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Recent Decisions on Arbitral Jurisdiction: Stay and Appeal Issues

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When considering arbitral jurisdiction in Canada, it is necessary to first understand the legislative framework pertaining to arbitration within the country. Canada is a federal state with legislation both at the federal level and within each of the 10 provinces and three territories that governs both international and domestic arbitration.¹ The numerous arbitration statutes share many similarities, including setting out when parties may seek the assistance of, or have recourse to, local courts. Each province and territory has adopted legislation for international commercial arbitration that incorporates the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 (the Model Law). The federal government has also incorporated the Model Law, albeit with some slight modifications, for all domestic and international arbitrations under federal jurisdiction.² This broad adherence to the Model Law provides a significant degree of predictability for parties to international arbitrations in Canada.

Against this backdrop, two specific issues involving arbitral jurisdiction have received notable judicial consideration in the past year:

- the circumstances in which a party to an arbitration may seek the assistance of a local court to stay either court or arbitral proceedings where there are concurrent proceedings for a dispute in both fora; and
- the ability of a party to an arbitration to appeal a partial or full award.

As arbitration has become a more popular means of settling commercial and other disputes within Canada, these issues have seen increased judicial scrutiny. This chapter will begin by providing a brief overview of stays of proceedings and appeals from arbitral awards in Canada, followed by a discussion of recent Canadian court decisions and developments that address these issues. As it happens, those decisions and developments have come primarily from the western province of Alberta, though the relevant principles should be transportable to other Canada jurisdictions.

Arbitration in Canada

Provincial, territorial and federal legislation on domestic and international commercial arbitration within Canada looks to safeguard arbitral jurisdiction from inappropriate judicial intervention. In accordance with the Model Law, there are only certain limited situations where a local court may intervene in domestic or international arbitral proceedings. In general, these provisions have been interpreted narrowly, reflective of the 'virtues of commercial arbitration' that 'have been recognised and... welcomed by' the Supreme Court of Canada.³

While our courts consistently speak of the 'virtues' of arbitration, the appropriate role of the court in staying either arbitration or court proceedings where there are concurrent proceedings, and regarding appeals from arbitral awards, has been subject to debate. With respect to stays of proceedings, the Supreme Court of Canada has recently explored the situation where parties have agreed to

arbitrate but legislation directs that the proceeding is not arbitrable. The *Seidel v TELUS (Seidel)* decision considered this interaction between arbitration agreements and statutory provisions excluding arbitration.⁴ We reviewed the *Seidel* decision in the *Arbitration Review of the Americas 2012* in relation to its endorsement of the 'competence-competence' principle.⁵ On the point of arbitrability, *Seidel* holds that 'whether and to what extent the parties' freedom to arbitrate is limited or curtailed by legislation will depend on a close examination of the law of the forum' where the party has commenced their court action.⁶ In upholding the ability of parties to an agreement to select arbitration for the resolution of disputes, the Supreme Court in *Seidel* ultimately held that, absent clear statutory language preventing arbitration, the court will enforce arbitration clauses.⁷

This issue of arbitrability, and when a court action should be stayed in favour of arbitration proceedings, was recently examined by the Federal Court of Appeal in *Rhodes v Cie Amway Canada*⁸ (*Rhodes*) and the Alberta Court of Appeal in *Young v National Money Mart Company*⁹ (*Young*). In each case, the court's determination involved an assessment of the principles established in *Seidel* in the context of consumer protection legislation.

On the subject of appeals from arbitral awards, in August 2012 the Alberta Law Reform Institute (the official law reform agency for the province of Alberta)¹⁰ issued a report for discussion entitled 'Arbitration Act: Stay and Appeal Issues', highlighting, inter alia, various issues involving appeals from arbitral awards.¹¹ Specifically, jurisprudence in Alberta on the test for leave to appeal an arbitral award under the domestic Arbitration Act (Alberta Arbitration Act)¹² has been unclear. Parties seeking leave to appeal an award have been faced with a statutory test under the Alberta Arbitration Act (section 44), along with a judicially created 'public interest' requirement. A question has also arisen as to whether there exists a more general residual discretion to refuse leave to appeal of an arbitral award even where the statutory test is met. The Alberta Law Reform Institute discussed these issues in its report for discussion and intends to publish its final recommendations on the issues sometime in 2013,¹³ which may influence legislative change in that province. In the interim, the decision in *Capital Power Corp. v Lehigh Hanson Materials Ltd*¹⁴ (*Capital Power*) by the Chief Justice of the Alberta Court of Queen's Bench brings greater clarity to the principles relevant to appeals from arbitral awards.

