

CANADA / JUDGMENT

Fotmer v. Tilray

2023 BCSC 1323

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Supreme Court of British Columbia

DECIDED

27 June 2023

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2023 BCSC 1323 Fotmer v. Tilray

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fotmer v. Tilray,

2023 BCSC 1323

Date: 20230627

Docket: S231975

Registry: Vancouver

Between:

Fotmer Corporation, S.A.

Petitioner

And

Tilray Brands, Inc.

Respondent

Corrected Judgment: The text of the judgment was corrected on the front page on August 10, 2023

Before: The Honourable Justice Ahmad

Oral Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, BC

June 16, 2023

Place and Date of Judgment:

Vancouver, BC

June 27, 2023

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I. Introduction

- [1] The parties to this petition proceeding, Fotmer Corporation S.A. ("Fotmer") and Tilray Brands, Inc. ("Tilray"), are parties to a Raw Material Purchase Agreement dated May 22, 2019 ("RMPA") pursuant to which Tilray agreed to purchase medical cannabis products supplied by Fotmer.

- [2] Shortly after entering into the RMPA, on June 18, 2019, they executed a quality agreement (the "First Quality Agreement"). Together, the RMPA and the First Quality Agreement set out the terms for the supply, purchase, and expected quality of the cannabis product. The First Quality Agreement was amended approximately one year later and then again in subsequent years.
- [3] In late 2021 and early 2022, disputes arose between the parties concerning the amounts owing under the RMPA and whether the quality of the product delivered met the standards set out in their agreement.
- [4] Pursuant to the arbitration agreement contained at s. 21 of the RMPA, the parties agreed that if they are unable to resolve the dispute under a specified tiered process, they would submit to an expedited arbitration process to be completed within 30 days of the appointment of the sole arbitrator to be jointly appointed by the parties.
- [5] In January 2023, Fotmer served a notice of arbitration on Tilray in which it proposed four possible arbitrators to serve as the sole arbitrator. All of the proposed arbitrators were American. Tilray objected to each of the proposed arbitrators. It proposed instead that the parties appoint an arbitrator with knowledge of British Columbia's arbitration legislation. It proposed two BC based arbitrators and one from Alberta.
- [6] The parties have been unable to agree on who should be appointed an arbitrator. Relying on s. 11(5) of the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 [ICAA], the parties request that the court appoint the sole arbitrator to resolve the dispute.

II. Legal Framework

- [7] There is no dispute that the ICAA applies to the proposed arbitration.
- [8] Section 11 of the ICAA relates to the appointment of arbitrators. Pursuant to s. 11(5) of the ICAA:
 - (5) ... if the parties fail to agree on the arbitrator, the appointment must be made, on request of a party, by the Chief Justice.
- [9] The Chief Justice has delegated me to do so in his place.
- [10] Section 11(8) of the ICAA provides relevant considerations for the court in its determination of an appropriate arbitrator. It provides that in appointing an arbitrator, the court must have due regard to two factors:
 - a) any qualifications required of the arbitrator by the agreement of the parties, and
 - b) other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

- [11] Although section 11(1) of the ICAA provides that a person of any nationality may be an arbitrator, pursuant to s. 11(9), the court must not appoint a sole arbitrator who is the same nationality as any of the parties.
- [12] Article 11(5) of the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration (the "Model Law"), on which the ICAA is based, also provides guidance. It provides:
- (5) The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

III. Position of the Parties

- [13] The parties agree on some of the qualifications the arbitrator should have. They are: experience as an arbitrator in international arbitration, availability to carry out the arbitration in the expedited 30-day timeframe, freedom from conflicts, and fluency in English.
- [14] The parties disagree on two other important criteria, being what nationality or legal experience, the arbitrator should have.
- [15] Relying on the principles of "neutral nationality" codified in both the ICAA and the Model Law, Fotmer submits that it is not enough that the arbitrator not share a nationality with one of the parties. It argues that regardless of nationality, the close connections between Tilray and Canada makes it inappropriate to appoint a Canadian-based arbitrator.
- [16] It seeks the appointment of one of three arbitrators, all of whom it says have neutral nationality (i.e., they are not from Canada, Uruguay, or the United States). All have cleared conflicts and are available for the appointment to the expedited process contemplated by the arbitration agreement.
- [17] Noting, among other things, its incorporation in Delaware and the conduct of its business operations in Portugal, Tilray denies that it is a Canadian national or even that it has close ties to Canada. It also notes that Fotmer has provided no evidence that it actually doubts the independence or impartiality of a British Columbian or Canadian arbitrator. Accordingly, it says that the appointment of a Canadian-based arbitrator does not contravene the principle of arbitral neutral nationality.

