

Court of Queen's Bench of Alberta

Citation: Flock v. Flock, 2007 ABQB 307

Date: 20070514
Docket: 0601 09739
Registry: Calgary

Between:

Doran Alfred Flock

Applicant

- and -

Arlene Joy Flock

Respondent

**Reasons for Judgment
of the
Honourable Madam Justice K.M. Horner**

Introduction

[1] The Applicant Doran Flock applies under s. 45 of the *Arbitration Act*, R.S.A. 2000 c. A-43 (the *Act*) to set aside the Award of Alan Beattie Q.C. (the Arbitrator) dated July 19, 2006. Alternatively, he seeks an order to vary the Award under s. 44 of the *Act* on the grounds that the Arbitrator made errors of law. Arlene Flock, the Respondent and ex-wife of the Applicant, opposes the motion.

[2] The subject matter of the arbitration was to make final determinations with respect to the valuation of certain assets owned prior to the marriage, the valuation of those assets at the time of the divorce and the proper distribution of those assets under ss. 7 and 8 of the *Matrimonial Property Act*, R.S.A. 2000 c. M-8.

Facts

Background:

[3] The parties were married on February 6, 1982. They separated in 1994 and became divorced effective June 26, 1999. On February 19, 2002, they signed an arbitration agreement (the Agreement) in order to resolve by way of arbitration the outstanding issues of the division of matrimonial property, the valuation of that property at the time of the marriage and the validity of the exemptions which each party was exerting.

[4] The arbitration was preceded by a series of hearings which were designed to set out the procedures to be followed, the evidence to be adduced and any other steps or procedures required to ensure a fair, expeditious hearing that would be conducted in accordance with the principles of natural justice.

[5] The six day arbitration (the Hearing) began on January 28, 2003 and including adjournments lasted until February 25, 2003. The final written argument was submitted to the Arbitrator on September 3, 2003. Due to the reasons and events described below, the Arbitrator did not release his decision until July, 2006.

[6] The Applicant submitted a brief outlining 13 grounds for review of the Arbitrator's decision including claims that there were errors of law on the part of the Arbitrator and claims that the Award should be set aside because the arbitration was not conducted in accordance with the Agreement. At the outset of the proceeding however, the Applicant narrowed the application to three main issues. These were whether the Award should be set aside or varied: (1) because of the delay by the Arbitrator in releasing the Award and the resultant prejudice to the Applicant; (2) because the Arbitrator re-opened the Hearing to obtain additional evidence from the Respondent regarding her exemptions, and (3) because the delay and other actions of the Arbitrator constitute breaches of the principles of natural justice.

[7] The events leading up to the release of the Award span a thirty-three month period, and must be evaluated with reference to certain clauses in the Agreement itself. The relevant sections of the Agreement deal with the decision to fix property values as at the date of the Hearing, the procedures to be followed with respect to the presentation of evidence at the Hearing, the requirement that the principles of natural justice be observed and the requirement that the Arbitrator release the Award within sixty (60) days of the Hearing.

Arbitration Agreement:

ARTICLE I
DEFINITION OF DISPUTES TO BE ARBITRATED

The parties agree to submit the following disputes to arbitration pursuant to this Agreement:

-
c) Identification and valuation of matrimonial property at the date of arbitration;
....

ARTICLE V
RULES OF EVIDENCE

The Arbitrator shall apply the principles of natural justice and shall not be bound by the strict rules of evidence in force in the Courts of this Province, but may receive any evidence submitted to it by the parties that the Arbitrator believes to be relevant to the matters in controversy or that will enable the Arbitrator to arrive at a fair and proper decision. The Arbitrator shall have full power and authority to rule on any questions of law applying to the admission of evidence or determination of the issues in the same manner as a Justice of the Court of Queen's Bench of Alberta.

