Court of King’s Bench of Alberta

Citation: Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc, 2023 ABKB 545

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Date: 20230928
Docket: 1601 16599
Registry: Calgary

Between:

Husky Oil Operations Limited

Plaintiff/Respondent

- and -

Technip Stone & Webster Process Technology, Inc. and Technip USA, Inc.

Defendant/Applicants

Reasons for Judgment
of the
Honourable Justice M. J. Lema

I. Introduction

[1] Can a third-party beneficiary of a contract litigate contractual warranties in its favour when the contract requires “all disputes” under the contract to be arbitrated?

[2] The beneficiary (Husky) says yes, because:

- the arbitrator only has jurisdiction over the parties to the contract -- a general contractor and a subcontractor;
- Husky (project owner) was not a party to that contract and did not agree to arbitrate its claims against the subcontractor, which provided the warranties;

- the contract expressly provide that third parties have no "right, remedy or claim" under the contract unless "specifically set forth" in the contract, and no such exception is provided;
- the contract's dispute-resolution provisions (including those on arbitration) do not refer to Husky, referring instead, and exclusively, to the (general and subcontractor) parties; and
- in any case, Husky has also advanced a non-contractual (and thus non-arbitrable) cause of action (negligence).

[3] The subcontractor says no (arbitration is required), since Husky chose to enforce its third-party rights under the contract and, per the contract, those rights can only be enforced via arbitration i.e. Husky cannot sever the benefit of the contract (contractual warranties) from its associated burden (mandatory arbitration).

[4] The learned applications judge agreed with Husky, concluding the contract could not impose an arbitration burden on a non-signatory.

[5] For the reasons outlined below, I reach the opposite conclusion. Husky was required to arbitrate its contract-warranty claims. With the expiry of the applicable limitation period, it is now too late to arbitrate those claims.

[6] On the other hand, Husky's negligence claims against the subcontractor, not arising out of the contract, are not arbitrable and thus not affected by the expiry of the limitation period.

II. Application judge's decision

[7] AJ Prowse focused on the terms of the general-subcontractor contract, finding its dispute-resolution provisions (including arbitration) apply only to the general and the subcontractor.

[8] He noted that, while Husky was referenced in various places in the contract (as the "Client"), including as the beneficiary of certain subcontractor warranties, that did not extend to any of the dispute-resolution provisions.

[9] As noted, I take a different view, as explained below.

[10] As for the standard of review, Husky and the subcontractor (collectively Technip) agreed that this is a *de novo* application, with no deference due to the learned applications judge. That is correct, per ***Club Industrial Trailers v Paramount Structures***, 2022 ABQB 34 (Feth J.) (para 16).

III. Analysis

[11] I outline below my reasons for finding Husky bound to arbitrate its warranty issues.

A. Court has jurisdiction to determine the arbitrator's jurisdiction over Husky-subcontractor disputes

[12] The Supreme Court of Canada tells us when a court (instead of the arbitrator) can determine the arbitrator's jurisdiction. Per ***Peace River Hydro Partners v Petrowest Corp***, 2022 SCC 41:

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> … it is well established in Canada that **a challenge to an arbitrator's jurisdiction should generally be decided at first instance by the arbitrator** (see *Uber*, at paras. 31-34; *Seidel*; *Dell*; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921). This reflects the presumption that arbitrators have fact-finding expertise comparable to that of courts, and that the parties intended an arbitrator to determine the validity and scope of their agreement (McEwan and Herbst, at § 5:10). …
>
> The … principle [underlying that approach] is not absolute, however. **A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record** (*Uber*, at para. 32; *Dell*, at paras. 84-85). This exception is justified by the particular expertise that courts have in deciding such questions. Further, it allows a legal argument relating to the arbitrator's jurisdiction "to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate" (*Dell*, at para. 84). [paras 41 and 42] [emphasis added]

[13] The issue of whether Husky is subject to the contract's arbitration provisions turns on the interpretation of that contract and on the application of the law concerning third-party beneficiaries of contract i.e. on questions of mixed fact and law or of law alone. And, in deciding these issues, no more than a superficial consideration of the evidentiary record is necessary.

[14] Accordingly, I have the jurisdiction to decide Husky's exposure to the arbitration provisions.

B. No dispute over existence of Husky contract rights

[15] Per general-subcontractor contract, Husky received the right to enforce performance warranties provided by Technip.

[16] Technip is not disputing the existence of that right in favour of Husky or arguing that, as a non-signatory to that contract, Husky cannot enforce that right. Technip acknowledges the existence of Husky's right and Husky's ability to enforce it against Technip.

[17] We are not in the zone of cases like ***London Drugs*** or ***Fraser River***, where the courts had to determine whether third-party rights had been conferred and, if so, whether they must or should be recognized.

[18] My task is to gauge the scope of the acknowledged warranty right conferred by Technip i.e. whether Husky received a limited or qualified right i.e. subject to arbitration of all right-related disputes.

C. Dispute is over nature of Husky's rights

[19] The debate here distills to the nature of the rights conferred by the general-subcontractor contract on Husky.

[20] Per Husky, its rights are freestanding i.e. are not subject to any associated conditions or limitations imposed by the contract, including a duty to arbitrate disputes over them. And, per Husky, as a non-signatory, it cannot be subjected to any burdens or obligations under the contract.

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[21] Per Technip, Husky received a qualified or limited right i.e. its contractual-warranty right is necessarily limited, where disputes arise, to enforcement via arbitration i.e. the warranty right is inherently limited. In taking up the right, Husky necessarily took up, and agreed to, the associated arbitration burden. Effectively, per Technip, the contract was not a buffet, where Husky could select the warranty right and pass over the duty to arbitrate. Instead, it was a set menu for Husky: enforcing the warranty right necessarily meant arbitration where disputes arose (as here).

