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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 the President of the Ontario Bar Association and the Canadian Bar Association. 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.

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.

Can An Arbitrator Award Compound Interest?

In the recent decision in ***British Columbia v. Teal Cedar Products Ltd.,*** the Supreme Court of Canada decided that compound interest could not be awarded in an arbitration arising from a statutory compensation regime. Under that regime, the arbitration was held pursuant to the British Columbia ***Commercial Arbitration Act*** **(CAA)***,* now the British Columbia ***Arbitration Act***.

While this decision depended upon the specific provisions of the B.C. arbitral legislation, the decision raises the whole issue of whether compound interest can be awarded in arbitrations in

Canada. The case raises the real possibility that, despite decisions to the contrary, interest cannot be awarded in arbitrations, at least in British Columbia.

Background

Teal's annual allowable forestry cut was reduced in 1999, following the creation of a provincial park. In 2001, Teal commenced proceedings against the province claiming compensation for a partial expropriation. In 2002, the province enacted retroactive legislation, the ***Protected Areas Forests Compensation Act*** **(PAFCA)**. That Act stated that the reduction in forestry cut did not amount to expropriation and directed that a claim for such a reduction should be asserted as a claim under the ***Forest Act***, which in turn said that the claim was to be dealt with by arbitration under the CAA.

Teal commenced an arbitration claim. In the arbitration award in 2010, the arbitrator awarded Teal $6.3 million plus legal costs. The arbitrator also awarded compound interest in the amount of $2.2 million from the date of the reduction in Teal's forestry cut in 1999 to the date of the award. The award of compound interest was upheld by the B.C. Supreme Court and Court of Appeal. The Supreme Court of Canada reversed the decision of the B.C. Court of Appeal and held that only simple interest is payable under the relevant B.C. legislation.

The Supreme Court's decision

The Supreme Court's decision depended upon the inter-relationship between the forestry legislation, section 28 of CAA and sections 1 and 7 of the B.C. ***Court Order Interest Act*** **(COIA)**.

Section 28 of CAA states that:

> "For the purposes of the ***Court Order Interest Act*** and the ***Interest Act (Canada)***, a sum directed to be paid by an award is a pecuniary judgment of the court."

Sections 1 and 7 of COIA deal with prejudgment (section 1) and post judgment (section 7) interest which may be awarded by a court in British Columbia. Section 2(c) of that states that "the court must not award interest under section 1…on interest or on costs…." Section 7(2) says that "A pecuniary judgment bears simple interest…" and section 7(1) defines simple interest to be "an annual simple interest rate that is equal to the prime lending rate of the banker to the government." Referring to those subsections, the Supreme Court concluded that "compound interest is prohibited".

So in British Columbia, the Supreme Court appears to have concluded that only simple interest may be awarded by a court. The Supreme Court effectively held that this court-mandated

regime is, by reason of section 28 of CAA, also mandated for arbitrations conducted under the CAA.

A number of submissions why this should not be so were advanced by Teal, all of which were rejected by the Supreme Court. One of Teal's submissions was that the arbitrator could order compound interest as part of the substantive compensatory award, not as interest on that award. The Supreme Court rejected that submission, holding that it did not conform to the plain meaning and statutory history of the sections.

Teal also argued that section 22 of CAA provided that the rules of the British Columbia International Commercial Arbitration Centre (BCICAC) apply to arbitrations conducted under CAA, and that those rules permit arbitrators to award compound interest. The Supreme Court pointed out that section 22(3) of CAA states that if the rules of BCICAC are inconsistent with or contrary to the Act, then the Act prevails. The Supreme Court held that such an inconsistency arose between the provisions of CAA and the rules of BCICAC in relation to interest.

While the Supreme Court held that the statutory regime in British Columbia mandated simple interest for pre and post-award interest in arbitrations under B.C's domestic arbitration statute, it stated that this regime may not exist in other provinces. The Court also made several comments indicating its view that compound interest awards are truer compensation for a pecuniary loss than simple interest. The Court said:

> "There is no doubt that compound interest is a more accurate way of compensating parties for the time value of money….compound interest is no doubt a better measure of the true cost of the loss suffered by Teal…."

Discussion

This decision is somewhat surprising in light of the previous decisions about the authority of courts and arbitrators to award compound interest.

