Geophysical Service Incorporated v. Canada (Attorney General), 2020 FC 984

Court: Federal Court

Case Date: October 20, 2020

Jurisdiction: Canada (Federal)

Citations: 2020 FC 984

Id. vLex VLEX-851058133

Link: https://app.vlex.com/#vid/geophysical-service-incorporated-v-851058133

Text

Date: 20201020

Docket: T-1735-19

Citation: 2020 FC 984

Montréal, Québec, October 20, 2020

PRESENT: The Honorable Madam Justice St-Louis

BETWEEN:

GEOPHYSICAL SERVICE INCORPORATED, THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON AND RUSSELL JOHN EINARSSON

Applicants

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an Application for judicial review under section 18.1 of the *Federal Courts Act* (RSC 1985, c F-7) [the Federal Courts Act] in respect of the decision made by the Trade Law Bureau of Global Affairs Canada [the Trade Law Bureau] on October 9, 2019, allegedly refusing to remove members of the team working for, and with, the Trade Law Bureau as counsel for Her Majesty the Queen [the Government Team] on the Applicants' arbitration proceeding under the *North American Free Trade Agreement* [NAFTA] [the NAFTA Proceeding] for an alleged conflict of interests.

[2] The document that is the subject of this Application is a letter dated October 9, 2019, from the Senior Counsel and Deputy Director of the Trade Law Bureau and addressed to the Applicants' counsel.

[3] Under the heading "*Claim by the Investors of Geophysical Service Inc. ("GSI")* against the Government of Canada under the North American Free Trade Agreement," the Senior Counsel and Deputy Director of the Trade Law Bureau writes:

We have considered the points made in your letter of September 20, 2019. We respectfully disagree with GSI's position and maintain that there is no legal basis to support removing Ms. Dosman or anyone else from Canada's legal team in this dispute.

We have confirmed Ms. Dosman's temporary removal from the file as a gesture of continuing good faith, but this situation cannot continue indefinitely without causing undue prejudice to Canada's ability to defend against your client's claims. We would be open to meet with you and a representative of Vannin in Ottawa to discuss this matter further. Please let me know your availability.

[4] For the reasons exposed below, I am satisfied that (1) the decision is not amenable to judicial review under the Federal Courts Act, as it is of a private nature; and (2) it is not proper for the Court to intervene in an arbitration process engaged under Chapter 11 of the NAFTA. I will consequently dismiss the Application for judicial review.

II. Background

[5] The Applicants are GSI, a United States company that creates marine seismic data, and Messrs. Theodore, Harold and Russel Einarsson, who present themselves as investors in GSI.

[6] Vannin Capital [Vannin] is a third-party funder that provides financial resources to potential

claimants in exchange for a share of the case proceeds. At the relevant time, Vannin had offices in London, Paris, Sydney, Jersey, the Isle of Man, New York and Washington, D.C.

[7] On or around October 10, 2018, the Applicants served a “Notice of Intent to Submit a Claim to Arbitration under Chapter Eleven of NAFTA” to the Government of Canada. The record before the Court includes an article from the Blacklock’s Reporter published on October 12, 2018, citing Mr. Paul Einarsson and Borden Ladner Gervais LLP [BLG] on the nature of the NAFTA claim, and valuing said claim at $1 billion. On January 28, 2019, the parties to the arbitration met for consultations.

[8] On February 8, 2019, BLG and Vannin executed a Non-Disclosure and Common-Interest Agreement. Mr. Harold Paul Einarsson signed only the Agreement’s Appendix, as BLG’s instructing client.

[9] On April 18, 2019, the Applicants served a Notice of Arbitration to the Government of Canada, which formally commenced the NAFTA Proceeding. The Applicants cited article 3 of the United Nations Commission on International Trade Law Arbitration Rules [UNCITRAL Arbitration Rules], and articles 1116, 1117 and 1120 of the NAFTA to demand and initiate arbitration against the Government of Canada (article 1139 of the NAFTA defines the UNCITRAL Arbitration Rules as those approved by the United Nations General Assembly on December 15, 1976). The Applicants also consented to arbitration in accordance with the procedures set out in the NAFTA and thus waived their rights to “initiate or continue before any administrative tribunal or any court, or any dispute settlement procedures, any proceedings with respect to the measures outlined herein, except for proceedings for injunctive, declaratory or other extraordinary relief, not involving payment of damages” (paragraph 3 of the Notice of Arbitration).