[22] The first step is determining whether the contract actually or at least purports to subject Husky-subcontractor warranty disputes to arbitration.

D. Contract requires arbitration of all disputes (including about Husky's warranties)

[23] As noted, the learned applications judge interpreted the contract as requiring arbitration of general-subcontractor disputes only.

[24] I disagree.

[25] Here are the key provisions:

> **All warranties given by [subcontractor] shall be given for the benefit of both the [contractor] and [Husky] and the warranties may be enforced by either the [contractor] or [Husky]** through the [subcontractor] [PC9] ["PC" is short for "Particular Contractual Condition"]
>
> In the event of a **dispute between the Parties** [i.e. the general and the subcontractor] as to the performance of the SUPPLY or the interpretation, application or administration of the [contract], the [subcontractor] shall perform the SUPPLY as directed by the [contractor]. All **disputes between the parties** not resolved by the initial decision of the [contractor's] Representative, **and all disputes arising out of this PURCHASE ORDER and its performance shall be settled in accordance with this PC 13** [i.e. the DISPUTE RESOLUTION / APPLICABLE LAW clause]. [PC 13.2]
>
> The **PARTIES** shall make all reasonable efforts to resolve all disputes by negotiation and agree to provide, on a "without prejudice" basis, open and timely disclosure of relevant facts, information and documents to facilitate these negotiations. [PC 13.3]
>
> During the duration of [the contract], either **PARTY** shall be entitled by notice to the other to call for the appointment of a Project Mediator, in which case the **parties** shall within ten (10) Work Days thereafter jointly nominate a Project Mediator. If the **PARTIES** do not agree on the appointment of a Project Mediator, then either **PARTY** may request the Chair of the Alberta Arbitration and Mediation Society to appoint a Project Mediator, who when so appointed shall be deemed acceptable to the **PARTIES** and to have been appointed by them. [PC 13.4]
>
> The **PARTIES** shall submit in writing their dispute to the Project Mediator, and afford to the Project Mediator access to all records, documents and information the Project Mediator may request. The **PARTIES** shall meet with the Project

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Mediator at such reasonable times as may be required and shall, through the intervention of the Project Mediator, negotiate in good faith to resolve their dispute. All proceedings involving a Project Mediator are agreed to be “without prejudice”, and the cost of the Project Mediator shall be shared equally between the **PARTIES**. None of the recommendations or determinations of the Project Mediator are binding on the **PARTIES**. [PC 13.5]

If the dispute has not been resolved within thirty (30) days after the appointment of the Project Mediator, either **PARTY** may by notice to the other withdraw from the mediation process. [PC 13.6]

All disputes arising out of or in connection with the present PURCHASE ORDER shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. [PC 13.8] [emphasis added]

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[26] Here is the correct interpretation of those provisions:

- some of the dispute-resolution provisions apply only to the “Parties” i.e. the general and subcontractor;
- others are not limited to the Parties, as signalled by the absence of a reference to the Parties or a Party. In particular, the last three lines of PC 13.2 (“… and all disputes arising …”_ and the entire PC 13.8 (“All disputes arising …”);
- this is so despite Husky being expressly named (i.e. as the “Client”) in other contractual provisions (e.g. PC 3 through PC 8, PC 10 and PC 12). One mode of tying Husky’s warranty rights to arbitration would have been to expressly name Husky (as the “Client”) in PC 13.2 and PC 13.8. However, an equally effective mode (and that used by the general and subcontractor) was to use the contrasting “disputes between the Parties” and “all disputes” phrases, with the latter obviously contemplating a wider scope of disputes;
- as far as I can tell, the contract creates rights for only one person beyond the parties, namely, Husky. Accordingly, the wider scope of “all disputes” (i.e. than “disputes between the Parties”) was obviously intended to capture the only other potential species of dispute arising from the contract i.e. disputes arising from Husky’s enforcement of its contract rights, including its warranty rights;
- this is especially so when the entire PC 13 set of provisions expressly replaced another set of dispute-resolution provisions in the contract (Clauses 28-30 of certain identified general conditions), which provisions were expressly limited to inter-party disputes. That is, the parties dropped the narrower dispute-resolution provisions in favour of a mix of inter-party and “all disputes” provisions;

- if the contractor and subcontractor had only intended their own disputes to be subject to arbitration, they would not have used the “all disputes” formulation i.e. departed from “disputes between the Parties” language;
- Husky gains nothing here from general condition 37, which states:

  Except as otherwise specifically set forth in the PURCHASE ORDER:

  a. nothing expressed or referred to in the [contract] shall be construed to give any person or legal entity, other than the PARTIES **any legal or equitable right, remedy or claim** under or with respect to the [contract] or any provision of the [contract]; and

  b. this [contract] and all of its provisions are for the sole and exclusive benefit of the PARTIES**.**

  Per PC 9 (reproduced above), Husky was specifically given certain contractual warranty rights against the subcontractor (as well as the other noted rights). These rights survive the “parties only” sweep of subsections 37(a) and (b) via s. 37’s opening proviso.

