IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Harder v. InCor Holdings Limited,*
2024 BCSC 1789

Date: 20240809
Docket: S237204
Registry: Vancouver

Between:

**Lorne Harder, Springhill Investments Ltd.
and Harder Investments Ltd.**

Plaintiffs

And:

**InCor Holdings Limited, George Molyviatis, Jocelyn Bennett,
Pangaea Resources Limited, InCor Energy Minerals Limited,
InCor LeadFX Limited Partnership, LeadFX Inc., InCor Holdings PLC
and InCor Services Limited**

Defendants

Before: The Honourable Justice Morley

Oral Reasons for Judgment

Stay under
International Commercial Arbitration Act

Counsel for the Plaintiffs appearing by videoconference:	P. J. Sullivan S. R. Shuchat
Counsel for the Defendants appearing by videoconference:	D. R. Shouldice
Place and Date of Hearing:	Vancouver, B.C. August 7 - 8, 2024
Place and Date of Judgment:	Vancouver, B.C. August 9, 2024

[1] **THE COURT:** These are oral reasons for decision in a chambers application. If a transcript is ordered, I reserve the right to edit it for clarity, errors and to add references to authorities or evidence. The result will not change, nor will the basis for it.

I. OVERVIEW

[2] When parties agree to arbitrate their disputes, British Columbia law makes that agreement binding at the option of either party, but does not deprive civil courts of jurisdiction altogether. If a claimant commences the arbitration proceeding, the responding party has to defend itself in that forum. If, on the other hand, the claimant brings a civil action, the responding party has a right to demand a stay of that action and proceed to arbitration instead. At the same time, because arbitration is a *consensual* dispute resolution forum, if the parties prefer, and the court otherwise has jurisdiction, they can ignore their arbitration agreement and get their dispute resolved by the ordinary courts.

[3] This leads to the question of *when* it will be determined which forum the parties have chosen. Unnecessary expense and other forms of prejudice will arise if the parties do not know which forum will decide their dispute or if the forum can be altered at whim. Because of this, British Columbia domestic and international commercial arbitration law sets a trigger after which a responding party with a right to arbitrate the dispute loses that right. This is when that party submits to the Court its “first statement on the substance of the dispute.”

[4] In the case of international arbitration, this is set out in s. 8 of the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 [*Act*], which says the following:

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

[5] This is a bright line rule. Section 8(2) of the *Act* provides that once the prerequisites for an application under s. 8(1) are satisfied, the stay is mandatory.

The Court has no discretion. But, if the prerequisites, including bringing the stay application *before* submitting to the Court the "party's first statement on the substance of the dispute" are not satisfied, no statutory stay is available.

[6] The dispute that gives rise to the stay application before me is between a British Columbia investor, Lorne Harder, and his two holding companies (the "Harder Group")[1], on the one hand, and George Molyviatis, Jocelyn Bennett, and two corporations the Harder Group had invested in at Mr. Molyviatis' and Ms. Bennett's invitation (the "Applicants"), on the other.[2]

[7] On the substance, the Harder Group say they made their investments as a result of what they characterize as overt or implied misrepresentations, either fraudulent or negligent. They ask for damages including loss on capital and return on investment. The Applicants' substantive position is that the Harder Group got exactly the equity stakes they bargained for, that they knew they were making risky and illiquid investments, and deny any misrepresentations.

[8] The question I have to decide today, though, is not the merits of this dispute but whether those merits should be decided by the British Columbia Supreme Court, where the Harder Group chose to pursue their claim, or by arbitrators in London, as the Applicants now say they prefer.

[9] There is no doubt that all of the plaintiffs' Equity Investments were made pursuant to agreements that included an arbitration clause. The arbitration clauses are all in essentially identical language: they required disputes or claims that arise out of or in connection with those agreements to be resolved by arbitration under the law of England and Wales. The only issue is whether the Applicants have submitted

[1] Mr. Harder's holding companies are Springhill Investments Ltd. ("Springhill") and Harder Investments Ltd. ("HIL"). In these oral reasons, I refer both to the "plaintiffs" and the "Harder Group": these are equivalent.
[2] InCor Holdings Limited ("IHL") and InCor Energy Minerals Limited ("IEML") were the entities in which the Equity Investments were made (collectively, the "Corporate Applicants"). The purchase of shares and partnership units in the Corporate Applicants will be referred to as the "Equity Investments".

to the Court their “first statement on the substance of the dispute” in which case they have lost their right to have the decision arbitrated.

