

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY

MAY 21 2021



S=214966

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

ENCANN SOLUTIONS INC.

PETITIONER

AND:

BC HOP COMPANY LTD.

RESPONDENT

PETITION TO THE COURT

ON NOTICE TO:

BC Hop Company Ltd.
1130-400 Burrard Street
Vancouver, BC V6C 3A6

This proceeding is brought for the relief set out in Part 1 below, by

the person(s) named as petitioner(s) in the style of proceedings above

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

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- (a) if you were served with the petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1) The address of the registry is:	800 Smithe Street, Vancouver
(2) The ADDRESS FOR SERVICE of the petitioner is:	Farris LLP Barristers & Solicitors 2500 - 700 West Georgia Street Vancouver, British Columbia V7Y 1B3 Attention: Tim Louman-Gardiner
Fax number address for service (if any) of the petitioner	None
E-mail address for service (if any) of the petitioner:	tlg@farris.com
(3) The name and office address of the petitioner's lawyer is:	Farris LLP Barristers & Solicitors 2500 - 700 West Georgia Street Vancouver, British Columbia V7Y 1B3 Attention: Tim Louman-Gardiner
Fax number address for service of the petitioner's lawyer is:	None
E-mail address for service (if any) of the petitioner's:	tlg@farris.com

**ENDORSEMENT ON ORIGINATING PLEADING OR PETITION
FOR SERVICE OUTSIDE BRITISH COLUMBIA**

The Petitioner, EnCann Solutions Inc., claims the right to serve this pleading/petition on the Respondent, BC Hop Company Ltd., outside British Columbia on the ground that the proceeding is for enforcement of an arbitral award made in or outside British Columbia.

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. an order pursuant to section 29 of the Arbitration Act, R.S.B.C. 1996, c. 55 (the "Arbitration Act"), granting the petitioner EnCann Solutions Inc. ("EnCann") leave to

enforce the partial final award of Joe McArthur (the “Arbitrator”) issued in EnCann Solutions Inc. v. BC Hop Company Ltd., BCICAC File No. DCA-2134 (the “Arbitration”) on May 10, 2021 (the “Arbitration Award”) in the same manner as a judgment or order of the Supreme Court of British Columbia, and entering judgment on the terms of the Arbitration Award;

2. an order pursuant section 29 granting EnCann leave to enforce any further arbitration awards, including supplementary awards or decisions in respect of currency, interest and/or costs, issued in its favour in the Arbitration by the time of the hearing of this Petition;
3. an order declaring the respondent BC Hop Company Ltd. (“BC Hop”) liable to pay to EnCann the total amount directed to be paid by BC Hop pursuant to the Arbitration Award, being \$865,763.40;
4. in the event that this Court adjourns the hearing of this petition or stays execution pending the hearing of a challenge by BC Hop to the Arbitration Award or pending the making of any further awards or decisions by the Arbitrator, or for any other reason, then:
 - (a) an order requiring BC Hop to pay into Court within 14 days of this order the full amount of the Arbitration Award (the “Deposited Funds”);
 - (b) an order giving EnCann liberty to obtain payment out of the Deposited Funds on the condition that EnCann will (A) repay any portion of the accessed funds that (by further arbitral determination or upon resolution of any challenge by BC Hop challenge to the Arbitration Award) EnCann is ultimately required to reimburse to BC Hop, plus interest (at the rate for funds in court from time to time) on and for the period EnCann had those funds; and (ii) provide security, to the satisfaction of the registrar of the Supreme Court of British Columbia, sufficient to ensure that BC Hop will receive repayment of the Deposited Funds (or such portion to which it is ultimately found to be entitled) plus interest at the rate for funds in court from time to time.

- (c) further or in the alternative to (ii), an order granting to EnCann such other security for the Arbitration Award, interest and/or costs of the Arbitration and/or of the within proceeding as to this Honourable Court may seem just;
- 5. an interim injunction restraining BC Hop from disposing of any assets outside the ordinary course of its business pending the hearing of this Petition; and
- 6. Costs.

Part 2: FACTUAL BASIS

- 1. On December 4, 2018, following negotiations between the parties, EnCann and BC Hop entered into a binding letter of intend dated November 30, 2018 (the "Agreement") pursuant to which BC Hop agreed to sell and EnCann agreed to purchase biomass at a fixed price.
- 2. The Agreement contained an arbitration provision referring any disputes arising thereunder to arbitration.
- 3. EnCann paid a deposit of \$100,000 plus GST of \$5,000 to BC Hop.
- 4. BC Hop breached the Agreement, by failing to deliver to EnCann the biomass it had agreed to sell. BC Hop in turn sold that biomass to different third party purchasers at an increased price.