[18] In fact, Tilray argues that because the dispute is governed by British Columbia law, a British Columbian arbitrator is the most suitable. Tilray seeks the appointment of one of two arbitrators, both of whom are familiar with interpreting and applying domestic legislation, domestic case law, and arbitrating international disputes. One is from Alberta and one is from British Columbia.

[19] I will now turn to my consideration of the arbitrator qualifications required for this appointment.

IV. Discussion and Analysis

A. Independence and Impartiality

1. General principles

[20] It is a maxim of international commercial arbitration that an arbitrator must be independent and impartial. As noted by Ilhyung Lee in his text, "Practice and Predicament: The Nationality of the International Arbitrator, (with Survey Results)":

Given the prevalence and reality of national identification and suspicion of national favouritism, Professor Lalive notes, neutral nationality of the arbitrator is necessary, for without it, "an unhealthy atmosphere of doubt and fear is likely to appear". The doubt and fear is of arbitrator bias towards the party with the same nationality, notwithstanding his obligation to be independent and impartial. Perhaps the "requirement" of a neutral national is best understood not by the presence of actual partiality or bias, but, rather, the "appearance" of it. In brief, there is a "greater degree of confidence on all sides if there is no chance that one party will get better hearing because of some cultural or national identification between the party and the arbitrator

[21] Despite the author's reference to "neutral nationality", the more general requirement of independence and impartiality is not limited to the concept of nationality. Indeed, both section 11(8) of the ICAA and article 11(5) of the Model Law on which the 11(8) is based, are worded more generally:

[22] Article 11(5) of the Model Law provides that due regard shall be given to:

... such considerations as are likely to secure the appointment of an independent and impartial arbitrator and ... take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

[Added emphasis.]

[23] Section 11(8) of the ICAA does not reference nationality at all. It mandates that, in appointing an arbitrator, the court must consider:

... other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

[Added emphasis.]

[24] As expressly contemplated by s.11(9) of the ICAA, shared nationality with one of the parties is one indicator of perceived bias.

[25] However, given the more general language contained in the Model Law and s. 11(8) of the ICAA, I am satisfied that nationality is not the only hallmark of an arbitrator's perceived independence and impartiality or bias. Other considerations will also bear on that analysis.

[26] I will now turn to those considerations, starting with nationality.

2. Nationality

[27] Despite the reference to "nationality" in s. 11(9), the ICAA does not define that term, nor does there appear to be much guidance in the case law. However, citing from a 1954 decision from Ontario, the 2023 edition of Halsbury's Laws of Canada defines "nationality of corporations" in part as follows:

A corporate entity is a legal person created by a state within the domain of its domestic jurisdiction. International law therefore recognizes that a corporation bears a nationality of a state under whose laws it is incorporated and in whose territory it has its registered office.

[28] In this case, Tilray was incorporated under the laws of Delaware in the United States. Its head office is located in Seattle, where its Chief Executive Officer was based. Its registered agent information was located in Delaware. Indeed, under s. 9(b) of the RMPA, Tilray represented and warranted to Fotmer that it was and would continue to be duly incorporated under the laws of Delaware, United States.

[29] I have no hesitation in concluding that Tilray is an American national. Put another way, I conclude that Tilray is not a Canadian national so as to preclude the appointment of a Canadian arbitrator on the basis of nationality.

[30] However, as I have found, that conclusion is not determinative of whether a Canadian arbitrator may nonetheless be perceived as being other than independent and impartial. "Other considerations" may apply.

3. Place of Business

[31] One such "other consideration" is the place where the parties carry on business: *Canadian Reinsurance Co. V. Lloyd's Syndicate* PUM 91, 6 B.L.R. (3d) 102, 1995 CarswellOnt 2356 [Canadian Reinsurance Co.] at paras. 10 -15.

[32] The question is: what constitutes the place that a party carries on business?

[33] Article 1, para. 3 of the UNCITRAL 2012 Digest of Case Law on the Model Law (the "UNCITRAL Digest") provides:

The term "place of business" has been considered in some courts to include any location from which a party participates in economic activities in an independent manner. It should thus include activities such as the establishment of a production plant, sales/marketing base, distribution, transport, or the place where the financial and administrative functions of the business are carried out.

