Federal Court of Appeal  Cour d'appel fédérale

Date: 20180108

Docket: A-80-17

Citation: 2018 FCA 1

CORAM: **RENNIE J.A.**
GLEASON J.A.
LASKIN J.A.

BETWEEN:

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

Appellants

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Toronto, Ontario, on November 20, 2017.

Judgment delivered at Ottawa, Ontario, on January 8, 2018.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: GLEASON J.A.
LASKIN J.A.

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REASONS FOR JUDGMENT

RENNIE J.A.

[1] The appellants appeal an order of the Federal Court (2017 FC 214) *per* Justice McDonald dismissing their appeal of an order of Prothonotary Aalto (2016 FC 1035). The prothonotary had dismissed the appellants' motion to stay an application in the Federal Court by the Attorney General of Canada to set aside a decision of an arbitral panel constituted under the *North*

American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (NAFTA).

[2] The relevant procedural history is set out in detail in the decisions below and need not be repeated, save to say that an arbitral panel was established under the investor-state dispute resolution provisions of Chapter 11 of NAFTA to determine a dispute between the appellants and Canada. The parties agreed to have the jurisdiction and liability issues decided separately from the assessment and quantification of damages and the panel made an order bifurcating the proceeding.

[3] In March 2015, the panel ruled against Canada in its award on jurisdiction and liability: *Bilcon of Delaware et al v. Government of Canada* (2015), CDA-2009-04 (Ch. 11 Panel), online: <http://www.pcacases.com/web/sendAttach/1287>.

[4] Article 1136 of NAFTA gives a disputing party a three-month window to commence proceedings to contest an arbitral award. The *Commercial Arbitration Code* (the Code), set out in Schedule 1 of the *Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), c. 17 applies to claims submitted to arbitration under article 1116 of NAFTA (*Commercial Arbitration Act*, s. 5(4); the Code, art. 1(1); *North American Free Trade Agreement Implementation Act*, S.C. 1993, c. 44, s. 2(1)). Accordingly, Canada filed an application in the Federal Court to set aside the award under article 34(1) of the Code. In response, the appellants filed a motion under article 34(4) of the Code and under paragraph 50(1)(*b*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 seeking an

order staying the set aside application pending the hearing and disposition of the damages proceeding. While the Code refers to an application to "set aside" awards by arbitral tribunals, I will, for ease of reference only, refer to it as an application for judicial review.

[5] The prothonotary found that the arbitration award was final, complete and dispositive of the issues of jurisdiction and liability. He began his consideration, appropriately, with a review of article 34(4) of the Code, which provides:

CHAPTER VII	**CHAPITRE VII**
Recourse Against Award	**Recours contre la sentence**
ARTICLE 34	ARTICLE 34
Application for Setting Aside as Exclusive Recourse against Arbitral Award	La demande d'annulation comme recours exclusif contre la sentence arbitrale
…	[…]
(4) 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.	**4** Lorsqu'il est prié d'annuler une sentence, le tribunal peut, le cas échéant et à la demande d'une partie, suspendre la procédure d'annulation pendant une période dont il fixe la durée afin de donner au tribunal arbitral la possibilité de reprendre la procédure arbitrale ou de prendre toute autre mesure que ce dernier juge susceptible d'éliminer les motifs d'annulation.

[6] After reviewing the text of the Code, he was satisfied that the award on jurisdiction and liability was "an award" within the meaning of 34(4) and that whether to stay the judicial review proceeding was in his discretion. In declining to exercise this discretion, he noted, amongst other considerations, that a stay of the judicial review application would not result in giving the

tribunal the opportunity, in the language of article 34(4), to "eliminate the grounds for setting aside" the arbitral award. The panel had fully and finally decided all matters relevant to jurisdiction and liability. Only the assessment and quantification of damages would be addressed in the next phase of the proceeding.

[7] The prothonotary then reviewed the history of proceedings, the nature of the issues, and the question of delay and the relative inconvenience to the parties should the application for judicial review be stayed. He declined to stay the application. On appeal, the Federal Court sustained the prothonotary's decision.

[8] Before this Court, the appellants conceded the finality of the award and the right of Canada to seek judicial review in oral submissions, but contended that the Federal Court erred in not exercising its discretion to stay the application.

