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Powerex Corp. v. Alcan Inc., 2004 BCCA 504 (CanLII)

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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

Decisions cited

- [Dalimpex Ltd. v. Janicki](#), 2003 CanLII 34234 (ON CA) — 64 OR (3d) 737 • 228 DLR (4th) 179 • 35 BLR (3d) 41 • 172 OAC 312
- [Voth Bros. Const. \(1974\) Ltd. v. Nat. Bank of Can.](#), 1987 CanLII 2716 (BC CA) — 12 BCLR (2d) 43

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Powerex Corp. v. Alcan Inc.*,
2004 BCCA 504

Date: 20041004

Docket: CA32159

Between:

Powerex Corp., formerly British Columbia Power Exchange Corporation

Respondent

(Petitioner)

And

Alcan Inc., formerly Alcan Aluminum Limited

Appellant

(Respondent)

Before: The Honourable Mr. Justice Smith
(In Chambers)

S.B. Margolis and C.E. Jones

Counsel for the Appellant

G.W. Ghikas, Q.C. and R. Deane

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia
7 September 2004

Place and Date of Judgment:

Vancouver, British Columbia
4 October 2004

Reasons for Judgment of the Honourable Mr. Justice Smith:

[1] Alcan Inc. seeks leave to appeal from an interlocutory chambers order. On Alcan's application, the chambers judge adjourned an application by Powerex Corp. for an order recognizing and enforcing an arbitral award in its favour made in Portland, Oregon until the United States Court of Appeal for the Ninth Circuit gives judgment on Alcan's appeal of the award. However, as a condition of the adjournment, she ordered that Alcan pay the full amount of the award to Powerex's solicitors in trust and that it be paid out to Powerex upon Powerex posting security for repayment in the event that Alcan's appeal should succeed. Alcan contends that the chambers judge had no authority or jurisdiction to make the latter order or, alternatively, that if she had such jurisdiction, she exercised her discretion unreasonably.

[2] The impugned order is set out as follows:

2. The Petition shall deliver to the solicitors for the Respondent security in the form of an irrevocable letter of credit, or other security, satisfactory to the Respondent, or as approved by this Court, sufficient to ensure that the Respondent will receive repayment of the Funds received by the Petitioner, plus an amount reflecting interest at the rate stipulated in the Award from and after the date of Funds were received by the Petitioner, in the event that the United States Appeal is allowed, and the Award is set aside.

...

4. If the Funds are provided to the Petitioner's solicitors in trust, provided that the Security has been provided in accordance with this Order, the Petitioner shall be at liberty to obtain payment out of trust of some or all of the Funds, and any interest earned upon the Funds during the period in which they are held in trust by the solicitors for the Petitioner shall be applied to the benefit of the Respondent, reducing the amount payable in respect of the Award.

5. In the event that the United States Appeal is allowed, and the Award is set aside, the Petitioner shall, unless this Court otherwise directs, pay to the

Respondent the Funds received by the Petitioner plus an amount reflecting interest at the rate stipulated in the Award from and after the date the Funds were received by the Petitioner.

[3] The background may be briefly summarized.

[4] Powerex was awarded \$100 million U.S. against Alcan pursuant to a consensual arbitration. Alcan appealed the award to a United States magistrate and, on losing the appeal, to a District Court judge in the State of Oregon, who dismissed the appeal. Alcan has appealed the District Court judge's decision to the United States Ninth Circuit Court of Appeals. The parties anticipate that the appeal will be heard and decided some time next year.

[5] In the meantime, Powerex brought the application that gives rise to this proceeding in the Supreme Court of British Columbia for an order to enforce and recognize the arbitral award pursuant to the provisions of the *International Commercial Arbitration Act*, [R.S.B.C. 1996, c. 233](#), and the *Foreign Arbitral Awards Act*, [R.S.B.C. 1996, c. 154](#). These statutes codify international standards for the recognition and enforcement of certain commercial arbitration awards, enacting the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the 1958 New York Convention, and the United Nations Convention on International Trade Law (UNCITRAL) Model Law, respectively.

[6] Article 6 of the *Foreign Arbitral Awards Act* provides as follows:

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.

[7] Subsection 36(2) of the *International Commercial Arbitration Act* provides as follows:

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.

[8] Thus, Alcan having applied to the United States courts to set aside the award, the Supreme Court of British Columbia was empowered to adjourn Powerex's application to enforce the award and, in addition, on Powerex's application, to order Alcan to give "suitable" or "appropriate" security.

[9] After reviewing many decisions in other jurisdictions on the scope and effect of the statutory provisions, the chambers judge concluded:

[31] In my view, it is appropriate that this matter be adjourned, on Alcan posting security in a manner that will allow Powerex use of the funds pending conclusion of these matters in the United States. The security will be similar to that ordered in *Voth Brothers Construction (1974) Ltd. v. National Bank of Canada* [1987 CanLII 2716 \(BC CA\)](#), (1987), 12 B.C.L.R. (2d) 43 (C.A.): Alcan will pay the amount of the award, together with accrued interest to Powerex's solicitors, in trust. Powerex will then have access to these funds on the following conditions: (1) should Alcan succeed in its appeal in the United States, Powerex will immediately repay all the monies which it has received, together with interest at the rate currently accruing on the award; and (2) Powerex will provide security satisfactory to Alcan to secure repayment of all monies, including interest, to Alcan.

