated.

[25] Nihtat relies on cases dealing with subsection 7(5) of the Alberta *Arbitration Act*, RSA 2000, c A-43 to support their reasoning. Section 7 of the Alberta Arbitration Act contains a mandatory stay provision and sets out certain exceptions that apply, similar to s. 8 of the NWT *Act*.

[26] The Alberta *Arbitration Act* outlines scenarios where the court proceeding may continue on non-arbitrable issues:

7 (5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that

> (a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and
>
> (b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

[27] In *New Era Nutrition Inc v Balance Bar Company*, 2004 ABCA 280 the court interpreted s 7(5) of the Alberta *Arbitration Act* as enabling a court to refuse a stay of the court action and held that the arbitration must give way to the civil action when there are overlapping issues in the two forums that cannot be separated. In doing so the Court also relied on s 6(c) of the Alberta *Arbitration Act*, which reads:

> 6. No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
> …
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;

[28] Nihtat asks the court to take the same interpretive approach in this application. They submit that separating arbitrable and non-arbitrable issues is impossible in this particular case, and as such, the arbitration must give way to the Action.

[29] As an example, Nihtat argues that a finding by the Arbitrator relating to the validity of the shareholders agreement will serve as a conclusion on the issue of Sullivan and Carnogursky's authority to enter into the Master Services Agreement and Transfer of Business Agreement. These agreements are non-arbitrable. In that instance, Nihtat argues, the court would have to accede to the Arbitrator's decision or risk reaching an inconsistent result.

[30] In summary, Nihtat submits that the Arbitrator misinterpreted s 24(1) and, additionally, that he failed to consider the overlapping issues and resulting multiplicity of proceedings as a bar to arbitration.

SULLIVAN'S RESPONSE

[31] In response to the Nihtat's application, Sullivan submits there is no provision in the *Act* that permits an arbitrator to refuse to adjudicate arbitrable issues.

[32] Sullivan suggests that any multiplicity of proceedings arising should properly be dealt with by a stay of court proceedings, rather than limiting the jurisdiction of the arbitrator.

[33] Sullivan submits that Nihtat's arguments relating to the Alberta case law are not applicable because there is no equivalent to s 7(5) of the Alberta statute in the NWT *Act* and because *New Era* is no longer reflective of the law in this area.

[34] Sullivan seeks to have the application dismissed.

ANALYSIS

Interpretation of s 24(1)

[35] As discussed, Nihtat asks the court to interpret s 24(1) by reading it together with s 8(5) of the *Act*.

[36] Section 8 deals with applications for a stay of proceedings where a court action raises arbitrable issues. Section 8 requires a stay of court proceedings if the matters in a court proceeding are the subject of an arbitration agreement, unless it determines one of the four exceptions in s 8(2) are present. The provision is mandatory: "the court shall make an order staying the court proceedings unless…".

[37] When an exception under s 8(2) is applicable and a stay application is denied (that is, the court proceeding continues), s 8(5) clarifies that any arbitral proceedings in respect of such matters are terminated. The provision is clear that "all or some of the matters" in a court proceeding may be stayed. Arbitral jurisdiction may then be terminated on all or some of the issues by operation of s 8(5).

[38] Nihtat points out that the language in s 8(2) mirrors the language in s 24(1). They argue that because there is mirroring language, the two provisions must be interpreted in the same way. Specifically, triggering of 24(1) should also lead to application of 8(5) which effectively terminates the arbitrator's jurisdiction.

[39] I do not agree with Nihtat's interpretation. The two provisions use different language. Subsection 24(1) does not direct an outcome; it simply confirms that an arbitrator may rule on their own jurisdiction and goes on to enumerate scenarios under which an arbitrator may have no jurisdiction. Further, the two provisions do not reference each other.

[40] Certainly, the presence of the circumstances in 24(1)(a)-(d) would be relevant and perhaps persuasive to an arbitrator in making a decision on jurisdiction, but the language is not mandatory.