  Section 37 says nothing about whether the “specifically set forth” rights accorded to third parties can be limited or qualified. Accordingly, it is not a bar to the existence or operation of any such limits or qualifications, including arbitration of any warranty disputes;
- the collective effect of PC 9, the last three lines of PC 13.2, and PC 13.8 is that, if Husky seeks to enforce the warranties given to it by the subcontractor, and the subcontractor disputes Husky’s warranty claim, their dispute must be resolved by arbitration. These provisions go together hand-in-glove: the first creating a warranty right and the latter two providing a mode of dispute resolution if an asserted warranty right is disputed. (In ***Peace River Hydro*** (cited above), the SCC viewed a duty to arbitrate as a “procedural burden” attaching to contract rights: “It is not clear … that [certain] terms expressly or impliedly authorize the Receiver **to take the benefits of the agreements while avoiding their procedural burdens, such as the obligation arising from their arbitration clauses**” (part of para 183). No inconsistency – instead, only harmony -- exists here. The right is silent about how warranty enforcement is to occur in the event of a dispute; the arbitration provision fills the gap. The net effect is the same as though these elements were contained in a single provision e.g. “Warranty disputes between Husky and the subcontractor shall be resolved via arbitration”;
- Husky did not point to, and I do not see, any contract provision giving Husky any right to opt out of the arbitration dimension of its warranty right;

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- the arbitration duty is not a freestanding obligation imposed on Husky; instead, it arises only where Husky decides to enforce those rights;
- no evidence shows that the subcontractor (and the general i.e. its contracting partner) would have extended the warranty right to Husky absent the associated arbitration duty;
- it would be odd if the parties to the contract intended (as they clearly did) to resolve all of their own disputes (not otherwise resolved) by arbitration, including any contractual warranty claims by the general against the subcontractor, yet simultaneously intended to leave the door open for litigation by Husky against the subcontractor, *including about the same warranties*. As explained above, they did not actually leave that door open, requiring arbitration of "all disputes"; and
- Husky did not argue that the scope-of-arbitrable-issues language in either PC 13.2 or 13.8 (" … arising out of this PURCHASE ORDER and its performance" and " … arising out of or in connection with the present PURCHASE ORDER") did not embrace the contractual warranty disputes here (only that its particular dispute arising out or in connection with the contract was not caught by (limited-to-parties) arbitration, which I have not accepted).

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[27] All to say: per the general-subcontractor contract, Husky received certain rights, disputes over which must be arbitrated.

[28] Is that imposing a burden on a non-signatory to a contract against its will? Does this violate privity of contract principles?

[29] The answers are no and no.

E. No imposition of burdens without consent here

[30] We are not in the territory of contracts attempting to impose burdens on third parties without their consent.

[31] The general-subcontractor contract did not oblige Husky to do anything or refrain from doing anything or otherwise affect Husky. It *did* require Husky to arbitrate any warranty disputes with Technip *but only if Husky decided to enforce those warranties* -- i.e. only after Husky decided to exercise its limited or qualified warranty right – and disputes arose.

[32] It was the subcontractor's decision (accepted by the general, via their contract) to extend the warranty right to Husky.

[33] Nothing in the record shows that Husky gave consideration or otherwise bargained for its rights under the general-subcontractor contract.

[34] It was within the subcontractor's power (as long as acceptable to the general i.e. as part of their contract) to decide on the scope or ambit of any rights extended to Husky as an outsider to their contract e.g. to decide whether any conditions or terms should attach to the warranty right.

[35] The right extended to Husky by Technip was indeed limited, by the requirement that, if disputes arose about the warranties, they would be resolved by arbitration.

[36] This is not "foisting an arbitration on Husky" or "violating the sanctity of privity of contracts." It was Husky's choice to take up the right given to it by Technip i.e. to seek enforcement of the warranties. That necessarily meant taking up the right with any attaching qualification or limitation – in this case, the restriction to resolving warranty disputes via arbitration.

[37] Husky was free to and apparently did seek to enforce its contract it had directly with the general contractor, as discussed in ***Husky Oil Operations Ltd v Saipem Canada Inc***, 2017 ABQB 489 (Horner J.).

[38] It also exercised its additional rights, conferred by the subcontractor, to enforce the latter's product warranties. If Husky did not wish to arbitrate any warranty disputes, it should not have exercised its warranty right i.e. it should have limited its recourse to pursuit of the general, under the Husky-general contract.

[39] Husky is attempting to strip its warranty-enforcement right from its associated mode-of-enforcement (i.e. mandatory arbitration) provision. In other words, Husky is seeking to enlarge the right given to it under the general-subcontractor contract.

[40] If one voluntarily picks up a stem with thorns, one is also voluntarily, and necessarily, picking up the thorns. Once Husky decided to enforce its warranty right against the subcontractor, it effectively agreed to arbitration of any disputes over them.

[41] Husky's right does not exist on any other terms.

[42] Husky is not obliged to proceed to arbitration (if still available). It has no freestanding duty to do so.

[43] But if it wants to enforce its warranty right, it has no other option.

[44] That is why pursuing its warranty right necessarily amounts to consenting, or being resigned, to arbitration.

[45] Hence no "foisting" here: Husky can pursue its warranty right or leave it. If it pursues it, arbitration necessarily applies to disputes arising.

F. Authorities recognize qualifying or limiting third-party benefits

[46] Canadian cases confirm the orthodoxy of qualifying or limiting benefits granted to third parties to contracts.

