# In the Court of Appeal of Alberta

**Citation: Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Limited, 2024 ABCA 214**

**Date:** 20240620
**Docket:** 2403-0002AC
**Registry:** Edmonton

2024 ABCA 214 (CanLII)

**Between:**

**Pacific Atlantic Pipeline Construction Ltd and Bonatti S.P.A.**

Applicant

\- and -

**Coastal Gaslink Pipeline Limited Partnership by Its General Partner Coastal Gaslink Pipeline Ltd**

Respondent

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**Oral Reasons for Decision of**
**The Honourable Justice Jack Watson**

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Application for Stay
The Honourable Justice N.J. Whitling
Dated the 19th day of December, 2023
(2023 ABKB 736, Docket: 2303 19140)

## Oral Reasons for Decision of
## The Honourable Justice Jack Watson

### I. Introduction

[1] This is Court of Appeal file number 2403-0002AC[1]. The application that has been brought to me as a single judge of the Court of Appeal sets out the following requests. Under paragraph number 1, it says:

> This is an application pursuant to section 65.1 of the *Supreme Court* Act [RSC 1985, c S-26] and the Court's power under the *Judicature Act* [RSA 2000, c J-2] directing the Respondent to withdraw and refrain from calling on the letter of credit (which is the subject matter of these proceedings, the "Letter of Credit") by issuing an interim injunction pending a determination on the Appellants' Application for Leave to Appeal to the Supreme Court of Canada (the "Leave Application").

[2] I pause to mention that I have been informed today that in fact an application which had not yet been filed when this was originally launched has in fact been filed[2]. I also point out that the nature of the application language in that paragraph number 1 includes directing the respondent to

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[1] These reasons are largely the oral reasons given on the date of hearing. They have been edited for clarity and completeness, and to include references. They were not produced in this form until now as the matter was promptly to proceed before the Supreme Court of Canada and I did not wish that Court to assume this version was written 'to' that review and "defending the verdict" as suggested in *R v Teskey*, 2007 SCC 25 at para 18, [2007] 2 SCR 267 or to "cooper up" the decision: see Donald J.M. Brown, *Civil Appeals*, vol. 2, looseleaf (Toronto: Canvasback Publishing, 2009), at pp. 13-31 to 13-32 cited in *Jacobs Catalytic Ltd. v. I.B.E.W., Local 353*, 2009 ONCA 749 at para 50, 312 DLR (4th) 250. This way, to shamelessly plagiarize from the imperishable Sir John Holt (1642-1710) in *Coggs v Bernard*, [1703] 2 Ld.Raym.909, 92 ER 107, [1558-1774] All E.R. Rep. 1 who said "wiser heads in time may settle" the law he had expressed, these reasons are now subject to similar analysis. I hasten to add that any ruminations of mine on any topic pale to the vanishing point compared to that legal giant. *Coggs*, for example, brought stability to the law of negotiable instruments. This judgment merely ventures a little on a point of statutory construction. As to the merits, the Supreme Court

[2] The Supreme Court of Canada, as usual, provided a formal decision without reasons in *Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd*, 2024 ABCA 74, 66 Alta LR (7th) 204, motions denied, with costs (April 25, 2024) [2024] SCCA 40 (QL) (SCC No. 41146). The formal order says: "The motion for an expedited stay of proceedings is dismissed with costs. The application for leave to appeal from the judgment of the Court of Appeal of Alberta (Edmonton), Number 2403-0002AC, dated February 29, 2024, is dismissed with costs." The Court had heard those motions on a very expedited basis, with brief interim decisions of Kasirer J. The Court released its decision in *Eurobank Ergasias S.A. v. Bombardier Inc., et al*, 2024 SCC 11, 490 D.L.R. (4th) 395 per Kasirer J on April 5, 2024.

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"withdraw and refrain". Consequently, the nature of the injunction that is requested under this clause of the Notice of Motion is both mandatory and prohibitive in my interpretation of it[3].

[3] The next part of the Notice of Application which perhaps should be read into the record is that paragraph number 5 says:

> The Appellants seek a stay of the enforcement of the Court of Appeal's February 29, 2024 decision pursuant to s. 65.1, in that the Appellants asked the Court to direct that the respondent refrain from drawing on the Letter of Credit in order to preserve matters between the parties pending a determination on the Leave Application, and in particular, the Appellants ask for an injunction pending a decision from the Supreme Court of Canada on its Leave Application to prevent prejudice and allow for a meaningful and effective judgment.

