

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Davison v. Novem Pharmaceuticals Inc.*,
2026 BCSC 1593

Date: 20260824
Docket: S263833
Registry: Vancouver

Between:

Colin Davison, Big Air Inc., and Stealth Consulting Inc.

Plaintiffs

And:

Novem Pharmaceuticals Inc., Phi Factor Inc., and Ocorp Holdings Ltd.

Defendants

Before: The Honourable Madam Justice Forth

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.
July 27, 2026

Place and Date of Judgment:

Vancouver, B.C.
August 24, 2026

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Introduction

[1] The plaintiffs have brought a claim under the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 [FCA] and the *Fraudulent Preference Act*, R.S.B.C. 1996, c. 164 [FPA] under Vancouver Registry No. S263833 (the “3833 Action”). The defendants seek a stay of the 3833 Action pursuant to s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2, ss. 8(2) and 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, and the inherent jurisdiction of this Court.

[2] The parties, except the defendant Ocorp Holdings Ltd. (“Ocorp”), submitted to arbitration pursuant to a consensual submission agreement (the “Submission Agreement”) vis-à-vis certain actions taken by the plaintiffs against various parties. The arbitration is ongoing with an arbitrator selected.

[3] The defendants seek an order that the 3833 Action be stayed in respect of all questions and matters in dispute until the conclusion of the arbitration. The plaintiffs submit that the stay application should be dismissed on several bases.

Relevant Background

The Parties

[4] The plaintiff, Mr. Davison, is a founder, a direct and indirect 30 percent shareholder, and a director of the defendant, Novem Pharmaceuticals Inc. (“Novem”), as well as the former CEO of Novem. Mr. Davison is the sole director and principal of the other two plaintiffs, Big Air Inc. (“Big Air”) and Stealth Consulting Inc. (“Stealth”), both Alberta corporations.

[5] Novem owns 100 percent of the shares of Phi Factor Inc. (“Phi Factor”). Ocorp was Novem’s landlord pursuant to a written lease agreement dated March 1, 2025, for premises located in Kelowna.

Unanimous Shareholder Agreement

[6] A unanimous shareholder agreement (“USA”) was entered into on March 12, 2021 with Novem and a number of other signatories. The signatories of the USA

include Veteran Express Secure Logistics Inc. (“VEXSL”), Cevello Management Corporation (“Cevello”) which appointed Cole Foullard and Darcy Dando to the Novem board, and 2217676 Alberta Ltd. (“CELAD”) which appointed Mr. Davison as its nominee director.

[7] Article 1.1(aa) of the USA defines “Shareholder” as:

any person who from time to time holds shares of the Corporation and is bound by the provisions of this Agreement, the Initial Shareholders being VEXSL, CEVELLO, JEFFCO, JP19, and CELAD and their known associates, trustees and beneficiaries

[8] Article 8.1 of the USA provides that:

8.1 Arbitration. Except for any determination of the value of an Participating Interest made in accordance with Article 11, which determination shall be in accordance with Article 11 and shall be final and binding on the parties, all disputes arising out of, or in connection with, this Agreement shall be referred to and finally resolved by a single arbitrator pursuant to the *Arbitration Act*, SBC 2020, c 2, as amended.

Proceedings Commenced

[9] The plaintiffs have commenced three other actions in 2026:

1. February 12, 2026 – by Stealth against Novem and Phi Factor in Vancouver Reg. No. S261144, claiming that Novem is indebted to Stealth for the sum of \$800,000, together with accrued interest (the “Stealth Action”);
2. February 12, 2026 – by the plaintiffs against Novem and Phi Factor in Vancouver Reg. No. S261143, claiming that Novem owes Big Air the sum of \$443,343, together with accrued interest (the “Big Air Action”); and
3. March 20, 2026 – by the plaintiffs against Novem and various present and former directors of Novem in Vancouver Reg. No. S262045, with Mr. Davison claiming he was wrongfully dismissed (the “Wrongful Dismissal Action”).

