Focus

ALTERNATIVE DISPUTE RESOLUTION

Arbitration at the crossroads

Decision time on question of restricting rights of appeal

William Horton

On Nov. 1, the Supreme Court of Canada will be asked to decide the fate of non-international arbitration in Canada when it hears two appeals from the British Columbia Court of Appeal. In doing so, the Supreme Court will determine whether its vision of arbitration, and cultural change in dispute resolution more broadly, will become more established or begin to unravel.

Beginning with its decision in *Desputeaux v. Éditions Chouette* 2003 SCC 17, (in which the top court established that arbitration is not part of the court system of any state and that disputes regarding statutory rights may be arbitrated as between the parties to the dispute) and ending, more recently, with its decision in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53, (in which the top court restricted rights of appeal from arbitration awards involving the interpretation of contracts) the SCC has sought to recognize and establish arbitration as a truly independent alternative to court litigation. The reasons for providing the public with such an alternative, and for reforming the court process itself, were well set out by the court in *Hryniak v. Mauldin* 2014 SCC 7.

The decision of the British Columbia Court of Appeal in *Urban Communications Inc. v. BCNET Networking Society* 2015 BCCA 297, applied both the letter and the spirit of the SCC decision in *Sattva*. The court concluded that the issue under appeal turned on the interpretation of a contract which engaged questions of mixed fact and law and which are therefore not reviewable as questions of law. The B.C. appeal court in the *BCNET* case also rejected the holding in the court below that the arbitrator had decided four "extricable questions of law." In characterizing the award in that manner, the lower court had simply ignored a more fundamental question on which the determination of the arbitrator had actually turned, namely whether the exercise of the option in that case, on the wording of a particular letter, was conditional or non-conditional.

Interestingly, in applying this analysis the British Columbia Court of Appeal in *BCNET* held that the same result would have obtained under pre-*Sattva* jurisprudence in British Columbia.

The analysis of the B.C. appeal court in the *BCNET* case is in stark contrast with that of the same court in *British Columbia v. Teal Cedar Products Ltd.* 2015 BCCA 263, the other case to be argued on Nov. 1 in the SCC.

The court's decision in *Teal* turns *Sattva* on its head. Whereas many would interpret *Sattva* as standing for the proposition that decisions of

Interpretation, Page 12

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Focus ALTERNATIVE DISPUTE RESOLUTION

Two roads to obtaining injunctive relief

Enforcement power can come from tribunals or from original agreement

Ben Hanuka

In Canadian domestic commercial arbitration, there are two typical aspects to the application of injunction remedies. The first relates to carving injunction remedies out of an arbitration agreement and reserving them for court proceedings. The second relates to the power of an arbitral tribunal to make an award for injunctive relief.

It is common in some types of arbitration agreements to exclude interlocutory injunction remedies and leave them to the jurisdiction of the court. Sometimes, the exclusion is discretionary at the election of one or both of the parties to the agreement.

This is typically done in franchise agreements that contain an arbitration clause. Different variations of this sort of a carve-out, some with the discretionary option and others without, are also used in some intellectual property agreements, telecom joint venture agreements and many other types of domestic commercial arbitration agreements.

In *Bell Mobility Inc. v. MTS Allstream Inc.* 2008 MBQB 144, the court analyzed a party's election under an arbitration agreement to seek an injunctive remedy in court and the consequences of that election.

Bell Mobility and MTS Allstream entered into a mobility alliance agreement. The agreement contained an arbitration clause, with an exception for interim and interlocutory injunctions. MTS brought a court proceeding for injunctive and related relief to restrain Bell Mobility from suspending shipments of products.

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While the court injunction proceedings were under way, MTS also issued a notice to commence arbitration proceedings for the adjudication of the substance of the dispute.

Bell Mobility took the position that by first going to court, MTS elected to adjudicate the entire dispute in court. The Manitoba Court of Queen's Bench held that MTS's court proceedings for injunctive relief did not override the requirement in the arbitration agreement to resolve the dispute through arbitration. Similarly, the court held that the commencement of the court proceeding was not a "duplicative" or "simultaneous" proceeding. As has been consistently held by Canadian courts in the enforcement of arbitration agreements, the court's overriding principle was the intention of the parties, which was to create a presumption in favour of arbitration.

By virtue of well-established provincial judicature statutes and under common law, injunctive relief falls within the inherent jurisdiction of Canadian superior trial courts. Most provincial domestic arbitration statutes in Canada contain provisions granting to an arbitrator the jurisdiction to award injunctive relief.

In Ontario, with virtually identical provisions in most other provinces' arbitration statutes, s. 8(1) the *Arbitration Act, 1991*, provides an arbitral tribunal with the same powers as the court in respect of preservation of property, interim injunctions and appointment of receivers. Section 31 makes it mandatory for an arbitral tribunal to decide a dispute in accordance with law, with which is expressly stated to include specific performance, injunctions and other equitable remedies.

