Date: 20080402

Docket: T-2048-07

Citation: 2008 FC 414

Ottawa, Ontario, April 2, 2008

PRESENT: The Honourable Mr. Justice Hugessen

BETWEEN:

GPEC INTERNATIONAL LTD.

Applicant

and

CANADIAN COMMERCIAL CORPORATION

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] I have before me three separate interlocutory motions, all arising out of an underlying application in which the applicant (GPEC) seeks judicial review of the decision of an Arbitral Panel which had been established in accordance with the parties' contract and the *Commercial Arbitration Act*, R.S.C. 1985, c. 17 (2nd Supp.) (CAA). In the first motion, the respondent (CCC) seeks an order striking or, in the alternative, staying the underlying application, and seeks security for costs should the application be allowed to continue. In the second motion, which was granted by consent at the

hearing on March 27, 2008, CCC sought an extension of time to serve and file its responding affidavits. In the third motion, GPEC seeks an order prohibiting the Arbitral Panel from proceeding with the second phase of the arbitration until the underlying application has been finally decided.

FACTS

[2] The underlying dispute between the parties is related to a design and build contract (Project Contract) for construction of a landfill (Project) for the St. Lucia Solid Waste Management Authority (Employer). The Project Contract was initially awarded to a joint venture between GPEC and its partner in St. Lucia, in May 2000. However, in June 2000, the Project Contract was novated to CCC, on the condition that it be GPEC which performed the works associated with the Project. In July 2000, a contract was entered into between the parties to this application, in which GPEC undertook to perform the works associated with the Project on behalf of CCC (Domestic Contract).

[3] The Domestic Contract includes a term stipulating that disputes are to be resolved by arbitration in accordance with the CAA:

> While disputes between CCC and the Employer are governed by the provisions of the Novated Agreement, in the event of any dispute between the Supplier and CCC under this Contract, the parties shall attempt to settle the matter amicably. In the event that the matter is not so settled and either party wishes to pursue the matter further, it shall be referred to arbitration in accordance with the *Commercial Arbitration Act* (R.S.C. 1985 c. 17, 2nd Sup.). The arbitration decision shall be final and binding upon both parties.

[4] It is the Domestic Contract which has given rise to the underlying application. A number of problems arose in relation to the Project, and the parties sent a number of disputes for consideration

by the Arbitral Panel, which was appointed in early 2004. A Dispute Arbitration Board was also established to deal with disputes arising under the Project Contract, but its proceedings are not directly in issue in these proceedings.

[5] At the request of GPEC, the hearing before the arbitrators proceeded in two phases, and the Phase 1 hearings began in June 2006. Certain of GPEC's claims were to be heard in Phase 1, along with CCC's counterclaims to the extent necessary to resist GPEC's Phase 1 claims, with Phase 2 to deal with the remaining claims and counterclaims.

[6] On June 29, 2006, CCC terminated the Domestic Contract. However, Phase 1 hearings continued with the full participation of both parties.

[7] On April 4, 2007, CCC entered into a settlement agreement with the Employer concerning the Project Contract (Settlement Agreement). GPEC was advised of this settlement on April 19, 2007, and, although it requested details concerning the settlement, it made no objection to the arbitration pursuing its course.

[8] On October 24, 2007, the Arbitral Panel rendered its decision on the Phase 1 issues (Interim Award), allowing GPEC's claim in certain respects but dismissing it in others, and it is this award which has given rise to the present application by GPEC, filed November 23, 2007. The relief sought is the following:

> 1. An Order, pursuant to Articles 18 and 34 of the *Commercial Arbitration Code*, Schedule to the CAA (the "Code") and section

> 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, setting aside the Interim Award, and
>
> 2. An Order declaring that the arbitration clause of the Domestic Contract is no longer in force or effect as a result of CCC's notice of termination of the Domestic Contract and the Settlement Agreement.

[9] GPEC bases its application on the existence of a number of "palpable and overriding errors of fact and law" which cause the Interim Award to be "contrary to the principles of natural justice and […] in conflict with public policy because it contravenes fundamental notions and principles of justice".

