IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mackay v. British Columbia*,
2011 BCSC 270

Date: 20110215
Docket: 10-1265
Registry: Victoria

IN THE MATTER OF THE COMMERCIAL ARBITRATION ACT,
R.S.B.C. 1996, c. 55

- and -

IN THE MATTER OF AN ARBITRATION RELATING TO WENDI JANE MACKAY

Between:

Wendi Jane Mackay

Petitioner

And:

Her Majesty The Queen in the Right of the
Province of British Columbia

Respondent

Before: The Honourable Madam Justice Fitzpatrick

Oral Reasons for Judgment

Counsel for the Petitioner:	B. Wallace, Q.C.
Counsel for the Respondent:	J. Eades
Place and Date of Hearing:	Victoria, B.C. February 14, 2011
Place and Date of Judgment:	Victoria, B.C. February 15, 2011

[1] **THE COURT:** In this proceeding, the petitioner, Wendi Mackay, seeks leave to appeal an arbitration award dated January 13, 2010, pursuant to s. 31 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55.

[2] The issues that have been raised relate to certain actions taken by the Archaeology Branch of the Ministry of Tourism, Sports and the Arts under the *Heritage Conservation Act*, R.S.B.C. 1996, c. 187, in relation to certain property owned by Ms. Mackay in Victoria, British Columbia. The Branch administers the scheme governed by that Act which has, as its purpose, the encouragement and facilitation of heritage properties in British Columbia.

[3] I will turn first to the background. The facts are largely not in controversy. Ms. Mackay and her late husband purchased the property at 2072 Esplanade Avenue, Victoria, B.C., in 2006, with the intention of constructing a single family home there for their principal residence.

[4] Unbeknownst to Ms. Mackay and her husband, the property had been earlier identified as having some archaeological significance as early as 1971, when many artifacts were removed by a Mr. Kenny, who later became the manager of the permitting and assessment section of the Branch. Later archaeological work was done on the site in 1985, when the original house was built on the site. Neither Ms. Mackay nor her husband were aware of any heritage value associated with the site before purchasing it. Nothing was registered on title to indicate that fact, nor that it was a "heritage site" as defined by the Act.

[5] The difficulties arose when Ms. Mackay began preparatory work to construct their new house. Their architect made inquiries of the Branch, and quickly discovered that the provisions of the Act were hurdles to overcome in that endeavour. The legislative scheme under the Act is sufficiently complex. I do not propose to set out the provisions in detail, but will summarize the various matters addressed under the Act below as they relate to this matter:

(a) A site is a “heritage site” if it has “heritage value”. “Heritage objects” are personal property having heritage value. Both may be designated as such or not (s. 1).

(b) The Lieutenant Governor may designate land as a heritage site under s. 9, and if that causes a reduction in the market value of the property, the government must compensate the owner (s. 11). Further, it is in this event only that the Minister is required to file a notice in the Land Title Office (s. 32).

(c) There is a Provincial heritage register which includes designated heritage sites under s. 9, and also other heritage sites which are, in the opinion of the Minister, protected under s. 13 (s. 3).

(d) No one may damage, excavate, dig in or alter any heritage object from a site that has historical or archaeological value (s. 13), unless that person has a permit under s. 12 or 14. It is clear that this applies to both designated and undesignated heritage sites.

(e) Site alteration permits are issued under s. 12. These permits may be issued by the Minister or his authorized representative. This permit may include requirements, specifications, and conditions as the Minister considers appropriate.

(f) Heritage inspection and heritage investigation permits are issued under s. 14 to professional archaeologists. Both heritage inspection and heritage investigation are defined in s. 1, but essentially respectively provide for examination and research to identify heritage value, and also to provide for a study of the property. These permits are expressly for "archaeological research or searching for artifacts" and are ordered by the Minister or his delegate under s. 14(4). If such a permit is ordered, and in certain circumstances, such as there is to be a change in the use or development of the land, the Minister, but not an authorized representative, may require the

person who is developing the land to pay for such inspection or investigation under s. 14(7).