[47] In ***Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*** [1999] 3 SCR 108, the Supreme Court of Canada explored whether a barge charterer could benefit from a subrogation waiver in an insurance contract between the barge owner and the insurer. The SCC did not have to examine limits on or qualifications to the benefit conferred on charterer third party, but it recognized that benefits conferred on third parties can be limited or qualified:

> A plain reading of the waiver of subrogation clause indicates that **the benefit accruing in favour of third parties** is **not subject to any qualifying language or limiting conditions.** When sophisticated commercial parties enter into a contract of insurance which expressly extends the benefit of a waiver of subrogation clause to an ascertainable class of third-party beneficiary, **any conditions purporting to limit the extent of the benefit or the terms under**

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> **which the benefit is to be available must be clearly expressed.** … [from p 131] [emphasis added]

[48] The present case features such a limiting-extent-of-benefit condition, namely, the requirement that any dispute arising from Husky's contract-warranty enforcement proceed via arbitration. Husky received a limited or qualified benefit i.e. warranties enforceable (where Technip disputed Husky's warranty claims) exclusively via arbitration i.e. not a freestanding right to enforce by all possible means (including litigation).

[49] As explained above, the contract in question clearly expresses both Husky's warranty right and the necessary pursuit of that right, if exercised and disputed, via arbitration. Thus meeting ***Fraser River***'s requirement for clearly-expressed benefit-limiting or benefit-availability terms.

[50] The concept of such terms was also considered in ***T Co Metals LLC v Federal Ems (Vessel)***, 2012 FCA 284, where certain indemnity benefits were asserted to be only available via arbitration. As the Federal Court of Appeal framed it:

> … the proper question is **whether the benefit conferred on the latter was a qualified benefit in the sense that the indemnity could only be invoked through arbitration proceedings.** If that is the true meaning of the amended charter party, then **by invoking the indemnity which the parties offered it, Canada Moon agreed to submit that question to arbitration.**
>
> On a proper interpretation of the amended charter party, **did the parties confer a qualified benefit on Canada Moon?** That question is one which must be resolved by an examination of the terms of the LOI and the charter party as well as the surrounding circumstances at the relevant time. [paras 97 and 98] [emphasis added]

[51] In the result, the FCA did not find an arbitration-limited indemnity benefit, noting the impracticality for the indemnified party of "[having] to arbitrate its claim for indemnity in New York while it was being sued in Canada", the absence of an arbitration clause in the indemnity document (contrasted to such a clause in a separate contract document), and "the arbitration clause [not lending] itself well to being invoked by a third party": paras 99-101. The FCA concluded:

> … the parties were alive to the circumstances in which the indemnity would be of value to Canada Moon and drafted the LOI [letter of indemnity] accordingly. **It is not necessary to make the indemnity subject to the arbitration clause in order to give it commercial efficacy.** The opposite is more likely to be the case.
>
> **In the end,** even if one accepts that the LOI was an amendment to the charter party, in my view, on a proper construction, **the amended charter party does not require Canada Moon to pursue the benefit of indemnity in arbitration proceedings. It is not a qualified benefit. [paras 102 and 103]** [emphasis added]

[52] By contrast, in the present case:

- Husky's warranty right is contained in the same contract, and the same set of provisions (PC 1 to PC 15) as the "arbitrate all disputes" provisions;

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- the warranty right and the arbitration duty fit hand-in-glove, as discussed above. That is, the subcontractor is not trying to saddle Husky with an independent or unrelated liability;
- the arbitration provision does not force Husky to arbitrate “out of jurisdiction”: per the closing words of PC 13.8, “the location of the arbitration shall be Calgary, Alberta, Canada”;
- Husky did not identify, and in any case I do not see, any factors exposing the arbitration provision as cumbersome or otherwise not easily or readily invoked by Husky. As explained by the FCA in para 97 (see above) and reflecting my earlier conclusions, by invoking the arbitration-qualified right (warranty benefit) here, Husky effectively agreed to arbitrate warranty disputes. As I see it, that qualifies Husky as a party to the arbitration mechanism, enabling it (as needed) to initiate arbitration; and
- as for commercial efficacy, adopting Husky’s (do-not-have-to-arbitrate) position would create (or have created) the potential for the general and subcontractor arbitrating warranty disputes at the same time (in theory) as Husky and the subcontractor were litigating over the same warranties. In any case, Husky has not identified any commercial inefficiency arising from the duty to arbitrate warranty disputes.

[53] Husky did not point to any case holding that rights extended by contract to third parties cannot be limited or qualified.

[54] The orthodoxy of attaching (clearly expressed) qualifications to or limits on rights extended by contract to third parties is further reflected by this Manitoba Law Reform Commission commentary (from “Privity of Contract” – Report #80 – 1993 CanLIIDocs 101):

> At the beginning of this Report, we stated that we had no desire to modify the privity rule as it relates to preventing contracting parties from imposing duties on third parties. For the purpose of clarity, we reiterate that position here. **This does not, however, prevent the contracting parties from imposing a condition on the enjoyment or reception of a benefit. In such a case, an obligation is not imposed but is accepted as a consequence of receiving a benefit which the beneficiary is free to decline**. **It would also seem clear that, if a third party was suing for the benefit of a contract to which he or she was not a party, he or she may be subject to limitations and exemptions contained in the contract**. This is a corollary to the rule that the promisor may raise all defences available against the promisee. Again, **the burden is not imposed by the contracting parties. It is a consequence of a voluntary decision to enforce a provision in the beneficiary's favour.** [page XX] [emphasis added]

[55] The principle that a non-party taking up a contractual or other right also takes up the associated burdens (i.e. the obligations or liabilities connected to the right) was further explored by Christine J. Davis in ***The Principle of Benefit and Burden***, (1998) Cambridge Law Journal, 57(3), pp 522-553. She argues (persuasively) in that, in the United Kingdom, a general principle of benefit and burden operates across various spheres of the law.

