BURGESS LAW OFFICES

Suite 308, Terrace on the Square
P.O. Box 23196
St. John's, NL A1B 4J9

R. Paul Burgess, QC
pburgess@burgesslaw.ca
Tel: (709) 757-2500
Fax: (709) 757-2501

November 13, 2018

Commission of Inquiry Respecting the Muskrat Falls Project
5th Floor, Suite 502, Beothuk Building
20 Crosbie Place
St. John's, NL A1B 3Y8

ATTENTION: THE HONOURABLE JUSTICE RICHARD LEBLANC, COMMISSIONER

Dear Mr. Commissioner:

RE: Submission on Commercially Sensitive Information on behalf of Astaldi Canada Inc. ("Astaldi")

The Commission has asked that parties with standing provide written submissions concerning the identification and treatment of commercially sensitive information.

Pursuant to the decision rendered by the Commission dated April 6th, 2018, Astaldi was granted limited standing in relation to Phase 2 of the Inquiry, in that it is limited to questioning only those witnesses speaking to issues impacting the interests of Astaldi and its involvement in the Muskrat Falls Project.

The Commission further ruled that should Commission Co-counsel or Astaldi determine that Astaldi's interests are impacted at other times during the Inquiry, Commission Co-counsel are required to notify counsel for Astaldi so that it may apply to the Commission for standing.

To date, while Astaldi has not participated in Phase 1 of the Inquiry it has carried out limited monitoring of the Inquiry and it is Astaldi's understanding that all evidence at the Inquiry to date is available for its review.

Astaldi has received and reviewed the submissions put forward by Nalcor Energy dated November 9, 2018.

The concerns raised by Nalcor Energy in its submission, as it relates to Astaldi, is not related to solicitor-client privilege or litigation privilege, but appears to be specifically in regard to information or documentation related to an ongoing arbitration proceeding between Astaldi and Muskrat Falls Corporation ("MFC") pursuant to a Notice of Arbitration filed by Astaldi dated September 27th, 2018, a copy of which has been provided to the Commission directly by Astaldi and is also attached to Nalcor Energy's submission.

Nalcor's submission is that there is information and or documentation which may get disclosed to Astaldi during Phase 1 of the Inquiry that is presently not otherwise available to Astaldi in relation to the arbitration proceedings and that there is a significant potential for adverse impact on the commercial interests of Nalcor Energy if such evidence is disclosed at the Inquiry.

Nalcor further submits the process for determining how commercially sensitive evidence related to the "Astaldi dispute that falls within the scope of phase two of the Inquiry will be protected should be deferred until that phase".

Astaldi submits Nalcor's position as it relates to these issues should not be accepted for the following reasons.

First, there are several facts which Nalcor has not included in its submission to the Inquiry which Astaldi submits are relevant and may impact the decision rendered by the Commission.

Subsequent to the Notice of Arbitration filed by Astaldi on September 27, 2018, MFC removed Astaldi from the Project site and required them to demobilize. While Astaldi has taken the position such action by MFC constitutes termination, MFC's position is it was a temporary work stoppage. That issue is now rendered moot, as MFC terminated the contract with Astaldi on November 8, 2018.

Additionally, Nalcor Energy states in its submission that "procedural disputes concerning the Notice of Arbitration have been before the courts of Newfoundland and Labrador and the courts of Ontario".

So that the Inquiry is fully cognizant and aware of the status of those matters, while an initial application was made by Astaldi in the courts of Ontario to force MFC to appoint an arbitrator pursuant to the Notice of Arbitration, that action has been adjourned *sine die* and Astaldi appeared before the Supreme Court of Newfoundland and Labrador to respond to an application filed by MFC in the Supreme Court of Newfoundland and Labrador. Astaldi filed its own application.

The results of both applications are set forth in the decision rendered by Mr. Justice Adams of the Supreme Court of Newfoundland and Labrador which dismissed MFC's application, granted Astaldi the remedies it sought in its application, and awarded costs to Astaldi in both matters. We enclose herewith a copy of that decision for the Commission's reference.

