Court of King's Bench of Alberta

Citation: Inter Pipeline Ltd v Teine Energy Ltd, 2024 ABKB 740

Date: 20241205
Docket: 2401 12890/2401 13291
Registry: Calgary

Between:

Inter Pipeline Ltd.

Applicant/Respondent

- and -

Teine Energy Ltd.

Respondent/Applicant

Reasons for Decision
of the
Honourable Justice Colin C.J. Feasby

I. Introduction

[1] Teine Energy Ltd ("Teine") is a shipper on Inter Pipeline Ltd's ("IPL") Mid-Saskatchewan Pipeline System ("MSPS"). Teine commenced an arbitration against IPL alleging, amongst other things, that IPL did not follow the correct methodology for compensating Teine for quality changes in its product – a process called "equalization" – that occurred between the entry and exit points of the MSPS. The Arbitral Tribunal issued an award (the "Award") in favour of Teine. Teine now seeks to enforce the Award.

[2] IPL has appealed the Award alleging errors of law and seeks to have the Award set aside because of manifest unfairness. IPL resists enforcement of the Award and asks the Court to stay enforcement of the Award pending the determination of the appeal and set aside application. IPL also asks the Court to seal the court record so that none of the documents filed in this proceeding are available to the public.

[3] Teine's enforcement application and IPL's cross-application for a stay of enforcement requires me to determine the appropriate legal test to apply. IPL submits that the appropriate test for enforcement of an arbitral award and stay of enforcement of an arbitral award is a two-part test found in a line of cases from Ontario. Teine's position is that the tripartite test used in many other contexts for stays and injunctions is more appropriate. Once the appropriate test is determined, I must weigh the evidence to decide whether the Award should be enforced or stayed pending IPL's appeal and set aside application.

[4] IPL submits that the subject matter of the arbitration was commercially sensitive, and that the arbitration record contains both IPL and third party confidential information. IPL contends that the arbitration record or at least the parts of it that may be filed with the Court by the parties in these enforcement and appeal proceedings should not be available to the public because the confidentiality interests outweigh the public interest in open courts. Further IPL asserts that the confidential nature of the material was recognized by the Arbitral Tribunal and that the parties' choice of private and confidential arbitration is relevant to the Court's assessment of the appropriateness of a sealing order in related enforcement and appeal proceedings. Teine submits that only certain genuinely confidential information should be protected and that a redacted version of the arbitration record should be available to the public on the court file.

II. Procedural Background

[5] Teine and IPL are parties to a Pipeline Connection Agreement dated June 24, 2014 ("PCA"). The PCA contains dispute resolution provisions that permit the parties to refer a dispute to arbitration (the "Arbitration Agreement").

[6] Teine referred a dispute to arbitration pursuant to the Arbitration Agreement and the Rules of the ADR Institute of Canada ("ADRIC"). IPL joined the arbitration and brought a counterclaim.

[7] The Arbitral Tribunal was chaired by Gerald W. Ghikas, KC and included retired Court of Appeal Justice Adelle Fruman and C. Kemm Yates (the "Arbitral Tribunal"). The arbitration hearing took place in Calgary from January 29 to 31 and February 1 to 9, 2024. The Arbitral Tribunal issued the Award on August 19, 2024. The Award is 174 pages long. Both parties had some success, but a substantial net amount is owed by IPL to Teine.

[8] There are two court actions. IPL commenced Court of King's Bench Action No 2401 12890 by Originating Application. IPL seeks permission to appeal the Award and applies to set aside the Award. IPL also states in its Originating Application at para 37 that the "Award and subsequent Costs Award should be stayed pending the disposition of this Application." Teine commenced Court of King's Bench Action No 2401 13291 seeking enforcement of the Award.

[9] The parties have treated the two court actions as a single proceeding. Following the parties' lead, I proceeded as if the two court actions were one at the hearing and take the same approach in these Reasons. As a formal matter, what was presented to the Court was an

application for enforcement of the Award in action 2401 13291 and an application to stay enforcement of the Award in action 2401 1290. I treat these as an application and cross-application as if they were made in the same action. IPL also applied for a sealing order in action 2401 12890 but some of the same material that IPL is concerned about is filed on both court files. Accordingly, I treat the sealing order application as if it were made in both actions and the sealing order granted shall apply to the court files for both actions.

[10] The parties referred to materials from both court files during the application without either party attaching significance to the distinction between the actions. Indeed, there is no substantive reason to treat these two actions as separate. I recognize that the formality of separate actions can be significant in some instances and that parties should typically bring an application to consolidate proceedings pursuant to Rule 3.72 where they wish the Court to deal with two actions as one. Given my view that these proceedings are best administered as one and that can be done without putting the parties to the trouble and expense of making a Rule 3.72 application, I proceed accordingly. The parties should consider whether going forward a consolidation order or something similar is necessary for the efficient administration of the actions.