[56] Her summary of the principle (below) aptly describes our current situation:

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> The cases have all involved what may loosely be termed an "arrangement." The arrangement may take various forms: a gift, whether inter vivos or by will; an agreement, whether by deed, writing or oral; or a grant. What is common to the arrangements is that **they confer a benefit and also impose a burden. The burden only binds persons who accept or exercise the benefit, have no other right to do so other than by relying on the arrangement, and have a choice whether or not they accept it**. Although in a large number of the cases the benefit was a right relating to land, there has been no indication in any of the cases that the principle is limited to real property and **there are a number of cases where the benefit was** personal property, money or **a contractual right**. … [p 544].

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G. Arbitration obligation would travel with assigned right

[57] A useful exercise is to examine whether Husky could assign its warranty right to a third party without the associated arbitration obligation. Or, if Husky were to become bankrupt or subject to receivership, whether the trustee or receiver would receive Husky's rights free of that obligation.

[58] The answers are no and no, per the Supreme Court of Canada's decision in ***Peaced River Hydro Partners v Petrowest Corp***, 2022 SCC 41:

> ... The interpretation of the term "party" under arbitration legislation falls to be "determined in accordance with the ordinary principles for construction of a contract" (McEwan and Herbst, at § 2:28; Casey, at ch. 3.5.1). It is well established that **an entity connected with a signatory to a contract containing an arbitration agreement may become bound as a "party" by operation of law. Such associated entities may include "subsidiaries, assignees, trustees and <u>others claiming through or under the named party to the arbitration agreement</u>"** (McEwan and Herbst, at § 2:37 (emphasis added)). These entities, although non-signatories, "may have all of the rights and obligations under the arbitration agreement by operation of law" (Casey, at ch. 3.5.1).
>
> Two examples are instructive here. The first is assignment**. It is a "fundamental" and "universal commercial legal principle" that an assignor may not assign contractual rights in such a way as to "convey the benefits and nullify the burdens". Stated differently, a party seeking to enforce assigned rights under an agreement "can only do so subject to the terms and conditions therein", including the condition that disputes are to be resolved by arbitration** (*ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* (1996), 1996 CanLII 12449 (ON SCDC), 135 D.L.R. (4th) 130 (Ont. C.J. (Gen. Div.)); see also Casey, at ch. 3.5.1; *Petro-Canada v. 366084 Ontario Ltd.* (1995), 1995 CanLII 7418 (ON SC), 25 B.L.R. (2d) 19 (Ont. C.J. (Gen. Div.)), at para. 55).
>
> The second example is trusteeship in bankruptcy. **When a trustee in bankruptcy adopts a contract containing an arbitration clause and a dispute later arises, "the arbitration agreement is enforceable by or against the trustee** in the same manner as any other commercial contract adopted by the trustee" (Casey, at ch. 3.8.2).

> In both of these scenarios, **a non-signatory "steps into the shoes of the original contracting party" and thereby becomes "bound by the terms of the contract to which he or she has succeeded as a trustee in bankruptcy ... or assignee**" (A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at §3.10).
>
> I see **no principled reason why the foregoing should not apply, *mutatis mutandis*, to a court-appointed receiver claiming through a debtor under a contract containing an arbitration agreement**. I agree with the Receiver that it "advances claims through [Petrowest and] the Petrowest [Affiliates]" (R.F., at para. 59 (emphasis added)). Indeed, a court-appointed receiver, by initiating legal proceedings on behalf of a debtor, "steps into the shoes" of the debtor as the original contracting party, much like an assignee or a trustee in bankruptcy does. While a court-appointed receiver may have the power to sue on the debtor's behalf, "the receiver acquires no cause of action in its own name" and therefore "must ... sue in the debtor's name to recover accounts receivable" (Bennett, at p. 257). In short, a court-appointed receiver has no independent cause of action to assert. It may only rely on the *debtor's* rights to recover, for example, accounts receivable owed by a third party. **It would violate basic principles of contract law to permit a receiver to enforce a contract on the debtor's behalf while avoiding the debtor's burdens, including the obligation to arbitrate contractual disputes.** [paras 105-108] [bold emphasis added]

[59] Given the continued attachment of associated obligations in each of these rights-transferring scenarios, it is difficult to see why, upstream of any transfers, Husky as the original holder of the right would have any ability to exercise it free of the associated (arbitration) obligation here.

H. Husky's reliance on some authorities misplaced

[60] Husky invoked the SCC's decision in ***London Drugs Ltd v Kuehne & Nagel International Ltd*** [1992] 3 SCR 299, [emphasizing this passage]:

> … [the privity-of-contract rule] precludes parties to a contract from **imposing liabilities or obligations** on third party [and] prevents third parties from **obtaining rights or benefits** under a contract …. [part of p 416]

[61] ***London Drugs*** focused on the latter aspect, namely, whether certain third parties (there, employees of Kuehne & Nagel) could take the benefit of a limitation-of-liability clause in K&N's contract with London Drugs i.e. despite not being parties to that contract i.e. whether the privity rule should be relaxed to permit that benefit for the third parties.

[62] The focus in the present case is whether Husky's acknowledged-by-all warranty benefit is qualified or limited by an obligation to enforce it only via arbitration.

[63] That question is not illuminated by ***London Drugs***. While the SCC stated that "[n]othing in these reasons should be taken as affecting in any way the law as it relates to the imposition of obligations on third parties" (closing portion of the same p 416 paragraph), ***London Drugs*** did not address limitations or of qualifications to benefits conferred on third parties.

[64] Husky also invoked ***Landex Investments Co v John Volken Foundation***, 2008 ABCA 333. But it sheds no light here, turning on findings that the outside party was a complete stranger

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to the contract containing the arbitration clause, being neither a party to it nor given any rights or benefits under it. Necessarily, with no right or benefit provided to the outsider, the question of limitations possibly attaching to rights did not arise.