Stays and arbitrability

Rhodes v Cie Amway Canada

This case involved a proposed class action initiated by Kerry Murphy (Murphy) in the Federal Court of Canada against Amway Canada (Amway) for damages in the sum of \$15,000. Murphy had registered with Amway as an independent business owner and alleged that Amway's business practices were contrary to certain provisions in the federal Competition Act,¹⁵ including those prohibiting pyramid selling schemes and the provision of false and inadequate information to independent business owners.¹⁶ The operative agreement included an arbitration provision requiring

that the parties submit certain disputes (such as the instant matter) to arbitration to be governed by the Ontario provincial Arbitration Act (Ontario Arbitration Act).¹⁷ This arbitration agreement also contained a ‘class action waiver’ which, among other terms, stated that no party ‘shall assert any claim as a class, collective or representative action if... the amount of the party’s individual claim exceeds \$1,000’.¹⁸

Shortly after the action was commenced, Amway brought a successful application before the Federal Court to stay the proceedings and compel arbitration. An initial jurisdictional issue for the Court, before deciding the substance of the stay, was whether the Federal Court or an arbitrator should decide whether the action ought to be stayed in favour of arbitration. On this point, the Federal Court held that, in light of the language of the arbitration agreement, any controversy regarding the ‘class action waiver’ ought to be decided by the Court. As to the substantive matter of whether the proceedings should be stayed in favour of arbitration, the Court rejected jurisdiction over the class action claim for more than \$1,000 and directed the claim to be heard by an arbitrator or alternatively for class member claims to be heard on an individual basis.¹⁹ The precedent set in *Seidel* for staying arbitration in favour of a court action could not be relied upon because, unlike the statute in *Seidel*, the federal Competition Act did not clearly exclude arbitration of the dispute.²⁰

Murphy appealed this decision to the Federal Court of Appeal on the issue of whether the Federal Court Judge’s interpretation of the Competition Act concerning the arbitrability of the proposed class action claims was correct.²¹ The Federal Court of Appeal upheld the lower court decision based on the clear language of the arbitration agreement, class actions such as Murphy’s could not proceed before the courts and must be arbitrated.²² The Federal Court of Appeal held, based on *Seidel*, that it was clear that express statutory language was required before the courts would refuse to give effect to the terms of an arbitration agreement. There was no such language in the Competition Act.²³ Murphy further argued the private and confidential nature of arbitration was manifestly incompatible with the Competition Act’s public policy objective of promoting an economic environment without anti-competitive practices.²⁴ This argument was also rejected. The Court reasoned that there was simply no basis to conclude that matters under the Competition Act are by their nature in some way sacrosanct such that they cannot be determined by arbitration for public policy reasons.²⁵

This case is also notable on another point. The Ontario Arbitration Act at section 7(6) states there ‘is no appeal from the court’s decision’ in respect of a decision on whether to stay court proceedings in favour of arbitration. Despite the parties expressly incorporating the terms of this statute in their agreement, the Federal Court of Appeal found such agreement could not prevent it from exercising its jurisdiction to hear the appeal from the lower court. This conclusion was based on a right of appeal from the lower court being expressly set out at section 27 of the Federal Courts Act.²⁶ In short, the jurisdiction of the Federal Court of Appeal was ‘not bound by the terms of’ the Ontario Arbitration Act.²⁷

Young v National Money Mart Company

In *Young*, the Alberta Court of Appeal considered the interplay between consumer protection and arbitrability. The context was section 7 of Alberta’s Arbitration Act, which requires stays of court proceedings ‘in respect of a matter in dispute to be submitted to arbitration under the agreement’, and section 16 of the Fair Trading Act,²⁸ which reads:

Despite any provision of this Act, neither a consumer nor the Director may commence or maintain an action or appeal under sections 13 to 15 if the consumer’s cause of action under those sections is based on a matter that the consumer has agreed in writing to submit to arbitration and the arbitration agreement governing the arbitration has been approved by the Minister.