III. Enforcement or Stay of Appeal

[11] Teine applied pursuant to *Arbitration Act*, RSA 2000, c A-43, s 49 to enforce the Award. IPL cross-applied to stay the enforcement of the Award. The parties disagree as to the appropriate test or tests to be applied on an application for enforcement and a cross-application for stay of enforcement. The relevant parts of *Arbitration Act*, s 49 are as follows:

> (1) A person who is entitled to enforce an award made in Alberta or elsewhere in Canada may make an application to the court to that effect.
>
> ...
>
> (3) The court shall give a judgment enforcing an award made in Alberta unless
>
> (a) the 30-day period for commencing an appeal or an application to set the award aside has not yet elapsed,
>
> (b) an appeal, an application to set the award aside or an application for a declaration of invalidity is pending, or
>
> (c) the award has been set aside or the arbitration is the subject of a declaration of invalidity.
>
> ...
>
> (5) If the period for commencing an appeal, an application to set the award aside or an application for a declaration of invalidity has not yet elapsed, or if such a proceeding is pending, the court may
>
> (a) enforce the award, or
>
> (b) order, on such conditions as the court considers just, that enforcement of the award is stayed until the period has elapsed without such a proceeding being

> commenced or until the pending proceeding is finally disposed of. [emphasis added].

[12] The comparable parts of the *Arbitration Act*, SO 1991, c 17 use the same wording. IPL relies on a line of Ontario cases where a modified form of the usual tripartite test for injunctions and stays is used to guide the court's discretion to enforce or stay enforcement of arbitral awards. The Ontario approach drops the irreparable harm requirement that comprises the second stage of the tripartite test. Alexander M. Gay, Alexandre Kaufman, and James Plotkin, *Arbitration Legislation of Ontario: A Commentary*, 4th ed, (Toronto: Thomson Reuters, 2023) at 644 express the view that the Ontario approach eliding the irreparable harm requirement is correct. To be fair, it is not clear to me that the line of authority that I have dubbed for convenience the Ontario approach is universally accepted in Ontario: see, for example, ***Kingston Automation Technology Inc v Montebello Packaging***, 2021 ONSC 2684 at para 14.

[13] The seeds of the Ontario approach were planted by Justice Farley in ***887574 Ontario Inc v Pizza Pizza Ltd***, 1995 CarswellOnt 1205 (Ont Gen Div [Commercial List]). At para 7 he explained that it was within the Court's inherent jurisdiction to permit enforcement of an arbitral award "on terms which I see as just and reasonable in the circumstances." Farley J considered the "relative financial capacities of the parties" and whether there would be "hardship" if the award were stayed during the period pending appeal. This approach was followed in ***Jaffasweet Juices Ltd v Michael J Firestone & Associates***, 1997 CarswellOnt 4384 (Ont Gen Div) at para 41.

[14] Justice Macdonald in ***Mungo v Saverino***, 1995 CarswellOnt 3420 (Ont Gen Div) elaborated on Farley J's approach. She explained at para 15 that she "considered the *bona fides* of the [appeal]; hardship to the parties if a stay is granted or refused and whether or not the *status quo* should be maintained pending final disposition of the application." The test applied by Macdonald J is essentially the tripartite injunction test minus the irreparable harm requirement. Asking whether there is a *bona fide* appeal is the same as asking whether the appeal raises a serious issue. And looking at the comparative hardship if a stay is granted or refused and considering whether the *status quo* should be maintained is what courts do when weighing the balance of convenience (or inconvenience) at the third stage of the tripartite test. The most recent application of the Ontario approach is ***Abraham v Abraham***, 2024 ONSC 5315.

[15] With respect, the Ontario approach is not principled. The problems with the Ontario approach become apparent where there is an application for enforcement and a cross-application for a stay. On the application for enforcement the Court must consider steps 1 and 3 of the tripartite test and it is not clear from the decisions which party bears the burden of proof. On the cross-application for a stay of enforcement, the Court must consider all three steps of the tripartite test with the party moving for the stay bearing the burden of proof. For an example of these contrasting approaches, compare ***The Canada Soccer Association Incorporated v Association de Soccer de Brossard***, 2023 ONSC 1367 and ***Abraham***.

[16] The Ontario approach is more likely to result in an arbitral award not being enforced while an appeal is pending. The stay-friendly Ontario approach may be sub-consciously influenced by the Ontario rules governing enforcement of judgments while appeals are pending. The *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 63.01(1) provides for an automatic stay of a judgment pending determination of an appeal. An Ontario judge hearing an application for enforcement of an arbitral award or an application for stay of enforcement of an arbitral award

may start with a mindset shaped by the judgment enforcement rules and assume that a party is not entitled to benefit from a first instance decision until the relevant appeal process is exhausted. Of course, the approach is different in Alberta. The Alberta *Rules of Court* do not provide for an automatic stay of enforcement pending an appeal. The default position in Alberta is that a judgment is enforceable from pronouncement unless a stay of enforcement is granted by either the Court of King's Bench or the Court of Appeal.