[4] They are of course in that respect referring to a meaningful and effective judgment by the Supreme Court.

## II. Is there ABCA Jurisdiction to 'Stay' Under Section 65.1 of the Supreme Court Act?

[5] The thing I would mention in connection with this element of the applicants' submission is that it has been very capably set out in the written submissions and the oral submissions on behalf of the applicants in this matter as to why they contend that the word "stay", which is the operative word in section 65.1 of the *Supreme Court Act,* is inclusive of a power to grant the injunctive remedy which is sought by that Notice of Motion.

[6] The position that has been argued in front of me is that the ***RJR-MacDonald*** case and other authorities[4] give rise to the conclusion that even though Parliament choose to use the word "stay" and did not use the word "injunction" in this matter, it is not limiting. They say that in fact by

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[3] A key difference between mandatory and prohibitive injunctions was discussed in *R v Canadian Broadcasting Corporation*, 2018 SCC 5 at paras 12-16, [2018] 1 SCR 196 where Brown J said, *inter alia*, "In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR — MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel." He cited R.J. Sharpe, *Injunctions and Specific Performance*, (6th Ed. 2012) at paras. 1.510, 1.530 and 2.640.

[4] *RJR – MacDonald Inc v Canada*, [1994] 1 SCR 311 referring to *Manitoba (Attorney General) v. Metropolitan Stores Ltd*, [1987] 1 SCR 110 and further back to *American Cyanamid Co. v. Ethicon Ltd*, [1975] AC 396 for the familiar three-part test referring firstly to a 'serious question to be tried' then to irreparable harm and then to balance of convenience.

virtue of comments such as were made by Mr. Justice Sopinka[5], the nature of that authority[6] should be considered but more broadly than in fact it has been by this Court, certainly in a number of cases.

[7] It does strike me that in relation to the question of jurisdiction on this point, that the extension of the power of the Court of Appeal to review one of its own decisions in this way, is not contemplated by Parliament in the manner which is suggested in front of me[7].

[8] While this Court, of course, is entitled -- and required, indeed -- to consider under section 65.1 of the *Supreme Court Act*, the grant of relief in situations where there is an executory element to the decision of the Court of Appeal, that is where it ends.

[9] That is the decision that was given by this Court in ***Baier*** with two judges, including Justice Côté and Justice Costigan[8]. It is authoritative. Subsequent decisions of this Court, including that

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[5] In *RJR – MacDonald*, at p 329, Sopinka and Cory JJ said "We are of the view that *the Court is empowered, pursuant to both s. 65.1 and r. 27, not only to grant a stay of execution and of proceedings in the traditional sense, but also to make any order that preserves matters between the parties in a state that will prevent prejudice* as far as possible pending resolution by the Court of the controversy, so as to enable the Court to render a meaningful and effective judgment. *The Court must be able to intervene not only against the direct dictates of the judgment but also against its effects. This means that the Court must have jurisdiction to enjoin conduct on the part of a party in reliance on the judgment which, if carried out, would tend to negate or diminish the effect of the judgment of this Court*." [Emphasis added].

[6] The Supreme Court was created by Parliament to be the ultimate judicial authority in Canada, by enactment pursuant to s 101 of the *Constitution Act, 1867* as "a General Court of Appeal for Canada". As such, its powers must be plenary, complete and conclusive on any justiciable legal question in every corner of the country. As noted in *Reference Re: Supreme Court Act*, 2014 SCC 21, at para 81, [2014] SCR 433, the "new Supreme Court had general appellate jurisdiction over civil, criminal, and constitutional cases. In addition, the Court was given an exceptional original jurisdiction not incompatible with its appellate jurisdiction, for instance to consider references from the Governor in Council …". He added that first criminal law jurisdiction in 1931 and then all other appellate jurisdiction of the Judicial Committee of the Privy Council in 1949 came to an end and at para 83, "the Supreme Court of Canada inherited the role of the Council under the Canadian Constitution", and "no less in scope": *Reference re The Farm Products Marketing Act*, [1957] SCR 198, at p. 212.