[41] The Northwest Territories *Act* reflects a modern approach to arbitration legislation that is based on the *Uniform Arbitration Act* (2016) drafted by the

Uniform Law Conference of Canada[1] [*Model Act*]. Sullivan points to the commentary on the *Model Act* which explains the language enumerated in s.24(1)(a)-(d) is to "ensure that it is clear that the same jurisdictional issues which the court may have declined to decide on a stay application…can be decided by the arbitral tribunal".[2]

[42] Importantly, even if s.24(1) did require an arbitrator to decline jurisdiction, the enumerated grounds in s.24(1)(a)-(d) are not present:

> i) 24(1)(a): are the arbitral proceedings in whole or in part in respect of a matter that is not the subject of an arbitration agreement?
>
> ii) 24(1)(b): are there concerns about legal incapacity?
>
> iii) 24(1)(c): are there concerns about the validity or enforceability of the arbitration agreement?
>
> iv) 24(1)(d): are there concerns that the dispute cannot be the subject of arbitration under the laws of the Northwest Territories?

[43] There are no concerns arising under 24(1)(b) or 24(1)(d), this is conceded by the parties.

[44] In regard to 24(1)(c), the parties acknowledge that the validity of the arbitration agreement is at issue and agree that a determination of validity requires findings of fact which properly fall to the Arbitrator to decide. This is consistent with Supreme Court of Canada jurisprudence including the decision in *Dell Computer Corp v Union des consumatteurs* 2007 SCC 34 and *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 [*Peace River*], where the court stated, at para 89:

> Where the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator. Such an approach accords due respect to arbitral jurisdiction, in light of the competence-competence principle, as well as to the parties' intention to refer their disputes to arbitration.

[45] In regard to s 24(1)(a), it must be determined whether the matters in dispute in the Notice of Arbitration are arbitrable issues. It is conceded by the parties that the issues relating to the shareholder agreement and share purchase options are arbitrable.

[46] Nihtat submits that because of the entanglement of the issues in the arbitration and the Action, by taking jurisdiction over the arbitrable issues the arbitrator is

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[1] Uniform Law Conference of Canada, *Uniform Arbitration Act* (2016). Online: https://ulcc-chlc.ca/ULCC/media/EN-Annual-Meeting-2016/Uniform-Arbitration-Act.pdf

[2] *Ibid* at 16.

effectively taking jurisdiction over non-arbitrable issues as well. It is their submission that s 24(1)(a) is therefore engaged and the arbitrator must decline jurisdiction on this basis.

[47] I do not agree with Nihtat's interpretation of s 24(1)(a). The provision asks whether "the arbitral proceedings…are in respect of a matter that is not the subject of an arbitration agreement". The short answer in this case is no, and therefore s 24(1)(a) is not engaged.

Application of Alberta Case Law and s 7(5) of the Alberta Statute

[48] Nihtat references Alberta caselaw in support of their application. This includes cases such as *New Era, Olymel S.E.C v Premium Brands Inc*, 2005 ABQB 312 and *Lamb v AlanRidge Homes Ltd*, 2009 ABQB 170, which deal with s 7(5) of the Alberta *Arbitration Act*.

[49] The NWT *Act* does not contain an equivalent to s 7(5) of the Alberta *Arbitration Act*. During development of the *Model Act*, the Alberta Law Reform Institute explicitly recommended that the *Model Act* delete the language in s 7(5) and the commentary on the *Model Act* reflects this[3].

[50] In addition to s 7(5), the court in *New Era* specifically relied on s 6(c) of the Alberta *Arbitration Act*, which allows the court to intervene "to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement". The NWT *Act* does not contain a similar provision. Section 5 of the NWT *Act* simply states: "No court may intervene in matters governed by this *Act*, except as expressly provided for by this *Act*". This is a much more limited role for the court than permitted by the Alberta *Arbitration Act*, and this was provision was explicitly cited by the Arbitrator in the Partial Award.

[51] Recent Supreme Court of Canada case law confirms that the intent of modern arbitration legislation is to hold parties to their contractual agreements to arbitrate. For example, see *Peace River* and *Telus Communications Inc v Wellman*, 2019 SCC 19 [*Telus*].

[52] In *Telu*s, the Supreme Court of Canada considered a contract of adhesion requiring arbitration of disputes. Consumers were not required to arbitrate because consumer protection legislation prohibited arbitration. Business customers, however, were not exempt. The result was the arbitration agreement covered some, but not all, of the claims in the court proceeding. The question was whether the court

[3] *Ibid* at 6

should stay the claims of the business customers and force them to arbitrate. The answer was yes.