[17] Alberta courts faced with arbitration enforcement and stay applications do not follow the Ontario approach. Instead, they apply the standard tripartite test: see, for example, ***Nilsson v Alberta (Minister of Public Works, Supply & Services)***, 1997 Carswell Alta 810 at paras 32-35 and ***Anand v Anand***, 2018 ABCA 259 at para 18. However, there is no decision from an Alberta court that has considered the Ontario approach or offered a reasoned justification for use of the tripartite test in the context of an application for a stay of an arbitral award. The appropriateness of the tripartite test is just assumed. British Columbia courts also use the standard tripartite test for stays of arbitration awards, but like in Alberta, the appropriateness of the test is taken to be self-evident: see, for example, ***lululemon athletica Canada inc v Industrial Color Productions Inc***, 2021 BCCA 108 at para 22.

[18] The enforcement provision in Manitoba's *Arbitration Act*, CCSM c A120 is identical to that in Ontario and Alberta. Chief Justice Joyal in ***Shelter Canadian Properties Limited v Christie Building Holding Company, Limited***, 2021 MBQB 59 at para 28 makes explicit the implicit assumption that guides courts in Alberta and British Columbia. He held that "the exercise of the court's discretion under s 49(5) of the *Act* should be governed by the same principles and criteria which are to be applied when a party seeks a stay pending an appeal of a judgment...." He went on to quote ***GS Dunn & Co Ltd v Venture See Ltd***, 2003 MBQB 293 at para 12 which explained that there is "a presumption of correctness to the decision" such that "a stay ought not to be granted easily." The Court in ***Dunn*** went on to articulate the standard tripartite stay test. The Manitoba approach is, in my view, principled and consistent with the wording of the *Arbitration Act*. It has the added virtue of being consistent with how Alberta courts approach stays of administrative decisions and lower court decisions: ***Knelsen Sand & Gravel Ltd v Harco Enterprises Ltd***, 2021 ABCA 362 at para 37.

[19] *Arbitration Act* s 49(5) contemplates two possibilities: (1) enforcement or (2) a stay. *Arbitration Act* s 49(5) does not allow for a third scenario where the Court declines to enforce an arbitral award without granting a stay. This means that once an applicant for enforcement has met the formal requirements for enforcement, the Court must grant an order enforcing the award unless the party resisting enforcement meets the requirements for a stay. The legislature in using the word "stay" in s 49(5) indicated that the usual tripartite test for a stay applies in the same way that its of the word "appeal" indicates that the usual appellate standard of review applies: ***Canada (Minister of Citizenship and Immigration) v Vavilov***, 2019 SCC 65 at para 44.

[20] The standard tripartite test for injunctions and stays was stated in ***American Cyanamid Co v Ethicon Ltd***, [1975] AC 396 (HL), later adopted by the Supreme Court of Canada in ***Manitoba (AG) v Metropolitan Stores Ltd,*** [1987] 1 SCR 110, and then explained in greater detail in ***RJR-MacDonald Inc v Canada (Attorney General)***, [1994] 1 SCR 311 at 347-349. The tripartite test to be applied in the context of an application to stay an arbitral decision is:

(a) is there a serious issue to be determined?

(b) will the applicant suffer irreparable harm if the stay is refused? and

(c) does the balance of convenience favour the granting of the stay?

[21] There are serious issues to be determined by the Court in IPL's appeal and set aside application. However, there is no benefit in detailing the issues raised by IPL in these Reasons given my conclusions in the following paragraphs that IPL has not demonstrated irreparable harm and that the balance of convenience favours Teine. I recognize that a strong showing at the first stage of the tripartite test can affect how a Court weighs the overall balance: ***Black v Alberta***, 2023 ABKB 123 at paras 56 and 68. But even if I assumed IPL's case to be very strong, it would not change my conclusion that a stay is not appropriate in the circumstances.

[22] Irreparable harm is often understood to be harm that is not quantifiable or compensable in money damages: R.J. Sharpe, *Injunctions & Specific Performance* (Westlaw: online) at §2.7; ***American Cyanamid*** at 408; ***RJR*** at 315; and ***Unifor, Local 707A v Suncor Energy Inc***, 2018 ABCA 75 at para 8. Examples of irreparable harm include permanent loss of market share and insolvency: ***RJR*** at 341.

[23] IPL claims that, without a stay, it will lose market share and market opportunities. IPL believes that these losses will occur because it will be deprived of "significant capital for its business investment purposes." If IPL is without capital for its business investment purposes, that is a choice not a consequence of the Court's failure to grant a stay. IPL is wholly owned by Brookfield Infrastructure which has a market capitalization of approximately USD $16 billion.