The Arbitration Tribunal is fully constituted and an emergency relief application filed by Astaldi is set to be heard November 26-27, 2018.

There are no other applications or court actions related to the arbitration before the courts of either Newfoundland and Labrador nor Ontario at this time.

Second, Nalcor submits that this Commission cannot and should not presume that the procedural rules and rulings of the arbitration proceeding will provide for the same disclosure as do the rules of procedure of this Inquiry or under the *Rules of the Supreme Court, 1986.*

Astaldi submits this Inquiry can, in fact, presume that Astaldi has the benefit of the procedures pursuant to the *Rules of the Supreme Court, 1986*, as it relates to the ongoing dispute with MFC.

There are numerous statement of claims issued by third parties as against Astaldi and Nalcor Energy related companies, including but not limited to MFC, many of which are mechanics lien actions. It is the intention of Astaldi in most, if not all of those actions, to third party MFC, and assert similar claims against MFC as are set forth and alleged in the Notice of Arbitration.

Consequently the *Rules of the Supreme Court, 1986* will be available to Astaldi, along with all such disclosure and production requirements.

Third, Astaldi submits that planning, cost estimating and risk assessment information will be a relevant and live issue during Phase 2 of this Inquiry. Any process established by the Inquiry for dealing with commercially sensitive information related to Phase 1 should apply equally to such information in Phase 2. Astaldi submits Nalcor's submission that the process for dealing with evidence related to the "Astaldi dispute" should be deferred until that phase is not the appropriate process in this regard.

Fourth, to exclude Astaldi from *in camera* hearings, as is proposed by Nalcor, would be unfair and unjust, given that such information will likely be relevant during Phase 2 of the Inquiry and relevant to Astaldi related issues. Astaldi submits that all parties who have standing during Phase 2 of the Inquiry ought to have access to any information, documents or evidence presented during Phase 1 that are relevant to issues in Phase 2 of the Inquiry, even if they aren't granted the opportunity to cross-examine any such witnesses.

Astaldi further submits any proposition that any *in camera* hearings would exclude the attendance by clients would be deeply concerning and problematic, as it would place legal counsel in an untenable position and unable to receive full and complete instructions from clients.

Astaldi is not seeking to withhold any "commercially sensitive" information regarding any disputes, arbitrations or litigation from the Inquiry, Nalcor Energy or its related companies, or any other party, other than commercially sensitive information that may impact Astaldi in relation to other projects for which it is involved in other locations.

In fact, Astaldi welcomes an open and transparent review of all aspects of its involvement in the Muskrat Falls Project and sought standing at the Inquiry so that this Commission, and the people of Newfoundland and Labrador generally, understand and are aware of all of the issues and have confidence in this Inquiry.

Astaldi makes no submission in relation to the testimony of Mr. Jim Keating or evidence related to other Project Contractors.

Yours very truly,
BURGESS LAW OFFICES

R. PAUL BURGESS, QC

RPB/sp
Encl.

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Muskrat Falls Corporation v. Astaldi Canada Inc.*, 2018 NLSC 210
Date: October 23, 2018
Docket: 201801G6917

BETWEEN:

MUSKRAT FALLS CORPORATION

APPLICANT

AND:

ASTALDI CANADA INC.

RESPONDENT

- AND -

Docket: 201801G7001

BETWEEN:

ASTALDI CANADA INC.

APPLICANT

AND:

MUSKRAT FALLS CORPORATION

RESPONDENT

Before: Justice James P. Adams

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: October 17, 2018

Summary: Muskrat Falls Corporation ("MFC") and Astaldi Canada Inc. ("Astaldi") entered into a contract for the construction of a large hydro electrical project in Labrador which contained an arbitration agreement requiring disputes to be determined by arbitration. In an amending agreement the parties agreed that the arbitration provisions would only be available to Astaldi if it was claiming damages for termination of the contract. The contract had not been formally terminated. Astaldi claimed the contract was unenforceable because of the actions of MFC, except for the arbitration provisions.