(collectively, the “Creditor Actions”)

[10] On May 22, 2026, the plaintiffs commenced the 3833 Action claiming that while the defendants were insolvent, unable to pay their debts in full, or on the eve of insolvency, the registered owner Phi Factor, transferred property described as 1429 McLeod Road, Spallumcheen, BC (the “Lands”) to Ocorp on April 15, 2026 (the “Transfer”). The plaintiffs claim that the consideration paid was inadequate in relation to the value of the Lands and that the Transfer was a disposition made voluntarily with the intent to defeat, delay, hinder, prejudice, or defraud the creditors of Novem and Phi Factors, including the plaintiffs. They further claim that the Transfer was granted to give Ocorp a preference over other creditors of Novem and/or Phi Factor, including the plaintiffs.

Request for Interim Relief

[11] A notice of demand for arbitration dated April 14, 2026 was delivered by certain shareholders of Novem raising a number of concerns (the “Notice of Demand”).

[12] On May 13, 2026, a request for an interim relief measure was delivered in the arbitration by the plaintiffs and CELAD seeking appointment of a receiver of all assets, undertakings, and property of Novem and related relief (the “Request”). The Request made reference, among other things, to the Transfer, and suggested it represented a fraudulent conveyance and preferential transaction under the *FCA* and *FPA*, respectively.

Submission Agreement

[13] On May 26, 2026, counsel for the plaintiffs provided a draft submission agreement to be appended to Arbitrator Jensen’s retainer letter. Issue 19 listed therein was:

If the sale of the Lands from Novem and Phi Factor to Ocorp was not properly authorized and/or is invalid, what remedies flow from the sale, including against Foulliard and Dando.

[14] On June 5, 2026, the plaintiffs, CELAD, VEXSL, Cevello, JP19 Consulting Ltd., Mr. Fouilliard, Mr. Dando, Novem, and Phi Factor entered into the Submission

Agreement, thereby agreeing to have certain disputes determined before a single arbitrator. The Submission Agreement covers “[a]ll disputes related to... the facts and/or issues”:

- a) raised in the Notice of Demand, save for under one particular subsection;
- b) raised in the pleadings of the Creditor Actions;
- c) “concerning the conduct of any member of the VCJ Group, the Directors, Novem, or Phi Factor that may constitute a breach of the terms of the USA and/or an uncured ‘Event of Default’ under the USA”; and
- d) raised in the Request for Interim Relief.

[15] Clause 4 of the Submission Agreement contemplates that all of the substantive disputes to be determined by arbitration under this agreement shall be submitted through an exchange of pleadings. This exchange has not yet taken place.

Status of 3833 Action

[16] As noted, the notice of civil claim in the 3833 Action was filed on May 22, 2026.

[17] On June 1, 2026, the plaintiffs filed a notice of application scheduled to be heard June 23, 2026, seeking an order pursuant to s. 9 of the *FPA* that the defendants show cause why the Transfer should not be set aside and the Lands returned or otherwise dealt with as the Court may direct (the “Show Cause Application”).

[18] On June 9, 2026, the defendants, Novem and Phi Factor, filed a notice of application seeking an order staying the 3833 Action. On the same day, they filed a response to the Show Cause Application taking the position that a stay application had been filed.

[19] On June 15, 2026, Novem and Phi Factor filed a response to civil claim asserting that the action should be stayed, without responding on the merits. On the same day, Ocorp filed a response to civil claim taking the same position.

[20] On June 17, 2026, the plaintiffs filed an application response opposing any stay. On the same day, Ocorp filed an application response to the Show Cause Application advising its own stay application would follow.

[21] On June 18, 2026, Ocorp filed a notice of application seeking an order staying the 3833 Action. On June 19, 2026, the plaintiffs filed an application response opposing any stay.

[22] On June 19, 2026, the plaintiffs filed an amended notice of civil claim, primarily amended to assert that Mr. Davison was at all times a guarantor of Novem's \$1.7 million principal debt to Farm Credit Canada and this independently provides him standing to bring this action.

[23] On July 10, 2026, Novem and Phi Factor filed an amended notice of application seeking the stay to rely on the Submission Agreement.

[24] On June 23, 2026, the stay applications and Show Cause Application came on for hearing in regular chambers but were unable to be heard due to the number of matters scheduled. The parties secured two one-day long chambers dates, being July 27 and August 10, 2026. The stay application was directed to proceed first.

