CITATION: 1852998 ONTARIO LIMITED v. HCC No. 227, 2021 ONSC 21
COURT FILE NO.: CV-20-74111
DATE: 2021-01-04

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1852998 ONTARIO LIMITED and 11877658 Canada Inc. o/a CANNACO THE CANNABIS COMPANY (Appellant)

- and –

HALTON CONDOMINIUM CORPORATION ("HCC") NO. 227 (Respondent)

BEFORE: A. J. Goodman J.

COUNSEL: S. Pulver and J. Bartlett, for the Appellants

E. Savas, for the Respondent

HEARD: December 31, 2020 (Videoconference)

E N D O R S E M E N T

1. This is a motion for leave to appeal an arbitration award.

2. The appellants, 1852998 Ontario Limited, and 11877658 Canada Inc. operating as Cannaco the Cannabis Company ("Cannaco") is a corporation duly incorporated under the laws of the Province of Ontario. Cannaco is a legal business engaged in the sale of cannabis products, as approved by the Alcohol and Gaming Commission ("AGCO").

3. The respondent, Halton Condominium Corporation No. 227 ("HCC 27") is a condominium corporation located in the Town of Milton, in the Province of Ontario, at an address municipally known as 547 & 555 Main Street East. Cannaco owns units 16, 17, 18, and 19.

4. Cannaco brings this motion under s. 45 of the *Arbitration Act*, 1991, S.O. 1991, c. 17 (the "Act") seeking leave to appeal an Award dated December 18, 2020 and an Amended Award dated December 23, 2020. The appellant also request a stay of their obligations under these awards pursuant to the *Rules of Civil Procedure, R.R.O. Reg. 194.*

5. This matter was heard as an urgent motion due to the imminent date of January 5, 2021, for the appellant to wind-down its business at HCC 27.

6. For the following reasons, the motion for leave to appeal is dismissed.

Background:

7. The facts leading up to the litigation have been outlined in the respective facta provided by the parties. I need not repeat them here in detail.

8. Briefly, the appellants proposed the appointment of Mr. Blair to arbitrate the issues. HCC 227 readily agreed. It is not disputed that Mr. Blair was selected for the arbitration due to his legal knowledge, reputation and extensive experience in dealing with condominium disputes while a jurist of the Court of Appeal for Ontario.

9. Mr. Blair conducted a two-day hearing. Mr. Blair received a substantial amount of evidence, extensive pleadings and numerous pages of pre-hearing and post-hearing written submissions. No issue is taken with the fairness or the process of the hearing.

10. On December 18, 2020, Mr. Blair rendered a decision on the arbitration setting out the material facts and the relevant legal principles. Mr. Blair made an award granting, *inter alia*: A declaration that the Cannabis Rule is valid and validly enacted by the Corporation, and that it became enforceable and effective on June 17, 2020. A declaration that the appellant is in breach of the Cannabis Rule and s. 119(1) of the *Act*. A declaration that the appellant is in breach of s. 3.01(b) of the Corporation's Declaration. An order that Cannaco immediately and permanently discontinue the retail sale of cannabis products and any other cannabis-related operations from HCC 227's premises, and an order dismissing the appellant's counterclaim.

Positions of the Parties:

11. The appellants submit that the grounds of appeal in the Award and Amended Award include the following errors of law. Mr. Blair erred in finding that the Cannabis Rule is not inconsistent with s. 3.01(a) of the Corporation's Declaration, and that Mr. Blair erred in finding that a sufficient number of the votes cast at the Requisition Meeting were not in favour of setting aside the Cannabis Rule, resulting in the Cannabis Rule becoming effective on June 17, 2020.

12. The appellants submit that Mr. Blair states in his reasons that if the objections to inconsistency between the Cannabis Rule and the Declaration "were to be well-founded, they would be dispositive of the issues in the Arbitration" (at para. 67). In other words, had Mr. Blair properly applied the law to this issue, the Cannabis Rule would have been set aside, and the appellants would have succeeded in the arbitration.

13. The appellants say that the issue of whether or not the Cannabis Rule was or was not consistent with the Corporation's Declaration was a question of law which required interpretation of the relevant sections of the *Condominium Act*. Had Mr. Blair found that the Cannabis Rule was inconsistent with the Declaration, the rule would have been found to invalid at law and the appellants could not have been found to be in breach.