The Arbitration

- 5. EnCann delivered a Notice to Arbitrate pursuant to the Agreement on August 6, 2019, and delivered it to the British Columbia International Commercial Arbitration Centre (the "BCICAC") on August 8, 2019, thus initiating the arbitration (the "Arbitration").
- 6. EnCann and BC Hop agreed to the appointment of Joe McArthur as arbitrator, and engaged him by joint agreement on September 17, 2019.
- 7. EnCann and BC Hop further agreed to procedural orders:

- (a) Pursuant to Procedural Order #1, that Mr. McArthur was duly and validly appointed, and that the Arbitration was to be conducted in accordance with the BCICAC Revised Domestic Commercial Arbitration Rules, as modified by the parties; and
 - (b) Pursuant to Procedural Order #2, as amended, setting deadlines and the process for the hearing of the Arbitration.
8. The Arbitrator made further procedural orders, dealing with adjournments (related to the COVID-19 pandemic and otherwise) and other procedural issues that arose.
9. The Arbitration proceeded in accordance with the Procedural Orders pronounced by the Arbitrator. The parties attended at an evidentiary hearing from January 18-21, 2021. Thereafter, the parties provided written submissions and attended at an oral hearing on February 9, 2021. The Arbitrator requested and the parties provided further written submissions on April 20, 2021 related to the test and availability of restitutionary damages.
10. The Arbitrator granted a Partial Final Award (the “Award”) on May 10, 2021. Pursuant to the Award, the Arbitrator:
- (a) Declared that the Agreement was binding, and was breached by BC Hop;
 - (b) Awarded EnCann:
 - (i) \$105,000 being the return of the deposit plus GST, and
 - (ii) \$760,763.40 in restitutionary damages; and
 - (c) Directed the exchange of submissions on interest and costs.
11. On May 11, 2021 EnCann demanded payment of the Award.
12. BC Hop has refused to pay the amounts set out in the Award.

13. EnCann is a start-up business. Without the cash from the Award, it is hamstrung in its ability to grow and develop its business.

Part 3:LEGAL BASIS

1. The Petitioner relies on the *Arbitration Act*, RSBC 1996, c. 55. The 2020 *Arbitration Act*, SBC 2020, c. 2, does not apply as the Arbitration was commenced before it came into force.
2. Section 29 of the *Arbitration Act* provides that with leave of the Court, an award may be enforced in the same manner as a judgment or order of the Court to the same effect and judgment may be entered in the terms of the award.
3. An order under section 29 is not automatic and various considerations may be taken into account by the Court, including whether “matters of importance to the arbitration” are unresolved, whether the award is subject to challenge, or whether proper processes were followed in obtaining the award: *Bekar v. TD Evergreen*, 2006 BCCA 266. In some circumstances the hearing of an application for leave to enforce has been adjourned or enforcement suspended pending resolution or pursuit of certain outstanding matters: *Hassall v. Children’s & Women’s Health Centre*, 2001 BCSC 1399; *Maruna v. Lopatka*, 2003 BCSC 462; *The Owners, Strata Plan BCS 3165 v. KBK No. 11 Ventures Ltd.*, 2014 BCSC 2276.
4. Here, leave to enforce should be granted without delay. The Arbitration Award was made pursuant to the arbitration clause, by an arbitrator on whom the parties agreed. The Arbitration Award itself is clear and unambiguous, and has not been honoured. EnCann should enjoy the fruits of the Arbitration Award, which compensates in part for BC Hop’s breach of contract and the related negative financial repercussions of that breach.
5. The parties are in the process of exchanging submissions on interest and costs. However, even if a further arbitral determination on these matters has not been issued by the time of the hearing of this petition, enforcement of the Arbitration Award should proceed. The award of damages is clear and those damages are in an amount greater than the costs and interest that may arise. The issues on which the Arbitrator is receiving further

submissions are discrete and do not detract from the force or clarity of the Arbitration Award. The Arbitration Award is an award that is enforceable and should be enforced.

6. In any event, after the filing of this petition some time will pass before it can be heard. The issues on which the Arbitrator sought further submissions may have been resolved by the time of the hearing of this petition.