ARTICLE VII
ORAL HEARING

1. The Parties shall present evidence at the Hearing in the following manner:
 - (a) Each party shall present its evidence through individual witnesses who shall testify under oath or affirmation;
 - (b) The parties shall present their evidence in accordance with various subject headings or asset items as identified by the parties and the Arbitrator;
 - (c) In regard to each subject heading or asset item, Doran will present his evidence first then Arlene will present her evidence including any rebuttal evidence and, finally Doran will present rebuttal evidence;
 - (d) The order of examination of witnesses shall be examination-in-chief by Counsel for the party, cross-examination by Counsel for the other party and then re-examination by the party's own Counsel;
 - (e) The Arbitrator shall also have the right to examine witnesses.

ARTICLE IX
PERIOD FOR THE AWARD

The Arbitrator shall communicate his award to the parties not later than sixty (60) days after the close of the hearings, subject to any reasonable delay due to unforeseen circumstances.

[8] There are two factors driving the Applicant's desire to vary or set aside the Award. The first is that the Respondent was granted significant contested exemptions for property that the

Arbitrator traced back to the beginning of the marriage. The second is that between 2003 when the Hearing ended and the release of the Award, there was a significant increase in the value of four pieces of real property which were the major assets involved in the arbitration, primarily, the matrimonial home in which the Applicant has a 50% interest. Despite the increases in value of the properties awarded to the Respondent the Applicant's equalization payment was limited to his percentage interest in each property as valued at 2003, together with minimal interest.

[9] The increase in property values during the time that the Arbitration was conducted was very much a live issue between the parties. In fact, at the outset of the Hearing, the Applicant requested that the Arbitrator use updated appraisals of the property in question because he felt that the increases in value already realized should be properly distributed. His application was denied, and as events later unfolded, the combination of the rise in real estate values and the delay was to become an issue of increasing concern to the Applicant.

[10] The events and correspondence between the parties and the Arbitrator from the conclusion of the Hearing up until the release of the Award are as follows:

[11] On September 3, 2003 the Arbitrator contacted the parties, acknowledged receipt of all briefs and evidence and informed them that the award would not be ready within the sixty-day time limit imposed by Article IX of the Agreement. Instead, he proposed to deliver the Award in the early part of December (approximately one month late). Neither party objected to this delay.

[12] One full year later, the Award had still not been released and on September 10, 2004, the Applicant's solicitor wrote to the Arbitrator and the Respondent requesting that due to the considerable delay, the increase in the values of the properties over that time, and the resultant prejudice to the Applicant, revised property values should be used to calculate the equalization payments to the Applicant.

[13] On September 21, 2004 the Respondent wrote to the Arbitrator and the Applicant opposing the use of updated appraisals and stated that there was "no authority or precedent for the presentation of reports after arbitration which would be akin to re-opening the trial". The Arbitrator agreed with the Respondent in his reply dated September 27, 2004 that "there was no authority to re-open the hearing". He apologized for the delay and promised to release the Award by the end of October 2004.

[14] On November 6, 2004 the Arbitrator again wrote to the parties explaining that the Award was not yet complete but assuring them that it would be ready by the first week of December 2004.

[15] On December 22, 2004 the Arbitrator again wrote to the parties. In this letter he explained that the Award was "virtually" complete but that he had come to an impasse with respect to the exemptions claimed by the Respondent.

[16] The letter proceeded to explain that the evidence adduced by the Respondent during the Hearing was “of little assistance” and that due to the significance of the issue, further evidence would be required for him to reach a decision:

It is fair to [the Respondent] although she did not meet the onus required of her in the first place, to be able to establish what amount of the \$355,000 can be traced to January 2003.

The ensuing paragraphs set out the Arbitrator’s thoughts and interpretations of the evidence on the exemption issue and requested that the Respondent fill in the informational gaps he had identified.