Position of the Parties

Position of the Defendants, Novem and Phi Factor

[25] Novem and Phi Factor submit that the 3833 Action rests on the claim that the plaintiffs are their creditors, which is a contested assertion that is the subject of the Creditor Actions. These defendants say that all disputes related to the facts and/or issues in the Creditor Actions have been agreed to be submitted to arbitration pursuant to the Submission Agreement. They also rely on the USA, which requires that all disputes "arising out of or in connection with" the USA be submitted to

arbitration. Whether and to what extent the plaintiffs are creditors of Novem and Phi Factor involves agreements whose validity depends on, and conduct whose effect turns on, provisions of the USA.

[26] These defendants further rely on the Request, which puts in issue whether the Transfer was a fraudulent preference and/or fraudulent conveyance.

[27] It is submitted that all of the prerequisites for a stay have been met and that these defendants must only raise an “arguable case” that the arbitrator has jurisdiction over the parties and the dispute.

Position of the Defendant, Ocorp

[28] Ocorp adopts the same position as Novem and Phi Factor and further submits that it too is a party to the USA. That Ocorp is not a signatory to the arbitration agreement does not preclude it from seeking a stay of proceedings when a co-defendant, who is a party, has applied for a stay. Ocorp says that the plaintiffs have agreed to determine whether they are creditors of Novem and Phi Factor in arbitration. As such, the Court should defer to that choice and stay the proceeding pending the outcome of that arbitration, thereby avoiding multiplicity of actions and preventing inconsistent decisions.

Position of the Plaintiffs

[29] The plaintiffs submit that the application for a stay of proceedings should be dismissed on the following independent bases.

[30] First, with respect to Mr. Davison and Big Air, there is no arguable case that the claim falls within the matters to be arbitrated under the USA. Neither is a shareholder under the USA and both are indisputably creditors of Novem and Phi Factor. Further, at the material time, Novem and Phi Factor were plainly insolvent or “on the eve of insolvency”. Novem missed payroll due to insufficient funds and Phi Factor’s director, Mr. Foulliard, admitted its insolvency.

[31] Next, the plaintiffs say there is a jurisdictional question which is a pure question of law and which is determinative. Accordingly, the *FPA* requires the *FPA* application herein to proceed before this Court.

[32] The plaintiffs also argue that the arbitration agreement is inoperative or incapable of being performed, as this action and the *FPA* application are brought by the plaintiffs in a representative capacity.

[33] Finally, the plaintiffs say Ocorp is not a party to the arbitration and has not otherwise advanced the position that it is bound by the arbitration agreement in the USA.

Legal Principles

Arbitration Act

[34] A party to a legal proceeding may apply for a stay of that proceeding under s. 7 of the *Arbitration Act* where there exists an agreement between the parties that the matters in dispute be submitted to arbitration for resolution. If the arbitration agreement is not void, inoperative, or incapable of being performed, the court must grant the stay of proceedings. Section 7 provides:

- (1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substances of the dispute, apply to that court to stay the legal proceedings.
- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
- (3) An arbitration may be commenced or continued and an arbitral award made even if an application has been brought under subsection (1) and the issue is pending before the court.

[35] The Supreme Court of Canada in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 [*Peace River*] set out a two-part test: the court must first ask whether the applicant has established the technical prerequisites for a mandatory stay, and only if so, whether a statutory exception of void, inoperative, or incapable of being performed, defeats it: *Peace River* at para. 76. The applicant carries the

onus of establishing the first prong, and the party resisting arbitration in respect of the second, such that refusal of a stay is justified: *Peace River* at para. 77. Otherwise, the court must grant a stay and cede jurisdiction to the arbitral tribunal: *Peace River* at para. 79.

[36] The prerequisites for a stay under the *Arbitration Act* are:

- (a) the applicant must show that a party has commenced legal proceedings in respect of a matter agreed to be submitted to arbitration;
- (b) the application must be brought before the applicant submits its first response on the substance of the dispute; and
- (c) the arbitration agreement is not void, inoperative or incapable of being performed.

Davidson v. Lyra Growth Partners Inc., 2024 BCCA 133 at para. 28
[*Davidson*].

[37] The standard of proof at the first stage is lower than the usual civil standard and the applicant must only establish an “arguable case” that the technical requirements are met: *Peace River* at para. 84; *Davidson* at para. 35.

