KING'S BENCH FOR SASKATCHEWAN

Citation: **2024 SKKB 168**

Date: **2024 09 16**
File No.: KBG-MF-00007-2023
Judicial Centre: Melfort

BETWEEN:

GLENN MAXIMILLIAN FORSTER

APPLICANT

- and -

PATRICK ROSS HAROLD FORSTER and
MARTHE LOUISE FORSTER

RESPONDENTS

Counsel:

Grant Carson	for the applicant
Jay D. Watson, K.C.	for the respondents

FIAT — ELSON J.
September 16, 2024

Introduction

[1] This dispute is about the possible rearrangement or reallocation of undivided interests in farmland previously used in the operation of a farming partnership. One of the parties expected that the reallocation would have long since been completed. He now wishes to press the matter on by bringing an application for partition of the farmland.

[2] Unlike the usual practice in partition cases, this application is not brought

pursuant to the Imperial partition statutes which were received as part of Saskatchewan law more than 100 years ago (See *The Partition Act, 1539*, 31 Hen VIII, c 1 (UK); *The Partition Act, 1540*, 32 Hen VIII, c 32 (UK); and *The Partition Act*, *1868*, 31 & 32 Vict c 40 (UK)). The applicant has deliberately and expressly decided to ignore these well-known statutes. Instead, he has chosen to rely on a little-known statute that, subject to specific limitations, provides for the "subdivision" of the subject farmland. In the words of his counsel, the applicant argues that the legislation he relies on reflects Saskatchewan's version of the Imperial partition statutes.

[3] The respondents' opposition to this application does not meaningfully address the actual merits of the applicant's argument. Rather, the respondents contend that the Court lacks jurisdiction to hear the matter. They ground this contention on two premises. The first premise, which I find lacks any meaningful substance, is the matter cannot proceed by way of originating application. At most, this submission asserts an irregularity that the Court can, and should, easily rectify.

[4] The second premise is more substantive. In this respect, the respondents assert that the Court's jurisdiction is ousted by arbitration agreements reflected in the business arrangements between the parties.

[5] For the reasons that follow, I find that the application must be dismissed, but not for any of the reasons asserted by the respondents. Simply put, I find that one of the prerequisite circumstances for the applicant's request has not been established.

[6] As for the respondents' challenge to the Court's jurisdiction, I am compelled to comment that the analysis behind the challenge is flawed and ignores the applicable case law. That case law makes it clear that jurisdictional issues relating to a possible commercial arbitration are, subject to certain exceptions, to be determined by the arbitrator – not by the Court.

Background Facts

[7] The applicant in this matter is Glenn Maximillian Forster. The respondents are his brother, Patrick Ross Harold Forster, and his brother's wife, Marthe Louise Forster. For the sake of brevity, and meaning no disrespect, I will refer to each party by their respective first names.

[8] According to the presented evidence, Glenn and Patrick carried on a farming partnership [Partnership] for many years. Originally, the Partnership operated a seed farm under the name "Forster Seed Farm", but later switched to a grain farming operation from 2006 to 2016. Glenn and Patrick each held their respective Partnership interests through their personal corporations. Glenn held his interest in 628777 Saskatchewan Ltd. [777 Sask] while Patrick's interest was held in 628778 Saskatchewan Ltd. [778 Sask], a corporation he and Marthe own.

[9] While the Partnership interests were held in the respective corporations, the land on which the Partnership operated, consisting of 14 parcels, was held, and continues to be held, personally by the parties in undivided one-half interests as tenants in common. Glenn is the sole title holder of his half interests, while Patrick and Marthe jointly hold their half interests. The parcel numbers and abbreviated legal descriptions for the land are as follows:

