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Appealing the Remedy Granted by an Arbitration Award

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Cases Considered:

Fuhr Estate v. Husky Oil Marketing Company, 2010 ABQB 495

This decision by Mr. Justice Don J. Manderscheid answers a novel question: whether section 49(7) of the *Arbitration Act*, R.S.A. 2000, c. A-43 allows an applicant to appeal the remedy awarded by an arbitrator without raising a question of law or seeking leave to appeal under section 44? Section 49(7) provides, in part, that "[i]f the award gives a remedy that the court . . . would not grant in a proceeding based on similar circumstances, the court may . . . grant a different remedy requested by the applicant. . .". In *Fuhr Estate v. Husky Oil Marketing Company*, the applicant, Mrs. Fuhr, did not want the damages awarded her; she wanted specific performance. She argued she could by-pass the appeal provisions of the *Arbitration Act* and rely on section 49(7) alone for the remedy she wanted. It seems that section 49(7) has not previously been subjected to judicial scrutiny, even though an identical provision appears in the domestic arbitration legislation of Manitoba, New Brunswick, Ontario and Saskatchewan. Neither does the section appear to have been considered in the literature; the standard texts usually merely repeat what section 49(7) states. While the decision is also noteworthy because Justice Manderscheid adopts a rather unorthodox interpretation of section 44, this comment will focus on the section 49(7) issues.

Facts

The claimant/applicant, Sylvia Fuhr, Executrix of the Will of George Fuhr, sought leave to appeal an award by an arbitrator under sections 44, 45(1)(c) and 49(7) of the *Arbitration Act*. The arbitrator held that the respondent, Husky Oil Marketing Company, breached an agreement between itself and Mr. Fuhr to remediate the property it had leased from Mr. Fuhr when it terminated the lease, but the arbitrator awarded damages and not the specific performance remedy Mrs. Fuhr had sought. In the Court of Queen's Bench, Mrs. Fuhr argued that the arbitrator erred in two ways:

1. By failing to order specific performance, which in these circumstances was the best remedy;
2. By awarding damages for the appraised value of the building when this was not a matter covered by the arbitration agreement or was beyond the scope of the arbitration agreement.

Mr. Fehr had owned the property located at the corner of Highway 16A and Junction 29, just west of Stony Plain, since 1957. (One can read about this property and its predecessors in "The Beach Corner Story" by George H. Fuhr, part of the History of the Village of Spring Lake.) In

or about 1960, the Fuhrs had a former church approximately 1,154 square feet in size and originally built in or around 1911 moved to and installed on the property. It is that wood frame building that was at the heart of the dispute. The property, operated for many years as a gas station, was contaminated as a result of gasoline leakage, presumably from underground gas tanks. After terminating its lease and its operation of the gas station at the end of 2005, Husky remediated all the property except for the soil in the area immediately beneath the 1911 building. Mrs. Fuhr insisted that the building be retained, while Husky refused to incur the significantly increased costs of remediating under the building, arguing that it would be more reasonable to tear the building down and then remediate.

Why was retaining this 100-year-old building so important to Mrs. Fuhr? Apparently the property had been zoned Highway Commercial and the use of the property as a gas station had been a conforming use. Then the zoning was changed to Country Residential in about 2000 and the use of the property as a gas station became a legal but non-conforming use. Mrs. Fuhr argued that under the *Municipal Government Act*, R.S.A. 2000, c. M-26 — presumably section 643(6) — if the 100-year-old building was destroyed, then the building could not be replaced and the operation of the gas station could not be reestablished (Appendix A, Applicant's Reply, paras. 3–7).

The lease between Mr. Fuhr and Husky (a successor in 1998 to Mohawk Oil Company Limited, the original lessee in 1985) provided, *inter alia:*

- "The Lessee will keep at all times during and will yield up at the termination of the Term, the Leased Premises in good and tenantable repair. . .". (6.2)
- "Any dispute arising between the Lessor and the Lessee shall, if not settled within thirty (30) days of such dispute arising by agreement of the parties, be determined by a single arbitrator, pursuant to the Arbitration Act of Alberta. (15.1)
- "The decision of the arbitrator upon the matters in dispute shall be final and binding upon the Lessor and the Lessee . . .". (15.2(c)).

When the dispute arose between the parties concerning the remediation of the contaminated lands beneath the building after Husky terminated the lease, the parties therefore appointed Ms. Phyllis A. Smith, Q.C. as the single arbitrator of their dispute.