[17] On January 25, 2005, the Applicant, apparently only having just become aware of the request for additional evidence and having received three large binders from the Respondent purporting to provide the tracing of assets requested, wrote to the Arbitrator opposing the request for additional evidence. The Applicant’s opposition to the request for new evidence was based on both procedural and substantive grounds. Procedurally, the Applicant argued that the Hearing could not be re-opened, that the new evidence received was not sworn and therefore was not in compliance with Article VII of the Agreement, and that the re-opening of the Hearing would result in further delay and further prejudice to him unless revised appraisals of the properties were obtained. Substantively, the Applicant pointed out that the onus to establish the exemptions was on the Respondent and that her inability and unwillingness to provide proper tracing at the Hearing meant that she had failed to meet that onus.

[18] The Arbitrator wrote to the parties again on January 23, 2005. Presumably, this letter passed in the mail with the Applicant’ January 25, 2004 letter, as neither refers to the other. The purpose of the Arbitrator’s letter was to indicate that:

I embarked upon a cursory review of the Tracing Summary prepared by Ms. Burke and the supporting documents... It would be counterproductive for me to undertake a full, detailed, examination of the documents because Mr. Flock is in a better position to do that examination and submit his conclusions. I invite that exercise which will be beneficial to all of us. Needless to say, given the number of transfers among the brokerage firms, it is difficult to isolate what are allegedly exempt funds and trace them through. I will look forward to Mr. Flock’s analysis in that regard.

[19] The letter concluded with a proposal that once the Applicant had reviewed the information submitted by the Respondent, the parties should again meet, identify areas of disagreement and agreement and conclude the now re-opened hearing:

Once Mr. Flock and Mr. Maitland have completed their review, perhaps it would be most expedient if we all met with a view to attempting to agree on the amount of the exempt payment which is traceable and the amount which should be

allowed as an exemption. That may be too optimistic. We could at least narrow the areas of disagreement, hear final submissions, and proceed with finalization of the Award.

[20] On February 14, 2005 the Applicant filed a Notice of Motion with this Court seeking an order that (1) the Arbitrator be directed to acquire and use updated property appraisals so as to fairly calculate the division of the matrimonial property and (2) that the Award be delivered within 30 days.

[21] The Arbitrator responded to this application by mail on February 15, 2005 and expressed his opinion that the Notice of Motion was premature, and that such an application, if necessary should properly be brought after the Award had been issued. The Applicant then discontinued the Application.

[22] On December 22, 2005, having reviewed the documentation and additional evidence provided by the Respondent, the Applicant delivered the results of his own tracing exercise to the Arbitrator. His assessment was that certain documents and receipts were missing and that consequently many of the claimed exemptions were impossible to trace back to the Respondent's holdings prior to the marriage. The letter explaining the results of the Applicant's tracing exercise also re-stated his objections to the re-opening of the Hearing and the Arbitrator's acceptance of unsworn evidence.

[23] On July 19, 2006, the Arbitrator released his decision a full thirty-three months after the conclusion of the Hearing in September of 2003. Between December 22, 2005 and the release of the Hearing there was no further argument or discussion of the exemptions evidence as had been proposed in the Arbitrator's January 23, 2005 letter.

[24] The portions of the Award relevant to this application are that the Respondent was granted \$197,730 in exemptions and that the equalization payment to the Applicant for his interest in the matrimonial property was based on the Arbitrator's findings of his percentage entitlement in each piece of property applied to the assessed value of that property as determined by the Arbitrator. The valuation evidence used by the Arbitrator was collected prior to the commencement of the Hearing in 2003. Between that time and 2006 market forces substantially increased the value of the real property in question, the most prominent of which was the matrimonial home held jointly by the parties.

[25] On August 16, 2006, the Applicant brought this application to set the Award aside or to vary it so as to remedy the errors in law alleged to have been made by the Arbitrator. The variations requested are to set the Respondent's exemptions at zero, and to order that the equalization payment to the Applicant be recalculated based upon updated property valuations.

