IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society,* 2024 BCSC 1465

Date: 20240813
Docket: S233197
Registry: Vancouver

Between:

Montaigne Group Ltd.

Plaintiff

And

St. Alcuin College for the Liberal Arts Society

Defendant

Before: The Honourable Justice Laurie

Reasons for Judgment

Counsel for the Plaintiff:	A. Piercy
Counsel for the Defendant:	C. Hartnett J. Pinnock, Articled Student
Place and Date of Hearing:	Vancouver, B.C. July 3, 2024
Place and Date of Judgment:	Vancouver, B.C. August 13, 2024

Table of Contents

OVERVIEW **3**
FACTUAL AND PROCEDURAL BACKGROUND **3**
THE DISPUTE RESOLUTION PROVISION IN THE JVA **6**
POSITIONS OF THE PARTIES **6**
ISSUES **8**
Preliminary Issue: Is it Proper for the Court to Determine these Issues? 8
GOVERNING LEGAL PRINCIPLES **9**
ANALYSIS **10**
Issue #1: Did St. Alcuin's motion to strike constitute a "step in the proceedings" such that a mandatory stay of proceedings is precluded? 10
The BCCA Decision in Seidel v. TELUS Communications Inc. 12
The Ontario Court of Appeal Decision in RH20 13
Application of s. 45(3) of the Act 14
Conclusion on Issue #1 16
Issue #2: Has St. Alcuin waived its right to arbitration rendering the arbitration agreement inoperable? 16
Conclusion on Issue #2 16
DISPOSITION **16**

Overview

[1] This is an application by the defendant, St. Alcuin College for the Liberal Arts Society ("St. Alcuin"), for a stay of the action filed by the plaintiff, Montaigne Group Ltd. ("Montaigne"), on the basis that the court lacks jurisdiction over the dispute pursuant to an arbitration clause in a joint venture agreement between the parties.

[2] After considering the documentary evidence in the application record, submissions of counsel, and relevant statutory and case authorities, I have concluded that the applicant has attorned to the court's jurisdiction and waived its right to arbitration. I, therefore, dismiss the application for a stay of proceedings.

Factual and Procedural Background

[3] Montaigne is a development company engaged in the business of residential and commercial construction, project management, project financing, and rezoning. St. Alcuin is an independent school society and registered owner of lands and premises located in North Vancouver, British Columbia (the "Lands").

[4] In December 2020, Montaigne and St. Alcuin entered into a joint venture agreement (the "JVA") pursuant to which Montaigne agreed to construct a four-storey building on the Lands. Pursuant to the JVA, the building would be stratified such that the first three storeys would belong to St. Alcuin to be used as a school and the fourth storey would belong to Montaigne to be used as amenity space (the "Montaigne Amenity Space").

[5] In April 2023, after approximately two-and-a-half years of construction, St. Alcuin purported to terminate the JVA based on alleged breaches by Montaigne. At the time of termination, St. Alcuin intended to seek additional financing which would be registered against the Lands.

[6] On April 26, 2023, in order to protect its proprietary interest, Montaigne filed a notice of civil claim ("NOCC") and registered a certificate of pending litigation (the "first CPL") against the Lands.

[7] On May 4, 2023, St. Alcuin filed a notice of application seeking a discharge of the first CPL and a stay of the action pursuant to s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2 [*Arbitration Act* or *Act*]. The stay application is the matter before me.

[8] On May 15, 2023, Montaigne filed an amended NOCC ("ANOCC") and registered a second CPL on the Lands (the "second CPL"). In its ANOCC, Montaigne did not oppose St. Alcuin's stay application.

[9] On May 17, 2023, Montaigne agreed to discharge the first CPL. St. Alcuin's stay application was adjourned generally.

