# In the Court of Appeal of Alberta

**Citation: Sivitilli v PesoRama Inc, 2025 ABCA 56**

**Date:** 20250219
**Docket:** 2401-0034AC
**Registry:** Calgary



**Between:**

**Edward Sivitilli**

Respondent

- and -

**PesoRama Inc.**

Appellant

---

**The Court:**

**The Honourable Justice Michelle Crighton**
**The Honourable Justice William T. de Wit**
**The Honourable Justice Jane Fagnan**

---

**Memorandum of Judgment**

Appeal from the Order by
The Honourable Justice R. Neufeld
Dated the 19th day of January, 2024
Filed the 19th day of April, 2024
(Docket: 2101-13740; 2201-07207)

## Memorandum of Judgment

**The Court:**

### Introduction

[1] The respondent, Mr. Sivitilli, the former CEO of PesoRama, brought an application to appoint an arbitrator while the appellant, PesoRama Inc., brought a cross application to enjoin arbitration. PesoRama appeals the chamber justice's decision that Mr. Sivitilli could have his wrongful dismissal issues dealt with by arbitration. PesoRama disputes whether the agreement to arbitrate was in effect and argues that Mr. Sivitilli's statement of claim, which included an oppression action, precluded him from arbitration as that would duplicate the ongoing litigation between the parties. PesoRama also argues the chambers justice erred in not applying section 6(c) of the *Arbitration Act*, RSA 2000, c A-43, to find that such duplication would be manifestly unfair to PesoRama.

### Background Facts

[2] Mr. Sivitilli was the CEO and director of PesoRama Inc. He was dismissed as CEO August 16, 2021. There was an employment contract dated September 1, 2018, which was amended June 18, 2020, and approved by the Board of Directors of PesoRama August 28, 2020. That employment contract included an arbitration clause for dealing with disputes arising from Mr. Sivitilli's employment with PesoRama. After being terminated, Mr. Sivitilli retained counsel to pursue compensation and let it be known that he intended to pursue arbitration if no resolution was reached.

[3] On November 2, 2021, Mr. Sivitilli filed a statement of claim in the form of an oppression action under the *Alberta Business Corporations Act*, RSA 2000, c B-9. On December 8, 2021, Mr. Sivitilli contacted PesoRama to propose discontinuing the oppression action. On December 13, 2021, PesoRama filed a statement of defense and counterclaim. On January 5, 2022, Mr. Sivitilli filed a Notice of Arbitration for his employment claims. On January 20, 2022, PesoRama filed an application to stay the arbitration and continue the litigation in the courts.

[4] On November 30, 2021, Mr. Sivitilli brought a notice of motion seeking to enjoin PesoRama's annual general meeting but on December 1, 2021, that application was dismissed. The chambers justice was aware of this injunction application and specifically stated that he agreed with the injunction decision which commented that the oppression action appeared to be intended to leverage a settlement of Mr. Sivitilli's claim for wrongful termination.

[5] In addition to asking the chambers justice to order that his wrongful termination case proceed to arbitration, Mr. Sivitilli also applied to discontinue his statement of claim that included

the oppression action. Mr. Sivitilli argued for a discontinuance because of his lack of resources and the appellant's tactics to run up the cost of litigation which would frustrate Mr. Sivitilli's pursuit of compensation for wrongful termination.



**Chambers Justice's Decision**

[6] The chambers justice held the respondent was entitled to discontinue pursuant to rule 4.36 of the *Rules of Court* which provides that a plaintiff may discontinue all or any part of an action against one or more of the defendants before a trial date is set. Because the action was in part an oppression claim, the chambers justice also considered leave to discontinue as required by section 242(2) of the *Canadian Business Corporations Act* (CBCA). The chambers justice held that when viewed from the CBCA perspective, there was no reason to refuse leave to discontinue as there would be neither benefit nor advantage to other PesoRama stakeholders.

[7] The chambers justice began his oral decision by referring to case law for the principle that the *Rules of Court* should be interpreted to facilitate access to justice and that delays coupled with the high cost of litigation create barriers to justice. He further stated that "an important mechanism for improving access to justice, is alternate dispute resolution." (TT/90/5-91/23) In *Telus Communications Inc v Wellman*, 2019 SCC 19 at paras 48-55, the Supreme Court held that there should be limited court intervention in arbitration matters, and that "courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting".