14. The appellants' position is that the Award and the Amended Award are of significant importance. The Award and the Amended Award purport to permanently close down a legal cannabis business, which employs 14 employees. There is no comparable case law which has ever ordered this form of relief. As such, the importance of this appeal cannot be overstated both for the appellants and other condominium owners who could be impacted by this decision. The determination of the questions of law at issue will significantly affect the rights of the parties.

15. The appellants submit that it was an error of law for Mr. Blair to find that the proxies submitted by Mr. Wiebe, on behalf of HCC 227, were valid. There were clearly numerous errors and non-conformance with its proper application, the form itself and governing regulations on each of the nine proxies submitted by Mr. Wiebe. The appellants say that the arbitrator seemed to gloss over these and other issues. The appellants argue that these errors in law were decisive to the outcome of the Arbitration.

16. The respondent submits that this court should dismiss this motion for leave because the errors advanced by the appellants in connection with the proposed appeal are not pure errors of law. Furthermore, and even if the errors advanced are characterized as errors of law, the outcome would be the same as the findings were reasonable. The respondent says that this Court should dismiss the request for a stay.

Have the Appellants Satisfied the Test for Leave to Appeal:

17. The Terms of Appointment executed in connection with the arbitration are silent as to any appeal rights of the arbitration award. Accordingly, the statutory rights provided under the *Act* apply.

18. Section 45(1) of the *Act* provides as follows:

> If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.

19. Under the *Act*, the parties may expressly or by implication, vary or exclude certain provisions of the statute. However, in this case, it is common ground that the Arbitration Agreement between the parties is silent as to an appeal from the award. While leave to appeal a question of law may be considered, leave to appeal a question of mixed fact and law may not be sought unless the arbitration agreement so provides: s.45(3). In this case, because the Arbitration Agreement is silent as to an appeal from the award, the parties agree that the appellants are ineligible to seek leave to appeal a question of mixed fact and law. Accordingly, s. 45 of the *Act* applies.

20. The applicable section permits either party to seek leave to appeal any question of law. However, to obtain leave, the court must be satisfied: (a) the importance to the parties of the matters at stake justifies an appeal and (b) the determination of the question of law at issue will significantly affect the rights of the parties.

21. In this regard, it is not enough for the moving parties to advance pure errors of law they wish to pursue by way an appeal. They must also show the proposed issues on appeal are fundamentally important to both sides.

22. There appears to be no firmly established legal principle concerning whether a determination by a court or arbitration tribunal of the consistency between a rule and a declaration in a condominium is either a question of law or a question of mixed fact and law.

23. The Supreme Court of Canada has cautioned that in the context of arbitrations where only questions of law may be appealed, the Court should be vigilant in determining the existence of any “extricable questions of law”: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 45.

24. The fundamental issue in this case is the characterization of the alleged errors committed by the learned arbitrator in order to satisfy the leave to appeal requirements. To address the question, I am guided by the discussion in the cases of *Toronto Standard Condominium Corp. No. 2256 v. Paluszki,* [2018] O.J. No. 1969, and the sage principles outlined by Perell J. in *Toronto Standard Condo Corp. No. 2256 v. Paulszkiewicz,* 2018 ONSC 2329, at paras. 57-74.

25. As mentioned, the appellants advance two errors that they characterize as errors of law. The first is the finding that the Cannabis Rule is not inconsistent with s. 3.01(a) of HCC 227's Declaration. The appellants argued that the Cannabis Rule was not valid under s. 58 of the *Act* because it was not consistent with the corporation's declaration.

26. Under the *Act*, a rule enacted by a condominium must be consistent with the declaration. In this case, the Corporation's declaration at paragraph 3.01(a) states: "Each unit shall be occupied and used for industrial purposes only as permitted by the relevant zoning by laws of the Town of Milton." The appellants argued before Mr. Blair that the Cannabis Rule, which prohibited the sale of cannabis from the units, was inconsistent with this provision in the declaration and therefore, unenforceable.

27. Mr. Blair concluded otherwise and determined that the Cannabis Rule was not inconsistent with section 3.01(a) of the corporation's declaration. He considered the arguments and stated *inter alia*, that:

> During the course of the Hearing, the Respondents amended their Counterclaim to allege that the Cannabis Rule is invalid because it is inconsistent with s. 3.01(a) of the Corporation's Declaration and because it fails to comply with s. 58 of the Act. If these objections were to be well-founded, they would be dispositive of the issues in the Arbitration. I conclude, however, that they are not.
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> Section 3.01(a) of the Corporations' Declaration states:
>
> > Each unit shall be occupied and used for industrial purposes only as permitted by the relevant zoning by-laws of the Town of Milton.
>
> This issue has two aspects. The first is raised by the strict wording of s. 3.01(a) itself.
>
> Mr. Pulver points out – quite accurately – that the Declaration provides that each Unit is to be "occupied and used for industrial purposes only". There is no reference to "commercial" use. In his submission, as I

understand it, any attempt to regulate the use of the Units for commercial purposes must start in the Corporation's documents with the Declaration. Because the Declaration is silent about commercial use, the Corporation cannot simply pass a rule to exclude any such uses; it must amend the Declaration to accomplish that purpose.