[10] On May 26, 2023, St. Alcuin filed a second notice of application seeking to discharge the second CPL and to strike portions of Montaigne's ANOCC pursuant to Rule 9-5 of the *Supreme Court Civil Rules* [*Rules*] on the basis that it did not disclose a reasonable cause of action, that it was frivolous and vexatious, and that it was an abuse of process. The portions sought to be struck included the following relief sought by Montaigne:

- a mandatory injunction or an order for specific performance requiring St. Alcuin to stratify the Montaigne Amenity Space from the Lands, transfer legal and beneficial title with respect to the Montaigne Amenity Space to Montaigne, and discharge all encumbrances against the Montaigne Amenity Space;
- a declaration that St. Alcuin holds the Lands or a portion of it in trust for Montaigne;
- a declaration that Montaigne has an equitable interest in the Lands or a portion of it;
- a certificate of pending litigation against the Lands;
- a substantive constructive trust against the Lands;
- a constructive trust, or in the alternative, damages for unjust enrichment.

[11] On June 12, 2023, in response to Montaigne's counsel's query about whether St. Alcuin still intended to proceed with the stay application, counsel for St. Alcuin

advised that they intended to reschedule the application after the hearing of their May 26 notice of application.

[12] On June 15, 2023, at the hearing of the May 26 notice of application, Justice Majawa, sitting in chambers, agreed with Montaigne's counsel that the motion to strike should not proceed in light of St. Alcuin's outstanding stay application. It was common ground that the motion to strike sought substantive relief and in the circumstances, Majawa J. declined to hear the motion when at the same time St. Alcuin had filed an objection to the court's jurisdiction in favour of arbitration. He adjourned St. Alcuin's motion to strike and proceeded to hear the application to discharge the second CPL: *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society d.b.a. Alcuin College* (15 June 2023), Vancouver S233197 (B.C.S.C.).

[13] On June 29, 2023, Majawa J. issued his reasons for judgment (indexed as *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society d.b.a. Alcuin College*, 2023 BCSC 1257) in which he dismissed St Alcuin's application to discharge the second CPL after finding that the second CPL was properly registered against the Lands.

[14] On July 20, 2023, Montaigne sent a settlement offer to St. Alcuin and was advised that the offer would be forwarded to new counsel retained by St. Alcuin.

[15] On August 2, 2023, new counsel for St. Alcuin advised Montaigne that he required more time to review the file material and deliver a response. Montaigne did not receive a response.

[16] On March 14, 2024, Montaigne advised St. Alcuin that it would be taking steps to advance its action.

[17] On May 14, 2024, Montaigne demanded that counsel for St. Alcuin file a notice of change of solicitor. Further, Montaigne advised that if St. Alcuin did not file a response to Montaigne's ANOCC by May 28, 2024, Montaigne would seek default judgment.

[18] On May 15, 2024, counsel for St. Alcuin responded that they took the position that Montaigne's NOCC and ANOCC had not been served on them.

[19] On June 27, 2024, Montaigne obtained a declaration in chambers that it had effected service in May 2023.

The Dispute Resolution Provision in the JVA

[20] Article 7 of the JVA sets out, in part, the following dispute resolution mechanism:

> 7.1: Self-Settlement and Mediation. The parties shall use their best efforts at all times to settle any disputes. If the parties are unable to settle their disputes between themselves, they agree to attempt settlement by way of mediation with a mutually agreed mediator who has adequate knowledge and insight into the subject matter in dispute.
>
> 7.2: Arbitration. All disputes arising in connection with this Agreement or its validity or any agreement provided herein that are not adequately settled between the parties or with the assistance of a mediator shall be determined by a binding arbitration panel consisting of three arbitrators, two selected by the party who first proposes binding Arbitration and one by the other party […]

Positions of the Parties

[21] As mentioned earlier, St. Alcuin applies for a stay of Montaigne's action pursuant to s. 7 of the *Arbitration Act*. That section states:

> **Stay of court proceedings**
>
> 7(1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
>
> (3) An arbitration may be commenced or continued and an arbitral award made even if an application has been brought under subsection (1) and the issue is pending before the court.

[22] St. Alcuin argues that it is entitled to a stay of proceedings because the requirements under s. 7(1) have been met. It submits that a stay is mandatory under

s. 7(2) as there is no basis to conclude that the arbitration agreement is void, inoperative or incapable of being performed.