[6] After the inquiries were made by Ms. Mackay's architect, Ms. Mackay learned that the site was an undesignated heritage site, and thus protected under s. 13. In these circumstances, a site alteration permit under s. 12 was required before any excavation work could begin. What happened in this case is that the Branch required, as a condition of the issuance of a site alteration permit, that Ms. Mackay retain an archaeologist to obtain s. 14(2) heritage inspection and heritage investigation permits, so that they could undertake extensive work on the property in accordance with the Act, before any redevelopment of the property could proceed. This work was required to be done at the cost of Ms. Mackay.

[7] What ensued were the various efforts of Ms. Mackay and her professional advisors to obtain the necessary permits and complete the work. It appears that throughout the matter, Ms. Mackay questioned the authority of the Branch to impose what were s. 14 permit requirements in the context of granting a s. 12 permit to her. The end result from Ms. Mackay's point of view was that, as a result of the requirements of the Branch, she was delayed in the construction of her house from March 2007 to January 2008. In addition, she contends that she has suffered losses in the range of $500,000 to $600,000, being either direct costs associated with the s. 14 permits or indirect costs associated by the delay and increased cost of construction in her attempts to avoid or minimize the impact of the Act.

[8] Ms. Mackay brought a claim against the Branch for recovery of these amounts and losses she had suffered, contending that the Branch had wrongfully applied the permitting scheme under the Act. The essence of her claim is twofold:

(a) that the Branch did not have the statutory authority to require her to obtain and pay for s. 14 permits and the associated inspection and investigation work as a condition of issuing the s. 12 permit; and

(b) the Branch's requirements constituted a nuisance, since they interfered with her use and enjoyment of the property.

[9] The parties ultimately decided to have the matter decided by John W. Horn, Q.C., in an arbitration proceeding. The arbitrator's award was issued on January 13, 2010, with the result that after giving extensive reasons, he dismissed the claim on the basis that Ms. Mackay had failed to prove any liability on the part of the Crown.

[10] On the two arguments relevant to this appeal, the arbitrator held that while there was no express provision in s. 12 allowing the Branch to impose the s. 14 requirements, such could essentially be implied given the scheme of the Act: see paragraphs 101 to 106 of the award.

[11] Further, the arbitrator held that the actions of the Branch did not constitute a nuisance and, if they did, the Branch had established a valid defence, since it acted pursuant to its statutory authority: see paragraphs 133 to 140.

Principles for Leave Application

[12] The requirements to establish a right to appeal under s. 31 of the *Commercial Arbitration Act* are not in dispute on this application. One must start from the proposition that leave to appeal is not to be lightly granted, principally in recognition that the parties have chosen a forum that is intended to provide an efficient, effective, and final means of resolving the dispute without intervention from the courts. In fact, s. 14 provides that an award of the arbitrator is final and binding on all parties to the award.

[13] Firstly, there must be a question of law, as opposed to a question of fact or mixed law and fact: see *British Columbia v. Canadian Cartographics Ltd.*, [2007] B.C.J. No.1339 at para. 22, and *Specialist Physicians and Surgeons of British Columbia v. General Practitioners of British Columbia*, 2007 BCSC 423 at paragraphs 23 to 25.

[14] Secondly, assuming that there is a question of law, the applicant must establish one of the prerequisites under s. 31(2). In this case, Ms. Mackay relies on s. 31(2)(a) and (c), namely that the result was important to her and that a determination on the point of law may prevent a miscarriage of justice and that the point of law is of general or public importance.

[15] Thirdly, even if the prerequisites are met, the court retains a discretion whether or not to grant the appeal. In accordance with the decision in *BCIT (Student Association) v. BCIT*, 2000 BCCA 496 at paragraphs 25 to 31, the merit or apparent merit is to be considered as part of this residual discretion. The applicant is also required to establish more than an arguable point or, to put it another way, that there is "sufficient substance to warrant an appeal".

[16] Finally, I have been directed to certain authorities by the Crown which indicate that if there is a question of law, it must be clearly perceived and delineated: see *Elk Valley Coal Partnership v. Westshore Terminals Ltd.*, 2008 BCCA 154 at paragraph 17. To similar effect is the admonition from the Court of Appeal in *Hayes Forest Services Limited. v. Weyerhaeuser Company Limited*, 2008 BCCA 31 at paragraph 45, that the appeal is not a broad inquiry and the appellant must identify the question of law concerning which the arbitrator is alleged to have erred.