Issues

The issues, as set out by Justice Manderscheid (at para 5) were:

> A. Does s. 49(7) provide a route whereby a party may appeal a remedy without seeking leave to appeal under s. 44? If so, should the Court grant a different remedy?
> B. Leave to appeal
> 1. Do the matters in dispute raise a question of law?
> i. Issues raised in Submissions
> ii. Issues raised in Originating Notice
> iii. Other issues
> 2. If so, do the matters at stake justify an appeal?
> i. That is, are they of sufficient importance to the parties and does determination of the questions significantly affect the rights of the parties?
> 3. Were these questions expressly referred to the Arbitrator?
> C. Did the Arbitrator make an error of law?

1. Specific Performance?
2. Mitigation?

D. Does the award deal with a matter in dispute that the arbitration agreement does not cover or is beyond the scope of the agreement?

The only issue I will deal with at any length in this comment is the first one. I pay some attention to the second issue, the test for leave to appeal, because Justice Manderscheid's handling of this question is not in line with the preponderance of case law. I will only briefly summarize the court's handling of the other issues.

Law

Three sections of the *Arbitration Act* are relevant to this case: sections 44, 45 and 49.

The parties' arbitration agreement did not provide for an appeal. The default provisions in the *Arbitration Act* therefore applied. Section 44(2) provides that leave to appeal is required and appeals are only available for questions of law:

> (2) If the arbitration agreement does not provide that the parties may appeal an award to the court on a question 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.
>
> (3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

As the quoted provision makes clear, a court's discretion to grant leave to appeal is constrained and a court may only grant leave if the matters at stake justify an appeal and the determination of the question of law significantly affects the parties' rights (s. 44(2)(a) and (b)) and the appeal is not on a question of law expressly referred to the arbitrator (s. 44(3)).

Setting aside arbitration awards is different than appealing them. Section 45(1)(c) of the Act provides that a Court may set aside an arbitral award if, among other things, it deals with a matter not covered in the arbitration agreement or deals with a matter in dispute beyond the scope of the agreement. Mrs. Fuhr raised this provision as her second ground of appeal and the court discussed it as the fourth issue.

Section 49 of the Act provides for the enforcement of awards. Section 49(7) — the key provision for the first issue in this case — provides:

> (7) If the award gives a remedy that the court does not have jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may

> (a) grant a different remedy requested by the applicant, or
>
> (b) in the case of an award made in Alberta, remit it to the arbitral tribunal with the court's opinion, in which case the arbitral tribunal may award a different remedy.

What does section 49(7) mean? That was the first issue considered by Justice Manderscheid.

Issue A: Does s. 49(7) provide a route whereby a party may appeal a remedy without seeking leave to appeal under s. 44?

Arguments

Mrs. Fuhr argued that section 49(7) applied to allow her to ask the Court to grant a different remedy than the one granted by the arbitrator. If section 49(7) applied because the court did not have jurisdiction to grant, or would not grant in a proceeding based on similar facts, the remedy the arbitrator granted, then no question of law needed to be raised, no leave of the Court was required, and her application was not an appeal. She submitted that the portion of section 49(7) that states that the Court "would not grant in a proceeding under similar circumstances" vests in the Court a broad jurisdiction to consider what the most appropriate remedy would be on the facts.

Husky made a conventional legal argument in response to the applicant's novel interpretation, noting that in attempting to appeal the award pursuant to section 49(7), Mrs. Fuhr was attempting to use the section as a complete and alternative means to appeal, vary, or set aside an award. Such an approach is inconsistent with the *Arbitration Act*, they argued. Section 49 is entitled "Enforcement of Award" and its purpose is to permit a party to enforce an award, not appeal it or apply to set it aside. Husky submitted that section 49(7) must be read in the entire context and intention of the *Arbitration Act*

Decision

Justice Manderscheid noted (at paras. 34 and 35) that there are only two Canadian decisions that even mention the equivalent of Alberta's section 49(7). Only one of those decisions had anything to say about the issue before Justice Manderscheid. In *National Ballet of Canada v. Glasco* (2000), 49 O.R. (3d) 230 (ONSupCtJus) the court dismissed the utility of the Ontario equivalent of section 49(7), stating it was not "helpful in determining the scope of the court's supervisory jurisdiction under the more specific provisions found in [the equivalent of Alberta's sections 44 and 45]".