Young was a customer of National Money Mart Company with which he had entered into an agreement for various services, including short-term loans or ‘fast cash advances’.²⁹ Young subsequently brought a representative action against National Money Mart for allegedly charging a criminal rate of interest on the loans. National Money Mart brought an application to stay the court proceedings because Young had agreed to pursue any disputes through arbitration.³⁰ The chambers judge refused to grant National Money Mart’s application on the basis that the provincial legislature had clearly intervened to regulate arbitration clauses in consumer contracts through the Fair Trading Act. The minister had not approved the arbitration clause in the agreement as required under section 16 of that legislation and therefore the agreement could not be used to prevent or stay any court action.³¹

The Court of Appeal upheld the chambers judge’s decision. It acknowledged the power of a legislature to limit arbitration clauses and that it is ‘incumbent on the courts to give effect to the legislative choice’.³² The Court of Appeal quoted Binnie J from *Seidel*: ‘The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause.’³³ The legislative choice engendered in the Alberta Fair Trading Act was to provide the minister with the ability to monitor consumer contracts and approve arbitration clauses that did not frustrate consumer protection.³⁴ That choice must be respected, even at the expense of the freedom of the parties to agree to determine disputes by arbitration.

Appeals from arbitration

Capital Power Corp v Lehigh Hanson Materials Ltd

In this case, Chief Justice Wittmann of the Court of Queen’s Bench of Alberta addressed the law on leave to appeal arbitration awards under the Alberta Arbitration Act. The arbitration in issue began in 2011 when Lehigh Hanson Materials Ltd (Lehigh) commenced arbitration proceedings against Capital Power Corp (Capital Power), raising several matters with respect to the parties’ supply and purchase obligations and the enforceability of restrictive covenants under an agreement.³⁵ Following a tribunal award, Capital Power initiated proceedings before the Court to either appeal the award or have the award set aside on a number of grounds.³⁶ The comments of Wittmann CJ in respect of the law on leave to appeal an arbitral award in Alberta are significant.

Wittmann CJ began his review by assessing section 44 of the Alberta Arbitration Act, which governs appeals and required leave in the absence of an appeal provision in the arbitration agreement. It states:

- 44(1) *If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.*
- (2) *If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that*
 - (a) *the importance to the parties of the matters at stake in the arbitration justifies an appeal, and*

- (b) determination of the question of law at issue will significantly affect the rights of the parties.
- (3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.
- (4) The court may require the arbitral tribunal to explain any matter.
- (5) The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal and give directions about the conduct of the arbitration.
- (6) Where the court remits the award to the arbitral tribunal in the case of an appeal on a question of law, it may also remit to the tribunal the court's opinion on the question of law.

Because the arbitration agreement between Lehigh and Capital Power did not provide for appeals, the Court first had to decide whether to grant leave to Capital Power to appeal the award under subsections 44(2) and 44(3).³⁷ Wittmann CJ then summarised the three issues raised.

First, '(b)y combined effect of s. 44(2) and s. 44(3) of the Act, leave may be granted in respect of a question of law, but only if that question of law was not expressly referred to the arbitrator for determination. In the context of the Arbitration Act, how should courts distinguish between unappealable mixed questions of law and fact, unappealable questions of law expressly referred to the arbitrator, and appealable questions of law?'³⁸

Second, what is the meaning of a matter (under section 44(2)) that is 'important to the parties' and that 'significantly affects their rights'?'³⁹

Finally, does the Court have any residual discretion to deny leave to appeal beyond those included in section 44?⁴⁰

On the first issue, the Court held the correct approach is to look at each of the alleged errors by the tribunal for which a party is seeking leave to appeal and then determine whether there is an extricable question of law that could be subject to appeal.⁴¹

The second issue raises the question of whether an element of public interest is required as a prerequisite to obtain leave. While the language of section 44(2) appears fairly straightforward, this provision has been the subject of recent controversy because a significant line of Alberta case law has developed based on the interpretation that section 44(2) includes a requirement that an appeal must also be in the public interest.⁴² This public interest requirement arises from a 1997 decision where the trial court reached the conclusion that some public interest or public issue had to be triggered in order to override the parties' agreement to restrict appeals from an arbitration agreement to questions of law.⁴³ Despite the lack of any reference to 'public interest' in the legislation, this view was adopted in some subsequent jurisprudence. Accordingly, in opposing Capital Power's application for leave to appeal the arbitral award, Lehigh contended the Court should consider 'whether the public interest in the matters at issue warrants an appeal'.⁴⁴

