CITATION: Clayton et al. v. Attorney General of Canada, 2022 ONSC 6583
COURT FILE NO.: CV-19-617718-0000
DATE: 20221124

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.	)	Gregory J. Nash, John Terry, Brent R.H. Johnston and Emily Sherkey, for the Applicants
Applicants	)	
	)	
– and –	)	
	)	
Attorney General of Canada	)	Karen Lovell and Andrea Bourke, for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** October 19 and 20, 2022

J.T. AKBARALI J.

Overview

[1] In this application, the applicants seek to set aside the damages award made by a three-member tribunal (the "Tribunal") constituted under chapter 11 of the North American Free Trade Agreement ("NAFTA"). The applicants argue that the Tribunal exceeded its jurisdiction, breached principles of natural justice and procedural fairness, and rendered an award contrary to the public policy of Canada.

Brief Factual Background

[2] At this stage, I review the facts only briefly to orient the reader. I review additional facts in my analysis of the issues on this application.

[3] The applicants, with the encouragement of government officials from Nova Scotia, undertook efforts to investigate the feasibility of, and then seek approvals to develop, a quarry in Nova Scotia. The applicants were the largest suppliers of aggregate in New Jersey and had a marine terminal in New York City where they could receive shipments of aggregate for distribution in New York and New Jersey. The quarry project in Nova Scotia was intended to be on Digby Neck, on the Bay of Fundy, in deep water. The applicants planned to develop the

quarry, which they estimated would produce high quality aggregate that they could distribute for about 50 years. They also intended to develop a marine terminal in Nova Scotia, where large ships could be loaded with aggregate for delivery to their marine terminal in New York City. For the applicants, the project represented an opportunity to be their own supplier of high-quality aggregate.

[4] As part of the approvals process, a federal-provincial joint review panel ("JRP"), studied the project and delivered a report entitled "Environmental Assessment of the Whites Point Quarry and Marine Terminal Project". While acknowledging benefits in the form of long-term access to a major aggregate resource, economic development and diversification in the local economy, and job creation, the report recommended rejection of the quarry.

[5] Among other things, the report raised concerns about marine species at risk, including the endangered right whale, which it concluded would be at risk from ship movements, collisions and sonic disturbance from blasting. It raised concern over the destination waters in New Jersey, where organisms known to carry parasitic lobster disease have decimated the local lobster populations, and cautioned that shipping between the Bay of Fundy and New Jersey might bring in unwanted organisms which would be rapidly dispersed in the highly dynamic character of the Bay of Fundy coastline, endangering local marine populations, a risk which it concluded cannot be fully contained with currently used mitigation measures.

[6] The JRP referenced the biophysical burdens of the proposed quarry, including those I note above. Others included wildlife displacements and loss of habitat, possible alteration of destruction of a coastal wetland, and uncompensated greenhouse gas emissions at a time when governments seek reductions in greenhouse gases. It also referenced the social burdens of the project, most of which would be borne by surrounding communities, including changes in quality of life, altered air quality, reduction of groundwater quantity, and lower property values. It found that the economic burdens would fall upon local fishers, harvesters, and tourism operators.

[7] It placed a great deal of weight on what it termed "community core values". It concluded that the inhabitants of Digby Neck and Islands have forged a model of sustainable community development that embraces values including a strong sense of place, a living connection with traditional lifestyles, harmony with the environment, and a strong sense of stewardship. The JRP concluded that imposing a major long-term industrial site would introduce a significant and irreversible change to Digby Neck and Islands, resulting in sufficiently important changes to the community's core values. It concluded the changes to the community's core values was a significant adverse environmental effect that could not be mitigated.

[8] After receiving the JRP report, the federal and Nova Scotia Ministers of the Environment denied approval for the quarry.

[9] The applicants commenced an arbitration under Chapter 11 of the NAFTA. The arbitration was bifurcated. In the liability stage, the majority of the Tribunal determined that

Canada had breached obligations owed to the applicants under the NAFTA, and specifically, by breaching its obligations under Article 1105 to treat the applicants' investments fairly and equitably, and by breaching its obligation under Article 1102 to treat the applicants' investments no less favourably than it has treated investments of its own investors.

[10] Those conclusions were based on the Tribunal's determination that the JRP was a flawed process. It criticized the JRP for considering, and placing a great deal of weight on, community core values in assessing the impact of the quarry project, the meaning of which it found unclear from the JRP report. It found that the applicants were denied reasonable notice of the community core values approach taken by the JRP and the opportunity to seek clarification and respond to it.

