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- English

[Home](#) > [British Columbia](#) > [Supreme Court of British Columbia](#) > 2003 BCSC 1096 (CanLII)

Powerex Corp. v. Alcan Inc., 2003 BCSC 1096 (CanLII)

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[Powerex Corp. v. Alcan Inc.](#), 2004 BCSC 876 (CanLII) - 2004-06-30

Legislation cited (available on CanLII)

- [Foreign Arbitral Awards Act](#), R.S.B.C., 1996, c. 154
- [International Commercial Arbitration Act](#), R.S.B.C., 1996, c. 233

Citation. *Powerex Corp. v Alcan Inc.*,
2003 BCSC 1096

Date. 20030710

Docket. L030449

Registry. Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

**Re. Section 35 of the International Commercial Arbitration Act,
[R.S.B.C. 1996, c. 233](#) and Section 2 of the Foreign Arbitral Awards
Act., [R.S.B.C. 1996, c. 154](#) and**

**In the Matter of an International Commercial Arbitration Pursuant to
the Commercial Arbitration Rules of the American Arbitration
Association Between Powerex Corp. and Alcan Inc. (AAA No. 50-
198-T161-02)**

Between.

Powerex Corp., Formerly British Columbia Power Exchange Corporation

Petitioner

And

Alcan Inc., Formerly Alcan Aluminium Limited

Respondent

Before. The Honourable Mr. Justice Halfyard

Reasons for Judgment

Counsel for the petitioner.

G.W. Ghikas, Q.C. &

Counsel for the respondent.

R.J.C. Deane
S. Margolis & C.E. Jones

Date and Place of hearing.

July 04, 2003
Vancouver, B.C.

[1] This is an application by the respondent Alcan Inc. for an order adjourning the hearing of the petition of Powerex Corp. The facts leading up to the hearing of this adjournment application (which are not in dispute) are as follows.

- (a) On January 17, 2003, after an arbitration in Oregon, under Oregon law, an arbitrator decided that Alcan Inc must pay \$100,000,000.00 (U.S.) to Powerex Corp., with the award being enforceable as of February 17, 2003.
- (b) On February 14, 2003, Alcan commenced court proceedings in Oregon, to set aside the award.
- (c) On February 18, 2003, Powerex filed a petition in the Supreme Court of British Columbia seeking enforcement of the award.
- (d) By agreement between the parties, no further steps were taken in either proceeding under after April 25, 2003.
- (e) On May 8, 2003, Powerex's petition to enforce the award was set for hearing in this court at Vancouver on July 21, 2003.
- (f) At or about the end of May, 2003, Alcan's motion to set aside the award was set for hearing in the Federal Court in Oregon, on August 12, 2003. (Powerex filed a motion in the Oregon proceedings to confirm (not to enforce) the arbitrator's award).
- (g) On June 6, 2003, Alcan asked Powerex to consent to an adjournment of its petition pending the outcome of Alcan's motion to set aside the award. Powerex refused to consent.
- (h) On June 16, 2003, the date of July 4, 2003, was set (by agreement) for Alcan's application to adjourn the petition for enforcement.
- (i) On June 23, 2003, Alcan delivered its motion for adjournment of the petition.
- (j) Alcan failed to deliver its substantive materials to Powerex by June 27, 2003, as had been demanded by Powerex.
- (k) On June 30, 2003, Powerex delivered a motion seeking dismissal of Alcan's application, and in the alternative sought an order that the

petition be heard on July 21, 2003, but that the court's decision on the issue of enforcement be adjourned pending the Federal Court's decision on Alcan's motion in Oregon. In the further alternative, Powerex sought an order requiring Alcan to post security in the full amount of the award plus interest to date, as a condition of any adjournment that might be granted.

(l) Both applications came before me for hearing on July 4, 2003.

[2] Alcan brings its adjournment application under the following separate and independent rules of law.

(a) Section 36(2) of the *International Commercial Arbitration Act* of British Columbia, which states.