[9] This concession was appropriate. The plain text of the Code itself does not distinguish between final awards and other awards (with the exception of article 32 "Termination of Proceedings"). Further, the proceedings were governed by the *United Nations Commission on International Trade Law Arbitrational Rules*, GA 31/98 (UNCITRAL Rules), article 32(2) of which expressly permits "the arbitral tribunal … to make interim, interlocutory, or partial awards" and provides that such awards "shall be final and binding on the parties." I note as well that, in their definitive text, *Redfern and Hunter on International Arbitration*, 5th ed. (New York: Oxford University Press, 2009) at 522, the authors recognize that judicial review can arise when proceedings are bifurcated.

[10] Of note in this regard is the decision of a NAFTA panel in *Methanex Corporation v. United States of America* (2005), online: <https://www.italaw.com/sites/default/files/case-documents/ita0529.pdf> (*Methanex*) following a request that it reconsider its award on jurisdiction. In rejecting the submission that the tribunal has broad continuing discretion to reconsider or vary a final award that it has made, the panel agreed with the submissions of the Government of the United States that article 32(2) of the UNCITRAL Rules reflects the principle of *res judicata*:

> 31. … A partial award is a final and binding award within Article 32(2) of the UNCITRAL Rules in regard to the matter it decides, although it does not leave the tribunal functus officio. It is presented as an award; and as an award it disposes finally of certain issues in the arbitration proceedings. …
>
> 32. The Tribunal therefore rejects Methanex's contention that the Partial Award is not a final and binding award under Article 32(2) of the UNCITRAL Rules and the contention that Article 32(2) concerns only final awards, not partial awards. That contention runs counter to the ordinary meaning of the Articles 32(1) and (2) as a matter of the English language. In the Tribunal's view, no weight is to be placed on the fact that "award" is not further defined in Article 32(2) expressly to include (inter alia) a partial award. It follows that, where reference is made to an award under Article 32(2), that is intended to include a partial award made under Article 32(1) of the UNCITRAL Rules (*Methanex*, Part II, Chapter E at paras. 31–32).

[11] Article 34(4) of the Code provides that the Court may suspend the judicial review application where, amongst other considerations, it is satisfied that the arbitral panel may take further action which "will eliminate the grounds for setting aside." Here, the appellants conceded that there is no possibility that the findings on liability and jurisdiction, which are the focus of the judicial review application, will disappear as a result of the damages hearing. As such, article 34(4) does not apply.

[12] With this background, I turn to the appellants' core argument. They say that the Federal Court erred in not exercising its discretion to stay the judicial review application. They contend that the damages are "inextricably linked" to the liability finding and that statements made by the tribunal in the damages decision may provide clarity to its reasons underpinning the finding of liability. They also contend that the Court did not afford sufficient deference to the arbitration procedure and the principle that recourse to the courts is not to be taken until other remedies are exhausted. The appellants also say that the prothonotary applied the wrong test in respect of whether the judicial review proceedings should be stayed under paragraph 50(1)(*b*) of the *Federal Courts Act* and erred in concluding the appellants would not suffer serious prejudice.

[13] Since this Court's decision in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, 402 D.L.R. (4th) 497 (*Hospira*), a discretionary decision of a prothonotary will only be reversed if the prothonotary made an error of law or a palpable and overriding error regarding a question of fact or mixed fact and law: *Hospira* at paras. 64-65, 79. The same standard of review applies when this Court reviews the Federal Court motions judge's consideration of the prothonotary's decision: *Hospira* at paras. 83-84.

[14] Decisions on a motion to stay under article 34(4) of the Code and under paragraph 50(1)(*b*) of the *Federal Courts Act* are discretionary and are governed by the *Hospira* standard. Applying *Hospira*, I am not persuaded that the Federal Court made either an error of law or a palpable and overriding error of fact or mixed fact and law which would justify intervention.

[15] I will begin with the issue of deference. The motions judge and the prothonotary acknowledged that deference is afforded to administrative processes generally (*Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61 at paras. 30–32, [2011] 2 F.C.R. 32 (*C.B. Powell*)) and to arbitration tribunals specifically: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 105, [2014] 2 S.C.R. 633. A corollary to this principle is "courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted": *C.B. Powell* at para. 31; see also *Strickland v. Canada (Attorney General)*, 2015 SCC 37 at paras. 40, 42, [2015] 2 S.C.R. 713.

