

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *lululemon athletica canada inc. v. Industrial Color Productions Inc.*,
2021 BCCA 225

Date: 20210609
Dockets: CA47227; CA47296
Docket: CA47227

Between:

lululemon athletica canada inc.

Appellant
(Petitioner)

And

Industrial Color Productions Inc.

Respondent
(Respondent)

- and -

Docket: CA47296

Between:

lululemon athletica canada inc.

Appellant
(Petitioner)

And

Industrial Color Productions Inc.

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
(In Chambers)

On appeal from: Order of the Supreme Court of British Columbia, dated January 6, 2021 (*lululemon athletica canada inc. v. Industrial Color Productions Inc.*, 2021 BCSC 15, Vancouver Docket S204884) and February 25, 2021 (*lululemon athletica canada inc. v. Industrial Color Productions Inc.*, 2021 BCSC 422, Vancouver Docket S204884).

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Place and Date of Hearing:

Vancouver, British Columbia
May 31, 2021

Place and Date of Judgment:

Vancouver, British Columbia
June 9, 2021

Summary:

Court of Appeal declined to grant intervenor's status to three applicants in a contractual dispute which had been the subject of an arbitration award under the International Commercial Arbitration Act. Chambers judge was not persuaded that their respective submissions would be of assistance to the Court on appeal.

Reasons for Judgment of the Honourable Madam Justice Newbury:**Issues**

[1] Three applicants—the Arbitration Place, ADR Chambers, and the Chartered Institute of Arbitrators—seek leave to intervene in this appeal pursuant to s. 10(2)(a) of the *Court of Appeal Act*, R.S.B.C. 1996, c. 77 and R. 36 of the *Court of Appeal Rules*, B.C. Reg. 297/2001. If intervenor's status is granted, they seek to file factums of varying lengths and to make oral submissions at the hearing of the appeal; and ask that the style of cause be amended to reflect their intervention.

Background

[2] The underlying appeal concerns an arbitration award made in favour of Industrial Color Productions Inc. ("ICP") against lululemon athletica canada inc. ("lululemon"), upheld on review by Mr. Justice Funt in the court below. ICP provides media production services, including photography, video and retouching in facilities located across the United States; lululemon is an athletic apparel retailer. In August 2016, the parties entered into a Services Agreement under which ICP agreed to provide photography and production services to lululemon for its global e-commerce platforms. Under ss. 53 and 54, any disputes arising under the Services Agreement were to be submitted to arbitration. The Agreement expressly incorporated an appended "Statement of Work" ("SOW") and contemplated additional Statement(s) of Work if agreed upon by the parties.

[3] In 2019, ICP was providing services under a third SOW, which set forth the services to be performed and the fees for those services, and included termination provisions. The term of the third SOW ended on July 31, 2019. On May 13, 2019,

lululemon notified ICP that it intended to terminate the Agreement as of August 1, 2019. The termination provision in the third SOW read as follows:

23. Termination of Agreement for Convenience – Notwithstanding any other provision in this Agreement, lululemon may terminate this Agreement at any time for convenience provided that lululemon delivers to Service Provider ninety (90) days' written notice of its intention to do so.

[4] The original Services Agreement contained a termination provision at s. 13. It allowed either party to terminate upon 75 days' notice. Lululemon argued that a 75-day notice period applied from the date of its notice (May 13) and that the effective date of termination was therefore August 1, 2019. ICP took the position that lululemon was not entitled give notice of termination until the end of the initial term of the SOW (July 31, 2019), so that the 75-day notice period would not be effective until October 14, 2019.

[5] When the parties could not reach agreement, ICP referred the matter to arbitration under the arbitration clause in the Agreement. It sought a declaration that lululemon had breached the Services Agreement by reason of improper notice, and an award of general damages in an amount not less than the contractual minimum amount calculated through October 14, 2019.

[6] The arbitration took place in British Columbia and was governed by the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 (the "Act"). The arbitrator held that lululemon's notice of termination had not been effective to end the Services Agreement on August 1, 2019, finding instead that the company had terminated the Agreement as of October 14, 2019. Accordingly, he ruled that ICP was entitled to compensation for 75 days of additional losses resulting from lululemon's premature termination of the Agreement (totaling \$1,081,967 US). He also ordered lululemon to pay ICP a \$455,755.03 invoice for services in the month of July 2019.

Review by Chambers Judge

[7] Lululemon subsequently applied for an order pursuant to s. 34(2)(a)(iv) of the Act to set aside that portion of the award that required it to pay ICP damages for termination of the Agreement. Section 34(2)(a)(iv) provides:

Application for setting aside arbitral award

34 (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3).

(2) An arbitral award may be set aside by the Supreme Court only if

(a) the party making the application furnishes proof that

...

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the arbitral award which contains decisions on matters not submitted to arbitration may be set aside, or ...
[Emphasis added.]

