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Thomas Heintzman specializes in commercial litigation and is counsel at McCarthy Tétrault in Toronto. His practice focuses on litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of Goldsmith & Heintzman on Building Contracts, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Building Contracts has been cited in 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), 2007 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

Arbitration Appeal Rights: Think About Them Before Signing A Contract

Owners and contractors will normally insert an arbitration clause into their contract. When they do so, they rarely consider their rights of appeal from an arbitral award. The recent decision of the Ontario Court of Appeal in *Kingsway Insurance Company v. Gore Mutual Insurance Company* provides a good opportunity to develop a strategy towards appeal rights before signing a construction contract containing an arbitration clause.

Under the domestic Ontario *Arbitration Act*, an appeal of an arbitration award may be taken in two circumstances. First, if the parties agree, then an appeal may be brought on a matter of law, fact or mixed fact and law. Otherwise, an appeal may be brought on a matter of law with

leave of the Superior Court. In addition, of course, an application may be brought to set aside the award or for a declaration of the invalidity of the award.

In *Kingsway*, the Court of Appeal has held that leave to appeal is required before a further appeal may be taken from the Ontario Superior Court to the Court of Appeal for Ontario. In arriving at this conclusion the Court resolved a statutory conflict. Section 49 of he Ontario *Arbitration Act* states that leave to appeal is required from a decision of the Superior Court relating to an appeal to that Court of an arbitral award, or an application to set aside the award or a declaration of invalidity of the award. However, section 6(1) (b) of the Ontario *Courts of Justice Ac*t states that an appeal lies to the Court of Appeal from a final decision of a judge of the Ontario Superior Court.

The Court of Appeal held that these two provisions are in direct conflict and that the conflict must be resolved in favour of the more specific provision in the *Arbitration Act*, being the Act which specifically governs domestic arbitrations in Ontario.

While *Kingsway* was not a construction law case, this ruling may be of importance to owners and contractors, particularly if they wish to preserve appeal rights relating to the arbitral decision. Under Ontario law, the parties may include in their arbitration agreement a full appeal to the Superior Court on matters of law and fact. If they do so, that is probably because they wish those issues to be dealt with by the Court in the usual way. They may now be surprised to learn that the normal appeal route is not available to them, and that, despite their agreement and despite the normal situation in civil actions, they are only entitled, as of right, to one level of appeal.

The situation created by section 49 of the Ontario Arbitration Act may be contrasted with the Ontario *International Commercial Arbitration Act* ("ICAA"). That Act applies to international arbitrations. Like the ICAAs of virtually all the other provinces, the Ontario ICAA incorporates the New York UNCITRAL treaty provisions which do not countenance an appeal of the arbitral award. Likewise, those provisions contain no provisions relating to an appeal from a decision of the Superior Court setting aside, or refusing to set aside, the award. In these circumstances, the normal provisions of Section 6(1) (b) of the Ontario *Courts of Justice Act* presumably apply, as presumably would the comparable legislation in the other provinces. Indeed, there are instances in which appeal courts in Canada have heard appeals from the provincial superior courts dealing with arbitrations under the ICAA statutes, without leave being granted.

Ironically, therefore, the ICAA statutes may allow for appeals as of right from a reviewing judge's decision in circumstance in which no such appeal as of right exists under the domestic arbitration regime. That would be ironic since ICAA is generally considered to contain an "anti-appeal" regime.

A comparison of domestic arbitration statutes across Canada reveals a somewhat diverse regime with respect to appeals from decisions of reviewing judges. The statutes in **Ontario, Alberta**, **Saskatchewan, Manitoba, New Brunswick** and **Nova Scotia** generally provide a similar regime. They allow for an appeal from the arbitral award to the Superior Court with leave on a

question of law (except in Nova Scotia). They generally allow the parties to provide in the arbitration agreement for appeals without leave on matters of law, fact and mixed fact and law. But they also generally provide that any further appeals from the reviewing or appeal decisions of the Superior Court to the Court of Appeal are only with leave.

British Columbia permits an appeal of the arbitral award to the British Columbia Supreme Court on a question of law either with leave or on consent, but does not deal with further appeals.

Newfoundland and Labrador does not expressly provide for appeals from arbitration awards and establishes no express limit on, and does not address, appeals from orders reviewing and setting aside, or refusing to review and set aside, arbitration awards.

The **Prince Edward Island** statute contains the novel provision, whereby if the parties provide for an appeal in the arbitration agreement, then the parties have the right to appeal directly from an arbitral award to the Appeal Division.

In these circumstances, owners and contractors who are entering into arbitration agreements should carefully consider their rights of appeal. Perhaps, rights of appeal are the very last thing they want. In this case they may wish to specifically state that there are to be no rights of appeal. In some provinces (like Ontario), the parties can, in the arbitration agreement, entirely contract out of their right to an appeal even with leave, while in other provinces (like Manitoba) they cannot.

But the parties may wish to have full rights of appeal, particularly if there are serious issues of law at stake. If so, they may want to stipulate that the arbitral law of a specific jurisdiction is to apply to their contract and select one which is the most appeal-friendly. If this is the case, then Ontario arbitral law may have become less suitable to those parties and more suitable to parties wishing to restrict appeal rights following a hearing before the Superior Court.

See *Goldsmith and Heintzman, Canadian Building Contracts (4th ed), Chapter 10*

Construction Law – Arbitrations – Contract – Appeals – Civil Procedure
Kingsway Insurance Company v. Gore Mutual Insurance Company 2011 ONCA 87

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www.constructionlawcanada.com May 24, 2011