[11] In addition, it criticized the JRP for failing to conduct a "likely significant effects after mitigation" analysis on the rest of the project effects, which it was required to do. The Tribunal found that by failing to undertake this analysis, the JRP "denied the ultimate decision makers in government information which they should have been provided".

[12] Canada sought to set aside the liability decision in the Federal Court, but was not successful.

[13] Subsequently, the damages phase of the arbitration took place before the Tribunal. The applicants sought damages equal to the profits they would have earned from the quarry over a 50-year life span, which they calculated at over $440 million. Among other things, Canada argued that the applicants failed to prove that, but for Canada's breach of its NAFTA obligations, the applicants would have received the necessary approvals to develop and operate the quarry. The Tribunal determined that Canada's breach of the NAFTA led the applicants to lose a chance to have a fair environmental assessment process, but that they had not discharged their burden of proof to establish that, but for the breach, they would have obtained the permissions to proceed with the quarry project. The majority of the Tribunal awarded damages in the amount of $7 million USD. In a concurring decision, one member agreed with the quantum, but on a different analytical basis.

[14] The applicants have commenced this application to set aside the Tribunal's damages award. They argue that:

a. The Tribunal exceeded its jurisdiction by failing to apply the standard of proof known to international law, by rendering an arbitrary and perverse award;

b. The Tribunal breached natural justice and procedural fairness by denying the applicants the right to file two rejoinder expert reports in response to what the applicants say was case splitting by Canada[1];

c. The Tribunal rendered an award that conflicts with the public policy of Canada because the award is contrary to fundamental notions and principles of justice, clearly irrational, totally lacking in reality, and perverse. They rely on the alleged excess of jurisdiction and breaches of natural justice. In addition, they submitted that the Tribunal's conclusion on causation, and the date at which to assess damages, reveal a misapprehension of commercial reality and fundamental principles of damages assessment.

[15] Canada argues that this application is an attempt to re-argue the merits of the Tribunal's decision, which is not permitted. It denies that the Tribunal exceeded its jurisdiction in any way, or that its failure to allow the applicants to file additional expert evidence was a breach of procedural fairness and natural justice. It states that the award cannot rationally be considered perverse or morally repugnant, and denies it is contrary to public policy.

Issues

[16] This application raises the following issues:

a. Did the Tribunal exceed its jurisdiction in rendering its damages award by failing to apply the standard of proof known to international law;

b. Did the Tribunal breach the principles of natural justice and procedural fairness by failing to allow the applicants to file two expert reports, thereby denying them the opportunity to present their case fully?

c. Did the Tribunal render an award that was perverse and irrational such that it is contrary to the public policy of Canada?

[17] For the reasons below, I dismiss the application in its entirety.

Relevant Statutory Principles

[18] The arbitration at issue in this proceeding was commenced pursuant to the *Commercial Arbitration Code*, Schedule I to the *Commercial Arbitration Act*, R.S.C. 1985, c. 17. The

[1] The applicants originally argued that one of the Tribunal members was partial, or apprehended to be partial, such that the applicants were deprived of their right to impartiality in the arbitral process. The applicants advised me before the hearing that they were no longer proceeding on this ground.

Commercial Arbitration Code (the "*Code*") is based on the model law adopted by the United Nations Commission on International Trade Law: s. 2, *Commercial Arbitration Act*.

[19] Article 5 of the *Code* provides that, in matters to which it applies, no court shall intervene except in accordance with the *Code*. Article 34(2) of the *Code* provides limited circumstances in which a court may set aside an international arbitral award. Of relevance here, under Article 34(2)(a), a court may set aside an arbitral award where the party making the set-aside application furnishes proof, among other things, that: "… (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 (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…"

[20] Under Article 34(2)(b)(ii), the court may set aside an arbitral award if it finds that the award is in conflict with the public policy of Canada.

Did the Tribunal exceed its jurisdiction?

[21] The parties agree that *United Mexican States v. Cargill*, 2011 ONCA 622 ("*Cargill*") is the leading case on setting aside international arbitral awards. It makes clear that the onus of proving that the award should be set aside lies on the applicants: *Cargill*, at para. 53; see also Article 34 of the *Code*.

[22] In *Cargill*, the Court of Appeal was asked to set aside an international arbitral award on the basis that the tribunal had exceeded its jurisdiction.

[23] The Court of Appeal cautioned that "courts should accord international arbitration tribunals a high degree of deference", and "should interfere only sparingly or in extraordinary cases": para. 33.

