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# Leave to Appeal an Arbitration Award: Is There a Public Interest Requirement?

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**Cases Considered:**

*Milner Power Inc. v. Coal Valley Resources Inc.*, 2011 ABQB 118

This brief judgment raises an interesting question. Is it possible to interpret section 44(2) of Alberta's *Arbitration Act*, R.S.A. 2000, c. A-43 to require that leave to appeal be in the public interest, as so many Alberta decisions have done? At the end of his judgment, Mr. Justice M.A. (Mel) Binder suggested to counsel that they raise this question with the appropriate government department or legislative counsel. This is not a new issue but it has been surprisingly seldom raised during the twenty years that the provision has been in effect considering that the test for leave to appeal in section 44(2) speaks only of the "the importance to the parties" and "the rights of the parties."

In this case, Milner Power sought leave to appeal an award made May 10, 2010 by Frank R. Foran, Q.C. Coal Valley Resources had agreed to supply coal from its mine to Milner Power in order to fuel its electrical production station. The coal supply agreement was for an initial term of five years, with a 5 year option to renew, subject to the right of Coal Valley Resources to call for a price review if the anticipated operating costs of its mine would not result in a profit at price levels provided for in the agreement. Coal Valley Resources did call for a price review. The matter was referred to arbitration as provided for in the coal supply agreement.

Milner Power argued that, properly interpreted, the price review provision of the agreement called for a "mine profitability test" and Coal Valley Resources argued the provision required a "contract profitability test". The arbitrator had to decide between these two tests and determined that the "contract profitability test" was what the price review provision in the parties' agreement called for.

Milner Power sought leave to appeal on the basis that the arbitrator erred in law when he refused to consider parol evidence led by both parties about the circumstances leading up to the finalization of the coal supply agreement and the subjective intention of the parties as to the meaning of the price review provision. Milner Power relied upon *Université du Québec à Trois-Rivières v. Larocque*, [1993] 1 S.C.R. 471, where the arbitrator had refused to hear and thus refused to consider parol evidence.

Section 44(2) of the *Arbitration Act* reads as follows:

> 44(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
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> (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. (emphasis added)

Under section 44(2), leave to appeal will only be granted if the appeal raises a question of law and if the applicant can meet the criteria in section 44(2)(a) and (b). Justice Binder decided the leave application on the basis that Milner Power had not raised a question of law.

The Court of Appeal has held, in the context of determining the standard of review, that the test for the rule excluding parol evidence is a question of law but the application of the parol evidence rule is a question of mixed fact and law: *McRoberts v. Whissel*, 2006 ABCA 388 at para. 4; *Driving Force Inc. v. Assaf*, 2009 ABCA 62 at para. 8. Thus, as Justice Binder noted (at para. 11), if Milner Power had been arguing that the arbitrator had misinterpreted or misstated the parol evidence rule, this would raise a question of law. On the other hand, once all of the parol evidence had been admitted, it was up to the arbitrator to apply the parol evidence rule to the facts and determine which facts were relevant. In Justice Binder's opinion (at para. 12), this type of determination raised a question of mixed fact and law. The arbitrator did hear and consider the parol evidence and then determined that only a portion of it could be considered.

Because leave to appeal under section 44(2) can only be granted on a question of law and Milner Power had not raised a question of law, Justice Binder dismissed its application. However, even though it was unnecessary to decide whether Milner Power had met the criteria in section 44(2)(a) and (b), Justice Binder did question whether the Court must be satisfied that it is in the public interest to grant leave.

Recall that section 44(2)(a) and (b) require that the court be 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. How does a court read the requirement that the court shall only grant leave to appeal if it is satisfied that it is in the public interest into section 44(2)?

The first case to consider section 44(2) and add a public interest requirement was *Warren v. Lawyers' Public Protection Association (Alberta)* (1997), 56 Alta. L.R. (3d) 52, 1997 CanLII 14925 (ABQB). Justice Binder speculated (at paras. 21 and 22) that the reason *Warren* added a public interest requirement was because the two conditions in section 44(2)(a) and (b) were unhelpful. They did not help screen applications for leave to appeal because in almost every case an arbitration award will be important to the parties and determination of the question of law will significantly affect their rights. As a result, *Warren* — and all of the cases that have followed it — in effect added a third requirement to section 44(2), a requirement that a court only grant leave to appeal if it is satisfied that it is in the public interest to do so. See, for example, *Sherwin-Williams Co. v. Walls Alive Ltd.*, 2002 ABQB 999 at para. 19, discussing three cases that followed *Warren* and deciding to do so as well because the public interest requirement provided a degree of certainty and fairness.

Despite the fact that most Court of Queen's Bench decisions have followed *Warren*, Justice Binder is not the only judge who has questioned whether a public interest requirement can be read into section 44(2). In *Rudiger Holdings Ltd. v. Kellyvone Farms Ltd.*, 2002 ABQB 601, the applicants actually argued that it is only the interests of the parties that are to be considered. The court in *Rudiger* reviewed the Alberta case law and concluded (at para. 39) that leaves to appeal cannot be granted simply on the basis that one party will suffer in economic loss. If they could be, leave would be granted virtually as a matter of course. Nevertheless, the court in *Rudiger* had grave doubts that the legislature had mandated that some public interest must be at stake before leave to appeal would be allowed because it had chosen the phrase "the parties" to convey its intention in both subsections (a) and (b).

