

THE ARBITRATION TRIBUNAL AND EQUITABLE RELIEF:

**An Update from the British Columbia Court of Appeal
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Introduction

Over the past decades, the popularity of alternative dispute resolution (“ADR”) has increased as both litigants and lawyers have become increasingly frustrated with traditional litigation through the court system.

One popular form of ADR is arbitration, the resolution of disputes using a neutral third-party empowered to render binding decisions. Arbitration may offer numerous advantages over the court system, including perceived economy, speed, flexibility, privacy and the selection of a neutral decision maker with subject matter expertise. Since most arbitrations are consensual, parties have greater control over the process as they may set their own procedural rules in their arbitration agreement. This is an important advantage over the present court system, where litigants are bound to the procedural rules of the forum where the litigation takes place.

As arbitration has gained in popularity, legislatures and courts have established legal parameters under which it operates. Due in part to the various policy concerns associated with the private adjudication of rights, these parameters have been, and continue to be, the subject of disagreement. A tension has existed between parties wanting to resolve disputes by arbitration and courts limiting the power of arbitrators to do so. The effect has been that arbitrators and courts have maintained concurrent jurisdiction over some aspects of disputes referred to arbitration. This concurrent jurisdiction has at times forced the parties to commence parallel proceedings; at other times it has created the opportunity for parallel proceedings in an effort to gain a procedural advantage. Inevitably, the existence of parallel proceedings has increased the time, cost and complexity of arbitration, thereby undermining the very benefits parties may have believed they were achieving.

Despite reluctance by some courts to permit arbitrators a wide jurisdiction, recent cases suggest an increasing acknowledgement of the benefits to be derived from arbitration and accompanying deference. In addition to the benefits to be derived by the parties to arbitration, the courts also derive the benefit of a decrease in their docket load. Concomitant with this acknowledgement is an increased willingness to remit matters to arbitration where the parties have agreed to do so. For example, the recent Supreme Court of Canada decision in *Dell Computer Corp. v. Union des consommateurs and Olivier Dumoulin* stressed the deference to be given to an arbitrator in deciding questions of jurisdiction.¹

However, some courts have shown signs of resistance to accepting the powers and scope of arbitrators’ jurisdiction. One area that has recently been explored in British Columbia is the

¹ *Dell Computer Corp. v. Union des consommateurs and Olivier Dumoulin*, 2007 SCC 34.

ability of arbitrators to award equitable relief. This should be distinguished from arbitrators rendering decisions on the basis of equitable and fairness considerations, or *ex aequo et bono*.

If arbitrators are unable to grant equitable relief it becomes necessary to turn to the courts for such remedies as a declaration, injunction or specific performance. This leads to the necessity of parallel proceedings before arbitration tribunal and the courts. Additionally, it is possible that parties may use the need for parallel proceedings to their tactical advantage. In both cases, the benefits of arbitration are undermined.

Numerous jurisdictions, both inside and outside of Canada, permit arbitrators to grant equitable relief. This power, however, is potentially subject to two caveats: first, limitations in the arbitration agreement, and second, restrictions in the applicable arbitration rules. These arbitration rules are either adopted by the parties or prescribed in the applicable legislation.

British Columbia has been slower to cede jurisdiction over equitable remedies to arbitrators. However, that issue was recently decided by the British Columbia Court of Appeal in *Hayes Forest Services Limited v. Teal Cedar Products Ltd* in June of this year.² The remainder of this article examines the evolution of equitable relief in arbitration proceedings both in British Columbia and elsewhere.

Other Jurisdictions in Canada, England and the U.S.

In keeping with the general trend towards increasing the jurisdiction of arbitrators, many Canadian provinces as well as England and the United States give arbitrators the power to grant equitable relief in certain circumstances.

In Ontario, the *Arbitration Act*, which governs domestic commercial arbitrations, expressly provides that an arbitration tribunal may award equitable remedies.³ Express provisions are also contained in the Alberta,⁴ Manitoba,⁵ New Brunswick,⁶ Saskatchewan⁷ and Nova Scotia⁸ statutes. The National Arbitration Rules of the ADR Institute of Canada⁹ and the Arbitration Rules of the ADR Chambers¹⁰ contain similar provisions. The *Commercial Arbitration Code*,¹¹ which governs arbitrations within the federal heads of power, does not specify the form of

² *Hayes Forest Services Limited v. Teal Cedar Products Ltd.*, 2008 BCCA 283 (“Hayes”).

³ *Arbitration Act*, 1991, S.O. 1991, c. 17, s. 31.

⁴ *Arbitration Act*, R.S.A. 2000, c. A-43, s. 31.