[38] As well, the legislature’s use of, “in respect of”, in s. 7 of the *Arbitration Act* as connecting language describing the relationship between the legal proceedings brought and the matter reserved for arbitration suggests a broad approach to assessing that relationship: *Davidson* at para. 44.

[39] At the second stage, the standard of proof requires the party seeking to avoid arbitration to show on a balance of probabilities that one or more of the statutory exceptions apply. If not, the court must grant a stay: *Peace River* at para. 88. Where the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator: *Peace River* at para. 89.

[40] The following analytical framework must be followed by a judge in determining whether a matter comes within the scope of an arbitration agreement:

- a) The claim is reviewed for connection with the matters the parties have agreed to submit to arbitration.
- b) If there is no connection, the stay application must be dismissed.
- c) If there is a connection, the judge must consider whether there is an arguable case that the claim falls within the matters to be arbitrated.
- d) If there is an arguable case, the question should be referred to arbitration by the arbitrator under the principle of competence-competence (the principle that it is for the arbitrator to first determine which claims are subject to arbitration and which should go before a court), unless the arbitration agreement is void, inoperative, or incapable of being performed, or the jurisdictional question is a pure question of law of mixed fact and law whose disposition requires only a superficial consideration of the record.

Davidson at para. 30.

Law and Equity Act

[41] Sections 8 and 10 of the *Law and Equity Act* together permit a court to grant a stay where it sees fit to do so, and in particular, to avoid a multiplicity of hearings: *Vancouver Pile Driving Ltd. v JGC Constructors BC Ltd.*, 2024 BCSC 344 at para. 37 [*Vancouver Pile Driving*].

[42] Where claims are advanced against multiple parties, some of whom are not parties to the arbitration agreement, a stay of proceedings as a whole is the appropriate remedy if the claims against the various parties are sufficiently intertwined, and if such a stay would be consistent with the principle of judicial economy: *Ts'kw'aylaxw First Nation v. Graymont Western Canada Inc.*, 2018 BCSC 2101 at para. 31.

[43] If there is an arguable case that the dispute consists of matters the parties agreed would be submitted to arbitration, the stay should be granted. The Supreme Court of Canada has called for deference to arbitrators to resolve challenges to their

jurisdiction: *Vancouver Pile Driving* at para. 15, citing, among other cases, *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 at para. 84.

Analysis

First Stage of the Stay Test

Are the plaintiffs bound by an Arbitration Agreement?

[44] The plaintiffs' position is that neither Mr. Davison nor Big Air is a party to the USA since they did not hold shares in Novem.

[45] The defendants argue that Mr. Davison and Big Air are parties to the USA, based on the expanded definition of "shareholder" therein to include actual shareholders and "their known associates, trustees and beneficiaries". The parties disagree as to the meaning of the phrase, "their known associates, trustees and beneficiaries". The defendants submit it includes not only shareholders but also the known associates, trustees, and beneficiaries that hold shares. The plaintiffs submit that it does not expand the persons who are shareholders, but instead is part of a larger expression that reads "the Initial Shareholders being VEXSL, CEVELLO, JEFFCO, JP19 and CELAD and their known associates, trustees and beneficiaries".

[46] In my view, there is an arguable case that the definition of "Shareholder" in the USA adds a class of persons who are shareholders and does not limit the application of that term to only the initial shareholders.

[47] The defendants point to a letter written by counsel for the plaintiffs dated April 23, 2026, in which plaintiffs' counsel states:

First, while we agree that the definition of "Shareholder" under section 1.1 of the USA includes Celad (*i.e.* 22176776 Alberta Ltd.) and all of its "known as [*sic*] associates, trustees and beneficiaries," and that this phrase captures Mr. Davison, the companies Big Air Inc., Stealth Consulting Ltd...do not fall within the definition. ...

[48] I accept that there is an arguable case that Mr. Davison is a party to the USA.

[49] I turn now to whether Big Air and Stealth are parties under the USA. The USA does not define the term “associates”.

[50] The defendants argue that since Mr. Davison appointed Stealth and Big Air to receive compensation from Novem for services he provided, he should not be able to shield Stealth and Big Air from the burdens of the USA. The defendants further argue that Stealth is a purchaser and transferee of Class ‘G’ preferred shares in Novem. In support, they refer to the securities register for Novem showing Stealth acquiring 425,532 class ‘G’ preferred shares on September 9, 2024. The plaintiffs argue that these shares were issued in error.