Justice Manderscheid therefore went back to the basics, relying on fundamental principles of statutory interpretation (at paras 36-38):

- A statutory provision must be interpreted within the overall context of the statute to determine the legislature's intention: *Quebec (Revenue) v. Caisse populaire Desjardins de Montmagny*, 2009 SCC 49 at para. 19.
- The words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Ludco Enterprises Ltd. v. Canada*, 2001 SCC 62, [2001] 2 S.C.R. 1082 at para.36.

- It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole: *A.D. v. Alberta (Child, Youth and Family Enhancement Act, Director),* 2010 ABCA 83 at para. 22, relying upon Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002) at 168.
- A legislature does not intend absurd consequences, such as consequences that are incompatible with the object of a statute: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at 43.
- Headings may be used as an aid to statutory interpretation: *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357 at 376-77; *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106 at 119-20; *R. v. Lohnes*, [1992] 1 S.C.R. 167 at 179; *R. v. Davis*, [1999] 3 S.C.R. 759 at paras. 51-53.

Justice Manderscheid noted (at para 39) that the *Arbitration Act* sets out a complete scheme under the heading of **"**Remedies**",** and that each section under the heading of "Remedies" has its own heading. In his view, those headings indicated that section 49(7) was not intended to be a provision under which a person could appeal the remedy granted by the arbitrator. Mrs. Fuhr's argument that seeking a different remedy under the enforcement provision was not an appeal was not a tenable argument and neither was Mrs. Fuhr's submission that she was not asking the Court to substitute its decision for the arbitrator's:

> The Arbitrator awarded one remedy and Mrs. Fuhr is seeking another remedy, one which the Arbitrator expressly chose not to award. That is an appeal. The heading of s. 49 is "Enforcement"; if the Court orders a remedy that is fundamentally different than that of the Arbitrator, it is not enforcing it, it is substituting its award for the Arbitrator's. (para. 42)

After looking at section 49 in its entirety, Justice Manderscheid held (at para. 44) that section section 49(7) "must relate to granting an order that is consistent with both the intent of the arbitral award and with the Court's jurisdiction. The entire tenor of the section is devoted to give effect to the award, and in fact, ss. 49(3) and (4) are mandatory." The mandatory nature of subsections (3) and (4) of section 49 are key to enforcing awards: a court must grant an order enforcing the award if the prerequisites of section 49 are met. Justice Manderscheid therefore concluded that it would be inconsistent to allow a court to change the type of remedy granted by an award in the context of a section requiring a court to make an order enforcing an award.

Justice Manderscheid also noted (at para 49) his interpretation of section 49(7) was in line with the legislative scheme of the *Arbitration Act* as a whole, which makes it clear that the courts' role in reviewing arbitrators' decision is a limited one. Here he cites a number of Alberta decisions that "the clear policy thrust of the legislation is to limit Court intervention and to promote arbitral autonomy": *Babcock and Wilcock Canada Ltd. v. Agrium Inc*., 2005 ABCA 82 at para. 10. He reviews sections 44, 45 and 47 of the *Arbitration Act* and concludes (at para. 55) that these sections illustrate the legislature's intent to limit the courts' review of arbitral awards and it would render the statutory scheme "incoherent and inconsistent" to interpret section 49(7) broadly enough to allow a court to substitute the remedy it would have granted.

So if section 49(7) does not mean what Mrs. Fuhr argued it meant, what does it mean? Justice Manderscheid offers his interpretation, but it is conclusory. After rejecting the meaning argued for by Mrs. Fuhr, he merely states (at para. 56):

> In my view, the section is limited to situations where either there is no jurisdiction to grant the remedy (for example a Quebec civil code remedy) or a remedy that is contrary to Alberta public policy (child support or custody that is contrary to the best interests of the child). In such situations, the Court may grant a court order that, as close as possible within the Alberta legal framework, gives effect to the arbitration award. (emphasis added)

That is all Justice Manderscheid has to say on the question of the meaning of section 49(7).

Comments

Justice Manderscheid's reasons for rejecting the claimant's argument are persuasive. The location of subsection (7) within section 49 and in relation to the other sections in the Remedies part make Mrs. Fuhr's argument in favour of a remedy-only appeal as of right an extremely tenuous one.

However, Justice Manderscheid's interpretation of what section 49(7) does mean does not follow simply from rejecting Mrs. Fuhr's argument and Justice Manderscheid does not offer any independent reasons supporting his view of what he sees as the scope of section 49(7). His interpretation of the first type of problem covered by subsection (7) — where the remedy in the award is one that the court does not have jurisdiction to grant — is really just a repeat of the relevant problem with a comprehensible example. An Alberta court would have no jurisdiction to grant a Quebec civil code remedy, but it could grant reasonably similar relief as an alternative.