[24] Other cases have also recognized the high degree of deference to be accorded to arbitral decisions. For example, in *Bayview Irrigation District #11 v. Mexico*, 2008 CanLII 22120 (ON SC), at para. 13, the court held that according a high degree of deference to arbitral awards is in the interest of comity among nations, predictability in decisions, and respect for autonomy of the parties' chosen panel. In *United Mexican States v. Karpa,* 2005 CanLII 249 (ON CA), at para. 36, the Court of Appeal held that according a high degree of deference to arbitrators' decisions supports the integrity of the arbitral process.

[25] In *Cargill*, the Court of Appeal recognized the dangers of undertaking a review of an arbitral award on a reasonableness standard, noting that once a court enters into a reasonableness review, it is effectively considering the merits of the tribunal's decision and deciding whether that decision is acceptable because it is reasonable, not because it was made within the tribunal's jurisdiction: para. 51. However, the court also confirmed that with respect to true jurisdictional

questions, the standard of review to be applied to the award is correctness, "in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made": at para. 42.

[26] In *Cargill*, at para. 52, the court highlighted the need for the reviewing court to identify and narrowly define any true questions of jurisdiction, that is, whether the tribunal decided an issue that was not part of the submission to arbitration or misinterpreted its authority under the NAFTA. It set out three questions a reviewing court ought to ask itself to define the proper approach to jurisdiction:

a. What was the issue that the tribunal decided?

b. Was that issue within the submission to arbitration made under c. 11 of the NAFTA?

c. Is there anything in the NAFTA, properly interpreted, that precluded the tribunal from making the award it made?

[27] The court summarized the approach in this way, at para. 53:

> The role of the reviewing court is to identify and narrowly define any true question of jurisdiction. The onus is on the party that challenges the award. Where the court is satisfied that there is an identified true question of jurisdiction, the tribunal had to be correct in its assumption of jurisdiction to decide the particular question it accepted and it is up to the court to determine whether it was. In assessing whether the tribunal exceeded the scope of the terms of jurisdiction, the court is to avoid a review of the merits.

[28] In *Alectra Utilities Corporation v. Solar Power Network*, 2019 ONCA 254, the Court of Appeal addressed the concept of jurisdiction and jurisdictional errors. Huscroft J.A., at para. 29, noted Dickson J.'s caution in *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, at p. 223 (in the context of curial review):

> The question of what is and is not jurisdictional is often very difficult to determine. The courts, in my view, should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so.

[29] Huscroft J.A. went on to note, at para. 30, that "the distinction between an error that is jurisdictional in nature – which justifies judicial intervention – and an error made within jurisdiction – which does not – is so fine as to be manipulable. The same matter can be characterized as jurisdictional or non-jurisdictional depending on whether one seeks to intervene or defer" [emphasis in original].

[30] Huscroft J.A. articulated the danger of treating non-jurisdictional errors as jurisdictional errors at paras. 33-34:

> The problem with the respondent's argument is plain: given that an arbitrator's authority stems from the agreement pursuant to which he or she is appointed, any unreasonable or mistaken interpretation of that agreement could be characterized as resulting in an excess or loss of jurisdiction. On this approach, arbitration awards that are not subject to appeal would, nevertheless, be vulnerable to being set aside for jurisdictional error. In effect, arbitrators would have only the jurisdiction to make awards that are reasonable or correct.
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> That is not the law in Ontario. …

[31] The first question before me is thus whether the alleged jurisdictional error the applicants claim is, in fact, a true question of jurisdiction. The applicants allege that the Tribunal failed to apply the governing law, specifically by applying a standard of proof to the applicants that is not known at international law.

[32] I turn to consider the questions laid out in *Cargill* in the context of this case, and the applicants' allegations.

[33] First, the Tribunal in this case decided the issue of damages. At para. 94 of its award, it described the scope of its decision as follows:

> The Tribunal shall briefly address the legal standard of reparation under international law, including the applicable test for causation. The Tribunal shall then recall the breaches of NAFTA Articles 1105 and 1102 that it had determined in its Award on Jurisdiction and Liability. On that basis, the Tribunal shall examine which injury, if any, of the Investors was caused by the Respondent's breaches of NAFTA. It falls to the Tribunal to determine which situation would have prevailed in the absence of the NAFTA breaches found in the Award on Jurisdiction and Liability – in other words, the applicable "but for" scenario. The Tribunal recalls that pursuant to NAFTA Article 1116, an investor is entitled to recover only damages incurred "by reason of, or arising out of" a breach.

