CIRCU lawR
A regular publication for legal news and reviews

The British Columbia *Arbitration* Act & Construction Disputes – Questions of Law and Grounds for Appeal

Disputes and conflicts routinely arise between owners, builders, contractors and other parties during the planning, design, construction and post-construction phases of a construction project. Delays, unforeseen work or property damage are common grounds for such disputes, which can often result in one of the parties incurring unanticipated costs for which they may seek recovery from the other parties. To address the risks that such disputes may arise, dispute resolution provisions are routinely incorporated into construction contracts to establish a process whereby the parties to a dispute will be required to participate in mediation, arbitration or other alternative dispute resolution processes. As an example, the Canadian Construction Documents Committee has incorporated a dispute resolution process into its CCDC 2 Stipulated Price Contract that sets out a three-stage process where the parties may engage in negotiations with each other, a mediation and failing that a binding commercial arbitration process through which an arbitrator will render an enforceable decision regarding the dispute.[1] While the intention of a contractually required dispute resolution process is to provide a less formal and more streamlined framework for resolution, as demonstrated in a number of recent cases out of the British Columbia Court of Appeal, there are grounds through which an arbitration award can be challenged through the courts. The construction industry should be mindful that even where an arbitration decision has been rendered this may not necessarily be the conclusion of the dispute and there are avenues through which one of the parties may attempt to challenge the decision of the arbitrator through the British Columbia *Arbitration Act* SBC 2020 c. 2 (the "**Act**").

The Arbitration Act

On September 1, 2020, the Act came into force and the former British Columbia *Arbitration Act* RSBC 1996 c. 55 was repealed (the "**Former Arbitration Act**"). Under Section 31 of the Former Arbitration Act, parties to an arbitration were permitted to appeal arbitration decisions to the British Columbia Supreme Court.[2] The new appeal provisions under the Act have slightly modified the appeals process for arbitration decisions; which now must be heard by the British Columbia Court of Appeal (the "**Court of Appeal**"). Under Section 59 of the Act, a party to an arbitration may appeal an arbitration award to the Court of Appeal on the grounds that there is a "question of law" arising out of

the arbitration award.[3] This creates a mechanism through which a party to a construction dispute may challenge an arbitration award on any question of law arising out of the award with either (1) consent of the parties to the arbitration or (2) leave of the Court of Appeal.

Appeal on a Question of Law

Questions of law often involve the ascertainment of legal tests or the interpretation of statutory provisions. This can be contrasted with "questions of fact" which generally deal with questions about the facts giving rise to a dispute. For example:

- If an arbitrator applies an incorrect legal principle when reaching their decision or fails to consider an element of a legal test or forgets, ignores or misconceive evidence in a manner that effects the result then this would constitute a question of law that would ground the right to an appeal under Section 59 of the Act.[4]
- If an arbitrator misstates minor or inconsequential factual circumstances giving rise to the dispute and which do not affect the outcome then this would be a question of fact for which no right of appeal under Section 59 of the Act would arise.

The distinction between what is a " question of law" and what is a "question of fact" is often difficult to demarcate and, as demonstrated by recent Court of Appeal cases, in some circumstances the misapprehension of evidence by the arbitrator may give rise to a question of law for which a right to appeal will arise.

Direction from the British Columbia Courts

The first appeal under Section 59 of the Act was heard by the Court of Appeal in the case of *Escape 101 Ventures Inc. v. March of Dimes Canada,* 2022 BCCA 294. The case arose out of an arbitration decision that was rendered in relation to a dispute over the purchase of a business. The agreement required an earnout to be paid out to Escape 101 Ventures Inc. ("**Escape**") for a period of five years on a quarterly basis, however, it was unclear whether the earnout calculations would include revenue from new contracts obtained by the business. The quarterly payout of the earnout did not account for the money from a new contract and a dispute arose which resulted in a commercial arbitration occurring. The arbitrator determined that the earnout included revenue from the new contract that derived from business activities in two cities but not in any other locations. In reaching his decision, the arbitrator noted that Escape had learned of the new contract and had accepted earnout reports for previous quarters despite the non-disclosure of any revenue from the contract in those quarters for business activities underway in other cities and regions, which the arbitrator deduced meant that the parties had not intended the revenue from this new contract deriving from other cities or regions to be calculated as a part of the earnout.