Many of the provincial statutes dealing with the power of the court to award interest state that interest on interest may not be awarded. Thus section 2(2)(b) of the Alberta ***Judgment Interest Act*** says that "The court shall not award interest….on interest awarded under this Part," and Section 128(4)(b) of the **Ontario *Courts of Justice Act*** states that "Interest shall not be awarded on interest" on judgments. Those sections seem to mirror sections 2(c) and 7(2) of the B.C. COIA.

Similarly, other provincial arbitration statutes also provide that interest under arbitral awards is to be in accordance with the court-mandated regime. Thus, section 54 (1) of the **Alberta *Arbitration Act*** says that an arbitral tribunal has the same power with respect to interest as the

court has under the ***Judgment Interest Act***. Similarly, section 57 of the **Ontario A*rbitration Act**, 1991* says that "Sections 127 to 130 (prejudgment and post-judgment interest) of the ***Courts of Justice Act*** apply to an arbitration, with necessary modifications", thereby adopting the regime in section 128(4)(b) excluding compound interest.

And yet, arbitral tribunals and courts have been held entitled to award compound interest, notwithstanding the apparent statutory prohibition. Thus in Alberta, in ***Alberta (Minister of Infrastructure) v. Nilsson*, 2002 ABCA 283** it was held that an arbitral tribunal could award compound interest as part of the substantive award, that is, as part of the damages and by reason of the exercise of the court's equitable jurisdiction, notwithstanding the statutory prohibition against compound interest.

Most noticeably, in ***Bank of America Canada v. Mutual Trust Co*, [2002] 2 SCR 601,** the Supreme Court of Canada dealt with the interest regime in the **Ontario *Courts of Justice Act***. The court held that the Ontario court had jurisdiction to award compound interest notwithstanding the apparent prohibition in section 128(4)(b) of the Act against awarding interest upon interest. In arriving at that conclusion, the court relied upon Section 130 of that Act which allows a court, where it considers it just, to vary the interest rate or the time for which interest may be awarded. The court also relied upon subsections 128(4)(g) and 129(5) of that Act which excludes the court-mandated interest regime – and effectively allows a court to award interest - where interest is "payable by a right other than under this section". The court held that the court's common law power to award damages flows from the application of contract law and that subsections 128(4)(g) and 129(5) provide statutory authority to award compound pre-and post-judgment interest according to this common law power.

In the ***Teal Cedar*** decision, the Supreme Court did not refer to its prior decision in ***Bank of America Canada***.

There appear to be two relevant differences between the interest regime in the **B.C. COIA** and the interest regimes in the **Alberta *Judgment Interest Act*** and the **Ontario *Courts of Justice Act***.

First, the latter two statutes give the court the power to award a different rate of interest (Alberta, section 2(3); Ontario section 130(1)(b)).

Second, the latter two statutes give the court the power to award interest "where the payment of pre-judgment interest is otherwise provided by law" (Alberta, section 2(2)(i); Ontario, section 128(4)(g) and 129(5)). As already noted, it was those subsections that were relied upon by the Supreme Court in the ***Bank of America Canada*** decision for the conclusion that the Ontario court did have power to award compound interest notwithstanding the apparent prohibition of compound interest in section 128(4)(b).

Those powers do not appear in the B.C. statute. The only apparent exception to the mandatory simple interest rate in the BC Act is "an agreement about interest between the parties"**.**

The apparent result is that, for both court and domestic arbitration proceedings in British Columbia, compound interest cannot be awarded, unless there is an agreement between the parties dealing with interest. There does not appear to be any basis to distinguish between court and arbitral proceedings as the domestic arbitration act adopts the court interest regime.

In other provinces which have interest statutes like those in Alberta and Ontario, compound interest can be awarded both by courts and by domestic arbitral tribunals.

So far as international commercial arbitration is concerned, the **B.C.** ***International Commercial Arbitration Act*** **(ICAA)** does not contain any provision relating to interest that is similar to that found in the **CAA.** Section 31(7) of the B.C. ICAA empowers the arbitral tribunal to award interest, unless the parties have agreed otherwise. But there is no reference to the rates or compounding of interest. Accordingly, international commercial arbitral tribunals in British Columbia appear to have a wider authority to award interest than domestic arbitral tribunals.

British Columbia v. Teal Cedar Products Ltd., **2013 SCC 51**

Arbitration - Interest - Judgments and Awards

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