Alberta Court of Appeal considers the right to appeal stay applications pursuant to the Arbitration Act

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Background

In a recent decision, *Agrium v Orbis Engineering Field Services*, 2022 ABCA 266, the Alberta Court of Appeal (ABCA) considered section 7(6) of the *Alberta Arbitration Act* (the Act) relating to a court's right to hear appeals of an application to stay proceedings in favour of an arbitration. In a split decision, the majority of the ABCA determined that there was no bar to the right to appeal a decision of a Master (now an Application's Judge) to a Justice under section 7 of the Act.

Section 7 of the Act allows the court to stay a proceeding, where a party has commenced an action in court in face of a mandatory arbitration agreement. This issue often arises when a party has not followed the dispute resolution process in its agreement and has proceeded to file an action in court in an attempt to preserve its limitation date. In the circumstances, the opposing party to the arbitration agreement can bring an application under section 7 of the Act to stay the proceedings. Section 7(6) of the Act states that, "there is no appeal from the court's decision under this section."

In *Agrium*, the agreement between the parties contained a mandatory arbitration clause. The appellant had a dispute with the respondents and filed a statement of claim only days before the limitation period for the dispute expired. The appellant did not serve the statement of claim on the respondents until right before its deadline to do so, one year later. The respondents were not aware of the claim until being served. In the circumstances, the time to commence an arbitration had long expired by the time the respondents were served with the statement of claim.

The respondents defended the action and participated in the proceedings before applying to strike the action due to the mandatory arbitration clause. The appellant argued that by failing to move promptly to strike the statement of claim, and by participating in the litigation, the respondents waived their right to arbitration and attorned to the jurisdiction of the court. When the matter was before the Master, the respondents' application was denied and the statement of claim was allowed to continue.

On appeal of the Master's decision, the appellant (who was the respondent in the appeal of the Master's decision) applied to strike the appeal on the basis that section 7(6) of the Act expressly prohibited an appeal of the court's decision. The Justice of the Court of Queen's Bench (now the Court of King's Bench) denied the application to strike the appeal and allowed the appeal, which resulted in a stay of the proceedings. The appellant then appealed that decision to the ABCA where, in a 2-1 split decision, the appeal was dismissed and the stay of proceedings was upheld.

The appeal to the ABCA was not an appeal of the Justice's findings on the merits, rather it was an appeal on the basis that the Justice did not have jurisdiction to consider the appeal from the Master under section 7(6) of the Act. In both the majority and dissenting decisions, the ABCA considered case law regarding principles of statutory interpretation and harmonizing of different statutes in order to consider the potential conflict of legislation being considered in this action. At issue was how the prohibition on appeals in the Act could be read in harmony with both the *Court of Queen's Bench* Act (soon to be the *Court of King's Bench Act*) and the *Alberta Rules of Court* which state that parties may appeal a Master's judgment. The Justice and the majority opinion of the ABCA agreed all three pieces of legislation could be interpreted harmoniously.

The majority in the ABCA also specifically noted that legislation is presumed to be enacted in compliance with the Constitution and that, "Alberta courts have characterized any deference to the decisions of provincially-appointed masters as fettering the discretionary jurisdiction of federally-appointed (by constitutional powers) judges" (para 30). In short, the majority determined section 7(6) of the Act was not a more specific provision which would override the right to appeal a Master to a Justice as conferred by the *Court of Queen's Bench Act* and the *Rules of Court.*

The stated purpose of section 7(6) of the Act is to ensure that the Court's intervention in arbitration matters is limited to ensuring the parties arbitrate as they agreed. However, this particular section will preclude the appeal of a Court of Queen's Bench decision made under section 7 of the Act to the Court of Appeal, but it will not preclude an appeal of a Master's decision to a Justice.

The dissenting decision authored by Justice Wakeling would have allowed the appeal and concluded that the Justice had no jurisdiction to hear the appeal pursuant to section 7(6) of the Act. He was of the opinion the decision by the Master was a decision of the Court of Queen's Bench, made under Section 7 of the Act, and that section 7(6) of the Act "is in play" (para 53).& It was "crystal clear" that section 7(6) deprives a Justice the jurisdiction to hear an appeal from an order pursuant to section 7 of the Act.

Further, the Constitution does not assist the respondents because a party may apply for permission to appeal a decision pursuant to section 7 of the Act to the Supreme Court of Canada under the *Supreme Court Act* and Alberta does not have the constitutional authority to regulate the jurisdiction of the SCC by way of section 7(6). It is also open to a party to apply for judicial review of a section 7 order despite section 7(6).

Justice Wakeling states the Act, and specifically section 7(6), is designed not to give the Courts a prominent role in arbitral disputes and that the section "…plays an important role in ensuring that courts do no more than is necessary to ensure the integrity of an arbitration agreement" (para 115).

Key takeaway

This matter may be considered for appeal to the SCC in the future but for now, the law in Alberta suggests that appeals of Master's decisions regarding section 7 applications for a stay of proceedings are allowed despite the wording of section 7(6). Due to the split opinions of the ABCA, we expect this may not be the last time we hear about interpretation of this provision. For now, this case provides guidance to appeals of stay applications in relation to arbitrations.

BLG's Construction Group is familiar with appeals of arbitral awards and can help navigate the process of appeal. We can also provide front-end assistance with drafting arbitration agreements to clarify the language with respect to appeals of arbitral awards. For more information, please contact us directly and see our related Insight: Alberta Court of Appeal clarifies procedure for appealing an arbitration award.

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