Torkin Manes
Barristers & Solicitors

Torkin Manes LegalWatch

RECENT DEVELOPMENTS & TRENDS IN CASE LAW

NOVEMBER 2017

Want to Appeal a Commercial Arbitration Award? Make Sure You Secure Broad Rights of Appeal.

One of the main purposes of commercial arbitration is to provide the parties with a final and binding resolution of their dispute. For this reason, section 45 of the *Ontario Arbitration Act, 1991*, S.O. 1991, c.17 limits appeals from arbitral awards, making it clear that if the parties want broad rights of appeal on questions of law, fact or mixed fact and law, their arbitration agreement must expressly say so. Otherwise, the parties will be stuck with the narrow appellate rights set out in the *Arbitration Act*.

A decision of the Ontario Court of Appeal, *652443 Canada Inc. v. Toronto (City)*, 2017 ONCA 486, establishes the Court's unwillingness to get involved in appeals from arbitral awards. The case affirms that the policy underlying commercial arbitration, i.e. to promote an efficient and final resolution of the dispute between the parties, would be undermined by broad appellate review.

Facts

652443 Canada Inc. involved a dispute between the City of Toronto, as landlord, and the appellant commercial tenant. Both were parties to a 99-year lease (the "Lease") relating to a retail property in downtown Toronto.

The Lease provided that during the second rental period, i.e. between December 1, 2011 to November 30, 2037, the parties were to agree on what amounted to the "fair market rental" for the property. If the parties could not agree, the matter was to be submitted to arbitration.

The Lease further provided that the "decision of the arbitrators shall be subject to appeal in accordance with the provisions of *The Arbitrations Act*, R.S.O. 1970, as amended, or any other successor Act".

The City commenced arbitration when the parties failed to agree on the "fair market rental" cost for the property.

The parties entered into an arbitration agreement (the "Arbitration Agreement"). This Agreement provided that the "decision of the arbitrators shall be subject to appeal in accordance with the provisions of the *Arbitration Act*, S.O. 1991, c.17 as amended, or any other successor Act".

Marco P. Falco
Partner, Litigation & Written Advocacy

PHONE
416 777 5421

EMAIL
mfalco@torkinmanes.com

Marco is a partner in the Litigation Department at Torkin Manes. He provides written advocacy for a wide range of civil disputes, including commercial litigation and administrative law. He specializes in applications for judicial review and civil appeals.

Following a sixty-eight day arbitration before a tribunal which resolved, amongst other things, the issue of "fair market rental" for the property, the tenant sought to appeal the award to the Superior Court on the basis that that the tenant was denied procedural fairness and that the tribunal erred in its determination of "fair market rental".

Motion Judge Quashes Appeal

The City brought a motion to dismiss the appeal on the basis that the Arbitration Agreement between the parties only provided for rights of appeal as set out in the *Arbitration Act*.

In other words, the Arbitration Agreement stated that appeals of the arbitral award were only available in "accordance with provisions of the *Arbitration Act*".

Under section 45 of the *Arbitration Act*, a party may appeal an award on questions of law, questions of fact and questions of mixed fact and law, but only if the arbitration agreement so provides. In the absence of such a provision in the arbitration contract, a party may only appeal the arbitral award on a question of law alone, and then, only with leave of the Court.

The motion judge allowed the City's motion and quashed the appeal. Because the tenant's appeal only raised questions of mixed fact and law (and not a pure question of law), and because there was no right of appeal on questions of mixed fact and law specified in the Arbitration Agreement, the tenant was precluded from appealing the arbitral award.

The motion judge also rejected the tenant's argument that affidavit evidence and the Lease ought to be considered as raising broader rights of appeal than those set out in the Arbitration Agreement.

The tenant appealed the motion judge's decision to the Court of Appeal.

Arbitration Agreement Failed to Include Broad Rights of Appeal

The Court of Appeal dismissed the tenant's appeal and upheld the motion judge's ruling.

First, the Court agreed with the motion judge's ruling refusing to admit affidavit evidence of the "factual matrix" surrounding the formation of the Arbitration Agreement in order to determine what appeal rights the parties intended to secure.

Citing the Supreme Court of Canada's decision, *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court noted that while evidence of the "factual matrix" relating to the "objective evidence of background facts known to the parties at the time of the execution of the contract" was admissible, evidence of negotiations and of a party's subjective intentions was not.

In this case, the affidavit evidence regarding the parties' intended appeal rights as set out in the Arbitration Agreement consisted of "evidence of the parties' negotiations and of their subjective intentions with respect to the scope of their appeal rights" and was therefore inadmissible. The affidavits did not offer evidence of the "parties' mutual objectives".

Second, the Court of Appeal rejected the tenant's argument that the Lease, which referred to the *Arbitration Act*, R.S.O. 1970, c.25, conferred broad rights of appeal from the arbitral award, including on questions of fact and mixed fact and law.

The Court upheld the motion judge's ruling that the Arbitration Agreement was a "stand alone agreement" concerning the arbitration. Neither the Lease nor the 1970 *Arbitration Act* ought to be considered. The Lease only included four clauses concerning the arbitration, while the parties' recently-negotiated Arbitration Agreement set out a "comprehensive procedure for arbitration". Accordingly, it was the Arbitration Agreement that governed any appellate rights following the arbitral award.

Moreover, even if the Lease governed, it made reference to the 1970 *Arbitration Act* and "any successor Act". Accordingly, both the Lease and the Arbitration Agreement provided that any appellate rights would be governed by the 1991 *Arbitration Act*.

Third, if the parties intended to secure broad rights of appeal, "they would have so provided explicitly in the Arbitration Agreement". The parties were "represented by experienced counsel" who were presumed to understand the *Arbitration Act*.

Broad Rights of Appeal Must be Expressly Provided

The decision in *652443 Canada Inc. v. Toronto (City)* emphasizes a number of themes governing the appellate review of arbitral awards, as recently reiterated by the Supreme Court of Canada in *Teal Cedar Products v. British Columbia*, 2017 SCC 32:

1. Courts are becoming less willing to intervene in commercial arbitration disputes. Where sophisticated commercial parties choose to arbitrate, appellate review of these decisions is necessarily limited to promote the goals of finality and efficiency that underlie the arbitration process.

2. The Courts' reluctance to review commercial arbitration awards is expressly reflected in Legislation. The Ontario *Arbitration Act* deliberately limits appeals from arbitration to questions of law alone, with leave of the Court, if the Arbitration Agreement fails to provide broader appellate rights.

3. If sophisticated commercial parties intend to secure broad rights of appeal from an arbitration decision, they must specify in their arbitration contract that the parties have the right to appeal on questions of law, fact and questions of mixed fact and law. The parties will likely be unable to rely on evidence of their subjective intentions at the time of entering into the arbitration agreement to argue the parties always intended to secure broad rights of appeal, if such rights are not expressly provided for in the arbitration contract.