Surface Parcel #152677570	NW 25-39-22 W 2 Ext 78
Surface Parcel #113490480	NE 25-39-22 W 2 Ext 0
Surface Parcel #153439724	SW 17-39-21 W 2 Ext 15
Surface Parcel #153439735	SW 17-39-21 W 2 Ext 51
Surface Parcel #152323354	SE 17-39-21 W 2 Ext 14
Surface Parcel #152651369	SW 28-40-22 W 2 Ext 89
Surface Parcel #113502440	SE 27-40-22 W 2 Ext 0
Surface Parcel #113523757	SE 26-39-22 W 2 Ext 0
Surface Parcel #152677626	SW-35-39-22 W 2 Ext 86
Surface Parcel #152677637	SW-35-39-22 W 2 Ext 87
Surface Parcel #152677592	LSD 2-35-39-22 W 2 Ext 80

Surface Parcel #152677604	LSD 7-35-39-22 W 2 Ext 81
Surface Parcel #113503193	SW-2-40-22 W 2 Ext 0
Surface Parcel #113523779	NW-26-39-22 W 2 Ext 0

[10] 777 Sask and 778 Sask continued to operate the Partnership together until December 31, 2015. Leading up to this date, the two corporate partners entered into a written Partnership Agreement, dated January 17, 2010. Among other issues, the Partnership Agreement addressed a long-term plan to wrap up the Partnership's affairs. In the definition provision of the Partnership Agreement, the corporate partners were identified, and their respective "Principals" were described as "Glenn Forster" and "Pat Forster". Against this backdrop, there are two provisions of the Partnership Agreement that deserve mention. The first is Article 23, which relates to the ownership of the land used in the operation of the Partnership. This article reads as follows:

> 23. LAND OWNERSHIP
>
> The Parties to the Agreement hereby acknowledge that the land held by Partners and their Principals is registered in equal undivided ½ interests. The Parties agree to work together to use their best efforts to have the land transferred so as to obtain equal ownership of the land on separate titles. The Partners and Principals wish to have defined land ownership so that each Partner and Principal has titles to whole quarters and not undivided one half interests.
>
> [Emphasis added]

[11] The second noteworthy article is Article 10, pertaining to resolution of disputes between the partners by arbitration pursuant to *The Arbitration Act, 1992*, SS 1992, c A-24.1. Article 10 read as follows:

> 10. Arbitration
>
> All disputes and questions whatsoever which shall arise between the Partners or between the Partners and the personal representatives of a principal that touches this agreement or the construction or application thereof or any clause or thing herein contained or any account, valuation or division of assets, debts or liabilities to be made hereunder or any other matter relating to the Partnership business or

> affairs thereof or the rights, duties, and liabilities of any person under this agreement respecting the joint operation and management of the Partnership shall, when a mutually satisfactory settlement cannot otherwise be reached, be submitted to arbitration.
>
> The arbitrator may be a single person mutually satisfactory to both parties, or if the parties cannot agree then each Partner shall appoint an arbitrator and the two so appointed shall appoint a third and a decision of the majority of the three arbitrators shall be binding on the Partners.
>
> In the event that the first two named arbitrators are unable to agree upon a third within seven (7) days after the appointment of the last of them, then upon application a judge of the Court of Queen's Bench for Saskatchewan [now Court of King's Bench for Saskatchewan] shall be entitled in chambers to name the third arbitrator. In all respects, the Arbitrations Act of Saskatchewan and amendments thereto shall govern such proceedings. The Arbitrator shall be entitled to fix the costs of the arbitration and to settle the matter and by whom such costs are to be paid.
>
> [Emphasis added]

[12] Although there is some dispute as to the circumstances under which the Partnership wrapped up, the parties agree that 777 Sask, Glenn's corporation, sold its Partnership interest to a corporation owned by Patrick's son, Clayton Forster [Clayton]. Clayton's corporation is Bright Valley Farms Ltd. [Bright Valley].