[8] The main issue in front of the chambers justice was whether the impugned agreement was operative. PesoRama took the position that the agreement was not signed or approved by PesoRama's Board of Directors and therefore not operative and further, Mr. Sivitilli was not an employee of PesoRama, but an independent contractor. The chambers justice, after reviewing the impugned agreement, stated that it contained provisions that were typical of an employment contract and quoted paragraph 23.1 which stated that any dispute between the parties regarding the construction, effect, rates, duties, liabilities, or any other matter in any way connected with or arising out of the subject matter of the agreement was to be submitted for determination to a single arbitrator.

[9] The chambers justice found that the affidavit evidence was not clear about the circumstances surrounding the impugned agreement but PesoRama's letter of termination of Mr. Sivitilli stated that it terminated his "employment" for cause. The chambers justice also pointed to the termination letter which referred to the impugned agreement to remind Mr. Sivitilli he had contractual obligations regarding confidentiality and noncompetition. The chambers justice recognized that PesoRama was resiling from that position but found there was some evidence that the impugned agreement was enforceable. (TT 96/34-39, 97/4-25)

[10] The chambers justice held that whether the impugned agreement was operative was a question of mixed fact and law and as such, it should be decided by the arbitrator at first instance,

citing *Dell Computer v Union des consommateurs*, 2007 SCC 34, and *EPCOR Power LP v Petrobank Energy and Resources Ltd*, 2010 ABCA 378.

[11] The appellant was refused leave to appeal the chambers justice's decision dismissing the application to declare the employment agreement invalid or ceasing to exist: *Sivitilli v PesoRama Inc*, 2024 ABCA 249. No permission was required to appeal the decision regarding section 6(c) of the *Arbitration Act*.

[12] The chambers justice did not refer to section 6(c), but considered PesoRama's argument that arbitration would be duplicative and unnecessary and stated:

> I also reject the argument that referring the dispute to arbitration would be duplicative and unnecessary. If PesoRama succeeds in persuading the arbitrator that the impugned agreement is not operative, arbitration of the dispute on the merits will not proceed and the parties can then pursue other remedies. If the arbitrator decides that the impugned agreement is operative, then Mr. Sivitilli's claim and any associated claim by PesoRama can be determined in that forum, if it falls within the scope of the agreement. (TT 97/34-39)

**Issue**

[13] The sole issue is whether the chambers justice erred in failing to consider and apply section 6(c) of the *Arbitration Act*.

**Standard of Review**

[14] Whether a matter should be referred to arbitration is a discretionary decision with a highly deferential standard of review. "Absent a material error in principle, a significant misapprehension or disregard of the evidence or a decision which is clearly wrong, an appellate court will not interfere with an exercise of discretion": *Epcor Power LP v Petrobank Energy & Resources Ltd*, 2010 ABCA 378 at para 14. Where an exercise of discretion involves points of law, the standard of review of those points of law is correctness.

**Analysis**

[15] The appellant, PesoRama, argues it was manifestly unfair to permit the arbitration because it is being forced to defend the same claims in two forums and the respondent, in resorting to the courts, had repudiated his alleged right to arbitrate. The appellant argues that the respondent's statement of claim was not an oppression action but a wrongful dismissal action which duplicates the wrongful dismissal issues that are to proceed to arbitration. It further argues it was an error of law and manifestly unfair for the chambers justice not to consider section 6(c) of the *Arbitration Act* referred to in its written materials and oral submissions.

[16] Section 6(c) of the *Arbitration Act* states in part:

> 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



*PesoRama's Submissions to the Chambers Justice Regarding Section 6(c)*

[17] In their written submissions to the chambers justice, the appellant argued in the alternative, it was just and appropriate for the court to stay and enjoin the arbitration pursuant to sections 6(c) and 7 of the *Arbitration Act*. In those written submissions, section 6 was reproduced and subsection (c) was highlighted. The appellant also made oral submissions on section 6(c) before the chambers justice.

*New Era v Balance Bar*

[18] The appellant relies on *New Era Nutrition Inc. v Balance Bar Company*, 2004 ABCA 280, which held that section 6(c) of the *Arbitration Act* allowed a court to stay an arbitration where one party brought both an arbitration and a court proceeding and there were overlapping matters that could not reasonably be divided. This Court in *New Era* reasoned that section 7 of the *Arbitration Act* was designed to protect against the dangers inherent in duplicative proceedings by allowing for a stay of the court proceedings and section 6(c) could also be used to stay arbitrations to protect against duplicitous proceedings (para 43).

