

B.C. COURT RESTRICTS APPEAL FROM ARBITRATOR'S AWARD

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When parties to a dispute elect to use arbitration, typically one of the motivating factors is the desire to obtain a final and binding decision. Recognizing this, the drafters of the *Commercial Arbitration Act* in British Columbia, as with legislation found in most other jurisdictions in Canada, provided for very limited judicial review of an arbitrator's award. The Act provides that only those aspects of an arbitrator's award that raise questions of law can be appealed to a court of law and, even then, only if the court grants leave to appeal or the parties to the arbitration consent to an appeal being heard. Findings of fact made by an arbitrator cannot be challenged.

Of course, this begs the question, "what is a question of law?" That issue was considered by the British Columbia Supreme Court in the case of *Western Forest Products Inc. v. Hayes Forest Services Ltd.* The dispute between the two companies concerned the rate that Western should pay Hayes for harvesting timber. Hayes had been performing this work for Western over a number of years under a series of replaceable contracts but, for 2008, the parties could not agree on the rate.

The timber contract was subject to provincial regulation which provided that, if a rate dispute arose, it would be referred to arbitration. The regulations set out a test to be applied by an arbitrator in determining the fair market rate payable under a contract for the harvesting of timber. The arbitrator could consider, among other factors, the rates agreed to previously by the licence holder and the contractor as well as rates found in any other contract for similar services.

After reviewing the evidence placed before him in this case, the arbitrator determined the fair market rate but Western sought leave to appeal the decision to the British Columbia Supreme Court. Western claimed that the arbitrator committed an error of law in interpreting the market rate test set out in the regulation and that he erred in his use of historical rate information. Hayes took the position that the arbitrator's determination of the rate was a question of fact—or, alternatively, mixed fact and law—but not a pure issue of law: therefore it could not be subject to review by the court.

In B.C. Supreme Court, Mr. Justice Pitfield noted that the regulation set out the kind of evidence the arbitrator could take into account in determining the rate. It permitted, but did not compel, the arbitrator to consider the following factors:

- rates agreed to by the licence holder and the contractor for prior timber harvesting services
- rates agreed to under another contract by the licence holder or the contractor for some of their services
- rates agreed to under another contract by the licence holder, the contractor or another person for each phase of the operation
- rates agreed to by another person for similar services.

The regulations also provide that the arbitrator may take into account “any other similar data or criteria the arbitrator considers relevant”.

The Court concluded that any question regarding the arbitrator’s treatment of, or weight to be given to, the evidence available to him were questions of fact and not law. It was within the arbitrator’s discretion to determine whether any of the information offered to him in evidence could or should be regarded as evidence of the fair market rate and, if so, what weight should be accorded to that evidence. Mr. Justice Pitfield held that the arbitrator should not be second-guessed since the regulations permitted the arbitrator to consider a wide range of evidence in determining fair market rate. In the result, the arbitrator’s award was final and not subject to judicial review.

Often, business disputants have no choice between arbitration and court proceedings since many commercial contracts stipulate that disagreements must be resolved by arbitration. The significance of this decision is that it brings some additional certainty to the question of when, and in what circumstances, an appeal can be taken from an arbitrator’s award. Commercial clients who do not wish to face the prospect of their case winding its way through a lengthy appeal process usually choose arbitration. After all, part of the attraction of arbitration is that it is generally faster and less costly than traditional litigation. Restricting the right of appeal helps achieve those goals.

On the other hand, those parties that prefer the additional safeguards of having appeal rights—and have a choice as to whether to pursue arbitration or not—may still elect to have their case considered in the courts and thereby preserve their rights to have an unfavourable decision reviewed. Questions of law, fact, or mixed fact and law can all be the subject of an appeal from a lower court decision.