[10] From July 1, 2018 to May 3, 2019, Ms. Alexandra Dosman was an employee of Vannin, as an investment advisor in its New York office. In late 2018, Ms. Dosman started discussing prospective employment with the Trade Law Bureau. On June 3, 2019, she accepted the employment offer presented to her by the Trade Law Bureau, and on June 7, 2019, she began working there.

[11] On or around July 24, 2019, the Applicants were made aware that Ms. Dosman worked at the Trade Law Bureau on their NAFTA Proceeding. On August 2, 2019, the Applicants sought Ms. Dosman’s exclusion from the NAFTA Proceeding, on the basis of an alleged conflict of interests. They also requested the identification of the other members of the Trade Law Bureau who worked with Ms. Dosman on the NAFTA Proceeding.

[12] In brief, the Applicants allege that Ms. Dosman is in a conflict of interests, having received and had access to certain non-public, confidential, and privileged information regarding the Applicants and their claims in the NAFTA Proceeding. They claim said information includes (i) that the Applicants were seeking third-party litigation funding in the NAFTA Proceeding; (ii) that the Applicants had approached Vannin for third-party litigation funding; (iii) that the Applicants had been identified as a prospective “lead” by Vannin; and (iv) the amount of funding the Applicants had requested from Vannin. They add that no measure was put in place at Vannin to prevent Ms. Dosman from obtaining information about potential claims against the Government of Canada, despite her having been informed that she would receive a written offer of employment after her January 2019 interview with the Trade Law Bureau.

[13] Relying on Ms. Dosman's affidavit and cross-examination transcript, the Applicants submit that she admitted to receiving such information.

[14] From August 2, 2019, the Trade Law Bureau temporarily removed Ms. Dosman from the file, pending receipt of more information, and on August 16, 2019, it requested details from the Applicants regarding the alleged conflict of interests.

[15] By a letter dated August 29, 2019, the Applicants essentially reiterated their claim that Ms. Dosman was in a conflict of interests and that she ought to be permanently removed from the matter. The Applicants also reiterated their request that the Trade Law Bureau prepare a list of individuals who had worked on the Arbitration, so the Applicants could request the exclusion of individuals who communicated with Ms. Dosman.

[16] On September 18, 2019, the Trade Law Bureau responded to the Applicants' August 29 letter, stating that it did not know that GSI had a relationship with Vannin prior to the Applicants' disclosure of August 2, 2019. The Trade Law Bureau noted that the Applicants had provided no further justification for Ms. Dosman's removal, and that absent such justification, Ms. Dosman would be reinstated as legal counsel to Canada in the NAFTA Proceeding.

[17] On September 20, 2019, the Applicants responded, and ultimately reiterated their request that Ms. Dosman be removed from the file and that individuals having had contacts with Ms. Dosman be sequestered.

[18] On October 9, 2019, the Trade Law Bureau reiterated its decision to reinstate Ms. Dosman in her role on the NAFTA Proceeding, as the Applicants had not provided sufficient information as to the alleged conflict of interests.

[19] On or around October 11, 2019, the Applicants filed a Motion under subsection 17(5) of the Federal Courts Act regarding the alleged conflict of interests. The Motion concerned the September 18, 2019 letter from the Trade Law Bureau.

[20] On October 23, 2019, the Applicants abandoned their Motion and commenced this Application for judicial review, challenging the aforementioned *October 9, 2019* letter from the Trade Law Bureau's Senior Counsel and Deputy Director to the Applicants' counsel.

[21] As per the Respondent's submissions, Ms. Dosman has not been reintegrated in the NAFTA Proceeding team since August 2, 2019, and this situation remains unchanged pending the outcome of this Application for judicial review.

