Federal Court  Cour fédérale

Date: 20201105

Docket: T-305-20

Citation: 2020 FC 1034

Ottawa, Ontario, November 5, 2020

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

CANADIAN NATIONAL RAILWAY COMPANY

Applicant

and

GIBRALTAR MINES LTD.

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a January 28, 2020 final offer arbitration [FOA] decision [the "Decision"], made by the Arbitrator pursuant to Part IV of the *Canada Transportation Act*, SC 1996, c 10 [*CTA*], accepting the Respondent's final offer.

II. Background

[2] The Applicant, the Canadian National Railway Company, is a Canadian Class I railway, headquartered in Montreal, QC. It operates a transcontinental rail network and is the largest rail network in Canada. The Respondent, Gibraltar Mines Ltd., is a subsidiary of Taseko Mines Limited. It operates the second largest open pit copper mine in Canada, located in south-central British Columbia [the "Mine"], more specifically producing copper and molybdenum concentrates.

[3] The parties have a long-standing commercial relationship, dating back to 2004, whereby the Respondent shipper engages the Applicant railway company to ship its metal concentrates from the Mine to a terminal in North Vancouver, BC for export [the "Terminal"]. Services were provided under various confidential contracts. The Applicant is the only railway serving both locations.

[4] However, in 2016, the Respondent initiated the first of three FOAs, accessing this process under the *CTA*, which allows for the neutral resolution of contract disputes between a railway company and a shipper. The parties were able to reach a settlement before the end of the 2016 FOA and entered into a confidential contract that expired in June of 2018. The second round was initiated in the fall of 2018. The Respondent's final offer was selected and bound the parties until October of 2019. In October of 2019, the Respondent commenced this third FOA, the 2019 FOA Decision (dated January 28, 2020) being the subject of this application.

[5] The matter was referred to the Arbitrator and the parties filed and exchanged their "information" or documents and submissions they intended to rely on. Key distinctions in the parties' final offers included: (1) the freight rates; (2) the nature of the service standards and penalty/incentive schemes; and (3) the presence of a dispute resolution clause. Rebuttal information was also submitted.

[6] The Applicant's final offer did not include a dispute resolution provision. However, the Respondent's final offer contained the following [the "Arbitration Clause"]:

> All disputes, controversies and claims directly or indirectly arising out of or in relation to the interpretation, construction, performance, or breach of this final offer will be submitted for arbitration under section 36.2 of the *Canada Transportation Act*. The arbitration will be conducted in accordance with the Canadian Transportation Agency's *Sample Rules of Procedure for Arbitrations under Section 36.2 of the Canada Transportation Act*. The place of arbitration will be Vancouver, British Columbia, unless otherwise determined by the arbitrator appointed under section 36.2.

[7] On January 15, 2020, in the week prior to the arbitration hearing on January 20, 2020, the Arbitrator informed the parties that he would like to obtain the Canadian Transportation Agency's [the "Agency"] views "as to the availability of Gilbraltar's Dispute Resolution mechanism under Section 36.2 of the CTA". Counsel for both parties responded. The Applicant objected to this request on the basis that it was not appropriate to seek the submissions of the Agency. The Agency was a "third party" from which advice should not be sought and the issue to be decided was properly that of the Arbitrator's. Further, the question did not fall within the scope of "legal assistance" contemplated by subsection 162(2) of the *CTA*, such that it may be provided by the Agency at the request of the Arbitrator.

[8] The Arbitrator's response to the Applicant stated that:

A. The Arbitrator's Decision is not binding on the Agency and the answer of the Agency would not resolve the issue, but would be an important "data point";

B. The issue of whether section 36.2 of the *CTA* provides the Agency with the jurisdiction contemplated in the Arbitration Clause is an issue for the Arbitrator to decide; and

C. The type of assistance sought by the Arbitrator from the Agency is contemplated by the *CTA*.

[9] The parties were provided with a further opportunity to comment on the Arbitrator's draft request to the Agency, prior to the email request being sent to the Agency on January 16, 2020, in which the Arbitrator sought the Agency's views, as follows:

> CNR contests the ability of an Arbitrator to impose the dispute resolution procedure under section 36.2 of the *Canada Transportation Act* on the parties by selecting a Final Offer which contains such provision over a Final Offer which does not contain such a provision and to which the other party objects. Of course, that is a matter which I will decide as between the parties based on the submissions in the arbitration.
>
> I understand that any determination I make would not bind the Agency; nor do I consider that I would be bound by the views of the Agency. However, the views of the Agency (if any) as to the interpretation of its mandate to conduct arbitrations under section 36(2) in these circumstances (and the willingness of the Agency to do so from an administrative perspective) seems to me to be an important consideration in evaluating the Dispute Resolution provision as one element in the FOA arbitration process.