It is Justice Manderscheid's interpretation of the second type of problem — where the remedy in the award is one a court would not grant in a proceeding based on similar circumstances — that is more controversial. He interprets it to mean instances where the remedy is "contrary to Alberta public policy" and follows that with the rather contradictory example of child support or custody that is contrary to the best interests of the child.

Public policy is not mentioned in the *Arbitration Act*. Being contrary to public policy is a reason to set aside an international commercial arbitration award and a reason to refuse to recognize and enforce an international commercial arbitration award under Articles 34 and 36, respectively, of the UNCITRAL Model Law, an "International Law" which applies to international commercial arbitration agreements and awards by virtue of section 2 of the *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5. In the context of international commercial arbitration, the public policy provisions are acknowledgments of the existence of very diverse legal systems around the world. In Canada, they are usually interpreted quite restrictively: see *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International, S.p.A.* (1999), 45 O.R. (3d) 414 (C.A.).

But these provisions do not apply to a domestic award such as the one rendered by the arbitrator in this case. Is the UNCITRAL Model Law the source of the idea for Justice Manderscheid's interpretation of the second prerequisite? He does not say, and, unlike his example for the first prerequisite, his example does not draw on Quebec civil law tradition. Limiting "where the remedy in the award is one a court would not grant in a proceeding based on similar circumstances" to remedies that are contrary to public policy is in keeping with the legislative scheme of the *Arbitration Act* as a whole, which Justice Manderscheid did review, because it is a restrictive interpretation. However, using "child support or custody that is contrary to the best interests of the child" as his examples of remedies that are contrary to public policy seems to open up the scope of section 49(7). If his example was "determining child support or child

custody on a principle other than the best interest of the child," then his example would be more along the lines of the Quebec civil code remedy example and more in keeping with the idea that section 49(7) is limited to remedies contrary to public policy. But Justice Manderscheid's example could be read as being about getting the application of the best interests of the child principle wrong.

If the second type of problem in section 49(7) is about wrongly applying the right principle of law, it is very far from the international commercial arbitration understanding of violations of public policy and a very expansive interpretation of section 49(7). In most jurisdictions, in the international commercial arbitration context, the ground is seen as a reason to vacate an award that was inconsistent with fundamental notions of justice, honesty and fairness: *Redfern and Hunter on International Arbitration*, 5th ed. (Oxford University Press, 2009) at ¶10.82. Corruption or fraud would likely be considered reasons to challenge awards as contrary to public policy. See, e.g., Margaret L. Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 2008) at 196. Incorrectly applying a test of the best interests of the child is a long way from corruption or fraud.

B. Leave to appeal (s. 44)

In dealing with the second issue and applying section 44 of the *Arbitration Act*, Justice Manderscheid first asks whether the matters in dispute raise a question of law. He goes through the six questions Mrs Fuhr argued were questions of law in her written submissions and the seven questions she argued were questions of law in her Originating Notice and finds (at paras. 67-87) that they were all questions of fact or, at best, questions of mixed fact and law.

Oddly enough, that was not the end of this issue because Justice Manderscheid found that two questions of law did arise as a result of other arguments made by Mrs. Fuhr. He found (at para 88) that her questions about the applicability of section 49(7) raised the question of whether the arbitrator correctly stated the test for when specific performance is available. He also found that portions of Mrs. Fuhr's submissions raised a question of law regarding mitigation of damages and whether the arbitrator identified the correct test for mitigation. It is unusual for a judge to supply questions of law to represented parties who have put forward their own thirteen questions as questions of law.

In connection with the two questions of law that he formulated, Justice Manderscheid then asked whether the matters at stake justified an appeal. According to section 44(2)(a) and (b), before granting leave to appeal, a court must be satisfied that:

> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal, and
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> (b) determination of the question of law at issue will significantly affect the rights of the parties.

An interesting aspect of this test is the question of whether or not there must be an element of public interest to the appeal. Justice Manderscheid admits (at para. 96) that "the preponderance of the Alberta case law holds that there must be an element of public interest and must require more than the resolution of the dispute between the parties." The requirement for a public interest element usually rests on the supposition that all matters at stake in the arbitration are important to the parties and resolution of questions of law always affect parties' entitlements, so there must be more to the section. Mrs. Fuhr argued, of course, that there is nothing in section

44(2) to suggest that an element of public interest is required. Justice Manderscheid agreed with her and declined to require the presence of an element of the public interest (at paras 99, 103). As a result, and because both questions of law were of great importance to Mrs. Fuhr and could significantly affect the parties' rights, Justice Manderscheid held that the test for leave to appeal in section 44 had been met.

