Federal Court  Cour fédérale

Date: 20170222

Docket: T-1000-15

Citation: 2017 FC 214

Ottawa, Ontario, February 22, 2017

PRESENT: The Honourable Madam Justice McDonald

IN THE MATTER OF SECTIONS 5 AND 6 OF THE *COMMERCIAL ARBITRATION ACT*, R.S.C. 1985, C. 17 (2nd SUPP.)

IN THE MATTER OF ARTICLES 1, 6, AND 34 OF THE *COMMERCIAL ARBITRATION CODE* SET OUT IN THE SCHEDULE TO THE *COMMERCIAL ARBITRATION ACT*

AND IN THE MATTER OF AN ARBITRATION UNDER CHAPTER 11 OF THE *NORTH AMERICAN FREE TRADE AGREEMENT* (NAFTA)

BETWEEN:

ATTORNEY GENERAL OF CANADA

Applicant

and

WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON AND BILCON OF DELAWARE, INC.

Respondents

and

SIERRA CLUB CANADA FOUNDATION AND EAST COAST ENVIRONMENTAL LAW ASSOCIATION (2007)

Interveners

ORDER AND REASONS

I. Overview

[1] This is a Motion by the Respondents [the Investors], pursuant to Rule 51(1) of the *Federal Courts Rules,* SOR/98-106, appealing the September 12, 2016 Order of Prothonotary Aalto [the Order]. The Prothonotary refused the Investors motion to stay the judicial review application filed by Canada, pending a decision on damages from an International Tribunal dealing with a dispute between the Investors and Canada under the *North American Free Trade Agreement [NAFTA]*.

[2] For the reasons that follow, the Appeal Motion is dismissed.

II. Background

[3] The facts and procedural background of this matter are detailed in the Order and will only be repeated here as necessary to provide context.

[4] The Investors and Canada agreed to resolve their *NAFTA* dispute through arbitration and an Arbitral Tribunal [the Tribunal] was established in accordance with the *United Nations Commissions on International Trade Law Arbitration Rules* [*UNCITLAR*]. The parties agreed to have the issues of jurisdiction and liability decided separately from the issue of damages, through a bifurcated proceeding.

[5] On March 17, 2015, the Tribunal issued an Award on Jurisdiction and Liability.

[6] On June 16, 2015, Canada filed a Notice of Application with this Court, seeking to set aside the Tribunal's award on jurisdiction and liability [the Set Aside Application]. It is the Set Aside Application which the Investors seek to stay from proceeding.

[7] On June 17, 2015, Canada brought a motion before the Tribunal asking the Tribunal to stay its consideration of damages pending the outcome of the Set Aside Application.

[8] On August 10, 2015, the Tribunal issued Procedural Order No. 19 where it denied Canada's motion to stay the continuation of the arbitration. This Order states as follows at para 22:

> *The Tribunal would also note that any assessment of the Tribunal's Award on Jurisdiction and Liability at the present stage would take place without any further context that might be provided by this Tribunal's concluding award in this case.*

[9] On September 15, 2015, Canada brought another motion, requesting that the Tribunal not consider loss of profit in the assessment of damages. On January 5, 2016, by Procedural Order

No. 20, the Tribunal denied Canada's motion to limit the scope of issues to be addressed in the damages phase and ordered that the damage phase proceed according to the pre-hearing schedule as agreed by the Parties, which will result in the hearing on damages and costs to be heard in August 2017, at the earliest.

[10] As indicated, the Motion before Prothonotary Aalto was a request by the Investors to stay Canada's Set Aside Application until the Tribunal finished its work and issues its award on the damage phase of the arbitration. The Investors argue that Canada should not be able to pursue its Set Aside Application as the Tribunal has not yet concluded its work. They argue this is contrary to the principal of exhaustion of remedies and they also argue that the Court owes deference to the arbitration process which means the Court must allow the Tribunal to finish its mandate before considering the Set Aside Application.

[11] In considering the Motion, Prothonotary Aalto considered the provisions of the *Commercial Arbitration Code* [the *Cod*e], set out in the schedule 1 to the *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp.), which the parties agree applies to their arbitration. Prothonotary Aalto considered Article 34(4) of the *Code* which states:

> The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

[12] Prothonotary Aalto concluded that the Tribunal's award on jurisdiction and liability was an award which fell within the meaning of section 34(4) of the *Code*. He also concluded that the

jurisdiction and liability award was complete and that consequently, the arbitration in respect to those issues could not be resumed.

[13] The Prothonotary concluded that the Tribunal's statement that "further context might be provided" in Procedural Order No. 19 (above), was not only vague and uncertain, but in any event, was in and of itself insufficient to support the argument that Canada should not be permitted to proceed with its Set Aside Application.