[10] Alcan submits that an order that the award be paid to Powerex subject to Powerex's posting security for repayment exceeds the authority granted by Article 6 of the *Foreign Arbitral Awards Act* and by s-s. 36(2) of the *International*

Commercial Arbitration Act because it is not an order for “suitable” or “appropriate” security to be provided by Alcan. In Alcan’s submission, the court’s jurisdiction was limited by the provisions of the two statutes and was not as broad as that exercised by the Court in the *Voth Brothers* case, where the jurisdiction lay in s. 18 of the *Court of Appeal Act*.

[11] Although there have been decisions made by domestic courts in other jurisdictions pursuant to these two provisions, there have been no decisions on the point in question in British Columbia or in any courts binding on the courts of this Province.

[12] In support of its submission, Alcan refers particularly to *Dalimpex Ltd. v. Janicki; Agros Trading Spolka Z.O.O. v. Dalimpex Ltd.* [2003 CanLII 34234 \(ON CA\)](#), (2003), 64 O.R. (3d) 737 (C.A.). In that case Agros obtained an arbitral award against Dalimpex in Poland. Dalimpex took proceedings in Poland to have the award set aside, unsuccessfully, and an appeal from that decision was pending when the Ontario Superior Court of Justice, on the application of Agros, granted a “provisional judgment” recognizing the arbitral award as valid and enforceable in Ontario. The judgment was provisional in the sense that the application judge directed that it should be vacated should Dalimpex’s appeal in Poland succeed. In doing so, he was purporting to exercise the jurisdiction conferred on his court by the Ontario statute enacting the provisions which were enacted in British Columbia under Article 6 of the *Foreign Arbitral Awards Act* and s-s. 36(2) of the *International Commercial Arbitration Act*.

[13] Dalimpex appealed. Speaking for a unanimous Court of Appeal, Charron J.A. said:

[55] Both parties take the position that the application judge had no jurisdiction to make a provisional judgment under the statute. As noted earlier, this question is the subject-matter of the cross-appeal. I agree with the joint position of the parties on this issue. The only avenues open to the application judge under articles 35 and 36 were to allow, adjourn or dismiss the application.

...

[61] In the circumstances, it is my view that the application should have been adjourned under article 36(2) pending the final decision in the Polish courts. In the event that the arbitral award is set aside, the basis of the application will have disappeared. If the appeal is dismissed, the application can be brought back before a justice of the Superior Court of Justice to be dealt with on the merits on this outstanding issue.

[14] From those comments, Alcan draws the proposition that the jurisdiction of the chambers judge was confined by the relevant statutory provisions to ordering it to post security for payment of the award, and that she erred in going further and providing that Powerex was entitled to receive payment of the award upon posting security for its repayment should Alcan's Oregon appeal succeed. In Alcan's submission, her order was in substance a provisional judgment, like the one successfully appealed in the *Dalimpex* case.

[15] I am satisfied that the question raised is one of general importance. The decision below is the first decision interpreting these provisions in British Columbia and it is arguable that no domestic court in any other jurisdiction that is party to the international commercial dispute resolution regime has interpreted the provisions as liberally as has the chambers judge here. If so, the decision marks a departure from international jurisprudence in a field where order and predictability are desirable. Moreover, the decision arguably is inconsistent with that of the Ontario Court of Appeal in the *Dalimpex* case. If so, this Court may wish to consider harmonizing the approach to this issue.

[16] The granting of leave on this issue will not unduly hinder the progress of Powerex's application to enforce the arbitral award, since it cannot be enforced in any event until the Ninth Circuit United States Court of Appeal renders its decision next year. An appeal on this question may well be heard and disposed of by then.

[17] Accordingly, I grant leave to appeal on the question of whether the orders embodied in paragraphs 2, 4, and 5 quoted above exceeded the jurisdiction

conferred by article 6 of the *Foreign Arbitral Awards Act* and by s-s. 36(2) of the *International Commercial Arbitration Act*.

[18] Alcan also seeks a stay of execution on the order pending the hearing of this appeal. Since it is conceded that the chambers judge had jurisdiction to order Alcan to post security for the arbitral award and since the challenge is limited to the provision of her order that permits Powerex to receive payment of the award on posting security for its repayment, the order that Alcan post the security should not be stayed.

[19] Alcan says it will suffer irreparable prejudice in having to incur the expense of raising funds to post security. If that is so, that is not relevant to whether the order for payment out of trust to Powerex should be stayed. Counsel advise that Powerex has arranged the necessary security for repayment. Thus, if the order is carried into execution the appeal will not be rendered nugatory. I am not satisfied that Alcan has demonstrated irreparable harm if the order should not be stayed nor that the balance of convenience favours a stay. Accordingly, the application for a stay of the order pending appeal is dismissed.

[20] In my view, leave ought not to be granted on the question whether, if she had jurisdiction to make the order, the chambers judge exercised her discretion unreasonably. This question involves the application of settled law to particular facts and nothing of general importance to the practice arises. Moreover, Alcan does not allege any error of principle and concedes that the chambers judge considered all relevant factors. It wishes to argue simply that the decision is clearly wrong. The relevant statutory provisions confer a wide discretion and I think there is little prospect that Alcan would succeed on this issue.

[21] In summary, leave to appeal is granted on the jurisdictional issue only. The application to stay the order pending appeal is dismissed.

“The Honourable Mr. Justice Smith”

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