THE NAVIGATOR

IN THIS ISSUE

Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Limited: The Courts and the Integrity of the Procurement Process

In a recent and quite lengthy decision, the Federal Court of Appeal resolved a years long dispute regarding complaints addressed and decided by the Canadian International Trade Tribunal (CITT) in connection with bids solicited by Public Works and Government Services Canada (PWGSC) for the Canadian Coast Guard. The prize was a 3-year contract to provide two towing vessels for operations on the BC coast worth $67 million. Two decisions of CITT were challenged in no less than 5 judicial review applications, all heard together by the Federal Court of Appeal as *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Ltd.* (*1), in which all parties, including the Attorney General as intervener, sought to challenge the CITT's decisions. The case dealt with a number of interesting legal issues, but this case comment focuses mainly on the Court's broad willingness to intervene in a tribunal's finding to preserve the integrity of the bidding process in procurement.

Background

Although a complex multi-proceeding matter, the dispute can be boiled down to a review by the Federal Court of Appeal of two decisions of the CITT arising from complaints brought by Heiltsuk Horizon Maritime Services in respect of findings of PWGSC; the first, that Atlantic Towing's bid was non-compliant with a mandatory bid requirement regarding minimum towing power (MR 12) and the second – after CITT found that PWGSC could re-evaluate all bids in response to the first complaint – that CITT exceeded its jurisdiction by interpreting MR 12 in a way that was inconsistent with the Request for Proposals (RFP), thus changing its mandatory requirements. The Court referred to these, respectively, as Decision I and Decision II of the CITT.

Decision I

Decision I related to the complaint of Heiltsuk Horizon to the CITT that Atlantic Towing ("Atlantic") had submitted a non-compliant bid in respect of MR 12, in that Atlantic's bollard pull certificate, which each bidder had to submit, did not show a bollard pull exceeding 120

FIRM AND INDUSTRY NEWS

- **Women in Logistics Impact Award** Ceremony will be held virtually on April 1, 2021. **Kim Stoll** will attend and represent the firm.

- **Women's Shipping & International Trading Association (WISTA) Canada,** on April 13, 2021, will present the next (virtual) edition of **WISTA Canada's Women in Leadership Series** featuring guest speaker **The Honourable Lisa Raitt,** Vice-Chair, Global Investment Banking, CIBC Capital Markets. **Kim Stoll**, in her role as VP Central Region of WISTA Canada will be hosting. This event is open to WISTA members and friends. Please contact Kim (kim@fhllp.ca) if you would like to attend.

- **Rui Fernandes** will be presenting a Fernandes Hearn LLP webinar on "Trends in Transportation in 2020" on Friday April 16th, 2021 from 9 am to 10:30 am. Anyone wishing to attend virtually should send a request to info@fhllp.ca.

- The **United States Maritime Law Association** Spring 2021 Meetings and Annual Dinner will take place in New York on May 4-7, 2021.

- **Gordon Hearn** will be participating in a panel discussion addressing "*Strategies in Broker and 3PL Risk Management*" at the **Transportation Intermediaries Association** 2021 Capital Ideas Conference being held virtually from Phoenix, Arizona on May 13, 2021.

- The **Toronto Commercial Arbitration Society** Annual General Meeting will take place on May 27th, 2021 in Toronto. **Rui Fernandes** and **Kim Stoll** will be attending.

- The **Canadian Board of Marine Underwriters** Spring Conference will take place on May 27th, 2021 virtually.

- The **Canadian Maritime Law Association** Annual General Meeting and Seminar will take place June 7-8, 2021 in Ottawa. **Rui Fernandes** as Central Region VP is organizing the Seminar.

- The **Transportation Lawyers Association** Annual Conference **/Canadian Transport Lawyers Association** Midyear Meeting will take place in Lake Tahoe California June 23-26, 2021. **Gordon Hearn** will be chairing an "International Transportation Law Update" panel.

- The **International Conference on Admiralty and Maritime Law** will take place July 12-13, 2021 in Ottawa, Ontario.

- The **International Maritime Law Seminar** will take place October 28, 2021 in London England.

- Mark your calendars. The next **Fernandes Hearn LLP Annual Seminar** will take place on February 10, 2022. Send us an email to info@fhllp.ca to let us know what topics you would like us to cover.

tonnes "when all required engine driven consumers were accounted for" (*2) as required by the RFP. Despite this, PWGSC found all 12 bidders, including Atlantic, to have been compliant with MR 12. A later Vessel Confirmation Assessment of Atlantic's vessels, the top-ranked bidder, showed, as alleged by Heiltsuk Horizon, that Atlantic Towing failed to satisfy MR 12, leading to Heiltsuk Horizon's first complaint to the CITT.

