THOMPSON DORFMAN SWEATMAN

Can What's Reasonable Today be Unreasonable Tomorrow? Teal Cedar Products Ltd. v. British Columbia

Authors: John Stefaniuk, K.C.

published 08/30/2017

Disputes are often resolved through arbitration. Arbitrators often interpret and apply the law in arriving at a decision. What happens when an arbitrator gets it wrong and how wrong does an arbitrator have to be before the losing party can successfully appeal an arbitrator's decision? This issue was considered in *Teal Cedar Products Ltd. v. British Columbia*.

The facts are straightforward. British Columbia reduced Teal's cutting rights pursuant to the *Forestry Revitalization Act* (FRA). As a result, Teal was entitled to compensation. Teal and BC invoked the FRA arbitration process to resolve one outstanding issue, the amount of compensation payable to Teal for improvements (i.e., roads and bridges) it had built on Crown land.

The arbitration was heard by a single arbitrator who was presented with different theories on how to determine the value of the improvements. BC argued that the arbitrator should use an income-based approach, which calculates the value based on discounted future cash flow. Teal presented evidence that supported a valuation based on depreciated replacement cost (i.e., the cost of rebuilding what currently exists, less allowances for wear and tear and obsolescence). The arbitrator agreed with Teal, resulting in an award that was significantly more than BC's valuation; $9,150,000 vs. $4,000,000.

BC claimed that the valuation methodology accepted by the arbitrator was flawed and that the arbitrator had applied the FRA incorrectly. BC appealed the award. The first stop in the appeal process was the British Columbia Supreme Court. BC argued that the provisions of the FRA regarding how compensation was to be arrived at did not support the method adopted by the arbitrator. Teal argued that the correct method had been applied and that the Court should not interfere with the arbitrator's decision. The Court found that the arbitrator was correct in his decision.

BC appealed to the British Columbia Court of Appeal. The Court of Appeal found that the arbitrator erred in selecting a valuation method that was inconsistent with the FRA. The Court

www.tdslaw.com | ©2023 TDS Law. All rights reserved.

found that the award granted to Teal by the arbitrator resulted in overcompensation. It further found that the income method presented by BC was more consistent with the FRA when applied to valuation of the improvements.

Teal appealed this decision to the Supreme Court of Canada. In British Columbia, as in other provinces, arbitration legislation limits the court's intervention in arbitration decisions to questions of law. This prevents courts from getting into the weeds and re-judging the facts of each case.

The majority of the Supreme Court decided that courts are limited to considering the actual application of the FRA, and not whether the arbitrator was correct in his or her decision. The majority held that an arbitrator does not have to be correct in his or her interpretation of the law, as long as the arbitrator has acted within the realm of reasonable alternatives. The majority did not express an opinion in regard to which interpretation of the FRA was correct. Rather, the majority found that the arbitrator's decision was at least a reasonable interpretation of the FRA that ought not be overturned.

The four dissenting justices concluded that the arbitrator had not properly applied the law and that the decision was neither reasonable nor correct. They would have substituted the income method presented by BC because it prevented overcompensation.

This case has implications for parties looking at arbitration. The reasonableness standard offers less in the way of predictability to parties who are evaluating their prospects in resolving a dispute in anticipation of possible arbitration or court proceedings. Arbitration will not always result in a decision that is legally correct, and if challenged, the decision will likely withstand appeal so long as the courts think it is a reasonable one. The Supreme Court sees this as being consistent with the use of arbitration as a summary, cost-effective, alternative dispute resolution process.

Some arbitrations, however, are every bit as complicated and as high-stakes as any court proceeding. The best advice that legal counsel can now provide to a party going to arbitration is that all that can be expected is a decision that is reasonable, not necessarily correct. This makes the selection of qualified arbitrators all the more important. It may give an edge to those with subject matter expertise.

Parties to contracts or arbitration agreements should consider specifying which issues can be appealed to the courts (questions of law, mixed fact and law, questions of fact), where legislation permits. They may also want to at least attempt to specify the applicable standard of review.

The Supreme Court's decision also creates an interesting conundrum. The British Columbia Court of Appeal and four Supreme Court justices were of the opinion that the arbitrator's interpretation of the FRA was incorrect. Does this mean that the approach adopted by the

www.tdslaw.com | ©2023 TDS Law. All rights reserved.

arbitrator in Teal is now wrong and would be considered unreasonable in another, similar arbitration under the FRA; or is it still open to an arbitrator to apply the same method, which was found by the Supreme Court to be "reasonable"? British Columbia can get the answer it wants by just amending the legislation.

John Stefaniuk is a lawyer practising natural resource and environmental law at Thompson Dorfman Sweatman LLP.

Melanie LaBossiere is a second year law student at the University of Manitoba.

DISCLAIMER: *This article is presented for informational purposes only. The content does not constitute legal advice or solicitation and does not create a solicitor client relationship. The views expressed are solely the authors' and should not be attributed to any other party, including Thompson Dorfman Sweatman LLP (TDS), its affiliate companies or its clients. The authors make no guarantees regarding the accuracy or adequacy of the information contained herein or linked to via this article. The authors are not able to provide free legal advice. If you are seeking advice on specific matters, please contact Keith LaBossiere, CEO & Managing Partner at kdl@tdslaw.com, or 204.934.2587. Please be aware that any unsolicited information sent to the author(s) cannot be considered to be solicitor-client privileged.*

While care is taken to ensure the accuracy for the purposes stated, before relying upon these articles, you should seek and be guided by legal advice based on your specific circumstances. We would be pleased to provide you with our assistance on any of the issues raised in these articles.

 | ©2023 TDS Law. All rights reserved.