[34] Second, the issues identified by the Tribunal were within the submission to arbitration under chapter 11 of the NAFTA. The questions put to the Tribunal are set out in the Notice of Arbitration, at paras. 38 and 39, as follows:

a. Did Canada take measures inconsistent with its obligations under Articles 1102, 1105 or 1103 of the NAFTA?

b. If the answer to the above question is yes, what is the quantum of compensation to be paid to the Investors as a result of the failure by Canada to comply with its obligations arising under Chapter 11 of the NAFTA?

[35] The liability phase of the arbitration answered question (a) in the affirmative. The question for the Tribunal on the damages hearing is set out in (b) above. The issues the Tribunal

decided were clearly within the submission to arbitration. There is no dispute between the parties on this point.

[36] It is the third question on which the parties disagree. Is there anything in the NAFTA, properly interpreted, that precluded the tribunal from making the award it made?

[37] The parties agree that, in reaching its determinations, the Tribunal was bound to apply international law, and the NAFTA. The Tribunal's Procedural Order No. 1 provided that the applicable arbitration rules would be the UNCITRAL Arbitration Rules, except to the extent they are modified by Section B of NAFTA Chapter 11. It also provided that the governing law for the arbitration is the NAFTA and applicable rules of international law.

[38] There is no dispute that the Tribunal directed itself to the appropriate articles and rules of international law. For example, the Tribunal noted Article 31 of the ILC Articles on Reparation which provides that "[t]he responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act." It also directed itself to Article 1116 of the NAFTA, which allows for a claim to be made under the relevant section of the NAFTA alleging that another party has breached an obligation under certain sections or articles of the NAFTA and "that the investor has incurred loss or damage by reason of, or arising out of, that breach."

[39] Nor is there any dispute that, in reaching its decision, the Tribunal correctly identified the relevant principles of international law arising from jurisprudence. It relied on leading cases, including *Case Concerning the Factor at Chorzów* (Germany v. Poland), 1928 P.C.I.J. (ser.A.) No. 17 (13 September 1928), which held that "reparation must, as far as possible, wipe-out the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed". It also cited to *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), (ICJ Reports 2007), Judgment, 26 February 2007, which concluded that a "sufficient degree of certainty" is required that, absent a breach, the injury would have been avoided.

[40] The parties agree that, in answering the damages question, the Tribunal was required to determine causation, on the standard which the Tribunal articulated. They also agree that, in so doing, the Tribunal was not required to determine what situation was probable had the JRP process been conducted fairly, but only whether, but for Canada's breaches of the NAFTA, it was probable that the applicants would have received permission to develop and operate the quarry.

[41] The applicants allege that, despite articulating the correct standard, the Tribunal acted outside its jurisdiction because it did not apply the correct standard of proof; rather, it applied a standard of proof that is unknown to international law which they allege was so high it was impossible for the applicants to meet.

[42] Is the correct application of the identified, and correct, legal standard of proof, a true question of jurisdiction? The applicants argue that it is necessary not only to look at what the Tribunal said, but what it did: *Amco Asias Corporation and others v. Republic of Indonesia,* ICSI Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986, at paras. 23-24.

[43] Admittedly, the question is a fine one. As Huscroft J.A. noted in *Alectra*, the distinction between an error that is jurisdictional in nature, and an error made within jurisdiction, is so fine as to be manipulable.

[44] I conclude that the question is not a true question of jurisdiction. If the incorrect application of a correctly identified legal principle is a jurisdictional question, the court would, in effect, be embarking on a correctness review of arbitral decisions, something it ought not to do.

[45] Here, the Tribunal identified the correct legal principles. Applying those principles to the facts of the case is not, in my view, a true question of jurisdiction.

[46] If I am wrong, and the question is a true question of jurisdiction, I conclude that the Tribunal did not exceed its jurisdiction, that is, it applied the correct standard of proof.

[47] The Tribunal repeatedly referred itself to the correct standard of proof. After having reviewed the relevant legal principles, the Tribunal indicated it would review the 'but for' scenarios discussed by the parties. It then reviewed each parties' position. Having devoted many pages to these endeavours, it turned to its analysis.

[48] In the course of its analysis, the Tribunal specifically indicated it was applying the correct standard of proof. It found that there was a "realistic possibility" that the quarry would have been approved, but it could not find that this outcome would have occurred "in all probability" or with "a sufficient degree of certainty".

[49] The Tribunal found that various outcomes of a NAFTA-compliant JRP process were reasonable conceivable. It reviewed some other scenarios that it found were possible, reasonable, or not impossible.

[50] The thrust of the Tribunal's reasoning is that, since multiple outcomes were possible, the applicants had not proven that obtaining approval to develop and operate the quarry was probable. This analysis does not indicate that the Tribunal applied an enhanced standard of proof. I note again that all parties agreed the Tribunal was not bound to find which scenario was probable; it had only to determine whether the approval of the quarry was probable. Its reasons are clear that the plaintiffs did not discharge their burden of proof to allow the Tribunal to find that it was.