In its submissions, lululemon contended that the award had been made on the basis of a dispute “beyond the scope of the submission to arbitration”. The chambers judge, Mr. Justice Funt, loosely referred to this concept as “jurisdiction” in his reasons, although counsel prefer the phraseology of the Act.

[8] In the course of his reasons, the chambers judge noted that the interpretation of the Act is guided by “international considerations”. He cited s. 6, which refers *inter alia* to the *International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*, and the *Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration* (1985). At para. 20 he suggested that the “standard of reasonableness and not correctness will generally best serve ‘to preserve the autonomy of the forum selected by the parties and to minimize

judicial intervention”’. (Quoting in part from *Quintette Coal Ltd. v. Nippon Steel Corporation* (1991) 50 B.C.L.R. (2d) 207 (C.A.).) He continued:

As a matter of statutory interpretation, the fact that the arbitral tribunal under s. 16 of the ICA Act “may rule on its own jurisdiction” buttresses the use of reasonableness as the generally appropriate standard of review.

A reasonableness standard of review also aligns with the general framework set forth in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 for the judicial review of a decision of a statutory tribunal and the general framework for domestic commercial arbitration: see *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 104–106. [At paras. 21–; emphasis added.]

[9] The judge distinguished the Ontario Court of Appeal’s decision in *United Mexican States v. Cargill, Inc.*, 2011 ONCA 622, *lve. to app. ref’d* [2011] S.C.C.A. No. 528, in which the Court addressed questions of law involving the interpretation of provisions of the *North American Free Trade Agreement*. He commented that “[a] dispute involving two commercial parties over the termination of a private contract is, without more, foundationally different than a claim for damages against a country under *NAFTA* engaging international multilateral trade agreement or treaty interpretation principles.” (At para. 25.)

[10] On the merits, the judge noted lululemon’s argument that the arbitrator had exceeded the scope of his authority in making his award for damages. He found that, while the arbitrator’s reasons did not specifically address lululemon’s “scope of authority” argument, this was acceptable in the context of a private arbitration. In his view, “the parties’ expectations as to the completeness of the arbitrator’s reasons is [sic] less than those of parties engaged in commercial litigation before a judge.” (At para. 45.) He concluded that it was not the Court’s role to intervene, and that he was satisfied the arbitrator’s award was reasonable: paras. 46–9.

[11] On February 23, 2021, Justice Griffin of this Court granted lululemon a stay of execution pending appeal: 2021 BCCA 108. Lululemon has paid the award of \$455,755.03 USD (the invoice for services for the month of July) and paid the additional \$1,081,967 in damages (plus interest calculated to June 30, 2021) to its lawyers in trust.

[12] The hearing of the appeal is scheduled for one day in October of this year.

The Applicants for Intervenor Status

The Arbitration Place

[13] The Arbitration Place is an organization that among other things holds arbitration conferences and training sessions for arbitrators and others, supporting educational opportunities relating to international arbitration theory and practice, and promotional campaigns to promote Canada as an attractive venue for international arbitration. The organization has been granted leave to intervene before the Supreme Court of Canada on two occasions. In this case, it says that it can assist this court with submissions regarding the implications of departing from the approach of other *Model Law* and *New York Convention* jurisdictions around the world.

[14] The Arbitration Place submits that the appeal raises issues concerning a court's role when a party challenges an arbitral award on the basis that the arbitral tribunal exceeded the scope of the parties' submission. As we have seen, these issues arise under s. 34(2)(a)(iv) of the *ICAA*, which adopts the *Model Law* and has implications for similar legislation across Canada. This applicant proposes to advance two submissions:

- a. First, that the continued growth and development of Canada as a leading centre for international arbitration depends on the predictability and reliability of its arbitration law, a factor considered by parties in determining a venue for international arbitrations; and
- b. Second, that the Court ought to carefully consider the different roles of courts as compared to international tribunals; and that protecting parties' legitimate expectations is essential to maintaining confidence in arbitration (and in turn, Canada's place as a safe and reliable arbitration jurisdiction).

[15] The Arbitration Place acknowledges that the underlying litigation is simply a contractual dispute between two private parties, but submits that it raises important

issues about and for international arbitrators and thus resembles a “public law” matter. Should leave be granted, it wishes to emphasize that the continued growth of Canada as a leading centre for international arbitration depends on the “predictability and reliability of its arbitration law, and its continued consistency with international expectations.”

[16] In reply, ICP submits that the Arbitration Place’s proposed submissions on applying the *Act* consistently with that of other *Model Law* and *New York Convention* jurisdictions (and the consequent risk of damage to Canada’s reputation as an arbitration-friendly jurisdiction) would expand the scope of the appeal to an issue that would not otherwise be addressed by the parties and that is not material to its disposition. It says its proposed submissions on the “boundary line” or (using the chambers judge’s term) “standard of review” are duplicative of arguments advanced by the appellant and that there is no risk that an important point of view would be overlooked if leave to intervene were refused.

ADR Chambers Inc.