[10] On December 7, 2007, the Arbitral Panel released a number of directions, including an invitation to GPEC to bring a motion before the Arbitral Panel with respect to its jurisdiction.

THE COMMERCIAL ARBITRATION CODE

[11] Central to these motions are the provisions of the Code, which are given force of law by the CAA. Of particular relevance are the following provisions:

5. In matters governed by this *Code*, no court shall intervene except where so provided in this *Code*.	5. Pour toutes les questions régies par l*e* présent *code*, les tribunaux ne peuvent intervenir que dans les cas où *celui*-ci le prévoit.
6. The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by *the Federal Court or any superior, county or district court*.	6. Les fonctions mentionnées aux articles 11-3, 11-4, 13-3, 14, 16-3 et 34-2 sont confiées *à la Cour fédérale ou à une cour supérieure, de comté ou de district*.

8. (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

8. 1. Le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage si l'une d'entre elles le demande au plus tard lorsqu'elle soumet ses premières conclusions quant au fond du différend, à moins qu'il ne constate que la convention est caduque, inopérante ou non susceptible d'être exécutée.

(2) Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

2. Lorsque le tribunal est saisi d'une action visée au paragraphe 1 du présent article, la procédure arbitrale peut néanmoins être engagée ou poursuivie et une sentence peut être rendue en attendant que le tribunal ait statué.

16. (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

16. 1. Le tribunal arbitral peut statuer sur sa propre compétence, y compris sur toute exception relative à l'existence ou à la validité de la convention d'arbitrage. À cette fin, une clause compromissoire faisant partie d'un contrat est considérée comme une convention distincte des autres clauses du contrat. La constatation de nullité du contrat par le tribunal arbitral n'entraîne pas de plein droit la nullité de la clause compromissoire.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is

2. L'exception d'incompétence du tribunal arbitral peut être soulevée au plus tard lors du dépôt des conclusions en défense. Le fait pour une partie

not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

d'avoir désigné un arbitre ou d'avoir participé à sa désignation ne la prive pas du droit de soulever cette exception. L'exception prise de ce que la question litigieuse excéderait les pouvoirs du tribunal arbitral est soulevée dès que la question alléguée comme excédant ses pouvoirs est soulevée pendant la procédure arbitrale. Le tribunal arbitral peut, dans l'un ou l'autre cas, admettre une exception soulevée après le délai prévu, s'il estime que le retard est dû à une cause valable.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

3. Le tribunal arbitral peut statuer sur l'exception visée au paragraphe 2 du présent article soit en la traitant comme une question préalable, soit dans sa sentence sur le fond. Si le tribunal arbitral détermine, à titre de question préalable, qu'il est compétent, l'une ou l'autre partie peut, dans un délai de trente jours après avoir été avisée de cette décision, demander au tribunal visé à l'article 6 de rendre une décision sur ce point, laquelle ne sera pas susceptible de recours; en attendant qu'il soit statué sur cette demande, le tribunal arbitral est libre de poursuivre la procédure arbitrale et de rendre une sentence.

19. (1) Subject to the provisions of this *Code*, the parties are free to agree on the procedure to be

19. 1. Sous réserve des dispositions *du* présent *code*, les parties sont libres de convenir

followed by the arbitral tribunal in conducting the proceedings.

de la procédure à suivre par le tribunal arbitral.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this *Code*, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

2. Faute d'une telle convention, le tribunal arbitral peut, sous réserve des dispositions *du* présent *code*, procéder à l'arbitrage comme il le juge approprié. Les pouvoirs conférés au tribunal arbitral comprennent celui de juger de la recevabilité, de la pertinence et de l'importance de toute preuve produite.

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

34. 1. Le recours formé devant un tribunal contre une sentence arbitrale ne peut prendre la forme que d'une demande d'annulation conformément aux paragraphes 2 et 3 du présent article.