(2) If an application for setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1)(a)(vi), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

(b) Article VI of the Schedule to the *Foreign Arbitral Awards Act* of British Columbia, which reads.

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

(c) Supreme Court Rule 52(11) and the inherent jurisdiction of this court.

[3] Mr. Margolis advances several grounds in support of Alcan's application for adjournment, which I paraphrase as follows:

- (a) The contract between the parties is governed by the laws of Oregon, the arbitration was held in Oregon, and the challenge to the arbitrator's award has been brought in Oregon. If the enforcement hearing proceeds in British Columbia before the Federal Court in Oregon decides Alcan's motion to set aside, then Alcan will have to lead expert evidence to prove the applicable American law. This will be costly to Alcan (especially with respect to bankruptcy law) and will lengthen the enforcement hearing considerably. The American court is better suited to decide questions of American law, and if an adjournment is granted, much unnecessary duplication of work and expense (and inefficient use of judicial time) will be avoided.
- (b) Powerex will not be prejudiced by an adjournment, because the hearing in Federal Court is set for August 12, 2003, which is only three weeks beyond the date presently set for the enforcement hearing. Moreover, Alcan has prosecuted the Oregon proceedings in a timely way.
- (c) Alcan's challenge to the arbitrator's award is not frivolous, and is made in good faith.
- (d) An adjournment will not make it more difficult for Powerex to enforce payment of the award, in the event that the award is upheld. Alcan has and will continue to have substantial assets, including assets in British Columbia.

[4] In the alternative, Alcan seeks an adjournment on the further ground that it cannot reasonably obtain the expert evidence necessary to prove American law, by July 21, 2003. In the final alternative, an extension of time is sought for delivery of its response materials.

[5] In opposition to Alcan's application, Powerex makes the following allegations (again, my paraphrasing).

- (a) Alcan is using the court proceedings in Oregon for the purpose of delay and with a desire to postpone the inevitable. Accordingly, Alcan does not come to this court with clean hands.
- (b) The fact that court proceedings are pending in Oregon is not a sufficient reason for adjourning the enforcement proceedings in this court, nor do the circumstances warrant the exercise of the court's discretion in favour of Alcan. The onus is on Alcan to establish that its challenge to the award has at least some prospect of success, and this it has failed to do.
- (c) With the exercise of reasonable diligence, Alcan could have been (and still can be) ready to proceed with the enforcement hearing by July 21, 2003. The significance of American law issues, the need for extensive expert evidence to prove American law, and the difficulties associated with obtaining the expert evidence, have been exaggerated by Alcan.

[6] In the alternative, Powerex submits that, if the court defers Powerex's right to enforcement and grants the adjournment, Alcan should be required to post security for the full amount of the award, plus interest to date. It is said that Powerex has been prejudiced by the rise in the value of the Canadian dollar, and that if full security is not ordered, Powerex will be exposed to the risk of further loss by unfavourable fluctuation in the exchange rate.

[7] The only significant factual disputes between the parties are whether Alcan has brought court proceedings in Oregon for the purpose of delay, and whether Alcan has failed to diligently prepare for the enforcement hearing. On the first point, Mr. Ghikas reviewed the evidence of communications between counsel, and other circumstances indicating neglect in trial preparation, to establish a foundation for his argument. He says that an overall "pattern of delay" is apparent from the evidence. Counsel submits, in effect, that I should draw the

inference that Alcan is seeking to delay the enforcement hearing, while knowing that its challenge to the arbitrator's award is futile. He suggested two possible motives for such conduct, which I understood to be as follows. First, Alcan wants to have the use of the money it would otherwise have to pay to Powerex.

Second, Alcan wants to gain time to persuade the American courts that the bankruptcy court should assume jurisdiction over the issue between the parties.

[8] Because of the high interest rate payable by Alcan (bank lending rate plus 2%), I do not accept the first suggested motive. As to the second, I would see nothing improper in Alcan pursuing a possible remedy in bankruptcy court. I conclude that the circumstantial facts do not include a possible ulterior motive.