[51] The Tribunal concluded its analysis, at paras. 175-176, as follows:

> The Tribunal must accordingly conclude that no further injury has been proven beyond the injury that is substantially uncontroversial between the Parties on the basis of the majority's finding in the Award on Jurisdiction and Liability, namely that the Investors were deprived of an opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner. In particular, the Investors have not proven that "in all probability" or "with a sufficient degree of certainty" the Whites Point Project would have obtained all necessary approvals and would be operating profitably.
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> The Investors are thus only entitled to compensation equivalent to the value of the opportunity to have the environmental impact of the Whites Point Project assessed in a fair and non-arbitrary manner.

[52] Subsequently, under the heading "The Tribunal's Comments on the Valuations Approaches Proposed by the Parties", at paras. 276-280, the Tribunal, in discussing the applicants' proposed discounted cash flow valuations of future profits ("DCF") approach to damages, wrote:

> As the Tribunal has noted above, the Investors have failed to prove, to the standard applicable under international law, that the Whites Point Project would have obtained environmental approval. The Tribunal's analysis of the Investors' lost profits claim ends here, as, without a high degree of certainty as to regulatory approval, it goes without saying that no damages based on the profitable operation of the quarry can be awarded.
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> In view of the volume of the evidence exchanged by the Parties regarding the business plan for the Whites Point Project's operation, which the Tribunal has carefully reviewed, the Tribunal would nonetheless add that, even in the event of an approval, the long-term future profitability of the Whites Point Project must be regarded as uncertain. This is notably due to (i) possible changes in the Bay of Fundy ecology; (ii) possible new environmental regulations affecting quarry operation and/or shipping; (iii) possible market changes affecting the need for basalt over time; and (iv) possible macro-economic changes that may occur over the five decades of the projected life of the quarry.
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> While uncertainty may in principle be reflected in DCF valuations, many tribunals have declined to resort to DCF valuations of future profits where the investment is not yet a going concern, which has not generated any historic cash flows. In the present case, the uncertainty affecting future income streams is particularly pronounced. Not only was the quarry not a going concern so that future cash flows, positive and negative, are difficult to predict; more significantly, the evidence before the Tribunal is such that the Tribunal cannot, with a sufficient degree of confidence, conclude that the Whites Point Project could have generated long-term profits.

> The Tribunal therefore concludes that, even if it had found (contrary to its determination above) that environmental approval for the Whites Point Project would have been a virtual certainty, it would nonetheless have declined to award the Investors lost profits/compensation valued in terms of future earnings.

[53] The applicants point to the reference in para. 280 to "virtual certainty" to suggest that the Tribunal in fact applied a standard of proof of "virtual certainty" in its analysis some 100 paragraphs earlier. I disagree. The Tribunal's reasons must be read as a whole. The Tribunal repeatedly (and particularly in the relevant portion of its discussion and analysis) makes reference to the correct standard of proof at international law. The four paragraphs quoted above are better understood, not as a late indication of the instruction the Tribunal gave itself as to the standard of proof, but as an editorial comment on the damages approach adopted by the applicants. Although the Tribunal had found that lost profits were not the correct measure of damages, given the evidence and submissions that had been made about the quarry's business plan, the Tribunal considered it appropriate to comment on the other problems inherent in a DCF analysis of lost profits.[2] In my view, in para. 280, the Tribunal ought properly to be understood to be highlighting the other problems which would exist even if approval of the quarry were a virtual certainty, or, put another way, not an impediment to a lost profits damages analysis.

[54] In the result on this issue, I find that the question of the application of the correct standard of proof is not a true question of jurisdiction in this case, and even if it were, the Tribunal did not exceed its jurisdiction. It did not apply an impossible standard of proof. Rather, it correctly applied international law to the facts of this case.

Did the Tribunal breach principles of procedural fairness and natural justice?

[55] Article 18 of the *Code* directs that the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

[56] As I have already noted, Article 34(2)(a)(ii) provides that an arbitral award may be set aside if, among other things, the party making the application was unable to present his case.