[10] On January 16, 2020 and January 17, 2020, both parties made submissions directly to the

Agency with respect to the Arbitration Clause. The Agency provided a response on January 23, 2020:

> This is in response to your request for assistance pursuant to subsection 162(2) of the *Canadian Transportation Act* (CTA).
>
> It is acknowledged that Gibraltar Mines Ltd. has included the following provision within its offer:
>
> > …[Arbitration Clause]
>
> Please be advised that section 36.2(1) of the *Canadian Transportation Act* states:
>
> > 36.2(1) If sections 36.1 and 169.1 do not apply, the Agency may mediate or arbitrate a dispute relating to any railway matter covered under Part III – other than Division VI.2 – or Part IV, or the application of any rate or charge for the movement of goods by railways or for the provision of incidental services, if requested to do so by all parties to the dispute.
>
> As you may know, the Agency cannot be compelled to accept any case under this provision. Any application will be reviewed by the Agency, at the time of submission. The Agency's jurisdiction is limited by statute, and as such, it can only hear matters that fall within the parameters of its enabling legislation.

[11] The final hearing of the FOA ran from January 20, 2020 until January 24, 2020, including the presentation of evidence from fact witnesses and experts and final submissions from the parties.

I. Decision Under Review

[12] The Arbitrator chose the Respondent's final offer and released the six-page Decision on

January 28, 2020. As it relates to the Arbitration Clause, the Arbitrator made the following statements:

> 11. On December 2, 2019, following the exchange of information by the parties on November 28, 2019, I again wrote to the parties, advising that I did not feel it necessary to seek the Agency's assistance in determining the LRVC, but would advise the parties if that determination changed. I did not subsequently change my view that the assistance of the Agency was not needed with respect to the LRVC issue and (with one exception noted below) I proceeded to make my selection between the offers based on the information, witness testimony, export opinions and legal submissions of the parties in the arbitration.
>
> …
>
> 16. On January 15, 2019, I contacted the parties to advise that I would be seeking the Agency's assistance with respect to the ability of an Arbitrator to impose the dispute resolution procedure under section 36.2 of the Act by selecting a Final Offer which contains such a provision over a Final Offer which does not contain such a provision, and to which the other party objects.
>
> …
>
> 21. The Agency did not opine on whether a dispute arising out of a successful Final Offer, in the circumstances described above, would fall within its jurisdiction under s. 36.2 of the Act.

[13] The Decision outlined the procedural steps undertaken in FOA process, including when submissions were made, pre-hearing steps, agreement as to timetables and when procedural orders were issued. The Arbitrator further referenced various provisions under the *CTA*, including subsections 165(1), (4) and (5), in setting out his obligations.

II. Issues

[14] The issues are:

A. Did the Arbitrator improperly ask the Agency for its opinion on its jurisdiction under section 36.2 of the *CTA*, pursuant to subsection 162(2) of the *CTA*?

B. Was the Arbitrator's selection of the Respondent's final offer unreasonable because it contained the Arbitration Clause?

C. Did the Arbitrator err by releasing "reasons" for his Decision, contrary to subsection 165(4) of the *CTA*?

III. Relevant Provisions

[15] Subsections 36.2(1), 162(2) and 165(4) of the *CTA*:

> **Request by all parties**
>
> 36.2 (1) If sections 36.1 and 169.1 do not apply, the Agency may mediate or arbitrate a dispute relating to any railway matter covered under Part III — other than Division VI.2 — or Part IV, or to the application of any rate or charge for the movement of goods by railways or for the provision of incidental services, if requested to do so by all parties to the dispute.
>
> …
>
> **Assistance by Agency**
>
> 162(2) The Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator on a cost recovery basis.
>
> …
>
> **Reasons not required**
>
> (4) No reasons shall be set out in the decision of the arbitrator.