I. Conclusion on Husky and arbitration provision

[65] For these reasons, I find that, when Husky decided to enforce the subcontractor's contractual warranty, it necessarily agreed to resolve any warranty disputes via arbitration. Again, the warranty right was not provided on any other terms.

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[66] I note Husky's argument at the application that the subcontractor had changed its core arguments between its first-level and appeal briefs and again at the application itself. I do not agree: the subcontractor's central point, throughout, has been that Husky cannot take up its warranty rights without the associated condition of arbitrating them. And whether the subcontractor has argued the point implicitly or expressly, it has consistently maintained that Husky became a party to the arbitration agreement by pressing its warranty rights. Plus, it does not appear to me that the subcontractor relied on any unilateral-versus-bilateral contract theory at any stage or that, in any case, anything turns on that theory, which does not form part of my reasoning here.

[67] The result is that, on activating the warranty and (necessarily) engaging the associated arbitration mechanism, Husky became a party to that mechanism.

J. Is the subcontractor estopped from relying on the arbitration provision?

[68] Husky argued that, whether Husky is party to the arbitration provision or not, the subcontractor is barred from relying on it. Here are its arguments on this aspect:

> The doctrine of estoppel by conduct is summarized by the *Canadian Encyclopedic Digest*:
>
> The rule may be stated as follows: **when one party, has, by words or conduct, made to the other a representation** that was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him or her at word and acted on it to his or her detriment, the **party who made the representation** may not revert to the previous legal relations as if no such representation had been made, but must accept the legal relations subject to the qualification that he or she has introduced, despite the absence of consideration. The party to whom the representation was made cannot be said to rely on the statement if knowing it to be release; he or she must reasonably believe it to be true. Furthermore, the statement must be clear and unqualified and the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action. [footnotes omitted]
>
> **[The subcontractor] did not invoke the dispute resolution process** under PC 13 after receiving Husky's warranty claim in 2015.
>
> Similarly, after being served with Husky's Statement of Claim in 2017, **[the subcontractor] did not invoke any dispute resolution provisions, either to say that they applied, or that Husky's statement of claim could not proceed because Husky was instead obligated to arbitrate.** This was so despite the

> ongoing engagement and communication between [the subcontractor] and Husky regarding the claim.
>
> **[The subcontractor] had many opportunities over years of negotiation to invoke the dispute resolution process in PC 13 or to assert the position the dispute had to be arbitrated.** By failing to do so, it not only failed to perform its obligations under PC 13 but **represented by conduct to Husky that these provisions did not apply, which Husky reasonably relied on**. Accordingly, [the subcontractor] is estopped from now asserting that Husky's claims are subject to PC 13 or that Husky is bound to arbitrate the dispute, and this is a separate reason to dismiss its application. [emphasis added]

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[69] The subcontractor disagrees, as detailed in paras 125-139 of its first-level brief (incorporated by reference into its brief for the present application). In a nutshell, per the subcontractor, it did and said nothing to encourage Husky to start warranty litigation, to attorn to that litigation, or to discourage Husky from arbitrating the warranty disputes.

[70] I find for the subcontractor here:

- Husky did not point to any actual representation (by word or conduct) made by the subcontractor to Husky on the subject of the appropriate forum (litigation or arbitration) here;
- Husky is responsible for its own decision to start litigation. No evidence shows that the subcontractor had anything to do with that decision or that it said or did anything to encourage Husky to maintain that litigation or to discourage it from arbitrating;
- no evidence shows that the subcontractor attorned to the litigation; and
- Husky sought to enforce the contractual warranties. When disputes arose between it and the subcontractor on that front, it fell to Husky to start arbitration proceedings to vindicate (or try to) its warranty rights i.e. it was not the subcontractor's responsibility to start arbitration proceedings for Husky.

[71] I find support for these conclusions in ***Ryan v Moore***, 2005 SCC 38, where the Supreme Court of Canada outlined the requirements for estoppel by convention (paras 53-59) and by representation (paras 76 and 77).

[72] In the present case, the evidence does not reflect an "assumption shared and communicated" (i.e. about the availability of a litigation (i.e. non-arbitration) pathway for Husky) or anything to ground a "duty to speak" (i.e. for the subcontractor to raise its "arbitration only" position to Husky at any stage).

K. Do neither the *Arbitration Act* nor the *International Commercial Arbitration Act* apply because Husky not a party to the arbitration agreement?

[73] Husky also argues that, in any case, neither of Alberta's arbitration statutes authorizes a stay of Husky's litigation proceedings, with the stay provisions of both aimed at litigation pursued by a "party" to an arbitration agreement.

[74] Husky is wrong here.

[75] As explained above, by seeking to enforce its warranty right, Husky effectively signed on to the accompanying arbitration mechanism and, by extension, became a party to it. Accordingly, any asserted difficulties stemming from Husky not being a party to the arbitration agreement do not arise, whichever arbitration statute applies.

L. Is the contract's arbitration provision invalid for uncertainty or confusion over which arbitration statute applies?

[76] Husky argues further that, in any case, uncertainty or confusion over which statute applies renders the arbitration mechanism invalid.

[77] I disagree.

[78] As Husky notes, the subcontractor asserts that the *ICAA* applies, on the basis that Husky and the subcontractor have their "places of business" in different countries: see ***AA***, s. 2 (***AA*** applies unless ***ICAA*** applies), ***ICAA***, ss 4-9 (international commercial arbitrations), and ***ICAA***, Schedule 2 (Uncitral Model Law on International Commercial Arbitration), Article 1 (Scope of application) (when an arbitration is international).

