Thomas G. Heintzman, O.C., Q.C.
McCarthy Tétrault
Toronto, Ontario
www.mccarthy.ca

416-362-1812

theintzm@mccarthy.ca

www.constructionlawcanada.com

www.heintzmanadr.com

Thomas Heintzman is counsel at McCarthy Tétrault in Toronto. His practice specializes in 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 *Heintzman & Goldsmith on Canadian Building Contracts,* 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Heintzman & Goldsmith on Canadian Building Contracts has been cited in over 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

How Correct Does An Arbitrator Have To Be?

What margin of error does an arbitrator have? Should an arbitral tribunal's decision be set aside if it is legally incorrect? Or should a wider deference be shown, so that a decision will only be set aside if it is unreasonable, or perverse?

And how detailed does an arbitral decision have to be? Can it be struck down if the reasons are not adequate?

There are older appellate decisions which addressed these issues in the arbitration context. In recent years, however, a seismic shift has occurred in administrative law relating to these issues as a result of decisions of the Supreme Court of Canada. Do the same principles apply to the review of arbitral decisions?

In its 2003 decision in ***Dunsmuir,*** the Supreme Court of Canada collapsed the various standards of review which apply to administrative tribunals into two standards.

Decisions must be correct if they truly relate to the jurisdiction of the tribunal, or relate to general questions of law about which the tribunal has no particular expertise. If they are of that nature, then they will be set aside if they are not correct (the "correctness" standard). All other decisions of administrative tribunals will only be set aside if, in all the circumstances, they are unreasonable (the "reasonableness" standard).

In its 2002 decision in ***Sheppard,*** *t*he Supreme Court held that a court's decision should be set aside for legal error if the reasons are totally inadequate. Without adequate reasons, the person who loses does not know why. Nor does the appeal court have a proper basis to review the original decision without adequate reasons. The "adequacy of reasons" provides a second and related basis for reviewing a decision of an inferior court or tribunal.

In two recent decisions, the Supreme Court applied the ***Dunsmuir*** and **S*heppard*** principles to arbitral tribunals. While both decisions relate to labour arbitrations, there is every reason to expect that the same principles will apply to commercial arbitrations.

In ***Nor-Man Regional Health Authority v. Manitoba Association of Health Care Professionals,*** the Supreme Court upheld an arbitrator's decision in which the arbitrator had applied the principle of estoppel. The arbitrator found that the company had breached the collective agreement. However, he held that the union was estopped from complaining about that breach because it had failed to raise any complaint about the same conduct, and the same interpretation of the collective agreement, by the company over a 20 year period and numerous collective agreements.

The Supreme Court held that the arbitrator's decision should be reviewed on the standard of reasonableness, not correctness, for three reasons:

First, labour arbitration decisions are normally reviewed on the reasonableness standard.

Second, the principle of estoppel is well known to labour law and highly suited to the ongoing relationships between management and its employees.

Third, (and most importantly for general arbitration law), the Supreme Court held that an arbitrator's application of common law principles must not always meet the correctness

standard. An arbitrator's decision applying general principles of law will only be reviewed on that standard if the decision raises legal issues "both of **central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise**." In the present circumstances, the arbitrator's reliance on estoppel did not fall in that category.

In ***Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board),*** the Supreme Court upheld a labour arbitrator's award relating to the calculation of vacation benefits. That decision was attacked on the basis that it was unreasonable due to the paucity of reasoning in the award. The Supreme Court applied the *Dunsmuir/Sheppard* principles and adopted a wide scope of reasonableness, both as to the deference to be shown to the arbitrator and the necessity for detailed reasons. The Court held that:

> The arbitrator's decision should not be scrutinized by the court separately for adequacy of reasons and reasonableness of result. These two ingredients are inter-related. The court's review process "is a more organic exercise – the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes."
>
> The arbitrator's reasons need not include "all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred." Nor need they include "an explicit finding on each constituent element, however subordinate, leading to the final conclusion."
>
> The reviewing court should not seek to subvert the arbitrator's decision but supplement them by logic and reasonable inference.
>
> The issue of adequacy of reasons cannot be boot-strapped into the standard of correctness by being labelled a matter going to procedural fairness and therefore a matter of law: **"Any challenge to the reasoning/results of the decision should therefore be made within the reasonableness analysis.**"

While these decisions relate to awards of labour arbitrators, the principles they adopt are readily applicable to commercial arbitrations. They will be particularly important in protecting a decision of a commercial arbitral tribunal from court review when it is alleged that the decision:

does not deal with all issues raised by the complaining party;
or erroneously decides or applies general principles of law;
or is unfair or outside the bounds of reasonableness.

On all these grounds, the ***Nor-Man*** and the ***Newfoundland and Labrador Nurses Union*** decisions of the Supreme Court will provide powerful support to the party seeking to uphold the award.

Nor-Man Regional Health Authority v. Manitoba Association of Health Care Professionals, 2011 SCC 59;

Newfoundland and Labrador Nurses Union v. Newfoundland and Labrador (Treasury Board) 2011 SCC 62

Arbitration – estoppel – standard of review – adequacy of reasons

Thomas G. Heintzman O.C., Q.C. **January 20, 2012**

www.constructionlawcanada.com
www.heintzmanadr.com