[24] IPL submitted that it is the party to the action and that Brookfield Infrastructure's ownership of IPL is irrelevant to the question of irreparable harm. There are many circumstances where the legal formality of separate corporate identity is determinative. However, IPL is seeking a stay, which is an equitable remedy, partly on the basis that it will suffer financial harm. Under the circumstances, it is appropriate for the Court to take stock of the broader financial context in which IPL exists which includes its parent company because equity looks to substance rather than form: ***Royal Bank of Canada v W. Got & Associates Electric Ltd***, 1997 ABCA 136 at para 103-04 aff'd without comment on this point [1999] 3 SCR 408.

[25] Regardless of IPL's ownership, IPL is a significant entity. IPL could access the capital markets – equity or debt – to raise money or could borrow money to finance its unspecified "business investment purposes." The cost to IPL of a stay is not the value of the Award, it is the cost of capital or the cost of borrowing for the time that the stay is in force. There is no evidence to suggest that IPL cannot go to the market to raise funds or borrow funds or that it cannot afford the costs associated with raising or borrowing funds.

[26] There is no evidence before the Court that Teine would be unable to repay the Award if IPL is successful on the appeal. Indeed, the evidence is that Teine is a profitable business with over $4.3 billion in assets and $116 million in net revenue for the first half of 2024. I accept Ms. Farrow's evidence that, if IPL is successful on appeal, Teine will be able to repay the amount of the Award.

[27] I am satisfied that there is no evidence of irreparable harm. Though there is no irreparable harm, I will consider the question of the balance of convenience. Balance of convenience in the present circumstances is fundamentally an issue of who is most capable of bearing the financial burden of the Award pending the determination of the appeal. But there is no evidence before the Court that would enable the Court to compare the financial capacities of

IPL and Teine or the potential harm to each even if the Court was qualified to do so. IPL submits that not having the amount of the Award will impair its business investments but, at the same time, Teine can plausibly claim that it has been deprived of the amount of the Award for some time and that not having access to the money impairs its business plans too. Both parties are well-resourced energy industry players backed by even larger money management entities. I find that both parties can bear the burden of not having the amount of the Award pending the determination of the appeal. In the absence of the balance tipping one way or the other, there is no equitable reason to deny Teine the benefit of its victory in the arbitration pending IPL's appeal.

[28] A final policy consideration informs my decision to deny the stay application. Arbitration is a party-driven process. Parties are free to determine most of the rules governing the arbitration process. This includes terms governing the enforceability of awards pending appeal. The Arbitration Agreement could have provided for an automatic stay pending appeal, but it did not. Accordingly, the parties knew or ought to have known that the default position was that an arbitration award would be enforceable while an appeal was pending. There is no equitable reason to relieve IPL from circumstances which could have been avoided if the parties had addressed the question of a stay pending appeal in their Arbitration Agreement.

IV. Sealing Order

i. The Positions of the Parties

[29] IPL seeks a sealing order preventing public access to the court file. IPL's position is that the whole arbitration record is confidential or, if it is not, it would be too onerous to sift through the arbitration record to separate confidential information from non-confidential information. IPL submits that the confidential information in the arbitration record is comprised of IPL proprietary information and customer and competitor information, much of which must be kept confidential pursuant to agreements with third parties.

[30] Teine agrees that some parts of the arbitration record contain confidential information and should be withheld from the public. However, Teine submits that the parties have already done the hard work of redacting confidential information and that redacted versions of the Award, expert reports, exhibits, and transcripts, to the extent required for the appeal, can be put on the court file. The redacted version of the arbitration record was produced so that decision-makers at IPL and Teine could be informed about the arbitration and instruct counsel. The redacted version of the arbitration record does not include "Proprietary Information" which was defined in the Confidentiality Order governing the Arbitration as "all Confidential Information which is designated by the Disclosing Party ... as containing highly commercially sensitive Confidential Information ... [and] may include Confidential Information of third parties...."

ii. The Open Courts Principle

[31] The open courts principle is often considered to be an aspect of the *Charter* s 2(b) right to freedom of expression because it "protects not only expression but the right of members of the public to obtain information about the courts...": ***Sidhu v Lieutenant-Governor of Alberta***, 2018 ABCA 284 at para 9; see also, ***Dagenais v Canadian Broadcasting Corporation***, [1994] 3 SCR 835 at 876-77. But the open courts principle existed long before the *Charter* and is best understood as a component of the rule of law and a core feature of, as *Charter* s 1 puts it, a "free and democratic society." The open court principle has been called the "cornerstone of the

common law": ***Canadian Broadcasting Corporation v New Brunswick (Attorney General)***, [1996] 3 SCR 480 at para 21. Justices Iacobucci and Arbour, writing for the majority in ***Vancouver Sun (Re)***, 2004 SCC 43 at para 25 observed:

> Openness is necessary to maintain the independence and impartiality of courts. It is integral to public confidence in the justice system and the public's understanding of the administration of justice. Moreover, openness is a principal component of the legitimacy of the judicial process and why parties and the public at large abide by the decisions of courts.