[10] There are three steps, taken by the Applicants in this action before they sought a stay, that the Harder Group alleges disqualifies them from now obtaining one:

a) The first two, which I will consider together, are affidavits filed by Ms. Bennett, first on October 27, 2023, and second on November 2, 2023. Both affidavits were filed in response to a *Mareva* injunction application by the Harder Group. The first affidavit was in support of an adjournment of the *Mareva* application and the second was in support of the defendants' response to that application. It is common ground that Ms. Bennett's affidavits set out her evidence about the Equity Investments, what was said between the parties and what each party understood. However, it is disputed as to whether they would disqualify a stay application within the meaning of s. 8(1) of the *Act*.

b) The third allegedly disqualifying step raises different issues and I will analyze it separately. On November 3, 2023, all defendants, including the Applicants here, filed a response to civil claim, which has subsequently been amended (the “RTCC”). It is common ground and undeniable that the RTCC denies allegations relating to the Equity Investments, sets out the defendants' versions of the facts relating to those investments, makes legal arguments as to why there were no misrepresentations, fraudulent or negligent, and asks for dismissal of the claim with costs, clearly including the claims with respect to the Equity Investments.

[11] For reasons I set out in more length, I conclude the following:

a) Ms. Bennett's affidavits in response to the *Mareva* injunctions were *not* "statements on the substance of the dispute" as that term is used in s. 8(1) of the *Act*. While they addressed the underlying merits in some sense, they did so primarily in response to the Harder Group's assertion that they had a strong *prima facie* case as part of satisfying the *Mareva* test. They were thus not really a statement on the substance of the dispute, but a response to "an interim measure of protection" as referred to in s. 9 of the *Act*. Such responses do not disentitle parties to their negotiated right to arbitrate.

b) By contrast, the RTCC *was* a "statement on the substance of the dispute" within the meaning of s. 8(1) of the *Act.* Crucially, it went beyond asserting the dispute was arbitrable and instead responded to the facts, legal theory and remedies sought in relation to the substantive dispute. There is no evidence its purpose was simply to respond to the *Mareva* application, but even if there were, filing it disqualifies the Applicants from subsequently seeking a statutory stay.

II. BACKGROUND

[12] The background to this dispute is set out at length by Justice Milman in his analysis of the *Mareva* injunction indexed at 2023 BCSC 2021, as upheld by the Court of Appeal indexed at 2024 BCCA 286. I note the evidence before Justice Milman was precisely the same as that before me.

A. The Harder Group's Equity Investments

[13] Mr. Harder was introduced to Mr. Molyviatis in May 2019 as they were both investors in a mining exploration company, Cascadero Copper Corporation. Mr. Harder's sister, Judith Harder, had been the CEO of Cascadero until her death, when her husband and Mr. Harder's brother-in-law, William McWilliam, succeeded to

that position. Mr. Harder did not approve of Mr. McWilliam's leadership and came to know Mr. Molyviatis in that context.

[14] Mr. Harder was impressed by Mr. Molyviatis, who introduced him to Ms. Bennett. He soon expressed interest in investing in projects with them. The first investment was into IHL, which Ms. Bennett described as a “private venture capital funding and investment group incorporated under British law”. IHL primarily invests in mining ventures and companies.

[15] IEML is a New Zealand limited partnership. Its limited partners include IHL, Ms. Bennett, Mr. Molyviatis, Mr. Harder and other investors. It holds shares in another defendant (not one of the applicants for a stay under the *Act*), LeadFX Inc. (“LeadFX”), a Canadian company that has an interest in a lead mine in Western Australia.

[16] In October 2019, Springhill, represented by Mr. Harder, entered in a Framework Agreement with IHL, IEML, Ms. Bennett and Mr. Molyviatis. The first transaction provided for in the Framework Agreement was Springhill's purchase of common shares in IHL for $3.5 million CDN. As a result of this transaction, Springhill gained a 12.3% interest in IHL. The second transaction was a purchase of partnership units in IEML for $1.5 million CDN.

