

Federal Court of Appeal



Cour d'appel fédérale

Date: 20240126

Docket: A-289-23

Citation: 2024 FCA 20

Present: GOYETTE J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Applicant

and

ELLISDON CORPORATION

Respondent

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on January 26, 2024.

REASONS FOR ORDER BY:

GOYETTE J.A.

Federal Court of Appeal



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REASONS FOR ORDER

GOYETTE J.A.

[1] The Attorney General of Canada seeks a stay of his application for judicial review.

[2] For the following reasons, the motion for a stay will be dismissed.

I. Context

[3] EllisDon Corporation filed a complaint with the Canadian International Trade Tribunal concerning a solicitation issued by the Department of Public Works and Government Services (Public Works) for the rehabilitation and optimization of a building.

[4] EllisDon alleged that Public Works failed to evaluate the tenders in accordance with the invitation to tender and thereby breached trade agreements. EllisDon sought, among others, compensation for lost opportunity from the date it was awarded the contract to the date the contract was awarded to another tenderer.

[5] The Tribunal issued its Determination on September 25, 2023 and its reasons on October 10, 2023 (the Decision). The Tribunal found EllisDon's complaint to be valid. The Tribunal further recommended that Public Works compensate EllisDon for "its lost opportunity, if any". In this regard, the Tribunal recommended "that the parties negotiate the amount of compensation, if any", and that they report back to the Tribunal on the outcome of their negotiations within 60 days of the date of the issuance of the Tribunal's reasons. Finally, the Tribunal wrote that should the parties be unable to agree "on the amount of the compensation", the Tribunal would establish the final amount of the compensation after having provided the parties with the opportunity to file full submissions on this issue.

[6] The Attorney General filed a judicial review application of the Tribunal's Decision. The application states that the Decision is unreasonable and that the Tribunal exceeded its statutory authority when it recommended compensation for EllisDon.

[7] A few days after the filing of his judicial review application, the Attorney General moved for an order staying his application "until 30 days following the outcome of the compensation phase before the Tribunal".

[8] As a result of the Attorney General's motion for a stay, EllisDon asked the Tribunal to hold the compensation phase in abeyance until this Court rules on the Attorney General's judicial review application or on his motion to stay his application. Despite the Attorney General's request that the compensation phase continue, the Tribunal decided to hold the compensation phase of EllisDon's complaint proceeding in abeyance until this Court has ruled on the Attorney General's motion to stay his application for judicial review.

II. Analysis

[9] Paragraph 50(1)(b) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 confers a discretionary power on this Court to stay a proceeding before it where "it is in the interests of justice". The exercise of this discretionary power is guided by certain principles, including securing "the just, most expeditious and least expensive determination of every proceeding on its merits": Rule 3 of the *Federal Courts Rules*, SOR/98-106 (the Rules); *Cootte v. Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para. 12. In this regard, it will take much to convince this Court to

grant a stay where a long period of abeyance is requested or when the ensuing delay will cause harsh effects on a party: *Mylan Pharmaceuticals ULC v. AstraZeneca Canada, Inc.*, 2011 FCA 312 at para. 5.

[10] The Attorney General says that three “key circumstances” militate in favour of staying his application.

A. *Negotiations Not Concluded*

[11] First, the Attorney General argues that this Court should stay his application so that the parties can continue negotiations on the amount of the compensation. Should the parties reach an agreement, the entire matter may be resolved, and if not, the Tribunal will rule on the amount of compensation.

[12] I disagree that this argument militates in favour of staying the judicial review application. As EllisDon justly notes, parties do not need a stay to negotiate a resolution of their dispute.

[13] I would add that there is no guarantee that the parties will agree on the amount of the compensation. Failing such an agreement, the Tribunal will have to proceed with the compensation phase of the complaint process. EllisDon submits that this could be a lengthy and costly phase. To support its argument, EllisDon refers to prior decisions from the Tribunal, which illustrate that more than a year may elapse between the Tribunal making a determination on a complaint’s validity and the Tribunal rendering a decision on compensation. For instance, in

The Masha Krupp Translation Group Ltd. v. Canada Revenue Agency, the reasons on validity were issued on March 20, 2017 (see 2017 CanLII 149224 (CA CITT)), and the reasons on compensation were issued on October 17, 2018 (see 2018 CanLII 146634 (CA CITT)); in *Oshkosh Defense Canada v. Department of Public Works and Government Services*, the reasons on validity were issued on July 20, 2016 (see 2016 CanLII 153258 (CA CITT)), and those regarding compensation were issued on December 29, 2017 (see 2018 CanLII 146784 (CA CITT)).