Astaldi filed a Notice of Arbitration alleging numerous breaches of contract and fiduciary duty, among other things, by MFC and appointed an arbitrator to a proposed Board of Arbitration. MFC rejected the right to arbitration and refused to appoint an arbitrator. MFC applied to the Court to decide if the dispute was arbitrable submitting that it is the Court that has the authority to decide this jurisdictional question in the circumstances. Astaldi took the position that the question of the jurisdiction of the arbitrator must first be referred to the arbitrator. It requested that the Court order MFC to appoint an arbitrator or to appoint one for it so the matter of jurisdiction could be determined.

Held: The arbitration raises issues of mixed fact and law requiring a detailed consideration of the contract and the factual matrix surrounding it. Therefore, the issue of jurisdiction should be referred to the Board of Arbitration for determination once it is established. MFC was ordered to appoint an arbitrator to the Board.

Appearances:

Thomas R. Kendell, Q.C. Douglas Skinner	Appearing on behalf of the Applicant/Respondent
Paul R. Burgess Peter-Paul Du Vernet	Appearing on behalf of the Respondent/Applicant

Authorities Cited:

CASES CONSIDERED: *Wheeler v. Hwang*, 2007 NLTD 145; *Marine Atlantic Inc. v. Seabase Ltd.* (1995), 132 Nfld. & P.E.I.R. 121, 410 A.P.R. 121 (Nfld. S.C. (T.D)); *Union des Consommateurs v. Dell Computer*, 2007 SCC 34; *Creston Moly v. Sattva Capital*, 2014 SCC 53; *Seidel v. Telus Communications Inc.*, 2011 SCC 15; *Alberta Medical Assn. v. Alberta (Minister of Health and Wellness)*, 2012 ABQB 113; *Jean Estate v. Wires Jolly LLP*, 2009 ONCA 339; *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135

STATUTES CONSIDERED: *Arbitration Act*, R.S.N.L. 1990, c. A-14

TEXTS CONSIDERED: Mustill and Boyd, *Commercial Arbitration*, 2nd edition (Butterworths, 1989)

REASONS FOR JUDGMENT

ADAMS, J.:

INTRODUCTION

[1] The parties to the two applications before me entered into a contract on 29 November 2013 for the completion of certain civil construction work on the Muskrat Falls Project in Labrador (the "CW Contract"). The CW Contract contained a provision for the resolution of disputes between the parties by arbitration. On 27 September 2018 Astaldi Canada Inc. ("Astaldi") filed a Notice of Arbitration alleging numerous breaches of contract by Muskrat Falls Corporation ("MFC") and in which it appointed its arbitrator to a prospective Board of Arbitration. MFC refused to appoint an arbitrator and took the position that the arbitration agreement was not available to Astaldi in the circumstances by virtue of a subsequent contract amending the arbitration agreement in the CW Contract.

[2] MFC filed an application in 201801G6917 in which it sought, among other things, a declaration that it was not obliged to appoint an arbitrator and that the arbitration process in the CW Contract was not available to Astaldi.

[3] Astaldi filed an application in 201801G7001 seeking, among other things, an order that MFC is required to appoint an arbitrator pursuant to the arbitration agreement and a stay of the MFC application.

[4] These two applications were heard together.

FACTUAL BACKGROUND

The Agreements

[5] The CW Contract between the parties was entered into on or about 29 November 2013. There followed several other agreements amending the CW Contract which together form the whole contract between the parties. Of particular interest to these applications is the Incentive Funding Contract ("IFC") entered into on or about 6 September 2018 by which, among other things, the parties agreed to restrict the application of the arbitration provisions in the CW Contract.

