# Arbitration
# Case Law Update

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# Domestic Cases

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# Appeal Rights and Standards of Review

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# ***Teal Cedar Products Ltd v British Columbia***, [2017] 1 SCR 688, 2017 SCC 32

**Issues**

- When appeals are limited to questions of law, is there a right of appeal and, if so, what is the applicable standard of review for issues of:
  1. Contractual interpretation
  2. Statutory interpretation
  3. Statutory application

**Approach for Appellate Review**

1. Identify the appeal issue as one of fact, law, or mixed fact and law to determine if there is a right of appeal,
2. If there is a right of appeal, determine what the applicable standard of review is,
3. Then, determine whether the decision withstands the standard of review.

# ***Teal Cedar Products Ltd v British Columbia***, [2017] 1 SCR 688, 2017 SCC 32, *cont.'d*

**Held**

- Issues of contractual interpretation and statutory application are almost always issues of mixed fact and law from which there is no right of appeal.
- With issues of mixed fact and law, the Courts should be cautious in identifying extricable errors of law.
- Extricable errors of law, and pure question of law (like statutory interpretation), are appealable but they are almost always reviewed on the reasonableness standard.
- Exceptions that are reviewed for correctness: constitutional questions, questions of central importance to the legal system or questions outside of the expertise of the arbitrator.

**Post-Script**

- *Teal Cedar Products Ltd v British Columbia*, 2018 BCCA 79

## ***KBR Industrial Canada Co v Air Liquide Global E&C Solutions Canada LP***, 2018 ABQB 257

**Issue**

- Leave to appeal an award, which is limited to issues of law, was sought on three issues of contractual interpretation (among other issues) post-***Teal***.

**Held**

- The Court found one possible extricable error of law being whether the majority of the Arbitration Panel erred in how it read two clauses together.
- The Court stated “failing to remain faithful to the terms of a contract” and “disregarding a clear, compelling substantive provision” can both constitute errors in law.
- Leave was ultimately not granted on the issue because it failed to meet the other requirements for leave under the Alberta *Arbitration Act*.

## *The Dominion of Canada General Insurance Company v Unifund Assurance Company*, 2018 ONCA 303

**Issue**

- Can parties agree to the applicable standard of review on appeal?

**Held**

- The parties' agreement on the standard of review is not determinative of the issue. The applicable standard of review is a question of law to be decided by the reviewing court.

## ***Saskatchewan v Capitol Steel Corporation***, 2018 SKCA 3

**Issue**

- Whether an appeal of a Judge's decision concerning an Arbitrator's determination of a preliminary issue should be quashed. The section of the Saskatchewan *Arbitration Act* concerning preliminary issues specifically provides there is no appeal from a Judge's decision.

**Held**

- The appeal was not quashed.
- As the decision related to the Judge's jurisdiction under the preliminary issue section of the *Arbitration Act*, the Saskatchewan *Court of Appeal Act* provides a general right of appeal to the Court of Appeal which was not displaced by the *Arbitration Act*.

## ***Saskatchewan v Capitol Steel Corporation***, 2018 SKCA 3, *cont.'d*

- The provision of the *Arbitration Act*:

> 18(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.
>
> …
>
> (8) The arbitral tribunal may rule on an objection as a preliminary question or may deal with it in an award.
>
> (9) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within 30 days after receiving notice of the ruling, make an application to the court to decide the matter.
>
> **(10) There is no appeal from the court's decision on an application pursuant to subsection (9)**

# ***Saskatchewan v Capitol Steel Corporation***, 2018 SKCA 3, cont.'d

- The Saskatchewan *Court of Appeal Act* provides:

  Right of appeal

  7(2) Subject to subsection (3) and section 8, an appeal lies to the court from a decision:

  (a) of the Court of Queen's Bench or a judge of that court; and

  (b) of any other court or tribunal where a right of appeal to the court is conferred by an enactment.

  (3) **If an enactment provides that there is no appeal from a decision mentioned in subsection (2) or confers only a limited right of appeal, that enactment prevails.**

- For comparison, the Alberta *Rules of Court* provide:

  Right to appeal

  14.4(1) **Except as otherwise provided**, an appeal lies to the Court of Appeal from the whole or any part of a decision of a Court of Queen's Bench judge sitting in court or chambers, or the verdict or finding of a jury.