[17] ADR Chambers provides conflict resolution services across Canada and elsewhere and has intervened on several leading cases in Canada. Its application focuses on what Funt J. called the applicable “standard of review” under the *Act*. It proposes to make submissions on the lack of a “foundational” difference between commercial arbitrations and treaty arbitrations on this issue, and in particular, on why correctness should be applied in both contexts. It would argue that party autonomy militates in favour of the court’s insisting on *correctness* in the context of both commercial international agreements and trade treaties.

[18] ICP submits that ADR’s proposed submissions on the standard of review are fully canvassed and advanced by lululemon in its factum. It says the authorities proposed by this applicant overlap with those of the appellant and there is little or no risk that an important point of view would be overlooked if leave to intervene were refused.

The Chartered Institute of Arbitrators (Canada) Inc. (“CIArb Canada”)

[19] CIArb Canada is the Canadian branch of the Chartered Institute of Arbitrators, founded in 1915 and chartered in 1979. It is primarily a “qualifications and professional body” which grants diplomas and other training required for members to obtain designations such as CIArb Fellow or C. Arb, Chartered Arbitrator. It produces periodical journals aimed at the advancement of arbitration and the training and professionalism of arbitrators around the world.

[20] CIArb Canada would focus its submissions on only one issue, namely what constitutes a “sufficiently reasoned award” under the *Act*, in the context of a court’s ability to set aside an award under s. 34.

[21] ICP agrees that CIArb’s proposed submission on the issue of sufficiency of reasons may provide a distinctive perspective not directly raised by the parties and that it would not necessarily expand the issues on appeal.

[22] For its part, lululemon took no position on the applications before me, acknowledging that it has no particular interest in the matters sought to be raised by the proposed intervenors, except as they may bear on the outcome of the appeal. The question of sufficiency of reasons is not raised by lululemon in its appeal. Rather, it relies on only two grounds of appeal, namely the reasonableness “standard of review” and the deference shown to, in its words, the arbitrator’s “non-existent jurisdictional analysis”. Its factum addresses *United Mexican States v. Cargill, Inc.*, *supra*, the *Model Law* and *New York Convention* and the approaches of other jurisdictions. It submits that the proper standard of review under s. 34(2)(a)(iv) is correctness and that the *Act* should be interpreted in a manner that will ensure international consistency. It discusses leading cases from the U.K., Australia, the U.S., Hong Kong and elsewhere, which apply a correctness standard to legislation that is very similar to the *Act*. In my view, the proposed submissions of the intervenors on the standard of review do overlap to a significant degree with the submissions contained in lululemon’s factum.

[23] The law on the question of granting intervenors status is well-known. I was provided with three thick volumes of authorities by the intervenors, but I believe it will be sufficient for the purposes of this application to quote the admirably brief summary provided by Madam Justice Smith in chambers in *Halalt First Nation v. British Columbia (Environment)*, 2012 BCCA 191. At para. 5 she stated:

The granting of intervenor status is a discretionary order that is subject to the following principles:

- a) the applicant must have a direct interest in the matter; or
- b) the applicant must have a public interest in a public law issue in question, and
- c) the applicant can make a valuable contribution or bring a different perspective to a consideration of the issues on appeal that differs from that advanced by the parties.

See *EGALE Canada Inc. v. Canada (Attorney General)*, 2002 BCCA 396 at para. 7.

I also note my own comments, sitting in chambers, in *R. v. Watson and Spratt* 2006 BCCA 234:

... where the applicant does not have a 'direct' interest in the litigation, the court must consider the nature of the issue before the court (particularly whether it is a 'public' law issue); whether the case has a dimension that legitimately engages the interests of the would be intervenor; the representativeness of the applicant of a particular point of view or 'perspective' that may be of assistance to the court; and whether that viewpoint will assist the court in the resolution of the issues or whether, as noted in *Ward v. Clark*, 2001 BCCA 264 the proposed intervenor is likely to 'take the litigation away from those directly affected by it'. [At para. 3.]

[24] As mentioned earlier, the proposed intervenors acknowledge that they do not have direct interests in this case, but that it raises important issues of public interest, although they may not be issues of "public law". Applying the third criterion described by Smith J.A. in *Halalt First Nation*, however, I am not persuaded that the Court would be truly assisted by the submissions of the Arbitration Place or of ADR Chambers. Indeed, the arguments based on the *Model Law* and *New York Convention* are, as I have said, raised in lululemon's factum in connection with the "standard of review" issue. As well, it seems to me that this court is likely to be guided by the application of the *Act* to this case, rather than by more general

arguments about Canada's reputation in the arbitration world and the importance of uniformity in arbitral practice. This is not to suggest that these applicants do not have an important role to play in the realm of international arbitration, but that in the present context, those considerations are attenuated.

[25] As far as the CIArb is concerned, the matter of "sufficiency of reasons" has not been asserted by lululemon. Generally speaking, I do not regard an intervenor's role as extending to the raising of new grounds of appeal for one or other of the parties.

[26] In the result, with thanks to all counsel, I would dismiss all three applications.

"The Honourable Madam Justice Newbury"