Issues

1. Pursuant to s. 45 of the *Act* what, if any, was the effect upon the validity of the Award of:

- a) The delay in rendering the Award
 - b) The re-opening of the Hearing to obtain additional evidence; and
 - c) The alleged breaches of the principles of natural justice
2. Was the delay, the re-opening of the Hearing and the use of stale dated appraisals errors of law such that the Award can be varied under s. 44 of the *Act* or is a remedy under s. 45 of the *Act* more appropriate.

The Law:

[26] The *Arbitration Act*, R.S.A. 2000, c. A-43 provides the following:

Appeal of award

- 44(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact ...
- (5) The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal and give directions about the conduct of the arbitration.
 - (6) Where the court remits the award to the arbitral tribunal in the case of an appeal on a question of law, it may also remit to the tribunal the court's opinion on the question of law.

[27] Section 45 of the *Act* allows a Court to set aside the decision of an arbitrator on various grounds going essentially to either the jurisdiction of the arbitrator as it is derived from the arbitration agreement in question, or the Court's jurisdiction under the *Act* to prevent awards which are a result of unfair procedure or treatment of one of the parties by the arbitrator. For the purposes of this application, the relevant provisions in s. 45 are:

Setting aside award

- 45(1) On a party's application, the court may set aside an award on any of the following grounds:
- (f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator; ...
 - (g) the procedures followed in the arbitration did not comply with this *Act* or the arbitration agreement; ...

- (7) When the court sets aside an award, it may remove an arbitrator or the arbitral tribunal and may give directions about the conduct of the arbitration.
- (8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration.

[28] Thus, if all or some of the three primary issues noted above constitute errors of law pursuant to section 44 of the *Arbitration Act* then the Court may (i) vary the Award; (ii) set aside the Award; or (iii) remit the Award to the Arbitrator with the Court's opinion on the questions of law and with directions. If all or some of the primary issues contravene section 45 of the *Arbitration Act* then the Court may (i) set aside the Award; or (ii) remit the Award to the Arbitrator with directions.

Analysis

1. a) The delay in rendering the Award.

[29] There is no question that the Arbitrator failed to abide by his obligation under Article IX to deliver his Award within sixty days of the Hearing. Neither party introduced argument or evidence to challenge or assert that the delays by the Arbitrator can be saved under the Article as being "reasonable delays due to unforeseen circumstances". Furthermore, none of the Arbitrator's own explanations for the delay attempt to justify it as falling within this category. The magnitude of the delay alone takes it outside the realm of reasonableness. As such, the Award falls afoul of s. 45(g).

[30] What remains to be determined is limited to whether the parties agreed to the delay, whether the parties waived their right to object to the delay, or whether the Court should refuse to set aside the Award as an exercise of the discretion granted to it under s. 45(1).

[31] The Applicant relies on *Petro-Canada and PanCanadian Gas Products Ltd. v. The Alberta Gas Ethylene Company Ltd. et al.* (1991), 121 A.R. 199 (Q.B.) rev'd on other grounds (1992), 1 Alta L.R. (3d) 380 (C.A.) for the proposition that once the time to deliver the award as set out in the arbitration agreement has expired, the arbitrator or arbitral tribunal no longer has jurisdiction over the dispute. The arbitration in question fell under the federal *Commercial Arbitration Act*, R.S.C. 1985, c. 17. In *Petro-Canada*, the arbitral tribunal, coincidentally chaired by Alan Beattie, indicated at the conclusion of the Hearing that it would be unable to render a decision within the time allowed under the arbitration agreement. The parties agreed to an extension then and on two subsequent occasions, but the tribunal failed to deliver a decision within the revised time frame. Prior to the release of the decision, one of the parties applied to have a new arbitral panel constituted as allowed for under the arbitration agreement. After the award was released, Lomas J. set it aside because of the expiry of the time to deliver the award. Although he found that the parties had verbally agreed to some extension of the time to deliver the award, he found that further delays by the tribunal took it outside its jurisdiction. He rejected

the notion that the tribunal could unilaterally extend the time to deliver the award and indicated that it did not have the authority to amend or change a term of the arbitration agreement without the express agreement of the parties.