This specific issue leads to the third, more general, issue of whether there is a 'residual discretion' to deny leave based on the language of section 44(2) of the Alberta Arbitration Act.⁴⁵

In *Capital Power*, Wittmann CJ undertook a thorough review of the relevant case authorities. Based on these authorities, he concluded that he was:

...not satisfied that there is a sound basis in the statute for the weighing of the public interest as a critical factor in the analysis under s. 44(2). What the Act requires, in both its general scheme and under s. 44(2) specifically, is a very high standard when considering whether the importance to the parties of the matters at stake in the arbitration justifies an appeal. Mere pecuniary interest may not suffice, though I do not think it necessary to

*conclude that a pecuniary interest, no matter how significant, could not suffice on its own.*⁴⁶

Accordingly, the importance of the issues raised to the parties alone, even absent any broad public significance, was found sufficient to justify leave to appeal, provided other requirements are met. This decision was rendered on 18 July 2013, and because it involves a significant point of law an appeal to the Alberta Court of Appeal remains possible. Pending such appeal, *Capital Power* appears to represent a definitive ruling that there is no public interest requirement imposed by section 44(2) of the Alberta Arbitration Act.

Wittmann CJ also considered the more general issue of whether courts retain a jurisdiction to refuse leave even where the statutory test is met. Specifically at issue were statements made in a recent trial-level decision holding that such a residual discretion 'is consistent with the goal of restricting appeals and ensuring that, before a party can appeal, the value to the parties of quick resolution, finality, and efficacy are balanced against the potential merits of the appeal'.⁴⁷ Wittmann CJ held that this interpretation ran afoul of the Alberta Arbitration Act for two reasons. First, the statute states that a Court 'shall' only grant leave to an appeal if the two conditions in section 44(2) are met and reading in an additional ground was contrary to the use of this imperative direction. Second, the Court was not convinced there was a reliable basis or authority from other Canadian jurisdictions that supported the Court having any residual discretionary authority to deny leave to appeal in this fashion.⁴⁸

The decision in *Capital Power* should not be taken as indicative that obtaining leave to appeal from an arbitral decision should be readily granted. Indeed, the Court took pains to stress that, even without a public interest requirement for leave or any residual discretion with the Court to deny leave, Alberta jurisprudence sets a high standard to support leave to appeal arbitral awards in Alberta.⁴⁹

Conclusion

Canadian courts continue to demonstrate a strong commitment to upholding arbitration agreements between the parties. Only narrow exceptions are to be permitted. Recent judicial developments strongly reinforce this commitment to the arbitration process while defining its boundaries. There will undoubtedly be further judicial refinement of the Canadian positions on arbitrability and on requirements to appeal arbitral awards on novel points or otherwise in the coming years.

All of the decisions reviewed above speak to the courts' deference to arbitration. This deference was evident in *Capital Power* where Wittmann CJ commented on the courts' respect for arbitral decisions and dissuaded any notion that leave to appeal an arbitral award should be routine. Indeed, the opposite is true in light of the courts' emphatic statement of the high standard for leave to appeal. This approach to appeals of arbitral rulings is consistent with other Canadian jurisdictions.

The findings in *Rhodes* and *Young* also speak to the freedom of parties to agree to arbitrate disputes and the courts' willingness to uphold such arbitration agreements, absent clear legislative provision to the contrary. As noted in both *Young* and *Rhodes*, there are several legislative schemes across Canada that may impact arbitrability and stays of Court actions in favour of arbitration. Some of these legislative schemes are not very well known, such as section 16 of Alberta's Fair Trading Act. The variety of statutes that could impact arbitrability underscores the importance of retaining local counsel to review arbitration agreements before they are finalised so as to avoid any surprises with respect to arbitrability, and once proceedings are initiated to ensure there are no hidden

issues arising in the chosen forum. The decision in *Rhodes* also highlights a jurisdictional consideration where a combination of federal and provincial jurisdictions may be relevant to the terms of an arbitration agreement or the subject matter of a dispute. That is, a court of one jurisdiction may not be bound by a limiting provision in provincial or territorial arbitration legislation that is otherwise applicable.