[13] The evidence presented to the Court, albeit in separate affidavits, suggests the existence of two separate stages in the transaction to sell 777 Sask's interest. The first stage involved a three-party agreement between 777 Sask, 778 Sask and Bright Valley, executed on January 20, 2016. This agreement, named an "Agreement in Principle", was obviously prepared in contemplation of the sale of 777 Sask's interest in the Partnership. Among other things, the Agreement in Principle acknowledged and/or stipulated to the following:

a. that 777 Sask and 778 Sask had ended the activities of the Partnership and all joint business interests as of December 31, 2015, such that both partners were then free to carry on their own business activities

(Article 1);

b. that 777 Sask shall sell its interest in the Partnership to Bright Valley on terms to be agreed upon, but on the understanding that all parties would use their best efforts to make the transaction proceed forward as quickly and as smoothly as possible (Article 3);

c. that 777 Sask and 778 Sask "have agreed that in conjunction with the partnership interest transfer that there will be transfers of some land to ensure each Partner, or principle *(sic)* of the Partner, has its own land base. The land shall be transferred to create as equal ownership as possible" (Article 5);

d. that "All disputes and questions whatsoever which shall arise between the parties to this agreement or the construction or application thereof or any clause or thing herein contained or any account, valuation or division of assets, debts or liabilities to be made hereunder or any other matter relating to this Agreement shall, when a mutually satisfactory settlement cannot otherwise be reached, be submitted to arbitration" (Article 7).

In respect of the arbitration clause in Article 7 of the Agreement in Principle, I note that the procedure for the appointment of arbitrators and conduct of the arbitration is substantially similar to that described in the Partnership Agreement's arbitration clause.

[14] Eleven months after the Agreement in Principle, on December 21, 2016, 777 Sask and Bright Valley executed the agreement for the sale of 777 Sask's Partnership interest. It is noteworthy that the sale agreement stipulated that 777 Sask was only selling its interest in the "farm partnership". The sale did not involve transfer of any interest in land or serve as a waiver of rent that may be owing. Although the

wording of this provision referred to 777 Sask's interest in land, it is understood that this reference was to Glenn's interest in the land that was used for the Partnership's operation.

[15] Glenn deposes that at the time of the sale of 777 Sask's Partnership interest to Bright Valley, Patrick gave him a verbal undertaking that he would "address and complete an equal division of the jointly owned farm lands in 2017" but that he failed to follow through on this undertaking. In the meantime, the Partnership, now consisting of corporations operated by Patrick and Clayton, has continued to farm all the land with no formal agreement on the terms of rent and with no consideration to a possible partition of the land.

[16] Glenn made a proposal to Patrick and Marthe that he would receive four quarters of the subject land, consisting of SE 26-39-22 W2, NW 26-39-22 W2, SW and part of SE 35-39-22 W2 and SW 2-40-22 W2, with the respondents having the remaining lands. To this date, this proposal and proposals related to it have been ignored.

[17] As the division of farmland has not yet been resolved to Glenn's satisfaction, he brought this application for an order to "partition by way of subdivision" the undivided interests in the farmland previously used by the Partnership. Subject to a change I have taken the liberty of making, the subdivision Glenn seeks would result in a division of the land as follows:

To Patrick and Marthe:

Surface Parcel #152677570	NW 25-39-22 W 2 Ext 78
Surface Parcel #113490480	NE 25-39-22 W 2 Ext 0
Surface Parcel #153439724	SW 17-39-21 W 2 Ext 15
Surface Parcel #153439735	SW 17-39-21 W 2 Ext 51
Surface Parcel #152323354	SE 17-39-21 W 2 Ext 14
Surface Parcel #152651369	NW 28-40-22 W 2 Ext 89
Surface Parcel #113502440	SE 27-40-22 W 2 Ext 0

To Glenn

Surface Parcel #113523757	SE 26-39-22 W 2 Ext 0
Surface Parcel #152677626	SW-35-39-22 W 2 Ext 86
Surface Parcel #152677637	SW-35-39-22 W 2 Ext 87
Surface Parcel #152677604	LSD 7-35-39-22 W 2 Ext 81
Surface Parcel #152677592	LSD 2-35-39-22 W 2 Ext 80
Surface Parcel #113503193	SW-2-40-22 W 2 Ext 0
Surface Parcel #113523779	NW-26-39-22 W 2 Ext 0

For reasons not explained in the evidence or the submission of counsel, Glenn also asked for a remedy with respect to Surface Parcel #152677659. The evidence shows that Glenn already holds sole title to this parcel. Accordingly, I have not included it in the above list.