⁵ *Arbitration Act*, C.C.S.M. c. A120, s. 31.

⁶ *Arbitration Act*, S.N.B. 1992, c. A-10.1, s. 31.

⁷ *Arbitration Act*, 1992, S.S. 1992, c. A-24.1, s. 32.

⁸ *Commercial Arbitration Act*, S.N.S. 1999, c. 5, s. 34.

⁹ The National Arbitration Rules, “General Powers of Tribunal” (d).

¹⁰ Arbitration Rules, s. 8(1)(k).

¹¹ R.S.C. 1985, c. 17 (2nd Supp.)

remedies available to arbitrators. However, the emerging view is that arbitrators governed by the Code may award some forms of equitable relief.¹²

The arbitrator's power to grant equitable relief is also recognized in other common law countries. In England, the *Arbitration Act, 1996* contains an express provision allowing for several enumerated equitable remedies, including specific performance, declarations, injunctive relief and the rectification, setting aside or cancellation of a document.¹³ In addition to clarifying the jurisdiction of arbitrators, this section expands upon the predecessor legislation granting wider equitable powers to arbitrators.¹⁴ The English Act also provides that parties are free to agree what remedies arbitrators may fashion, including relief not available in court.¹⁵

*Wealands v. CLC Contractors Ltd.*¹⁶ is an example of the expanded jurisdiction given to arbitrators under the *Arbitration Act, 1996*. The Court of Appeal (Civil Division) considered the jurisdiction of an arbitrator to order contribution under s. 1 of the *Civil Liability (Contribution) Act 1978*. The defendant argued that only a court was competent to order contribution. Although not expressly provided for under the *Arbitration Act, 1996*, Mance L.J. for the majority, held that the arbitrator could order contribution. In his reasons, Mance L.J. adopted the court's previous decision in *Chandris v. Isbrandtsen-Moller Co. Inc.*¹⁷ stating that tribunals have the implied power to exercise "every right and discretionary remedy given to a Court of law".¹⁸ Although this may be an overstatement of the current law, it provides a forceful demonstration of the wide powers of, and deference shown to, arbitrators in England. A more moderate view was espoused in the reasons of Tuckey J., who opined that it was not necessary to decide the question of whether an arbitrator has the same power to grant remedies as a court. However, Tuckey J. also noted that previous jurisprudence "indicates that an arbitrator *may* have such power" (emphasis added).¹⁹ *Wealands* was applied more recently in *X Ltd. v. Y. Ltd.*²⁰

In the United States, the case law suggests that arbitrators will often have the power to award equitable relief, including relief not open to a court to provide.²¹ One example is the Supreme Court of California decision in *Advanced Micro Devices (AMD) v. Intel Corp.*²² The arbitrator

¹² Department of Justice Canada, "Annotation of the Commercial Arbitration Code", available online at <http://www.justice.gc.ca/eng/pi/dprs-sprd/ref/law-loi/cac/ch6.html>

¹³ *Arbitration Act*, 1996, c. 23, s. 48(2)-(5).

¹⁴ Mustill & Boyd (2nd ed., 2001 companion), *Commercial Arbitration*, p. 330.

¹⁵ *Arbitration Act*, 1996, c. 23, s. 48(1). See also Sutton, Gill & Gearing (2007), *Russell on Arbitration*, 23rd ed., para 6-097.

¹⁶ *Wealands v. CLC Contractors Ltd.*, [1999] 2 Lloyd's Rep. 739 ("Wealands").

¹⁷ *Chandris v. Isbrandtsen-Moller Co. Inc.*, (1950) 84 L1 L Rep 347; [1951] 1 KB 240.

¹⁸ *Wealands*, supra, para. 21.

¹⁹ *Wealands*, supra, p.7 (Q.L.).

²⁰ *X Ltd. v. Y. Ltd.*, [2005] EWHC 769 (TCC).

²¹ For example, see the decision of the New York Supreme Court in *Rochester Teachers Assn.* (1977) 41 N.Y. 2d 578, [394 N.Y.S. 2d 179, 362 N.E. 2d 977, 981].

²² *Advanced Micro Devices (AMD) v. Intel Corp.*, 885 P. 2d 994 (Cal. 1994) ("AMD").

awarded one of the parties in an intellectual property dispute a permanent, royalty-free licence over certain intellectual property as well as a two-year extension of certain patent and copyright licenses. This remedy was not specifically authorized by law or in the arbitration agreement. The court of first instance upheld this award although the court of appeal reversed it. However, on appeal the Supreme Court agreed with the arbitrator and trial judge and held that the arbitration clause was broad enough to provide the arbitrator with jurisdiction to provide the remedy given. The Supreme Court stated that arbitrators “enjoy the authority to fashion relief they consider just and fair under the circumstances existing at the time of the arbitration, so long as the remedy may be rationally derived from the contract and the breach”, and do not restrict the available remedies in the arbitration agreement.²³ The court also stated that arbitrators are not bound to provide the same type of relief that a court would have if the claim had been litigated.