[32] The Applicant also cited *Metcalfe v. Metcalfe*, 2006 ABQB 798. In *Metcalfe*, Nation J. heard an application to set aside an arbitrator's decision under s. 45 of the provincial *Act*. As in the current case, the arbitration had been conducted to settle disputes in a divorce proceeding. The arbitration agreement required that the award be delivered within thirty days of the hearing. The arbitrator failed to abide by this requirement and instead delivered the award four months after the hearing, or three months late. Nation J. considered and agreed with the principles outlined by Lomas J. in *Petro-Canada* but declined to set aside the award. Her decision to allow the award despite the arbitrator's failing was based on her finding that the applicant had not objected to the delay until after the award was made. Accordingly she found that pursuant to the provisions of ss. 45(5) and 4 of the *Act*, he had waived his right to have the award set aside.

[33] In the alternative, she indicated that even if she had not found a waiver of the applicant's right to object, based on the facts before her she would not have hesitated to exercise her discretion under s. 39 of the *Act* which allowed her to extend the time for rendering of the award. She relied on two key findings to explain her decision under s. 39: First, given the nature of the dispute, four months was not an inordinate amount of time to arrive at a decision, and second because each party had been awarded an interest in the real property subject to the dispute, neither had suffered any prejudice as a result of the increase in land values during the period of delay.

[34] The Applicant looks to *Petro-Canada* and *Metcalfe* to establish that the delay by the Arbitrator is sufficient to take him outside of his jurisdiction and render his Award void. The facts here are argued to be distinguishable from those allowing the award to survive in *Metcalfe* because this Applicant did object to the delay and because the delay was thirty three months as opposed to four months. Furthermore, the Applicant argues that the Arbitrator's failure to account for the increase in land values in the Award resulted in a prejudice to his financial interests.

[35] The Respondent's position on the delay is simply that the parties waived their rights to object to the late delivery of the Award. In support of the argument for waiver, the Respondent asks the Court to note that the Applicant never attacked the delay itself in any of its letters between September 2003 and July, 2006, nor did he ever seek to have the Arbitrator removed or a declaration that the Arbitrator no longer had jurisdiction over the dispute. Instead, the Applicant focused almost exclusively on the issue of updating the property appraisals.

[36] The Respondent also cites *Re Stephenville Minor Hockey Association and Newfoundland Association of Public Employees* (1993), 104 D.L.R. (4th) 239 (Nfld. C.A.) as authority for its argument that the Award should not be set aside merely because of the Arbitrator's delay.

[37] The decision in *Re Stephenville* was related to the failure of a Labour Relations Board to deliver its decision on two grievances within the 35 day time limit required by the collective agreement and the *Labour Relations Act*, S.N. 1977 c. 64. Soper J. of the Newfoundland Trial Division set aside the decisions of the Labour Relations Board due to the delay, but on appeal the decision was reversed. The Court of Appeal held that the time restrictions in the *Labour Relations Act* were directory and not mandatory. The facts of the case indicate that neither party objected to the delay until after the decision was released, and that there was otherwise no prejudice to either party as a result of the delay. The specific passage relied on by the Respondent comes from p. 243 of the decision:

To nullify the arbitration proceedings because of the dilatory conduct on the part of the board would not only be manifestly unjust to the parties affected, who had no control over the events, but would also be inconsistent with the purpose and intent of the [Labour Relations] Act.

Decision

[38] Having regard to the thirty-three month delay, the correspondence indicating that the Applicant objected to the resulting prejudice of his financial interest as a result of the delay and the intended purpose of the arbitration itself to achieve the speedy, efficient and fair resolution of the dispute between the parties, I conclude that the actions of the Arbitrator took him well outside the scope of his jurisdiction under the Arbitration Agreement. The principles applied in *Petro-Canada* and *Metcalf* are equally applicable to this case. By exceeding the allowable time in the Agreement for delivery of the Award, the Arbitrator lost the jurisdiction granted to him under the Agreement.