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Two exceptions are noteworthy: Newfoundland and Labrador provides such a power to an arbitrator indirectly, by stating that its *Arbitration Act* is to be read together with its *Judicature Act*. The latter contains typical equitable and injunction powers granted to the court.

In British Columbia, s. 10 of the *Arbitration Act* uses the term "specific performance" and only in respect of the sale of goods.

The British Columbia statute also contains an indirect purported general power to grant injunction and related relief. Section 22 of the act incorporates by reference the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations, unless "those rules are, among other things, inconsistent with, or contrary to the statute." Subsection 29(k) of those rules provides the power to make broad injunctive and other equitable relief.

While private arbitration rules of various arbitration institutions in Canada (and internationally) routinely grant such powers to their arbitral tribunals, it is unclear to me whether this scheme can properly work to effect a statutory scheme. The statute incorporates the rules by reference, making them technically inferior to the statute. The rules themselves are stated as rules of *procedure*, rather than substantive powers or rights. This scheme becomes circular.

Further, s. 23 of the B.C. *Arbitration Act* requires an arbitrator to decide an arbitration "by reference to law," unless the parties agree that the matter may be decided on equitable grounds. This agreement of the parties is made under s. 35 of the act, and thus can only be made *after* the arbitration has commenced.

The B.C. Court of Appeal has provided conflicting decisions on the jurisdiction of an arbitrator to award equitable relief in the absence of an agreement by the parties (see *Randhawa v. Pepsi Bottling Group (Canada) Co.* 2006 BCCA 273, and *Hayes Forest Services Limited v. Teal Cedar Products Ltd.* 2008 BCCA 283). Recently, the Supreme Court of Canada, in *British Columbia (Forests) v. Teal Cedar Products Ltd.* 2013 SCC 51, stated in a unanimous decision (by Justice Marshall Rothstein) that the B.C. *Arbitration Act* does not grant to an arbitrator jurisdiction to award equitable relief, unless the parties agree to it under s. 23 of the act.

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Interpretation: The court's decision in Teal turns Sattva on its head

Continued from page 11

arbitrators on the interpretation of a contract are not reviewable *because* they engage issues as to the factual matrix and commercial context, the B.C. court of appeal in *Teal* holds that the decisions of arbitrators are *only* non-reviewable *in relation to* their findings as to the factual matrix and commercial context. On that approach, once those matters are determined or agreed, the resulting interpretation is *always* reviewable as a point of law.

Whereas many would interpret *Sattva* as standing for the proposition that the deference to be paid to arbitration awards is based upon the *presumed* expertise of the arbitrators chosen by the parties, the British Columbia Court of Appeal in *Teal* holds that deference should only be accorded *if it is established on the appeal* that the arbitrators were in fact expert on the point under consideration. The court in *Teal* goes on to question whether contract interpretation can ever be a matter of expertise. Again, this would appear to blunt the main thrust of *Sattva*.

Whereas *Sattva* creates the impression that a reviewable arbitration award would be a rare occurrence, especially on a point of contract interpretation, the court in *Teal* strongly suggests that the application of legal principles in the interpretation of contracts is generally a question of law *of central importance to the legal system as a whole* and suggests that the restriction of appeals from arbitration awards "would be at the expense of the certainty which lies at the heart of the common law of contract."

Essentially, the court in *Teal* operates on the simple premise that the only legitimate outcome to a commercial dispute is one which bears a court's seal of approval as to any points of law which a losing party can identify. While it pays lip service to the ultimate standard of reasonableness by finding the arbitrator's award to have been unreasonable, the court in *Teal* does so in the dubious context that the decision of the arbitrator would have been upheld by both the judge of first instance (who appears to have had some expertise in the subject matter) and by the chief justice of the province who sat on the appeal when it first came before the B.C. appeal court. Were they unreasonable too?

If the B.C. appeal court in *BCNET* is correct in having been deferential, then the B.C. appeal court in *Teal* was neither correct nor deferential. The SCC will decide.

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Focus ALTERNATIVE DISPUTE RESOLUTION

Reasonableness standard affirmed in insurance case

Courts reluctant to intervene in dispute resolution mechanisms established by statute

Marco Falco

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Canadian courts are showing increasing deference to the decisions of arbitrators. There are a number of reasons for this trend. First, courts are recognizing the expertise of arbitrators, who deal with specific legal issues on a regular basis. Second, out of respect for legislative intent, courts defer to the statutory regimes put in place to resolve disputes through arbitration.

A recent decision of the Ontario Court of Appeal, *Intact Insurance Co. v. Allstate Insurance Co. of Canada* 2016 ONCA 609, applies the principle of deference to the judicial review of insurance arbitrations. In *Intact*, the court established that the presumptive standard of review applicable to an insurance arbitral award is reasonableness, absent exceptional circumstances.