[7] The Supreme Court is clearly transcendent in its powers in its "unifying jurisdiction' over the provincial courts": *Hunt v. T&N plc*, [1993] 4 SCR 289, at p. 318; *Bank of Montreal v. Metropolitan Investigation & Security (Canada) Ltd.*, [1975] 2 SCR 546, at p. 556. The *Supreme Court Reference* added at para 84: "The Supreme Court became the keystone to Canada's unified court system. It "acts as the exclusive ultimate appellate court in the country" (Secession Reference, at para. 9). In fulfilling this role*, the Court is not restricted to the powers of the lower courts from which an appeal is made. Rather, the Court may exercise the powers necessary to enable it "to discharge its role at the apex of the Canadian judicial system, as the court of last resort for all Canadians": R. v. Gardiner*, [1982] 2 S.C.R. 368, at p. 404, per Dickson J.; Hunt, at p. 319." [Emphasis added]. By a similar token, no abridgment of the powers of the Supreme Court to uphold the rule of law and its foundational principles including the Constitutional values of our free democracy should be 'read in' to its "constitutionally essential" authority.

[8] See *Baier v Alberta*, 2006 ABCA 187, 269 DLR (4$^{th}$) 233. Later in his motion reasons in *Baier v Alberta*, 2006 SCC 38 at para 9, Rothstein J noted that Cote and Costigan JJA at para 14 of their reasons expressed "little doubt that the Supreme Court could fashion a remedy, and maybe one judge of the Supreme Court could". Rothstein J agreed. He

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of Justice Wakeling[9] (and I believe there are others[10]) are to the effect that in fact where a judgment has been rendered by this Court, which is basically simply dismissed on appeal and has not issued any executory elements to it or it does not have any direct implications in terms of something to happen in the future, is not a judgment for which a stay is applicable under Section 65.1 because as Justice Côté put it, "the Court has done nothing".

[10] That is, of course, a somewhat colourful way of describing what the Court has done, but I think it is important to remember that in this instance, what this Court did last Thursday[11], was give a judgment on three different points; some law, some facts. But those three different points led to ultimately, a single result. Which is that the judgment of Justice Whitling to *refuse* an interlocutory injunction in this instance, was not incorrect.

[11] I might say I called it "interlocutory" and that might even be technically incorrect because it is pending an arbitration as opposed to pending another court hearing[12]. But Mr. Justice Whitling did not choose to grant the order, and he gave several reasons for doing so.

[12] The reasons that are impugned in relation to Justice Whitling's decision and are, in fact, advanced in connection with the argument before me, can be quoted directly out of the written submissions of the applicant; and they are in paragraphs 16 and 17 of their written submissions. Paragraph 16 reads as follows:

> The appellants have raised important arguable questions for the consideration of the Supreme Court of Canada, including whether the strong *prima facie* case standard, rather than the serious questions to be tried standard, applies to an injunction against a beneficiary, as opposed to a bank; whether beneficiaries can be enjoined from drawing on a letter of credit for reasons other than fraud, and the

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noted that they had "succinctly explained" that "the plaintiffs have sued, and the Alberta courts have refused to give them any relief, dismissing the suit. The Alberta courts have done nothing. Apart from costs, there is no judgment on which to levy execution or conduct further proceedings...". Rothstein J went on to cite the observations of Sopinka J in *RJR MacDonald* that the Supreme Court, however, could "intervene against … its effects".

[9] See *Grant Thornton Ltd. v. Alberta Energy Regulator*, 2017 ABCA 278 at paras 8-11, 57 Alta LR (6th) 37.

[10] Compare *Calaheson v Gift Lake Metis Settlement*, 2016 ABCA 227 at paras 8-9, [2024] AJ No. 245 (QL) which recognized the difference between the jurisdiction of this Court and of the Supreme Court of Canada. In that case, the first instance Court of Queen's Bench judge vacated the election of three councilors, so there was an executory element (removal of the councilors) that, arguably, could be stayed.

[11] *Pacific Atlantic Pipeline*, 2024 ABCA 74 supra at footnote 2.