[51] In the context of this hearing, I need not decide whether this issuance was in error, but I can rely on the securities register.

[52] I am persuaded there is an arguable case that Big Air and Stealth are deemed subject to the USA.

Is Ocorp bound by the USA?

[53] According to the Novem securities register, Ocorp purchased 160,000 Class C common voting shares of Novem on April 1, 2025. The defendants rely on s. 146(3) of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, which provides:

Constructive party

(3) A purchaser or transferee of shares subject to a unanimous shareholder agreement is deemed to be a party to the agreement.

[54] Ocorp in its application submits that it is a party to the USA. I accept that there is at least an arguable case that Ocorp is subject to the USA.

Is the 3833 Action in respect of a matter agreed to be submitted to arbitration?

[55] The USA’s arbitration provision is framed broadly: “all disputes arising out of, or in connection with” the USA.

[56] The 3833 Action asserts that:

- a) the plaintiffs are creditors of Novem;
- b) the Transfer was made with the intent to defeat, delay, hinder, prejudice, or defraud creditors; and
- c) from and after March 21, 2026, Novem and/or Phi Factor, to the knowledge of Novem, Phi Factor, and Ocorp, were insolvent or unable to pay their debts in full, or on the eve of insolvency.

[57] The defendants argue that in the 3833 Action, the plaintiffs pleaded facts concerning whether and to what extent the plaintiffs were creditors of Novem.

[58] They concede that Novem, in its responses to the Big Air and Wrongful Dismissal Actions, did not plead the USA; however, Novem nonetheless claims that the USA will be a central feature of its defences.

[59] The defendants further assert that in the Stealth Action, Novem's response raises the issue of whether its obligations relating to the advances comprising Stealth's claimed debt were satisfied by the issuance of the Class 'G' preferred shares to Novem.

[60] The defendants point out that the USA contains provisions concerning:

- i. required approval for issuance of shares (Article 3.13); and
- ii. the power of the board to allot shares (s. 8.1, incorporated into the USA by Article 10.5).

[61] The plaintiffs submit there is no need to stay this application pending arbitration, as there is no arguable dispute regarding whether Mr. Davison is a creditor of Novem and whether Novem and/or Phi Factor were near insolvency since the evidentiary record only supports that at the material time, Novem was missing

payroll and therefore must have been insolvent. The plaintiffs submit that there is no “genuine *lis*”.

[62] They further say it is plain and obvious that Novem and Phi Factor have been in dire financial straits since January 2026, and were insolvent or on the eve of insolvency in March and April 2026, relying on the following evidence:

- a. Beginning in February 2026, Novem deviated from using its regular payroll system and began paying employees via “Interac e-Transfer”.
- b. On March 6, 2026, Novem had insufficient funds to make payroll and therefore missed payroll.
- c. Mr. Foulliard admitted, on March 21, 2026, in relation to a proposed, but failed, mortgage financing, on the Lands that at least Phi Factor was on the verge of bankruptcy.
- d. Novem failed to pay rent to Ocorp and the amount of unpaid rent under the lease for the period December 2025 to April 2026, amounted to an aggregate amount of approximately \$630,000.

[63] The defendants did not elicit any specific evidence on the merits, relying instead on the overall evidentiary record and a number of cases. In short, the defendants say that arbitration is a question of subject-matter, not merits; a claim the defendant is bound to lose and a claim the defendant is bound to win are equally arbitrable if they fall within the arbitration clause.

[64] In that regard, the defendants submit that whether they were insolvent, and the strength of the plaintiffs’ evidence on that issue, is not determinative of whether the dispute about their insolvency, the Transfer, and other matters pled falls within the scope of the arbitration provision. I accept this submission.

[65] The law is clear that the arguable case to be made at this stage of the test under s. 7 of the *Arbitration Act* is that the parties and the issues in dispute are subject to an arbitration agreement: *3-Sigma Consulting Inc. v. Ostara Nutrient*

Recovery Technologies Inc., 2023 BCSC 100 at para. 8. The dispute referred to arbitration can contain a question as to the proper parties to the arbitration, and those parties may include non-signatories in certain circumstances: *DNM Systems Ltd. v. Lock-Block Canada Ltd.*, 2015 BCSC 2014 at paras. 75-77.