- [34] Referring to that definition, Tilray notes that its president and CEO was based out of Seattle. Seattle was the base for its sales and marketing and where it carried out its financial and administration functions. All of the production, distribution, and transportation of medicinal cannabis that was the subject of the RMPA was based out of its operations in Portugal. Fotmer shipped all of the products Tilray ordered under the RMPA from Fotmer's facility in Uruguay directly to Tilray's facility in Portugal.
- [35] Applying the UNCITRAL Digest definition to those facts, Tilray arguably has a place of business in either the United States (or, more specifically, Seattle) or Portugal. However, as a multinational company, those are not the only places in which Tilray has business operations. Indeed, at the time that the RMPA was concluded, Tilray had subsidiaries and was operating internationally, including in Portugal, Germany, and Canada, where it operated a production plant.
- [36] The question is how does one determine the place of business of a multinational entity that conducts its business operations in more than one country or jurisdiction?
- [37] The ICAA provides some insight.
- [38] Pursuant to s. 1(3) of the ICAA, a party's "place of business" is a relevant consideration in determining whether an arbitration is "international" in the context of the ICAA. Pursuant to s. 1(4)(a), where a party has more than one place of business, the relevant place of business is that which has the closest relationship to the arbitration agreement.
- [39] The relevant time for determining the "closest relationship", in turn, is the time that the contract between the parties was concluded: *Alberta Motor Association Insurance Company v. Aspen Insurance UK Limited*, 2018 ABQB 207 at para. 77.
- [40] I acknowledge that neither ss. 1(3) or (4) of the ICAA directly relate to the issue before me; that is the question of assessing an arbitrator's independence and impartiality. However, in my view, they do provide insight into the Legislature's intention, and the court's interpretation of that intention, regarding the application of the ICAA. In my view, it is appropriate to consider that guidance in the determination of an arbitrator's independence and impartiality.
- [41] At the time that the RMPA was concluded, Tilray held licences to cultivate cannabis in both Canada and Portugal. It also had production facilities in Canada and sought to expand its large-scale operations to Portugal. Although Tilray had not yet completed that expansion, the parties drafted the RMPA to contemplate that it may operate in either Canada or Portugal. For example, although the RMPA references Canadian federal cannabis regulation,

it expressly leaves room for other regulations to apply and contemplates the import of the cannabis material to either Canada or Portugal.

[42] Ultimately, Tilray shipped the raw cannabis product it purchased from Fotmer directly to its production facility which, by then, had been completed in Portugal. The cannabis product never passed through Canada. Tilray argues that the delivery to and the production and distribution in Portugal makes Portugal "its place of business" for the purposes of the RMPA and the arbitration agreement contained therein.

[43] However, in my view, that argument ignores the reference in the RMPA and the First Quality Agreement that reflect Tilray's presence in Canada. For example:

- a) Tilray's address for service of the RMPA is located in British Columbia;
- b) Tilray lists its address in the First Quality Agreement as Nanaimo, British Columbia;
- c) Four of the six key contacts listed in the First Quality Agreement are located in Canada; only two are located in Portugal;
- d) Tilray's VP Legal under the First Quality Agreement has a Tilray.ca e-mail address and a physical address in Nanaimo;
- e) The First Quality Agreement states that Tilray has a registered office located in Vancouver, British Columbia; and
- f) The list of approved subcontractors includes two entities from Canada and two from Uruguay. None are from Portugal.

[44] I acknowledge that ultimately Tilray performed its obligations under the RMPA in Portugal, not British Columbia. However, while contemplated in the RMPA, those operations in Portugal did not come to pass until after the parties had entered into the RMPA. As noted, the relevant time for determining the place of business at the time that the contract, in this case the RMPA, was concluded.

[45] At that time, not only did Tilray conduct business in British Columbia, it had not yet completed its expansion of its Portuguese facilities. Presumably, British Columbia was the location in which it was able to fulfil its obligations to Fotmer.

[46] The references in the RMPA and First Quality Agreement that I have listed above are a clear indication of Tilray's presence in British Columbia at the time those agreements were signed. Collectively, those factors are sufficient to establish that at the time the RMPA was concluded, British Columbia, not Portugal, was Tilray's place of business.

[47] Even if I am wrong in that conclusion, however, I am satisfied that given the close and obvious connection with British Columbia as expressly set out and reflected in the RMPA, the appointment of a British Columbian or Canadian arbitrator could give rise to a perception of bias and risk undermining the integrity of the arbitration process.

[48] It follows that, in my view, to ensure the appearance of independence and impartiality, the arbitrator to be appointed for this dispute should be a non-Canadian.

