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Arbitration is not Administrative Law

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Cases Considered:

Jamani v. Subway Franchise Systems of Canada Ltd., 2008 ABQB 438

The reasons that arbitration is a legitimate way to resolve a dispute are not the same reasons that administrative decision-making is legitimate. Arbitration is normally a process voluntarily chosen by parties who want a dispute decided by an impartial judge of their own choosing, whose decision on the merits of the dispute will be final and binding. It is a private alternative to the courts (albeit governed by legislation and even mandated by legislation in some cases). The justification for legislative and judicial deference to arbitration rests on the principle of freedom of contract and the norm of party autonomy. Administrative law, on the other hand, is public law. Administrative agencies and tribunals are created by federal and provincial legislative bodies and given tasks to do on behalf of the citizens of the country or province. Administrative decision-makers do not just resolve disputes between parties; they are also responsible for fulfilling the goals of their agency. Judicial review of administrative decisions exists, in part, to control the exercise of power by the executive and administrative branches of the state. Nevertheless, courts have recently been conflating the two areas of law and the decision in *Jamani v. Subway Franchise Systems of Canada Ltd.* is an example of this trend.

Two franchisees, (Bob) Imtiazali Jamani and Zarin Jamani, wanted to appeal the award an arbitrator had made to resolve their dispute with the franchisor, Subway Franchise Systems of Canada Ltd. This was a preliminary application, an application made to facilitate their ability to obtain the necessary permission from the Court of Queen's Bench to bring the appeal. The franchisees were seeking an order requiring the arbitrator to produce the notes she took during the hearing of witnesses and to produce copies of the photographic exhibits entered during the arbitration hearing. Producing the exhibits was not controversial, but the order to produce the arbitrator's notes was resisted.

The arbitration appears to have been an administered one. The International Centre for Dispute Resolution (ICDR) in New York, operated by the American Arbitration Association (AAA), appointed the arbitrator and they had also forwarded all materials in their possession to the franchisees. When the franchisees asked the ICDR to get the arbitrator's notes from her, the ICDR refused on the basis that "they are not subject to dissemination" to the parties. We are not told the grounds for the ICDR refusal, but perhaps none were given. We are not told anything

about the rules or procedures agreed to by the parties or implemented by the arbitrator, save and except that the lawyers for the parties agreed there would be no recording or transcript of the evidence given during the hearing.

Without a transcript of the evidence heard by the arbitrator, an appeal is difficult. Therefore, the franchisees argued that the arbitrator's notes should be part of the record for the appeal. The argument was that that the record of the proceedings before the arbitrator includes all the evidence presented to the arbitrator, the exhibits entered and, in the absence of a transcript, her notes.

The franchisor had two arguments in opposition to this application. The first argument was that, even if a transcript was available, it could not be put before the court on the application for leave to appeal in any event. Under section 44(2) of the Arbitration Act, R.S.A. 2000, c. A-43 and unless they otherwise agree, a party may appeal an award to the court on a question of law only, and only with leave of the court. The second argument was that the arbitrator's notes are not a record of the evidence and would not serve to establish what the evidence before the arbitrator was.

Mr. Justice Brian R. Burrows noted (at para. 😎that counsel raised a number of interesting questions:

Is there any obligation on the part of the arbitrator to provide a record or return given that the [*Arbitration*] *Act* does not expressly create one? Do the Rules of Court relating to returns in judicial review situations apply even by analogy? Does the Court hearing the application for leave or the appeal itself examine anything other than the award itself?

One might think that after all the applications for leave to appeal awards and all the appeals of arbitration awards to the courts, these rather mundane procedural questions would have been sorted out, either in rules of arbitration procedures or in the considered option of a court . . . somewhere. But, no. Neither are they addressed by this judgment. Justice Burrows indicated (at para. 9) that it was not necessary for him to address any of those questions in order to resolve the application before him.