[17] The Framework Agreement included a "Governing Law and Jurisdiction" clause, which I set out as follows:

> This Framework Agreement (and any other related documents which are not expressed to be governed by another law) and any non-contractual obligations arising out of or in connection with it (including any non-contractual obligations arising out of the negotiation of the transactions contemplated by this Framework Agreement) are governed by and shall be construed in accordance with the laws of England and Wales.
>
> The Parties irrevocably agree that any dispute or claim that arises out of or in connection with the Framework Agreement including a dispute relating to any non-contractual obligation arising out of or in connection with either this Agreement or the negotiation of the transactions contemplated by this Framework Agreement shall be referred to and finally resolved by arbitration under the *LCIA* [London Court of International Arbitration] Rules, which Rules are deemed to be incorporated by reference into this Clause. The number of

> arbitrators shall be three (3). The seat of the arbitration shall be London and the language to be used in the arbitral proceedings shall be English.

[18] On March 27, 2020, Springhill entered into a sale agreement with IHL to purchase a further two million partnership units in IEML for $2 million CDN. The March 2020 sale agreement had an arbitration clause materially identical to the one in the Framework Agreement.

[19] The developments in the relationship between the parties after the Equity Investments that led up to the litigation are set out in Justice Milman's reasons at paras. 24–50, and by the Court of Appeal at paras. 6–12. In broad strokes, the Harder Group made a series of loans at the request of Mr. Molyviatis and Ms. Bennett beginning in early 2021. In the spring of 2022, Mr. Harder began to make demand on these loans. The repayment of the loans, as opposed to the Equity Investments, is not before me on this application, since there are no arbitration agreements with respect to them.

[20] As stated by the Court of Appeal at para. 12, “From then until October 2023, when the plaintiffs commenced their action, [Mr. Harder's] requests for repayment, or at least progress reports, were generally met with silence, although he did receive two payments of $1 million each later in 2022.” The relationship definitively broke down in 2023, leading to this action.

B. The Original Notice of Civil Claim

[21] The original notice of civil claim in this action was filed on October 24, 2023. Whether and when the applicants have made their “first statement on the substance of the dispute”, takes its colour from what the plaintiffs pleaded. In this regard, I will address specifically what the notice of civil claim says about the Equity Investments and the negotiations and representations made around them.

[22] At paras. 18–20 of the Statement of Facts in the original notice of civil claim, the plaintiffs plead the following:

> 18. In 2019, Harder had meetings with Bennett and Molyviatis who described the business of InCor Holdings [i.e. IHL] as:
>
> (a) investing into low value companies in the mineral and gold mining industry and building up those companies to create profit;
>
> (b) currently engaged and becoming further engaged in numerous mineral and gold mining projects which were promising; and
>
> (c) heavily involved and interested in LeadFX which was guaranteed or highly expected to create profit.
>
> 19. Prior to advancing any funds or investments with Bennett, Molyviatis, or any of the companies as described below, Harder advised, and Bennett and Molyviatis were aware, that Harder had:
>
> (a) limited investment experience generally;
>
> (b) limited investment experience in the mining industry; and
>
> (c) Mr. Harder was relying on Bennett and Molyviatis regarding the legal status of the corporate vehicles, the business of the companies, and the nature and reliability of the investments.
>
> 20. In or around September 2019, Harder began negotiating with Bennett and Molyviatis regarding the terms of its notes and investments.

[23] The alleged material facts related specifically to the Equity Investments are set out at paras. 60–77. The core of the allegations is that certain false “Investment Representations” were made in October 2019 and that other facts that should have been disclosed were not. “Investment Representations” is a defined term in the notice of civil claim. It includes alleged representations by the Applicants to Mr. Harder that:

> a) IHL was directly investing in LeadFX;
>
> b) the equity injection from Springhill would be used for the purchase of increasing the ownership in LeadFX;

c) IEML was, or was going to be, the general partner in InCor LeadFX LP, that it held shares in LeadFX and held partnership rights in trust for the benefit of Ms. Bennett and Mr. Molyviatis;

d) the strategy of IEML was to fund LeadFX in the short term, and its mine would be open in two years; i.e. by the fall of 2021.

[24] The notice of civil claim alleges that the Equity Investments in October 2019 and March 2020 were in reliance on these “Investment Representations” and that the “Investment Representations” were not true.