In Decision I, rendered on January 2, 2019, the CITT found in favour of Heiltsuk Horizon in part. It agreed with Heiltsuk Horizon that, "*on their face*," Atlantic's certificates did not show deduction for engine driven consumers. Atlantic did not dispute this but noted that deductions weren't necessary because of the presence of auxiliary generators. CITT was also concerned because one of the evaluators "took it for granted" that Atlantic's bid was compliant with MR 12 even though this was not shown on the face of the certificates. Although successful, Heiltsuk Horizon did not get the remedy it wanted – that it be found the only compliant bidder and be awarded the contract. Instead, CITT recommended that PWGSC re-evaluate MR 12 for all timely bids received, and that the contract remain with Atlantic until this was completed. The re-evaluation, by which Atlantic was found to be compliant with MR 12, led to Heiltsuk Horizon's second complaint to CITT

Decision II

In its second complaint, Heiltsuk Horizon argued before the CITT that the process adopted by PWGSC in re-evaluating bids was in fact in breach of Decision I, allegedly for failing to follow the CITT's recommendations. A new evaluation team was struck which again assessed bidders' compliance with MR 12. The new team interpreted "required" in the phrase "when all required engine driven consumers … are taken into account" as meaning those "required" to operate the vessel safely for the purpose of a Bollard Pull test according to the Classification Society Bollard Pull testing procedure. By applying this interpretation, the new team of evaluators found all bidders compliant, and therefore further found that the contract had been properly awarded to Atlantic.

In its second complaint Heiltsuk Horizon was again partially successful. CITT found in Decision II, rendered on October 18, 2019, that PWGSC's re-evaluation process proceeded on an incorrect interpretation of MR 12. In CITT's view, the evaluators ought to have taken the word "required" to mean "required for emergency towing operations," and therefore would have to make deductions for engine-driven consumers in these conditions from the certified bollard pull (*3). The CITT thus ordered in part that the evaluators:

> … must ensure that a vessel would have a *functional* bollard pull of at least 120 tonnes, even during an emergency towing operation when power may be drawn away from the engine to power other consumers (*4).

All parties ended up challenging Decision II by judicial review. Heiltsuk Horizon challenged this decision on the grounds that Atlantic could not have been allowed to participate having been found not compliant with MR 12 in Decision I. Atlantic, for its part, argued that the CITT had exceeded its jurisdiction by imposing new conditions absent from the original RFP and that it failed to give proper deference to the evaluators approach to finding compliance with the MR 12. The Attorney General intervened to raise the same issue as Atlantic regarding the CITT exceeding its jurisdiction.

The Decision of the Federal Court of Appeal

The Federal Court of Appeal's decision on the collection of judicial review applications before it, all of which essentially favoured Atlantic, illustrates a greater willingness of the courts to challenge tribunal decisions in the wake of the landmark 2019 decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and*

Immigration) v. Vavilov (*5). In reviewing the decisions of the CITT at issue here, the Federal Court of Appeal found that it could "intervene if the Tribunal's reasoning lacks internal coherence and is not defensible in respect of the facts and the law" (*6).

On the question of whether Decision I was reasonable, the Federal Court of Appeal affirmed the CITT's decision. It agreed with the CITT that one of the evaluator's taking it as *assumed* that Atlantic's bollard pull certificate was compliant with MR 12 had tainted the process, and that all bids should therefore be re-evaluated. This did not amount, in the Court's view, to a decision that Atlantic was not compliant with MR 12. Rather, the CITT was concerned with protecting the *process* of reaching a decision on compliance, and not with deciding whether the bid was compliant with the RFP. It was therefore justified in ordering a re-evaluation to determine, in fact, which bids were compliant, and which were not.

With regards to Decision II, the Federal Court of Appeal was, however, prepared to find the CITT's approach *un*reasonable. It criticized the CITT for essentially rewriting the original RFP. The decision overreached by, instead of taking MR 12 at face value, proceeding to treat the bollard pull certificates as mere "starting points" to some new standard of evaluation. The Federal Court of Appeal therefore agreed with the Attorney General that the new requirements imposed by Decision II "bears little resemblance to what was published in the RFP" (*7)

Conclusion

In narrow terms, this decision should give comfort to those who see it as important for the courts to have the power to police the tendering process to ensure that it is both rules-based and results in a fair outcome. On a broader level, however, this is a decision illustrating just how important the Supreme Court's decision in *Vavilov* will be in future judicial review applications. As predicted by early analysts, the decision in *Vavilov* was ammunition for the lower courts to begin to overrule tribunal decisions by giving greater scope to viewing decisions as *un*reasonable. The decision in *Heiltsuk Horizon* seems to confirm predictions of greater judicial activism in terms of questioning the findings of administrative tribunals.