[16] The appellants assert that the tribunal may make statements in its damages decision that clarify the basis for the award on jurisdiction and liability, and that these potential reasons might affect the outcome of the judicial review application. How this might be so is unclear.

[17] In support of their argument, the appellants point to two procedural orders rendered by the panel after ruling on jurisdiction and liability: Procedural Orders 19 and 20. In those orders, the panel notes that the award on damages "might provide further context" and that "[i]n any multi-stage process, subsequent decisions may potentially cast light on the reasoning contained in previous decisions". The prothonotary found these orders to be vague and speculative and did not alter the finality of the award on jurisdiction and liability.

[18] I agree. The panel gave lengthy and detailed reasons in its award on jurisdiction and liability, and it was entirely unclear to the prothonotary, and the Federal Court judge, how the findings of jurisdiction and liability would be affected by the quantification of damages phase.

The panel did not elaborate on how the damages phase might "cast light" on the award, and indeed, in suggesting that the parties might want to settle, it reinforced the finality of its conclusion on jurisdiction and liability. Thus, the panel's work on these issues is done, and the prothonotary rightly gave little weight to these obscure comments. I would add that the appellants could not, and did not, advance any argument before this Court as to how the findings of jurisdiction and liability would be changed or altered by the damage assessment.

[19] The appellants also pointed to the judicial review application and memorials (written submissions) filed by Canada in the damages phase of the arbitration in support of its argument that there is a linkage between liability and the assessment of damages. While not before the Court, Canada accepted, for the purposes of this appeal, the appellants' characterization of the position taken by it in those pleadings. While liability is a condition precedent for an award of damages, if liability issues were always "inextricably linked" to the assessment of damages in such a way that the damages decision would retroactively affect the liability decision, no judicial review application of a bifurcated proceeding could ever proceed until the damages phase was completed.

[20] No matter how the parties might characterize the award on jurisdiction and liability for the purposes of contesting damages, and no matter what "further context" might be provided regarding the liability award by the panel in delivering its damages award, the fact remains that an award, regardless of what stage it is given in bifurcated proceedings, is a "final and binding" award and is subject to judicial review. There is, therefore, no possibility that Canada may succeed on the jurisdiction and liability issues within the damages phase. For the doctrine of

exhaustion of remedies to justify court non-interference, there must be other "available, effective remedies [that have yet to be] exhausted": *C.B. Powell* at para. 31.

[21] The motions judge and the prothonotary concluded, correctly, that there was no other avenue of recourse to Canada, and that the doctrine of exhaustion of remedies was entirely irrelevant. Awaiting the possibility of statements that might "cast light" on the liability findings does not constitute a remedy. The only remedy was judicial review, and had Canada not commenced its application to set aside within three months of the award on jurisdiction and liability, as mandated by article 34(3) of the Code, it would have been out of time.

[22] To conclude, Canada stated that it would continue its challenge to the jurisdiction and liability findings "even if the damage award was zero dollars". The appellants' arguments blur the fact that a final determination has been made on liability and that nothing that is said in the damages phase can undo that finding.

[23] I turn next to the question of whether the Federal Court erred in refusing to stay the judicial review proceeding under paragraph 50(1)(*b*) of the *Federal Courts Act*.

[24] To begin, it is important to distinguish between "a court staying other bodies' proceedings pending an appeal or other matter, or for an injunction" and a stay that is, in reality, "a long-term adjournment": *Epicept Corp. v. Canada (Minister of Health)*, 2011 FCA 209 at para. 14, 425 N.R. 353. Building on this distinction, in *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312, 426 N.R. 167 (*Mylan*), this Court set out an "interest

of justice" test governing whether the Court should stay its own proceedings. In that case, Justice Stratas held, at paragraph 5, that:

> [5] … *This Court deciding not to exercise its jurisdiction until some time later*. When we do this, we are exercising a jurisdiction that is not unlike scheduling or adjourning a matter. Broad discretionary considerations come to bear in decisions such as these. There is a public interest consideration – the need for proceedings to move fairly and with due dispatch – but this is qualitatively different from the public interest considerations that apply when we forbid another body from doing what Parliament says it can do. As a result, the demanding tests prescribed in *RJR-MacDonald* do not apply here. This is not to say that this Court will lightly delay a matter. It all depends on the factual circumstances presented to the Court. In some cases, it will take much to convince the Court, for example where a long period of delay is requested or where the requested delay will cause harsh effects upon a party or the public. In other cases, it may take less. (emphasis in original)

[25] While the prothonotary considered the threefold criteria from *RJR–MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 111 D.L.R. (4th) 385 (*RJR–MacDonald*), as opposed to the "interest of justice" test, it is an error of no consequence.