*Telus Communications v Wellman*

[19] Much of the reasoning in *New Era* has been overtaken by the subsequent Supreme Court of Canada decision in *Telus Communications Inc v Wellman*, cited by the respondent.

[20] In *Wellman* the Supreme Court interpreted the Ontario *Arbitration Act 1991*, SO 1991, c 17, which is virtually identical to the Alberta *Arbitration Act*. The Supreme Court described the shift to a modern approach to arbitration, noting the statutory restrictions imposed on courts to intervene in arbitrations "signals that courts are generally to take a 'hands off' approach to matters governed by the *Arbitration Act*". The Court further explained, "[t]his is 'in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts' (*Inforica Inc. v. CGI Information Systems & Management Consultants Inc*., 2009 ONCA 642, 97 O.R. (3d) 161, at para. 14)" (para 56). This approach has been recently applied by this Court in *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2023 ABCA 343.

[21] Section 7(2) of the *Arbitration Act*, in both Ontario and Alberta, allows for the staying of a court proceeding, and for a court to refuse to stay a court proceeding in specific circumstances, none of which are the duplication of issues in an arbitration and a court proceeding. Section 7(4) only allows the court to order the discontinuance of an arbitration or alternatively, that the arbitration not proceed where the circumstances listed in section 7(2) apply. The majority of the Supreme Court in *Wellman* held that section 7(5) "does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement" (para 8).

[22] The majority further explained why the legislation did not permit stays of arbitrations at paragraphs 75-76:

> Furthermore, while I agree that s. 7(5) should be read in the context of the statutory scheme as a whole and that s. 6-3 permits the court to intervene "[t]o prevent unequal or unfair treatment of parties to arbitration agreements", I also note that s. 6 allows such intervention only "in accordance with this Act". Therefore, even though Mr. Wellman's interpretation of s. 7(5) would ostensibly give the court greater scope to intervene in an effort to prevent perceived unequal or unfair treatment of parties to arbitration agreements, the words "in accordance with this Act" indicate that s. 6 was not intended to override or change the meaning of other sections of the *Arbitration Ac*t.
>
> More fundamentally, Mr. Wellman's interpretation sits at odds with the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement. If accepted, Mr. Wellman's interpretation would reduce the degree of certainty and predictability associated with arbitration agreements and permit persons who are party to an arbitration agreement to "piggyback" onto the claims of others. Ultimately, this would reduce confidence in the enforcement of arbitration agreements and potentially discourage parties from using arbitration as an efficient, cost-effective means of resolving disputes. Clearly, this was not what the legislature had in mind when it passed the *Arbitration Act*.

[23] In *Wellman*, the majority of the Supreme Court specifically stated that "a multiplicity of proceedings" would not be a reason to stay proceedings unless the legislature amended the *Arbitration Act* to allow such a stay (paras 89 and 90).

[24] The circumstances enumerated in section 7(2) are not present in this case. Section 6(c) does not allow for a court to stay arbitration proceedings because it may result in a duplication or multiplicity of proceedings. In any event, as discussed below, we need not determine if *New Era* has been overturned as the chambers justice found the proceedings were not duplicative.

*Repudiation of the Right to Arbitrate*

[25] On appeal, the appellant cites *RH20 North America Inc v Bergmann*, 2024 ONCA 445, for the proposition that once a party to an arbitration agreement actively pursues litigation, rather than an arbitration, the party has waived or abandoned the right to arbitrate. They argue that in this case the respondent's filing of a statement of claim and applications pursuant to that statement of claim resulted in the abandonment of the right to arbitrate. As well, they argue allowing the arbitration to proceed would result in unfairness for the purposes of section 6(c) of the *Arbitration Act*.

[26] In *RH20*, the parties had an agreement that stated all disputes arising in connection with the contract would be "decided in accordance with the rules of the London Court of International Arbitration by exclusion of taking recourse to the courts of law": *RH20* at para 29. In *RH20* the party seeking to proceed by arbitration was relying of the *International Commercial Arbitration Act, 2017*, SO 2017, c 2 Sch 5 (ICAA), and article 8 of the Model Law on International Commercial Arbitration. The Ontario Court of Appeal recognized certain conceptual elements which include the negative obligations of parties to an arbitration agreement not to seek to resolve disputes that are subject to an arbitration agreement in domestic courts (para 42).

