Date: 20020524
Docket: S.H. 173182

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as: Attorney General of Canada v. Marineserve.MG Inc. et al, 2002 NSSC 147]

BETWEEN:

ATTORNEY GENERAL OF CANADA,
in Right of the Minister of Transport

PLAINTIFF

- and -

MARINESERVE.MG INC., a body corporate, and
MARITIME HARBOURS SOCIETY, an incorporated society

DEFENDANTS

D E C I S I O N

HEARD: **At Halifax before The Honourable Justice Walter R. E. Goodfellow (Chambers) on April 18th, 2002**

DECISION: **May 24th, 2002**

COUNSEL: **John P. Merrick, Q.C. and Sean Foreman, Representing the Plaintiff**
George W. MacDonald, Q.C. and Harvey L. Morrison, Representing the Defendant, Marineserve.MG Inc.
William L. Ryan, Q.C. and John E. MacDonell, Representing the Defendant, Maritime Harbours Society

GOODFELLOW, J.:

BACKGROUND

[1] The Attorney General of Canada (Transport Canada) issued an Originating Notice Action Statement of Claim August the 8th, 2001 and a further Originating Notice Action and Statement of Claim entitled “amended this 24th day of August, 2001". It is difficult to follow the documentation because of the misnumbering of paragraphs. The Statement of Claim indicates that a part of the 1995 National Marine Policy was the intention to end Transport Canada’s ownership and operation of regional/local ports by virtue of a Port Divestiture Program. Maritime Harbours Society was incorporated as a non-profit society and the management of the Digby Port was transferred to it October the 21st, 1999 on terms which included the Crown paying Maritime Harbours Society Three Million and Seventy Thousand ($3,070,000.00) Dollars.

[2] The Claim goes on to indicate that Transport Canada alleges MHS sub-contracted the management of the Port of Digby to Marineserve.MG Inc., a for- profit society and that in September, 2001 the Minister of Transport, after questions were raised in the House of Commons, directed officials to

accelerate the standard audit and PricewaterhouseCooper were engaged. PWC produced an audit report June the 18th, 2001 and following that, Transport Canada proceeded with this action and a series of remedies are claimed in paragraph 25 of the Statement of Claim, including, accounting, reimbursement, an Order directing MHS to maintain, in the view of Transport Canada, appropriate and complete records, injunctive relief against both MHS and Marineserve with respect to the manner in which funds are to be dealt with and finally, damages against both MHS and Marineserve for whatever losses Transport Canada says it may incur, etc. The August 24th amendment simply added to paragraph 25(b) specific reference to Contribution and Operating Agreements and further references specifically to the Agreements.

[3] A Defence was filed on behalf of MHS the 28th of September, 2001 and on behalf of Marineserve October the 1st, 2001.

[4] There followed an application primarily for injunctive relief which was heard the 19th of September and October the 9th. This was an application by Transport Canada which also dealt with the production of documents and it culminated in an Order of this Court the 30th of November, 2001 which provided apparently some restrictive injunctive relief. There followed

considerable correspondence dealing with the determination of the Court and in any event, the Order was granted the 30th of November, 2001. Following the granting of the Order, there is a volume of correspondence to the Justice who heard the initial application and this correspondence raises issues of interpretation, the extent of his Order, questions of compliance, etc. and it would appear from the file that the Justice who heard the application endeavored to set up a meeting with counsel and there is a measure of correspondence in March and April of 2002 but I am unable to ascertain whether any such meeting took place.

[5] An Interlocutory Notice (inter partes) was filed by Transport Canada January the 30th, 2002 for a hearing on the 7th of February, 2002 seeking to compel the Defendants to file a list of documents, C.P.R. 20.01, on or before February the 15th, 2002. That application awaits the determination of this application.

[6] This file came before me on the filing by Interlocutory Notice (Inter Partes) March the 6th, 2002, amended March the 18th, 2002, seeking an Order to Stay the present proceedings and directing the Defendant, MHS, and Transport Canada to follow the dispute resolution procedures said to be

mandated by various agreements between the parties on or about October the 21st, 1999.