He then considered section 44(3) and the question of whether the questions of law were ones that the parties expressly referred to the arbitral tribunal for decision. If they were, then leave to appeal could not be granted. Justice Manderscheid briefly reviewed the judicial history of this controversial section (at paras. 105-110). The controversy has centered on the question of whether the general question referred to the arbitrator for decision — a general question such as entitlement to spousal support or the amount of child support — is, in the words of section 44(3) a "question expressly referred to the Arbitrator." Justice Manderscheid also goes against the grain when he comes down on the *Willick v. Willick* (1994) 158 A.R. 52 (Q.B.) side of this debate. Most decisions have adopted the distinction between an identifiable question of law which is "expressly referred" to the arbitrator and "any question of law that arises during the arbitration" which was first set out by William H. Hurlburt, Q.C. in "Case Comment: *Willick v. Willick*: Appeals From Awards Under the *Arbitration Act*" (1994), 33 Alta. L. Rev. 178 and adopted by Mr. Justice Hutchinson in *Seneviratne v. Seneviratne*, 1998 ABQB 289 and Madam Justice Nation in *Metcalfe v. Metcalfe*, 2006 ABQB 798. While Justice Manderscheid accepted the distinction made by Hurlbert, he thought it was applied too literally in *Seneviratne* and *Metcalfe*. In his opinion (at para. 111), "if the matter expressly referred to the Arbitrator necessarily includes the question subject to appeal, then it is a question of law that was expressly referred to the Arbitrator."

In this case, because Mrs. Fuhr expressly sought specific performance as a remedy, the legal test for that remedy's availability and appropriateness was a necessary element of the arbitrator's determination not to grant that remedy and therefore a question expressly referred to the arbitrator. Justice Manderscheid also held that because Husky clearly raised the question of the reasonableness of Mrs. Fuhr's refusal to allow destruction of the building, that question was also a question expressly referred to the arbitrator. As a result, he held (at para. 112) that the appeal on the questions of law was barred by s. 44(3).

C. Did the Arbitrator make an error of law?

Justice Manderscheid dealt with the third issue on the basis that he might be wrong about not granting leave to appeal. On the first ground, after reviewing the law on specific performance and Mrs. Fuhr's submission on the test and its applicability in this case and the arbitrator's comments on that remedy, Justice Manderscheid concludes (at para. 129) that the arbitrator applied the correct test to determine whether specific performance was the appropriate remedy and did not therefore err in law. He adopted the same approach in canvassing the mitigation question and held (at para 137) that the arbitrator was correct when she applied the principle of mitigation to the issue of whether Mrs. Fuhr's actions were reasonable in insisting on keeping the building.

D. Does the award deal with a matter in dispute that the arbitration agreement does not cover or is beyond the scope of the agreement?

The final issue raises the question of setting aside the award. However, because Mrs. Fuhr's Amended Statement of Claim sought specific performance and, alternatively, damages, Justice

Manderscheid concluded (at para. 143) that the assessment of damages for remediation, the value of the building, and lost rent were within the scope of the arbitration.

Conclusion

This decision is 82 pages in total, with 46 pages being devoted to Justice Manderscheid's judgment, which I will not summarize in this conclusion. Instead, I want to mention two unrelated points about this judgment.

First, the remaining pages of the 82 page decision reproduce the claimant/applicant's submissions to the arbitrator (an amended statement of claim, a reply to the respondent's statement of defence and counterclaim, a reply by claimant to respondent's demand for particulars, and a demand for particulars), the respondent's pleadings (a statement of defence and counterclaim, a demand for particulars, a reply to the claimant's demand for particulars) and the relevant provisions of the *Arbitration Act*. The decision could be a useful teaching tool because it includes these pleadings as Appendices.

Second, Justice Manderscheid mentions that the arbitrator allowed Mrs. Fuhr to provide a 71-page written submission and allowed her lawyer to argue for a full day (paras. 17 and 18). Perhaps the ability to make all of the arguments you want in as great a length as you want is an advantage of arbitration for those with deep enough pockets that is not enumerated in the usual list of the advantages of arbitration over litigation. It is difficult to imagine any tax-payer funded judge would allow that much paper or oral argument on this type of case. After all, the Supreme Court of Canada limits oral arguments in *Charter* matters to one hour for the parties.