[12] As pointed out in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24, [2017] 1 SCR 824 an interlocutory injunction thus: "An interlocutory injunction is normally enforceable *until trial or some other determination of the action*. Interlocutory injunctions seek to ensure that the subject matter of the litigation will be "preserved" so that effective relief will be available when the case is ultimately heard on the merits …". In the case at bar, the injunction was, in effect, to indefinitely prevent resort to the line of credit pending an arbitration under the parties' agreement. The injunction would therefore essentially deny the respondent's right to exercise the relevant terms of the contract.

interplay of that stricter standard with contractual duties of good faith and honest performance.

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[13] Paragraph 17 says:

> The law regarding enjoining beneficiaries, as opposed to banks, is nascent and has not squarely been dealt with by the Supreme Court of Canada in order to provide consistent national guidance on the issue of international commercial importance. Without an injunction, the Supreme Court of Canada will not have the opportunity to consider the issue.

[14] The situation that I put to counsel for the applicants in this matter is that the three points that are put forward there in those paragraphs, and as ably outlined by counsel for the applicants before me, are essentially, to a certain extent, merged in a single thought. That single thought being that -- although the clause itself (the standby letter of credit provisions of the agreement) are not challenged for their language, and there is no suggestion this interpretation of them or they mean something different than they say[13] -- the effect of the exercise of that clause creates a miscarriage of justice and a prejudice and injustice in this situation[14].

[15] As I say, the single argument, sort of composed as an interlocking argument before this Court, has consisted of three points:

(a) what is the onus of proof for the injunction, namely either "strong *prima facie* case" or "serious question to be tried";
(b) is there a possibility of an argument of something else than fraud that can be used to justify an injunction against calling on the letter of credit; and
(c) the interplay of the aspect of good faith and honest performance of a contract in this regard. Those things are all essentially based on a single theme.

[16] The difficulty with the applicant's situation before me, it seems to me, is that that single theme is very much dependent upon the existence of fact findings which were not made in their favour in their case[15].

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[13] Justice Whitling devoted some of his reasons to the topic of contract formation, relying in particular on the reasoning of Rowe J in Rowe J. in *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 at paras 35-38, [2021] 1 SCR 868. This reasoning is not assailed before me or the Court earlier.

[14] As pointed out in *Equustek Solution*, 2017 SCC 34 at para 25: "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific."

[15] Justice Whitling had evidence before him related to factual controversies said to relate to honest performance element of good faith in relation to the respondent's drawdown on the letter of credit. First, as discussed at paras 13-16 of the decision of this Court at 2024 ABCA 74, Justice Whitling was satisfied that even assuming the respondent was exercising a discretion requiring good faith under *Wastech Services Ltd v Greater Vancouver Sewerage and*

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[17] Consequently, the determination of what it is that our Court decided, is not a decision with an executory element. In fact, neither was the decision of Mr. Justice Whitling. The decision to *refuse* an injunction was basically on the overall facts of the case.

[18] The standard -- although it is a particularly high standard according to the argument for the respondents -- the standard was not met either way[16]. In other words, that there simply was not an indication to satisfy, either that Court or this Court, that in fact there should be an injunction granted to the effect that was being sought in front of them.

[19] So, looking at it from that point of view, it seems to me that the argument that has been made by the respondent, that there is a very great unlikelihood on the part of the Supreme Court of Canada to see that the genuine legal questions of importance that are put forward really have any vitality on the record of this case[17].

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*Drainage District*, 2021 SCC 7 at para 88, [2021] 1 SCR 32, the exercise by the respondent was not unconnected to the purpose for which the discretion was granted, nor was it arbitrary or capricious. Second, as discussed at paras 18-23 of the decision of this Court, Justice Whitling was not satisfied there was a strong *prima facie* case that the respondent had misled the applicant about refraining from such exercise pending the arbitration, but rather he was satisfied "the evidence supports the occurrence of a misunderstanding induced by wishful thinking on the part of" the applicant. In other words, whatever the standard was, Justice Whitling's reasons show he was persuaded against the applicant on the facts.