COMMERCIAL ARBITRATION ACT R.S., 1985, c.17 (2nd Supp.)

s.4(1) This Act shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose.

s.10 This Act is binding on Her Majesty in right of Canada.

Article 5

Extent of Court Intervention

In matters governed by this *Code*, no court shall intervene except where so provided in this *Code.*

CHAPTER II. ARBITRATION AGREEMENT

Article 7

Definition and Form of Arbitration Agreement

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Article 8

Arbitration Agreement and Substantive Claim before Court

(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.

(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.

Article 9

Arbitration Agreement and Interim Measures by Court

It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CONTRIBUTION AGREEMENT - 21st October, 1999

Section 13.01 Negotiation and Mediation

In the event of a dispute between the parties arising out of this Agreement, the parties agree to use the following procedure prior to pursuing any other legal remedy:

(a) promptly following the onset of the dispute, a meeting shall be held between the parties, attended by senior individuals with decision-making authority, to attempt, in good faith, to negotiate a resolution; and

(b) if within ten (10) days after this meeting the parties have failed to resolve the dispute, they agree to submit the dispute to mediation and to equally bear the costs of that mediation:

(i) the parties will jointly select a mediator. If after then (10) days, the parties are unable to agree upon the choice of mediator, then a mediator will be chose by the President of the Nova Scotia Barristers' Society; and

(ii) the parties agree to participate, in good faith, in the mediation process for a period of two (2) days or less.

Section 13.02 Arbitration

If the parties do not resolve all of the issues in dispute through mediation, then within ten (10) days from the date of the mediator's report, the parties agree to submit any claim or dispute arising out of or in connection with this Agreement, other than any claim or dispute pertaining to a question of public law, to binding arbitration pursuant to the federal Commercial Arbitration Act. The party requesting such arbitration shall do so by notice to the other party. The costs of the arbitration and fees of the arbitrator(s) shall be borne equally by the parties. The arbitration shall take place in Digby, Nova Scotia before

> a single arbitrator to be chosen by the parties. If the parties cannot agree on the choice of arbitrator within ten (10) days of the notice to submit to arbitration, then the parties shall each choose an arbitrator who in turn will select a third.
>
> The parties may determine the procedure to be followed by the arbitrator(s) in conducting the proceedings, or may request the arbitrator(s) to do so. The arbitrator(s) shall issue a written award within thirty (30) days of completion of the hearing. The award shall be in such form that it may be entered for judgment in any court having jurisdiction.

[7] Similar, if not identical, dispute resolution provisions also appear in the Transfer Agreement, the Assignment Assumption and Indemnity Agreement and the Operating Agreement.

ISSUE

[8] The sole issue to be determined is whether it is appropriate for the Court to exercise its discretion in this case and grant a stay of proceedings against Maritime Harbours Society.

APPLICATION

[9] This application is made pursuant to:

- ➜ Civil Procedure Rules 14.25 and 37.10 (Stay of Proceeding);
- ➜ Section 41(e) *Judicature Act*, R.S.N.S. 1989, c.240;
- ➜ *Arbitration Act*, R.S.N.S. 1989, c.19;
- ➜ *Commercial Arbitration Act*, R.S.C. 1985, c.17 (2nd Supp.), Article 8

Striking out Pleadings

Striking out pleadings, etc.

C.P.R. 14.25.

(1) The court may at any stage of a proceeding order any pleading, affidavit or statement of facts, or anything therein, to be struck out or amended on the ground that,

(d) it is otherwise an abuse of the process of the court;

and may order the proceeding to be stayed or dismissed or judgment to be entered accordingly.

Powers of court on hearing of application

C.P.R. 37.10

On a hearing of an application, the court may on such terms as it thinks just,

(g) exercise such jurisdiction and grant any other order as it deems just.