[18] Glenn's application is brought pursuant to *The Farming Communities Land Act*, RSS 1978, c F-10 [*FCLA*]. In his submission, Glenn's counsel posited that the *FCLA* is Saskatchewan's version of English partition of land legislation that the province received when it was created. He further argued that I, as the chambers judge, had the necessary jurisdiction to make the order his client requests, all without further inquiry.

[19] Patrick and Marthe's opposition to the application is rooted in two arguments. First, they contend that the Court has no jurisdiction to decide this matter on the basis of an originating application. Secondly, and more directly, they assert that the arbitration clauses in both the Partnership Agreement and the Agreement in Principle oust this Court's jurisdiction in favour of a resolution by arbitration.

Law and Analysis

***The Farming Communities Land Act* [*FCLA*]**

[20] The *FCLA* is a rather old and somewhat inscrutable piece of legislation.

The first version of this statute received royal assent on February 28, 1936. Although amended multiple times since, the substantive provisions of the *FCLA* have not changed in any significant way.

[21] I have not been able to uncover any documents or records to describe the reasons why the *FCLA* was considered necessary when it came before the Saskatchewan Legislature. At the time of its enactment, legislative debates were not recorded. I also could not find any newspaper reports that shed any light on the reasons for the legislation.

[22] In a nutshell, the *FCLA* creates a framework whereby a municipality or a person, with the required eligibility, can initiate a procedure to subdivide farmland that is registered to, or beneficially held by, two or more persons. The procedure necessarily begins with an application to the Court for "directions" to hear an application for subdivision. Contrary to Glenn's contention, the judge who hears this initial application cannot address the subdivision request on its merits. If that judge is satisfied the matter can go forward, he or she can only make directions.

[23] Where directions are given and a hearing is subsequently held, the hearing judge may make orders for the subdivision of the land. Such orders can include designation of persons who are entitled to portions of the land and directions to issue new titles. Alternatively, and as I read the statute, it is open for the hearing judge not to make any substantive order, at all. Moreover, I think it particularly noteworthy that the *FCLA* does not set out specific criteria for the Court to consider in deciding how – or whether – a subdivision should be directed.

[24] In the context of the matter before me, I find the most relevant provisions of the *FCLA* are sections 2(1), 3, 4, 5 and 10. These provisions read as follows:

> **2(1)** If the title to land is registered in the names of two or more

persons, each having an undivided interest in the land, and those persons or some of them, either alone or along with other persons, are jointly engaged in farming operations on the land, or if title to land is registered in the name or names of one or more persons who actually hold the land in trust for persons jointly engaged in farming operations on the land, then any registered owner of the land, or any other person claiming an interest in the land, or the municipality in which the land is situated, may apply without notice to a judge of the Court of King's Bench sitting at the judicial centre nearest to which the land is situated for directions as to the hearing of an application for an order for subdivision of the land and the issue of new titles to any persons that the judge determines to be entitled to the land.

....

3(1) Upon an application for directions the judge shall fix a place and time for a hearing and shall direct notice of the hearing to be given, in such manner as he may deem expedient, to all persons appearing by the records of the Land Titles Registry and the municipality in which the land is situated to have an interest in the land and to all other persons known to the applicant to have or claim an interest in the land, and may also direct notice to be advertised in one or more newspapers circulating in the municipality in which the land is situated.

(2) The application for an order for subdivision of land shall be by notice of motion and, unless otherwise ordered, there shall be at least ten clear days between the service of the notice and the day fixed for the hearing.

(3) The local registrar shall register an interest based on the notice of the hearing in the Land Titles Registry against the affected titles.

4. After an interest is registered against the affected titles in accordance with subsection 3(3) and until registration of that interest is discharged pursuant to section 10, no person shall:

(a) register a transfer of that title or titles; or

(b) register any interest against that title or titles.