[14] With respect to the language in Article 34(4) of the *Code*: "to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside", Prothonotary Aalto concluded that this refers to situations where procedural errors may have occurred. He noted that there was nothing in the record to indicate that there are "any procedural errors or the like which would give rise to the Tribunal's ability to eliminate the grounds for the setting aside".

[15] Prothonotary Aalto concluded that although Article 34(4) of the *Code* gave the Court discretion to stay the Set Aside Application, the present circumstances did not warrant granting a stay or a suspension of the set aside application.

[16] The Prothonotary also considered the doctrine of exhaustion of remedies, as outlined in *Canada (Border Services Agency) v C.B. Powell Limited*, 2010 FCA 61 [*C.B. Powell*] and concluded that none of the policy objectives of the doctrine were engaged. The Prothonotary found that by agreeing to bifurcate the *NAFTA* arbitration the parties in effect agreed to proceed in two distinct phases.

[17] Finally, Prothonotary Aalto refused to issue a stay pursuant to paragraph 50(1) (b) of the *Federal Courts Act*, RSC 1985, c F-7, noting that a stay should only be granted sparingly and in the clearest of cases. He also found that Investors had not established "real, definitive, unavoidable harm".

III. Issues

[18] On appeal, the Investors argue that the Prothonotary erred by failing to give appropriate deference to the international arbitral process. They also argue that the Prothonotary made errors in the application of the doctrine of exhaustion of remedies to the facts of this case.

[19] I have framed the issues as follows:

A. Did the Prothonotary err by failing to defer the Federal Court proceedings until the conclusion of the arbitration proceedings?

B. Did the Prothonotary make an error of law in finding that the doctrine of exhaustion of remedies did not apply?

IV. Standard of Review

[20] The parties agree that the applicable standard of review is articulated in *Hospira Healthcare Corporation v Kennedy Institute of Rheumatology* 2016 FCA 215 *[Hospira]*, where the Court states at paragraph 64, as follows: "discretionary orders of prothonotaries should only be interfered with when such decisions are incorrect in law or are based on a palpable and overriding error in regard to the facts."

V. Analysis

A. *Did the Prothonotary err by failing to defer the Federal Court proceedings until the conclusion of the arbitration proceedings?*

[21] The Investors argue that Prothonotary Aalto committed an error of law in stating the following at paragraph 62 of the Order:

> [62] While deference is often given to tribunal decisions as counsel for the Intervenors argued, no deference is owed in this case as the bifurcation has effectively resulted in two separate arbitrations […]

[22] The Investors argue that the Prothonotary erred by first concluding that bifurcation resulted in two separate arbitrations, and second, by finding that the liability and jurisdiction portion of the arbitration was final and complete. The Investors contend that the arbitration under *NAFTA* constitutes one single proceeding with two phases, rather than two isolated proceedings.

[23] They further argue that, since the Tribunal itself refused to stay the damage phase of the arbitration following a request by Canada, deference demands that this Court respect the decision of the Tribunal and hold off intervening until the damage phase of arbitration is concluded.

[24] I agree with the Investors that Courts normally afford deference to arbitration decisions (*Corporacion Transnacional de Inversiones S.A. de C.V. v Stet International S.p.A,* [1999] O.J No.3573 at para 22; see also *Desputeaux v Éditions Chouette (1987) inc.*, 2003 SCC 17).

[25] However, these cases defend deference as a principle when a Court is tasked with reviewing the merits of an arbitration decision. That was not the issue before Prothonotary Aalto.

[26] Prothonotary Aalto does note that deference would also apply to the Tribunal's Procedural Orders. However, he notes that there was nothing in the language of the Procedural Orders (No. 19 and No. 20), which were issued after the Tribunal award on jurisdiction and liability, to support the Investors position that jurisdiction and liability remains an ongoing proceedings. The language used in the Procedural Orders did not persuade Prothonotary Aalto that damages needed to be determined as a condition precedent to the conclusion of arbitration.

[27] Further, Prothonotary Aalto did not find that the language used in the Procedural Orders suggested that the award on damages could impact the Tribunal awards on jurisdiction and liability. In fact, it appears that the Tribunal itself expressed a contrary intention in stating that the jurisdiction and liability finding could allow the parties to resolve the damage phase, where at paragraph 732 of the March 17, 2015 "Award on Jurisdiction and Liability", the Tribunal states:

> The Tribunal in Procedural Order No. 3 accepted Canada's position that this proceeding should be divided into a merits phase and a damages phase. The Tribunal has found that Bilcon has established breaches of Article 1102 and 1005 of Chapter Eleven of NAFTA. To the extent that there is any possible legal requirement at the merits phase to make a *prima facie* case for the existence of at least some loss or damage, Bilcon has done so. The Tribunal makes no prejudgment whatsoever about the ultimate outcome on compensation if the Parties do not settle this case by agreement. Both Parties will have the opportunity, if they do not resolve the matter through a settlement, to submit evidence and argument to this Tribunal concerning the quantum of a compensation award for loss or damage and concerning the allocation of the costs of this arbitration.