I am somewhat puzzled by this argument. It is true that the Declaration specifies use for industrial purposes only. But it is no secret, and is not disputed, that most, if not all the Corporation's Units – including Ms. Sen's for the past 8 or 9 years – are and have been used for purposes of small commercial businesses. Certainly, a cannabis retail store is not an industrial use. If this argument were to be given effect, what would be the need for the Arbitration? Ms. Sen's use of the Units for that purposes would not be permitted at all by the Declaration.

The Corporation is not advancing the position that the Declaration is to be interpreted as excluding Cannaco's business altogether on the basis that it is not an industrial use. It says the Declaration has historically been interpreted to permit the use of the Units for small commercial retail business purposes. In my view, it is only on this premise that the Arbitration makes any sense.

If the Respondents' argument is that I am to treat the Declaration as permitting retail commercial uses for practical operational purposes, but, that in determining whether the Cannabis Rule is consistent with section 3.01(a), I must assume that the Declaration only permits industrial uses and therefore a rule cannot deal with what is not expressly set out in the Declaration, I decline to go down that illogical path.

In any event, and in spite of the foregoing, I do not think the Cannabis Rule is inconsistent with section 3.01(a) of the Declaration. If the Units are to be occupied and used for industrial purposes only, how can a rule that provides they cannot be used for non-industrial purposes (whether a retail cannabis outlet or something else) be inconsistent with the Declaration's requirement? Such a rule might be unnecessary or superfluous, but it is not inconsistent with the Declaration.

I do not find this first aspect of the s. 3.01(a) debate of assistance in determining the issues to be resolved in the Arbitration. The only basis upon which it makes any sense to have to resolve the numerous and complex issues that are raised on the Arbitration is if the Declaration is read – in the **factual context of this condominium complex and its day-to-day use** – to permit commercial use, and I proceed on that basis. **(emphasis added**).

28. The appellants also argued that since a declaration may contain conditions or restrictions concerning the use of the units, while rules may be made respecting the use of units, the Corporation was not eligible to prohibit use of units for the sale of cannabis without an amendment to the declaration. Mr. Blair rejected this argument. I have reviewed his decision, and in particular paras. 73 – 89, with his references to the relevant sections of the *Act*. In summary, Mr. Blair determined that:

> The second aspect of the s. 3.01(a) issue is more nuanced and overlaps with the considerations relating to the argument that the Cannabis Rule contravenes s. 58(1)(a) of the Act. It evolves around the difference between prohibiting a use and limiting the manner in which the use may be enjoyed. The former requires an amendment to the declaration, the Respondents submit...
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> Here, the Cannabis Rule prohibits the use of the condominium units, amongst other things, for the purposes of a retail cannabis outlet, as opposed to simply limiting the parameters of how that use may be enjoyed. The respondents argue that as long as the use in question is a lawful commercial use, such a prohibition may not be enacted in the form of a rule alone. I disagree.
> Again, there are two aspects to the discussion. The first is the submission that a corporation may not by a rule prohibit a type of use that is part of a category of permitted uses in the declaration; it must amend the declaration to do so. In other words, as I understand it, the Cannabis Rule cannot be enacted through a rule because it prohibits the otherwise lawful commercial use of a unit as opposed to merely restricting the manner of use in ways that promote the safety, security and welfare of the owners and the property; such a change must be enacted through an amendment to the Declaration…
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> The second aspect is the submission that, here, the Rule was enacted for the purposes of prohibiting or shutting down Ms. Sen's cannabis business rather for purposes of promoting the health, security and safety concerns of the owners as a whole and there is no evidence supporting the latter...

29. I observe that Mr. Blair referred to some of the authorities in his analysis including, but not limited to, *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan* (2001), 2001 CarswellOnt 2495 (S.C.J.), at para. 36. He also referenced *Perrault v. Toronto Standard Condominium Corp. No. 2298* [2020] O.J. No. 2414 (S.C.J.).

