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Leave to Appeal Arbitration Awards and the Addition of the Public Interest

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Cases Considered:

Lion's Gate Homes Ltd. v. Shand, 2008 ABQB 15

This brief decision by Mr. Justice D.K. Miller provides an opportunity to look at how the courts in Alberta have interpreted subsection 44(2) of the Arbitration Act, R.S.A. 2000, c. A-43. This is the provision that usually governs the ability of the parties to appeal an arbitrator's award. Although subsection 44(2) does not, on the face of it, require that there be any public interest in the parties' dispute or the award resolving that dispute or an appeal from the award, judges of the Court of Queen's Bench of Alberta have fairly consistently read in that extra element.

In *Lion's Gate Homes Ltd. v. Shand*, the builder, Lion's Gate, applied for leave to appeal an arbitrator's award in a home construction dispute. The dispute had been referred to arbitration pursuant to the terms of a Purchase and Construction Agreement under Alberta's New Home Warranty Program and the Arbitration Act by a February 2006 order of Mr. Justice Moen. That order was silent on the question of appeals from the arbitrator's award and so the issue of whether or not Justice Miller should give permission for Lion's Gate to appeal the award depended upon subsection 44(2):

> 44 (2) . . . [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.

Based on this wording, the first question is whether the grounds of appeal raise questions of law. An appeal based on questions of fact or questions of mixed law and fact is not permitted by the Act. Although the distinction is not an easy one to make, the usual differentiation relied upon is that set out by Justice Iacobucci in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R 748 at paragraph 35: "Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests." Justice Miller, while noting that a question of law was required, did not address this issue in the Lion's Gate case.

If the grounds of appeal do raise a question of law, the next issue is whether the court is satisfied that "the importance to the parties of the matters at stake in the arbitration justifies an appeal, and determination of the question of law at issue will significantly affect the rights of the parties." The question of the importance to the parties of the mattes at stake could depend upon who the parties are and their particular situations. For many companies and individuals, it would not take that great a loss or gain to satisfy the subsection's conditions. That was the approach and interpretation adopted by Justice Jones in *Altarose Construction Ltd. v. Kornichuk* (1997), 201 A.R. 258 (Q.B.), another dispute over the construction of a new home and one involving a relatively small construction company and an individual at or near retirement age without superior economic means.

However, the approach to subsection 44(2) in Altarose Construction — an approach that focused on the parties and their socio-economic context — was rejected in a number of subsequent cases. Instead, the interpretive approach of Justice Dea in *Warren v. Alberta Lawyers' Public Protection Association* (1997), 208 A.R. 149 (Q.B.) has been preferred. His approach focused on the context of subsection 44(2) and not the context of the parties. It was preferred to that in Altarose Construction explicitly by Justice Nash in *Schultz v. Schultz*, 2000 ABQB 866 at paragraph 57 and the reasoning in Warren was adopted expressly by Justice Johnstone in Oakford v. Telemark Inc., [2001] A.J. No. 853 (Q.B.) at paragraph 14 and by Justice Sanderman in *Sherwin-Williams Co. v. Walls Alive (Edmonton) Ltd.* (2002), 331 A.R. 317 at paragraph 18.

In the Warren case, at paragraphs 14 to 17, Justice Dea justified the addition of a public interest requirement on the following basis:

> The applicant argues that he meets the requirements of these subclauses because if successful he will defeat the Ducommum claim and gain an economic benefit which it now appears he has lost. It seems to me that, while on the face of it the applicant's argument is not without merit, that in context such an interpretation of the clauses is not warranted.
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> The context I refer to is this:
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> > 1. Arbitration is a process of dispute resolution adopted consensually by the parties in preference to what is sometimes perceived as the slower more expensive civil litigation process available at law.
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> > 2. While the parties in an arbitration may agree to broad rights of appeal, when they fail to do so the Arbitration Act itself restricts the right of appeal to questions of law. Even then it requires leave from the court.
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> > 3. The Act discourages appeals in an effort to produce a final and binding decision in a quick and inexpensive proceeding.
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> In this context it is, I think, wrong to conclude that subparagraphs (a) and (b) aforesaid are met when "… the importance to the parties …" means simply a loss or gain of some claim and the "… determination of the questions of law will significantly affect the rights of the parties …" also means a loss or gain of some claim.

> Surely in the context some public interest or some resolution of some public issue must be triggered sufficient to warrant overriding the mutual agreement of the parties to restrict appeals to issues of law. There is not before the court any evidence of that kind.

The main point of interest in *Lion's Gate Homes Ltd. v. Shand* is the fact it takes for granted the addition of a public interest requirement in subsection 44(4) of the Arbitration Act. The earlier cases discussed and debated the extra element but now, according to Justice Miller, "it is clear" that leave to appeal will not be granted unless the public interest is engaged. The public interest interpretation in Warren is treated as a given. Justice Miller merely notes, at paragraph 9, that "[t]his Court has dealt with these issues in numerous recent cases . . ." and then lists Warren and the cases that approved of Justice Dea's approach.

Lion's Gate did, of course, argue that the issues raised by their grounds of appeal were of public interest and importance. Those issues involved completion and possession and the builder argued the arbitrator's decision set a negative precedent for the home building industry. Justice Miller responded that the Arbitrator's award was unique to the parties' relationship and did not comment on industry practices. He could see no wide ranging impact on the home construction industry. As a result, he held that no public interest was engaged by the grounds of appeal. He could have, but did not, note that setting a negative precedent is an awkward argument for a party to arbitration to make. Almost all arbitration hearings and results are private and confidential by agreement. The only reason we know about this one, and know the terms of the award, are because Lion's Gate chose to apply for leave to appeal to a court system that values openness and publishes its decisions.

When parties choose arbitration as their dispute resolution process, constraining their ability to appeal an award may be relatively unproblematic. As Justice Sanderman noted in *Sherwin-Williams Co. v. Walls Alive (Edmonton) Ltd.* at paragraph 18: "It provides a degree of certainty and fairness. . . . They should be held to their agreement to avoid the civil litigation process unless it is in the public's interest for the court to allow an appeal to proceed. If the public interest requirement is lacking, the parties should be bound by the decision coming from the dispute resolution mechanism they chose." Under this reasoning, Lion's Gate, the builder and presumably the party who put forward the Purchase and Construction Agreement that stipulated arbitration as a mandatory process for resolving disputes, should have been forced to live with its choice in this particular case. This reasoning, however, neglects the many instances in which the consumer has no choice but, if they want the goods or services, must accept the standard form contract offered to them. The parties and their socio-economic context should not, perhaps, always be ignored.