[25] The notice of civil claim also claims that there was a warranty that no documents or material information were concealed at the time of these investments and alleges that there were allegations of fraud, misappropriation and of financial and securities misconduct against Ms. Bennett and Mr. Molyviatis that the defendants knew about and did not disclose, and that these were material.

[26] In para. 82 of the notice of civil claim there is a list of “Additional Misrepresentations” from 2019 to 2023, alleged to be either fraudulent or negligent. It says generically that the plaintiffs relied on them. This implies, at least in part, that these were relied on in making the Equity Investments.

C. The *Mareva* Injunction

[27] One day after filing the notice of civil claim on October 24, 2023, the plaintiffs filed a notice of application for what is commonly referred to a “worldwide *Mareva* injunction”. There were two affidavits in support of the application. The one before me is the Affidavit #1 of Mr. Harder.

[28] Mr. Harder’s affidavit is important for context in determining whether Ms. Bennett's affidavits were a “statement on the substance of the dispute”, and what was in the *Mareva* material she was responding to. And here I note that one of the elements an applicant for a *Mareva* injunction has to establish is a “strong *prima facie* case.”

[29] Without reviewing Mr. Harder's affidavit in support of the *Mareva* injunction in detail, it is fair to note that it sets out *his* evidence of what representations were made to him by Mr. Molyviatis and Ms. Bennett, including in relation to the Equity Investments. It also sets out his evidence as to his reliance on these representations and as to why he says these were false.

[30] Specifically, Mr. Harder deposed as to representations made to him about Mr. Molyviatis' net worth and about both Mr. Molyviatis' and Ms. Bennett's past investment experience. He also deposes to representations made about the corporate structure and interests in IEML and IHL, the expectations of profitability of their assets. He provided evidence about the amount of his Equity Investments in IHL and IEML. He says he understood IHL was directly or indirectly invested in LeadFX, that this was a major part of his motivation to invest in IHL, and that "it was represented to me by Molyviatis and/or Bennett that the strategy was to fund LeadFX in the short term, and the [Australian] mine would be open in two years."

[31] Mr. Harder also deposed that he expected the allegations of fraud would have been disclosed to him. He says he would not have invested with Mr. Molyviatis or Ms. Bennett had they done so.

[32] It is clear to me that the immediate purpose of this part of the affidavit was to establish a "strong *prima facie* case" in relation to the test for a *Mareva* injunction, specifically including in relation to the Equity Investments.

D. Bennett Affidavits

[33] The *Mareva* injunction was originally set to be heard on short leave for October 27, 2023 but was adjourned by consent.

[34] I think I can summarily reject the view that the consent adjournment, as such, could be a "statement on the substance of dispute" without lengthy analysis. Adjourning matters, including on terms, is inevitably without prejudice to positions on the merits. A consent adjournment might have been, in the language of the older versions of the *Act* and of its domestic arbitration equivalent, a "step", but, as I will

discuss at greater length, that is not the operative language anymore, presumably reflecting a legislative judgment that purely procedural steps like consenting to an adjournment should not lead to the loss of a right to arbitrate.

[35] The Bennett Affidavit #1 was prepared in response to this original hearing set for October 27. At para. 4, Ms. Bennett deposes:

> I intend for this affidavit to be filed in support of a request for an adjournment of the scheduled hearing of the Plaintiffs' application for an order freezing all of the Defendants' assets. The Defendants request a short period of time to gather its evidence and prepare a fulsome response.

[36] I find that in addition to seeking the adjournment, the reason for Bennett Affidavit #1 was to address the plaintiffs' argument for a *Mareva* injunction, including that the plaintiffs met the "strong *prima facie* case" if the adjournment was not successful. The latter issue was different for the Equity Investments as opposed to the loans, and indeed Justice Milman ultimately found no strong *prima facie* case in relation to the latter.

[37] To be sure, para. 2 sets out the primary purpose of the affidavit as a "summary response to the allegations against the defendants described in the notice of civil claim for the within proceeding and set out in the Affidavit #1 of Lorne Harder made October 23, 2023." This is ambiguous as to whether it was just a summary response to those allegations for the purpose of defending the *Mareva* injunction or to the claim as such.

[38] But while the affidavit is written so that it could perhaps be used in future in another application, possibly including a summary judgment or summary trial application, it is clear to me that its purpose at the point of filing was to either adjourn or defend the *Mareva* injunction. I find it was not, at that point, intended to present a defence to the claim as such, nor would it have had that effect as filed in support of an application response to an injunction application.