[6] The CW Contract provides a dispute resolution system in Article 31. It states at Article 31.1:

> 31.1 If any dispute, controversy, claim, question or difference of opinion arises between the Parties under this agreement including an interpretation, enforceability, performance, breach, termination or validity of this Agreement ("Dispute"), the Party raising the Dispute shall give Notice to the other Party in writing within thirty (30) days of the Dispute arising, and such Notice shall provide all relevant particulars of the Dispute.

[7] The CW Contract also has a number of exhibits attached to it which by definition form part of the agreement. Of relevance to these applications is Exhibit 16, Rules for Dispute Review Board and Arbitration. Part A of Exhibit 16 sets out a process for resolving disputes short of arbitration. Part B of Exhibit 16 establishes the rules by which an arbitration will be held if there is no resolution to a dispute

pursuant to Part A. Together, Article 31 and Exhibit 16 form the arbitration agreement in the CW Contract before the parties entered into the IFC.

[8] The arbitration agreement provides, among other things, that:

a) Either party may submit a dispute to arbitration by giving a Notice of Arbitration to the other party (CW Contract, Article 31.4);

b) The *Arbitration Act*, R.S.N.L. 1990, c. A-14 ("the *Arbitration Act*") applies for the interpretation of terms and phrases in the exhibits (Exhibit 16, Part B, section 1.1 (a) (i);

c) Any mandatory provisions in the *Arbitration Act* shall govern if there is any inconsistency between them and any of the Rules in Exhibit 16 (Exhibit 16, Part B, section 1.4);

d) A reference to "the Court" in the exhibits shall mean the Supreme Court of Newfoundland and Labrador (Exhibit 16, Part B, section 1.1(d);

e) Any arbitration shall be conducted in Toronto, Ontario (Exhibit 16, Part B, section 5.1);

f) The arbitration shall be conducted before a three-person arbitral tribunal if the amount involved in the dispute exceeds $5,000,000 (Exhibit 16, Part B, section 8.2);

g) In the case of a three-person arbitral tribunal, each party shall appoint an arbitrator and the two appointed arbitrators shall select a third arbitrator who shall be the chairperson (Exhibit 16, Part B, section 8.4);

h) The Supreme Court of Newfoundland and Labrador shall determine procedural issues such as the appointment of an arbitrator if there is disagreement or failure to appoint one (Exhibit 16, Part B, section 8.7); the replacement of an arbitrator (section 8.10); an "appeal" against an award of an arbitrator (section 17.6); a dispute respecting the consolidation of a number of arbitrations (section 20.2) and; any dispute respecting procedural issues arising out of the consolidation of arbitrations (section 20.4);

i) The arbitrator (which includes a Board of Arbitration) may rule on the arbitrator's jurisdiction (Exhibit 16, part B, section 10.2).

[9] The IFC provided, among other things, that it incorporated by reference the CW Contract and subsequent agreements referred to therein, including Article 31 and Exhibit 16. Of particular relevance to these applications, it also provided in section 31 in relevant part:

> Exhibit 16 to the Agreement [CW Contract] including, but not limited to, the Dispute Review Board, provisions:
>
> ...
>
> c. are only available to Contractor [Astaldi] for claims for damages upon termination for Default.

[10] The CW Contract sets out in Article 24 a detailed provision respecting default and the rights of termination of the contract.

[11] It is common ground that the CW Contract and subsequent contracts have not been formally terminated, although MFC issued a Notice of Default to Astaldi. Astaldi claims that by its actions MFC has rendered the contracts invalid and unenforceable. In fact, work was progressing on the project by Astaldi on the day of this hearing. Nevertheless, there was evidence before me of numerous disputes, both formal and informal, initiated by Astaldi claiming breach of contract, among other things, by MFC.