Oleg M. Roslak

Endnotes

(*1) *Heiltsuk Horizon Maritime Services Ltd. v. Atlantic Towing Limited* 2021 FCA 26 [*Heiltsuk Horizon*].
(*2) *Heiltsuk Horizon* at para. 16.
(*3) *Heiltsuk Horizon* at para. 51.
(*4) *Heiltsuk Horizon* at para. 54.
(*5) 2019 SCC 65.
(*6) *Heiltsuk Horizon* at para. 63.
(*7) *Heiltsuk Horizon* at para. 129.

2. Vaccination Schedules for Supply Chain Workers

The Public Health Agency of Canada has advised that it is up to each province to determine vaccine eligibility and not the federal government. Indeed, the provinces are all taking a slightly different approach to supply chain workers.

"Phase Two" of the vaccine roll-out in Ontario will include adults over 60 years old, individuals with specific health conditions, and a few select classes of other people at elevated risk, including those who cannot work from home. This is said to explicitly include workers in "transportation, warehousing and distribution". (*1). It is currently anticipated that this phase will run from about April 2021 to July 2021.(*2)

"Long haul" truck drivers, and workers who regularly cross the Nova Scotia-New Brunswick border for work, are similarly scheduled to be included in Nova Scotia's "Phase Two". However, other supply chain workers are not included as a priority ground in Nova Scotia, as they are in Ontario.(*3). Nova Scotia's timeline will likely be similar to that in Ontario, following "Phase One", which includes those over 80 years old, residents and workers in long-term care homes, and a small list of other groups.

Commercial truck drivers have already been included in the vaccine roll-out in Prince Edward Island. Other "non-frontline essential workers" will be included in "Phase Two", scheduled for April 2021 to June 2021.(*4)

In New Brunswick, it is anticipated that truck drivers and "regular cross-border commuters" will be eligible later this month.(*5). Other supply chain workers may have to wait until "Phase Three", unless they otherwise qualify earlier due to age or other reasons.(*6). Newfoundland and Labrador similarly plans to include in its "Phase Two" people who "regularly travel in and out of the province for work, including truck drivers".(*7)

British Columbia has classified "wholesale/ warehousing employees" and "cross-border transport staff" as "front-line priority workers" for the AstraZeneca/SII COVISHIELD vaccine, starting sometime in April.(*8)

The plans for Alberta,(*9) Saskatchewan,(*10) and Manitoba (*11) are primarily based upon age. No special priority is given to the supply chain sector.

Quebec, similarly, has made no special provision for supply chain workers.(*12).

In the territories, all adults over 18 years old are eligible for a vaccine now. Residents should consult the availability in their local areas.

Alan S. Cofman

Endnotes

(*1) Populations Eligible for Phase Two COVID-19 Vaccination, online : <https://news.ontario.ca/en/backgrounder/60570/populations-eligible-for-phase-two-covid-19-vaccination>.

(*2) See "Ontario's COVID-19 Vaccination Plan", online: <https://covid-19.ontario.ca/ontarios-covid-19-vaccination-plan>.

(*3) "Coronavirus (COVID-19): Vaccine", online: <https://novascotia.ca/coronavirus/vaccine/>.

(*4) "COVID-19 Vaccines and Immuniczation Phased Approach", online, <https://www.princeedwardisland.ca/en/information/health-and-wellness/covid-19-vaccines-and-immunization-phased-approach>.

(*5) Updated COVID-19 Vaccination Plan", online: <https://www2.gnb.ca/content/gnb/en/news/news_release.2021.03.0194.html>.

(*6) COVID-19 Vaccines, online: <https://www2.gnb.ca/content/gnb/en/corporate/promo/covid-19/nb-vaccine.html#3>.

(*7) Newfoundland and Labrador COVID-19 Immunization Plan, online: <https://www.gov.nl.ca/covid-19/vaccine/files/NL-COVID19-Immunization-Plan-1.pdf.>

(*8) COVID-19 Immunization Plan, online: <https://www2.gov.bc.ca/gov/content/covid-19/vaccine/plan#front-line-priority>.
(*9) COVID-19 Vaccine Program, online: <https://www.alberta.ca/covid19-vaccine.aspx#phases>.
(*10) Vaccine Delivery Phases, online: <https://www.saskatchewan.ca/government/health-care-administration-and-provider-resources/treatment-procedures-and-guidelines/emerging-public-health-issues/2019-novel-coronavirus/covid-19-vaccine/vaccine-delivery-phases>.
(*11) COVID-19 Vaccine: Current Eligibility Criteria", online: <https://www.gov.mb.ca/covid19/vaccine/eligibility-criteria.html>.
(*12) COVID-19 Vaccination Campaign, online: <https://www.quebec.ca/en/health/health-issues/a-z/2019-coronavirus/progress-of-the-covid-19-vaccination/#c78786>.