Notes

- 1 For example, the province of Alberta has enacted the Arbitration Act, RSA 2000, cA-43, for domestic arbitration matters and the International Commercial Arbitration Act, RSA 2000, cI-5, for international commercial arbitration matters. Similarly, the province of Ontario has legislation in the Arbitration Act, 1991, SO 1991, c17, for domestic arbitrations and the International Commercial Arbitration Act, RSO 1990, cI.9, for international commercial arbitrations. The situation is the same in the territories with, for example, the Yukon enacting the Arbitration Act, RSY 2002, c8, along with the International Commercial Arbitration Act, RSY 2002, c123. Federally, international commercial arbitration is governed by the Commercial Arbitration Act, RSC 1985, c17, and there is no separate federal legislation to govern domestic arbitration matters because this statute applies to all matters where a federal entity is a party.
- 2 J Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed (Huntington, NY: Juris Publishing Inc, 2011) at 21-24.
- 3 *Seidel v TELUS Communications Inc*, 2011 SCC 15, at para 23 (*Seidel*).
- 4 *Ibid*.
- 5 Michael D Schafner, Tamela J Coates and Chloe Snider, 'Commercial Arbitration and the Canadian Justice System: Recent Decision of the Supreme Court of Canada,' (2011) *The Arbitration Review of the Americas 2012: A Global Arbitration Review Special Report* 38.
- 6 *Seidel*, supra note 3 at para 42.
- 7 *Ibid*.
- 8 *Rhodes v Cie Amway Canada*, 2013 FCA 38 (*Rhodes*).
- 9 *Young v National Money Mart Company*, 2013 ABCA 264 (*Young*).
- 10 See Alberta Law Reform Institute, online: Alberta Law Reform Institute www.law.ualberta.ca/alri/.
- 11 Alberta Law Reform Institute, *Arbitration Act: Stay and Appeal Issues*, Report for Discussion 24 (Edmonton: Alberta Law Reform Institute, 2012), online: *Arbitration Act: Stay and Appeal Issues* www.law.ualberta.ca/alri/docs/RFD24.pdf (ALRI Report).
- 12 RSA 2000, cA-43.
- 13 As of the date of writing, these final recommendations are still forthcoming.
- 14 *Capital Power Corp v Lehigh Hanson Materials Ltd*, 2013 ABQB 413 (*Capital Power*).
- 15 RSC 1985, c34.
- 16 *Rhodes*, supra note 8 at para 5.
- 17 *Ibid* at paras 3-4, referencing the Ontario Arbitration Act, 1991, SO 1991, c17.
- 18 *Ibid* at paras 19 and 23.
- 19 *Ibid* at paras 12-14 and 38.
- 20 *Ibid* at paras 16-17.
- 21 *Ibid* at para 33.
- 22 *Ibid* at paras 38-39.
- 23 *Ibid* at para 60.
- 24 *Ibid* at para 42.
- 25 *Ibid* at paras 64-65.
- 26 RSC 1985, cF-7.
- 27 *Rhodes*, supra note 8 at paras 32 and 34.
- 28 RSA 2000, cF-2.
- 29 *Young*, supra note 9 at para 1.
- 30 *Ibid* at para 4.
- 31 *Ibid* at para 9.
- 32 *Ibid* at para 19.
- 33 *Ibid* at para 16 citing *Seidel*, supra note 3 at para 2.
- 34 *Ibid* at para 20.
- 35 *Capital Power*, supra note 14 at para 7.
- 36 *Ibid* at para 21.
- 37 *Ibid* at paras 6 and 23-24.
- 38 *Ibid* at paras 24-27.
- 39 *Ibid* at paras 28-37.
- 40 *Ibid* at paras 45-51.
- 41 *Ibid* at para 27.
- 42 ALRI Report, supra note 11 at para 62.
- 43 See *Warren v Alberta Lawyers Public Protection Association* (1997), 44 56 Alta LR (3d) 52 (ABQB), at para 17.
- 44 *Capital Power*, supra note 14 at para 28.
- 45 See *Central Alberta Rural Electrification Assn (Contract Policy Committee) v Fortis Alberta Inc*, 2012 ABQB 653, at paras 97-125 (CAREA), which came to the conclusion there is such residual discretion following a review of authority from other jurisdictions.
- 46 *Capital Power*, supra note 14 at para 35.
- 47 *Ibid* at para 45 citing CAREA, supra note 45 at 112.
- 48 *Capital Power*, supra note 14 at paras 46-48.
- 49 *Ibid* at para 50.



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