Thomas G. Heintzman, O.C., Q.C., FCIArb

Heintzman ADR

Arbitration Place

Toronto, Ontario

www.arbitrationplace.com

416-848-0203

tgh@heintzmanadr.com

www.constructionlawcanada.com

www.heintzmanadr.com

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, broadcasting and telecommunications, construction and environmental law.

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.

May An Order Dismissing a Stay Motion be Appealed?

In Canada, there has been a controversy about appeals from stay motion decisions in the context of arbitration clauses. The issue is whether a decision of a motion judge denying the stay of an action, when the moving party relies on an arbitration agreement, may be appealed to the Court of Appeal. The controversy arises from a sub-section found in the **Uniform Arbitration Act** drafted by the **Uniform Law Conference of Canada** and adopted in many Canadian provinces.

In ***Hopkins v. Ventura Custom Homes Ltd.***, the Manitoba Court of Appeal has recently held that such a motion judge's decision may be appealed if that decision is based upon the motion judge finding that arbitration agreement does not apply to the dispute. This decision is consistent

with earlier decisions of the Courts of Appeal of New Brunswick, Ontario and Alberta. These decisions appear to now consistently hold that an appeal is not statutorily barred if the motion judge's decision to deny the stay is based upon a determination that the arbitration agreement does not apply to the dispute.

The Background

Ventura agreed with the Hopkins to construct a home on land to be acquired by Ventura, and to sell the land and home to the Hopkins. The land was bought, the home was built, and the Hopkins took possession in May 2006. The agreement between the Hopkins and Ventura contained an arbitration clause.

In October 2010, over four years after taking possession, the Hopkins advised Ventura that they had water leakage into their home, causing mould and making the home unsafe to live in.

Ventura said that it was only liable for defective materials and workmanship for the first year following possession and that any problems that arose after that were to be referred to the National Home Warranty Program (the Program).

The Hopkins then complained to the Program. The Program said that its warranty only covered structural defects and that the Hopkins' problem did not fall within the terms of the warranty. The Program denied liability under its warranty.

The Hopkins then sued Ventura alleging that Ventura's materials and workmanship were not fit for the purpose intended. Ventura defended saying *inter alia* that the claim should be referred to arbitration and the action stayed. Ventura then brought a motion to stay the action.

The Arbitration Clause

The arbitration clause in the agreement between the Hopkins and Ventura said that:

> "if, in the opinion of the Purchaser, the work being done or materials supplied by the Builder are not in accordance with the Specifications, the Purchaser shall immediately notify the Builder in writing and if any dispute or difference arises between the Builder and the Purchaser in that respect, the same shall be referred to arbitration as hereinafter provided."

The arbitration clause provided that the arbitrator was to be:

> "the then area representative of the National Home Warranty Program. In the event the aforementioned Arbitrator is unable to complete their duties in the Arbitration for whatever reason, then he shall appoint another Arbitrator who shall act in his stead. The Arbitration Act of Manitoba shall govern the arbitration

procedure and the decision of the Arbitrator shall be final and binding upon the Parties."

The Motion Judge's Decision

The judge hearing the stay motion dismissed the motion. He found that the arbitration clause did not apply to this dispute because the clause was only applicable to disputes during the course of construction and not to disputes occurring long after the building of the house and the closing of the agreement to purchase the lot and house.

The motion judge arrived at this conclusion for a number of reasons:

In particular, in his view a representative of the Program would be a most unsuitable arbitrator after the agreement had closed.

Second, he applied sub-section 6(c) of the **Manitoba *Arbitration Act*** to find that court intervention was necessary to prevent unfair and unequal treatment of one party to the agreement.

Third, he held that since the arbitration clause did not apply, the court was not under the same general obligation to grant the stay since sub-section 7(2)(b) of the Act did not apply. Accordingly, the motion judge dismissed the stay motion.

The Manitoba Court of Appeal's Decision

1. **The Merits of the Appeal**

The Manitoba Court of Appeal reversed the decision and granted the stay motion. On the merits of the motion, it held that the motion judge had mis-interpreted the arbitration clause and had failed to apply the proper principles of interpretation. The court said that the proper approach is to give an arbitration clause a liberal interpretation:

> "In summary, while the court's role in the interpretation of private arbitration clauses is to give effect to the intentions of the parties as reflected in their words, policy considerations in encouraging arbitration, and a generally broad and liberal attitude by the courts in favour of arbitration, where that option has been chosen, will impact the interpretation in any given case."

The Court of Appeal held that the motion judge ought to have considered the other provisions of the Act which provided recourse in order to appoint a suitable arbitrator and to deal with issues of apprehension of bias. The court pointed out that the Act contemplates that challenges to the bias of the arbitral tribunal should first be made to that tribunal with appeal to the court, whose decision is final except in limited circumstances. In addition, recourse to section 6 of the Act would allow the court to intervene to assist the arbitration process. All in all, the court was

of the view that the appointment of the arbitrator led to no issue whereby the arbitral process was inherently unfair and inapplicable to the dispute.

The court concluded that even:

> "if there is a problem with the appointment of the area representative of the Program due to a perceived bias, the broader and more liberal interpretation of the arbitration clause would be to give effect to the parties' intention to have their procedural disputes settled under the *Act*, as has been specifically provided in the Agreement, and to raise the question of bias with the arbitrator, as contemplated by the *Act*. This broader interpretation would permit the parties to resolve any concerns about the suitability of the arbitrator within their chosen dispute resolution mechanism, rather than completely removing their choice of a resolution forum for all purposes following their taking possession of the property."