(2) An arbitral award may be set aside by the court specified in article 6 only if:

2. La sentence arbitrale ne peut être annulée par le tribunal visé à l'article 6 que si, *selon le cas* :

(a) the party making the application furnishes proof that:

a) la partie en faisant la demande apporte la preuve :

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of *Canada*; or

i) *soit* qu'une partie à la convention d'arbitrage visée à l'article 7 était frappée d'une incapacité; ou que ladite convention n'est pas valable en vertu de la loi à laquelle les parties l'ont subordonnée ou, à défaut d'une indication à cet égard, en vertu de la loi *du Canada*;

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

ii) *soit* qu'elle n'a pas été dûment informée de la nomination d'un arbitre ou de la procédure arbitrale, ou qu'il lui a été impossible pour une autre raison de faire valoir ses droits;

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or 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 award which contains decisions on matters not submitted to arbitration may be set aside; or

iii)*soit* que la sentence porte sur un différend non visé dans le compromis ou n'entrant pas dans les prévisions de la clause compromissoire, ou qu'elle contient des décisions qui dépassent les termes du compromis ou de la clause compromissoire, étant entendu toutefois que, si les dispositions de la sentence qui ont trait à des questions soumises à l'arbitrage peuvent être dissociées de celles qui ont trait à des questions non soumises à l'arbitrage, seule la partie de la sentence contenant des décisions sur les questions non soumises à l'arbitrage pourra être annulée;

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this *Code* from which the parties cannot derogate, or, failing such agreement, was not in accordance with this

iv) *soit* que la constitution du tribunal arbitral, ou la procédure arbitrale, n'a pas été conforme à la convention des parties, à condition que cette convention ne soit pas contraire à une disposition de la présente loi à laquelle les parties ne peuvent déroger, ou, à défaut d'une

Code; or	telle convention, qu'elle n'a pas été conforme à la présente loi;
(b) the court finds that:	*b*) le tribunal constate :
(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of *Canada*; or	i) *soit* que l'objet du différend n'est pas susceptible d'être réglé par arbitrage conformément à la loi *du Canada*;
(ii) the award is in conflict with the public policy of *Canada*.	ii) *soit* que la sentence est contraire à l'ordre public *du Canada*.
(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.	3. Une demande d'annulation ne peut être présentée après l'expiration d'un délai de trois mois à compter de la date à laquelle la partie présentant cette demande a reçu communication de la sentence ou, si une demande a été faite en vertu de l'article 33, à compter de la date à laquelle le tribunal arbitral a pris une décision sur cette demande.
(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.

ANALYSIS

1. The motion to strike GPEC's Application

[12] It is clear to me beyond any doubt that, to the extent that GPEC's application to set aside the interim award relies on jurisdiction conferred on this Court by the *Federal Courts Act*, such jurisdiction is altogether lacking. The Arbitral Panel is not a "federal board" within the meaning of the *Federal Courts Act*, and does not derive its powers or authority from any federal statute. While the CAA is, of course such a law, it does no more than provide a framework within which parties are free, as they have done here, to submit a dispute to arbitration in accordance with its terms. To put it simply, while the Code may define the extent and manner of exercise of the arbitrators' powers, those powers themselves find their sole source in the agreement of the parties to submit to arbitration (*Rampton v. Eyre*, 2007 ON CA 331, [2007] O.J. No. 1687 (QL)).

[13] It follows that the motion to strike must succeed, but only to the extent that the application relies on the powers, including the power to issue declaratory relief, conferred on this Court by the *Federal Courts Act*. If counsel cannot agree on the proper form of detailed Order to give effect to this finding, counsel for CCC may, if necessary, move pursuant to Rule 369 for the entry of a formal judgment.

2. The motion to stay GPEC's application

[14] It is clear, and indeed conceded by CCC, that GPEC's application is not based solely on the *Federal Courts Act*. Article 34 of the Code, when read in conjunction with article 6, also confers on this Court a clear power to set aside arbitral awards in defined circumstances. Those circumstances

are narrowly enumerated by the Code itself and have also been generally narrowly interpreted by the Courts (see *e.g. Canada (Attorney General) v. S.D. Myers Inc.*, [2004] 3 F.C.R. 368, [2004] F.C.J. No. 29 (T.D.) (QL); *Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET International, S.p.A.* (1999), 45 O.R. (3d) 183, [1999] O.J. No. 3573 (S.C.J.), aff'd (2000), 49 O.R. (3d) 414 (C.A.), leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 581; *NetSys Technology Group AB v. OpenText Corp.*, [1999] O.J. No. 3134 (S.C.J.) (QL)).