Is there a Question of Law?

[17] In the amended petition, Ms. Mackay framed two questions of law in a particular fashion, but during the argument of her counsel, there was a reframing of one of the questions regarding the nuisance issue, and the order was reversed, such that the statutory authority question followed from the nuisance question. The nuisance issue was originally framed as an error in finding that the actions of the Branch were not a nuisance, because they did not interfere with Ms. Mackay's property itself, but rather from her use and enjoyment of the property.

[18] This reversal of the order in which the questions were to be addressed was in part necessary since it was conceded by counsel for Ms. Mackay that there was no

standalone argument that the Branch was liable in tort for having allegedly exceeded its statutory authority: see *Holland v. Saskatchewan*, [2008] 2 S.C.R. 551 at paragraph 9, and *Canada (Attorney General) v. TeleZone*, [2010] S.C.J. No. 62 at paragraphs 28 to 31.

[19] In fact, the arbitrator found that the Branch had acted honestly and in good faith, in that they were of the view that they were acting in accordance with the Act. Ms. Mackay did, however, contend that the arbitrator erred in finding that the statutory authority allowed the Branch to defend the nuisance claim.

[20] The two questions of law, the first as amended, were thus framed by Ms. Mackay as follows:

> (a) Did the arbitrator err in law in failing to apply the correct test necessary to establish nuisance, as articulated in paragraph 133 of his reasons, in concluding in paragraph 137 of his reasons that the actions of the Branch could not be said to have caused physical injury to the land or interfered with Ms. Mackay's enjoyment of the property? and
>
> (b) If nuisance is established, did the arbitrator err in law in finding that the Branch had the statutory authority to require Ms. Mackay, in the manner it did, to engage at her expense archaeologists to conduct a heritage inspection and a heritage investigation on her property and to obtain permits under s. 14 of the Act for those purposes, as preconditions to granting her a site alteration permit under s. 12 of the Act?

[21] The focus of the arguments centred on the issue as to whether the above questions were questions of law, questions of fact, or questions of mixed fact and law. In that regard, counsel for the Crown relies on *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at paragraph 35 where the Court discussed the distinction between questions of law, questions of mixed law and fact and questions of fact. In particular, the Court stated that questions of law are questions about what the correct legal test is.

[22] I will firstly deal with the nuisance issue. It is common ground that the arbitrator correctly articulated at paragraph 133 the test for nuisance set out in *Royal Anne Hotel Co. Ltd. v. Ashcroft Village* (1979), 95 D.L.R. (3d) 756 (BCCA), in that there must be an act that directly or indirectly causes physical injury to land or substantially interferes with use or enjoyment of land.

[23] The difficulty or potential difficulty arises in the reasons following the statement, where there is a discussion about the tort being to the land and not the person. In paragraph 137 of the reasons, the arbitrator specifically finds that:

> The injury or interference complained of here can only be the actions of the Branch in requiring the Claimant to authorize and to finance an archaeological inspection and investigation upon her land. *These actions [of the Branch] cannot be said to have caused physical injury to the land or interfered with its enjoyment.* [emphasis added]

[24] Further, in paragraph 139, he finds that since a s. 14 permit:

> . . . does not authorize entry onto the land . . . without the permission of the owner . . . it cannot be said that the activities of the archaeologists were imposed upon the land by the Branch.

[25] Counsel for Ms. Mackay contends that it is difficult to reconcile these later findings with the articulated test in paragraph 133, and in particular he says that the arbitrator failed to apply the "indirect" aspect of the *Royal Anne Hotel* test in his application of the facts of the law. In essence, he says that after correctly stating the test, the arbitrator applied some incorrect test to the facts.

[26] Counsel for the Crown contends that the arbitrator did not identify in his reasoning whether he considered both direct and indirect actions of the Branch as potential causes of the injury or interference, and that I must assume that he correctly applied the test since he made no distinction in his conclusions. Further, the Crown says that the findings in paragraphs 137 to 140 of the award constitute a finding of fact which cannot be the subject of an appeal, citing *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at paragraph 53, which clearly states that:

> Whether or not a particular activity constitutes a public nuisance is a question of fact.