[39] Even if the parties agreed to some delay immediately after the Hearing closed in September 2003, the facts before me do not support a finding that the time requirement of Article IX was waived to the extent of the actual delay, nor do they support the exercise of my discretion to extend the time to deliver the Award. The facts here are markedly different from those which influenced Nation J. in *Metcalf*. The Award in *Metcalf* was delivered four months after the close of the Hearing, as opposed to thirty-three months. In *Metcalf* the applicant did not protest the delay until after the award was made; this Applicant protested the delay on numerous occasions, even if the objections were phrased as requests to use updated appraisals. Finally, in *Metcalf* the award gave real property to each of the parties, so that the effect of a rising real estate market was distributed equally; in this case the Applicant alone suffered significant financial prejudice as a result of the delay.

[40] I do not accept the Respondent's argument that the principle from *Re Stephenville* should prevent me from setting the Award aside in this case. That decision dealt with an arbitration imposed on the parties by statute whereas here we are concerned with consensual arbitration. The principle applied by the Court to uphold the award in *Re Stephenville* comes from the Supreme Court of Canada's decision in *Air-Care Ltd. v. U.S.W.A.* (1974), 1 S.C.R. 2, in which

the Court stated that “the right of a party should not be lost or prejudiced as the result of dilatory conduct of the board over which it has no right or control”.

1. b) The re-opening of the Hearing.

[41] The Applicant submits that the Arbitrator had no authority to re-open the Hearing for the purpose of requesting additional evidence. In support of this argument, the Applicant relies on the specific wording of Article V which states that the Arbitrator:

[M]ay receive any evidence submitted to it by the parties that the Arbitrator believes to be relevant to the matters in controversy or that will enable the Arbitrator to arrive at a fair and proper decision
(Emphasis added)

[42] The Applicant contends that the wording supports the Arbitrator’s right to receive evidence but not to solicit or request it from the parties. The Applicant also points to the detailed procedure for the presentation of evidence as defined in the pre-arbitration hearings and agreed to in Article VII which requires evidence to be presented under oath or affirmation and allows for cross examination and rebuttal evidence. The procedure followed by the Arbitrator did not follow the rules in Article VII and the Applicant points to this as a further example of the Arbitrator failing to abide by the Agreement and as an additional ground for setting the Award aside.

[43] The Respondent’s position is that Article V clearly states that the Arbitrator is not bound by the strict rules of evidence and that he was permitted to:

[R]ule on any questions of law applying to the admission of evidence or determination of the issues in the same manner as a Justice of the Court of Queen’s Bench of Alberta

[44] Admittedly there is a tension between the specific procedure agreed to by the parties in Article VII and the general discretion granted to the Arbitrator in Article V. I note also that s. 21 of the *Act* gives discretion to arbitrators when determining the admissibility of evidence. Furthermore, if the Arbitrator did have powers akin to those of a Justice of the Court of Queen’s Bench, his request for the tracing would be analogous to a Justice exercising the discretion to order an accounting “at any time during the proceeding” as allowed for in Rule 418 of the *Alberta Rules of Court*.

[45] Other sets of rules and general practice governing consensual and commercial arbitration are also instructive on this point: The BCICAC’s Domestic Commercial Arbitration Rules contemplate that in exceptional circumstances a tribunal may reopen hearings at any time prior to the final award, and academic commentary also supports the proposition that after the hearing and prior to the award a tribunal has discretion to hear further evidence (J. Kenneth MacEwan &

Ludmila B. Herbst, *Commercial Arbitration in Canada*, (Aurora: Canada Law Book, 2006) at §9:30.120).