IV. Standard of Review

[16] The parties disagree on the applicable standard of review. It is the Applicant's position that each issue engages the correctness standard. In the Applicant's view, the issues concern either questions of procedural fairness or the presumption of reasonableness review is otherwise rebutted (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 53 [*Vavilov*]).

[17] The Respondent, however, asserts that the starting presumption of reasonableness review has not been rebutted in this case. In its view, this is not a case where the rule of law requires the standard of correctness to be applied (*Vavilov*, above at para 10).

[18] The *Vavilov* framework applies "[w]here a court reviews the merits of an administrative decision (i.e., judicial review of an administrative decisions (sic) other than a review related to a breach of natural justice and/or the duty of procedural fairness)…" (*Vavilov* at para 23) [*emphasis added*]. The duty of procedural fairness in administrative law is context-specific, the specific procedural requirements of which are determined in light of all of the circumstances (*Vavilov* at para 77). Therefore, the presumption of reasonableness under the *Vavilov* framework does not apply to questions of procedural fairness and my starting point is this delineation between whether the issues engage the merits of the Arbitrator's decision or duties of procedural fairness.

[19] The process followed in making a decision (i.e. seeking the Agency's opinion) and whether written reasons are required may be considered to be issues of procedural fairness, informed by the context of the statutory scheme in this case. However, the first and third issue, at their core, are questions of statutory interpretation. In this respect, and for the reasons discussed below, the Arbitrator is engaged in an exercise of interpreting a statute closely connected to his function. This is a question of the merits of an administrative decision-maker's interpretation of a statutory provision, which must be consistent with "the text, context and purpose of the provision" (*Vavilov* at para 120). This more appropriately engages a standard of reasonableness. The second issue, challenging the Arbitrator's selection of the Respondent's final offer on the basis of the Arbitration Clause, is properly a question of the merits of Arbitrator's Decision, invoking the presumption of reasonableness under the *Vavilov* framework. In this respect, I have not been provided with sufficient evidence to show that the presumption is rebutted as it relates to the issues.

[20] Therefore, the standard of reasonableness review applies to the three issues raised by the Applicant. However, even if this Court was to apply the standard of correctness with respect to procedural fairness, it would not change my decision that follows.

V. Analysis

A. *Jurisdiction*

[21] I am satisfied that I have jurisdiction to hear this case. A proceeding in respect of an FOA pursuant to Part IV of the *CTA* is not a proceeding before the Agency (*CTA*, s 161(4)). As such,

exclusive jurisdiction is not conferred on the Federal Court of Appeal, pursuant to subsection 28(1)(k) of the *Federal Courts Act*, RSC, 1985, c F-7 [*Federal Courts Act*].

[22] I am otherwise satisfied that the requirements of sections 18 and 18.1 of the *Federal Courts Act* and the three-prong test in *ITO-Int'l Terminal Operators v Miida Electronics*, [1986] 1 SCR 752 at 766 give jurisdiction to this Court.

[23] Subsection 18.1(1) of the *Federal Courts Act* provides that "[a]n application for judicial review may be made by the Attorney General of Canada *or by anyone directly affected by the matter in respect of which relief is sought*" [emphasis added]. I agree the Applicant has been directly affected by the Decision for the term of the FOA.

[24] This Court's jurisdiction is exercised in relation to a "federal board, commission or other tribunal", as defined in section 2 of the *Federal Courts Act*, which is "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…" An Arbitrator, while separate from the Agency, is part of the machinery of the *CTA*:

> …The final offer arbitration provisions establish a method of determining rates in special instances and, as such, are an integral part of the whole legislative scheme regulating freight rates. They are specifically addressed to disputes relating to rates or conditions associated with the movement of goods, issues that are integral to the operation of the railways. The quick, simple and out-of-court settlement of those disputes is a means of achieving the object and purpose of the Act, which is to render the railway industry more efficient and competitive and the transportation system more economical. That the issues of rates and conditions of carriage arise with respect to the execution of a private contract does not nullify their significance with respect to a legitimate and valid