[66] It is also important to reiterate that the standard of proof on this first step is lower than the usual civil standard, as the applicant must only establish an “arguable case” that the requirements for a stay are met: *Peace River* at para. 84; *Davidson* at para. 35.

[67] Moreover, in *Davidson*, the Court noted that the connecting language in that arbitration clause, “with respect to”, was one of the widest of any expression available to convey connection between two related matters, having “a broader meaning, for example, than ‘disputes under the agreement’”: at para. 43. On the matters reserved for arbitration in the USA, the provision includes “all disputes arising out of, *or in connection with* [italics added]” the USA. The latter expression is, like the phrase “in respect of”, regarded in the jurisprudence as one conveying “the widest possible scope”: *Regina Bypass Design Builders v. Supreme Steel LP*, 2021 SKCA 82 at para. 32.

[68] I accept that the factual disputes underlying the 3833 Action are within the areas agreed to be submitted to arbitration under the Submission Agreement, that the Creditor Actions engage matters governed by the USA, including alleged share issuances, and that there are live issues as to the proper parties to the arbitration agreement which are within the jurisdiction of an arbitrator. Based on the foregoing, and considering the breadth of the language in the USA describing the scope of matters referable for arbitration, I find that the defendants have met the low burden at this stage of establishing an arguable case.

Second Stage of the Stay Test

Is the Arbitration Agreement “inoperable or incapable of being performed”?

[69] Since I have found there is an arguable case and the first stage has been met, the onus is on the plaintiffs to establish the second stage. The plaintiffs assert that the arbitration agreement is inoperable or incapable of being performed. I will discuss their arguments in support of that assertion in turn, however, I first note certain principles to be applied by the Court at this stage of the test.

[70] In *Peace River*, the Supreme Court of Canada directed courts to interpret the words, “void, inoperative or incapable of being performed”, narrowly to promote the enforcement of arbitration agreements, which generally leads to streamlined dispute resolution with minimal judicial intervention: at para. 134. The term “inoperative” in arbitration law to describe agreements which have become inapplicable to the parties and their dispute, or have ceased for some reason to have future effect: *Peace River*, at para. 138. The Court in *Peace River* also described circumstances in which an arbitration clause may be inoperative:

[139] Possible reasons for finding an arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties. The cases interpreting s. 15(2) of the *Arbitration Act* make it clear that matters such as inconvenience, multiple parties, intertwining of issues with non-arbitrable disputes, possible increased cost, and potential delay generally will not, standing alone, be grounds to find an arbitration agreement inoperative (*Prince George*, at para. 37; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291, at para. 34). Indeed, like all the statutory exceptions, the exception for an inoperative arbitration agreement is to be narrowly interpreted, with the party seeking to avoid arbitration bearing the heavy onus of showing that it applies. This serves “the interests of freedom of contract, international comity and expected efficiency and cost-savings” from enforcing otherwise valid arbitration agreements (McEwan and Herbst, at § 3:57; *MacKinnon*, at para. 36).

[71] By contrast, an arbitration agreement is incapable of being performed where the arbitral process cannot effectively be set in motion because of a physical or legal impediment beyond the parties’ control: *Peace River* at para. 144. As an example of one such legal impediment, the Court provided that an arbitration agreement may be

incapable of being performed because the subject matter of the dispute is covered by an express legislative override of the parties' right to arbitrate: *Peace River* at para. 145, citing *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 40.

[72] The plaintiffs argue that the 3833 Action is a representative action which is not amenable to private arbitration. If the plaintiffs succeed at arbitration, there is nothing to require the plaintiffs to publicly register the resulting award declaring the transaction a fraudulent conveyance/preference. Section 61(1) of the *Arbitration Act* provides that a party *may* apply to the Supreme Court to recognize and enforce an arbitral award made in an arbitration with a place of arbitration in Canada.

[73] The plaintiffs rely on Justice Newberry's decision in *Guthrie v. Abakhan & Associates Inc.*, 2017 BCCA 102 in support of the position that this type of action involves a representative aspect, as a conveyance declared void must be void against all creditors of the debtor. In *Guthrie*, Justice Newberry referred, with approval, to:

[23] ... a decision of the New Brunswick Court of Appeal, *Michaud v. Cyr* (1986) 169 A.P.R. 363. There, the transferor had fraudulently made certain gifts of money to family members, which were set aside at the suit of a creditor. When another creditor sought to set the same gifts aside, the Court ruled that a second proceeding did not lie, because the conveyance had already been declared void as against all creditors of the debtor and the proceeds recovered had to be available to all such creditors.