[79] However, per Husky, the parties selected the ***AA*** as the governing statute, per s. 13.7 of the Particular Contractual Conditions. Per Husky, if the subcontractor is right about this being an international arbitration, with the ***ICAA*** thus applying, this disconnect (which Act applies?) renders the arbitration agreement invalid.

[80] The problem, for Husky, is that, while PC 13.7 indeed references the ***AA***, the section overall is unintelligible:

> GENERAL TERMS AND CONDITIONS FOR PURCHASE ORDER DOCUMENTS – HIGH COMPLEXITY – GTC-COR-MATE-001-E Rev 05 shall be referred to and finally resolved by arbitration under the rules of the International Chamber of Commerce in accordance with the Arbitration Act of Alberta ("the Act").

[81] The opening reference to the described terms and conditions cannot be reconciled with the balance of the provision: what is being referred to and finally resolved by arbitration? All the described terms and conditions? That makes no sense.

[82] And all counsel (including Husky's) agreed at the argument of the recent application that s. 13.7 is effectively unintelligible and should be disregarded for present purposes.

[83] Accordingly, it cannot be said that the parties elected the ***AA***, at least via s. 13.7.

[84] In any case, the disconnect asserted by Husky does not arise if this is not actually an international arbitration.

[85] And, on that point, I agree with another of Husky's submissions, namely, that the evidentiary record is incomplete on whether the subcontractor has or had a place of business in Alberta and, if so, which of its places of business had the closest connection to the contract (see Article 1, s. 1(4) on multiple places of business). Accordingly, it is not clear which of the ***ICAA*** and the ***AA*** applies i.e. whether we have an international arbitration or not.

[86] However, that is not material for present purposes. The key is that, regardless of the subcontractor's position on which statute applies, the statutes themselves will (or would, as necessary) provide the answer in the circumstances here. One of them will apply: the ***AA*** (the

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default position, per s. 2 ***AA***) or the ***ICAA*** (if this is an international arbitration). (Husky did not argue that the parties agreed to exclude the (potential) application of the ***AA***: see para 2(1)(a) ***AA*** for this potential argument.)

[87] All to say: the application provisions of both statutes will (or, as necessary, would) operate in harmony to determine which of the two applies, a process not prevented or made uncertain or confusing by the parties' agreement.

[88] As I result, I reject Husky's invalidity argument: the arbitration agreement created a valid and enforceable arbitration obligation, whichever of the two Acts applies.

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M. Is it too late for Husky to seek arbitration of its warranty claims now?

[89] With a valid and enforceable arbitration mechanism available from the start, and with the subcontractor not estopped from relying on it now, has the time for Husky to seek arbitration now expired?

[90] The answer is yes, for the reasons outlined in the subcontractor's first-level brief (paras 94-99):

> While a conclusion that Husky's claims are governed by the arbitration provisions would normally result in a referral to an arbitral tribunal, **given the overwhelming evidence that Husky failed to commence arbitration proceedings within the applicable limitation period, it would be appropriate ... to simply dismiss the within Action** pursuant to Rule 3.68 of the Alberta *Rules of Court*.
>
> The **limitations period for commencing arbitration is two years** from when the claimant knew or ought to have known: 1) that the injury for which it seeks a remedial order had occurred; 2) that the injury was attributable to the conduct of the defendant; and 3) that the injury, assuming liability, warrants bringing a proceeding. [reference here to *Limitations Act*, s. 3]
>
> The undisputed evidence is that the last part of the OTSG Modules was delivered to the Sunrise Project nearly 9 years ago and that it has been more than 7 years since Husky identified the Alleged Defects. Husky communicated with Donald Hallwachs in 2015 and early 2016 about those Alleged Defects. [evidence references omitted]
>
> Indeed, **Husky filed its Amended Statement of Claim on November 27, 2017, more than 4 years ago** [i.e. from January 21, 2022, the date of this brief]. This fact alone is incontrovertible evidence that the limitation period has passed.
>
> Accordingly, and as discussed by Justice Dario in *Lafarge Canada Inc v Edmonton (City)* [2015 ABQB 56 at para 24], citing two Court of Appeal decisions, the proper remedy in these circumstances is for the Court to dismiss rather than stay Husky's claim:
>
>> ... An application under R. 129 or R. 159 is appropriate here because the underlying right to arbitrate is statute-barred. Usually, parties whose lawsuits deal with arbitrable issues would have their actions stayed under s. 7(1) [*AA*] and the arbitration would proceed. The lawsuit would not be dismissed outright because the

> court retains supervisory jurisdiction under s. 6 and could, for example, enforce an award. **<u>In the instant case a stay is not appropriate because the right to arbitrate is extinguished through the expiration of the limitation period, and accordingly, there is no further supervisory or enforcement jurisdiction for the court to exercise</u>**. [emphasis added]

Should the Court find that Husky's claims set out in the Amended Statement of Claim are properly within the jurisdiction of an arbitral tribunal, and that the applicable limitation period for commencing arbitration has passed, the Court ought to dismiss Husky's claims in their entirety. [bold (without underlining) emphasis added]

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[91] Section 3 of the *Limitation Act* sets deadlines for seeking a "remedial order", which is defined (in para 1(i) as "a judgment or order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right", subject to certain exceptions not applying here.

[92] At first glance, requesting arbitration would fall outside seeking a remedial order. But a linkage between arbitration proceedings and the *Limitations Act* is supplied, for the purposes of the ***AA***, by ss. 51(1) of the latter Act:

> The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a matter in dispute in the arbitration were a cause of action.