5. After hearing all interested parties, or such of them as have appeared, the judge may by order:

(a) designate the persons whom he finds entitled either legally or equitably to any portion of the land, and the portions to which those persons are entitled;

(b) direct the subdivision of the land into such number of blocks or lots of such area or areas as he deems expedient, with suitable

> provision for access to each block or lot;
>
> (c) specify the registered interests to which each block or lot is subject, and, if necessary, divide and apportion any registered interest affecting two or more blocks or lots if those blocks or lots are not found to belong to the same person;
>
> (d) direct:
>
> (i) the Controller of Surveys, on receipt of the plan of subdivision mentioned in section 7, to approve the plan; and
>
> (ii) the Registrar of Titles to issue titles to the parcels shown on the plan, in the names of the persons found by the judge to be entitled to those parcels, subject to the registered interests specified in the order.
>
> …
>
> **10.** If no order is made pursuant to section 5, the local registrar shall discharge any interests registered pursuant to subsection 3(3).
>
> [Emphasis added]

[25] My research has revealed that the *FCLA* has rarely been applied. It has been judicially considered in only one reported case, namely, the decision of this Court in *Lisoway v Lisoway*, 1982 CarswellSask 827 (WL) (QB) [*Lisoway*].

[26] In 2001, the *FCLA* caught the attention of The Law Reform Commission of Saskatchewan [LRCS] in its June 2001 Report, *Proposals for a New Partition and Sale Act* (online: www.lawreformcommission.sk.ca/publications/ (16 September 2024). This attention was less than flattering. Leading up to its recommendation that Saskatchewan should enact its own partition and sale legislation and should repeal the *FCLA*, the LRCS reviewed the state of the law as it then applied to partition of co-owned land. In doing so, the LRCS observed that the reasons why the *FCLA* was originally enacted had become "obscure" and that "its scope and purpose is uncertain". Although it did not identify any reported decisions involving the statute, the LRCS did say, at p. 3 of the Report, that the *FCLA* "has apparently been used on rare occasions to

effect … partition…". In the end, the LRCS concluded, at p. 15 of the Report, that whatever virtues the *FCLA* might possess, "it is difficult to justify a special regime for division of farm land owned in co-tenancy. Perhaps fortunately, it is almost a dead letter for lack of use in any event. In our opinion, it should be repealed".

[27] In viewing the relevant provisions I have recited from the *FCLA*, it is evident that the Court's jurisdiction, at this stage of the proceeding, is set out in s. 2(1). Aside from the circumstance of land held in trust for others – which does not apply in the present case – s. 2(1) stipulates that two circumstances must be in place before the Court is obliged to issue directions.

[28] The first circumstance is that the land must be registered in the names of two or more persons such that they each have an "undivided interest in the land". The second circumstance is that these persons or some of them, either alone or along with other persons, must be "jointly engaged in farming operations" on the land.

[29] I am satisfied that these two circumstances are jurisdictional in the sense that the Court is precluded from making directions unless both circumstances are shown to exist at the time the application is filed. I draw support for this view from the decision in *Lisoway*. In that case, Geatros J. dismissed an application for directions under s. 2 of the *FCLA* on the grounds that the applicant, as a joint tenant to the farmland, did not have an undivided interest. He added that, while the applicant might otherwise have the right to partition, this had no impact in the constructions of s. 2. In this regard, Geatros J. wrote the following at para. 7:

> 7 It is apparent, in my view, that it is a requirement at all events, on an application under section 2 of The *Farming Communities Land Act* [1978, F-10], that the land be registered *at the time of the application*, in the words of the section, "in the names of two or more persons, each having an undivided interest therein." That is implicit given the opening words of section 2, "Where the title to land is registered..." So it is that it is of no moment that the applicant as a "joint tenant"

> may otherwise have the right to partition. By partition he may be able to acquire an undivided interest as defined by the authorities but he does not have that here at the time of his application.

[30] In the present case, and unlike the situation in *Lisoway*, the parties, as tenants in common, do hold undivided interests in the subject farmland. Accordingly, that circumstance has been met.