30. In addressing the issues, Mr. Blair concluded:

> Here, I find nothing inconsistent between the Cannabis Rule and any sources preceding it in the hierarchy. The Act permits a declaration to contain conditions or restrictions with respect to the occupation and use of the units and common elements. The Corporation's Declaration states that the units are to be occupied and used for [commercial]/industrial purposes. No argument is made that the Rule is inconsistent with anything in the Corporation's by-laws. Section 58 of the Act permits the board to make rules "respecting the use" of the units and common elements to promote the safety, security and welfare of the owners and the property and to prevent unreasonable interference with the use and enjoyment of the units or common elements...
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> > As Molloy J. observed further in Zeidan, at para. 39:
> >
> > > The fact that a rule cannot be inconsistent with the declaration does not mean that it cannot impose use restrictions that go beyond what is provided in the declaration, as long as those restrictions are consistent with what is in the declaration. Here, the declaration requires that units be used as residential dwelling units. [The rule in question] does not prevent the use of units as residential dwelling units; nor does it permit a use that is other than residential. All it does is narrow the range of residential uses that will be permitted. Further, it is not sufficiently restrictive as to completely negate or fundamentally alter the right of owners to lease their units to tenants generally. [my emphasis]
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> The same may be said for the Cannabis Rule in the commercial use context. All it does is "narrow the range of [commercial] uses that will be permitted". As Mr. Savas put it, the Cannabis Rule, together with the rule enacted by the Corporation in 2016, merely limits the field or scope of potential commercial/industrial uses of the Units; owners and occupants are permitted to use their units for any such use that complies with government and municipal regulations except as a cannabis dispensary, food bank, place of worship, banquet facility, bar, restaurant, or school.

31. I find that Mr. Blair made findings of fact concerning the uses of the units generally and the historical interpretation of the declaration by the corporation's board. His conclusion concerning the interpretation of the terms and uses permitted and consistency between s. 3.01(d) of the Declaration and the Cannabis Rule was made in the context of these specific factual findings.

32. Therefore, despite the very able arguments of appellants' counsel, I agree with HCC 227 that Mr. Blair's conclusion on these first set of issues involved his application of various facts to the law.

33. In sum, I am not persuaded that this ground of appeal is a pure question of law. It is a question of mixed fact and law. As such, I am compelled under s. 45 of the *Act* to deny leave on this basis.

34. As mentioned, the appellants advance another alleged error made by Mr. Blair. The second of which is the finding that a sufficient number of the votes cast at the Requisition Meeting were not in favour of setting aside the Cannabis Rule, resulting in it becoming effective on June 17, 2020.

35. In the arbitration, the appellants argued that the notice sent to the owners calling the June 17, 2020 owners' meeting to consider the Cannabis Rule informed owners that any proxy delivered to the Corporation by an owner would be used to vote in favor of the Cannabis Rule. The appellants claimed that this did not allow any owner who could not attend the meeting and opposed the Cannabis Rule to give his or her proxy to HCC 227; the Corporation's President acted unlawfully in collecting nine proxies in favor of the Cannabis Rule; and these nine proxies were completed incorrectly, rendering them illegible in the vote count; and (d) the meeting did not comply with the *Act* because the owners misunderstood the purpose of the meeting and the implications of their vote.

36. As I dialogued with counsel during the course of submissions, it appeared that this alleged error involved determinations of fact by the arbitrator. Upon a more fulsome consideration of the issue, I am convinced that this is, indeed, the case.

37. Mr. Blair carefully considered all of these related and relevant issues and made several critical findings of fact. Moreover, those findings of fact were open to him based on the record, including that there was nothing precluding Ms. Sen, on behalf of Cannaco from seeking and collecting proxies - in fact she did so - and HCC 227's president simply asked owners to attend the meeting in person or provide him their proxy to vote in favor of the Cannabis Rule. Mr. Blair determined that everyone knew where he stood on the Cannabis Rule and that the nine proxies HCC 227's president collected were completed properly and effective to count in favor of the Cannabis Rule. Based on the evidence, he determined that the owners understood the sole purpose of the meeting was to vote for or against the Cannabis Rule. There was no evidence was led to the contrary by the Moving Parties. In this regard, Mr. Blair concluded that there was nothing in the *Act* that required how the vote is to be framed.

38. One of these findings of fact was that at the June 17, 2020 Requisition Meeting, 17 units voted in favor of the Cannabis Rule while 10 units voted against the Cannabis Rule. Even if I have mischaracterized the nature of this issue or particular alleged error, at its highest, Mr. Blair's application of this part of the award is a question of mixed fact and law.