## ***Newfoundland and Labrador v ExxonMobil Canada Properties***, 2017 NLTD(G)147

**Issue**

- Did the parties contract out of the setting aside provision in the applicable *Arbitration Act* and if so, was that permissible?

**Held**

- Although the parties cannot interfere with the review jurisdiction of the Court by completely contracting out of the setting aside provision, they can agree to the scope of the review as they did in this case- particularly where there are sophisticated parties contracting commercially using clear and unequivocal language.

# Domestic Cases
# Other Issues

# ***Inter Pipeline Ltd v Rural Road Construction Ltd,*** 2017 ABQB 811

**Issues**

1. Does the court have the discretion to decide a limitations issue in the first instance or must it be referred to the Arbitrator?
2. Does entering into an arbitration agreement commence arbitration proceedings for the purposes of limitations?

**Held**

- The Court should decide the issue. If the limitation period has expired, there would be nothing left to submit to the Arbitrator. It was not necessary for the limitations issue to end the entire dispute only the "jurisdictional dispute" or "question of law" at issue. The limitations issue was a "pure question of law" and required only limited facts (no testimony) to dispose of it.
- Entering into an arbitration agreement after a dispute materializes can serve to commence arbitration for the purposes of limitations.

**Contra** ***Husky Oil Operations Limited v Saipem Canada Inc***, 2017 ABQB 489

- An application raised a number of jurisdictional issues all of which the Judge referred to the Arbitrator for determination. One issue concerned limitations. It was conceded to be an issue of mixed fact and law.

## ***2249492 Ontario Inc v Donato*, 2017 ONSC 4975**

**Issue**

- A party applied to seal an award so that it would not form part of the public record on appeal.

**Held**

- The motion was dismissed. The requirements for a confidentiality or sealing order established in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 must be complied with even where the parties have agreed to confidentiality in an arbitration agreement and the Arbitrator found the award to be confidential as a result.

# Reasonable Apprehension of Bias


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# ***Halliburton Company v Chubb Bermuda*** [2018] EWCA Civ 817

Issues:

1. Whether and to what extent an arbitrator might accept appointments in multiple references concerning the same or overlapping subject matter with only one common party without thereby giving rise to an appearance of bias.
2. Whether and to what extent should an arbitrator make disclosure of circumstances which might give rise to justifiable doubts as to his or her impartiality.
3. What were the consequences of failing to make disclosure of circumstances which should have been disclosed?

Holding:

- Arbitrator ought, as a matter of good practice and, in the circumstances of the case, as a matter of law, to have made disclosure to Halliburton at the time of his appointments in references 2 and 3. However, the fair-minded and informed observer, having considered the facts, would not conclude that there had been a real possibility that the Arbitrator had been biased.

# ***Hunt v The Owners, Strata Plan LMS 2556***, 2018 BCCA 159

Issues

1. Whether judicial review proceedings constitute a collateral attack.
2. Whether a reasonable apprehension of bias arose in the arbitration proceeding

Holding

- The judicial review proceedings did not constitute a collateral attack – against either the arbitrators costs award, or the subsequent judicial proceeding denying leave to appeal that award.

- The trial judge erred in failing to find that the communications between one party to the arbitration and the arbitrators raised a reasonable apprehension of bias, entitling the appellants to an order quashing the arbitration and resultant costs decision against them.

# *Atlantic Industries v SNC- Lavalin Constructors (Pacific) Inc* 2017 BCCA 433

Issues

- Whether the judge erred by finding AIL's waiver of its ability to raise a reasonable apprehension of bias against Mr. Knutson was sufficiently informed, and therefore valid.
  - Determining this issue requires consideration of the scope of disclosure required from an arbitrator in order to give rise to a legally valid waiver of the right to object to a reasonable apprehension of bias

Holding

- Appeal dismissed. The judge did not misstate or misapply the legal test for valid waiver, and he properly considered the context.

# International Cases


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*This is not an International Arbitration*

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# ***McHenry Software Inc. v. ARAS 360 Incorporated***, 2018 BCSC 586

Issues

- Which statue governs the arbitration – the ICAA or the Arbitration Act?
  - Does the ICAA apply?
  - Did the parties waive the provisions of the ICAA such that the Arbitration Act applies to the Arbitration?
  - In the alternative, is ARAS estopped from taking the position that the ICAA applies to the arbitration based on its conduct in the arbitration?