Intact concerned a priority dispute between two insurers that provided coverage under separate motor vehicle liability policies. The issue was which of the two insurers was responsible for paying the injured parties' statutory accident benefits. The matter was resolved through arbitration, as required by O. Reg 283/95, *Disputes Between Insurers*.

In August 2010, the insured and her daughters were involved in a motor vehicle accident. The daughters were catastrophically injured. They applied for and received statutory accident benefits from Intact, the insurer of the vehicle in which they were riding. Intact argued that because the insured and her daughters were financially dependent on the insured's boyfriend at the time of the accident, the insurer for the boyfriend, Allstate, was liable to pay the statutory accident benefits.

The arbitrator held that the insured and her daughters were not principally dependent for financial support on the insured's boyfriend at the time of the accident. In the arbitrator's view, the "relationship [between the insured and her boyfriend] was not one of permanence." Accordingly, the arbitrator held that Intact was liable for the accident benefits.

On appeal to the Superior Court, Justice Russell Raikes reversed the arbitrator's decision. The court held that the arbitrator made an error of law by importing a permanency requirement in the assessment of the insured's relationship with her boyfriend at the time of the accident. Applying the less deferential standard of "correctness," the court concluded that the arbitrator was speculating about the future of the insured's relationship. The arbitrator's decision was set aside and Allstate was held liable to pay the statutory accident benefits. The court's decision was based on the fact that the insured and her daughters were principally dependent on the boyfriend at the time of the accident.

On further appeal to the Court of Appeal, the court held that the arbitrator's decision was unreasonable. In the court's view, the arbitrator's focus on the temporary nature of the relationship between the insured and her boyfriend was based on "speculation and unreliable inferences." The relationship between the insured and boyfriend was a developing, but "real" relationship at the time of the accident, in which the insured and her daughters were dependent on the boyfriend for support. Accordingly, Allstate was liable for the statutory accident benefits.

In reaching this conclusion, the Court of Appeal overturned Justice Raikes' conclusion that the arbitrator's decision should be reviewed on the less deferential correctness standard. Rather, the court held that the standard of review generally applicable on appeals from insurance arbitrations should be the more deferential standard of reasonableness.

Citing the Supreme Court of Canada's leading decision in *Dunsmuir v. New Brunswick* 2008 SCC 9, the court concluded that when reviewing the decision of an insurance arbitrator, the correctness standard rarely applied, unless the issue at hand involves one of jurisdiction, constitutionality, or raises a general question of law "of central importance to the legal system as a whole and outside the adjudicator's specialized area or expertise."

The court offered a range of reasons for why it should presumptively apply a reasonableness standard to insurance arbitration.

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Insurance arbitrators engage in the business of interpreting their home statute, i.e. the *Insurance Act*, R.S.O. 1990, c.1-8 and its related regulations. The courts recognize the expertise of insurance arbitrators in this regard.

Moreover, as with other forms of private arbitration, the parties in insurance arbitration can choose the decision-maker who will decide their case. This choice creates the presumption that the parties will select an arbitrator with the necessary expertise.

Further, the Ontario Legislature has created a specific statutory regime in which the insurance arbitrator must resolve priority disputes between the insurers before a court can intervene. The deference to the arbitrator's ruling arises out of respect for the alternative dispute mechanism created by statute.

In addition, the issue of priority disputes between insurers is the type of legal question that attracts a deferential standard of review. The court recognized that the issue before it did not raise constitutional matters, questions of jurisdiction, or matters of central importance to the legal system.

The *Intact* decision reflects a reluctance by Canadian courts to get involved in dispute resolution mechanisms established by statute, such as interest arbitration. By elevating the standard of review to reasonableness, the Ontario Court of Appeal has confirmed that appellate intervention in arbitration should occur in limited and exceptional circumstances.

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Girl Scouts sued after girl barred from troop

The cookie can crumble in surprising ways when it comes to money. A disgruntled Brooklyn, N.Y., mother is suing the Girl Scouts for US$30 million after her daughter was expelled when use of cookie sales money was questioned, reports nypost.com. The mother, who said her 9-year-old daughter sold 80 boxes of Girl Scout cookies, was upset that the money raised by the troop was not used for a party, which they voted for, but a camping trip instead. "Everything was fine till I asked her (the troop leader) about the ... money. That's when it flipped," she alleged. "Based upon everything that has transpired over the last year and all of our efforts," Barbara Murphy-Warrington, the CEO of the Girl Scouts of Greater New York, wrote to the mother, "it is our determination, for which we have the sole responsibility, that Troop 207 is not a viable option for you." Despite the fact the organization says it has offered to register the girl with other troops, the mother has taken the case to the county's Supreme Court after two human rights complaints were dismissed. – **STAFF**