[16] Even assuming, contrary to the decision of this Court in this case (which I agree with) that the standard for this injunction should be 'serious question to be tried', I have compared this to "reasonably arguable or has a reasonable prospect of success": *Dreco Energy Services Ltd v Wenzel Downhole Tools Ltd,* 2008 ABCA 434 at para 3, 446 AR 93. If one deploys the notion of "arguable merit", that latter concept was helpfully explained in relation to a grant of leave to appeal from an arbitration decision on the basis of alleged miscarriage of justice under s 31(2)(a) of the *Arbitration Act* of BC in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 74, [2014] 2 SCR 633 as follows: "In my opinion, the appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit. The arguable merit standard is often used to assess, on a preliminary basis, the merits of an appeal at the leave stage (see for example *Quick Auto Lease Inc. v. Nordin*, 2014 MBCA 32, 303 Man. R. (2d) 262, at para. 5; and *R. v. Fedossenko*, 2013 ABCA 164 (CanLII), at para. 7). "Arguable merit" is a well-known phrase whose meaning has been expressed in a variety of ways: "a reasonable prospect of success" (*Quick Auto Lease*, at para. 5; and *Enns v. Hansey*, 2013 MBCA 23 (CanLII), at para. 2); "some hope of success" and "sufficient merit" (R. v. Hubley, 2009 PECA 21, 289 Nfld. & P.E.I.R. 174, at para. 11); and "credible argument" (*R. v. Will*, 2013 SKCA 4, 405 Sask. R. 270, at para. 8). In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law. In order to decide whether the award should be set aside, a more thorough examination is necessary and that examination is appropriately conducted by the court hearing the appeal once leave is granted.

[17] The prospect of whether the Supreme Court of Canada would consider the matter to be of public and national importance is an element of the 'serious question' here: see *C.(A.) v Alberta*, 2021 ABCA 133 at para 11, [2021] AJ No 492 (QL) citing *Poole City Wide Towing and Recovery Service Ltd*., 2020 ABCA 400 at para 5, [2020] AJ No 400 (QL), and *Santoro v Bank of Montreal*, 2019 ABCA 423 at paras 19-20, [2019] AJ No 1464 (QL). Importantly, that Court would first look at whether the decision *of this* Court was foundationally wrong in how it characterized the decision of Justice Whitling.

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[20] Consequently, I am not persuaded that in fact the Supreme Court of Canada would regard this as being of that type. In any event, as I said before, we have to look at the context of what is likely to be done by the Supreme Court of Canada as based upon what this Court has decided on the case from last Thursday.

[21] So, for the purposes of section 65.1, as far as interpretation and *my jurisdiction* is concerned, I am satisfied that I do not have jurisdiction to grant the remedy which is being sought here today by the applicants. I do not read section 65.1 as being capable of interpretation or expansion to include both mandatory and prohibitive nature of an injunction which is being proposed here[18].

## III. Would a "Stay" Be Granted?

[22] If I am wrong that in fact an injunction is available under 65.1 of the *Supreme Court Act*, the question then is whether or not it should be granted. There are three elements of course that are standard with respect to injunctions and with respect to stays. I would make the point that they are somewhat different, however, and that there are different standards that apply to different types of injunctions as opposed to different types of stays[19]. There are anonymous injunctions. There are family law injunctions. There are financial injunctions. There are different kinds of things, and all of those can be considered somewhat varied from the content of a stay application.

[23] Nonetheless, the courts have long established a three part test, and the question then is for the first part of the three part test in the case we have here today is whether or not it is arguable that the Supreme Court of Canada would reverse this court in its decision in relation to the issues

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[18] Statutory construction underlies the applicant's submission. As noted, the Supreme Court of Canada has the power to 'stay' under this provision in the context of the necessity of complete plenary jurisdiction of that Court. In addition, s 97(2) of the Supreme Court Act provides that "The rules and orders may extend to any matter of procedure or otherwise not provided for by this Act, but for which it is found necessary to provide, in order to ensure the proper working of this Act and the better attainment of the objects thereof." Accordingly, as in *Baier,* Rothstein J was entitled to draw in the authority in Rule 62 of the *Supreme Court Rules* which reads "Any party against whom a judgment has been given, or an order made, by the Court or any other court, may make a motion to the Court for a stay of execution *or other relief against such judgment or order, and the Court may give such relief on the terms that may be appropriate.*" [Emphasis added]. By comparison, this Court has only the jurisdiction given by section 65.1 itself. A legal term like 'stay' would be taken to mean what it means at common law because Parliament did not say otherwise: see eg *Chandos Construction Ltd v Deloitte Restructuring Inc,,* 2020 SCC 25 at para 29, [2020] 3 SCR 3. Similarly, we can assume Parliament knows what an 'injunction' is and what differentiates it from a stay. It was observed in *Rumping v DPP*, [1964] AC 814 at 834 that "It is true that there are cases where it has been held that Parliament has legislated under a misapprehension of the existing law, but that can hardly be the case here." In this case, the mere similarity or analogy between the three-part test for injunctions and for stays does not mean that either concept is included in the other. If Parliament meant to convey both concepts it could have said so: compare *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para 53, [2016] 2 SCR 555.