[23] St. Alcuin argues that the timing of its application complied with s. 7(1) because its notice of application dated May 4, 2023 was filed before it took any other step in the proceedings. In the alternative, it argues that even if the relevant date was the hearing date of this application, the application was still brought before St. Alcuin took any steps in the proceedings. This is because the motion to strike should not be considered a step in the proceedings. In the further alternative, even if it were, St. Alcuin asserts that the motion to strike was taken to oppose an interim measure of protection (i.e., the second CPL), therefore pursuant to s. 45(3) of the *Arbitration Act*, it was not inconsistent with the arbitration agreement.

[24] Finally, St. Alcuin argues that unless these issues involve “a clear question of law”, these matters ought to be dealt with by an arbitrator.

[25] Montaigne opposes the application. It primarily argues that St. Alcuin has not met the requirements of s. 7(1) because in pursuing the motion to strike, St. Alcuin had taken a step in the proceedings and attorned to the jurisdiction of this court.

[26] In addition, Montaigne argues that the arbitration clause in the JVA has not been triggered because St. Alcuin has failed to engage in best efforts to settle the dispute through negotiation and mediation, as required by Article 7.1 of the JVA. In other words, Montaigne says the dispute was not a matter agreed by the parties to be submitted to arbitration because preconditions had not been complied with.

[27] In the alternative, Montaigne argues that St. Alcuin’s overall conduct including in delaying the stay application and pursuing the motion to strike amounted to a waiver of the agreement to arbitrate, rendering it inoperative pursuant to s. 7(2) of the *Act*.

[28] With respect to the proper forum for the determination of these issues, Montaigne says that the issue of whether the motion to strike was a “step in the proceeding” is a question of law that is for the court to decide. All other issues are

either purely legal issues or legal issues that can be resolved through superficial consideration of the documentary evidence. These issues are properly before the court.

Issues

[29] In my view, the following issues are dispositive of this application:

1) Did the motion to strike constitute a “step in the proceedings” such that a mandatory stay of proceedings is precluded?

2) Had St. Alcuin waived its right to arbitration rendering the arbitration agreement inoperable?

[30] It is not necessary for the purpose of determining this application to adjudicate Montaigne’s argument that the arbitration agreement had not been triggered. For the purpose of the discussion in this judgment, I have assumed, without deciding the issue, that it had been triggered.

Preliminary Issue: Is it Proper for the Court to Determine these Issues?

[31] Under the general rule of competence-competence, any challenge to an arbitrator’s jurisdiction must first be determined by the arbitrator, except where the challenge involves a pure question of law, or one of mixed fact and law that requires “only superficial consideration of the documentary evidence in the record”: *Seidel v. TELUS Communications Inc*., 2011 SCC 15 at para. 29; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 at paras. 84–85.

[32] In this application, Montaigne does not challenge an arbitrator’s jurisdiction generally. Its primary argument is that the requirements of s.7 of the *Arbitration Act* have not been met because St. Alcuin had taken a step in the proceedings and attorned to the court’s jurisdiction. The competence-competence principle does not require a referral of this issue to an arbitrator. Determining whether a party has responded to the substance of a civil dispute is generally within the court’s competence: *Hawthorn v. Hawrish*, 2023 BCCA 182 at para. 93.

Governing Legal Principles

[33] The legal framework that governs this application is set out in *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41 [*Peace River*]. The framework consists of two general components:

1) the technical prerequisites of a mandatory stay of court proceedings, and
2) the statutory exceptions to a mandatory stay of court proceedings

See: *Peace River* at para. 76.

[34] The technical prerequisites are that:

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

See: *Peace River* at para. 83.

[35] The determination of the fourth technical prerequisite requires an objective approach. The court must consider whether on the facts the party should be held to have impliedly affirmed the correctness of the proceedings and its willingness to go along with a determination by a court of law instead of arbitration: *Peace River*, para. 97; *Larc Developments Ltd. v. Levelton Engineering Ltd*., 2010 BCCA 18 [*Larc*] at para. 16.

[36] Although the analysis in *Peace River* was based on the pre-2020 version of s. 7 of *Arbitration Act* which contained an express reference to taking a "step in the proceedings",[1] the Supreme Court's discussion of the framework for stays of court

[1] See s.15(1) of the *Arbitration Act*, R.S.B.C. 1996, c.55, reproduced in *RH20 North America Inc. v. Bergmann,* 2024 ONCA 445, para. 38.

proceedings in favour of arbitration did not turn on this specific language: *RH20 North America Inc. v. Bergmann*, 2024 ONCA 445 [*RH20*] at para. 41; *Hawthorn* at para. 54.