[39] As a matter of content, the first Bennett affidavit certainly addresses the circumstances leading up to the Equity Investments, Ms. Bennett's understanding of

Mr. Harder's knowledge and sophistication, and what representations were and were not made.

[40] Once the adjournment was granted, Ms. Bennett made and filed a second affidavit. It appends a number of documents not included in the first affidavit and it provides an explanation of the timing of disclosing to Mr. Harder an investigation in Switzerland that the notice of civil claim says should have been disclosed at the time of the Equity Investments. It has more detailed denials of alleged misrepresentations. But as with the first affidavit, its structure is oriented towards the various elements at issue in a *Mareva* injunction application, including the relative strength of the parties' cases, but also the prejudice arising from such an order, and the risk of dissipation of the assets if the order is not granted. I find its primary purpose was to defend against the *Mareva* injunction.

E. The Response to Civil Claim

[41] On November 3, 2023, the defendants, including the Applicants, filed the RTCC. I will only address those aspects that touch on the Equity Investments.

[42] Division 1 of the RTCC either denies or, in minor cases, admits, the factual allegations that are the basis of the Harder Group's claim in relation to the Equity Investments.

[43] In Division 2, the defendants set out their version of the facts. This includes statements about the sophistication of Mr. Harder as an investor. At paras. 26–29, it sets out the Framework Agreement under which the initial Equity Investments were made, and it sets out the defendants' versions of what representations were and were not made.

[44] At para. 47, there is a specific denial that the defendants made the "Investment Representations" as defined in the claim, which is as indicated earlier were, by definition, in relation to the Equity Investments. Para. 47 says:

> If the Defendants, or anyone on their behalf, made the Investment Representations, which is denied, then the Investment Representations were accurate and not misleading.

It makes an alternate statement that if:

> ... the Defendants say that the Plaintiffs did not reasonably rely on the Investment Representations or suffer any detriment as a result of the Investment Representations.

[45] The RTCC denies providing warranties alleged in the notice of civil claim. It denies making representations or misrepresentations by silence, as alleged, and denies reliance.

[46] In the "Legal Basis" section, the RTCC addresses the claims of misrepresentation in relation to the investments, and Part 2 opposes all of the relief sought in the notice of civil claim. Para. 10 of Part 3 asks that the claim be dismissed with costs.

[47] The original RTCC does not at any point state that any of the Equity Investment-related claims are arbitrable, nor does it refer to the arbitration clause in the Framework Agreement, although the Framework Agreement itself is referred to.

III. ANALYSIS

A. Interpreting "Statement on the Substance of the Dispute" in s. 8(1) of the *Act* in Light of Pre-Amendment Caselaw

[48] The ultimate issue I will have to address is whether Ms. Bennett's affidavits or the RTCC are "statements on the substance of the dispute" within the meaning of s. 8(1) of the *Act*. This is a question of statutory interpretation and therefore must be determined in light of the text of the provision, its context in the statute as a whole and the statutory purpose.

[49] The Harder Group rely heavily on case law decided prior to the enactment of the current wording of the provision. They say the text of the statutory provision is ambiguous. They say the purpose of the requirement for the stay application is that the application be timely, or, in other words, its purpose is "to prevent the mischief of a party to an arbitration agreement having both the benefit of the court process and, if that did not achieve its purpose, the benefit of arbitration" citing to *Larc Developments Ltd. v. Levelton Engineering Ltd*., 2010 BCCA 18 at para. 18. Another way of stating this purpose is the value of "certainty" once a forum has been chosen by both sides for the orderly administration of justice.

[50] Before the most recent amendments to s. 8(1) of the *Act*, instead of "first statement on the substance of the dispute", it spoke of "delivery of any pleadings or taking any other step in the proceedings." The plaintiffs conceded that under the case law that built up in relation to this language not every step was actually a "disqualifying" step for a party seeking arbitration, but they argued that the filing of the affidavits and the RTCC both would have been.