> federal objective and take them out of federal legislative competence.
>
> (*Canadian National Railway Co v Canada (National Transportation Agency)*, [1996] 1 FC 355 at 10-11 (FCA), leave to appeal to SCC refused, 24919 (28 March 1996))

[25] Further, this Court has previously recognized that the *CTA* is a statute closely connected to the Arbitrator's functions, finding that "to the extent the Arbitrator may have been required to interpret provisions of the CTA, he is interpreting his home statute" (*National Gypsum (Canada) Ltd v Canadian National Railway Company*, 2014 FC 869 at para 50). In this respect, the Arbitrator is a person exercising powers conferred by the *CTA*, pursuant to referral of the matter from the Agency under the *CTA*.

[26] For this reason, the Arbitrator is a person exercising powers conferred under an Act of Parliament, the *CTA*.

B. *The parties' positions*

[27] It is the Applicant's position that the Arbitrator improperly abdicated his decision-making role when seeking the Agency's position on its jurisdiction in relation to the Arbitration Clause. In this respect, the Arbitrator allegedly erred in his interpretation of subsection 162(2) of the *CTA*, which permits the Arbitrator to make requests for "legal assistance" from the Agency. Further, the Arbitrator allegedly erred by selecting the Respondent's final offer on the basis that it contained the Arbitration Clause, which is unenforceable because the Agency does not have jurisdiction, under section 36.2 of the *CTA*, to determine the disputes that could arise thereunder.

Additionally, the Applicant argued that the Arbitrator erred by providing reasons for the Decision in contravention of subsection 165(4) of the *CTA*.

[28] It is the Respondent's position that none of the above grounds raised by the Applicant are established on the basis of the record. The Arbitrator's request to the Agency allegedly fell within the scope of subsection 162(2) of the *CTA*. Nothing in the Decision compels the inference that a particular interpretation was afforded to section 36.2 of the *CTA*, nor the conclusion that the Arbitrator ignored the consequences of the Arbitration Clause in its consideration. Additionally, the Respondent claims that no reasons were provided for the selection of the Respondent's final offer in accordance with subsection 165(4) of the *CTA*.

C. *The statutory framework for the FOA regime*

[29] A railway company and a shipper are permitted to enter into confidential commercial contracts defining, for example, the rates charged to the shipper and service obligations, among other terms (*CTA*, s 126(1)). The purpose is to support an efficient transportation system by encouraging deregulation and commercialization, thereby leveraging market forces.

[30] The FOA regime was added to the former *National Transportation Act, 1987*, SC 1987, c 34 and was continued under the current *CTA*, as a mechanism to neutrally resolve contract disputes between a railway company and a shipper. Where the parties are unable to negotiate a contract, they may submit the matter to the Agency for FOA:

> **161(1)** A shipper who is dissatisfied with the rate or rates charged or proposed to be charged by a carrier for the movement of goods, or with any of the conditions associated with the movement of

> goods, may, if the matter cannot be resolved between the shipper and the carrier, submit the matter in writing to the Agency for a final offer arbitration to be conducted by one arbitrator or, if the shipper and the carrier agree, by a panel of three arbitrators.

[31] The Agency refers the matter to an outside arbitrator and FOA is therefore not a proceeding before the Agency (*CTA*, s 161(1), (4), 162(1)). However, the *CTA* outlines the arbitration procedure in broad strokes and provides for the exchange of information between the parties (*CTA*, s 163(3)). The *CTA* contemplates an expedited process of 60 days for the issuance of the Arbitrator's Decision (*CTA*, s 165(2)(b)).