[32] To this I add that courts, including court records, must be open to the public so that the work of the courts may be scrutinized and so the conduct of litigants – governments, corporations, and individuals – can be evaluated. Through publicity, courts and litigants alike may be held accountable. Iacobucci and Arbour JJ in ***Vancouver Sun*** at para 24 gave a nod to this point when they quoted Jeremy Bentham: "publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity." Much to the same effect, prior to his appointment to the US Supreme Court, Louis D. Brandeis observed, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman": Louis D. Brandeis, "What Publicity Can Do," *Harper's Weekly*, (December 20, 1913) 10 at 10.

[33] Justice Kasirer, writing for the Court in ***Sherman Estate v Donovan***, 2021 SCC 25, outlined an analytical framework for determining whether a restricted court access order should be granted. He held at para 38:

> [T]he person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;
>
> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

[34] The first critical point to note is that the open courts principle may only be limited to protect a public interest. A private business interest or commercial sensitivity on its own will not suffice. Justice Iacobucci, writing for the Court in ***Sierra Club of Canada v Canada (Minister of Finance)***, 2002 SCC 41 at para 55, held that for a private business interest to gain the protection of a restricted court access order it must also engage a public interest.

[35] IPL asserts three public interests in its written submissions that it says justifies limiting the open courts principle as follows:

> (1) The public interest generally, and in the midstream industry broadly, in recognizing, preserving and enforcing ongoing confidentiality obligations of entities and individuals, including those underlying and governing commercial arbitration proceedings;

(2) The fact that encouragement and preservation of confidential arbitration as a dispute resolution mechanism preserves the availability of scarce judicial resources for other public (and private) law matters; and

(3) It is trite (and amply reflected in the record here) that one of the principal motivations for commercial parties to engage in confidential arbitrations is to have the matters resolved in private and outside the purview of the public, including their competitors and other counterparties – to allow open access to the confidential arbitration record would undermine parties' willingness to exercise their right to challenge arbitration awards, no matter how flawed, for fear of their confidential information being exposed.

[36] I characterize IPL's three asserted public interests as: (i) midstream industry/third party confidentiality interests; (ii) the promotion of private arbitration to preserve public court resources; and (iii) respecting parties' choice of private and confidential dispute resolution.

iii. Midstream Industry/Third Party Confidentiality Interests

[37] IPL claims that its business information is proprietary and the way that it administers the MSPS is akin to a trade secret. IPL's affiant, Mr. DeGruchy, explained generally about midstream operators like IPL in Southwest Saskatchewan that "[r]elatively few companies operate in the area and knowledge about the contracting practices, pricing approaches and formulae, and how they (including IPL) structure their commercial relationships is proprietary and commercially sensitive to their business." IPL is understandably sensitive about the disclosure of information about how it conducts business on MSPS but that sensitivity on its own is not enough to justify a sealing order. I am not persuaded that how IPL manages MSPS is akin to a trade secret or that protecting IPL's business information engages the public interest.

[38] Third party information in the possession of IPL, however, is different. And in making this distinction I acknowledge that in practice there may be considerable overlap between third party information and the information that IPL considers to be its own proprietary information. Mr. DeGruchy deposed that IPL's interest in confidentiality is shared with its customers and competitors:

> [T]here is also a widely recognized implied duty of confidentiality between midstream infrastructure operators and market participants with respect to the types and content of infrastructure agreements (including transportation related agreements such as the PCA) they enter into and the information they exchange in the performance of the agreements and their business relations generally.

[39] Mr. DeGruchy further explained that IPL's customers, third parties, have an interest in safeguarding their business information. He explained that IPL customers (*ie*. shippers on the MSPS) do not want:

> their market competitors (and other infrastructure companies) to know what commitments they have made to IPL (or another infrastructure company), they also have a commercial interest in protecting the confidentiality of the monthly or periodic transactional data that is shared with IPL (or other infrastructure companies) indicating the volumes and qualities of the crude that is being transported, bought and sold, and their market positions.

[40] Teine's position differs from IPL's position by degree, not by kind. Teine accepts that some information in the arbitration record is commercially sensitive such that it should not be disclosed and that information subject to third party confidentiality obligations should be protected. Teine, however, says that information concerning the volumes and crude oil quality of shippers on the MSPS should not be subject to a sealing order because the MSPS Tariff incorporates The Canadian Crude Oil Quality Equalization Procedures Guide ("EPG"). Teine says that the EPG creates an expectation amongst shippers that information regarding their crude oil quality and volumes will be shared and is, accordingly, not confidential.

[41] ***Sierra Club*** stands for the principle that protecting confidentiality expectations of third parties – strangers to the legal proceedings – can be a public interest. Justice Iacobucci held that protection of third party confidentiality interests could constitute a public interest at para 55:

> [A] private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if ... exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information.

[42] The practice in Alberta is to grant sealing orders to prevent the disclosure of commercially sensitive information between competitors in concentrated markets and to protect commercially sensitive information of third parties who have an expectation of confidentiality by reason of a confidentiality agreement. For example, a sealing order was granted in ***Dow Chemical Canada ULC v Nova Chemicals Corporation***, 2015 ABQB 81 to limit the dissemination of information between entities which competed to buy ethane and sell ethylene, both of which were concentrated markets, and to safeguard third party supplier and customer information. There is no evidence before the Court that would support a finding that IPL and Teine operate in a concentrated market analogous to that considered in ***Dow Chemical***.