[51] My interpretation of the plaintiffs' oral argument is that if there is a statement and it refers to the substance of the dispute and it is submitted into the court proceeding, then that it is sufficient to preclude arbitration. Since both Bennett affidavits and the RTCC refer to the substance of the dispute, the Applicants are disqualified from seeking a stay under s. 8(1) of the *Act.*

[52] The Applicants also rely heavily on pre-enactment case law. They argue that the requirement of s. 8(1) of the *Act* is to bring a stay application before "submitting the party's first statement on the substance of the dispute" is determined primarily by the *purpose* of the submission to the Court and must be read in the context of s. 9 of the *Act*. That section provides as follows:

> 9 It is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure.

[53] Since the plaintiff/claimant has the right to seek interim protection from a court without losing their right to arbitrate, the Applicants argue that steps taken in response to such interim measure, such as those steps they took in response to the plaintiffs' application for a *Mareva* injunction, should not be considered disqualifying steps in the proceeding for the purpose of s. 8(1) of the *Act*. Were it otherwise, they say, a defendant on notice of an application for interim measures would be forced to an election of whether to respond to the application and waive its right to arbitrate, or not respond and risk an order against it.

[54] In support of this proposition, the Applicants point to *Pixhug Media Inc. v. Steeves*, 2017 BCSC 2171, and *No. 363 Dynamic Endeavours Inc. v. 34718 BC Ltd.*, 81 B.C.L.R. (2d) 359, 1993 CanLII 1294 (C.A.). The Applicants say both cases stand for the proposition that a step taken by a defendant for the purpose of protecting its rights in the face of a plaintiff's interim protective measure is not incompatible with the arbitration clause and therefore does not disqualify the defendant from seeking a stay: see *Pixhug* at para. 47; *No. 363 Dynamic* at paras. 23-25.

[55] I think both parties miss the point that under the current legislation, what matters is not whether there has been a "step" and whether it should be considered "disqualifying", but whether the applicant for a stay has filed a "statement on the substance of the dispute." In considering whether a statement is "on the substance of the dispute", it is relevant to consider past case law and the interaction with s. 9 of the *Act*, but the ultimate question is not whether what the applicant has done fits within the case law under the older language, but whether it fits within the current statutory definition, properly construed.

[56] Both *No. 363 Dynamic* and *Pixhug* were decided under the earlier language. In *No. 363 Dynamic*, the Court held that a demand for discovery of documents made to protect rights as a respondent to an *ex parte* injunction, rather than to defend the action as such, was not a "step in the proceedings" in the relevant sense. In *Pixhug*, Justice Pearlman took note of this principle, but decided that the steps in the

proceeding that the defendants had taken went beyond simply responding to an interim measure for protection.

[57] At para. 84 of *Pixhug*, Justice Pearlman said the following:

> Here, if the defendants, before applying for the stay of proceedings, had confined themselves to filing and delivering responses to civil claim that requested a stay of proceedings in favour of arbitration, it might have remained open to them to argue they were not seeking to have the benefit of both the court process and the arbitration agreement. However, the defendants, in addition to delivering their responses to civil claim, also brought applications for security for costs and for damages flowing from the grant of the *Mareva* injunction.

[58] In the result, Justice Pearlman found that the steps taken by the defendant there were disqualifying under the *Act* as it was at that time, and the application for the stay was dismissed.

[59] How these cases apply in the face of the new statutory wording is a matter of first instance.

[60] In my view, the Legislature's choice of the phrase “statement on the substance of the dispute” in preference to the previous language of “service of any pleading or taking any other step in the proceedings” with the judicial qualification for some non-disqualifying “steps” was intended to provide a brighter-line rule, while retaining the overall balance of the previous case law. The issue now is whether a “submitted” (typically, filed) “statement” (typically, document) is “on the substance of the dispute”. The previous case law is useful in interpreting what this means, but is not determinative because it was addressing a different statutory scheme.

[61] I agree with the Applicants that the new language, like the old language, should be read in light of s. 9. The “substance of the dispute” is opposed, in an important sense, to seeking or resisting interim protection, which in itself does not go to the substance of the dispute.

[62] I also agree with the Applicants that when Justice Pearlman said a response to civil claim that confined itself to requesting a stay of proceedings in favour of

arbitration would not be a disqualifying step, this would apply under the new language. Such a pleading would not be "on the substance of the dispute" since it would *only* set out a jurisdictional defence.