[74] Justice Newberry went on to conclude:

[26] ... No authority was cited to us, and I have found none, that suggests it is open to a court to declare a fraudulent transfer "void" under the Act *only to a certain extent* or *only to permit a certain debt* to be recovered; to declare a transfer void *only as against a particular creditor* but not as against other creditors delayed or hindered by the transfer; or to declare a transfer void *only for a limited time*. Once a conveyance has been found to infringe the Act, it remains fraudulent, and is ineffective as against all creditors who may be hindered or delayed. As counsel for the appellant suggested, it would be "contrary to logic" as well as to authority (and in this case would be placing form over substance) to require that a creditor who wishes to enforce more than one judgment return to court to have the same transaction declared void "time and time again". Similarly, it would offend the purpose of the Act to require that creditor after creditor prove in court that the same transfer was intended to avoid the just claims of creditors.

[75] On this authority, the plaintiffs argue that the arbitration clause in the USA is inoperative or incapable of being performed.

[76] The defendants agree that a remedy under the *FCA* is collective but say that neither the *Guthrie* case nor any other jurisprudence establishes that a representative remedy is outside the scope of an arbitration agreement. The defendants point out that neither the *FCA* nor *FPA* includes a provision purporting to render void or inoperable certain contractual arbitration clauses, unlike, for example, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c 2. Rather, these statutes create private rights by which a creditor or certain others may unwind a transaction that prejudices its own claim. I accept the defendants' submission that the collective character of the relief sought under the *FCA* and *FPA* does not meet the plaintiffs' burden to prove that the arbitration clause is inoperative or incapable of being performed. More is required in the circumstances to establish that the legislature intended to override contractual arbitration agreements: *Williams v. Amazon.com Inc.*, 2023 BCCA 314 at para. 20.

[77] The plaintiffs also rely on *Peace River* for the proposition that the arbitration provision in the USA is inoperative in the insolvency context of this case. However, as the defendants contend, the exception for insolvency contemplated in *Peace River* relates to cases where the defendant is "subject to bankruptcy or insolvency protection": at para. 140. That is not the case here.

Is the stay application purely a jurisdictional question being a pure question of law?

[78] The plaintiffs submit that the stay application raises a jurisdictional question which is a pure question of law because the *FPA* requires that the Show Cause Application proceed before the Supreme Court. Reliance is placed on s. 9 of the *FPA*, which states, in part:

9(1) If

...

(b) a creditor or assignee for the benefit of creditors alleges that a disposition is void under sections 2 to 6,

it is not necessary to institute an action to set aside the disposition.

(2) In the circumstances described in subsection (1), an application may be made to the Supreme Court by the judgement or other creditor or assignee or person entitled to the money, calling the judgement debtor or person to whom the conveyance or other disposition has been made or who has acquired interest under it, to show cause

(a) why the land, or a competent part of, should not be sold to realize the amount payable under the judgment, or

(b) why the disposition or payment should not be set aside and the property returned or otherwise dealt with as the court may direct.

[79] The Show Cause Application must be brought in the Supreme Court and no alternative forum exists. The plaintiffs argue that the clear legislative intent behind s. 9 of the *FPA* is that this Court determine the issue.

[80] It is not disputed that a determination under s. 9 of the *FPA* is not arbitrable, whether as it relates to the pure question of law of standing under that provision, or as a factual matter to be decided within the exclusive jurisdiction of this Court. However, the defendants submit that a proceeding in which remedies within the Court's exclusive jurisdiction are sought will nonetheless be stayed if it relates to a matter covered by an arbitration agreement. The stay, if granted, does not oust the jurisdiction of the Court, but rather defers the Court proceeding until after the arbitration has addressed the matters that fall within the scope of the arbitration agreement. Moreover, there is no risk to the plaintiffs, since as part of the 3833 Action, they claim a certificate of pending litigation is going to be filed.