The decision in *AMD* indicates a deferential approach to arbitration exceeding that which exists in Canada or England. Central to this deference is the notion that arbitrations are to be decided *ex aequo et bono* unless the parties agree otherwise. The fact that arbitral decisions made *ex aequo et bono* are restricted in Canada and England likely accounts, at least in part, for the more limited remedies available to arbitrators.

British Columbia Statutory Framework

Until recently, the ability of an arbitrator to grant equitable relief in British Columbia was a subject of confusion. Much of this confusion was generated by the ambiguous statutory framework governing arbitrations in British Columbia.

Domestic commercial arbitrations in British Columbia are governed by the *Commercial Arbitration Act*²⁴ (the “CAA”). The CAA provides that the Rules of Procedure for Domestic Commercial Arbitration of the British Columbia International Commercial Arbitration Centre (the “BCICAC Rules”) apply unless the parties agree otherwise.²⁵ Rule 29(1)(k) of the BCICAC Rules allows an arbitration tribunal to award equitable remedies, including specific performance, rectification and injunctions. However, the applicability of BCICAC Rule 29(1)(k) has been called into question based on s. 23 CAA:

An arbitrator must adjudicate the matter before the arbitrator by reference to law unless the parties, as a term of an agreement referred to in section 35, agree that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.

²³ *Advanced Micro Devices*, p. 21 (Q.L.).

²⁴ *Commercial Arbitration Act*,²⁴ R.S.B.C. 1996, c. 55

²⁵ CAA, s. 22(1)

Some B.C. decisions have read this section as a prohibition precluding arbitrators from granting equitable relief.²⁶

Previous Jurisprudence in British Columbia

In *DiMitri v. Plumtree*,²⁷ an arbitrator determined the amount of damages claimed by a contractor in a construction dispute on a *quantum meruit* basis. On appeal, it was argued that this exceeded the scope of the arbitrator's jurisdiction. The British Columbia Court of Appeal accepted this argument, holding that s. 23 CAA required the arbitrator to decide the dispute by reference to law rather than on equitable grounds.

This decision was followed by the Court of Appeal in *Randhawa v. Pepsi Bottling Group (Canada) Co.*²⁸ An arbitrator refused to order an employee reinstated, holding that he had no jurisdiction to do so under the CAA. The employee appealed to the British Columbia Supreme Court, and then the Court of Appeal. Both courts held that the arbitrator had not erred in finding he did not have the power to award equitable relief and held that s. 23 CAA precluded the equitable remedy of reinstatement.

DiMitri and *Randhawa* were followed by the lower courts more recently in *Wireless 2000*²⁹ and *Lafarge Canada Inc. v. Western Explosives Ltd.*³⁰ These decisions appeared to entrench the view that equitable remedies may not be awarded by arbitrators.

In *Wireless 2000* the appellant challenged an arbitral award rectifying an agreement made between the parties and ordering specific performance. The appellant argued that s. 23 CAA prohibited an arbitrator from granting equitable remedies. Relying on *DiMitri* and *Randhawa*, the court agreed. However, unlike those decisions, the court also noted that s. 22(1) CAA incorporates the Rules into domestic commercial arbitrations unless the parties agree otherwise. The court held that applying the Rules to allow equitable relief would conflict with s. 23 CAA. Further, the court noted that s. 22(3) resolved the conflict in favour of the CAA. In the result, the court held that the arbitrator lacked jurisdiction to order rectification or specific performance.

In *Lafarge*, the claimant applied to court for an order appointing an arbitrator pursuant to an arbitration agreement and a declaration that the arbitrator had the power to award equitable relief. Although the court appointed an arbitrator it declined to make the declaration requested holding that it would be premature to do so. However, in *obiter*, the court relied on *DiMitri*,

²⁶ For example see: *Randhawa v. Pepsi Bottling Group (Canada) Co.*, 2006 BCCA 273 (CanLII) ("*Randhawa*"); *Wireless 2000 RF&UWB Technologies Ltd. V. AMS Homecare Inc.*²⁶ 2007 BCSC 1919 (CanLII) ("*Wireless 2000*").

