Court of King's Bench of Alberta

Citation: Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd, 2024 ABKB 17

Date: 20240109
Docket: 2303 19140
Registry: Edmonton

Between:

Pacific Atlantic Pipeline Construction Ltd. and Bonatti S.p.A.

Applicants

- and -

Coastal Gaslink Limited Partnership by its General Partner Coastal Gaslink Pipeline Ltd.

Respondents

Corrected judgment: A corrigendum was issued on January 10, 2024; the corrections have been made to the text and the corrigendum is appended to this judgment.

Oral Reasons for Judgment
of the
Honourable Justice N.J. Whitling

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[1] This is an application by the Applicants Pacific Atlantic Pipeline Construction Ltd. and Bonatti S.p.A. pursuant to r. 14.48 of the *Alberta Rules of Court* for a stay pending appeal of my decision of December 22, 2023, reported as ***Pacific Atlantic Pipeline Construction Ltd v Coastal Gaslink Pipeline Ltd.,*** 2023 ABKB 736, as well as an extension of the interim injunction pending

appeal granted at the end of that decision. In very brief terms, the Applicants seek an Order prohibiting the Respondents from drawing on a letter of credit in the amount of C$117,162,384.00.

[2] However, since the Order granted in that decision was one denying the Applicants' application for an interim injunction, there is nothing to stay, and r. 14.48 has no application. See for example ***Alberta Energy Regulator v Grant Thornton Limited***, 2017 ABCA 278 at paras. 70-72.

[3] So this application is, in substance, an application for an interim injunction pending appeal, and the root of this Court's jurisdiction to grant such relief appears to be s. 8 of the *Judicature Act* of Alberta.

[4] The test applicable to an application for an injunction pending appeal is not entirely clear. There does exist authority from the Court of Appeal to the effect that a higher or more onerous standard applies to an injunction pending appeal than to a stay pending appeal or to an injunction pending a trial.

[5] In ***J.B. v. N.R.J.F.***, 2003 ABCA 32 Justice Côté addressed a similar application and in doing so wrote:

> **8** …Since Gallant J. declined to do anything, and since the caveat has expired, strictly speaking there is no occasion here for a stay. Or to put it another way, to stay nothing produces nothing. There is nothing to stay the enforcement of.
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> **9** What is really desired is an order that nothing should be done about probate until the appeal is heard. That is more or less an interlocutory injunction. An interlocutory injunction pending appeal is possible, but it is not a common remedy, and I believe that the grounds for it should be stronger than those for the grant of an interlocutory injunction pending trial.

[6] And in ***Phillips v Phillips***, 2004 ABCA 173, Justice Côté wrote at para. 8: "The first problem is that the test for an injunction pending appeal is stiffer than the test for a stay pending appeal."

[7] Little else in the way of guidance is provided as to the standard to be applied to injunctions of this nature.

[8] The present application raises somewhat exceptional circumstances since the injunction sought on the previous application was subject to the elevated standard of a strong *prima facie* case. (See my aforementioned decision at 2023 ABKB 736 paras. 44 to 48.)

[9] In these circumstances, it cannot be the case that the standard applicable to the first stage of the tripartite test is reduced to that of a serious issue to be tried in the context of an injunction pending appeal of that decision. That is, it cannot get easier to get an injunction when appealing a decision to deny such an injunction.

[10] I therefore conclude that the first stage of the tripartite test applicable to this application for an injunction pending appeal is a strong *prima facie* case, or strong grounds of appeal.

[11] In this regard, I must respectfully disagree with the adoption of the "serious issue to be tried" standard in ***Veolia Water Technologies, Inc. v K+S Potash Canada General Partnership***, 2018 SKCA 61 at paras. 10-12 which was raised for the first time at the hearing of this application and which also addressed an application for an injunction respecting a letter of credit. That decision does not appear to address any arguments to the effect that the applicable standard might be higher, and it does not appear to be consistent with the decisions of Justice Côté quoted earlier.

[12] I have reviewed the written submissions of the Applicants and listened to their oral submissions respecting their grounds of appeal. The Applicants do not argue that their appeal raises strong *prima facie* grounds. Instead, they argue that their grounds of appeal are "non-frivolous, arguable grounds of appeal". While I certainly agree that the appeal is not frivolous, I do not find that the Applicants have raised any strong grounds of appeal. Their submissions are framed in very general terms, and they do not identify any clear error in my earlier decision.

[13] I have considered the timeframe of typical appeals in this province. Without, of course, criticizing anyone involved in advancing an appeal, it would not be at all surprising to find that such a proceeding could last until the fall of this year, thereby granting the Applicants substantially the relief they sought in the original application, and frustrating the liquidity of the letter of credit. The importance of ensuring that letters of credit may be treated in commercial transactions as equivalent to cash is an important theme throughout the case law in this subject area.

[14] I am aware, and have considered the fact that the Applicants have provided an undertaking as to damages and have also posted money to cover interest in the interim. In addition to satisfying the standalone requirement of the undertaking, these considerations are also significant when considering the balance of convenience at the third stage of the test.

[15] Also in terms of the balance of convenience, I have considered that the Applicants have not made serious efforts to expedite their appeal. They have submitted a bare request to the Court of Appeal in the context of a letter to the Registry. They have not brought an application to a Justice supported by evidence. The request by letter was denied since, among other things, it was unsupported by the necessary proof of grounds to expedite.

[16] Given these considerations, I find that neither the first nor the third requirements of the applicable test have been met. That is, there is no strong *prima facie* case on appeal, and the balance of convenience favours the Respondents.

[17] The Applicants request for an injunction pending the completion of their appeal is, therefore, denied.

[18] It will be apparent that I have again avoided addressing the question of irreparable harm. I find this to be a difficult question given Bonatti's size and the fact that I do not have a team of accountants at my disposal.

[19] Having found that two of the three applicable requirements are not met, the fact remains that the overarching consideration applicable to an application of this nature is the interests of justice. The Applicants have advised me that they do wish to pursue this application further to the Court of Appeal, and I do wish to give them a reasonable opportunity to bring such an application.

A Justice of the Court of Appeal would be in the position to potentially order an expedited appeal schedule and would bring a more objective perspective to an assessment of the Applicants' grounds of appeal. I have been advised that the earliest available date for an application to a Court of Appeal Justice to expedite the appeal and for a stay pending appeal is January 30, 2023. This would require a further interim injunction for approximately three weeks.

[20] I conclude that the brevity of that potential injunction changes the calculus significantly and I conclude that the Applicants ought to at least have the opportunity to seek relief from the Court of Appeal.

[21] I therefore conclude that the current interim injunction shall be extended to January 30, 2024. On that date a Justice of the Court of Appeal may or may not choose to impose a further injunction.

Heard on the 8th day of January, 2024.
Dated at the City of Edmonton, Alberta this 9th day of January, 2024.

N.J. Whitling
J.C.K.B.A.

Appearances:

Michael Valo and Jessica Gahtan
Glaholt Bowles LLP
for the Applicants

Scott Matheson, Alisha Hurley, and Elisa Carbonaro
Field Law LLP
for the Applicants

Keith Marlowe, K.C., Lindsay Rowell, Alyssa Duke, Laura Cundari and Karen O'Keeffe
Blake, Cassels & Graydon LLP
for the Respondents

Corrigendum of the Oral Reasons for Judgment
of
The Honourable Justice N.J. Whitling

Added the name of counsel Karen O’Keeffe to the list of counsel at the end of the Judgment.