[19] See *Canadian Broadcasting Corporation*, 2018 SCC 5, *supra* at footnote 3.

or any of those issues that are vital to the outcome, and reaching back down to in effect Justice Whitling via that means[20].

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[24] It is important to remember that an arguable case does not become, as Justice Whitling wisely pointed out, easier to meet as you go higher up in the scale. The Supreme Court of Canada pointed out in a totally different context in a family law case called *Barendregt* that the issue it is not supposed to get more complicated as it gets higher. It is supposed to get simpler and more narrow in focus[21]. The point anyway that I am attempting to make is that it does seem to me that the established law in this province in connection with the obligation level of proof you might say for the arguable case is that in *Veolia*[22] and in the decision of this Court and in the other cases that have been referred to. It is a enhanced merits standard.

[25] It is not an arguable case standard which might be sufficient in another context. And the reason, the rationale for an enhanced merits standard is obvious. That is that a lot of the financial commercial thinking that goes on in the world is very much dependent on the reliability and the sufficiency of things like letters of credit, especially irrevocable ones at that.

[26] The possibility of a collateral attack in effect on the validity of such a letter of credit because it turns out it is exercised under a bad motive, or it would be exercised in a manner which is considered to be lack of good faith or something, would be a point which I think that it would be important for the Supreme Court of Canada to deal with it at some stage, but not on this record it seems to me.

[27] Consequently, I think that the first step in the injunction test is not met by the applicants in this instance. In that respect, I guess I am agreeing with both courts that have spoken on this point

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[20] One example is *C(A) and F(J) v Alberta*, 2021 ABCA 133 at para 10 where Crighton JA said the three-part test in *RJR – McDonald* applied. She added at para 11 that the test for arguable case would consider if it is likely that the Supreme Court of Canada would find the matter of "sufficient public and national importance": citing *Poole City Wide Towing and Recovery Service Ltd*., 2020 ABCA 400 at para 5, [2020] AJ No 400 (QL), and *Santoro v Bank of Montreal*, 2019 ABCA 423 at paras 19-20, [2019] AJ No 1464 (QL).

[21] Referring to the offering of new evidence on appeal, *Barendregt v. Grebliunas*, 2022 SCC 22 at para 31 said the matters in issue between" the parties should "narrow rather than expand as [a] case proceeds up the appellate ladder": *Public School Boards' Assn. of Alberta v. Alberta (Attorney General),* 2000 SCC 2, [2000] 1 S.C.R. 44, at para 10".

[22] *Veolia Water Technologies, Inc. v. K+S Potash Canada General Partnership*, 2019 SKCA 25 at para 25-29. It also involves a fraud disentitling factor by the beneficiary to overcome the strong public policy for enforcement of the letter of credit: *Veolia*, at paras 30-44. The Court cited to *Bank of Nova Scotia v Angelica-Whitewear Ltd*, [1987] 1 SCR 59 at 84. Similarly, this Court at 2024 ABCA 74 said at para 7 that "The stricter standard ensures courts do not too readily interfere with the operation of letters of credit and undermine their utility and efficacy. The characteristic that gives letters of credit international commercial utility and efficacy is that they operate independently of disputes about performance of the underlying contract. They are intended to provide beneficiaries a "ready means of obtaining prompt payment"." In the case of ***Eurobank Ergasias***, 2024 SCC 11 at paras 5-13, and paras 74-87, the Court referred to the "fraud exception" and its rationale as an autonomous and independent obligation and to the authority of *Angelica-Whitewear.*

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below. Bearing in mind that the three steps are conjunctive, that should be enough to end it also right there, but I will deal with the question of irreparable harm.