[32] The Arbitrator's role is to determine which of the two offers is more reasonable (*Canadian National Railway Company v Western Canadian Coal Corporation*, 2007 FC 371 at para 35 [*Western Canadian Coal*]). It is an all-or-nothing approach. The Arbitrator must select the final offer of either the shipper or the railway company (*CTA*, s 165(1)). The Arbitrator cannot extract reasonable terms from one offer for inclusion in the other:

> **35** Final offer arbitration has been described as "an intentionally high risk form of arbitration" that encourages settlement and tempers final positions. The arbitration resolves isolated disputes over rates to be charged by a carrier for a period of one year when the parties are unable to agree. The arbitrator's task is to select the more reasonable of the two offers submitted. As is indicated in paragraph 165(6)(a) of the Act, the arbitrator's decision is intended to bring finality to the dispute. The limited duration of the decision's binding effect on the parties is closely linked to the limited timeframe within which the arbitration process occurs….
>
> (*Western Canadian Coal*, above at para 35)

D. *Did the Arbitrator improperly ask the Agency for its opinion on its jurisdiction under section 36.2 of the CTA, pursuant to subsection 162(2) of the CTA?*

[33] It is the Applicant's position that the Arbitrator improperly abdicated his decision-making authority by requesting the Agency's views on its jurisdiction under section 36.2 of the *CTA* in relation to the Arbitration Clause. In the Applicant's view, the Agency was bound to independently decide the issues in the FOA based on the *delegatus non potest delegare* maxim:

> **93** It is settled law that a body to which a power is assigned under its enabling legislation must exercise that power itself and may not delegate it to one of its members or to a minority of those members without the express or implicit authority of the legislation, in accordance with the maxim hallowed by long use in the courts, *delegatus non potest delegare* : *Peralta v. Ontario*, [1988] 2 SCR 1045 (SCC), aff'g (1985), 49 O.R. (2d) 705. In the case at bar it was specifically the intent of the legislature that decision-making authority be assigned to a committee of inquiry.
>
> (*Therrien (Re)*, 2001 SCC 35 at para 93)

[34] I find that the Arbitrator's request does not amount to an act of sub-delegation. The Arbitrator clarified consistently throughout the record that he was not bound to the views of the Agency, including in his request to the Agency itself. The Arbitrator referred only to the Agency's opinion as a useful "data point". The Arbitrator issued a Decision, exercising his authority under subsection 165(1) of the *CTA* to select the final offer of the Respondent. In relation to the Agency's opinion, the Arbitrator noted in his Decision at paragraph 21 that the Agency did not opine on whether a dispute within the scope of the Arbitration Clause would in fact fall within the Agency's jurisdiction under section 36.2 of the *CTA*. In these circumstances, I am not convinced the Arbitrator sub-delegated his authority or relied on the response received

from the Agency in any event. As such, any opinion of the Agency was of no moment for the decision to be made.

[35] Nonetheless, the core of this issue is one of statutory interpretation and whether the request was outside the scope of subsection 162(2) of the *CTA*. For the reasons that follow, I find that the question put to the Agency falls within the scope of "legal assistance" contemplated in subsection 162(2) of the *CTA*, which specifies:

> **Assistance by Agency**
>
> (2) The Agency may, at the request of the arbitrator, provide administrative, technical and legal assistance to the arbitrator on a cost recovery basis.

[36] The Applicant relies on *McDiarmid Lumber Ltd v God's Lake First Nation*, 2006 SCC 58 at paragraph 30, for the proposition that two or more words linked by "and" should be interpreted with a view to their common features, namely that the Arbitrator may utilize the Agency for the purposes of logistical assistance, consistent with the terms "administrative assistance" and "technical assistance". This allegedly does not include substantive legal advice on matters at issue in the FOA.

[37] This position requires me to read down the language of subsection 162(2) of the *CTA*, whereby legal assistance would be subsumed within "administrative assistance" and receive no independent meaning. In the context of a different provision in the *CTA*, with similar wording to subsection 162(2), Justice McVeigh described the Agency's relationship with an Arbitrator.