[43] The only evidence of third party confidentiality obligations are the claims of the parties because no third party confidentiality agreements were adduced on this application nor did any third parties take part in this application. Despite my concern about the evidential foundation, I am comforted by the fact the Arbitral Tribunal accepted that the parties had *bona fide* third party confidentiality obligations in granting the Confidentiality Order. Moreover, the Arbitral Tribunal honoured the Confidentiality Order throughout the arbitration proceedings after having exposure to the extensive arbitral record. The Confidentiality Order and the Arbitral Tribunal's subsequent conduct demonstrate that the third party confidentiality obligations are genuine even if they remain opaque to the Court. Had Teine or IPL questioned the existence of the asserted third party confidentiality obligations, I would have required the parties to produce the relevant confidentiality agreements and, where appropriate, to provide notice to the potentially affected third parties. Nevertheless, given the Arbitral Tribunal's implicit finding that there are genuine third party confidentiality interests at stake, I am persuaded that, pursuant to ***Sierra Club***, court openness in the present case poses a risk to an important public interest being the maintenance of the confidentiality of the business information of third parties.

iv. Promotion of Private Arbitration to Preserve Public Court Resources

[44] Private arbitration has long been recognized as a legitimate way for parties to resolve disputes. Every province, territory, and the federal government have statutes that govern

arbitration. And there are valid reasons why parties may choose private arbitration over litigation in public courts. But that does not mean that judges should deliberately shape the law in ways that encourage the movement of disputes into the private realm of arbitration to reduce the workload of the public courts.

[45] The premise of IPL's argument, that the courts are under resourced, may or may not be true. But it is very difficult to know because there is a paucity of reliable empirical data about Alberta courts available to the public (or internally for that matter): for a similar concern expressed regarding the Ontario courts, see Brown JA's lament in ***Moffitt v TD Canada Trust***, 2023 ONCA 349 at footnote 2. Counsel for IPL, like other members of the civil bar, is left to infer from long lead times for civil special chambers applications and trials that the Court lacks resources.

[46] Long lead times for civil special chambers applications and trials may be indicative of a lack of resources. But long lead times might also be indicative of priorities in the allocation or management of resources including the preference given to criminal matters after ***R v Jordan***, 2016 SCC 27 and family matters which present urgent issues. Or other factors may contribute to long lead times for civil matters including Alberta's expansive pre-trial discovery rules, the civil bar's affection for motions and aversion to trials, inefficient Applications Judge appeal rules (see generally, ***Lesenko v Wild Rose Ready Mix Ltd***, 2024 ABKB 333), and the lack of active (judge-driven) case management.

[47] Even if I accepted IPL's premise that the public courts are under resourced (which I cannot without evidence), it would be inappropriate to shape legal doctrine to achieve an instrumental objective that would make the lives of judges easier. The answer to under resourced courts is more resources, not judges altering legal doctrine to facilitate the privatization of civil justice.

[48] The availability of private arbitration as an option for dispute resolution is in the public interest as reflected in the existence of arbitration statutes. But the legitimacy of private arbitration as an option for dispute resolution does not imply that the courts should encourage the erosion of their civil docket. Private arbitration depends on the continued existence of civil dispute resolution in public courts.

[49] Private arbitration is exactly that, private. Reasons for decision by arbitrators are not routinely made public and, even when they are, there is no system for gathering and indexing Canadian arbitration decisions outside the labour context. Private arbitration depends on public courts to continue to articulate the law in their public reasons. As I explained in ***Benke v Loblaw Companies Limited***, 2022 QBQB 461 at para 9:

> A large-scale exodus from the courts also creates a rule of law problem. The law that governs commerce is, in significant part, the product of the courts. This is true whether the reasons produced by judges are part of the common law or interpretations of statutes. Public reasons are a public good. Arbitration, which is typically conducted in private and sometimes shielded by confidentiality agreements, rarely produces public reasons. Without a steady caseload in the courts, commercial law will cease to develop in tandem with our ever-changing society.

[50] I do not accept IPL's submission that there is a public interest in encouraging private arbitration for the purpose of preserving scarce judicial resources for other matters. To the contrary, there is a public interest in ensuring that the Court maintains a healthy civil docket so that it may continue to fulfill its role as a custodian of the common law and interpreter of statutes. The question of court resources, to the extent that it is a real issue, is one for the legislative and executive branches of government.

v. Respecting Parties' Choice of Private and Confidential Dispute Resolution

[51] IPL submits that it is "trite" that "one of the principal motivations" for parties to choose arbitration is for its privacy. Privacy is a reason parties choose arbitration, not the reason. Parties also opt for arbitration because they may choose an adjudicator with subject matter expertise, the pre-hearing discovery process is streamlined, interlocutory appeals are rare, and arbitrators offer active case management, all of which facilitate advancing disputes to hearing faster than is currently possible in the courts. Privacy is only one characteristic of arbitration that makes it attractive to parties.