[15] While attempting to persuade me that the application could not possibly succeed under subsection 34(2), counsel for CCC quite properly refrained from arguing the merits of the application at this stage of the case.

[16] The case law in this Court is clear to the effect that, first, motions to strike are only to be granted where it is clear beyond peradventure that the plaintiff cannot succeed (*Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93 (QL)), and second, that, especially in matters of applications for judicial review, judicial economy requires that, except in the very clearest of cases, objections to the pleadings should be made only at the hearing of the application on its merits (*David Bull Laboratories v. Pharmacia Inc.*, [1995] 1 F.C. 588, [1994] F.C.J. No. 1629 (C.A.) (QL)).

[17] While this Court's lack of jurisdiction under the *Federal Courts Act* is so evident that in my view it is appropriate to give effect to a motion to strike, that is not so with regard to the jurisdiction

conferred by article 34 of the Code, and I must therefore move on to consider CCC's alternative claim for relief, namely a request that I enter a stay of the application.

[18] On a review of the above quoted provisions of the Code, it seems clear to me that the determination of questions relating to their own jurisdiction falls squarely within the powers granted to the arbitrators themselves (see especially article 16). The Court is directed, by article 8, to defer any arbitrable questions to the arbitrators and, logically, this would include any question of the arbitrators' powers. That this is indeed the case is made even clearer by subsection 34(4). The highest authority has it that objections to arbitrators' jurisdiction should be made to and decided, at least initially, by the arbitrators themselves (*Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] S.C.J. No. 34 (QL). See also *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 at paras. 11-13, [2007] S.C.J. No. 35 (QL)).

[19] Furthermore, it would appear to me that as a matter of policy the Court should, whenever possible, favour recourse to arbitration and discourage applications such as this one which necessarily have the effect (and perhaps even the object) of halting an arbitration in mid-stream and frustrating the parties' expressed contractual intention to make use of this method for settling their disputes. This is not a case in which the Court is called upon to apply the traditional three part test for granting interlocutory stays or injunctions (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.* [1987] 1 S.C.R. 110, [1987] S.C.J. No. 6 (QL); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 (QL)). Rather, it is a case of the Court having no discretion but to give effect to a clear direction founded in both statute and in

policy to respect the parties' expressed desire to submit to arbitration (*Nanisivk Mines Ltd. v. F.C.R.S. Shipping Ltd.*, [1994] 2 F.C. 662, [1994] F.C.J. No. 171 (C.A.) (QL)). It is not beside the point to note that the arbitrators have already held a full nine weeks of trial and have given a detailed and lengthy award resulting therefrom.

[20] Accordingly, an Order will go staying GPEC's application and deferring the matter to the arbitrators for the latter to determine first, the challenge to their jurisdiction, and second, if they deem it appropriate, to complete the arbitration and make a final award. I do not think it necessary or desirable in the circumstances to fix in advance any time limit for the exercise of the arbitrators' powers.

3. The request for security for costs

[21] The application having been stayed, the request for security for costs will be dismissed as moot.

4. GPEC's motion to stay the arbitration proceedings

[22] For the reasons given above in support of my decision to stay GPEC's application I would decline to order that the arbitration proceedings be stayed.

5. Costs

[23] CCC has enjoyed substantial success on these motions and should have its costs, to be assessed in the usual way.

ORDER

THIS COURT ORDERS that:

1. The motion of CCC is allowed with costs.

2. GPEC's application is struck to the extent only that it relies on powers granted and relief obtainable under the *Federal Courts Act*.

3. The said application is otherwise stayed and the matter is referred back to the arbitrators with directions to determine GPEC's challenge to their jurisdiction and, if they deem it appropriate to do so, complete the balance of the hearings and render a final award

4. GPEC's motion for a stay of proceedings is dismissed with costs.

"James K. Hugessen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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