Now Justice Binder has raised the issue again: can or should the courts interpret section 44(2) of Alberta's *Arbitration Act* to include a requirement that leave to appeal must be in the public interest? Although Justice Binder suggested that counsel raise this question with the appropriate government department or legislative counsel, perhaps it is time to ask the Alberta Law Reform Institute (ALRI) to reconsider the section. The source of section 44(2)(a) and (b) was a considerable amount of consultation and discussion among a number of Canadian law reform institutions.

Alberta's *Arbitration Act* is patterned after the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985 which, slightly modified, applies to international arbitrations in Alberta under the *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, s. 4. See the Institute of Law Research and Reform, *Proposals for a New Alberta Arbitration Act*, Report No. 51 (October 1988). There is no provision for appeals in the Model Law. Section 44(2), which allows appeals on questions of law even if the parties' arbitration agreement does not provide that the parties may appeal an award to the court on a question of law, is one of the significant changes, made to the Model Law template "to make it more suitable to arbitrations in Alberta and fit better with Alberta law, practice and terminology" (*Proposals for a New Alberta Arbitration Act* at 1; see also W.H. Hurlburt, "New Legislation for Domestic Arbitrations" (1992-1993) 21 Can. Bus. L.J. 1 at 19).

In proposing the predecessor to section 44(2), the Institute of Law Research and Reform considered the appeal provisions of the British Columbia *Commercial Arbitration Act*, S.A. 1986, c. 3, the first modern domestic arbitration legislation. The British Columbia Act had three alternate pre-conditions to the grant of leave to appeal:

> It should be noted that the appeal provided by the BC Act is limited. First, an appeal can be taken only with leave of the Court. Second, the Court is to grant leave only in limited circumstances: if the importance of the result of the arbitration to the parties justifies the intervention of the Court and the determination of the point of law may prevent a miscarriage of justice; if the point of law is of importance to a class of which the appellant is a member; or if the point of law is of general or public importance. (*Proposals for a New Alberta Arbitration Act* at 128)

It is not clear from the Institute of Law Research and Reform's *Proposals for a New Alberta Arbitration Act* or its earlier Issue Paper, *Towards a New Arbitration Act for Alberta* (June 1987) where the inspiration for the two conditions in section 44(2)(a) and (b) come from. It is clear that the same two pre-conditions were in the proposed act in 1988, as section 34(6) and (7): see *Proposals for a New Alberta Arbitration Act* at 104. The approach is not that of the British Columbia Act. As John Chapman noted in 1995, the wording of the leave to appeal provisions of the Ontario, Alberta and Saskatchewan Acts is closer to the English Act than to the British Columbia Act and it appears that the sections in the Alberta *Arbitration Act* dealing with the appeal of arbitral awards have as their predecessor a 1979 amendment to the English *Arbitration Act:* see John J. Chapman, "Judicial scrutiny of domestic commercial arbitral awards"(1995) 74 Canadian Bar Review 401 at 412. For another review of the roots of Alberta's legislation and the various influences on it, see also W.H. Hurlburt, "New Legislation for Domestic Arbitrations" (1992-1993) 21 Can. Bus. L.J. 1. However, none of these sources directly address why the drafters of the Alberta legislation chose the two conditions they did and not a requirement that directly addressed the public interest, as did the British Columbia legislation they had before them.

If the predecessor to section 44(2)(a) and (b) was a 1979 amendment to the English *Arbitration Act*, then there is one point in the English case law addressing that amendment that suggests a source for a public interest requirement in Alberta. Both the Court of Appeal and the House of Lords in *Pioneer Shipping Ltd. et al. v. B.T.P. Dioxide Ltd*., [198013 All E.R. 117 (C.A.), aff'd [1981] 2 All E.R. 1030 at 1034 (H.L.) (*The Nema*) held that the leave to appeal provision, even though requiring that "the determination of the question of law could substantially affect the rights of one or more of the parties to the arbitration agreement," did not affect the general discretionary nature of the granting of leave (Chapman at 412). Thus, it has long been thought that, despite the existence of pre-conditions to leave to appeal in section 44(2), the court has a discretion to refuse leave even when the pre-conditions have been met. The imposition of the public interest requirement in that context would be the result of the courts' attempt to structure the exercise of judicial discretion in granting leave (Chapman at 411).

*Domtar Inc. v. Belkin Inc*., (1989) 62 D.L.R. (4th) 530, [1990] 2 W.W.R. 242 (C.A.) was the first appellate level Canadian case to consider the new domestic appeal provisions and *The Nema* guidelines. The British Columbia Court of Appeal followed the approach in *The Nema* and held that a residuary discretion to refuse leave existed even if the statutory requirements for the grant of leave to appeal had been met. However, the first Alberta case to impose a public interest requirement did not justify doing so on the basis of a residuary discretion: see *Warren v. Lawyers' Public Protection Association (Alberta)* at paras. 15-19. And subsequent cases merely followed *Warren* (at para. 18) in finding that "[s]urely in the context some public interest or some resolution of some public issue must be triggered. . .".

Given this unsatisfactory state of interpretation, it would be helpful if counsel in *Milner Power Inc. v. Coal Valley Resources Inc.* — Daniel J. McDonald, Q.C. and Jeff E. Sharpe of Burnet, Duckworth & Palmer LLP for Milner Power and Kenneth F. Bailey, Q.C. of Parlee McLaws LLP for Coal Valley Resources — did act on Justice Binder's suggestion (at para. 22).

Hopefully they have raised the vexing issue of the public interest requirement that has been read into section 44(2) of the *Arbitration Act* with the appropriate government department or legislative counsel — or with the Alberta Law Reform Institute, the successor to the Institute of Law Research and Reform which drafted the original legislation in 1988.