III. The Application for judicial review

[22] In their Notice of Application, the Applicants seek (a) a declaration that members of the Government Team are in a conflict of interests with respect to the NAFTA Proceeding and are prohibited from working on the NAFTA Proceeding, and (b) in the alternative, an injunction enjoining the Government Team from continuing to work on the NAFTA Proceeding and from communicating with any new counsel or consultants to the government regarding the NAFTA Proceeding.

[23] In their Memorandum of Fact and Law, the Applicants request that the Court issue (a) an

Order declaring that members and consultants of the Trade Law Bureau who are working on the NAFTA Proceeding are in a conflict of interests, must be permanently removed as counsel to the Government of Canada in the NAFTA Proceeding, and are prohibited from communicating with any new counsel or consultants to the Government of Canada regarding the proceeding; (b) in the alternative, an injunction enjoining members and consultants of the Trade Law Bureau Michelle Hoffman and Jennifer Reynolds-Fry from continuing to work on the NAFTA Proceeding and from communicating with any new counsel or consultants to the Government of Canada; (c) an Order for solicitor-client, full indemnity costs in favour of the Applicants and (d) such other or further relief as this Court may award.

[24] In support of their Application for judicial review, the Applicants filed two affidavits sworn to by Mr. Harold Paul Einarsson who was, for many years, the Chief Operating Officer and who is currently Chairman of Applicant GSI.

[25] Mr. Einarsson' first affidavit was sworn on October 2, 2019, hence before the impugned decision was rendered. Mr. Einarsson introduces the three (3) following exhibits: (a) the Non-Disclosure and Common-Interest Agreement between Vannin and BLG executed February 8, 2019, which he signed in its Appendix A; (b) the Notice of Arbitration dated April 18, 2019, which the claimants, Theodore David Einarsson, Harold Paul Einarsson, and Russell John Einarsson, each signed on their own behalf and on behalf of Applicant GSI; and (c) five letters between BLG and the Senior Counsel and Deputy Director of the Trade Law Bureau.

[26] Mr. Einarsson's second affidavit was sworn on February 14, 2019, hence outside the period provided for under Rule 306 of the *Federal Courts Rules*, SOR/98-106 [the Rules]. Mr. Einarsson introduces "Undertakings and Responses of Harold Paul Einarsson from the Cross-Examination on an Affidavit Held on January 22, 2020," which is not contemplated in the Rules relating to Applications.

[27] I am not convinced that the Application is properly supported nor that its prayer for relief is entirely available. However, considering my conclusions below, I need not decide on these issues.

IV. The issues raised by the parties

[28] The Applicants submit that the Court has jurisdiction over this Application for judicial review. They stress that the Court's "inherent" jurisdiction covers all conflicts of counsel, including those in matters that are not otherwise before the courts (*Chapters inc v Davies, Ward & Beck LLP*, (2001) 141 OAC 380), and that the Respondent's assertions that the arbitral tribunal has jurisdiction do not oust this Court's inherent ability to address conflicts of interests of Canadian lawyers. They also rely on a decision of the Ontario Court of Appeal in *Council of Canadians v Canada (Attorney General)*, 2006 CarswellOnt 7543 [*Council of Canadians*]. In that decision, the Court framed the issue before it as "whether, by agreeing in NAFTA to such tribunals to resolve these disputes, the Government of Canada has deprived Canadian superior courts of their authority to adjudicate upon matters reserved to them by s. 96 of the *Constitution Act 1867*" (at para 2). The Applicants rely upon paragraph 14, outlining that the NAFTA clearly sets out the extent of the remedial authority of the arbitration tribunal (articles 1136 and 1137 of the NAFTA), and paragraph 17, essentially outlining that the award may be reviewable by domestic courts. The Applicants also rely upon paragraph 53 of the decision, where the Court indicates that article

1121 of the NAFTA expressly contemplates that investors who resort to arbitral tribunals constituted under the NAFTA can elect to proceed in the domestic courts rather than before a NAFTA tribunal, and that it thus cannot be said that there is any removal of jurisdiction from those courts.