[14] Highlighting the time that may elapse between a determination on validity and a determination on compensation is in no way meant to criticize the work of the Tribunal. Rather, it is an acknowledgement that the compensation phase of the Tribunal's work is complex and involves significant financial, accounting and evidentiary work for the parties to file, and for the Tribunal to consider. The point is that telling the parties that they need to proceed to the determination of the amount of the compensation phase of the complaint without further justification would not be in line with the guiding principle of securing the just, most expeditious and least expensive determination of every proceeding on its merits.

B. *The Scope of the Compensation Remains Undecided*

[15] The Attorney General argues that the scope of the compensation remains unclear and that the Tribunal should decide this issue before this Court is required to intervene.

[16] Again, I disagree. The Tribunal identified the scope of the compensation: Public Works is to “compensate EllisDon for its lost opportunity cost in this instance”: Decision at paras. 72, 83, 90.

[17] Furthermore, the sole ground of review raised in the Attorney General’s judicial review application is that the Tribunal allegedly “exceeded its statutory authority when it recommended compensation for EllisDon’s alleged lost opportunity”. During the validity phase of EllisDon’s complaint, Public Works made the same argument and the Tribunal rejected it: Decision at paras. 67-72. It follows that the Tribunal will not revisit the issue of the compensation’s scope nor whether it had authority to recommend it. Indeed, the Decision makes clear that the next phase of the complaint process will be dedicated to establishing the “amount” of the compensation, either by way of negotiation between the parties or, if necessary, by the Tribunal: Decision at para. 90.

[18] In this context, it would defy logic for this Court to acquiesce to the Attorney General’s request to stay the proceeding to let the Tribunal decide an issue that it will not decide.

C. *Judicial Economy*

[19] The Attorney General’s last argument is that the bifurcation of the Tribunal’s determination—the validity of the complaint phase and the amount of compensation phase—mandates that his application for judicial review be stayed. Otherwise, there is a risk of costly duplication of judicial resources and inconsistent findings flowing from:

- the possibility that a negotiated settlement on the amount of the compensation or the Tribunal's determination of that amount will render the judicial review application unnecessary; and
- the possibility of two judicial review applications: the one presently before this Court and a second one regarding the amount of the compensation.

[20] While I agree that unnecessary judicial proceedings, duplication of judicial resources, and inconsistent findings should be avoided, I do not think that there is such a risk of these situations happening if I do not grant a stay of the Attorney General's judicial review application. Let me explain.

[21] As this Court has stated, “[b]ifurcation, without more, is not a golden ticket to a stay”: *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at para. 21. This is particularly true when the two phases of a proceedings are not “inextricably linked”: *Clayton v. Canada (Attorney General)*, 2018 FCA 1 at para. 19. Here, there is no need for the amount of the compensation to be known for this Court to rule on whether the Tribunal had the statutory authority to recommend compensation for lost opportunity cost. Moreover, a determination of the amount of compensation will not resolve the issue of the Tribunal's statutory authority such that, if Public Works disagrees with an amount determined by the Tribunal, the Attorney General will pursue the present judicial review application. By contrast, as *EllisDon* points out, a decision of this Court that the Tribunal did not have the statutory authority will put to rest the issue of the amount of the compensation. It is therefore in the parties' interest to find out at the earliest

opportunity whether the Tribunal had the authority to recommend compensation for lost opportunity.

[22] Not only will this knowledge determine the necessity of the second phase of the complaint before the Tribunal, but it might also save considerable costs to the parties if this second phase proves unnecessary. At paragraphs [13] and [14] above, I highlighted how complex and demanding the determination of the amount of compensation phase could be. Such a complex and demanding process is likely to entail significant costs to the parties. These costs should not be incurred unless necessary, but this necessity will not be known if the Attorney General's judicial review application is stayed.

[23] In light of the above, I conclude that judicial economy and the interests of justice do not support the Attorney General's request for a stay of his judicial review application.

III. Conclusion

[24] Consequently, the motion for a stay will be dismissed with costs in favour of the respondent.

"Nathalie Goyette"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-289-23

STYLE OF CAUSE: THE ATTORNEY GENERAL OF
CANADA v. ELLISDON
CORPORATION

REASONS FOR ORDER BY: GOYETTE J.A.

DATED: JANUARY 26, 2024

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

Andrew Gibbs FOR THE APPLICANT
Calina Ritchie

Marc McLaren-Caux FOR THE RESPONDENT
Jan M. Nitoslawski

SOLICITORS OF RECORD:

Shalene Curtis-Micallef FOR THE APPLICANT
Deputy Attorney General of Canada

Cassidy Levy Kent (Canada) LLP FOR THE RESPONDENT
Ottawa, Ontario