[31] As for the circumstance related to the jointly engaged farm operation, I find that it has not been met. Giving s. 2(1) a purposive construction, I am persuaded that, in the context of the evidence before the Court, the existence of "jointly engaged farming operations" can only exist if Glenn, Patrick and Marthe were, as of the date the application was filed, farming the subject land together in pursuit of a common enterprise or common purpose. Given the undisputed evidence that Glenn and 777 Sask had ended their active participation in the Partnership as of December 31, 2015, I am satisfied that the parties were not jointly engaged in farming operations on the subject land when the application was filed.

[32] In making the above findings, I acknowledge that the phrase "jointly engaged in farming operations" is not defined in the *FCLA*. It necessarily follows that the Court must construe this phrase in the entire context of the statute and in the grammatical and ordinary sense, having regard to the scheme of the statute (See *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 SCR 27 at para 21). In its grammatical and ordinary sense, the reference to "jointly engaged" operations suggest an arrangement, typically in the form of a contract, whereby two or more parties are pursuing a single enterprise. In this regard, jointly engaged operations can be likened to a "joint enterprise" or "joint venture".

[33] A helpful and occasionally cited definition of a joint venture was penned by the Ontario Court of Appeal in *International Corona Resources Ltd. v Lac Minerals*

Ltd. (1987), 44 DLR (4th) 592 (WL) (Ont CA), aff'd in [1989] 2 SCR 574. At para. 153, and drawing upon *Black's Law Dictionary* (revised 4th ed, 1968), the Court set out this definition as follows:

> 153 …. A joint venture (also known as a joint adventure) is in essence a form of partnership. It has been defined in *Black's Law Dictionary* (revised 4th ed., 1968), p. 73 [under adventure], as:
>
> > A commercial or maritime enterprise undertaken by several persons jointly; a limited partnership, — not limited in the statutory sense as to liability of the partners but as to its scope and duration ... An association of two or more persons to carry out a single enterprise for profit, for which purpose they combine their property, money, effects, skill and knowledge. ... A special combination of two or more persons where, in some specific adventure, a profit is jointly sought without any actual partnership or corporate designation.
>
> See also *United Dominion Corp. v. Brian Pty. Ltd.* [(1985), 60 ALR 741 (Aus HC)]. Partnerships and joint ventures are, of course, commonly, and one can say with some degree of certainty, usually formed for the purpose of carrying on commercial activities. In many cases the persons who become partners or joint adventurers are at arm's length prior to the creation of the partnership or joint adventure. Each is concerned with promoting his or her own interests and welfare. This has not prevented the Courts from finding that a fiduciary relationship may exist between the intended partners or joint venturers before the partnership or joint venture has been created and even though the intended partnership or joint venture never comes into existence: see *United Dominion Corp*.
>
> [Emphasis added]

[34] In concluding that jointly engaged farming operations have not been established, I have not been unmindful of the fact that 778 Sask and Bright Valley continue the Partnership's operations. I am not persuaded, however, that this reality meets the required circumstance. As I read s. 2(1) of the *FCLA*, it is the expectation of the statute that two or more of the persons who hold the undivided interests must be jointly engaged in the relevant farming operations. The use of the phrase "some of them" reflects the legislature's intention that a multiple number of undivided interest holders must be so engaged. As Patrick and Marthe hold their undivided interests as

joint tenants, I find that, for all intent and purposes, they should be seen as one holder of an undivided one-half interest, not as separate undivided interest holders.

Effect of the Arbitration Clauses

[35] Having addressed the merits of Glenn's application under the *FCLA*, I now turn to the arbitration issue raised by Patrick and Marthe. Both counsel included a discussion about the issue in their respective written submissions. Unfortunately, neither submission gave much consideration to the body of jurisprudence that has developed on the operation of arbitration clauses in commercial agreements. I will explain.