Escape appealed the arbitrator's decision under Section 59 of the Act and raised that the arbitrator had misapprehended the evidence regarding the party's post-agreement conduct by misconstruing that the contract started yielding revenue in previous quarters that predated the quarterly report that gave rise to the dispute. The arbitrator drew an improper inference from Escape's acceptance of prior quarterly earnout reports that they had accepted that they were not entitled to the revenue from the new contract that derived from other cities and regions. The Court of Appeal held that this misapprehension constituted an extricable error and overturned the arbitrators decision.

As demonstrated in this case, the misapprehension of evidence may give rise to grounds for an appeal if that misapprehension gives rise to an improper inference that has a material affect on the outcome of the arbitration.[5] In what circumstances a misapprehension of evidence gives rise to an extricable error of law was summarized by the Ontario Court of Appeal in *Bayford v. Boese*, 2021 ONCA 442 as follows:

> [28] A misapprehension of evidence may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence: R. v. Morrissey (1995), 1995 CanLII 3498 (ON CA), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 218. Doherty J.A. noted, at p. 218, that most errors that constitute a misapprehension of evidence will not be regarded as involving a question of law. However, appellate intervention is warranted where the misapprehension of evidence is palpable and overriding, such that it is plain to see or obvious and goes to the very core of the outcome of the case: see Waxman v. Waxman, 2004 CanLII 39040(Ont. C.A.), at paras. 296-97, leave to appeal refused, [2004] S.C.C.A. No. 291; Carmichael v. GlaxoSmithKline Inc., 2020 ONCA 447, 151 O.R. (3d) 609, at para. 125, leave to appeal refused, [2020] S.C.C.A. No. 409.[6]

Parties to a commercial arbitration may have an avenue to appeal the arbitration decision under the Act in circumstances where the arbitrator has misapprehended evidence that is central to what is at issue and impacts the decision that is ultimately rendered by the arbitrator. However, it should be noted that a notice to appeal to the Supreme Court of Canada has been filed in *Escape 101 Ventures Inc. v. March of Dimes Canada* and further guidance from the courts regarding whether a material misapprehension of evidence constitutes a question of law that grounds a right to appeal of an arbitrator's decision may be coming.

The Court of Appeal recently considered granting leave for appeal under Section 59 of the Act in relation to an arbitration that occurred regarding a construction dispute in *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure),* 2022 BCCA 440. The Ministry of Transportation & Infrastructure (the "**Ministry**") awarded a A.L. Sims and Son Ltd. (the "**Contractor**") a contract to perform roadwork on a number of access roads to the Site C Dam through a tendering process (the "**Project**"). In the course of preparing its bid for the Project, the Contractor improperly priced components of the work based on errors made in estimating related to the cost of certain materials and excavation works that would be undertaken as a part of the Project. A dispute arose between the Ministry and the Contractor regarding alleged differences in the character of the work encountered then what was anticipated based on the tender documents for the Project. The dispute ultimately headed to arbitration and the Contractor's claim was dismissed. Additionally, the arbitrator awarded the Ministry liquidated damages for delays in the work.

The contractor brought an appeal of the arbitration decision under Section 59 of the Act and alleged that a number of errors of law were made in the decision, and which the Court of Appeal broadly categorized into four sub-headings as (1) errors related to the application of incorrect legal principles, (2) errors related to the reliance on no or inadmissible evidence, (3) errors related to forgetting ignoring or misconceiving of evidence and (4) errors made by exceeding the arbitrator's jurisdiction by awarding liquidated damages to the Ministry.[7]

The Court of Appeal refused to grant the Contractor leave to appeal and upheld the arbitration award,

holding that the complaints raised by the Contractor were not questions of law. The court additionally affirmed its findings in *Escape 101 Ventures Inc. v. March of Dimes Canada*, that a material misapprehension of evidence going to the core of the outcome of an arbitration award amounts to a legal error that can be subject to an appeal under Section 59 of the Act.[8] Because no such misapprehension had occurred in this arbitration this ground for appeal was not open to the Contractor.