[26] In considering "the interest of justice", courts may take into account some of the same considerations as in *RJR–MacDonald* – whether there is a serious issue to be tried, the existence or not of irreparable harm and the overall balance of convenience or interests. Here, while the prothonotary did not use the precise nomenclature of the "interest of justice" test, he directed himself to considerations relevant to the exercise of discretion under the test.

[27] In the present case, the question of whether to issue a stay under paragraph 50(1)(*b*) of the *Federal Courts Act* devolved to simply one of when it was appropriate for the judicial review

application to be heard. The prothonotary examined this question in detail, considered and weighed the relevant factors, and made no palpable and overriding error in refusing to exercise his discretion to stay the application for judicial review.

[28] The prothonotary assessed the arguments advanced by the appellants of harm or prejudice and found that they were either speculative, compensable in costs, or re-articulations of arguments based on the panel's procedural orders. The prothonotary also considered and gave weight to the question of delay imbedded in any consideration of the interest of justice test. The prothonotary concluded that Canada may "suffer[] prejudice if a stay is granted as there will be at least another two years before a Court would hear this matter if they were to wait for the damages phase to be completed". Further, given that the judicial review application "[could] be heard and disposed of well before then" and that the appellants did not demonstrate prejudice, the prothonotary concluded that "there is no basis for this Court to exercise its discretion to grant a stay". The responsibility of the Court to ensure that proceedings move in an expeditious, timely, and fair manner is a critical consideration when a court is asked to stay its own proceedings.

[29] The prothonotary's concern about delay, the due administration of justice and the right of Canada to pursue an acknowledged right of recourse was reinforced by the fact that it took the tribunal 17 months to render its decision on jurisdiction and liability and that there is no prescribed time frame within which panels are to render their decisions. The prothonotary observed that a stay of the application for judicial review, which was commenced in June 2015,

could mean that Canada's challenge to the decision on jurisdiction and liability might not be heard for four years.

[30] The appellants have conceded that the decision on jurisdiction and liability is final and that the statute contemplates a judicial review application of the award at this time. The appellants also accepted that whether the judicial review should proceed now depends on the facts and circumstances of each case. Those circumstances include the fact that the parties and the panel agreed to bifurcate the proceeding into two distinct phases. The judicial review proceeding is well advanced – it is scheduled to be heard on January 29, 2018. A stay on the eve of the hearing of the judicial review application would result in a further delay and costs thrown away, each of which are inconsistent with the interest of justice. Further, if the award on jurisdiction and liability is set aside, it could render the second phase of the proceeding moot. As both the prothonotary and the judge noted, this also weighed in favour of rejecting the stay.

[31] In sum, I see no error of law warranting interference and no palpable and overriding error in the exercise of the discretion by the prothonotary and I would therefore dismiss the appeal with costs. I would also amend the title of proceedings to properly name as respondent the Attorney General of Canada, as should have been so indicated in the Notice of Appeal.

"Donald J. Rennie"

J.A.

"I agree
Mary J.L. Gleason J.A."

"I agree
J.B. Laskin J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

APPEAL FROM AN ORDER OF THE FEDERAL COURT DATED FEBRUARY 22, 2017 (2017 FC 214)

DOCKET:	A-80-17
STYLE OF CAUSE:	WILLIAM RALPH CLAYTON et al v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 20, 2017
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	GLEASON J.A. LASKIN J.A.
DATED:	JANUARY 8, 2018

APPEARANCES:

John Judge Gregory J. Nash	FOR THE APPELLANTS
Roger Flaim Karen Lovell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nash Johnston LLP Vancouver, British Columbia	FOR THE APPELLANTS
Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE RESPONDENT