[29] I note from the onset that this decision makes no mention of the courts constituted under Section 101 of the *Constitution Act 1867,* nor does it address the proper forum for deciding interim measures of protection once investors have elected to proceed with a NAFTA arbitration.

[30] The Applicants submit that the arbitral tribunal will not have jurisdiction over this issue, since it has no inherent jurisdiction. They stress that the arbitral tribunal will be limited to the jurisdiction conferred by the arbitration agreement and that this type of matter is not provided for in the relevant legislation and rules (the *Commercial Arbitration Act* (RSC 1985, c 17 [the Commercial Arbitration Act]), the NAFTA, or UNCITRAL Rules). They cite *Rompetrol Group NV v Romania* (ICSID Case No ARB/06/3, January 14, 2010) at paras 15-16, 25.

[31] The Applicants add that domestic Canadian law is applicable to the Application, that counsel are subject to Canadian conflict of interests rules, and that they will suffer extreme prejudice if the Court declines jurisdiction.

[32] The Applicants also argue that the Application is reviewable under section 18.1 of the Federal Courts Act. They add that the decision was an exercise of the Trade Law Bureau's authority under section 5 of the *Department of Justice Act*, RSC, 1985, c J-2 [the Department of Justice Act], and that it is clearly public in nature as per the applicable factors set out in *Air Canada v Toronto Airport Authority*, 2011 FCA 347 [*Air Canada*] (discussed below).

[33] The Applicants cite article 9 of the UNCITRAL Model Law on International Commercial Arbitration [the Model Law], which forms part of the Commercial Arbitration Act, and argue that they may come to the Court, as they are seeking an "interim measure of protection" of their privileged information. They add that the Trade Law Bureau's decision is not a litigation decision, as presented by the Respondent, but one about who is representing Canada, which falls squarely under section 5 of the Department of Justice Act.

[34] The Applicants also submit that the Trade Law Bureau ignored settled law regarding conflicts of interests in its own favour as an interested and adverse party in the NAFTA Proceeding. In doing so, the Applicants submit that it breached the principles of natural justice, a breach which would be reviewable on a standard of correctness.

[35] They argue that the presumption of the merits of the decision being reviewable on a reasonableness standard is rebutted. They contend that the misapplication of conflict of interests rules raises a general question of law of central importance to the legal system as a whole, such that the Trade Law Bureau's misapplication of the law regarding conflict of interests rules is reviewable on a standard of correctness.

[36] The Applicants also expose the law regarding conflicts of interests. They submit that the information provided to Vannin was privileged, that Ms. Dosman received the privileged information, that the Trade Law Bureau also received the privileged information, that they will suffer prejudice, and that the Trade Law Bureau team should be removed from the NAFTA Proceeding. They confirmed to the Court, at the hearing, that the letter under review is indeed the

one dated October 9, 2019 and not the one dated September 18, 2019, and thus argue that the Application for judicial review was brought without delay and that solicitor-client costs are appropriate.

[37] The Respondent essentially responds that (1) as per paragraphs 5(4)(a) of the *Commercial Arbitration Act*, articles 1112, 1116 and 1117 of the NAFTA, the UNCITRAL Arbitration Rules, and articles 5 and 34 of the Model Law, the Court must not involve itself in this matter, which is subject to a NAFTA arbitration (*Quintette Coal v Nippon Steel Corp et al*, [1990] BCJ No 2241), as the arbitral tribunal has the requisite jurisdiction to hear these arguments; (2) the Applicants failed to file a Notice of Application within the prescribed 30-day period under the Rules, given that their intention is to challenge the September 18, 2019 decision; (3) the decision not to remove counsel is not a reviewable decision under subsection 18.1(1) of the Federal Courts Act, as it is not that of a "federal board, commission or other tribunal" as defined in section 2 of the Federal Courts Act and the power exercised by the Senior Counsel and Deputy Director of the Trade Law Bureau is private in nature (*Air Canada*); (4) the decision is reviewable on a standard of reasonableness; and (5) the Applicants do not meet the "probability of mischief" test which is the applicable test (rather that the "possibility of mischief" test) (*Irving Shipbuilding Inc v Canada (Attorney General)*, 2008 FC 1102).