3. The Personal Liability of Corporate Directors for Unpaid Wages Pursuant to Business Corporations Legislation

In its recent decision *Abbasbayli v. Fiera Foods Company et al*. ("*Abbasbayli*") (*1), the Court of Appeal for Ontario offered some useful commentary regarding statutory claims that might be alleged against corporate directors in a wrongful dismissal action involving unpaid wages.

Facts

In *Abbasbayli,* the appellant commenced an action against his employers, together referred to as "Fiera," as well as two individual corporate directors of Fiera in their personal capacities, with respect to the termination of his employment for cause. The appellant, who was terminated on the basis of time-theft accusations, alleged that his termination amounted to a reprisal because he had raised concerns about health, safety and storage requirement violations by Fiera, and had taken steps to encourage other employees to unionize. The appellant sought wrongful dismissal damages, and moral and punitive damages against Fiera arising from the bad faith manner of his dismissal. He additionally advanced claims against the individual directors for unpaid vacation under section 81 the *Employment Standards Act, 2000 ("ESA")* (*2) and under section 131 of Ontario's *Business Corporations Act ("OBCA")* (*3), as well as relief from oppression under section 248 of the *OBCA*.

To offer some context, section 81 of the ESA stipulates certain conditions to be met before personal liability can be imposed on corporate directors of an employer for unpaid wages.

Section 131 of the *OBCA* provides that directors may be held liable for debts owing to employees arising from services performed by the employees for the corporation, up to a maximum of six months' wages, only if (i) the corporation is sued in the action against the director and execution against the corporation is returned unsatisfied, in whole or in part; or (ii) before or after the action is commenced, the corporation becomes involved in insolvency proceedings and the employee's claim for the debt has been proved.

Section 248 of the *OBCA* provides for a personal remedy available to a complainant where a corporation or its affiliates or directors act in a manner that is oppressive, unfairly prejudicial, or unfairly disregards the complainant's interests.

The Motion Judge's Decision

The respondents brought a motion to strike certain portions of the appellant's claim for failing to disclose a reasonable cause of action (that is, a complaint for the court to be able to address), for pleading evidence (as opposed to the proper practice of only placing facts of a case before the court), and for being irrelevant and inflammatory. The motion judge struck the appellant's claims for unpaid wages under section 81 of the *ESA* and section 131 of the *OBCA*, finding that those claims had no reasonable prospect of success. The motion judge additionally struck the appellant's oppression claim pursuant to section 248 of the *OBCA*, but granted leave to the appellant to amend those portions of the claim specific to the oppression claim in order to clarify the reasonably-held expectations that the appellant claimed were violated by the individual directors in an oppressive manner.

The Court of Appeal's Decision

The Court of Appeal for Ontario agreed with the motion judge that the claims against the directors under section 81 of the *ESA* were insufficient to meet the requirements to trigger that section.

The Court of Appeal further agreed that the motion judge properly granted the appellant leave to amend his oppression claim, and offered the following general observations concerning

oppression claims in the context of wrongful dismissals:

i. a wrongful dismissal on its own will not usually justify a finding of oppression;
ii. a former employee is not always a "complainant" as intended under section 248 of the *OBCA;*
iii. oppression claims typically asserted in the wrongful dismissal context are those made by shareholder employees whose interests have been unfairly disregarded;
iv. it is not sufficient for a terminated employee to plead that individual defendants acted oppressively as directors of the corporate defendants and to claim all of the former employees' damages against the directors by relying on section 248 of the *OBCA;* and,
v. it is not sufficient for a terminated employee to allege that the directors directed the termination or that the directors failed to issue a Record of Employee to the former employee.

The Court of Appeal further laid out the necessary elements of an oppression claim under section 248 of the *OBCA*:

i. the complainant must identify the reasonably held expectations that they claim were violated by the conduct alleged;
ii. the complainant must show that these reasonable expectations were violated by corporate conduct in a way that was oppressive, unfairly prejudicial, or that unfairly disregarded the interests of any security holder, creditor, director or officer of the corporation; and
iii. there must be oppressive conduct that is properly attributable to the director's implication in the oppression, and the imposition of personal liability must be fit in all of the circumstances.