[53] In deciding the matter, the court considered s 7(5) of the Ontario *Arbitration Act*, 1991, SO 1991, c 17 which is equivalent to s 7(5) of the Alberta Act and rejected the interpretation in *New Era*. The court held that the language in s 7(5) does not give a court discretion to grant a stay in respect of matters falling within the scope of the arbitration agreement. "At the end of the day, s. 7(5) does not, in my view, permit the court to ignore a valid and binding arbitration agreement." (*Telus*, para 103).

[54] The court in *Telus* recognized that separating the arbitrable from the non-arbitrable issues might be challenging. The Court also acknowledges that a multiplicity of proceedings can cause practical difficulties but concluded that "this concern cannot be permitted to trump the language of the statute" (para. 90). Potential inconsistency of results arising from a multiplicity of proceedings was not determinative:

> … where the application of an Ontario statute, properly interpreted, leads to a multiplicity of proceedings, the court must give effect to the will of the legislature, even if the consequence is to potentially create a multiplicity of proceedings. (*Telus* at para 90)

Other remedial powers

[55] Nihtat warns against an over-broad application of the principles in *Telus* and emphasizes that the court retains an overriding jurisdiction to intervene in matters where it is required to protect the interests of justice. Nihtat specifically relies on s 27 of the *Judicature Act*, RSNWT 1988, c J-1 which sets out the broad remedial powers of this court:

> A court in the exercise of its jurisdiction in every cause or matter pending before it has power to grant and shall grant either absolutely or on reasonable terms and conditions that it considers just, all remedies that any of the parties may appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the cause or matter, so that as far as possible all matters so in controversy between the parties respectively may be completely and finally determined and all multiplicity of legal proceedings concerning those matters avoided.

[56] The court's remedial powers under s 27 of the *Judicature Act* should be exercised sparingly and only when statutory authority is unavailable or insufficient. There is no such legislative gap here. Section 5 of the *Act* explicitly limits the ability of the court to intervene in arbitral issues, and s 8 sets out circumstances where a stay is appropriate. Further, the underlying policy goals of modern arbitration legislation guide against court intervention. Use of powers under s 27 is not warranted in these circumstances.

[57] Nihtat also relies on the *Rules of the Supreme Court of the Northwest Territories*, NWT Reg 010-96 which articulate an underlying objective "to secure the just, speedy and inexpensive determination of every proceeding".[4]

[58] Nihtat references the case of *Williams v Amazon.com Inc*, 2023 BCCA 314 [*Williams*], where the court considered when a contract may be void for public policy reasons. The court in *Williams* applied the legal principles from *Uber Technologies Inc v Heller*, 2020 SCC 16, which is the leading case on the legal doctrine of unconscionability in contract.

[59] In *Williams* the court focused on the validity of contract and when a contract can be void because it is contrary to public policy. Williams does not stand for the authority that there is a residual discretion to consider policy concerns raised by a party in opposing an arbitration agreement.

[60] The legal doctrine of unconscionability is not engaged on the facts before me and there is no public policy basis upon which the Arbitrator should have declined jurisdiction.

[61] I acknowledge that there are unanswered questions about how the findings in an arbitration process will impact the Action. However, as confirmed in *Telus*, the court cannot ignore the will of the legislature, even in the face of such uncertainty.

CONCLUSION

[62] The Arbitrator found that he does not have the discretion to refuse jurisdiction over the arbitrable issues. In doing so, the Arbitrator correctly interpreted s.24(1) of the *Act*.

[4] *Rules of the Supreme Court of the Northwest Territories*, Rule 3.

[63] Further, the Arbitrator correctly applied the law in concluding that a multiplicity of proceedings is not a bar to arbitration in this case.

[64] For the foregoing reasons I dismiss Nihtat's application to set aside the Partial Award of the Arbitrator.

Karin L. Taylor
J.S.C.

Dated in Yellowknife, NT this
14th day of August, 2025

Counsel for the Applicant: Jessica Buhler

Counsel for the Respondent: Alyssa Holland

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