***Judicature Act*, R.S.N.S. 1989, c.240, s.41**

Rules of Law

s. 41 In every proceeding commenced in the Court, law and equity shall be administrated therein according to the following provisions:

> (e) no proceeding at any time pending in the Court shall be restrained by prohibition or injunction but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained prior to the first day of October, 1884, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto provided always that nothing in this Act contained shall disable the Court from directing a stay of proceedings in any proceeding pending before the Court if it or he thinks fit, and any person, whether a party or not to any such proceeding who could have been entitled, prior to the first day of October, 1884, to apply to the Court to restrain the prosecution thereof, or who is entitled to enforce by attachment or otherwise any judgment, contrary to which all or any part of the proceedings have been taken, may apply to the Court thereof by motion in a summary way for a stay of proceedings in such proceeding either generally, or so far as is necessary for the purposes of justice and the Court shall thereupon make such order as shall be just.

[10] In *Sezerman v. Youle* (1996), 150 N.S.R. (2d) 161 our Court of Appeal confirmed this Court's inherent jurisdiction that existed prior to the first of October, 1984, to grant a stay in a civil action was preserved in the *Judicature Act*, s.41(e), and that also the power to grant a stay is found in C.P.R. 14.25. Chipman, J. A. went on to state, p. 75, para 63:

> **[63]** Thus it would appear that the court's inherent jurisdiction would permit the lifting of a stay should circumstances later come to hand making it unjust that it continue.

[11] In *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (B.C.C.A.), the British Columbia Court of Appeal in 1992 dismissed an appeal from a Chambers Justice who granted a stay of proceedings pursuant to the provision of s.8 of the International *Commercial Arbitration Act*, S.B.S. (1986) c.14. Section 8 of that *Act* provided:

> **Stay of legal proceedings**
>
> **8.(1)** Where a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the proceedings.
>
> **(2)** In an application under subsection (1), the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> **(3)** Notwithstanding that an application has been brought under subsection (1) and that the issue is pending before the court, an arbitration may be commenced or continued and an arbitral award made.

[12] Further, at p. 119, paras 33, 34, 35, 36:

> **[33]** Before exercising its jurisdiction to grant a stay, the court must be satisfied that the applicant has met the requirements set out in sub. (1) of s.8. It is only if the court is satisfied that those matters have been established that it must then grant the stay, subject to the provisions of subs. (2).
>
> **[34]** In order to obtain a stay of the legal proceedings, it will not be enough for an applicant to point to an arbitration agreement and assert that the plaintiff and the defendant are parties to that agreement and that the dispute is within the terms of the agreement.
>
> **[35]** The court continues to have some residual jurisdiction to exercise on an application for a stay of legal proceedings pursuant to s.8 of the Act.
>
> **[36]** Thus, if the court concludes that one of the parties named in the legal proceedings is not a party to the arbitration agreement or if the alleged dispute does not come within the terms of the arbitration agreement or if the application is out of time, the court should not grant the application.

[13] The relief sought is for the stay of these proceedings and a direction for Transport Canada to follow the procedures mandated by various Agreements

executed by the parties on or about October the 21st, 1999 and specifically, the Contribution Agreement.

[14] Section 13.02 of the Contribution Agreement states that:

> "... the parties agree to submit any claim or dispute arising out of or in connection with this agreement, other than any claim or dispute pertaining to a question of public law, to binding arbitration pursuant to the federal *Commercial Arbitration Act*."

[15] It follows therefore that the *Nova Scotia Arbitration Act*, R.S.N.S. 1989, c.19 and the new Nova Scotia *Commercial Arbitration Act*, S.N.S. 1999, c.5 do not apply to any proposed arbitration in this matter. The provincial legislation only binds the Crown in right of the province, and Section 4(1)(a) of the provincial *Commercial Arbitration Act* expressly excludes the operation of the *Act* when agreed to by the parties. Section 13.02 of the Contribution Agreement clearly states that federal legislation will apply.

PREREQUISITES OF ARTICLE 8(1)

[16] Transport Canada opposes the application for a stay and maintains that the three prerequisites for the operation of Article 8(1) are:

- ➜ The applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- ➜ The legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
- ➜ The application must be brought timely, i.e. before the applicant takes a step in the proceeding.

[17] There is no dispute that the stated first prerequisite that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement is obvious. Counsel refer to *Gulf Canada Resources Ltd. v. Arochem International Ltd.*, (above).