²⁷ *DiMitri v. Plumtree* (B.C.C.A.), [1989] B.C.J. No. 1933 (Q.L.).

²⁸ *Randhawa*, supra.

²⁹ *Wireless 2000*, supra.

³⁰ *Lafarge Canada Inc. v. Western Explosives Ltd.*, 2008 BCSC 659 (CanLII) ("*Lafarge*").

Randhawa and *Wireless 2000* for the proposition that s. 23 CAA prohibits an arbitrator from awarding equitable relief.

The Decision in *Hayes Forest Services Limited v. Teal Cedar Products Ltd.*

DiMitri, *Randhawa*, *Wireless 2000* and *Lafarge* appeared to establish a clear line of authorities: s. 23 CAA prevented arbitrators from awarding equitable relief. The most recent decision of the Court of Appeal in *Hayes Forest Services Limited v. Teal Cedar Products Ltd.*³¹ overrules this line of cases and affirms the power of BC arbitrators to grant equitable relief. This decision also confirms the trend towards greater deference to arbitrators.

Hayes involved a logging dispute between a logging contractor and a tree farm licence holder. The dispute was governed by the *Timber Harvesting Contract and Subcontract Regulation*, which contained a mandatory arbitration provision. Despite this provision, *Hayes* argued that the dispute was not arbitrable in part because the arbitrator appointed under the Regulation did not have the power to grant the declaratory or injunctive relief sought as a result of the application of the CAA as interpreted by *DiMitri* and *Randhawa*.

The court rejected this argument and held that the CAA was not a bar to an arbitrator awarding equitable remedies. Finch, C.J.B.C., for the Court, stated that to hold that s. 23 CAA excluded equitable remedies would render Rule 29(1)(k) of the BCICAC Rules meaningless. Instead, s. 23 CAA was an attempt to address the substantive rules that arbitrators must apply to a dispute, rather than the types of remedies they may order. Finch C.J.B.C. noted that the malady that s. 23 CAA was attempting to heal was the inclusion of “equity clauses” in arbitration agreements, which expressly exempt the arbitrator from having to apply the law and instead allow the arbitrator to decide a dispute on equitable grounds, or *ex aequo et bono*. Section 23 CAA ensures that this may only be done by agreement between the parties after the arbitration has been commenced.

The court also distinguished *DiMitri* as an arbitral decision in which the arbitrator had made his determination on a *quantum meruit* basis rather than by reference to law. This use of equity to decide a case was a direct contravention of s. 23 CAA. Yet, contrary to the decisions reached in *Wireless 2000* and *Lafarge*, the court clarified that *DiMitri* does not stand for the proposition that equitable remedies are excluded. The court also noted that the decision in *Randhawa* was made *per incuriam* and without reference to the relevant authorities.

Conclusion

In essence, the viability and scope of arbitration, including the remedies that may be awarded, depend on the boundaries established in the arbitration agreement between the parties. Since arbitration is premised on party autonomy and freedom of contract, courts in many common law

³¹ *Hayes*, supra.

jurisdictions have increasingly recognized that parties are free to delineate the boundaries for any arbitration between them.

This continued recognition of party autonomy is important to preserving the flexibility and efficiency of arbitration that originally led to its inception. The willingness of courts in multiple jurisdictions to give effect to party autonomy and freedom of contract nevertheless gives rise to several concerns.

Throughout the jurisprudence dealing with arbitral jurisdiction, there is a tension between the right of parties to define the powers of their arbitrator and the reluctance of the courts to give arbitrators the full panoply of powers and remedies available to a court. Increasingly, legislatures are making this decision for the courts. The arbitration statutes in force in various Canadian provinces, England, the U.S. and elsewhere make it clear that arbitrators do have the power to award some types of equitable relief. Even in the face of this clear wording, however, the courts have at times attempted to limit the powers of arbitrators and to carve off a larger piece of concurrent jurisdiction for the courts. This approach was evident in the British Columbia decisions of *Randhawa* and *Wireless 2000*. With the continued guidance of appellate courts, including the Supreme Court of Canada in such cases as *Dell*, lower courts are increasingly allowing arbitrators to exercise the powers bestowed on them by the legislatures. *Hayes* is the latest example of this from the British Columbia Court of Appeal. The decision in *Hayes* also moves British Columbia in line with the dominant view in other common law jurisdictions regarding the powers of an arbitrator.

It is unlikely that the tension that currently exists between the arbitral and court systems will reach equilibrium anytime soon. The common law is constantly adapting to meet the needs of the society it serves. However, it is clear, based on the current dissatisfaction that litigants have with the system, that in addressing the needs of these individuals, the best way for the court to do so may be to step aside.