V. Discussion

[38] The parties have raised a number of issues, but two allow the Court to dispose of the matter. In brief, the Applicants have not convinced me that (1) the content of the letter is amenable to judicial review under the Federal Courts Act, and (2) it is proper for the Court to intervene in a process engaged under Chapter 11 of the NAFTA.

A. The content of the letter is not amenable to judicial review

[39] The Court's jurisdiction arises under sections 18 and 18.1, while its powers on an Application for judicial review are stated at subsection 18.1(3) of the Federal Courts Act.

[40] The Court's jurisdiction is circumscribed by the definition of the terms federal board, commission or other tribunal provided at section 2 of the Federal Courts Act. The terms are defined as "any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a prerogative of the Crown [...]." In *Canada (Attorney General) v TeleZone Inc*, [2010] 3 SCR 585, the Supreme Court of Canada noted that the definition is "sweeping" and includes entities "from the Prime Minister and major boards and agencies to the local border guard and customs official and everybody in between" (at para 3).

[41] The definition is not, however, broad enough to encompass in "federal board, commission or other tribunal" decisions by all bodies which are even loosely related to the Crown. At issue here is the decision of the Senior Counsel and Deputy Director of the Trade Law Bureau, a joint initiative of the Department of Justice and Global Affairs Canada, with regards to the composition of the team which represents the federal government in an arbitration file. Significantly, the Trade Law Bureau is acting here in a representative capacity.

[42] The Applicants have provided very little justification for their assertion that the Federal Court

has jurisdiction in this case. As the Federal Court is a statutory court of limited jurisdiction, the Applicants had to satisfy the Court that it has jurisdiction. For the following reasons, the Applicants have not met that burden.

[43] Neither the Respondent nor the Applicants have provided authorities where the Trade Law Bureau or Global Affairs Canada were found to constitute a "federal board, commission or other tribunal," and there seem to be no cases where the Federal Court has addressed this issue.

[44] The test to determine whether a body falls within the purview of the definition is set out in *Anisman v Canada (Border Services Agency)*, 2010 FCA 52 [*Anisman*]. Here, the member of the Trade Law Bureau was exercising his power to manage his litigation team. As mentioned, the Trade Law Bureau represents the Government of Canada in an arbitration matter.

[45] While this specific issue has not previously been considered by the Federal Court, I will not decide on the matter but will assume, as the Applicants argue, that the Senior Counsel and Deputy Director was exercising his power under section 5(d) of the Department of Justice Act. This section states that the Attorney General and the Department of Justice are responsible for the "regulation and conduct of all litigation for or against the Crown or any department, in respect of any subject within the authority or jurisdiction of Canada."

[46] However, as both parties have recognised, the subsequent precedent of *Air Canada* summarises a well-established exception for powers which, while exercised under an Act of Parliament, are of an essentially private nature. It notes that the public or private nature of the power exercised is heavily fact-dependent. The Court summarises the jurisprudential factors used to assess the nature of the power. The list is not exhaustive, and neither factor is dispositive:

The character of the matter for which review is sought. Is it a private, commercial matter, or is it of broader import to members of the public? [The court cites *Peace Hills Trust Co v Moccasin*, 2005 FC 1364 at para 61 ("[a]dministrative law principles should not be applied to the resolution of what is, essentially, a matter of private commercial law…").]

The nature of the decision-maker and its responsibilities. Is the decision-maker public in nature, such as a Crown agent or a statutorily-recognized administrative body, and charged with public responsibilities? Is the matter under review closely related to those responsibilities?

