Goodmans LLP Update

Litigation

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Parties Successfully Rebut Presumption of Privacy Under the *Arbitration Act*

In a recent arbitration, the Honourable Robert P. Armstrong, QC, experienced arbitrator and former justice of the Court of Appeal for Ontario (the "**Arbitrator**"), held that proceedings under the *Arbitration Act, 1991* (the "**Act**") can be open to the public when they involve a "legitimate public interest." In *Association of Municipalities of Ontario and the City of Toronto v. Stewardship Ontario*, the Arbitrator exercised his discretionary power and ordered that the arbitration be conducted in an open hearing. The case involved the funding of an important environmental protection program involving taxpayer money. While the Arbitrator reaffirmed the presumption of privacy in proceedings under the Act, his order demonstrates that this presumption is rebuttable when certain conditions are met.

Background

Stewardship Ontario is a non-profit organization incorporated under the *Waste Diversion Act, 2002* and designated by the Ontario Minister of the Environment to fund two waste diversion programs, including blue box recycling. It is financed by large and small businesses in industries that own or import the products and packaging materials managed under the programs.

The City of Toronto and the Association of Municipalities of Ontario (AMO), a voluntary association of over 200 Ontario municipalities, operate blue box recycling programs. Funding of these programs by Stewardship Ontario is negotiated between the parties on an annual basis. When a dispute arose regarding funding for 2014, the matter was referred by statute to an arbitration process governed by the Act.

AMO and the City of Toronto sought an order that the arbitration hearing be open to the public. They advanced two grounds to support their position:

i) The proceedings were more akin to a statutory hearing than a private arbitration and, as such, section 2(b) of the *Canadian Charter of Rights and Freedoms* (the "**Charter**") required the hearing to be open to the public; and

ii) An arbitrator has the discretionary power to open the proceedings to the public and it was appropriate to do so in this case.

Decision

The Arbitrator ordered that the hearing be open to the public. Absent explicit agreement by the parties to the contrary, an arbitrator has the discretion to order an open hearing when the matter involves a "legitimate public interest," notwithstanding the underlying presumption that arbitration conducted under the Act will be private.

The presumption of privacy is based on: (i) the limited role given to the courts within the Act, (ii) the function of arbitration as a private alternative to public court hearings, and (iii) foreign jurisprudence and institutional rules.

In exercising his discretion to order an open hearing, the Arbitrator considered these factors:

i) The nature of the dispute;

ii) The impact of the public and media on the proceedings;

iii) Any negative effect on the parties to the proceedings; and

iv) Whether there was a legitimate public interest to be served in ordering a public hearing.

The Arbitrator was satisfied that the dispute was of significant public interest, as it concerned an important environmental protection program involving a substantial

amount of taxpayer money. He determined that an open hearing would not negatively impact the parties or the proceedings and was satisfied that any confidentiality concerns could be addressed as they arose.

The Arbitrator rejected the Charter argument advanced by AMO and the City of Toronto. He held that the proceeding was not akin to a public hearing and that section 2(b) of the Charter did not apply to the circumstances of the dispute, notwithstanding that some of the entities involved served quasi-governmental functions.

Key Point for Canadian Companies

This decision affirms the underlying presumption that proceedings under the Act are private and confidential, but also demonstrates that privacy is not absolute. Arbitrators may exercise their discretionary power to open an arbitration to the public in situations where there is a "legitimate public interest" in the subject matter of the dispute.

Companies operating in the public sector should understand that, absent explicit agreement to the contrary, arbitration proceedings may be ordered open to the public in certain circumstances.

For further information on the Act or the *Stewardship Ontario* decision, please contact any member of our Litigation Law Group.