2. The Jurisdiction to hear the appeal

The Manitoba Court of Appeal considered whether it had jurisdiction to entertain the appeal. The issue arose from the wording of section 7 of the Manitoba Arbitration Act, the relevant potions of which are as follows:

> **7(1)** Subject to subsection (2), if a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> **Refusal to stay**
> **7(2)** The court may refuse to stay the proceeding in only the following cases:
> ……. . . . .
>
> **No appeal**
> **7(6)** There is no appeal from the court's decision under this section.

The Manitoba Court of Appeal held that sub-section 7(6) only applied if the motion judge issued a decision applying the arbitration clause. It did not apply if the motion judge held that the arbitration clause did not apply. The court applied the following language of the New Brunswick Court of Appeal in ***SNC-SNAM, G.P. v. Opron Maritimes Construction Ltd. et al.***, 2011 NBCA 60;

> "….if a motion judge stays a proceeding on the grounds the conditions in s. 7(1) are met, there can be no appeal from that decision. Similarly, if a motion judge concludes that at least one of the criteria listed in s. 7(2) is met, and, as a result, refuses to stay the proceeding, there can be no appeal from that decision. ….

> On the other hand, if the motion judge holds there is no applicable arbitration agreement upon which the proceedings could be stayed, or, in other words, if the judge does not make any of the determinations he or she might be called upon to make under s.7 of the Arbitration Act, then s. 7(6) cannot be successfully invoked to bar an appeal."

The Manitoba Court of Appeal's decision is also consistent with decisions in Ontario (***Mantini v. Smith Lyons LLP*** (2003), 64 O.R. (3d) 505, ***Huras v. Primerica Financial Services Ltd.*** (2000), 137 O.A.C. 79, ***Brown v. Murphy*** (2002), 59 O.R. (3d) 404) and ***Griffin v. Dell Canada Inc.*** (2010), 98 O.R. (3d) 481) and Alberta (***Clark (A.G.) Holdings Ltd. et al. v. HOOPP Realty Inc***, 2013 ABCA 101).

Discussion

There are two important aspects of this decision:

First, with the Manitoba Court of Appeal's decision, there are now appellate decisions in four provinces to the same effect: Manitoba, Alberta, New Brunswick and Ontario. The appellate courts in each of these provinces have held that the statutory prohibition against appealing an order refusing a stay only applies if the motion judge considers and applies the arbitration agreement but nevertheless decides that a stay should be denied. If the motion judge did not consider the arbitration clause or held that the dispute did not fall within the clause, then there is no stay of an appeal.

The prohibition against appealing from a denial of a stay order – found in section 7(6) of the **Manitoba *Arbitrations Act*** – comes from the 2002 draft of the **Uniform Arbitration Act** prepared by the **Uniform Law Conference of Canada. T**he prohibition is in the same wording as sub-section 7(7) of that draft of the Uniform Act. In the 1990 draft, the prohibition was in sub-section 7(6) which stated: "There is no appeal from the court's decision." Perhaps unfortunately, in neither draft did the Uniform Act state that appeals from orders dismissing stay motions are barred in some circumstances but not others. The sub-section, as quoted above, simply states that there is "no appeal from the court's decision under this section." On its face, the sub-section would seem to include any decision granting or dismissing a stay motion on any ground.

Six provinces have adopted the Uniform Arbitration Act: Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia. Now, in four of the six provinces which adopted the Uniform Act, and the prohibition against appeals from orders dealing with stay motions in that Act, the appellate courts have held that there is no such prohibition if the motion judge did not consider the arbitration clause or held that the clause did not apply to the dispute.

The second interesting aspect of this decision is the Manitoba Court of Appeal's expression of a very liberal approach to the interpretation of arbitration clauses. The court said that the

statutory policy and the resultant judicial approach are in favour of "encouraging arbitration", and that there should be "a generally broad and liberal attitude" and a "broader and more liberal interpretation of the arbitration clause". In the court's view, this attitude and approach will result in the arbitral tribunal, and not the court, being the first to resolve questions about whether the dispute falls within the arbitration agreement or whether the arbitrators are suitable. This liberal approach to arbitration clauses, and the application of the remedial provisions in the Act, over-came all the objections to arbitration relating to apprehension of bias.

Perhaps this decision is the end of the Canadian dispute about the "no appeal against stay orders" sub-section in the Uniform Arbitration Act. But it will not likely be the end of the debate about the proper approach toward arbitration clauses. In that debate, the Manitoba Court of Appeal's decision is a powerful statement in favour of a very wide and inclusive interpretation and application of arbitration agreements. The decision will undoubtedly be relied upon in the future by parties seeking to ensure that, in the event of any ambiguity in the wording of the clause, the clause should be broadly interpreted and any dispute about its interpretation should first be determined by the arbitral tribunal and not the courts.

See *Heintzman and Goldsmith on Canadian Building Contracts*, 4th ed, chapter 10

***Hopkins v. Ventura Custom Homes Ltd.*, 2013 MBCA 67**

Arbitration –Stay Motion- Appeal- Jurisdiction of Appellate Court

Thomas G. Heintzman O.C., Q.C., FCIArb **July 20, 2013**

www.heintzmanadr.com
www.constructionlawcanada.com