[93] The subcontractor did not point to a similar or any limitations-focused provision in the ***ICAA*** i.e. in case that statute applies here.

[94] However, Husky did not raise any argument, in either of its briefs, that, if it was required to arbitrate any or all of its claims against the subcontractor, the deadline to arbitrate, under either statute, has not expired. At the application, Husky asserted that not all of the relevant facts limitation-period-wise were in evidence. In my view, with the subcontractor having expressly raised the limitation argument in its initial brief (if not earlier), it fell to Husky, if it perceived that additional facts were relevant to the limitation issue, to put them forward (e.g. via supplementary affidavit) at the application before me.

[95] In any case, I agree with the subcontractor that, if the circumstances circa 2017 compelled or motivated Husky to file its statement of claim then (i.e. if Husky discerned that it was then appropriate to commence litigation), the limitation period has necessarily passed by now i.e. more than five years later.

[96] In these circumstances, I find that the applicable limitation period(s) for Husky to commence arbitration have now expired, with no arbitration yet commenced by it.

[97] It is now too late for Husky to seek arbitration.

[98] The consequence is that Husky's arbitrable claims – at minimum, its claims anchored in the subcontractor's warranty granted to it – must be struck from its action against the subcontractor.

[99] Which raises the question: is Husky's negligence claim also time-barred?

N. Is Husky's negligence claim also caught by the arbitration provision?

[100] The answer is no.

[101] The arbitration clause here only reaches Husky because it sought to enforce its contractual warranties, as explained above.

[102] Husky's negligence claim arises under the law of negligence, not the general-subcontractor contract.

[103] It may be that the contract's terms having some bearing on the (possible) existence of a subcontractor duty of care to Husky, a (possible) breach of that duty, or (possibly) other elements of Husky's negligence claim.

[104] But that is distinct from the contract being the source of Husky's negligence claim, in the sense that the contract is the source of the contractual warranties Husky was required to arbitrate.

[105] The subcontractor anchored its "all claims covered by arbitration" argument on passages in ***Agrium Inc v Babcock***, 2005 ABCA 82 (para 15) and ***Autoweld Systems Ltd v CRC-Evans Pipeline International Inc***, 2009 ABCA 366 (para 5) discussing the breadth of "all disputes covered" or "all disputes including connected disputes" arbitration provisions i.e. how they may embrace both contract and tort claims arising out of the same circumstances.

[106] However, both cases apparently focused on the immediate parties to the contracts in question and the scope of the arbitration clause as between themselves i.e. did not examine the position of third-party beneficiaries to the contract. (I say "apparently" because the ABCA decision in ***Autoweld Systems*** only implicitly focuses on the immediate parties, and the first-level decision is apparently not reported.)

[107] It is not surprising that parties agreeing to an "all disputes covered" arbitration clause (or something akin) will or may be required to arbitrate every species of dispute arising from or connected to the contract in question.

[108] However, as noted, Husky here did not sign on to the (apparently all-embracing i.e. for the immediate parties) arbitration clause. Its connection with the arbitration clause comes from its decision to enforce its contractual warranties.

[109] It cannot fairly be said that, in stepping into the arbitration clause to enforce those warranties, Husky was necessarily or even possibly agreeing to arbitrate its negligence claim against the subcontractor.

[110] Husky's first-level brief accurately describes the situation:

> ... regardless of the Subcontract, Husky independently pleads that [the subcontractor] is liable in negligence for the dangerous defects in the [generators in question] for which Husky incurred substantial costs to correct. This is an independent cause of action that would exist regardless of whether Husky had any claim as an express third-party beneficiary under the Subcontract.
>
> [The subcontractor's] argument on this point ignores that Husky's cause of action in tort arises independently of the Subcontract. [The subcontractor] effectively seeks to bar Husky's common law tort claim by reason of a contractual provision in the Subcontract, to which Husky was not a party. Such an order would be contrary to law and has no legal foundation. [paras 57 and 58]

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[111] As already explained, Husky is effectively a party to the arbitration clause, but only while enforcing its contract warranty claim i.e. not its negligence claim.

[112] Accordingly, the negligence-focused elements of Husky's statement of claim (amended or amended-amended), not be arbitrable here, are not affected by the expiry of the limitation period to arbitrate.

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IV. Conclusion

[113] As explained, Husky had to arbitrate its contract-warranty claims.

[114] In concluding otherwise, the learned applications judge erred.

[115] Husky did not start arbitration proceedings before expiry of the applicable deadline(s). Husky's warranty-anchored claims are accordingly struck from the latest iteration of its statement of claim. (If the parties cannot agree on which clauses are struck and which remain, I will provide a follow-up ruling.)

[116] Husky's negligence claim was not arbitrable and is thus not affected by the expiry of the arbitration deadline.

[117] The subcontractor is entitled to costs of the application.

[118] If the parties do not agree on the scale (e.g. Schedule C, solicitor-and-client, etc.) and quantum of costs, I will rule after receiving written submissions (maximum three pages, excluding cases and supporting materials e.g. draft bill of costs), with the subcontractor's brief due by October 13, 2023 and Husky's by October 20, 2023.

[119] I thank all counsel for their excellent written and oral submissions.

Heard via Webex in Edmonton, Alberta on September 13, 2023.

Dated at Calgary, Alberta this 28th day of September, 2023.

M. J. Lema
J.C.K.B.A.

Appearances:

S.B. Gavin Matthews / Megan Stoker

Peacock Linder Halt & Mack LLP

Counsel for the Defendants / Applicants

Joshua D. Fraese

Rose LLP

Counsel for the Plaintiff