[12] As already stated, on 27 September 2018 Astaldi served a Notice of Arbitration on MFC requesting a three-person arbitral tribunal and appointing its arbitrator. On 28 September 2018 MFC "rejected" the Notice of Arbitration and refused to appoint an arbitrator. In its Notice of Arbitration, Astaldi alleged that shortly after entering into the CW Contract, MFC realized that it had under-budgeted the cost of the Muskrat Falls Project originally projected to be $6.2 billion. Astaldi alleges that thereafter MFC introduced "pain share" measures to ensure that additional costs would be borne by Astaldi. Astaldi claims that because of these measures, among other things, the CW Contract, including the subsequent agreements referred to earlier, in these reasons, no longer represent the bargain between the parties and that the agreements therein are no longer operative or enforceable, except for the arbitration agreement. Astaldi alleges that by its conduct, MFC has converted the CW Contract into a fully cost reimbursable agreement. Astaldi seeks various remedies, including damages in the amount of $500,000,000 for MFC's negligence, breach of contract, breach of fiduciary duty and breach of fair dealing. MFC totally rejects Astaldi's right to have its claim referred to arbitration and submits that this court is the appropriate forum in which to litigate the dispute raised by Astaldi.

Background Leading up to these Applications

[13] Following the issuance of its Notice of Arbitration and appointment of an arbitrator and MFC's rejection of the applicability of the arbitration provisions, Astaldi applied to the Superior Court of Ontario (the location agreed to by the parties where any arbitration would be held) to have that court appoint an arbitrator for MFC who could then with Astaldi's arbitrator, appoint a Chair and thereby establish the Board of Arbitration to hear Astaldi's claims. In response to the action by Astaldi in the Ontario Superior Court, MFC filed the Originating Application in this Court seeking, among other things, that this Court is the proper forum in which to hear the matters in dispute, including the appointment of an arbitrator and, more importantly, whether the matter raised in the Notice of Arbitration by Astaldi are subject to arbitration at all, that is, the jurisdiction of the Board of Arbitration. MFC took the same position in the Ontario action.

[14] Astaldi then filed its Originating Application in this Court seeking the declaratory relief earlier described, including that MFC be required to appoint an arbitrator in response to Astaldi's Notice of Arbitration and that both applications be heard together.

[15] In reply to MFC's application, Astaldi stated that it had adjourned its Ontario Superior Court application *sine die* and is proceeding in this Court. Astaldi acknowledged that the *Arbitration Act* and the law of this province applies to the issues before me.

ISSUE

[16] While there are two applications before me, the principle issue to be decided in both of them is whether this Court should decide if the Board of Arbitration has the jurisdiction to determine the matters raised in Astaldi's Notice of Arbitration or whether that question should be referred to the Board of Arbitration in the first instance once it is established. Depending on the answer to that question, it may be necessary to make certain ancillary orders.

CONSIDERATIONS

[17] The parties are in agreement that even if the CW Contract is found to be inoperative, unenforceable or is terminated, the arbitration provisions continue to be in full force and effect. I agree.

[18] This is known as the separability principle. In some jurisdictions (e.g. Ontario) their arbitration acts provide for this. That is not the case in the *Arbitration Act*. There is no such provision. Nevertheless, our Court has recognized the necessity of maintaining arbitration provisions in order to avoid abuse by parties to contracts by them simply terminating a contract and thereby eliminating the arbitration provisions to which the parties have agreed.

[19] In *Wheeler v. Hwang*, 2007 NLTD 145 the same issue arose as it was alleged that the contract which provided for arbitration of a dispute was invalid and thus the arbitration provisions were unenforceable. Butler, J. held that the principle of separability applies in this province. She referred at paragraph 11 with approval to another decision of this Court: *Marine Atlantic Inc. v. Seabase Ltd.* (1995), 132 Nfld. & P.E.I.R. 121, 410 A.P.R. 121 (Nfld. S.C. (T.D)). In that case, Hickman, C.J. referred to a statement of the law (which Butler, J. accepted) from Mustill and Boyd, *Commercial Arbitration*, 2nd edition (Butterworths, 1989).