The Court of Appeal disagreed with the motion judge's decision to strike the claim against the individual directors for unpaid wages under section 131 of the *OBCA* and found that the appellants claim for three weeks' vacation pay was able to properly ground a claim under that section. The Court of Appeal opined that it was not premature for the appellant to assert a claim for unpaid wages under section 131, because this section contemplates the corporate employers being sued in the same action as the directors (which was the case in *Abbasbayli*), although the defendant directors would not become liable to pay the accrued vacation pay until execution against Fiera was returned unsatisfied.

Takeaway

The Court of Appeal's decision in *Abbasbayli* confirms that employment claims, inclusive of unpaid wages and wrongful dismissal claims, can be advanced against directors personally under applicable business corporations statutes, even in cases where such claims may not be actionable under employment standards statutes. Where any such claims are advanced pursuant to business corporations legislation, complainants should ensure that their pleadings are styled in a manner compliant with statutory and common law requirements.

Janice C. Pereira

Endnotes
(*1) 2021 ONCA 95 ["*Abbasbayli*"].
(*2) S.O. 2000, c. 41 ["*ESA*"].
(*3) R.S.O. 1990, c. B. 16 ["*OBCA*"].

4. Downgrade of Commercial Class D Driver's Licence for Medical Reasons

On June 9, 2019 Thomas Lengyel was involved in a motor vehicle accident ("MVA"). This MVA led both a police officer attending the scene and an emergency room ("ER") physician to file information with the Registrar of Motor Vehicles (the "Registrar") expressing their respective concerns that Mr. Lengyel "may be or is suffering" from a medical condition that may make it unsafe or dangerous for him to operate a motor vehicle.

Mr. Lengyel's driver's licence was suspended for medical reasons on July 16, 2019.

On October 8, 2020 Mr. Lengyel's Class GM driver's licence was reinstated.

However, the Minister refused to reinstate the Class D license, in effect downgrading the licence to Class GM.

Under the *Highway Traffic Act* (Ont) the Minister of Transportation is responsible for ensuring that commercial drivers are medically fit to drive commercial vehicles on the highway pursuant to section 32(5)(b)(i) of the Act and section 14(1)(a) of Ontario Regulation 340/94.

The Minister may require a driver to provide satisfactory evidence that he or she is able to drive safely.

A person whose license is downgraded may appeal the downgrade to the Ontario Licence Appeal Tribunal. On appeal, the Minister has the burden of establishing that the licence should remain downgraded on the balance of probabilities.

Mr. Lengyel appealed the Minister's downgrade of his Class D licence.(*1) The issue in the appeal was whether Mr. Lengyel suffered from a medical condition, specifically seizures, which was likely to significantly interfere with his ability to drive a commercial vehicle safely.

On the appeal Mr. Lengyel testified that he was told that on June 9, 2019 he suffered two seizures, one while driving his personal vehicle home from the grocery store and one while in the ER of the hospital following the MVA. The appellant also testified that he had a witnessed a seizure while sleeping in 2017, when he was on holidays outside of Canada.

He also testified that there was "nothing wrong with [him]" as the doctors involved in his care did not find anything wrong despite all of his tests. These tests included electroencephalograms ("EEG"s), which measure the electrical activity of the brain and magnetic resonance imaging ("MRI") of his brain.

He further stated that he did not have any follow-up visit or call booked with his treating neurologist, Dr. I., had refills on his anti-seizure medication, had no family doctor and did "not have a condition to monitor".

He was of the opinion that his seizures were likely caused by stress. He stated that it is known that stress, anxiety or even lack of sleep can "bring out" seizures. Furthermore, he stated that at the time of his seizures noted above, he was stressed, anxious and not sleeping well because of the breakdown of his marital relationship over the preceding few years.

The adjudicator, however, noted that the e-discharge summary from his hospital stay in June 2019 following the MVA provided some information, stating:

> …the e-summary specifically states that neither the appellant's low calcium nor sleep deprivation at that time were likely the cause of his seizures, though it was possible they played a slight contributing role. In medical terms, if something is described as likely, it will meet the balance of probabilities test, whereas if it is described as slight, it will not. Furthermore, in the ES form Dr. I. checked off that the etiology or cause of the appellant's seizures is idiopathic or

> unknown. In the ES form Dr. I. had the opportunity to check off "provoked seizure with no structural brain abnormality", as the cause of the appellant's seizures, but he did not. Nowhere in either the MR or ES forms does Dr. I. mention stress, anxiety or sleep-deprivation. Furthermore, the Tribunal is aware that a normal EEG and normal MRI do *not* rule out the medical condition of seizures. This is consistent with the fact that Dr. I. told the appellant that by testing he could not find anything wrong, but that on a cellular level there may be something wrong with the appellant's brain. In medical terms, not being able to find anything wrong does not mean that there is not something wrong. [paragraph 27]

The adjudicator found on a balance of probabilities that Mr. Lengyel had suffered a number of seizures over the past four years or so and suffered from the medical condition of seizures.