[28] It does appear that this has a significant risk for the applicants if, in fact, this call takes place because it is $117,000,000 and that is not chump change. But on the other hand, this is, according to the respondents -- and I am persuaded to think this way now -- this was something that the applicants agreed to. This was a contractual term which is not being in a sense illegally exercised under the terms of the contract.

[29] It is objected to by the applicants on the basis that it is an unfair exercise of this jurisdiction, but even with the argument that was put forward for the applicants there was not intended to be a permanent evisceration of the letters of credit. It was intended to be a ‘standstill’ for a period of time. Half of that period of time has now been served, you might say, by the respondents[23]. It strikes me that the other aspects of the irreparable harm as to reputational financial implications for the applicants are speculative because, in fact, the applicants appear to have done just fine during the time that this form of effective injunction has been in place.

[30] Consequently, I am not persuaded that, in fact, the risks that are alleged by the applicants are at that level as to justify the grant of the injunction.

[31] As far as the questions of whether there is an irreparable harm by the rendering of a legal argument as to the test applicable to injunctions to becoming nugatory, I am not persuaded it would become nugatory[24].

[32] The financial implications of the more rigorous test would perhaps be more complicated for the applicants, but the appeal would not be nugatory because the Supreme Court of Canada could very easily say, ‘no, the injunction should have been granted on these conditions, and it wasn’t, and therefore there should be some compensation for that’. So, I do not see a nugatory argument in their situation. Accordingly, I do not accept that there is irreparable harm in either the financial side or the other ‘legal nugatory side’ if you know what I mean.

[33] And as far as balance of convenience is concerned, the discussion during the hearing with counsel exposed, to me, anyways, the idea that if anyone has been you might say in a kind of dilemma that it’s been the respondents. The applicants have been very successful overall in terms

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[23] The arbitration was scheduled to commence in November of 2024. The drawdown on the letter of credit was first called on by letter of October 16, 2023. The drawdown was stopped in the Court of King’s Bench, ultimately to January 30, 2024, by Justice Whitling. It was then stopped by this Court up to its decision on February 29, 2024, and thereafter, I believe by agreement, until my decision on March 5, 2024.

[24] This Court has decided that to render an argument nugatory can be considered irreparable harm: *Prosper Petroleum Ltd v Albert*a, 2020 ABCA 85 at para 23, 1 Alta LR (7th) 1.

of seeking this type of relief, even from reluctant judges from time to time. The respondents, on the other hand, have had to wait.

[34] Now, it's true they're not suffering irreparable harm either. They're a big company, and they can take it, but you know, they have legitimate concerns in the sense that their ability to exercise the contract that they agreed to, has been forestalled for a period of time[25]. And so, from the balance of convenience point of view, it seems to me that they are on the losing end or have been for a while now and that the applicants have been doing all right.

## IV. Conclusion

[35] So, in the end, I am not satisfied that I have jurisdiction to grant the relief that is sought. I am not satisfied that the interpretation of section 65.1 of the *Supreme Court Act* goes as has been proposed for the applicants.

[36] And assuming I am wrong in relations to that -- I am not satisfied that any of the three elements of the injunction test that would apply, properly apply, to a context like this have been met by the applicants. In the result, I dismiss the application.

[37] Dealing then with the question of whether I should grant some sort of an interim form of relief, it's my understanding that in fact it takes the bank approximately three days to act upon the drawdown. I could be wrong about that. So, in a sense there is a bit of a delay built into this situation. But I am not of the opinion that, having decided I do not have jurisdiction to do the matter as a 'big application' that I should be doing it as a 'little one'. The application to grant some sort of interim relief or suspension or something is, I don't believe, in fact even available to me. So, that application is also dismissed.

Application heard on March 5, 2024

Reasons filed at Edmonton, Alberta
this 20th day of June, 2024

Watson J.A.

[25] This is the very thing that *Veolia* and *Eurobank Ergasias* and our Court were talking about in relation to sending an undesirable message to the commercial world.

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**Appearances:**

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