> 11. ... It is now firmly established that the arbitration agreement which creates these obligations is a separate contract, distinct from the substantive agreement in which it is usually embedded, capable of surviving the termination of the substantive agreement and susceptible of premature termination by express or implied consent, or by repudiation or frustration, in much the same manner as in more ordinary forms of contract. ...

[20] Therefore, I find that the arbitration agreement survives any finding that the CW Contract is inoperative, invalid or has been terminated. I also find that the arbitration agreement includes the provisions in section 31 of the IFC, that is, that arbitration is only available to Astaldi for claims for damages upon termination for default. This forms an integral part of the arbitration agreement between the parties and would survive under the separability rule.

[21] The issue here requires a review of the so called "competence – competence" principle in arbitral authority. This principle states that a challenge to the jurisidiction of an arbitrator must at first instance be referred to the arbitrator to resolve. The most authoritative statement of this principle is found in *Union des Consommateurs v. Dell Computer*, 2007 SCC 34 and subsequent cases considering it.

[22] In *Dell*, a customer attempted to obtain a computer at an erroneously low price contained on the company's website. Dell refused to honour the purchase at that price and referred the dispute to arbitration pursuant to a term in the contract. The customer refused arbitration and sought to file a class action lawsuit. The Supreme

Court (reversing the Quebec Court of Appeal) held that the matter first had to be referred to arbitration to have the issue of jurisdiction resolved.

[23] Deschamps, J. stated for the majority at paragraphs 84 and 85:

> 84. First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts'expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.
>
> 85. If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. [emphasis added]

[24] The issues before me raise questions of mixed law and fact. MFC submitted that the case at bar falls into the exception created by Deschamps, J. in that "the questions of fact require only superficial consideration of the documentary evidence in the record". MFC says the IFC restricts the availability of arbitration to a claim by Astaldi for damages on termination of the contract. MFC says that it has not terminated the contract and therefore on a superficial consideration of the documentary evidence, this Court can conclude that there is no basis on which Astaldi's claim should go to arbitration as it would essentially be a pointless and costly exercise to establish a Board of Arbitration which would have to come to the same conclusion. In other words, the exercise is really a question of law which the

Court is uniquely suited to decide. This was the traditional approach applied to contractual interpretation.

[25] With respect, this approach invites an interpretation of a commercial contract which is at odds with current contractual interpretation established by the Supreme Court of Canada. In *Creston Moly v. Sattva Capital*, 2014 SCC 53, the Court rejected this historical approach to contractual interpretation. At paragraph 50, the Court stated:

> 50. With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[26] The Court did not rule out the possibility that there may be cases where an extricable question of law might be discerned from a question of mixed fact and law but held at paragraph 55 that these will be rare.

[27] So, is this one of those rare cases where an extricable question of law can be identified out of a mixed fact and law context? I find it is not.

[28] I was referred to several cases which considered this question following the *Dell* case. Astaldi referred me to *Seidel v. Telus Communications Inc.*, 2011 SCC 15 where the Supreme Court determined that the court was in a position to decide on the jurisdiction of an arbitrator based on the fact that there was a statutory prohibition governing the situation and the issue raised public policy considerations concerning consumer protection.

[29] MFC referred me to *Alberta Medical Assn. v. Alberta (Minister of Health and Wellness)*, 2012 ABQB 113 in which Wittmann, C.J.Q.B. found that in the circumstances of that case the Court held at paragraph 30 that it was as capable as an arbitrator to interpret the terms of the agreement on arbitration and the nature of

the arbitration sought by the Medical Association. Consequently, Wittmann, C.J.Q.B. went on to conclude in paragraph 38 that the Applicant was not entitled to arbitration.