Two cases were cited on the issue of the production of the arbitrator's notes. In one, *Construction Assn. Management Labour Bureau Ltd. v. International Brotherhood of Electrical Workers*, Local 625 (1983), 58 N.S.R. (2d) 145 (N.S.S.C.), production of an arbitrator's notes was ordered. In the second, from the same jurisdiction, *Re Northside-Victoria District School Board and Yorke* (1992), 90 D.L.R. (4th) 643, (N.S.S.C.A.D.), the majority held that the notes of the sole administrative decision-maker were not part of the appeal record. Justice Burrows chose to follow the latter administrative law decision. His stated reason (at para. 10) for preferring *Yorke* was that it was decided by the appellate division nine years after the trial division decision. He might have noted the trial decision was an oral one and relied upon the rules of court applicable to another process. Although Justice Burrows does not state that he finds the reasoning in *Yorke* persuasive, he does quote the reasons offered by the majority in that case:

The apparent purpose in requiring notes to be delivered up as part of the record of the proceedings is the assumption that the notes are a record of the evidence taken in the absence of a certified transcript of the proceedings. In my opinion the notes of a Board member are not a proper record of the evidence as the notes are not a verbatim record of what a witness stated under oath and are therefore likely inaccurate and unreliable. Secondly, the notes may contain tentative observations of the Board member which the board member may subsequently decide were not well-founded. Therefore, the notes could be misleading. Thirdly, the notes of a Board member are personal notations of the member made during the hearing. In short, the notes are a personal and unreliable record of the evidence. As a general rule, handwritten notes would serve no useful purpose for a superior court when reviewing a Board decision.

These are good reasons for not producing an administrative decision-maker's notes as part of the record. They depend in part, however, on the relevant rules of procedure that applied on this certiorari application. Are the reasons of the majority in Yorke equally relevant in the arbitration context under a different statute? Probably, but Justice Burrows does not address this question. Instead, he appears to assume that note-taking is note-taking, whether done by an administrative decision-maker, or arbitrator.

A more persuasive precedent might have been *N.M. Paterson & Sons Ltd. v. A & B Rail Contractors Ltd.*, [1998] 3 W.W.R. (3d) 782 (Sask.Q.B.) The Saskatchewan Arbitration Act, 1992, S.S. 1992, c. A-24.1, does have a unique provision that is relevant to the "record" issue. Section 45(3) requires the arbitrator to send "a copy of the award, the evidence received and the record of the arbitration proceedings forming the subject matter of the appeal" to the relevant judicial centre. Nevertheless, the court's reasons for refusing to allow a transcript to form part of the record do not depend on the unique statutory provision. The court held (at para. 9) that a transcript of viva voce evidence is not part of the record and is not available to the court because a court hearing an appeal from an arbitration award cannot "rehear" the dispute and cannot substitute its own view of the evidence. This reason ties the refusal to the relevant legislation and to the purpose behind the legislative deference to arbitration.

The decision by Justice Burrows was a short one, only twelve paragraphs long and it is only a decision about a preliminary application in a leave to appeal application. I have two reasons for making a proverbial mountain out of this particular molehill, both of which I will expand on briefly. First, the franchisees are very likely going to lose their application for leave to appeal because of Justice Burrows' decision. Second, Justice Burrows is not alone in apparently assuming that administrative law decisions are applicable, without question, in the arbitration context. This is a fairly common approach, as though judicial review is judicial review and the process being reviewed is not important.

Why is the decision not to force production of the arbitrator's notes enough to likely doom the franchisees' application for leave to appeal? After all, it might be argued that the facts are not relevant because the appeal can only be on a question of law. Consider, however, that an award made without supporting evidence is an error of law, but if there is no record of the evidence, how can this error been pointed out? There may be a way around this absence. According to J.

Brian Casey, in *International and Domestic Commercial Arbitration* (Toronto: Carswell, looseleaf), at para. 7.20, if there is no record and a court needs to know what the evidence was, the court can summon the arbitrator to give evidence and compel the arbitrator to testify to what evidence was led during the hearing. Unfortunately, he says nothing further about the issue and cites no authority for this proposition.

The bigger point is the use of administrative law precedents to decide arbitration cases, particularly when they are applied without any consideration of the very different context. For example, one reason why there might be no transcript and no record in an arbitration hearing is to discourage appeals of the award. Most parties to an arbitration agree ahead of time that the award will be final and binding upon them. They are free to agree there will be no appeal. The lack of evidence on which to base an appeal merely backs this up, in a very pragmatic fashion. This is generally seen to be legitimate based on freedom of contract in the context of the resolution of a private dispute with no public or governmental implications. You cannot use these reasons in an administrative law context. Context matters. Arbitration is not administrative law. Both may be third party decision making processes and both may be legitimate third party decision making processes. But they are not legitimated by the same, or even remotely similar, reasons. Each process should be given its due and the role that each plays should be recognized.

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