[18] Turning now to the stated second prerequisite that the legal proceedings must be in respect of a matter agreed to be submitted to arbitration, counsel for Transport Canada refer to the decision of the British Columbia Court of Appeal in *Prince George (City) v. McELhanney Engineering Services Ltd.*, [1995] B.C.J. No. 1474 (B.C.C.A.). Cumming, J.A. dealt with the second prerequisite, not only with respect to the question of multiple parties, but also with multiple issues and said this at p.9, para 37:

> These authorities establish that, as a general principle, the mere fact that there are multiple parties and multiple issues which are inter-related and some, but not all,

> defendants are bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause.

[19] And at p. 13:

> Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

[20] What emerges before me from the pleadings and material provided for my consideration is that the action by Transport Canada is framed solely in breach of contract as against MHS. The dispute between Transport Canada and MHS arise substantially, if not entirely, out of the Contribution Agreement of October the 21st, 1999. The main thrust of the Statement of Claim appears to be solely in the contract relating to the contractual terms and degree of authority thereby conveyed on MHS with respect to expenditures, etc. pursuant to the Agreements. Paragraph 17 specifically raises a claim of breach of agreement by MHS for what is alleged to be ineligible expenditures. The relief sought in paragraph 25 applied to the contract requiring an accounting for the amounts of contribution, reimbursement, actions with respect to record keeping and the making available of all records directly related to the Agreement for audit purposes, etc. The amended Statement of Claim, as already noted, specifically designated the Contribution and Operating Agreements and they were specifically pleaded and referred to as well in paragraph 7 and by amendment, elsewhere throughout the Statement of Claim. The action against Marineserve.MG Inc. alleges that it wrongfully induced, caused or

participated in a breach of the Contribution and Operating Agreements, wrongful interference and for such it seeks damages against Marineserve. Marineserve is not a party to the mediation of the dispute resolution process and there is no reason why Transport Canada's action against Marineserve.MG Inc. cannot continue.

[21] I now turn to the third stated prerequisite that the application must be brought in a timely fashion. Transport Canada takes the position that the time for raising the issue of mediation is strictly determined by Article 8 of the Arbitration Agreement. In my view, the position advanced by Transport Canada that the time for invoking the alternate dispute resolution agreed mechanism must be strictly interpreted, is far too restrictive an approach. I have had the benefit of reference to substantial correspondence between the parties and if I am in error as to the interpretation of the time application, then I would have no hesitation in concluding that MHS has met any such requirement.

[22] To begin with, the Defence filed by MHS specifically pleaded the Agreement, as does both the Statement of Claim and amended Statement of Claim. The Defence filed by MHS, paragraph 13, specifically recites s.13.01 of the Contribution Agreement and then goes on to plead:

> MHS states that Transport Canada is in violation of this agreement in that it has failed to follow the Dispute Resolution provisions of the Contribution Agreement, and similar provisions in the other agreements, prior to commencing the within action. MHS states that Transport Canada is estopped, by virtue of the Dispute Resolution provisions of the agreements and the *Commercial Arbitration Act of Canada*, from commencing or pursuing this action.

[23] In addition to references to correspondence, I have the benefit of extracts of evidence given before Justice MacAdam on September the 19th, 2001 where an official of Transport Canada clearly acknowledges that the Contribution Agreement was drafted and prepared by Transport Canada and that Transport Canada insisted at the time that the Agreements were drafted that there be a clause inserted so that all parties would be bound by the contractual dispute resolution mechanism. Indeed, the official acknowledged that the incorporation of the arbitration requirement was a strict requirement of Transport Canada in each and every one of their Agreements. The Transport Canada official also acknowledged that Transport Canada has not followed its own dispute resolution mechanism but in fairness, does acknowledge that Transport Canada is similarly bound by the contractual terms, as laid out in the dispute resolution mechanism.