[37] In *RH20*, the Ontario Court of Appeal stated that the technical prerequisites reflect a "negative obligation" on parties to an arbitration agreement not to seek the resolution of disputes subject to an arbitration agreement in the courts: para. 41.

[38] The burden is on the applicant to establish an arguable case that the technical prerequisites have been met: *Peace River* at para. 84.

[39] If the applicant discharges this burden, the onus shifts to the opposing party to show on a balance of probabilities that a statutory exception applies under the second component, i.e., whether the arbitration clause is void, inoperative, or incapable of being performed: *Peace River* at paras. 87–88.

Analysis

Issue #1: Did St. Alcuin's motion to strike constitute a "step in the proceedings" such that a mandatory stay of proceedings is precluded?

[40] For the reasons that follow, I am of the view that St. Alcuin's motion to strike constituted a "step in the proceedings", therefore, St. Alcuin is precluded from bringing a stay application under s. 7(1) of the *Act*.

[41] Although St. Alcuin filed its notice of application on May 4, 2023 before it took any other step in the proceedings, it chose not to proceed with the stay application until July 2024, which was over a year later and after it brought an application to strike that sought substantive relief from the court. In the circumstances, I do not accept St. Alcuin's submission that the filing of the notice of application in itself complied with the fourth technical prerequisite. This interpretation would not be consistent with the timeliness requirement of s. 7(1) of the *Act*.

[42] In viewing the circumstances objectively, I find that by bringing the motion to strike, St. Alcuin had impliedly affirmed the correctness of the court proceedings and demonstrated its willingness to go along with a determination by a court of law

instead of arbitration: *Peace River* at para. 97; *Larc* at para. 16. In making this determination, I have considered the content of the motion to strike in the context of the surrounding circumstances.

[43] The motion to strike addressed the substance of Montaigne's ANOCC, and sought substantive remedy. It asserted that Montaigne had failed to plead material facts, and/or legal bases to support its claims of having a beneficial and equitable interest in the Lands. It also asserted that the language of the JVA did not support Montaigne's allegations. Further, it alleged that the ANOCC was made for an improper purpose amounting to an abuse of process. Based on these allegations, St. Alcuin requested the court to strike out the bulk of the relief sought by Montaigne in the ANOCC.

[44] In my view, the motion to strike went far beyond what may be described as "purely defensive measures taken to parry or smother an action": *Bodnar v. Payroll Loans Ltd*., 2009 BCSC 1205 at para. 51; *Fathers of Confederation Buildings Trust et al. v. Pigott Construction Co*. (1974), 44 D.L.R. (3d) 265, 1974 CarswellPEI 33 (PEI S.C.) at paras. 15–16, or procedural steps taken within the confines of a jurisdiction motion: *Frazer v. 4358376 Canada Inc*., 2014 ONCA 553. These types of measures are not considered steps in the proceedings.

[45] St. Alcuin's motion to strike on the other hand was for the purpose of advancing its position in the litigation. In bringing the motion to strike, St. Alcuin chose to have a court of law determine the merits of its defence to Montaigne's claims instead of pursuing a resolution of the dispute through arbitration.

[46] I note that notwithstanding a lack of opposition by Montaigne to the stay application, St. Alcuin chose to delay setting a date for it until (at least) after the hearing of its May 26, 2023 notice of application that included the motion to strike. It appears, as Majawa J. observed in his June 15, 2023 decision, that St. Alcuin made a strategic decision to delay the stay application because if granted, St. Alcuin would not be able to seek relief under Rule 9-5 of the *Rules*.

[47] This is precisely the mischief that s. 7 of the *Act* was intended to prevent. A party should not be entitled to take the benefit of the litigation process while preserving the ability to reject that process in favour or arbitration: *Larc* at paras. 18–19.