39. In summary, Mr. Blair produced a 50-plus page award that considered all the intricate questions put to him by the parties. He made many findings of fact that did not favor the appellants. He concluded the Cannabis Rule was valid and enforceable, applying the correct legal principles and within the unique factual circumstances of this condominium.

40. I find that this is not one of those exceptional or rare cases where this Court must intervene to right an apparent injustice. In fact, I ought to exercise great caution given that this was the result of a private arbitration, decided by a highly qualified arbitrator. As stated, the appellants are prohibited by the *Act* from seeking leave to appeal questions of fact or of mixed fact and law.

41. As an aside, I also query whether the appellants are able to satisfy s. 45(1)(b) of the *Act*. Even if one or more of the alleged errors could be characterized as pure errors of law, a court hearing an appeal would apply a reasonableness standard of review with deference to the learned arbitrator. At the end of this exercise, I hazard to opine that that the same determination would likely ensue. While the case of *London Condominium Corporation No. 13 v. Awaraji*, 2007 ONCA 154 is factually distinguishable, the Court of Appeal held at para. 6:

> We disagree. In our view, by enacting the rule that it did, it is clear that the Condominium Corporation interpreted its Declaration and By-laws as permitting a common television system encompassing both cable and satellite components. Moreover, we consider that it is for the Condominium Corporation to interpret its Declaration and By-laws and that so long as its interpretation is not unreasonable, the court should not interfere.

Application for a Stay:

42. The appellants request a stay to allow their legal business to continue operating pending the hearing of the appeal. Cannaco has a sizeable, perishable product that has constraints as to its sale or distribution.

43. Rule 40.01 of the *Rules of Civil Procedure* provides that "An interlocutory injunction or mandatory order under s. 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding". The appellants rely on the three-part test set out by the Supreme Court of Canada in *RJR Macdonald Inc. v Canada (Attorney General)* [1994] S.C.J. No. 17.

44. I observe that since leave to appeal is required, there is no automatic stay. However, for the purposes of this motion, I need not undertake an extensive review of the authorities or address the merits of whether the appellants have satisfied their onus for such a stay. It may be that the appellants would have met the requisite test under the *RJR Macdonald* principles. That being said, as leave to appeal is being denied, any applicable interlocutory injunctive relief is somewhat moot.

45. Be that as it may, this court can grant remedies under its equitable jurisdiction. Notwithstanding the respondent's valid assertions and Mr. Blair's commentary regarding the appellants' undaunted conduct in opening and continuing the cannabis business in light of the ongoing dispute and pending litigation at the relevant time; I am persuaded by the appellant to exercise my discretion in this case.

46. Indeed, given the sellable nature of Cannaco's product line along with the ongoing COVID-19 pandemic, I am persuaded on the equities that the appellants may suffer some dire financial consequences if they are to cease operations tomorrow, with no mechanism or conduit to deal with their perishable inventory. On balance, I am not persuaded that HCC 227 and its owners may suffer a greater harm if a stay of the Award is granted in favour of Cannaco for a limited duration.

Disposition:

47. The appellants' overall submissions on the merits for this leave to appeal motion are interesting, cogent, and somewhat novel.

48. However, while the appellants advance persuasive arguments to frame the Award under an error of law principle, based on my review and with the relevant jurisprudence, none of the two errors alleged amount to questions of law. I find that the issues implicated in this application are either of pure fact or, at its highest, questions of mixed fact and law. In my opinion, the appellant has not met the test pursuant to s. 45 of the *Act*. As such, I am constrained in granting the relief sought.

49. The appellants' motion for leave to appeal the Award rendered by the Honourable Mr. Blair is dismissed.

50. Notwithstanding, in the exercise of my equitable prerogative, I will extend the Amended Award of the Honourable Mr. Blair from the current date of January 5, 2021 to March 15, 2021. This will permit Cannaco to sell, dispose or otherwise deplete their cannabis products or other inventory and to allow for an orderly wind-down of the business at HCC 227. Such extension of time will be made on terms to be furnished by HCC 227 in consultation with Cannaco and shall be incorporated in the Order.

51. If the parties cannot agree on the issue of costs, I will consider brief written submissions. These cost memoranda shall not exceed three pages in length, (not including any bill of costs or offers to settle). HCC 227 shall file its costs submissions within 15 days of the date of this endorsement. Cannaco may file its costs submissions within 15 days of the receipt of the respondent's materials. HCC 227 may file a brief reply within 10 days thereafter.

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Justice A. J. Goodman

Date: January 4, 2021