The extent to which a decision is founded in and shaped by law as opposed to private discretion. If the particular decision is authorized by or emanates directly from a public source of law such as statute, regulation or order, a court will be more willing to find that the matter is public. This is all the more the case if that public source of law supplies the criteria upon which the decision is made. Matters based on a power to act that is founded upon something other than legislation, such as general contract law or business considerations, are more likely to be viewed as outside of the ambit of judicial review.

The body's relationship to other statutory schemes or other parts of government. If the body is woven into the network of government and is exercising a power as part of that network, its actions are more likely to be seen as a public matter. Mere mention in a statute, without more, may not be enough.

The extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity. For example, private persons retained by government to conduct an investigation into whether a public official misconducted himself may be regarded as exercising an authority that is public in nature. A requirement that policies, by-laws or other matters be approved or reviewed by government may be relevant.

The suitability of public law remedies. If the nature of the matter is such that public law remedies would be useful, courts are more inclined to regard it as public in nature.

The existence of compulsory power. The existence of compulsory power over the public at large or over a defined group, such as a profession, may be an indicator that the decision is public in nature. This is to be contrasted with situations where parties consensually submit to jurisdiction.

An "exceptional" category of cases where the conduct has attained a serious public dimension. Where a matter has a very serious, exceptional effect on the rights or interests of a broad segment of the public, it may be reviewable. This may include cases where the existence of fraud, bribery, corruption or a human rights violation transforms the matter from one of private significance to one of great public moment (at para 60 [references omitted]).

[47] In considering these factors, I am satisfied that the issue raised before the Court here is of a private nature. The conflict of interests issue, as it relates to the October 9, 2019 letter from the Senior Counsel and Deputy Director of the Trade Law Bureau, cannot be construed as a public matter which ought to be resolved through public law.

[48] As noted, the Senior Counsel and Deputy Director of the Trade Law Bureau's letter relates to the composition of his legal team. This is a routine decision regarding the management of litigation (arbitration), and similar routine decisions are presumably made every day. The Trade Law Bureau is a public entity that is acting *as counsel*. It represents Canada in a dispute, substantially in the way that any attorney would represent any other party.

[49] As the Respondent mutedly notes in paragraph 75 of its Memorandum of Fact and Law, allowing the matter as amenable to an Application for judicial review would subject an untenably broad range of decisions to judicial review – by providing no additional benefit – which would impede the work of the Trade Law Bureau and other similar entities.

[50] The Applicants suggest that the conflict of interests issue is so significant that it becomes one of public interest. They notably cite, at paragraph 23 of their Reply Memorandum of Fact and Law, the public interest in ensuring that "lawsuits are conflict free." I disagree.

[51] First, this dispute does not raise issues of particular importance to the public. The Applicants are essentially claiming damages for the misappropriation of their property. This issue is certainly important to the Applicants, but I have not been convinced it has broader implications.

[52] Second, while I agree that there is a public interest in ensuring that "lawsuits are conflict free," this interest is protected by existing remedies, which are available to the Applicants.

[53] Third, even if I accepted the argument that the purported conflict of interests *could be* an issue of public interest, there is serious doubt that Ms. Dosman was indeed conflicted. Without deciding on the applicable test, I note, as did the Respondent, that there is little unambiguous

evidence that she received information that would cause a conflict of interests.

[54] For these reasons, I conclude that the Trade Law Bureau's letter of October 9, 2019 is not reviewable by our Court, as it is private in nature.

B. It is not proper for the Court to intervene in a process engaged under chapter 11 of the NAFTA

[55] If I am wrong on the first issue and the decision is amenable to judicial review under the Federal Courts Act, I am satisfied that it is not proper for the Court to intervene in a process engaged under Chapter 11 of the NAFTA, and I will thus decline the invitation to do so.

[56] I note that article 5 of the Model Law states that courts should not intervene in these proceedings "except where so provided in this Law." I also note that arbitrators have wide latitude to manage the proceedings before them, which includes setting procedural rules. A valid arbitration agreement could even fail to refer to *any* procedural rules, in which case the arbitrator would have full latitude to set them (article 19 of the Model Law). Arbitrators can also rule on their own jurisdiction, or lack thereof (article 16 of the Model Law), and on interim measures (article 17 of the Model Law).