These statements were made in the context of a motion for production:

> 32 The materials requested by CN, if they exist, pertain to documents or communications between the Arbitrator and persons appointed pursuant to subsection 169.35(3) of the CTA to provide administrative, technical and legal assistance to him. Although not a tribunal, *per se*, any arbitrator appointed pursuant to subsection 169.35(1) of the CTA, is clearly entitled to rely on Agency staff in fulfilling his or her duties in relation to a matter that has been referred for arbitration. This is provided for by subsection 169.35(3) of the CTA:
>
> > 169.35(3) The Agency may, at the arbitrator's request, provide administrative, technical and legal assistance to the arbitrator.
>
> 33 I agree with LDC's submission that this provision expresses Parliament's recognition of the practical realities under which level of service arbitrators must reach their decisions, especially in light of the often extensive evidence presented in the arbitration proceedings and the tight timelines imposed under the legislative scheme. While it is true that the arbitration is not an Agency proceeding, it is difficult to foresee how an arbitrator could reasonably comply with the requirement set out in subsection 169.38(3) of the CTA that he or she issue a decision no more than 45 days (65 days at the outset) after a matter has been referred, without the assistance of Agency staff. Therefore, in my view, subsection 169.35(3) is merely the statutory embodiment of the long-standing administrative principle that decision-makers do not have to do all the work themselves (*Syndicat des employés de production du Québec & de l'Acadie v Canada (Human Rights Commission)*, [1989] 2 SCR 879, at page 898).
>
> (*Canadian National Railway Company v Louis Dreyfus Commodities Ltd*, 2016 FC 101 at paras 32-33)

[38] The expedient FOA timelines and extensive evidence engaged in FOAs support a more expansive interpretation of subsection 162(2) in terms of the nature of “legal assistance” that may be provided by the Agency. This is because the Arbitrator is allowed to rely on Agency staff in exercising his duties, which may require more than logistical assistance. I am not persuaded that the Arbitrator’s request falls outside the scope of “legal assistance” in subsection 162(2) in

this case, particularly in the context where the Arbitrator is seeking the Agency's opinion as a consideration in its overall determination.

[39] Additionally, I note that in both the request to the Agency and in the response provided by the Agency, explicit reference is made to subsection 162(2) of the *CTA*.

[40] Further, I am not convinced that assistance under subsection 162(2) of the *CTA*, as described in this case, results in a reviewable decision of the Agency that could undermine the expediency of the FOA process, should review be sought. This is interpretive assistance, which the Arbitrator expressly acknowledges he is not bound to follow.

[41] Therefore, the Arbitrator's Decision is not unreasonable, neither is it incorrect, on the basis of his interpretation of subsection 162(2) of the *CTA* and his request to seek "legal assistance" under this provision.

E. *Was the Arbitrator's selection of the Respondent's final offer unreasonable because it contained the Arbitration Clause?*

[42] The Applicant submits that the Agency does not have jurisdiction under section 36.2 of the *CTA* to determine the types of disputes that may arise under the Arbitration Clause of the Respondent's final offer. In the Applicant's view, this is fatal to the Respondent's final offer, as the Arbitration Clause is unenforceable or unreasonable, compelling the parties to submit all

disputes to the Agency for arbitration, when the Agency has no such jurisdiction to hear the matters. Section 36.2(1) of the *CTA* provides:

> **Request by all parties**
>
> 36.2(1) If sections 36.1 and 169.1 do not apply, the Agency may mediate or arbitrate a dispute relating to any railway matter covered under Part III — other than Division VI.2 — or Part IV, or to the application of any rate or charge for the movement of goods by railways or for the provision of incidental services, if requested to do so by all parties to the dispute.

[43] Specifically, the Agency allegedly lacks subject matter jurisdiction because a claim for a breach of contract is not a "railway matter" as contemplated by section 36.2 of the *CTA*. The Agency also does not have jurisdiction over the parties, whereby the Arbitration Clause would be imposed on the Applicant without its consent.

[44] The Applicant further argues that the parties may be subject to lengthy proceedings should the Agency find it has no jurisdiction or decline to exercise jurisdiction in relation to matters caught within the scope of the Arbitration Clause.

[45] For the reasons below, I cannot conclude the Arbitrator's Decision to select the Respondent's final offer is unreasonable on this basis. The Arbitrator may well have agreed that the Arbitration Clause is unenforceable, but nevertheless concluded that this alone did not render the Respondent's final offer incapable of acceptance.

[46] The Arbitrator is required to accept the final offer of either the shipper or the carrier, in its entirety, based on the more reasonable of the two submitted offers (*CTA*, s 165(1); *Western Canadian Coal* at para 35):

> 165 (1) The decision of the arbitrator in conducting a final offer arbitration shall be the selection by the arbitrator of the final offer of either the shipper or the carrier.