[9] In my opinion, the evidence does not justify the inference sought by Mr. Ghikas. As in many cases involving litigation of this magnitude, there are grounds for suspicion that the desire to simply delay payment is a dominant motive. But I see nothing which lifts that suspicion to the level of reasonable probability.

[10] However, I think there is merit in Mr. Ghikas' submission that Alcan has been less than diligent in its preparation for the enforcement hearing. I find that, after the August 12th date was set for the hearing in Federal Court in Oregon, Alcan focused more on the obtaining of an adjournment of the enforcement proceedings, and did not exercise proper diligence in its preparation for the enforcement hearing. While that may be understandable in the circumstances, it negatives Alcan's alternative ground for seeking an adjournment.

[11] It is my opinion that Alcan has shown that its motion to set aside the arbitrator's award is not frivolous. It may be true that the arbitrator's findings of fact are not challenged, that the grounds of challenge permitted by statute are quite limited, and that only Enron is involved in bankruptcy proceedings. But on this application, I think I need only be satisfied that Alcan has an arguable case which is not bound to fail. I am so satisfied.

[12] I also find that an adjournment will not cause inordinate delay, nor will it create more difficulty for Powerex to obtain payment, in the event that the arbitrator's award is affirmed by the Federal Court in Oregon.

[13] I am also persuaded that, in the circumstances existing here, it would be more convenient for the Federal Court in Oregon to decide Alcan's challenge to the award, before Powerex's enforcement application is heard in this court. Although this court can decide questions of American law, in my view it would be far more convenient and efficient for the American court to do so.

[14] It is apparent that I have concluded that Alcan has established all of the primary grounds upon which it relies. The remaining question is whether those grounds justify an adjournment of the enforcement hearing.

[15] Most of the lengthy arguments on this motion were directed at principles which have been developed by the courts of various countries in considering the grounds upon which an adjournment should be granted pursuant to statutory provisions which are identical or similar to the B.C. Statutes relied on here. However, in my opinion, the two B.C. Statutes referred to do not apply to this application. I think those statutes confer a discretion on the chambers judge who will hear the enforcement petition, to adjourn his or her decision, after hearing the petition on the merits (to await the outcome of the proceedings in the original jurisdiction). But on the present application, I am being asked to adjourn the hearing which is contemplated by the statutes.

[16] If my conclusion is correct, there are two obvious consequences. First, the criteria for adjournments which have been developed in the cases decided under similar statutes, do not have direct application to Alcan's adjournment application. Second, I do not have authority to tell the chambers judge who hears the petition for enforcement, that he or she must reserve decision pending the outcome of the Oregon proceedings.

[17] However, it seems to me that it follows logically from the cases referred to by counsel, that an adjournment of proceedings to enforce an "International" arbitration award should not be granted lightly. I am also of the opinion that

several of the factors referred to in the cases as criteria for adjournments, are relevant to the present application.

[18] In my judgment, the grounds established here, taken in combination, provide a compelling reason to grant the motion for an adjournment of the enforcement hearing. Consequently, I order that the hearing of the petition be adjourned from July 21, 2003, until such time as the Federal Court gives judgment on the motions set for hearing on August 12th, 2003. In the event that the award is upheld, I think the enforcement hearing should proceed, regardless of whether Alcan appeals the Federal Court judge's decision. I would not make the order sought by Mr. Ghikas, that Powerex be entitled to enter judgment upon proof that Alcan's motion in Oregon is dismissed.

[19] I decline to order security in any amount, as I find that it is unnecessary, and is not otherwise justified. In the circumstances, I do not consider the potential fluctuation of foreign exchange rates to be a fact relevant to this issue.

[20] Powerex will have the costs of this application, in any event of the cause.

“D.A. Halfyard, J.”

The Honourable Mr. Justice D.A. Halfyard

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