Section 14(2)(a) of Regulation 340/94 allows the Minister to consider the Canadian Council of Motor Transport Administrators Medical Standards for Drivers (the "CCMTA Standards") when determining whether the requirements of s. 14(1) are met. Similarly, the Ontario Licence Appeal Tribunal to take the CCMTA Standards into consideration, although they are not binding requirements. The Standards emphasize making a risk analysis of all relevant sources of information that considers factors, including whether the impairment is persistent or episodic and the individual characteristics and abilities of each driver (e.g. whether the driver is a commercial or non-commercial driver, the driver's ability to compensate for any impairment, the driver's compliance with treatment, and whether the driver has insight into their medical condition and the impact that their medical condition may have on driving).

The adjudicator found that Mr. Lengyel lacked adequate insight into his medical condition of seizures. At the time of the hearing he had yet to accept that he had a medical condition that required monitoring or that he suffered from idiopathic seizures (unknown cause) and his previous stress, anxiety or sleep-deprivation likely played only a slight contributing role in his generalized seizures.

The adjudicator noted that as per the CCMTA Standards, commercial drivers spend more time driving in inclement weather and under far more adverse driving conditions than drivers of non-commercial vehicles, cannot readily abandon their vehicle should they become unwell and should a crash occur, the consequences of a crash are much more likely to be serious.

In an October 8, 2020 letter to Mr. Lengyel, the Minister was of the opinion that, in order to reinstate his commercial driver's licence, it required confirmation that Mr. Lengyel had remained seizure free for a period of five years, with or without medication.

The adjudicator also noted that there was no written evidence from Dr. I. substantiating Mr. Lengyel's claim that Dr. I., his treating neurologist, saw no reason why he was not able to continue operating a commercial vehicle.

The adjudicator having considered all of the evidence, found that on a balance of probabilities, Mr. Lengyel suffered from the medical condition of seizures. Furthermore, he found on a balance of probabilities, that this medical condition of seizures was likely to significantly interfere with his ability to drive a commercial Class D vehicle safely.

The Minister's downgrade of the license was upheld.

Rui Fernandes

Endnotes

(*1) *Lengyel v. Minister of Transportation*, 2021 CanLII 11897 (ON LAT).

6. Procurement Complaints to the Canadian International Trade Tribunal

A potential supplier to a government procurement process may file a complaint to the Canadian International Trade Tribunal ("CITT"). The Tribunal is required to determine if the complaint complies with the *Canadian International Trade Tribunal Act* and then is required to decide whether to conduct an inquiry into the complaint.

There are strict timelines for filing of complaints. A complainant has ten working days from the date on which it first becomes aware or reasonably should have become aware, of its ground of complaint to either (1) object to the government institution or (2) file a complaint with the Tribunal. If a complainant objects to the government institution within this time frame and is denied relief, then the complainant may file a complaint with the Tribunal within 10 working days of receiving actual or constructive knowledge of the denial of relief. (*1)

The Federal Court of Appeal has stated that in procurement matters, time is of the essence. "… potential suppliers are required not to wait for the attribution of a contract before filing any complaint they may have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should become aware of a flaw in the process." (*2)

The decision of the CITT in *Seacoast A Division of Polifibra Canada (1987) Inc. v. Department of National Defence* (*3) is illustrative of the application of the strict timelines.

The complaint to the CITT related to a Request for Proposals ("RFP") by the Department of National Defence ("DND") for the provision of electrical wire (Solicitation No. W8482-218004/A).

The complainant, Seacoast a division of Polifibra Canada (1987) Inc. ("Seacoast"), alleged that the product description in the RFP was vague, that the RFP specified a proprietary part number, and that DND did not answer its technical questions. Seacoast requested that DND issue a new solicitation.

Background

The solicitation was published on July 31, 2020.

On August 6, 2020, Seacoast contacted DND to allege that the product description of the RFP was vague and to request clarification. DND responded on September 2, 2020.

On September 9, 2020, the bid closing deadline was extended to September 30, 2020.

On September 21, 2020, Seacoast requested further clarification from DND on technical elements of the product description.

