January 21, 2014

Arbitrators Have the Last Word on Procedural or Interlocutory Matters

Written by: Jonnette Watson Hamilton

Case commented on: *Suncor Energy Inc v Alberta*, 2013 ABQB 728

Suncor Energy Inc v Alberta is a decision by Chief Justice Neil Wittmann on an appeal by the provincial Crown from an arbitration tribunal's order on a procedural point. Suncor Energy Inc. began arbitration proceedings in January 2011 to resolve a dispute over royalties to be paid on the production of mined bitumen to the province. The issue before the Chief Justice was a narrow one, namely, whether the refusal of the arbitrators to refer a question of law to the court, concerning the application of section 50 of the *Mines and Minerals Act*, RSA 2000, c M-17, to the production of records that the Crown received from oil sands producers other than Suncor, was a decision that could be appealed. The Chief Justice decided that the court did not have jurisdiction to hear the Crown's appeal under either section 17(9) or section 44 of Alberta's domestic arbitration statute, the *Arbitration Act*, RSA 2000, c A-3. In doing so he confirmed that the competence-competence principle, which allows an arbitral tribunal to determine its own jurisdiction, underlies sections 17 and 44. While not as explicit on this point as was the recent decision of the Ontario Court of Appeal in *Ontario Medical Association v Willis Canada Inc*, 2013 ONCA 745 at paras 19-37, the Chief Justice's decision gives effect to the statutory grant of authority to the arbitration tribunal to have the last word on procedural or interlocutory matters that arise during the course of arbitration.

The Crown objected to producing records that it argued could not be communicated according to section 50 of the *Mines and Minerals Act*, RSA 2000, c M-17 — financial, production, technical and other records that the Crown received from oil sands producers other than Suncor. The Crown objected even though the arbitration tribunal had adopted portions of the *Alberta Rules of Court*, Alta Reg 124/2010, including Rule 5.33, which provides for the confidentiality and use of information produced under affidavits of record, to govern its procedure. Suncor applied to the arbitrators for an order compelling production of the disputed records. The Crown counter-applied under section 8(2) of the *Arbitration Act*, which provides:

> 8(2) On the application of the arbitral tribunal, or on a party's application with the consent of the other parties or the arbitral tribunal, the court may determine any question of law that arises during the arbitration.

The Crown wanted the court to determine, among other things, whether the arbitrators had jurisdiction to decide the application of section 50 of the *Mines and Minerals Act* to the production of the records in issue.

In June 2013, the arbitrators refused to direct the Crown's questions of law to the Court of Queen's Bench. In their written reasons, the arbitrators stated (among other things):

> [9] Section 17 of the *Arbitration Act* provides that an arbitral tribunal may rule on its own jurisdiction and may determine any questions of law that arise during the arbitration. It is our view that Section 17 and the case of *Jardine Lloyd Thompson Canada Inc. v Western Oil Sands Inc*., 2006 ABCA 18 [a decision about a stay of proceedings]… are ample authority for this Panel to determine if production by the Crown of the relevant and material records in its possession is prohibited by Sections 50 and 51 of the Act.
>
> We find that this panel has the jurisdiction and the duty to decide these issues and to determine if the Crown is prohibited by Section 50 and 51 of the Act from producing the relevant and material documents at issue in these applications …
>
> The Rules of Court which govern this Arbitration have by Rule 5.33 codified the implied undertaking prohibiting misuse of produced documents. This panel in carrying out its duties can, like a court, order the parties before it to limited access to and use of the information that is produced.
>
> (ABQB decision)

It was this decision that the Crown promptly appealed. At the hearing of the matter, the parties agreed to limit the issue at the initial stage to the question of whether the decision of the arbitrators was subject to appeal under the provisions of the *Arbitration Act*. This limited issue was the matter heard by the Chief Justice.

The Crown argued the decision of the arbitrators was subject to appeal under both section 17(9) and section 44 of the *Arbitration Act*. Section 17, setting out the all-important authority of arbitrators to rule on their own jurisdiction and to determine questions of law, provides in part:

> 17(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.
>
> (2) The arbitral tribunal may determine any question of law that arises during the arbitration.
>
> …
>
> (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.