[47] This requires the weighing of a variety of considerations and differences across both submitted final offers, in light of certain objectives of the National Transportation Policy (*CTA*, s 5) and the "legal criteria" otherwise considered in the *CTA* (*Western Canadian Coal* at para 45; *CTA*, s 164(2)). The two parties' final offers differed in several respects, as identified above: (1) the freight rates; (2) the nature of the service standards and penalty/incentive schemes; and (3) the presence of a dispute resolution clause. The Applicant's request of this Court is seeking that particular weight be placed on the enforceability of the Arbitration Clause. This is not the role of this Court on review. Nothing on the record before the Court suggests that the enforceability of the Arbitration clause is a legal constraint or an overriding consideration in the Arbitrator's selection process.

[48] There are no reasons in the Decision to suggest whether the Arbitration Clause is reasonable or not. As such, I have considered the broader record (*Vavilov* at para 137). It is clear on the record that the Arbitrator was alive to the Applicant's concerns in relation to the section 36.2 jurisdiction of the Agency and the potential consequences should the Arbitration Clause be found unenforceable. I have not been pointed to any evidence which suggests that the Arbitrator's selection is "untenable in light of relevant factual and legal constraints" (*Vavilov* at para 101).

[49] Therefore, the Arbitrator's decision is not only reasonable, but correct as it relates to this ground.

F. *Did the Arbitrator err by releasing "reasons" for his Decision, contrary to subsection 165(4) of the CTA?*

[50] Subsection 165(4) provides that "[n]o reasons shall be set out in the decision of the arbitrator", unless requested by the parties within 30 days (*CTA*, s 165(5)). The Arbitrator rendered a six-page, thirty-one paragraph Decision on January 28, 2020, selecting the Respondent's final offer. It is the Applicant's position that these constitute "reasons", which are not permitted under subsection 165(4) of the *CTA*.

[51] The "prohibition" of reasons in subsection 165(4) of the *CTA* has been understood by this Court as serving several purposes, namely bringing certainty and finality to a contract dispute:

> 1. the FOA process is intended to be expeditious, inexpensive, final and binding;
>
> 2. since the arbitrator cannot select a "reasonable" middle ground between the two offers or a compromise position, the arbitrator does not have to rationalize his decision. His decision is obvious, namely that the offer selected by the arbitrator is considered more reasonable than the other offer taking into account the relevant factors; and
>
> 3. the lack of reasons further encourages the parties to reach a negotiated contract settlement before FOA or at least to discipline the parties to temper their respective offers. The parties realize they have to make their offers as "reasonable" as possible in order to be selected.
>
> (*Western Canadian Coal* at para 52)

[52] I do not read the Decision as offering "reasons" as contemplated under subsection 165(4) of the *CTA*, but rather a description of the procedural steps involved in the FOA process. The Arbitrator further refers to his obligations under the *CTA*. In fact, the Arbitrator explicitly acknowledges in his Decision that the preconditions for issuing reasons under subsection 165(4) have not been met.

[53] Upon reading the Decision, I find it does not provide a basis for the Arbitrator's selection of the Respondent's FOA. No information is included as to how the Arbitrator viewed the Arbitration Clause, nor how the enforceability of the Arbitration Clause was weighed in light of the other factors the Arbitrator had to consider.

[54] As such, for the reasons above, I am not prepared to find the Decision unreasonable on this ground. The Decision is also correct on this basis.

[55] It is also the Applicant's position that the Arbitrator misstated matters on the record in his Decision. I do not find that the Decision misstated the Applicant's position based on my review of the record.

VI. Conclusion

[56] For the reasons above, I dismiss the application and grant costs to the Respondent in the amount of $4,000, in accordance with Tariff B of the *Federal Courts Rules*, as agreed to by the parties.

JUDGMENT IN T-305-20

THIS COURT'S JUDGMENT is that

1. The application is dismissed; and

2. Costs to the Respondent in the amount of $4,000, in accordance with Tariff B of the *Federal Courts Rules*.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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JUDGMENT AND REASONS:	MANSON J.
DATED:	NOVEMBER 5, 2020

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