Holding

- The parties could not waive (or contract out of) the application of B.C.'s *International Commercial Arbitration Act* (ICAA) in favour of the Domestic *Act* because its application was mandatory for international arbitrations.

- Notwithstanding that the parties having conducted their entire arbitration according to the *Arbitration Act,* Russell J. held the party seeking to rely on the ICAA, and its more limited appeal provisions, could not be estopped from doing so as the ICAA was enacted for a public purpose.

# ***Alberta Motor Association Insurance Company v Aspen Insurance UK Limited***, 2018 ABQB 207

Issues

1. Was there one or more arbitration agreement(s)?
2. Does the domestic or international act apply?
3. Should a stay of action granted in favour of arbitration?
4. Should there be an order for consolidation?

Holding

- The only practical and common-sense conclusion was that there was one overarching reinsurance agreement, including all defendants.
- Since there was one overarching agreement and one of the signatories (Lloyd's) was an international party, the arbitration agreement fell under the international act.
- The action should be stayed and while consolidation makes sense, court does not have jurisdiction to order consolidation absent unanimous consent.

# *Heller v Uber Technologies* 2018 ONSC 718

Issues

1. Which arbitration act applies?
2. Does the Competence-Competence Principle Apply?
3. Do the Exceptions to a Stay and a Referral to Arbitration Apply?

Holding

- Employment-related agreements are “commercial” within meaning in the ICAA;
- Because the *ESA* does not preclude arbitration agreements, the Court should not stay the action;
- The challenge to the arbitrator’s jurisdiction should first be resolved by the arbitrator in the Netherlands; and
- It is not unconscionable to prevent employees from pursuing employment-related rights through a court when there is a valid arbitration clause.

# *Trade Finance Solutions Inc. v. Equinox Global Ltd and Lloyd's Underwriters,* 2018 ONCA 12

Issue

- When there is an international insurance agreement that contains both an arbitration provision and an "Action Against Insurer" clause, should an Ontario action brought by an insured be stayed or referred to arbitration in London?

Holding

- The Court of Appeal disagreed with the motions judge and granted Equinox the stay of proceedings. It grounded its reasoning on the following two key principles:

    1. An objective interpretation of the policy as a whole, giving effect and meaning to each term, indicated that the parties had agreed to mandatory arbitration in London, England, as the sole method of dispute resolution; and

    2. As the arbitration agreement was binding on the parties and the claims at issue fell within the scope of the agreement, the court was bound to refer the parties to arbitration in accordance with the Model Law.

# ***Pixhug Media Inc. v. Steeves***, 2017 BCSC 2171

Issues

(1) Have the defendants satisfied the requirements for a stay under s. 8(1) of the *ICAA*?

(2) If the defendants have satisfied the requirements of s. 8(1), are the arbitration agreements null and void for fraud under s. 8(2)?

Holding

- Application dismissed.
- A party who takes a step in the proceedings forfeits its right to apply for a stay under s. 8, regardless of whether it has expressed an intention to refer the dispute to arbitration.
- There is venerable authority that a motion for security for costs is a "step in the proceeding" which precludes a defendant from applying under statutes equivalent to the ICAA for a stay in favour of arbitration.

# ***Canada v. Bilcon et al.*** 2018 FC 436

- Application to set aside NAFTA Ch. 11 arbitration award on basis that Tribunal exceeded jurisdiction by deciding that Fed-Prov Environmental Joint Review Panel (JRP) erred in law and thereby breached NAFTA's fair and equitable treatment (Art.1105) and national standards (Art. 1102)
- Canada argued that Majority relied on an error of domestic law in finding that JRP assessed the project based on its undisclosed criteria of "community core values" and refusing tp consider issues of environmental mitigation
- Canada argued that the Majority decided that the JRP's failure to act in accordance with Canadian environmental law amounted to a breach of the international law standard
- Respondent investor argued this was not a jurisdictional issue but that Canada was simply re-arguing the merits

Issue

- Did the Tribunal exceed its jurisdiction by dealing with an issue not within the submission to Arbitration?

Holding

- Court followed *Cargill* case and reviewed the Award in light of the submission to arbitration to determine whether the Tribunal exceeded its jurisdiction.
- Court found that while Tribunal referenced Canadian law it did so in the context of deciding the merits of whether Art. 1105 and 1102 were breached.
- Majority's finding may be controversial but it was within their jurisdiction to make the findings they did and their findings on not subject to challenge on the merits.

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