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Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers. Mr. Heintzman is Chair of the Toronto Chapter of the Chartered Institute of Arbitrators.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

What Authority Does The Court Have To Interfere With Decisions Of Arbitrators?

This article will discuss the attitude of Canadian courts toward reviewing arbitral decisions. The decisions of Canadian judges reflect the legislative regime in the provincial Arbitration Acts which mandates a starkly different approach toward final arbitral awards as opposed to interlocutory decisions (that is, decisions made by the tribunal during the proceeding, and not the final award). That regime allows Canadian courts to have little hesitation in setting aside

final awards if they offend fundamental principles of justice, but directs that interlocutory arbitral decisions are practically inviolate.

The Decisions

In ***Toyota Canada Inc. v. Ali*****,** the British Columbia Supreme Court recently set aside an arbitrators decision when the arbitrator allowed evidence in the form of consumer complaints downloaded from the Internet to be adduced without further proof and refused to allow Toyota to obtain the information in the the "black box" out of Mr. Ali's car. Mr. Ali alleged that the software in his Toyota automobile was defective and caused the car to accelerate, causing an accident. Toyota said that the information in the black box might disclose whether or not Mr. Ali had his foot on the accelerator and/or the brakes at the time of the accident. The arbitrator held that that the data from the black box would not be necessary as it would not have any effect on his decision. The arbitrator proceeded to find that, in the condition described by Mr. Ali, the vehicle was not operating as intended and was therefore malfunctioning. The arbitrator held that this condition must be considered a manufacturing defect.

The B.C. Supreme Court set aside the arbitrators' decision holding that in admitting hearsay evidence from the Internet without considering the purpose for which it is introduced, whether it is relevant and whether it may be fairly regarded as reliable, and in refusing to admit relevant evidence from the "black box", the arbitrator had acted in breach of the rules of natural justice.

In ***Suncor Energy Inc. v. Alberta***, Suncor and the province of Alberta were engaged in an arbitration. Suncor brought an application to the arbitration tribunal for an order that the Province produce certain disputed documents which the Province acknowledged were relevant and material and in its possession and control but which, it asserted, it was legally not obliged to produce. The Province asked the arbitration tribunal to order a question of law to be determined by the court on this issue. The tribunal held that it had the jurisdiction to rule on Suncor's motion and should do so, and refused to refer the matter to the court as requested by the Province. The Province appealed to the court. The Province asserted that the documents in issue dealt with or affected the rights of third party producers and their rights to the statutory protections under the ***Mines and Minerals Act***, and that for this reason the tribunal had no jurisdiction to order their production. The Province relied upon several cases in which it had been held that arbitral tribunals did not have the power to make orders against third parties.

The Alberta Court of Queen's Bench dismissed the appeal. It held that the authorities relied upon by the Province dealt with orders directly affecting third parties, by requiring the third party to attend an examination for discovery or be subject to a ***Mareva*** injunction. The orders sought by Suncor only applied to the Province. While the disputed documents had been provided to the Province by third party producers with the statutory promise of confidentiality under the ***Mines and Minerals Act,*** that Act did not create a privilege for the documents and the implied undertaking only to use the documents for the purpose of the arbitration should provide sufficient protection. The arbitral tribunal had jurisdiction to deal with Suncor's motion

for production. Following decisions of the Ontario Court of Appeal, the Alberta court held that there was no appeal from the interlocutory decision of the arbitral tribunal under section 44 of the **Alberta *Arbitration Act***.

Discussion

The contrast between these two decisions could not be greater. In the ***Toyota* case**, the B.C. court was not prepared to countenance any failure by the arbitrator to adhere to procedural fairness. Clearly, the court found it unacceptable that an arbitrator could find an automobile to be defective based upon postings of complaints on the Internet and in the absence of the information from the black box in the automobile which was intended to collect operational information. But the arbitral regime was **Canadian Motor Vehicle Arbitration Plan** (the "CAMVAP") set up by Canadian automotive manufacturers, and the arbitrators are presumably selected for their experience, or accumulate experience in the course of the arbitrations they conduct. Yet, the court was not prepared to accept anything short of the evidentiary rules applied by courts.

In the ***Suncor*** case, the Alberta court held that it had no jurisdiction to even touch the issue. It was for the arbitrator and not the court to decide whether to order the production of documents in the possession of a party, even if that decision involved documents which the party had received from others. The ***Arbitration Act*** had made that decision for the court.

Have the provincial ***Arbitration Act*s** made the right policy choices? Should the courts have a more restricted power to review final awards? Should there be a more flexible jurisdiction for the courts to review interlocutory awards? Should third parties whose rights are potentially affected be given notice of arbitral proceedings?

On its face, the legislature seems to have struck the right balance. For centuries, final awards have been reviewed by courts for their legality. The ***Uniform Arbitration Act*** was promulgated by the Uniform Law Conference of Canada (ULCC) (see http://www.ulcc.ca/en/uniform-acts). The ***Uniform Act*** has been adopted in most provinces. A great deal of thought went into that ***Uniform Arbitration Act*** before it was published by the ULCC. The Act reflects a conscious decision to limit the review of final arbitral awards to specific grounds and to eliminate in most cases the review of interlocutory arbitral decisions. We can see the result of that decision in the Toyota and Suncor decisions. While the contrast between the two review systems is great, there seems to be no good reason to reverse the policy decision.

See *Heintzman and Goldsmith on Canadian Building Contracts* (4th ed.), chapter 10, parts 3, 5 and 6.

***Toyota Canada Inc. v. Ali* 2013 CarswellBC 3159;**

***Suncor Energy Inc. v. Alberta* 2013 CarswellAlta 2530**

Arbitration – Final Award and Interlocutory decision of Arbitral Tribunal - Judicial review of arbitration awards - Alternative dispute resolution - Grounds for review - Public Contracts – Natural Justice - Third Party Rights

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