THE LAWYER'S DAILY

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Family

Court underscores importance of gatekeeping function of application for permission to appeal

By **Barb Cotton**

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(May 18, 2022, 8:46 AM EDT) -- In a recent decision, *Esfahani v. Samimi* 2022 ABCA 178, the Alberta Court of Appeal, *per curiam*, has underscored the importance of the gatekeeping function of the requirement for permission to appeal and the independence of private dispute resolution from the courts. The decision involved an application for permission to appeal a decision of an arbitrator regarding a child support arbitration award.

As the parties to the standard form arbitration agreement had not "checked off the boxes" regarding their rights of appeal, under the Alberta *Arbitration Act* s. 44(2) the matter could only be appealed on a question of law, following the grant of permission to appeal. Seemingly as a matter of judicial economy, however, the chambers judge adjourned the issue of whether permission to appeal should be granted to be heard together with the substantive appeal in a one-day special hearing. She stated:

> So with respect to arbitration appeals, usually we hear the leave together with the substantive. Because otherwise the Judge has to look at all of the substantive issues to see if leave will be granted on the question of law. So a Judge usually hears both of them, or if leave is not granted, then it does not go on. … And that Judge will hear the question of whether leave should be granted; and if not granted, then that is the end of it. If the Judge hears that leave should be granted, then the Judge will go ahead and hear the second part of it.

This shortcut in procedure, endorsed by the chambers judge, was appealed, (with Andy Hayher of Vogel LLP as lead appellant's counsel), on the following bases:

> (a) Permission to appeal must be obtained first before an appeal on the merits can be scheduled;
> (b) The process adopted turns an appeal requiring permission into an appeal as of right;
> (c) The process adopted did not allow s. 44(2) of the *Arbitration Act* to operate as a gatekeeping function to limit judicial intervention in arbitrations;
> (d) The process adopted is inconsistent with the philosophy of the *Arbitration Act*;
> (e) It was procedurally unfair to have the permission to appeal heard concurrently with the appeal itself;
> (f) No appeal exists until such time as permission to appeal has been granted; and
> (g) There is no clear process or established practice in the Court of Queen's Bench of having the permission to appeal and appeal matters heard concurrently, and the chambers judge was wrong to base her decision on this misapprehension.

It was the appellant's argument that the procedure of the chambers judge had limited the ability of the application for permission to appeal to operate as a gatekeeping function which seemed to resonate the most with the Alberta Court of Appeal. The appellate court further underscored that the requirement for permission to appeal was designed to produce finality of arbitration awards "in an efficient and economical way and reduce judicial involvement to a minimum." This accords with the well recognized benefits of arbitration: speed, efficiency and cost.

The appellate court made clear that it was not aware of an invariable procedure that compelled

contemporaneous hearings of permission to appeal and appeals, as was the stated belief of the chambers judge. An application for permission to appeal would be rendered moot if the application was heard contemporaneously with the appeal, as the judge hearing both the application and the appeal would inevitably just decide the appeal on the merits. The application for permission to appeal must be decided first, and not contemporaneously.

In the result, the appeal was allowed and the notice of appeal was suspended until permission to appeal was obtained.

Thus, to give weight to the gatekeeping function of an application for permission to appeal and for reasons of respecting the independence of the arbitration process from the courts, the bifurcated process of an appeal was honoured.

This decision will give much needed guidance to litigants in Alberta and further safeguard the independence of private dispute resolution from the court system.

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