[48] The fact that the hearing on the motion to strike did not proceed does not alter the analysis which is focused on whether St. Alcuin's conduct in bringing the motion demonstrated a willingness to have the matter resolved by the court as opposed to arbitration. Further, it was not St. Alcuin's choice to adjourn the motion to strike. If St. Alcuin had its way, the motion would have proceeded.

[49] I also note that during the lengthy delay in setting a hearing date for the stay application, St. Alcuin did not respond to Montaigne's settlement offer of July 2023, nor did it pursue mediation in accordance with the dispute resolution procedure set out in the JVA. In my view, this conduct, which forms part of the overall context, is inconsistent with a desire to have the dispute resolved through arbitration.

The BCCA Decision in Seidel v. TELUS Communications Inc.

[50] Counsel for St. Alcuin relies on the British Columbia Court of Appeal's decision in *Seidel v. TELUS Communications Inc*., 2009 BCCA 104 [*Seidel*], rev'd on other grounds 2011 SCC 15, for the broad proposition that a motion to strike is not a step in the proceedings. It argues that this court is bound by *Seidel* on this issue. As I explain below, I don't agree with this assertion.

[51] In *Seidel*, the Court of Appeal granted the stay application of the defendant, Telus, pursuant to the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 in the context of a class proceeding, after a change in the law permitted Telus to apply for a stay in favour of arbitration, prior to an application for class certification.

[52] With respect to the timing of the stay application, the Court of Appeal found that Telus brought the application promptly, before filing a statement of defence, and it could not be faulted for its failure to make an earlier application that was bound to fail. It added that, although Telus had applied to strike out some of the plaintiff's

claims, such an application was not a step in the proceedings: *Seidel* at para. 26. This is the statement asserted by St. Alcuin as binding authority on the issue.

[53] *Seidel* involved very different facts and, in my view, the Court of Appeal's lone statement regarding the application to strike does not stand for the broad proposition asserted by St. Alcuin, nor does it address the circumstances before me. It appears the application to strike in *Seidel* was based on the repeal and replacement of legislation upon which some of the plaintiff's claims were founded: *Seidel v. Telus Communications Inc*., 2007 BCSC 1092. In this context, the Court of Appeal's comment that the application to strike did not constitute taking a step in the proceedings is consistent with jurisprudence that has held that purely defensive measures taken to parry or smother an action are not considered steps in the proceedings: *Bodnar* at para. 51.

The Ontario Court of Appeal Decision in RH20

[54] In my view, St. Alcuin's motion to strike is closer in nature to the motion to strike in the case of *RH20*. In that case, the defendants, including a company called Click+Clean GmbH ("Click"), brought an application to strike out several of the claims made by the plaintiffs. In the same notice of motion, Click sought an order staying the action against it by one of the plaintiffs, RH20, on the basis that the dispute ought to be referred to arbitration pursuant to an arbitration agreement between Click and RH20.

[55] Justice Valente of the Ontario Superior Court of Justice (the "motion judge") dismissed Click's application for a stay in part because he found that by joining the other defendants in seeking an order to strike, Click invoked the court's jurisdiction, which constituted a waiver of the arbitration agreement rendering it inoperable: *RH20*, para. 32. Although Click's application for a stay of proceedings was governed

by international arbitration legislation,[2] the substance of those provisions are consistent with s. 7 of the *Arbitration Act*.

[56] On appeal, the Ontario Court of Appeal agreed with the motion judge that Click's conduct in participating in the application to strike amounted to a waiver. It held that Click's request to strike out some of the plaintiffs' substantive claims as disclosing no reasonable cause of action was in effect an election to have those claims determined by the court. Further, it found that Click had breached its "negative obligation" under the arbitration agreement not to litigate arbitrable disputes in the courts: *RH20*, paras. 57–58.

[57] Similarly, in the case before me, by seeking substantive judicial relief through the motion to strike, St. Alcuin elected to have Montaigne's claims determined by the court. In these circumstances, the motion to strike constituted a step in the proceedings. Further, as I will discuss below, I am also of the view that in bringing the motion to strike, St. Alcuin had waived its right to arbitrate and this rendered the arbitration agreement inoperable.