Decision

[46] In light of these factors, and the tendency of courts to allow arbitrators a considerable amount of discretion in determining the admissibility of evidence during arbitrations, I conclude that in the absence of a restriction in the Agreement, it was within the Arbitrator's powers to request additional evidence from the Respondent after the conclusion of the Hearing but before the delivery of the Award; however, the exercise of this discretion was subject to the limits of fairness, compliance with the rules of natural justice and any other constraints imposed by the Agreement.

[47] The Arbitrator was entitled to reopen the Hearing and request the additional evidence prior to making the Award however the specific facts in this case taint the execution of his decision to do so. The fifteen-month delay prior to the request for the evidence, that the evidence was accepted although unsworn and because (as referred to below) the general procedure followed by the Arbitrator in requesting and evaluating the evidence all violated the rules of natural justice.

1. c) The principles of natural justice.

[48] The parties' right to be protected from violations of the principles of natural justice is enshrined in s. 45(f) of the *Act* which speaks to bias, procedural irregularities and fairness. These principles were also specifically agreed to by the parties in Article V of the Agreement.

[49] There is no shortage of case law discussing and applying these principles and generally speaking they should be thought of as the right to a fair hearing, free from bias and free from procedures which confer relative advantages or disadvantages on one of the parties.

[50] In *Jager Industries Inc. v. Leduc No. 25 (County)* (1996), 67 A.C.W.S. (3d) 858 (Alta Q.B.) aff'd 1999 ABCA 169, Lesfrud J. considered an arbitrator's decision resulting from a consensual arbitration arising out of a commercial dispute. With respect to natural justice he made the following comment at para 69:

It is rather trite to say that "natural justice" requires tribunals, when conducting proceedings resulting in administrative decisions, to assure procedural fairness.

[51] The Applicant argues that justice delayed is justice denied and that the delay itself is enough for the Court to conclude that the principles of natural justice were violated. *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 at para. 146, but the argument does not stop there. The Applicant also contends that the new evidence was unfairly accepted by the Arbitrator because it was unsworn, and points to the Arbitrator unfairly conducting the Hearing once it had been reopened.

[52] In his January 25, 2003 letter to the parties, the Arbitrator both requested that the Applicant review the documentation in his capacity as an expert in the field of accounting and identified a requirement that the parties have subsequent meetings to discuss the exemptions and the areas of agreement and disagreement with respect to the new evidence. Nevertheless after receiving the analysis provided by the Applicant, he placed virtually no weight on it, accepted the Respondent's tracing evidence, and released his Award. All of this without conducting any further inquiries, hearings or discussions with the parties, as committed to in his letter of January 23, 2005. The Applicant points to these actions to demonstrate that he was denied fair procedure with respect to the admission and evaluation of that evidence.

[53] The Respondent counters by citing various cases in which additional or unsolicited evidence was obtained by arbitrators and seeks to show that the situations in which Courts have found a denial of natural justice do not apply here:

[54] In *Saskatchewan Oil & Gas v. Leach* (1980), 6 Sask. R. 4 (C.A.) the court held that a Board was entitled to request an appraisal report which was submitted to them after the close of the hearing but that natural justice required it to inform the parties of the use of the evidence in its determination.

[55] In *Kannata Highlands Limited v. Kannata Valley (Village)* (1987), 61 Sask R. 292 (C.A.) it was held to be an error with respect to the rules of natural justice for a board to obtain information from outside sources without one of the parties being aware of them doing so.

[56] In those cases, it submits that one or both of the parties remained unaware that the arbitrator had relied on the new evidence. That is not the case here.

Decision

[57] As discussed above, the Arbitrator most likely had the authority to request and accept the additional evidence with respect to the exemptions claimed by the Respondent, but that discretion was subject to the principles of natural justice. I have determined that those principles were violated, not by the request for the evidence itself, but by the Arbitrator's actions in obtaining the evidence.