[36] Where a party to a proceeding before this Court is of the view that the relevant dispute is properly the subject of an arbitration agreement under *The Arbitration Act, 1992*, s. 8 of the statute comes into play. This provision reads as follows:

> **8(1)** Subject to subsection (2), if a party to an arbitration agreement commences a proceeding with respect to a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> **(2)** The court may refuse to stay the proceeding in any of the following cases:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid;
>
> (c) the subject-matter of the dispute is not capable of being the subject of arbitration pursuant to Saskatchewan law;
>
> (d) the motion was brought with undue delay;
>
> (e) the matter is a proper one for default or summary judgment.
>
> **(3)** An arbitration of the dispute may be commenced and continued

> while the motion is before the court.
>
> **(4)** If the court refuses to stay the proceeding:
>
> (a) no arbitration of the dispute shall be commenced; and
>
> (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.
>
> **(5)** The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that:
>
> (a) the agreement deals with only some of the matters with respect to which the proceeding was commenced; and
>
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.
>
> **(6)** There is no appeal from the court's decision pursuant to this section.

[37] In the present case, Patrick and Marthe did not apply for a stay of Glenn's application. Instead, they simply challenged the Court's jurisdiction to hear it. As it turned out, given that the Court has now dismissed the application on its merits, the failure to apply for a stay is of no consequence.

[38] Having said all this, I feel obliged to mention that, if a stay of proceeding was sought, I would have granted it. Such a decision, however, should not be construed as acceptance that the arbitration clauses in the Partnership Agreement and the Agreement in Principle necessarily apply to the resolution of the land dispute between the parties. They may or they may not. Rather, the decision to grant the stay would simply be made out of respect for the so-called "competence-competence principle". Under this principle, a court is expected, subject to certain exceptions, to recognize the power of an arbitrator to determine his or her own jurisdiction under an arbitration agreement.

[39] The competence-competence principle has been the subject of four

notable judgments of the Supreme Court of Canada, namely, *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34, [2007] 2 SCR 801 [*Dell Computer*]; *Rogers Wireless Inc. v Muroff*, 2007 SCC 35, [2007] 2 SCR 921 [*Muroff*]; *Seidel v TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 SCR 531; and *Uber Technologies Inc. v Heller*, 2020 SCC 16, [2020] 2 SCR 118. Although the judgment in *Dell Computer* is frequently regarded as the leading authority on the competence-competence principle, I find that the most concise description of the principle appears is in *Muroff*, where McLachlin, C.J.C. wrote the following at para. 11:

> 11 In *Dell*, the Court was unanimous in finding that under art. 940.1 *C.C.P.*, arbitrators have jurisdiction to rule on their own jurisdiction (the "*compétence-compétence* principle"). The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[40] In the present case, I think the question related to a potential arbitrator's jurisdiction is not easily resolved. While the arbitration clauses in this case are not particularly well drafted, they leave open the argument that they apply to the reallocation or partition of the 14 parcels of land previously used by the Partnership. More to the point, I am not satisfied that the matter of jurisdiction can be determined simply on a superficial glance of the words of the contracts. It is likely that some further context will be required. It follows that the issue of jurisdiction is largely a question of mixed fact and law. As such, it does not fall within a recognized exception to the competence-competence principle. For further guidance on this point, the parties' counsel would be well advised to note the observations of Morgan J. in *We Care*

Community Operating Ltd. v Bhardwaj, 2023 ONSC 4727.

[41] In the end, if Patrick and Marthe's submission can be construed as an invitation to rule on the jurisdiction of a prospective arbitrator, I am persuaded that it would be wrong for me to do so. It necessarily follows that one or the other side of this dispute must commence the arbitration pursuant to s. 24 of *The Arbitration Act, 1992*. Having regard to the position taken by Patrick and Marthe, I am frankly surprised they had not taken that step long before now. If the arbitrator's jurisdiction is challenged after proceedings are commenced, that issue must be left to be decided by the arbitrator.

Conclusion

[42] In the result, Glenn's application is dismissed.

[43] As for the costs of the application, the typical costs award for an unsuccessful application of this kind would exceed $2,000 or more. In the circumstances of this case, I find that would be unfair to Glenn. The evidence persuades me that the issue of allocating the 14 parcels of land should have been resolved long before this application was brought. If Patrick and Marthe truly believed that the matter was to be resolved by arbitration, they had plenty of time to commence such a proceeding. The fact that they did not do so should factor in the award of costs. Accordingly, I assess their costs in the fixed amount of $1,000, inclusive of disbursements.

_____J.
R.W. ELSON