Application of s. 45(3) of the Act

[58] I do not agree with St. Alcuin's alternative argument that even if the motion to strike amounted to a step in the proceedings, it was not inconsistent with the arbitration agreement pursuant to s. 45(3) of the *Act*, because it was taken to oppose an interim measure of protection, i.e., the second CPL.

[59] Section 45(3) provides:

> 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.

[60] In support of its argument, St. Alcuin relies on the case of *No. 363 Dynamic Endeavours Inc. v. 34718 BC Ltd*. (1993), 81 B.C.L.R. (2d) 359, 1993 CanLII 1294

[2] Section 9 of the *International Commercial Arbitration Act*, 2017, S.O. 2017, c.2, Sch. 5 and Article 8(1) of the *Model Law on International Commercial Arbitration*.

(CA) [*Dynamic*]. In that case, the plaintiff commenced an action alleging that the defendant breached a joint venture agreement, and obtained an ex-parte order freezing the joint venture funds. The defendant filed a notice of motion seeking to set aside this order. Prior to the hearing of the notice of motion, the defendant sent the plaintiff a demand for discovery of documents. Subsequently, the order freezing the funds was set aside. Later, the defendant obtained a stay of proceedings in favour of arbitration pursuant to the *Commercial Arbitration Act*, S.B.C. 1986, c.3 [*CAA*].

[61] On appeal, the plaintiff/appellant argued that the demand for discovery of documents was a "step in the proceedings", which barred the defendant from obtaining a stay. In dismissing the appeal, our Court of Appeal held that since the appellant's activity in seeking to freeze the funds fell within s. 15(4) of the *CAA* (now s. 45(3) of the *Arbitration Act*), anything done to oppose it necessarily fell within the subsection and the demand for discovery of documents was not incompatible with the arbitration agreement: *Dynamic* at para. 24.

[62] Relying on *Dynamic*, St. Alcuin argues that since the second CPL was an interim measure of protection, any activity taken by St. Alcuin to oppose it, including the motion to strike, fell within the ambit of s. 45(3).

[63] The difficulty with St. Alcuin's argument is that the breadth of the motion to strike went beyond opposing the CPL. It addressed the substance of the dispute and sought substantive relief. While a dismissal of Montaigne's claims could also effectively cancel the CPL, this is not what is contemplated by s. 45(3): *Elton v. 10 Star Events Inc*., 2018 BCSC 1974 at paras. 91, 93.

[64] An "interim measure of protection" pursuant to s. 45(3) is intended to be a narrow exception to the bar on taking a step in the proceedings under s. 7(1) of the *Arbitration Act*. It pertains to a step "interim" to the parties' dispute being decided through arbitration: *Bodnar* at para. 52. By definition, it does not include seeking substantive relief.

[65] The motion to strike was not limited to opposing the second CPL and could not be characterized as an interim measure of protection pursuant to s. 45(3).

Conclusion on Issue #1

[66] After considering all of the circumstances, I conclude that St. Alcuin has not demonstrated an arguable case that it has met the technical requirements under s.7(1) for a mandatory stay of proceedings.

Issue #2: Has St. Alcuin waived its right to arbitration rendering the arbitration agreement inoperable?

[67] In the alternative, even assuming that the technical prerequisites were met, in the circumstances, I find on a balance of probabilities that St. Alcuin's overall conduct, including in pursuing the motion to strike, constituted a waiver of its right to arbitrate and a breach of its "negative obligation" under the arbitration agreement not to litigate arbitrable disputes, as held in *RH20*. This rendered the arbitration agreement inoperable pursuant to s. 7(2) of the *Act*.

[68] In reaching this conclusion, I have considered all of the circumstances, including:

1) that the application for a stay of proceedings was not timely;

2) in bringing the motion to strike, the applicant invoked the court's procedures to advance its position in the litigation, and in the process had attorned to the court's jurisdiction; and

3) the applicant had not complied with the dispute resolution procedure set out in the JVA, for example, it had not pursued mediation.

Conclusion on Issue #2

[69] A mandatory stay of proceedings is precluded by application of a statutory exception under s. 7(2) of the *Act*.

Disposition

[70] The application for a stay of proceedings is dismissed.

[71] As the successful party in this application, Montaigne is entitled to costs at Scale B.

"Laurie J."