[49] I now turn to Tilray's proposed requirement regarding knowledge of British Columbia law.

B. Knowledge of British Columbia Law

[50] Tilray's argument for the appointment of a British Columbian arbitrator appears to be based on two primary factors: its view of the knowledge that will be required to conduct the arbitration, and the "practical realities for the arbitration, including the expert nature of the arbitration."

[51] Regarding law, s. 16 of the RMPA provides that the law of British Columbia is the governing law of the agreement. Second, provincial legislation, being the International Sale of Goods Act, R.S.BC 1996, c. 236 [ISGA], applies to the dispute. B.C. domestic case law will inform both the application of the ISGA and the United Nations Convention on Contracts for the International Sale of Goods ("CISG") that it incorporates.

[52] While those factors suggest that the appointment of a British Columbia arbitrator may be preferable, neither provide a compelling basis on which to conclude that only a British Columbian or Canadian arbitrator is qualified to arbitrate this dispute.

[53] First, there is nothing to suggest that an international arbitrator from outside of Canada will have any issue interpreting or applying relevant case law even if not trained or licensed in British Columbia. Indeed, the very nature of international arbitration requires arbitrators to do so. I would expect that any arbitrator with a sufficient amount of international arbitration experience will have sat on a range of cases, including those in jurisdictions from which they do not practice.

[54] In my view, the concern is less relevant in this case, given that the dispute will involve the application of the ISGA, legislation which incorporates and is informed by the CISG. International arbitrators experienced with the CISG would be well-qualified to interpret the CISG informed ISGA.

[55] On that basis, although Fotmer does not agree that the arbitrator have specialized knowledge in BC law, it agrees that it would be preferable to appoint an arbitrator with familiarity with the UN Convention that informs the domestic law.

[56] As Fotmer notes, requiring an arbitrator to be qualified in the governing law of a contract would effectively render the national neutrality principle inoperative any time that governing law emanates from the same jurisdiction as one of the parties. I do not accept that a qualification that would require the arbitrator to be qualified in British Columbia can or should override the crucial principle of independence and impartiality.

[57] I also reject the suggestion that a Canadian-based arbitrator is required for reasons of availability and the "practical realities of the arbitration". Again, the nature of international arbitration often requires arbitrators to travel and be required to sit in jurisdictions other than their own. The more recent reliance of remote hearing technology also serves to diminish concerns over the practical realities of international arbitration.

C. Qualifications Agreed to by the Parties

[58] Finally, in appointing an arbitrator, section 11(8)(a) of the ICAA requires the Court to have due regard to the any qualifications required by agreement of the parties. As noted, in this case, the parties agree that the arbitrator should be:

- a) experienced as an arbitrator in international arbitration;
- b) willing and able to carry out the expedited arbitration process within the time constraints imposed by the arbitration agreement;
- c) fluent in English; and
- d) free from conflicts

(collectively, the "Agreed Qualifications").

[59] Finally, I note that, in this case, neither party has suggested industry knowledge as a required qualification for the arbitrator. Accordingly, I have not considered it for the purpose of this appointment.

V. Summary of Relevant Arbitrator Qualifications

[60] To summarize the above, with respect to arbitrator qualifications, I conclude as follows:

- a) Having due regard to securing the appointment of an independent and impartial arbitrator, the arbitrator must be non-Canadian;
- b) The arbitrator need not have any particular expertise in British Columbia law. However, qualification in a jurisdiction that is based on the common law and experience with the CISG is preferable; and
- c) The arbitrator must have all of the Agreed Qualifications.

VI. Appointment

[61] Having reviewed the communications and biographies of the arbitrators proposed by the parties, I am satisfied that either Professor Jeffrey Waincymer or James Morrison, both proposed by Fotmer, are qualified to act as arbitrator.

[62] I appoint Professor Waincymer as the sole arbitrator of this dispute.

[63] However, if he is no longer available to conduct the expedited arbitration in the timeframe contemplated by the arbitration agreement, or otherwise does not accept that appointment within seven days, Mr. Morrison shall be appointed.

[64] In the event that Mr. Morrison is no longer available or otherwise unable to accept the appointment within seven days of the parties' communication with him, the parties may make arrangements with Supreme Court Scheduling to re-appear before me at 9:00 a.m. on a mutually convenient date for further direction or order.

VII. Costs

[65] Fotmer is entitled to costs of this petition.

"Ahmad J."

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Prepared on 25 October 2026 · Esheria