[52] To engage with IPL's submissions, I will accept its assertion that these parties chose arbitration mainly because it offered privacy. Does this mean that their choice for private dispute resolution should carry forward into enforcement and appeal proceedings in public courts? And does it matter that some parties may be reluctant to use the *Arbitration Act* mechanisms for enforcement and appeal if it means that the subject matter of the arbitration becomes public? The question, using the ***Sherman Estate*** framework, is whether respecting parties' choice of private dispute resolution is a public interest that justifies compromising the open courts principle.

[53] The parties' choice of private arbitration was made in the context of a legislative framework that requires a court application to authorize enforcement of awards and an appeal process in the Court. The legislature could have reduced the involvement of the Court in arbitration award enforcement and appeals by providing for enforcement of arbitral awards without a court application, specifying that awards are final with no right of appeal as is the case with the *International Commercial Arbitration Act*, RSA 2000, c I-5, or stipulating that public access to arbitral enforcement and appeal proceedings is restricted unless the Court otherwise orders. The legislature's use of the public courts for arbitration enforcement and appeal proceedings means that the default is that the open courts principle applies and that the usual standards for restricted court access orders apply.

[54] The arbitration in the present case was governed by the ADRIC Rules. The ADRIC Rules are one of several sets of arbitration rules commonly used for significant commercial arbitrations in Canada. The ADRIC Rules protect the privacy and confidentiality of arbitration proceedings. The ADRIC Rules do not purport to extend the privacy and confidentiality of arbitration proceedings to enforcement and appeal proceedings in public courts. The ADRIC Rules provide as follows:

> 1.18.1 Unless the parties agree otherwise, the arbitration proceedings must take place in private.
>
> 1.18.2 Unless the parties agree otherwise, the parties, any other person who attends any portion of the arbitral hearings or meetings, the Tribunal, and the Institute must keep confidential all Confidential Information except where disclosure is:

(a) required by a court;

(b) necessary in connection with a judicial challenge to, or enforcement of, an award; or

(c) otherwise required by law. [emphasis added].

[55] Clause 6 of the Confidentiality Order issued by the Arbitral Tribunal mirrors the ADRIC Rules in providing an exception to confidentiality for enforcement and appeal proceedings. The relevant part of cl 6 provides:

> The Receiving Party shall have no obligation to preserve the proprietary and/or confidential nature of any Confidential Information which:
>
> ...
>
> (c) is required to be disclosed to enable a Party to pursue judicial challenge or enforcement proceedings in respect of the Arbitration; provided that disclosure under this subsection must be limited to the extent necessary for that purpose;....

[56] The parties had a choice pursuant to the PCA between private arbitration and litigation in the public courts. The parties chose private arbitration but their clear expectation in making that choice, as reflected in the *Arbitration Act*, the ADRIC Rules, and the Confidentiality Order, was that once an award was rendered, any enforcement and appeal proceedings would take place in court according to normal court standards and practices including the open courts principle. In addition, had privacy been an overriding concern, the parties could have minimized the possibility of publicity by contracting for a private appeal, but they did not: ***2249492 Ontario Inc v Donato***, 2017 ONSC 4975 at para 23.

vi. Alternative Measures

[57] IPL's position is that everything related to the arbitration is confidential and, even if a narrower definition of confidentiality is used, it would be too onerous to require the parties to parse the arbitration record to separate confidential from non-confidential information. Since I found that there is only a public interest in protecting third party confidential information, the question to be considered is whether, as a practical matter, third party confidential information and material derived therefrom can be identified and redacted from the parts of the arbitration record that will be placed on the public court file.

[58] Teine submits that the parties have already undertaken this work. The parties produced a version of the arbitration record – pleadings, witness transcripts, expert reports, exhibits, and the Award – with Proprietary Information, as defined in the Confidentiality Order, redacted for the purpose of informing business principals of the respective parties of developments in the arbitration and obtaining instructions from those individuals.

[59] Blanket sealing orders in court proceedings involving arbitration matters are not the norm. If sealing orders are granted, they are typically granted over a sub-set of the arbitration materials: see, for example, ***Taseko Mines Limited v Franco-Nevada Corporation***, 2023 ONSC 2055 at para 118. Where something approaching a blanket sealing order is given, it is often because an arbitration is ongoing: see, for example, ***Telesat Canada v Boeing Satellite Systems International Inc***, 2010 ONSC 22 at paras 25 and 27 and ***Toyota Tsusho Wheatland Inc v Encana Corp***, 2016 ABQB 209 at para 89. Where there is a genuine confidentiality interest to protect and it is possible and not too onerous to extract confidential information from material to

be filed with the court, the court can grant a sealing order protecting the extricable confidential information.