[28] Based upon his consideration of the foregoing, it was reasonable for the Prothonotary to conclude that the Tribunal's finding on jurisdiction and liability was complete. He was properly guided by the language used in the Procedural Orders and the award.

[29] Prothonotary Aalto's interpretation of article 34(4) of the *Code* was also reasonable, as the language of the article itself expressly permits the exercise of discretion.

[30] As such, I disagree with the Investors' argument that the Prothonotary failed to accord the appropriate deference to the arbitration process. In considering both the language contained in the *Code* and in the Procedural Orders, the Prothonotary reasonably found that this Court's jurisdiction was not ousted by an ongoing arbitration. This was a reasonable conclusion and is therefore entitled to deference.

B. *Did the Prothonotary make an error of law in finding that the doctrine of exhaustion of remedies did not apply?*

[31] The Investors argue that Prothonotary Aalto erred in finding that the principle of "exhaustion of remedies", as outlined in *C.B. Powell*, did not apply. They argue that the doctrine of exhaustion of remedies requires that Canada await the Tribunal's final award on damages before seeking intervention from this Court.

[32] In *C.B. Powell*, the Federal Court of Appeal states at paragraph 31: "absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted." This principle has since been endorsed by the Supreme Court of Canada in *Strickland v Canada (Attorney General)*, 2015 SCC 37 and *Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission)*, 2012 SCC 10.

[33] The Investors argue that the Prothonotary erred in misconstruing the judicial review application as an appeal, where at para 64 of the Order, he states:

> [64] Bifurcation of the arbitration has resulted in the first phase finally deciding the issues of jurisdiction and liability. Inherent in the concept of bifurcation is the understanding that there will be the potential of appeals following each phase [….]

[34] The Investors argue that the Prothonotary's use of the word "appeal" is an error and it indicates that the Prothonotary failed to understand the international arbitration process.

[35] This reference by Prothonotary Aalto was in the context of considering the nature of the bifurcated process and the options the parties may seek to exercise in relation to a review of the Tribunal award. This is confirmed in paragraph 66 of the Order where Prothonotary Aalto states that there is nothing in the *Code* that precludes an application by way of judicial review. The reference to "appeal" was in the general sense of the rights of the parties to seek review of an arbitration award. This does not constitute a legal error.

[36] Further, the Prothonotary interpreted the options provided by Article 34(4) of the *Code* in a matter consistent with a plain reading of the words, which clearly grants the Courts discretionary jurisdiction.

[37] The Investors also take issue with the legal authorities relied upon by the Prothonotary and suggest that domestic labour cases would not be applicable to international arbitrations. However, this argument does not overcome the reality that there is an absence of exclusionary language in the following: the *Code*; the Tribunal's award; or in the Tribunal's Procedural

Orders. The Prothonotary correctly considered all of these sources before looking to case law to determine if the Court could exercise its discretion on whether or not to stay the Set Aside Application. This was a reasonable approach.

[38] Finally, Prothonotary Aalto also considered the Investors arguments with respect to issuing a stay pursuant to paragraph 50(1) (b) of the *Federal Courts Act*. However, he concluded that the Investors had not established "real, definitive, unavoidable harm". As the Investors failed to adduce evidence to support a finding of the requisite harm, this is a reasonable conclusion.

[39] I conclude that the Prothonotary did not make any legal errors in the Application of the doctrine of exhaustion of remedies. His decision is therefore reasonable.

VI. Intervenors

[40] The Intervenors made submissions on the Motion. They argued that the Investors Motions should be dismissed. They did not request costs.

VII. Conclusion

[41] The Respondents Motion is dismissed with costs payable to the Applicant in the fixed amount of $2,000.00.

JUDGMENT

THIS COURT'S JUDGMENT is that the appeal is dismissed with cost in the fixed amount of $2,000.00 payable by the Respondents to the Applicant.

"Ann Marie McDonald"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1000-15
STYLE OF CAUSE:	ATTORNEY GENERAL OF CANADA v WILLIAM RALPH CLAYTON, WILLIAM RICHARD CLAYTON, DOUGLAS CLAYTON, DANIEL CLAYTON AND BILCON OF DELAWARE, INC. AND SIERRA CLUB CANADA FOUNDATION AND EAST COAST ENVIRONMENTAL LAW ASSOCIATION (2007)
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