[57] In *Consolidated v. Ambatovy*, [2016] O.J. No. 6314, (S.C.J.), aff'd 2017 ONCA 939, at para. 65, the Court of Appeal held that Article 34(2)(a)(ii) is interpreted to include procedural as well as substantive justice. However, the threshold to set aside on the basis of a breach of procedural fairness and natural justice remains high. "[T]o justify setting aside an award for a

[2] I note that these paragraphs in the Tribunal reasons also refer to whether the quarry "could have" generated long-term profits, arguably a lower standard of proof than probability. In my view, the Tribunal's use of language that does not reflect the standard of proof at international law indicates that it was not directing itself to the correct standard of proof, which it had already repeatedly correctly identified, but rather making general comments on the damages approaches offered by the parties.

violation of Article 34(2)(a)(ii), the conduct of the tribunal must be sufficiently serious to offend our most basic notions of morality and justice": *Ambatovy* (S.C.J.), at para. 56.

[58] In *Ambatovy* (C.A.), the court relied on the decision in *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.*, 1999 CarswellOnt 2988, (S.C.J.) ("*STET*") at para. 34, where Lax J. held that "judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the Tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing State."

[59] The applicants argue that the Tribunal denied them their right to fully present their case when it denied the applicants the ability to file two rejoinder reports from their experts. It argues that, as a result, I ought to set the arbitral award aside under ar. 34(2)(a)(ii).

[60] The Tribunal made procedural orders relevant to the delivery and exchange of the parties' submissions. The parties were each entitled to two rounds of submissions, including expert reports. The first set of submissions was delivered by the applicants. Canada delivered its last submission and expert reports on November 6, 2017.

[61] The applicants argue that Canada's second submission was in violation of para. 38 of the Tribunal's Procedural Order No. 1, which required the parties' reply and rejoinder to contain only evidence that is responsive to the other disputing party's last preceding submission. The applicants argue that Canada's reply and rejoinder included expert evidence that was responsive to the expert evidence contained in the applicants' first submission, and as such, Canada improperly split its case.

[62] In response to what the applicants considered to be Canada's improper case splitting, they delivered two additional expert reports, not contemplated by the schedule set by the Tribunal, on January 17, 2018, less than one month before the damages hearing was to commence. They did so having not alerted Canada of their intent to do so, and without seeking permission from the Tribunal in advance. Canada objected to the delivery of the further reports. Each party made submissions to the Tribunal on the question of the admissibility of those reports.

[63] The Tribunal noted that, under Article 15 of the UNCITRAL Arbitration Rules, it was entitled to conduct the arbitration in the manner it considers appropriate, provided that the parties are treated with equality and that each is given a full opportunity of presenting its case.

[64] The Tribunal noted it had adopted a timetable for written submissions, based on a proposal to which the parties had agreed. It noted that, as is common, each party had the opportunity to make two submissions, and the second-round submissions were to be responsive to the first-round submissions.

[65] The Tribunal referred to the "inevitable consequence" that one party will have the first word, and one party (typically the opposing one) will have the last word. The cycle of rebuttal evidence cannot go on forever. The Tribunal noted the "strong presumption that each side has

had a full opportunity of presenting its case once the submissions foreseen in the procedural calendar have been filed".

[66] The Tribunal found that, in this case, there were no exceptional circumstances that would warrant the admission of further evidence. It noted that the applicants had not explained why they did not seek leave to respond to points raised in Canada's reply shortly after the receipt of that submission, as would be standard practice in arbitral proceedings. The Tribunal was concerned about the procedural disadvantage that Canada would suffer from the late admission of new evidence less than one month before the hearing.

[67] For these reasons, the Tribunal rejected the applicants' additional expert evidence. However, it made it clear that it was open to the applicants to critique Canada's reply reports, and to cross-examine one of Canada's experts (the applicants having already chosen not to cross-examine the other). Perhaps more importantly, the Tribunal held that it was open to the applicants "to file an application…that the Tribunal exclude from the record specific statements [in the impugned expert reports] that are unresponsive to the [applicants'] reply memorial".

[68] Assuming that Canada did split its case, the applicants could have moved with dispatch for leave to deliver further evidence. They did not.

[69] Despite having not done so, they were permitted by the Tribunal to move to strike the evidence which they allege was improper, less than a month before the commencement of the hearing. They did not do that either.

[70] They now allege a breach of procedural fairness because two of their expert reports were excluded from the record. I note the context of the hearing: it was eight days long and based on a record that included 11 expert reports and nine witness statements from the applicants, 17 expert reports and six witness statements from Canada, and over 500 exhibits.

[71] In argument, applicants' counsel agreed that, had evidence that amounted to improper case-splitting been struck from the record, there would have been no breach of procedural fairness. However, the applicants complain that the Tribunal foreclosed the applicants' ability to present new evidence as a remedy without substantively analyzing the issue.