[60] The Confidentiality Order identified two categories of protected information: Confidential Information and Proprietary Information. Confidential Information was defined broadly to include all information exchanged for the purpose of the arbitration. Proprietary Information was defined as:

> Confidential Information which is designated by the Disclosing Party, acting reasonably and in good faith, as containing highly commercially sensitive Confidential Information ... [and] may include Confidential Information of third parties and includes all Confidential Derivatives of Proprietary Information.

[61] The Confidentiality Order creates two categories of documents containing Proprietary Information: Proprietary Documents and Proprietary (DR) Documents. Proprietary Documents could only be viewed by experts, e-discovery service providers, external counsel, and the Arbitral Tribunal. Proprietary (DR) Documents could be viewed by the preceding categories of people plus a designated representative of the receiving party.

[62] Ms. Farrow, the Teine witness, deposed that only 20 of the 52 exhibits in the arbitration record were Proprietary Documents or Proprietary (DR) Documents, of the 2,311 pages of transcript, only 311 refer to Proprietary Information, and only 15 of the 641 paragraphs in the Award contained Proprietary Information. Based on this evidence, I am satisfied that it is not too onerous for the parties to prune third party confidential information from any material filed with or to be filed with the Court.

[63] I have reviewed the redacted Award and other examples of redacted documents and am satisfied that they are consistent with what is required by the open courts principle. The redacted Award and other redacted documents provided convey sufficient information to permit a reader to understand the subject matter without disclosing confidential information. With that said, the parties have presented the sealing order issue as a binary choice between a blanket sealing order and the redacted records provided to the business principals of IPL and Teine. Rather than choose one option or the other, I prescribe the following approach:

(a) the redacted arbitration record is the starting point;

(b) if IPL or Teine wish identify additional redactions required to protect third party confidential information, they are to provide notice of any additional redactions together with evidence to support the claim of confidentiality to the other party by January 17, 2025 or such other date as the parties may agree upon;

(c) if IPL and Teine have not resolved any differences over additional redactions to be made by January 31, 2025 or such other date as the parties may agree upon, they may book an appointment with me to argue the matter; and

(d) any party seeking redactions must provide evidence to show why the redaction is required.

[64] As I noted earlier when considering whether to stay enforcement of the Award, IPL and Teine are substantial entities. The parties have obviously spent a lot of money on the arbitration

and will continue to spend considerable sums on the associated court proceedings. The arbitration record, though large compared to some proceedings, is not daunting when the resources of the parties and the amount of money at stake are considered. This was illustrated by the fact that four counsel were present for each side at this application. These parties have the financial and human resources required to sift through the record to extract and redact confidential information.

[65] Another point of contention that arose in passing on this application that will continue to vex the parties if it is not addressed is the matter of what must be filed on an application for enforcement or an appeal of an arbitration award. The guiding principle where there are genuine confidentiality concerns, as in the present case, is that no more records than necessary should be put on the court file. The fact that IPL has appealed the Award or, in the alternative, seeks to have it set aside for manifest unfairness does not make the whole arbitration record relevant and material. To the contrary, relevance and materiality are defined by the Originating Application which, in this instance, means the grounds of appeal and grounds for setting aside the Award advanced by IPL. The material on the court file should be relevant and material to the appeal and set aside application and should not include parts of the arbitration record that are irrelevant to the appeal and set aside application. A strict application of the principles of relevance and materiality reduces the potential exposure of the parties' commercially sensitive information and confidential third party information.

vii. Proportionality

[66] Proportionality is a question of weighing costs and benefits. The cost to the open courts principle of removing third party confidential information from the documents to be filed with the Court is low. As noted above, the redacted version of the arbitration record, including the Award, is easily understood despite the redactions. An interested and informed member of the public with access to the redacted records would conclude that the Court was conducting its business transparently. Honouring third party confidentiality interests benefits third parties who did not consent to their private business being the subject of IPL and Teine's dispute and reinforces public confidence that parties can order their affairs by contract.

V. Conclusion

[67] IPL's application for a stay of enforcement is dismissed. Teine's application for enforcement of the Award is granted.

[68] IPL's application for a sealing order is granted. However, only third party confidential information and derivative information shall be protected and a redacted version of all records filed with the Court shall be available to the public. The parties shall follow the process set out in paragraph 63 above to address any disagreements over specific redactions.

[69] If the parties are unable to agree on costs, they may make submissions of three pages or less supported by a bill of costs.

Heard on the 27th day of November, 2024.
Dated at the City of Calgary, Alberta this 5th day of December, 2024.

Colin C.J. Feasby
J.C.K.B.A.

Appearances:

Gordon L. Tarnowsky, KC, Rachel A. Howie, Daniel Dickey, and Lyndsee Thompson, Dentons Canada LLP
for the Plaintiff

Michael P. Theroux, KC, Laura M. Gill, Elizabeth Allum, Daphne Wang, and Shanza Arif, Bennett Jones LLP
for the Defendant