TAKEAWAYS

As demonstrated by these cases, parties to a construction contract that contains dispute resolution provisions setting out a commercial arbitration process should consider the following two issues moving forward:

1. Risk of Appeals of Arbitration Decisions

The construction industry should be cognizant that simply because an arbitration process is required under the dispute resolution provisions in a construction contract that this does not guarantee that a construction dispute will be concluded at the time an arbitration decision is rendered. Although arbitration processes are routinely incorporated into the dispute resolution provisions of construction contracts in an effort to provide a degree of confidentiality, efficiency, and finality when disputes arise, there is a risk that the review of an arbitration award by the Court of Appeal under Section 59 of the Act could detract from the benefits of arbitration by making disputes more costly, lengthy and public in situations where leave for appeal is granted.

2. Exclusion of Right to Appeal a Question of Law in the Arbitration Agreement

As set out under Section 59 (3) of the Act, if the arbitration agreement entered into by the parties to the arbitration contains provisions that expressly exclude the right to appeal the decision on a question of law, then the Section 59 appeal process cannot be pursued.

> *59(3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.*[9]

In some circumstances, parties may prefer the benefits of finality and keeping the dispute outside of the courts where the facts and matters giving rise to the dispute will become public, as opposed to permitting an avenue for appeal that could drag the dispute out further through court proceedings. In the event that concerns over finality, expediency and confidentiality are paramount to the parties then they may prepare an arbitration agreement that prevents appeals on any question of law arising out of an arbitration award. However, parties to an arbitration should carefully consider the implications of prohibiting an appeal as this may result in binding arbitration decisions that were reached based on fatal errors in interpreting and applying the relevant law or in which the arbitrator has misapprehended key evidence in reaching a determination.

Those engaged in construction projects will have to be mindful of the dispute resolution processes set out in their contracts moving forward and consider whether they wish to allow disputes that go to arbitration to be appealed or whether any arbitration agreements prepared in response to a dispute should incorporate provisions that prevent such appeals from occurring. Additionally, with respect to whether a material misapprehension will remain a ground for appeal, further clarification from the Supreme Court of Canada may be coming should leave to appeal be granted in the *Escape Ventures 101 Inc.* case. In the meantime, builders, owners and other parties involved in construction projects should remain aware that the dispute resolution processes set out in their contracts may not necessarily

result in a final determination through that process and the Act provides some avenues through which arbitration decisions may be appealed.

April, 2023

David Giroday

Footnotes:

1. CCDC 2 - 2020 Stipulated Price Contract Part 8.

2. *Arbitration Act* RSBC 1996 c 55, s 31.

3. *Arbitration Act* SBC 2020 c. 2, s 59.

4. *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at paras 21 to 21.

5. *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para. 71

6. *Bayford v. Boese*, 2021 ONCA 442 at para 28.

7. *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure)*, 2022 BCCA 440 at para 2.

8. *Ibid* at para 82.

9. *Supra* note 3, s 59(3).

DAVID GIRODAY
604.358.7443
DAVID@CIVICLEGAL.CA

David is an associate lawyer of the firm. His practice is focused on municipal, land development and construction matters. Prior to working at Civic Legal LLP, David worked as a litigator and represented insurance corporations, local governments, construction managers and local and national companies in a variety of legal actions and disputes. David has developed a unique perspective on risk management, negotiation, and strategy from his litigation experience, which he draws on to advise his clients on a variety of legal and regulatory issues. In his solicitors practice David routinely advises clients on local government issues, procurement processes and land use planning and development regulatory matters. He has further drafted construction contracts and municipal service agreements on varied construction projects and contractual matters.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

710 - 900 West Hastings Street, Vancouver, BC V6C 1E5
604.639.3639 | www.civiclegal.ca | @CivicLegal