[72] The applicants did not do what they could have done to address whatever prejudice they believed arose from Canada's reply expert reports. They engineered the problem that was facing the Tribunal — less than a month before the damages hearing was to commence — through their choices. The Tribunal fashioned a solution that, had the applicants taken advantage of it, could have addressed the unfairness they now allege. They did not take advantage of the offer.

[73] In *STET*, at para.73, the court held that the purpose of Article 18 is to "protect a party from egregious and injudicious conduct by a Tribunal. It is not intended to protect a party from its own failures or strategic choices." In my view, to the extent Canada split its case, the applicants made strategic choices about how to deal with it. It cannot claim the benefit of Article 18 when it failed to take the steps it was able to take at the time to address the alleged unfairness.

[74] In any event, in fashioning a remedy that would preserve the hearing date, avoid procedural unfairness to Canada from the late admission of unexpected expert evidence, and allow the applicants the ability to move to strike evidence they believed was unfairly placed in the record by Canada, the Tribunal cannot be said to have conducted itself in a manner "sufficiently serious to offend our most basic notions of morality and justice". Nor can it be said that the Tribunal's conduct in so doing was so serious that "it cannot be condoned" under the law of Canada.

[75] I conclude that there was no breach of natural justice or procedural fairness that would justify setting aside the arbitral award.

Did the Tribunal render an award that is contrary to public policy?

[76] The applicants argue that the arbitral award should be set aside under Article 34(2)(b)(ii) of the *Code* because it conflicts with the public policy of Canada.

[77] In *STET*, at para. 73, the court held that the purpose of Article 34(2)(b)(ii) is "to guard against the enforcement of awards that are morally repugnant, or that are arrived at in a manner that is contrary to our notions of morality and justice". Lax J. explained that the public policy ground for resisting enforcement of an arbitral award is narrowly construed. At paras. 28-30, she wrote:

> The public policy ground for resisting enforcement of an arbitral award has also been narrowly construed. In *Schreter v. Gasmac Inc.* (1992), 1992 CanLII 7671 (ON SC), 7 O.R. (3d) 608, 89 D.L.R. (4th) 365 (Gen. Div.), Feldman J., as she then was, states at p. 623:
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> > The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.
>
> At p. 624 of *Schreter v. Gasmac, supra,* the court quotes with approval from the decision of the United States Court of Appeals Second Circuit in *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (1984) at p. 152. It was held there that public policy grounds for the setting aside of an award should apply only where enforcement would violate our "most basic notions of morality and justice". In this jurisdiction, the Ontario Court of Appeal has emphasized the care which courts must exercise in relying upon public policy as a reason for refusing enforcement of a foreign award. In *Boardwalk Regency Corp.*

v. Maalouf (1992), 1992 CanLII 7573 (ON CA), 6 O.R. (3d) 737 at p. 743, 88 D.L.R. (4th) 612 (C.A.), the court states:

> The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.

Accordingly, to succeed on this ground the awards must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal. The applicants must establish that the awards are contrary to the essential morality of Ontario.

[78] The applicants argue that Canada is founded on the rule of law, embedded in which is the concept of procedural and substantive fairness.

[79] They argue that substantive fairness requires a decision-maker not to act in an arbitrary manner, and demands that a decision maker employ a logical and rational chain of analysis. They rely on *Canada v. Vavilov*, 2019 SCC 65 to describe the requirements of rational decision-making.

[80] The applicants also rely on *Canada (Attorney General) v. S.D. Myers Inc. (F.C.)*, [2004] F.C.R. 368, at para. 55, for the proposition that public policy refers to fundamental notions and principles of justice, which include that "a tribunal not exceed its jurisdiction...", and that a jurisdictional error "can be a decision which is 'patently unreasonable', such as a complete disregard of the law so that the decision constitutes an abuse of authority amounting to a flagrant injustice". In *Myers*, the Federal Court asked whether the Tribunal's findings with respect to two jurisdictional questions were contrary to the public policy of Canada because they were "patently unreasonable", "clearly irrational", "totally lacking in reality" or "a flagrant denial of justice".

[81] To the extent that the applicants rely on the arguments that (i) the Tribunal exceeded its jurisdiction; and (ii) that the Tribunal breached procedural fairness by denying them the opportunity to file their two reply expert reports, I have already analyzed these issues and found that (i) the Tribunal did not exceed its jurisdiction or impose an impossible burden of proof on the applicants to prove their damages; and (ii) the Tribunal did not breach procedural fairness or the rules of natural justice in denying the applicants leave to file the expert reports. It follows that neither of these arguments supports a conclusion that the arbitral award is contrary to the public policy of Canada.