[30] However, there are a number of differences between that case and the case at bar. The contract in that case was found to not be an "ordinary contract" as it dealt "directly with the delivery of health care services" in the province. That is not the case here as the contract is, apart from the huge amounts of money involved, an ordinary commercial contract not involving any public policy issues such as in the *Alberta Medical Assn.* case. As well, section 47 of the Arbitration Act in Alberta contains a provision specifically permitting the Court to determine, among other things, that the arbitration agreement does not apply to the matter in dispute. The *Arbitration Act* has no such provision. As well, the *Alberta Medical Assn.* case was decided in 2012. So Wittmann, C.J.Q.B. did not have the benefit of the Supreme Court of Canada decision in the *Sattva* case for consideration in his deliberations.

[31] For these reasons and other distinctions in the specific contract under consideration in that case, I find that the *Alberta Medical Assn.* case is distinguishable from the case at bar.

[32] I was also referred by MFC to *Jean Estate v. Wires Jolly LLP*, 2009 ONCA 339 where the Ontario Court of Appeal upheld the trial judge's decision holding that the Court was the more appropriate forum in which to determine the applicability of a contingency fee agreement between the parties which also contained an arbitration clause for the resolution of disputes. The Court held that there were broad implications for lawyers and judges in the case and the issues in question would require only a brief consideration of the undisputed facts. That is not the case before me as the issues are restricted to the parties to the agreement and do not have broader implications. As well, the arbitration raises extensive disputed facts between the parties which form part of the factual matrix to be considered in determining the question of jurisdiction.

[33] In *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135, the Ontario Court of Appeal held that where it is arguable that the issue of

jurisdiction should be left to the arbitrator, the Court should decline to make that decision. Sharpe, J.A. for the Court, while acknowledging that the issue was not without doubt in declining to assume jurisdiction, referred to the breadth of the arbitration clause and the complex relationship between the parties as factors to consider in whether the question of jurisdiction should be referred to the arbitrator in the first instance. He concluded that before a court should assume jurisdiction it must be "clear and obvious that the dispute is not governed by the arbitration clause."

[34] This is consistent with the approach taken by Butler, J. in the *Wheeler* case referenced earlier. During the reserve period of her judgment, the Supreme Court of Canada decided the *Dell* case. Butler, J. referred to *Dell* in her decision at paragraph 23 citing the same paragraphs that I have referred to at paragraph [23]. Having determined that the question to be determined was one of mixed fact and law, she concluded that the matter of jurisdiction to hear the arbitration must first be referred to the arbitrator for determination. She concluded further, and I agree, that the onus is on the party seeking to deny the right to arbitration to show that the issue of jurisdiction should not in the first instance be referred to the arbitrator.

[35] In this case, the arbitration provision is broad and empowers the arbitrator to determine "any dispute, controversy, claim, question or difference of opinion" that might arise between the parties, "including an interpretation, enforceability, performance, breach, termination or validity" of the Agreement. Astaldi has alleged numerous breaches of contract by MFC including an allegation that the agreement (including the IFC) is no longer valid or enforceable due to the actions of MFC. The relationship between MFC and Astaldi has been fraught from the beginning and the factual matrix involving their contractual relationship is complex. It is not clear and obvious that that complex relationship will not form a part of the consideration as to whether the issues raised by Astaldi are subject to arbitration. In my view, it is at least arguable that the dispute falls within the arbitration agreement. As in *Wheeler*, MFC has failed to discharge its onus of satisfying the Court that there should be a departure from the general rule that the question of the jurisdiction of the Board must first be referred to the Board of Arbitration.

CONCLUSION

[36] In the result, I conclude:

(i) that the issue of the jurisdiction of the Board of Arbitration must first be submitted to the Board for determination;

(ii) the Originating Application of MFC in 201801G6917 is stayed pursuant to section 4 of the *Arbitration Act*;

(iii) the *Originating* Application of Astaldi in 201801G7001 is allowed in part as follows;

(iv) MFC shall appoint an arbitrator to the Board of Arbitration within 14 days;

(v) The *parties* may apply for any further direction;

(vi) *Astaldi* shall have its costs of both applications under column 3 of the costs Rule.

JAMES P. ADAMS
Justice