[63] At the same time, because of the change, I would say the Legislature is making clear that the question of whether a submission is or is not on the substance of the dispute does not turn on the purpose, especially understood as *motive*, for which a filing is made. This makes policy sense because finding a motive in litigation creates uncertainty and involves inquiring into matters that will be typically subject to privilege. The new language can be presumed to be intended to pursue the objectives of certainty for the better administration of justice and of disallowing defendants/respondents to take advantage of both forums. As with the old language, whether an election is made by a defendant to choose the court as the forum for the dispute is an objective question. The new language makes all the clearer that what matters is whether the statement is on the substance of the dispute, not why the filing party made it. Once an election is found as an objective manner, because a statement on the substance of the dispute has been filed, submitted, then that election is irrevocable.

[64] I therefore reject the interpretations advanced by both parties of when a step in litigation disqualifies a party to an arbitration agreement from seeking a statutory stay. The Harder Group's position is overbroad, since it ignores the statutory requirement that the statement be on the substance of the dispute, while the Applicants put forward an atextual immunity for submissions, even on the substance of the dispute, if their purpose is related to interim measures. Both parties are mistaken to rely on judicial tests that are paraphrases of the old language, in the face of a constitutionally-valid statutory amendment.[3]

[3] Both parties refer in this regard (mistakenly in my view) to *Prince George (City of) v. A.L. Sims & Sons Ltd.*, 9 B.C.L.R. (3d) 386, 1995 CanLII 2487 (C.A.) at para. 22, which paraphrases the older language.

B. Were the Bennett Affidavits "Statements on the Substance of the Dispute"?

[65] In my view, the Bennett affidavits are not statements on the substance of the dispute as that term is properly understood. They address the merits of the claim solely to resist the *Mareva* injunction by attempting to show (and, in the case of the Equity Investments, succeeding in showing) that the plaintiffs did not have a "strong *prima facie* case."

[66] I agree with the Applicants that it would put respondents to *Mareva* injunctions or other interim protective measures in an impossible position if they had to choose between foregoing their right to arbitrate and addressing a central issue in whether their assets should be frozen. In my view, responding to such an application, including with evidence addressing the strength of the underlying case, is not itself a "statement on the substance of the dispute" within the meaning of s. 8(1).

[67] An affidavit addressing the merits of the dispute in order to defend against a *Mareva* injunction *refers* to the substance of the dispute, but it is not "on" the substance of the dispute until or unless it is filed in response to a substantive application, such as a summary judgment or a summary trial application. In context, a statement on the substance of the dispute is to be distinguished from one addressing an interim measure, including aspects of the test for such an interim measure that refer to the strength of the underlying claim.

C. Was the RTCC a "Statement on the Substance of the Dispute"?

[68] By contrast, the RTCC is, on its face, a "statement on the substance of the dispute": see *Liang v. Barnard*, 2022 BCSC 924 at para. 20.

[69] I find that it was the first such statement, and therefore no stay application under s. 8(1) could be brought after it was filed (i.e, "submitted").

[70] A response to civil claim plays a different role in a civil proceeding from evidence on an interim or interlocutory application or motion. It joins issue on the

factual and legal assertions made in the notice of civil claim and sets out the filing party's position on facts, law and remedy. All subsequent steps in the civil process are downstream of the pleadings. A response to civil claim will therefore only fail to be a "statement on the substance of the dispute" if it confines itself to jurisdictional, and not substantive, objections to the proceeding.

[71] The RTCC in this case is, on its face, completely different from one confined to stating the matter was arbitrable and asking for a stay of proceedings, like the hypothetical response to civil claim referred to by Justice Pearlman in *Pixhug*. That kind of response to civil claim would not be a "statement on the substance of the dispute" because it would avoid statements on the substance of the dispute, and instead confine itself to a jurisdictional objection.

[72] By contrast, the RTCC here denied material facts, set out its own version of those facts, made propositions of law and asked for dismissal of the action with costs. It not only was not *confined* to asking for a stay of proceedings on the grounds that the proceeding should be arbitrated, but did not even raise the arbitration agreement at all. While I do not think that latter fact is determinative, since, on my view, a response to civil claim that included *both* a response on the substance *and* a request for a stay pending arbitration would be a statement on the substance of the dispute, the absence of any request for a stay at all is striking.

[73] On the record before me, these defendants appear to have changed their minds about whether they wanted a stay of proceedings or wanted the matter to be arbitrable on subsequent filings. As Justice Pearlman made clear at para. 87 of *Pixhug*, once an election has been made, it cannot be unmade.