[82] However, the applicants' argument goes further than that. In oral argument they argued that the award is patently unreasonable, clearly irrational, totally lacking in reality, and a flagrant denial of justice because:

a. The Tribunal based its award on retrospective, hypothetical and speculative scenarios rather than on the evidence;

b. The Tribunal conflated the date of Canada's initial breach of its obligations under the NAFTA with the date at which to assess damages, and in so doing, failed to assess subsequent and consequential damages from the breach;

c. The Tribunal misapprehended commercial reality and fundamental principles of damages assessment.[3]

d. The Tribunal's causation analysis is perverse.

[83] In my view, many of the applicants' criticisms arise because of how they describe the injury that caused their damages. The applicants repeatedly describe the loss as the failure to obtain permission to develop and operate the quarry. In fact, in the liability decision, the Tribunal held that the loss was the denial of the opportunity to have a fair environmental assessment process. The unfairness in the process was not just the JRP's use of the community core values approach, but also the JRP's failure to conduct an analysis of "likely significant effects after mitigation" analysis thus denying the ultimate decision makers in government "information which they should have been provided".

[84] The question of whether a fair JRP process would have led to approvals to operate the quarry was a hotly contested factual matter at the hearing. For example, Canada argued that removing the community core values analysis from the JRP report would have left an incomplete report.

[85] The proper calculation of damages was also hotly contested. The applicants argued that the loss of profits from 50 years of quarry operation was the appropriate measure. Canada offered other measures, including the lost costs associated with the JRP process, or the lost costs associated with the quarry approval process.

[86] The Tribunal concluded that the applicants did not meet their burden of proof to establish that it was probable that they would have received permission to develop and operate the quarry.

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[3] The applicants did not clearly identify these fundamental principles. I assume that the applicants refer to the principles I have referred to elsewhere in these reasons, such as the date at which damages ought to be assessed, and that damages must not be assessed under a standard of proof that is impossible to discharge.

Accordingly, it rejected the applicants' claim for lost profits, and it valued the lost opportunity for a fair environmental assessment process instead.

[87] The Tribunal's approach to damages flowed from its finding, on a significant record and after a lengthy hearing, that the applicants did not establish that it was probable they would have received permission to develop and operate the quarry. There is nothing perverse or contrary to morality about the Tribunal's causation findings. Moreover, its damages analysis flows from its conclusions about the nature of the loss, and causation that were proven in this case. There is nothing perverse about calculating damages from the date of the breach given the Tribunal's finding on causation. Moreover, I have already determined that the Tribunal did not apply an impossible standard of proof. To the extent its reasons considers hypothetical scenarios, that is a necessary reality of the "but for" causation analysis.

[88] I reject the notion that *Vavilov* has any application to this case. In the face of the jurisprudence directing courts to accord broad respect and deference to decisions made by arbitral tribunals, and to refrain from reviewing the merits of the awards, conducting a reasonableness review of an arbitral decision is entirely inappropriate. The Court of Appeal in *Alectra*, at paras. 33-34, found that arbitral tribunals are not limited to only making decisions that are correct or reasonable.

[89] In conclusion, the applicants have failed to establish any basis on which the arbitral award ought to be set aside as contrary to public policy. The decision to assess damages for the loss of the chance to have a fair environmental assessment process, rather than for the loss of the right to operate a quarry for 50 years is not morally repugnant. The conclusion that the applicants did not prove that it was probable they would have obtained the right to develop and operate a quarry is not morally repugnant. The choice of date from which to assess damages is not morally repugnant. The Tribunal's damages decision was not arrived at in a manner that is contrary to our notions of morality and justice.

Costs

[90] The parties agreed that the successful party in this litigation shall be entitled to costs of $100,000. Canada is the successful party. The applicants shall pay Canada its costs of $100,000 in accordance with the parties' agreement. If there is any issue with respect to the time frame within which costs shall be paid, the parties may contact me to address it.

Conclusion

[91] In summary, I make the following order:

a. The applicants' application is dismissed;

b. The applicants shall pay Canada its costs of $100,000, all-inclusive, in accordance with the parties' agreement.

[92] I wish to thank all counsel for their professionalism and the high quality of their work.

J.T. Akbarali J.

Released: November 24, 2022

CITATION: Clayton et al. v. Attorney General of Canada, 2022 ONSC 6583
COURT FILE NO.: CV-19-617718-0000
DATE: 20221124

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc.

Applicants

– and –

Attorney General of Canada

Respondent

REASONS FOR JUDGMENT

Akbarali J.

Released: November 24, 2022