[27] The court in *RH20* also referred to *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41, where the then British Columbia *Arbitration Act*, RSBC 1996, c 55, provided that a party to an arbitration agreement could seek a stay of legal proceedings "in respect of a matter agreed to be submitted to arbitration . . . before . . . taking any other step in the proceedings". No equivalent section existed in the Ontario (or Alberta) legislation, however, the Ontario Court of Appeal held that even in the absence of statutory language permitting a stay of international arbitration before a "step" had been taken in domestic courts, a party could obtain a stay on the basis of a breach of the negative obligation not to litigate disputes subject to arbitration (paras 36-54). The Court noted that "negative obligation is also a common conceptual element shared by most provincial domestic arbitration legislation and provincial legislation that has adopted the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and Model Law for international commercial arbitration agreement disputes (citations omitted)": para 42.

[28] Breach of the negative obligation not to proceed to court where there is an arbitration agreement requires the arbitrable dispute to be the same dispute as that which was brought to court. This is key. In *RH20* the Court noted the Model Law and the ICAA provide for a stay with respect to "the matters to which the arbitration relates" and cited texts and articles on international arbitration which described the application of the obligations of arbitration to circumstances where the same dispute to be determined by arbitration are sought to be dealt with in the courts.

[29] In Alberta, section 7(5) of the *Arbitration Act* provides that a court "may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement" but may allow the proceeding to continue "with respect to other matters" if it finds "the agreement deals with only some of the matters in dispute" and "it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters". The section recognizes that not every matter in dispute may be covered by an arbitration agreement: see *New Era* at para 37.

[30] The *RH20* decision was rendered after the chambers justice's decision in this appeal. He therefore did not address this argument of breach of the negative obligation. However, as discussed below, the chambers justice's finding that the statement of claim and notice to arbitrate were not duplicative proceedings, in effect, precludes a finding that there was no breach of the negative obligation and no waiver or abandonment of the right to arbitrate because the respondent did not bring a claim in the courts which was the same matter as the dispute subject to the arbitration provision in his employment contract.

*Not Duplicative Proceedings*

[31] Before the chambers justice in this case, the parties argued whether the statement of claim and notice to arbitrate involved the same issues. The appellant relied on the respondent's pleadings in his statement of claim which include the allegations relating to his termination. The appellant argued before the chambers justice and on appeal that the style of cause and remedies do not define the issue. The pleadings make the respondent's termination an issue, which would be the same issue in an arbitration. The respondent argued that his statement of claim alleged facts relating to his termination in the context of his broader allegations that the appellant's actions were in furtherance of activities oppressive to the corporation and shareholders and as such are issues outside his employment agreement and irrelevant to whether he was wrongfully dismissed. He argued that none of the remedies sought in his statement of claim were connected to an action for wrongful dismissal.

[32] Whether the same issues were being dealt with in the statement of claim and the notice of arbitration and whether there would be duplication was argued before the chambers justice. He clearly rejected the argument that the statement of claim and arbitration engaged disputes over the same issue which would make the arbitration duplicative and unnecessary. He recognized that the oppression action may have been brought primarily to leverage the wrongful dismissal claim but nevertheless, found that the statement of claim related primarily to the claim of oppression, which deals with the respondent's position as a shareholder, while the notice of arbitration referred to the employment agreement between the respondent and the appellant.

[33] The chambers justice found in effect that it would be reasonable to separate the matters in dispute between the statement of claim and the notice to arbitrate as he determined that the arbitration would not be duplicative. The appellant has not established that the chambers justice erred in his consideration of the two claims. His conclusion that arbitration was available in the circumstances is owed deference.

**[34]** As a result, even though the chambers justice did not expressly refer to section 6(c) of the *Arbitration Act*, intervention by this Court is not warranted. The record supports the chambers justice's decision not to intervene given his finding the issues in the two proceedings are not the same.

**Conclusion**

[35] We dismiss this appeal.

Appeal heard on February 10, 2025

Memorandum filed at Calgary, Alberta
this 19th day of February, 2025

Authorized to sign for: Crighton J.A.

de Wit J.A.

Authorized to sign for: Fagnan J.A.

**Appearances:**

D. Buntsma
B. Markusoff
for the Respondent

M.D. Mysak
A.T. Yowart
for the Appellant