[24] In *Queensland Sugar Corp. v. Hanjin Jedda (The)*, [1995] B.C.J. No. 624, the British Columbia Supreme Court applying the third prerequisite, concluded that the application for a stay of proceedings could not succeed. It did so in circumstances whereby the Court agreed with counsel opposing the application for a stay in that it would now be prejudicial for the matter to be referred to arbitration when the litigation process in that case was well underway. In that case, the action was commenced and the parties over the following twelve months complied with most of their pre-trial obligations to each other and the matter had been set down for trial when the application for arbitration was advanced.

[25] It seems to me that on a strict interpretation, MHS has in fact provided more than adequate notice invoking the mediation dispute resolution mechanism.

[26] In Driedger on the Construction of Statutes (3rd) Edition, at p. 38:

> **Modern purposive approach.** Modern courts do not need an excuse to consider the purpose of legislation. Today purposive analysis is a regular part of interpretation, to be relied on in every case, not just those in which there is ambiguity or absurdity. As Matthews J. A. recently wrote in *R. v. Moore* (1985), 67 N.S.R. (2d) 241, at 244 (C.A.):
>
> > From a study of the relevant case law up to date, the words of an Act are always to be read in light of the object of that Act. Consideration must be given to both the spirit and the letter of the legislation.

[27] In *Thomson v. Canada (Minister of Agriculture)*, [1992] 1 S.C.R. 385, L'Heureux-Dubé at p. 416 wrote:

> [A] judge's fundamental consideration in statutory interpretation is the purpose of legislation.

REASONS FOR MODERN ADOPTION OF PURPOSIVE APPROACH

> **Overview.** A number of factors have contributed to the emphasis put on purposive analysis in modern statutory interpretation. First, there is the remedial construction rule found in the Interpretation Acts of all Canadian jurisdictions. Starting with the first statute on interpretation enacted by the Parliament of Canada in 1849, Canadian Interpretation Acts have contained a provision that

directs courts to give every enactment “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”.

[28] Alternatively, applying the purposive rule of interpretation, one must recognize the desirability of (1) holding parties to their contractual obligations; and (2) recognizing the dispute resolution mechanism that the parties entered into obviously with the full desire and intent of avoiding lengthy and costly litigation. The alternate dispute resolution mechanism must be invoked in a timely fashion, that is to say the party must select the path it wishes to travel and if that selection is not made until litigation is underway in which it meaningfully participated, then such conduct may well foreclose the alternate path. Here, prior to and in its first pleading its statement of defence, MHS invoked the alternate dispute mechanism of their contract. MHS cannot be faulted by endeavouring clearly in correspondence to have Transport Canada abide by what it mandated as necessary and agreed upon in its contracts. The party that attempts to avoid an application such as this is not to be criticized where that party made its position clear from the outset of the litigation. This matter has not progressed out of the starting gate of litigation and I find no basis for failing to impose upon the parties that which they contracted for.

[29] When parties choose an alternate dispute mechanism, such as arbitration, it is because they recognize such as being more suited, less demanding of resources and expenses and likely to produce a result in a far more timely fashion than resorting to court action. In litigation, the parties must compete with other members of the public for utilization of

limited judicial resources which often provides substantial delay, particularly for matters that are likely to be trials of some length.

CONCLUSION

[30] I am satisfied the parties should follow the path of their own choosing and proceed to arbitration in accordance with their Agreements.

COSTS

[31] Normally, the Court would call upon counsel to address the issue of costs, however, in this case it is clear that MHS, while invoking the agreed dispute resolution mechanism, nevertheless, created a problem by somehow or another assuming that with respect to step one of the three step process, it had a right of veto over the nominee of Transport Canada. MHS took that position and in correspondence wanted to proceed directly to step two and while I do not discern any strong argument by Transport Canada based upon the wrongful exercise of a veto, it is clear that Transport Canada resorted to opposition to any alternative to litigation. The parties are bound by the procedure pursuant to their contract and the first step must start with a good faith meeting attended by senior individuals with decision-making authority and each is entitled to advance whomever they wish in compliance and only should that meeting fail to resolve the disputes does step two, the selection of a mediator, proceed.

[32] In the circumstances, the position taken by MHS is such that it is an appropriate exercise of discretion to deny MHS costs, even though it is successful in this application.

J.