Section 44 provides:

> 44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.
>
> (2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that
>
> > (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
> >
> > (b) determination of the question of law at issue will significantly affect the rights of the parties.
>
> (3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

The Crown argued that there was nothing in their agreement with Suncor or the *Arbitration Act* or the Rules of Court that had been adopted that would give the arbitrators jurisdiction to affect the rights of third party oil sands producers. They contended that because any decision on Suncor's application would necessarily deny these third party oil sands producers their rights to the statutory protections provided by s.50 of the *Mines and Minerals Act*, the arbitration panel has no jurisdiction to make such a ruling. The Crown cited three authorities in support of their arguments, but Chief Justice Wittmann questioned the relevance of all three:

> (1) *MJS Recycling Inc. v Shane Homes Ltd.*, 2011 ABCA 221, where the Alberta Court of Appeal held an arbitrator had exceeded his jurisdiction by affecting the rights of parties who were not before him when he concluded a waste management agreement with a number of builders was at an end in a dispute between the waste management company and one builder. The Chief Justice distinguished this case (at para 19) on the basis that the issue was whether the arbitrator, in his final order, could grant a remedy against non-parties.
>
> (2) *Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands Inc*., 2006 ABQB 933, an arbitration under the *International Commercial Arbitration Act*, RSA 2000, c.I-5, where the court decided whether the arbitrators had jurisdiction to order that certain employees and former employees of a third party be examined for discovery. The Chief Justice distinguished this case because the arbitrators' jurisdiction was governed by a different statute.
>
> (3) *Farah v Sauvageau Holdings Inc*., 2011 ONSC 1819, where the court held an arbitrator did not have jurisdiction to make an "arbitral-Mareva injunction" which required third party financial institutions to freeze the assets of a party to the arbitration. The Chief Justice distinguished this case because it was about the jurisdiction to grant a Mareva injunction, which is an extraordinary remedy based in the inherent jurisdiction of superior courts.

The Chief Justice also distinguished (at para 20) all three cases cited by the Crown on the basis that the award in issue in each of them was one that applied directly to non-parties to the arbitration. The order Suncor sought in this case, on the other hand, would bind only the Crown because it sought the production of documents within the possession of the Crown.

The Chief Justice recognized (at para 20) that the records had been provided to the Crown by third party oil sands producers with the assurance of confidentiality in section 50 of the *Mines and Minerals Act.* However, he found these circumstances were not decisive for three reasons:

> (1) the promise of confidentiality in section 50 of the *Mines and Minerals Act* does not create a privilege over otherwise relevant and material documents;
>
> (2) the arbitration was subject to the implied undertaking of confidentiality and restrictions on the use of information produced in Rule 5.33;
>
> (3) the arbitrators had the same ability that the Court of Queen's Bench has to make an order that was mindful of the confidentiality interests of the third parties oil sands producers.

However, it was not these specific reasons which appear to have been the primary motivation behind the Chief Justice's decision, but rather the fundamental principles behind modern arbitration legislation. This is clear because he makes the following comments:

> [21] This Court has had a number of opportunities in recent years to consider the general scheme of the *Arbitration Act* and its appeal provisions, and has concluded that the Legislature clearly intended to limit judicial intervention: *Ellsworth v Ness Homes Ltd*., 1999 ABQB 287 at para. 13; *Frank v Vogel*, 2012 ABQB 432 at para. 17; *Capital Power Corp v Lehigh Hanson Materials Ltd*., 2013 ABQB 413, at para. 42. In *Inforica Inc. v CGI Information Systems and Management Consultants Inc*., 2009 ONCA 642, Sharpe JA considered the largely identical provisions of Ontario's *Arbitration Act*, SO 1991 [c 17], and held:
>
> > [14] It is clear from the structure and purpose of the Act in general, and from the wording of s. 6 in particular, that judicial intervention in the arbitral process is to be strictly limited to those situations contemplated by the Act. This is in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not the courts…

The Chief Justice found the *Inforica* decision relevant because it also dealt with an interlocutory or procedural order. In *Inforica*, the arbitrator had made an award for security for costs which a Chambers Judge set aside on the basis that the arbitrator had no jurisdiction to make the order because it was not merely a matter of procedure. The Ontario Court of Appeal decided that the Chambers Judge did not have jurisdiction to hear the application to set aside the order for security for costs and, in doing so, considered the Ontario equivalent of both section 17 and section 44 on which the Crown relied.

In deciding whether the Chamber Judge had jurisdiction under the equivalent of Alberta *Arbitration Act*'s section 17, the Ontario Court of Appeal determined:

> [16] To establish the application judge's jurisdiction to entertain Inforica's application under ss. 17(5), (7) or (8) as an application to set aside the arbitrator's ruling "as a preliminary question", Inforica must bring the arbitrator's ruling that he had jurisdiction to entertain the CGI's application for security for costs within s. 17(1). Section 17(1) defines the parameters of s. 17, allowing an arbitrator to rule on his "own jurisdiction to conduct the arbitration". In my opinion, on a fair reading of that language in light of the modern approach that respects the autonomy of the arbitral process and discourages judicial intervention, s. 17(1) is concerned with only the arbitrator's jurisdiction to entertain the subject matter of the dispute. Asking an arbitrator to decide whether he has jurisdiction to order security for costs does not amount to asking him whether he has jurisdiction to conduct the arbitration. The words "jurisdiction to conduct the arbitration" in s. 17(1) connote jurisdiction over the entire substance or subject matter of the case, not jurisdiction to make interlocutory or procedural orders that do not determine the merits of the dispute and that are made along the way to final resolution of the issues.