On September 30, 2020, the bid closing deadline was again extended until October 21, 2020.

On October 21, 2020, Seacoast followed up with DND to ask whether the tender would be extended and to again request answers to its technical questions. On October 22 and 29, 2020, Seacoast again contacted DND to note that the tender had not been extended, that the deadline had now passed, and that it still had not received a reply to its technical questions. There is no indication that DND responded to any of the queries that Seacoast sent between September 21, 2020, and October 29, 2020.

DND awarded the contract on December 17, 2020.

On December 22, 2020, Seacoast contacted the Tribunal to indicate that it wished to dispute the contract award. The same day, the Tribunal sent Seacoast instructions on how to file a complaint and informed Seacoast of the deadlines for filing a complaint.

Seacoast filed its complaint on January 4, 2021.

The Tribunal decided not to conduct an inquiry into Seacoast's complaint on January 5, 2021.

Analysis

The Tribunal found that Seacoast's initial objection to the contracting authority was timely. Seacoast's central grounds of complaint—i.e. that the product definition allegedly was vague and contained a proprietary part number—became known when the solicitation was published. Within 10 working days of the publication of the solicitation, Seacoast had objected to DND about the vagueness of the product description.

However, the complaint to the Tribunal was not timely. The complaint had to be filed within 10 working days of Seacoast receiving actual or constructive knowledge that DND had denied the relief it sought in its objection.

The Tribunal considered Seacoast to have had constructive knowledge of the denial of relief when the solicitation closed on October 21, 2020. Previously, the Tribunal has interpreted "constructive knowledge of the denial of relief" to include instances where the complainant's objection has not been addressed by the time of bid closing.

The Tribunal found there was no indication that DND replied to any of the four emails that Seacoast sent between September 21, 2020, and October 29, 2020, in which Seacoast repeatedly requested clarification on the product description. However, by the time that the solicitation had closed on October 21, 2020, Seacoast ought to have known that it had effectively been denied relief by DND. It would have been too late for Seacoast to have received clarification on the product description after bidding had closed.

Seacoast's deadline to complain to the Tribunal was therefore November 4, 2020, 10 working days after the solicitation closed. Seacoast did not contact the Tribunal until December 22, 2020, and it did not file its complaint until January 4, 2021. Its complaint was therefore about two months late.

The Tribunal found that Seacoast's complaint was not filed within the deadlines set out in subsection 6 of the *Regulations*

The Tribunal therefore decided not to conduct an inquiry into Seacoast's complaint on January 5, 2021.

Rui Fernandes

Endnotes

(*1) See Subsections 6(1) and (2) of the Canadian International Trade Tribunal Procurement Inquiry Regulations.

(*2) *IBM Canada Ltd. v. Hewlett Packard (Canada) Ltd.* 2002 FCA 284 at paras. 18, 20.

(*3) 2021-01-12 CITT Case no. PR-2020-072

6. Missing a Flight Due to Personal Immigration Issues are Not Damages Occasioned by Delay Under the Montreal Convention

Mpamugo v FlightHub Canada Inc. et al., 2021 ONSC 1671 (CanLII) is the latest airline case in Ontario showcasing the strength of the *Montreal Convention* in Canada and demonstrating that claims that do not fall under it will be dismissed early on by the Court.

The plaintiffs, Lawrence and Kathleen Mpamugo (the "**Mpamugos**"), sued FlightHub, WestJet, and Delta Air Lines for approximately $7.5 million plus punitive damages of $500,000 for breach of contract and negligence. Due to immigration issues, Lawrence Mpamugo was unable to clear United States customs and board his flight. The plaintiffs claimed that Delta Air Lines owed them a duty, in contract and negligence, to replace their tickets with flights on another airline to transport them to Nigeria at the time that they were supposed to arrive there on their original Delta Air Lines flight.

Delta Air Lines brought a motion to dismiss the claims against it for disclosing no reasonable cause of action (that is, a complaint that can be addressed by the Court). The Court found in favour of Delta Air Lines.

The Mpamugos booked airline tickets online for their trip from Toronto to Nigeria on FlightHub.com. The Mpamugos were to travel from Toronto to Atlanta, Georgia on WestJet, and then from Atlanta to Nigeria on Delta Air Lines.

The Mpamugos were travelling to Nigeria because Lawrence was to attend his coronation as Eze or King of Ikwuano County, Umuahia in Abia State of Nigeria. The plaintiffs also needed to arrange for their ill daughter in Nigeria to be flown to London, England for medical care.