[57] As the Respondent argued, these principles safeguard the efficiency of the arbitral process. Arbitration is, at its core, a voluntary process whereby the parties can resolve their disputes in a way that is potentially quicker, more efficient, and more cost-effective than the traditional justice system. Requiring the parties to resort to the court system to address procedural and jurisdictional issues would obviously deprive arbitration of its key benefits.

[58] The Applicants stress that the NAFTA does not oust our Court's "inherent" jurisdiction (citing *Council of Canadians*, which is an Ontario Court of Appeal decision regarding the jurisdiction of provincial superior courts constituted under section 96 of the *Constitution Act, 1867*). I am not sure what to make of this argument and see two possible interpretations, neither of which persuades me to intervene.

[59] On the one hand, the Applicants may be using the word "inherent" in its juridical and constitutional sense, to suggest that our Court would have inherent jurisdiction to rule on the conflict of interests issue, even if this matter were not, as discussed above, a judicial review of an administrative decision. This is incorrect, as the Federal Court does not have the inherent and general jurisdiction of the provincial superior courts constituted under section 96 of the *Constitution Act, 1867*: it is constituted under section 101 of the *Constitution Act, 1867* and its jurisdiction is statutory. The Applicants' argument cannot prevail.

[60] On the other hand, the Applicants may be using the word "inherent" to suggest that our Court retains jurisdiction, presuming that the initial matter falls within its statutory jurisdiction, even when the parties, as is the case here, have elected to proceed via the NAFTA arbitration process.

[61] I have received few explanations to adjudicate, and in fact, even assuming the matter falls within the Court's statutory jurisdiction, I see no reason to rule on this point. Indeed, in *Council of Canadians*, though the context and issues were different (and the decision is not binding on this Court), the Ontario Court of Appeal found that arbitration can properly remove disputes from the purview of the regular court system.

[62] For the reasons set out above, the Applicants have not convinced me that the arbitral tribunal *does not* have jurisdiction to deal with the conflict of interests issue, and I therefore find, on the contrary, the tribunal to be the proper forum to deal with the issue – given the fact that the *Applicants* themselves *chose* to submit this dispute to arbitration.

[63] Finally, the Applicants also stress that our Court is authorised under article 9 of the Model Law to issue an "interim measure of protection," which they argue this Application is about as it would aim to "protect" their privileged information.

[64] I am not convinced that this is a proper interpretation of the nature of an interim measure of protection, nor that this or any Application for judicial review can be qualified as an "interim measure of protection." Even if it were, I note that the arbitral tribunal is expressly empowered, under article 17 of the Model Law, to grant interim measures. Again, pursuant to the fundamental principles of arbitration, I find that the Applicants, who have elected to proceed via the arbitral process, must raise their request for such relief before the arbitral tribunal.

[65] For these reasons, I will dismiss the Application for judicial review.

JUDGMENT in T-1735-19

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed;

2. Costs are awarded in favour of the Respondent.

"Martine St-Louis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1735-19
STYLE OF CAUSE:	GEOPHYSICAL SERVICE INCORPORATED, THEODORE DAVID EINARSSON, HAROLD PAUL EINARSSON AND RUSSELL JOHN EINARSSON v HER MAJESTY THE QUEEN IN RIGHT OF CANADA AS REPRESENTED BY ATTORNEY GENERAL OF

CANADA

PLACE OF HEARING:	calgary, alberta (by zoom from montréal)
DATE OF HEARING:	august 4, 2020
JUDGMENT AND reasons:	st-louis J.
DATED:	october 20, 2020

APPEARANCES:

Ms. Matti Lemmens	For The Applicants
Mr. Zack Seymour	
Mr. Alexander Gay	For The Respondent
Ms. Helen Gray	

SOLICITORS OF RECORD:

Ms. Matti Lemmens	
Mr. Zack Seymour	For The Applicants
Calgary, Alberta	
Deputy Attorney General of Canada	For The Respondent
Ottawa, Ontario	