[27] I must confess that there is some difficulty in my mind on this issue. It is confounded further by the alternate finding of the arbitrator at paragraph 138, that if there was a nuisance, the injury or interference by reason of the permit was justified, based on his finding that there was statutory authority. Counsel for Ms. Mackay says that this could only have been an indirect cause of the interference. The reasoning of the arbitrator is perhaps not as clearly articulated as it could have been on this issue.

[28] Nevertheless, I feel that I am bound to follow and apply the reasoning set out in *Southam*, in terms of what, in these circumstances, constitute questions of law. In this case, the arbitrator articulated the correct test for nuisance in his award. That is the question of law and the parties are agreed on that point. I can only presume that in coming to his conclusions, which are findings of fact or mixed law and fact, he applied the articulated test. He did not state any different approach. As was stated at paragraph 21 of *Specialist Physicians*, any error of the question of law must arise from the face of the award itself.

[29] In this case, I agree with counsel for the Crown that it is not possible to discern that after having articulated the correct test, the arbitrator failed to apply it, based on the theory that he forgot about the indirect aspect of that test when referring to "these actions" in paragraph 137.

[30] In substance, this amounts to an attack on the conclusions of the arbitrator about whether the actions of the Branch constituted a nuisance, which again are not within the purview of an appeal since they are findings of fact. In addition, it is clear that this finding is not dependent on the statutory authority issue: see paragraph 117 of the award.

[31] Accordingly, I find that with respect to the first issue relating to nuisance, there is no question of law raised in the arbitrator's award that meets the requirement in s. 31(1) of the *Commercial Arbitration Act*.

[32] Based on the submissions of counsel, it is apparent that the second alleged error is only relevant in the event that there is an established nuisance, since the statutory authority issue would have stood as a defence by the Branch to a finding of nuisance. Given my decision, it is therefore unnecessary to address the second issue as it is moot.

Other Issues

[33] I would say, however, that if a question of law had been raised in respect of the nuisance issue that was the proper subject of an appeal, I would have had no hesitation in concluding that the statutory authority issue did raise a question of law. I agree with Ms. Mackay's counsel that while the issue may be framed in the context of the facts of this case, the issue is one of statutory interpretation of the *Heritage Conservation Act* that is not necessarily tied to those facts.

[34] Further, I am of the view that Ms. Mackay also met the prerequisites in s. 31(2)(a) of the *Commercial Arbitration Act*, in that the result was certainly of significance in the circumstances, given the financial consequences to her of the Branch's decisions. Further, a different decision on the point of law would have led to a different result.

[35] Similarly, I would have concluded that the point of law was of general or public importance under s. 31(2)(c) of the Act, since the issue concerns whether public decisions of this kind, which are made for the common good, are appropriate to negatively affect a landowner's rights of use and enjoyment of his or her land. The interpretation and application of the *Heritage Conservation Act* certainly affects not only Ms. Mackay, but the rights of other landowners in this province who may similarly own lands having heritage value.

[36] Finally, but for the question of law issue, I would have found that the appeal had sufficient substance to warrant an appeal. As stated by counsel for Ms. Mackay, the issues in this appeal would have addressed the intersection and conflict of two very different but important concepts: firstly, protecting the interests of

the public by statutory authority by ensuring the research and preservation of items of heritage value; and secondly, protecting the interest of a private landowner in having the right to control and enjoy her own property as she wishes, without interference from the state and without the state requiring that the landowner fund activities on the land in what can only be described as a public interest endeavour.

[37] I must say that I have great sympathy for the position in which Ms. Mackay finds herself. She and her late husband bought this property without any knowledge of its history and the potential impact of the *Heritage Conservation Act* on the property and her rights to develop a home on the property. As stated in the amended petition, she simply wished to build a home and was met not only with having to satisfy the usual development requirements, but also extensive, lengthy, and expensive requirements under this Act too.

[38] Nevertheless, the parties chose to resolve this dispute by arbitration and, having done so, they expressly agreed to limit any rights of appeal from that decision. Accordingly, the petition is dismissed with costs.

"Fitzpatrick J."