[81] In my view, the jurisprudence on this issue supports the position taken by the defendants. For example, the Court of Appeal rejected a similar argument to that advanced by the plaintiffs in respect of this Court's exclusive jurisdiction, where certain equitable remedies were sought in *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117:

[55] In my view, the fact that Octaform has chosen to seek equitable remedies in their civil action has no relevance to the issue that was before the chambers judge. The question on the stay application was whether there was an arguable case that the dispute between the parties was one that the parties had agreed should be decided by arbitration. In my view, there was such an arguable case and the stay should have been granted.

...

[57] ... A stay is not a dismissal; it simply holds the proceedings in abeyance until the arbitrator does the work that the parties agreed should be arbitrated: *Houm Services Inc. v. Lettuce Eatery Development Inc.*, 2020 BCSC 430 at para. 50. If the arbitrator determines the dispute is not one that has been agreed to be referred to arbitration for resolution, or there are matters that remain unresolved after the dispute resolution procedures chosen by the parties have run their course, it is open to the respondents to apply to lift the stay. Whether that is appropriate can be determined based on circumstances as they exist at that time.

See also: *Elton v. 10 Star Events Inc.*, 2018 BCSC 1974 at paras. 67-70; *ABOP LLC v. Qtrade Canada Inc.*, 2007 BCCA 290 at paras. 22-24.

[82] Here, the alleged misconduct, *i.e.*, the Transfer, is central to not only the Show Cause Application but also throughout the rest of the litigation, and is inextricably linked to the various arguments the defendants seek to make with respect to USA compliance and governance over the parties: see *Elton* at para. 67. The fact that the plaintiffs seek relief under s. 9 of the *FPA* does not change that there is an arguable case that the dispute between the parties is one the parties agreed should be decided by arbitration: *Clayworth* at para. 55.

[83] The plaintiffs will be free to resume proceedings in respect of any relief sought that is within the exclusive jurisdiction of this Court after the arbitrable issues have been determined by the arbitrator in accordance with the USA.

What is the impact of Ocorp not being a party to the arbitration?

[84] Ocorp is not currently a party to the arbitration and has not undertaken to become a party. The plaintiffs note that there is no mechanism for the Court to compel a person who is not a party to an arbitration agreement to arbitrate.

[85] However, as I have previously found, it is arguable that Ocorp is bound by the USA as a result of the shares they own in Novem. I note that Ocorp agrees it is a party to the USA. Further, it is within the jurisdiction of the arbitrator to determine at first instance who are the proper or necessary parties to the arbitration. In *DNM*

Systems Ltd., the Court set out the circumstances in which an arbitrator may purport to bind non-parties:

[77] In determining who the proper parties are, the arbitrator may include non-signatories to the arbitration agreement in certain circumstances. Those circumstances are summarized in *Commercial Arbitration in Canada* as follows at 2-48:

- (1) the contractual agreement between a party and the non-party incorporates the arbitration clause by reference;
- (2) there is between a party and a non-signatory an agency relationship;
- (3) the corporate relationship between a parent and its subsidiary may be sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other; and
- (4) a non-party is bound by an estoppel.

(see also *Yeap* at para. 35).

[86] As such, Ocorp's present status as a non-party to the arbitration does not displace the arbitration agreement. It is within the arbitrator's jurisdiction to determine whether Ocorp is a proper party to the arbitration. If the arbitrator purports to find as such in the absence of one of the exceptions listed above, or errs in the absence of an exception, the arbitrator will have exceeded their jurisdiction and committed arbitral error: *DNM Systems Ltd.* at para. 84.

Conclusion

[87] I am not persuaded that this is a case in which the core of the claim concerns non-arbitral matters, nor that the arbitral and non-arbitral matters are so intertwined that they must be heard together: *Davidson* at para. 108. As such, this is not an appropriate circumstance for a partial stay of proceedings. Moreover, although I acknowledge that these reasons may result in a multiplicity of proceedings, some added procedural complexity, and potential for delay, these concerns do not trump the language of the *Arbitration Act* nor the parties' decision to enter into an arbitration agreement: *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 90; *ABOP LLC* at para. 24.

[88] In my view, stage one has been met and I am not persuaded that the arbitration agreement is inoperative or incapable of being performed. As such, the defendants application for a stay is granted. Costs of the stay application will be in the cause.

“Forth J.”