At the time of booking, Kathleen did not realize that Lawrence had potential immigration issues with the United States. After booking the trip, Kathleen called FlightHub who assured her that their tickets could be changed to fly through Europe. The Mpamugos alleged that FlightHub said that someone would get back to her, but no one did. A few days before the flights were scheduled to leave, Kathleen again called FlightHub, who told her to pick up their new tickets at the WestJet counter at Pearson Airport on the day of their trip.

When the Mpamugos attended at the WestJet counter, there were no tickets waiting for them. WestJet suggested they try to speak to someone at Delta Air Lines. The Delta Air Lines agent advised the Mpamugos that nothing could be done at that time, however, if for some reason the plaintiffs were unable to fly through the United States, they could come back to her to rebook their flight to fly through Europe with Air France or Lufthansa.

The Mpamugos proceeded to US Customs and Immigration Service in advance of their Toronto to Atlanta flight on WestJet. Kathleen cleared US immigration and could have boarded the flight; however, Lawrence was denied permission to enter the United States.

The Mpamugos claimed that they got the "runaround" by FlightHub, WestJet and Delta Air Lines. The plaintiffs were unable to get to Nigeria for a week. As a result, they alleged that Lawrence lost his entitlement to the throne and accompanying benefits. In addition, the plaintiffs claimed that their daughter passed away before they were able to get to Nigeria to take her to England for medical care.

The question on the motion was whether it was plain and obvious that the claim as pleaded could not succeed even if the plaintiffs proved at a trial everything that they alleged. Secondly, whether, with amendment, the claim might be restated in a way that might succeed.

The Court found that the claims were governed by the *Carriage by Air Act*, RSC 1985, c C-26 which proclaims into force in Canada the Montreal Convention (the Convention for the Unification of Certain Rules Relating to International Carriage by Air).

Article 29 of the Montreal Convention limits claims against airlines relating to air travel to those allowed under the convention.

The plaintiffs rely upon Article 19 of the Montreal Convention which reads as follows:

> Article 19 — Delay
>
> The carrier is liable for damage occasioned by delay in the carriage by air of passengers, baggage or cargo. Nevertheless, the carrier shall not be liable for damage occasioned by delay if it proves that it and its servants and agents took all measures that could reasonably be required to avoid the damage or that it was impossible for it or them to take such measures.

The Court found that missing a flight due to immigration problems was not "damage occasioned by delay in the carriage of passengers". There was no contractual term pleaded whereby Delta Air Lines was responsible for the plaintiffs' immigration problem that prevented them from travelling.

> "Airlines cannot assure passengers of their personal immigration status and cannot be held liable for the passengers' failure to ensure that they have arranged visas or other documents required to enter a country to which they wish to fly."

The plaintiffs also claimed against Delta Air Lines in negligence, pleading that Delta Air Lines owed a duty of care to the plaintiffs as a booking agent and as an airline transportation company. The plaintiffs alleged that Delta Air Lines breached its duty of care when, among other things, it knew or ought to have known that Lawrence would not be allowed by the USA immigration to board West Jet or Delta Airlines travelling through/transit in the USA to Nigeria having been informed of the plaintiff's prior predicament/plight with travelling through the USA.

The Court found that the plaintiffs pleaded no basis in law for the duties they alleged; nor was there a basis to find a duty for care outside of the express terms of the parties' highly regulated contract. The plaintiffs also presented no basis in law to allege that they were entitled to sue outside of the *Montreal Convention* to force an airline whose flight they missed due to their own immigration issues to rebook the Mpamugos (a) on a competitor airline; (b) transiting only through countries which they were authorized to enter; and (c) to arrive at the same time as the missed flight and to hold the airline liable for failing to do so. It was plain and obvious that the plaintiffs could not succeed on their claim as drafted.

The plaintiffs next argued that they should be able to amend their claim again to include that when the Delta Air Lines desk clerk said she could rebook the flight through Europe, and then Delta Air Lines was unable to help, Delta Air Lines caused the plaintiffs' losses and should be held liable.

The Court found that it was plain and obvious that a gratuitous offer to help was not a contractual promise. There was no consideration flowing to Delta Air Lines. Moreover, the airline's liability still remained subject to the Montreal Convention.

Lastly, the Court found that there was nothing that the plaintiffs could plead that would make Delta Air Lines responsible for the plaintiffs' failure to ensure that they had the ability to enter the United States to get to Atlanta for the flight that they booked. They might have an ability to claim a refund for their unused tickets depending on the wording of the applicable tariff. However, there was simply no basis in the law for an amendment to make Delta responsible in contract or tort for the losses suffered by the plaintiffs in the circumstances.

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DISCLAIMER & TERMS

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