Security for the Award

7. If the issues are by the time of the hearing not resolved and this Court considers that enforcement should not be granted at that stage and/or that the hearing should be adjourned, or that execution should be stayed, EnCann seeks that its position be secured: *Walls Alive (Edmonton) Ltd. v. Sherwin-Williams Co.*, 2002 ABQB 721.
8. The fact that BC Hop may seek to challenge the Arbitration Award is also not a sound basis in this case for denying or deferring leave to enforce. If the threat or commencement of a challenge were sufficient to block enforcement, parties would consistently challenging awards for this purpose. EnCann should be placed in the same position as a judgment creditor relying on a judgment of the Supreme Court of British Columbia which has been appealed: *Hamilton Doyle Architects v. 248976 BC Ltd.*, [1991] BCJ No. 51 (S.C.) at para 19 (an arbitration case where leave was granted to enforce despite leave being granted to the other party to appeal); see also *White v. Ritchie* (2008), 56 B.L.R. (4th) 277 (Ont. S.C.J.) and, in a different but related context, *Greenside Properties Inc. v. 8458429 Holdings Ltd.*, 2001 BCSC 983.
9. Examples drawn from pre-hearing process on appeals of trial judgments as well as jurisprudence on enforcement in the international arbitration context are instructive. Though specific statutory provisions differ, the principles are analogous. It is far from automatic, even if an award is being challenged, that the hearing for leave to enforce should be adjourned or that execution, if leave is granted, should be stayed. In *Wires Jolley LLP v. Wong*, 2010 BCSC 391, Willcock J. (as he was then) canvassed the jurisprudence under international arbitration legislation concerning the timing of enforcement of an arbitration award in the face of a challenge to that award.

Considerations arising in cases such as *Powerex Corp. v. Alcan Inc.*, 2004 BCSC 876 (leave granted 2004 BCCA 504 but appeal abandoned) and *Europcar Italia S.p.A. v. Alba Tours International Inc.* (1997), 23 O.T.C. 376 (Gen. Div.), include whether there is a serious question to be tried on the challenge to the award, whether the person seeking to block enforcement will otherwise suffer irreparable harm, and the balance of convenience. Militating against delay in enforcement are considerations including the fact that adjudication on the merits has already occurred, the prejudice that delay brings to the party seeking enforcement, the further time that may be taken in resolving a challenge to the award, whether the challenge is likely to succeed, whether the challenger is “merely delaying the inevitable”, “the availability of security and the possibility of asset removal prior to enforcement”, and “the willingness of the party resisting enforcement to undertake diligent prosecution of the action in the originating jurisdiction”.

10. Here, BC Hop cannot show even that there is a serious issue to be tried should it ultimately commence a challenge to the Arbitration Award (which it has not yet done). An appeal under section 31 of the *Arbitration Act* requires leave and is limited to questions of law, none of which are apparent from the detailed, fact-intensive Arbitration Award. An application to set aside under section 30 relates to “arbitral error” which is defined in section 1 of the *Arbitration Act* to include errors that consist of one or more of the following: (a) corrupt or fraudulent conduct; (b) bias; (c) exceeding the arbitrator’s powers; or (d) failure to observe the rules of natural justice. Again, nothing of this kind is evident from the Arbitration Award or the process that led to it.
11. The Arbitration Award here is primarily based on the factual record and there is no basis on which to believe an arbitral error has occurred.
12. Moreover, the balance of convenience lies strongly in favour of granting leave to enforce given the Arbitration Award seeks to remedy a longstanding denial by BC Hop of funds to EnCann. There is no irreparable (if any) harm to BC Hop in proceeding with enforcement and there is prejudice to EnCann in not doing so.

Security if Adjournment or Other Deferral of Enforcement/Execution

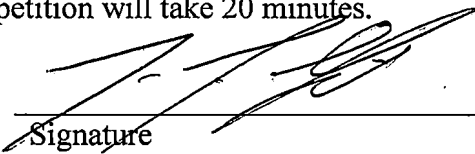
13. In the event that the Court determines that the hearing of the petition should be adjourned or enforcement/execution otherwise deferred, BC Hop should be required to make payment into court (potentially to be accessed by EnCann) or otherwise post security: *Europcar, supra* at paras 24-25; *Powerex (SC), supra* at paras 31-32; *Wires Jolley, supra* at paras 26-29, 47-50, 52; *Voth Bros. Const. (1974) Ltd. v. Nat. Bank of Can. (1987)*, 12 B.C.L.R. (2d) 43 (C.A. - Chambers). BC Hop's non-payment was the basis for the Arbitration and it has not paid any part of the amount due since the Arbitration Award was made.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Lincoln Johnson, sworn May 20, 2021.

The petitioner estimates that the hearing of the petition will take 20 minutes.

Dated: May 21, 2021



Signature

Petitioner
 Lawyer for petitioner(s)
Tim Louman-Gardiner

To be completed by the court only:	
Order made	
<input type="checkbox"/>	in the terms requested in paragraphs _____ of Part 1 of this notice of application
<input type="checkbox"/>	with the following variations and additional terms:
Date: _____	
Signature of	
<input type="checkbox"/>	Judge <input type="checkbox"/>
<input type="checkbox"/>	Master