[74] The Applicants argue that the RTCC was itself in "response to" or at least "flowing from" the *Mareva* injunction because its purpose, from the Applicants' perspective, was to strengthen their case resisting to that injunction.

[75] The first problem with this submission, in my view, is that there is no evidence that it is true on the facts of this case. When I turn to the application response in the

Mareva injunction, the RTCC is not referred to in Part 6 of the “Material To Be Relied On”, unless it is under the catchall of “such further and other materials as counsel may advise and the Honourable Court may permit.” This is in contrast to the Bennett affidavits, which are relied on by name.

[76] There is no evidence of any pressure by the plaintiffs that the defendants file a response to civil claim before the hearing of the *Mareva* injunction. The RTCC was filed earlier than the *Supreme Court Civil Rules* required, and there was no attempt on the part of the defendants to ask for an extension while the *Mareva* injunction was being considered and the extension, in my view, would have been difficult to deny. Nor is there any reason why the defendants could not have filed a jurisdictional response before filing the RTCC.

[77] The only reasonable inference in my view is that the RTCC was filed as a deliberate decision to respond to the merits of the claim in this Court. I must presume that when well-advised parties file pleadings, they do so intentionally for the purposes of advancing their interests in the dispute.

[78] But, in any event, on my view of the *Act,* it does not matter. Even if the RTCC *was* intended to strengthen the *Mareva* injunction response, it would still be a statement on the substance of the dispute, unless it avoids putting the substance of the dispute in issue in the ordinary courts.

[79] I see no unfairness in this rule. There is no reason why a respondent to a *Mareva* injunction or other protective measures would have to file a response to civil claim that addresses the merits of the underlying dispute. Even if the other party required one, they could file a jurisdictional response instead. If, for some reason, they felt they needed to file a response to civil claim, they could file one that says no more than that the dispute is subject to an arbitration clause and denies the Court has jurisdiction. The Applicants provide no reason why this would have prejudiced them in this case or why it would prejudice any respondent to a *Mareva* injunction application.

[80] Moreover, while I agree the *Act* should be read purposively, its text cannot be ignored. It says in no uncertain terms that once a “first” statement on the substance of the dispute has been submitted, a s. 8 application is out of time. But a response to civil claim that goes beyond simply asserting the dispute should be arbitrated and enters into whether the underlying dispute has merit is surely “on the substance of the dispute”.

[81] There would be practical problems in finding otherwise. The same response to civil claim filed initially to support a *Mareva* injunction could be relied on up to trial. In response to my question about this problem, the Applicants argued that the RTCC might *become* a “submission on the substance of dispute” once the interim protective measure had been adjudicated on, or, on further thought, only once all appeal periods expire. This could occur without any change in what the document itself says.

[82] With respect, were I to accept this submission, I would be replacing the scheme set out in s. 8, with one of my own devising. Section 8(1) could have been written so that the disqualification for filing a statement on the substance of the dispute did not apply until after all appeal periods relating to interim measures applications had expired, but it was not.

[83] It is clear from the statute that a document filed in the proceeding is either “on the substance of the dispute” or it is not. To find that that could change based on the overall context of the litigation would create great uncertainty which would be contrary to the purpose of the amendment, which was to provide a straightforward way of determining which forum will determine the underlying dispute.

[84] There is no evidence here that the decision to file a substantive response to civil claim was an error or that it would prejudice the defendants to consider it an election to proceed in the Supreme Court of British Columbia, rather than arbitrate. In any event, if there were a case in which there was a submission of a substantive response to civil claim through error of counsel or for some other reason, this would

not be the basis in my view for a s. 8 remedy. A s. 8 stay is not a *discretionary* remedy that might turn on balance of prejudice and the interests of justice.

[85] The Court of Appeal has suggested, without deciding, that there may be inherent authority on the part of the Court to stay a matter before it in favour of arbitration, even after a party has lost its right for a statutory stay: *Hawthorn v. Hawrish*, 2023 BCCA 182 at paras. 35, 67. If available, this possibility could address situations in which the bright line rule set out in s. 8(1) creates hardship. But no such application is before me today, nor is there any evidence given that would give it an air of reality.

[86] I therefore dismiss the application. Costs are to the Harder Group in the cause.

"The Honourable Justice Morley"