Chief Justice Wittmann agreed (at para 23) with this interpretation of the scope of the arbitrators' jurisdiction with respect to interlocutory or procedural orders under section 17(1). He agreed that section 17(9), upon which the Crown relied, had to be read in the context of section 17(1):

> It is the preliminary question of the arbitral tribunal's jurisdiction to conduct the arbitration that is subject to review under s.17(9), not the tribunal's determination of procedural issues that arise in the course of the proceedings.

Inforica was also relevant to the Crown's reliance on section 44. Ontario's equivalent provisions differ in material ways from Alberta's, but they share the crucial characteristic of allowing for appeals from an "award", a term that has a very specific meaning in the context of arbitration. The Ontario Court of Appeal held, with respect to the meaning of "award":

> [29] [T]he arbitrator's order for security for costs was not an "award" within the meaning of s. 46(1). … The Act does not define the term "award", but the term has been held to connote the judgment or order of an arbitral tribunal that "disposes of part or all of the dispute between the parties": *Environmental Export International of Canada Inc. v. Success International Inc*., *supra*, at para. 13. J. Kenneth McEwan & Ludmila B. Herbst, *Commercial Arbitration in Canada* (Aurora, Ont.: Canada Law Book, 2008) state at 9:30.10: "Only decisions determining the substantive issues should be termed 'awards'. Matters relating to the conduct of the arbitration are not awards but, rather, are procedural orders and directions".

The Chief Justice also pointed to *Mathieu v JR Stephenson Mfg Ltd*., 2013 MBQB 64, concerning an arbitrator's order for the production of documents. Manitoba's sections 44(1) and 44(2) are identical to Alberta's similarly numbered sections and the court in *Mathieu* held:

> [56]… applying the principles of statutory construction to s. 44 of the Act, absent express provision in the arbitration agreement to the contrary, no appeal lies under ss. 44(1) or 44(2) of the Act from a decision of an arbitrator unless that decision finally determines all or part of the substantive dispute between the parties. Unless that occurs, an arbitrator's decision is not an "award," regardless of what label the arbitrator places on their decision. A procedural or interlocutory order of an arbitrator will typically not amount to an award.

As a result, Chief Justice Wittmann determined (at para 26) that the Court did not have jurisdiction, under either section 17(9) or section 44 of the Alberta *Arbitration Act*, to hear the Crown's appeal. He held that the determination of whether the Crown can be required to produce relevant documents within its possession falls within the scope of the arbitrators' jurisdiction under the agreement between Suncor and the Crown, the *Arbitration Act* and the Rules of Court that were adopted. As a result, the Court does not have jurisdiction to hear the Crown's appeal under section 17(9). As for section 44, the arbitrators' order was not an "award" and therefore not subject to appeal under that provision. In summary, the arbitrators' refusal to direct the Crown's questions of law to the Court of Queen's Bench was not appealable.

The principle of restricted court intervention in arbitration proceedings governed by the domestic arbitration legislation was also recently affirmed by the Alberta Law Reform Institute in its Final Report 103 (2013) on the *Arbitration Act: Stay and Appeal Issues* (at paras 19-25). That Report recommends doing away with the parties' current right to appeal a question of law with leave of the court set out in section 44, leaving the existence of any avenue of appeal to the courts up to the parties and their arbitration agreement (at vi). The Institute summarized the policy arguments for and against appellate access to the courts (at paras 124-132). In favour of the position adopted by ALRI and by the Chief Justice in *Suncor Energy Inc v Alberta* are the arguments that appeals reduce the speed, finality and confidentiality of arbitration proceedings. While the finality of the arbitrators' decision to refuse to refer the Crown's question of law to the court was ultimately upheld in this case, the appeal to the Court of Queen's Bench did add six months to the hearing of the dispute and did give the public a very small glimpse into an oil sands royalty dispute between a producer and the Alberta government. Thus it did reduce the speed and confidentiality in this one instance, while upholding the finality of arbitration proceedings and providing a precedent for future arbitrations that favours speed, finality and confidentiality in arbitration proceedings.

To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**
Follow us on Twitter **@ABlawg**

CC BY NC ND