[58] The first misstep by the Arbitrator was to wait until over fifteen after the conclusion of the Hearing to request the additional evidence, after the Applicant's first two letters protesting the delay and after having assured the parties in three separate letters spanning this time period that the Award was almost complete.

[59] The second misstep by the Arbitrator was the manner in which the additional evidence was accepted. Not only was the evidence he obtained absent any oath or affirmation as required by the Agreement, but he acknowledged that the Respondent had failed to establish the exemptions at the Hearing and provided specific details of what he had already and might further conclude if certain evidence was made available to him. In so doing he unfairly led the

Respondent by identifying exactly what information was to be produced in order to establish her claim.

[60] The third misstep comes from the Arbitrator's failure to give proper consideration to the Applicant's analysis of the additional evidence and to adhere to the process that he himself put in place when requesting the new evidence: In his January 25, 2004 letter, he acknowledged that:

It would be counter productive for me to undertake a full, detailed, examination of the documents because Mr. Flock is in a better position to do that examination and submit his conclusions. ... Needless to say, given the number of transfers among the brokerage firms, it is difficult to isolate what are allegedly exempt funds and trace them through. I will look forward to Mr. Flock's analysis in that regard.

[61] Having acknowledged that the Applicant was the more qualified party to advise on the accuracy and completeness of the tracing, he proceeded to accept the Respondent's submission despite the detailed analysis provided by the Applicant which pointed out that certain important receipts and records were missing. Furthermore, the Arbitrator denied the Applicant the procedural step which would have enabled him to present his analysis and make clear exactly what the differing positions of the parties were on the exemptions

Once Mr. Flock and Mr. Maitland have completed their review, perhaps it would be most expedient if we all met with a view to attempting to agree on the amount of the exempt payment which is traceable and the amount which should be allowed as an exemption. That may be too optimistic. We could at least narrow the areas of disagreement, hear final submissions, and proceed with a finalization of the Award.

_____ (Emphasis added)

[62] When the principles of natural justice are involved, the mere appearance of unfairness is sufficient to justify the court's supervision. In this case, the failure by the Arbitrator to properly consider and manage the impact of the delay and the manner in which the additional evidence was requested, accepted and considered goes beyond the point at which the process merely appears unfair to the Applicant. His actions resulted in actual prejudice to the financial position of the Applicant and a corresponding enrichment to the Respondent.

[63] The exact amount of this financial prejudice cannot be ascertained without a detailed analysis of the exemptions data and a re-assessment of all the property as of the appropriate date of valuation, none of which is before the Court. The exemptions issue alone may have cost the Applicant as much as \$197,730, and the increases in property values as of September 2004 were assessed by the Applicant to be as much as \$321,750. The Award was not issued until a further twenty-two months had passed.

2. Was the delay, the re-opening of the Hearing and the use of stale dated appraisals errors of law such that the Award can be varied under s. 44 of the *Act* or is a remedy under s. 45 more appropriate.

[64] The Applicant's alternative argument is that the delay, the failure to use updated property valuations in the face of that delay and the re-opening of the Hearing are all errors of law by the Arbitrator. He submits that because these actions by the Arbitrator were errors of law, it is also appropriate for this Court to vary the Award pursuant to the powers conferred on it by s. 44 of the *Act*.

[65] The variation requested is to wholly set aside the Arbitrator's decision with respect to exemptions and to order that updated property valuations be obtained and applied against the percentage entitlement of the property as determined by the Arbitrator in the Award. Admittedly, in the face of this drawn out divorce continuing over 13 years past the date of separation, this would appear to be the tidiest and quickest way of resolving the conflict. Unfortunately, it is impossible for me to grant this remedy based on the evidence before me.

[66] By virtue of s. 3 of the *Act*, the parties to an arbitration agreement cannot agree to vary or exclude certain provisions of the Act, including s. 45. Further, the Agreement here limits appeals of the Award under s. 44 to questions of law.

[67] While I have no difficulty agreeing that, whenever an Arbitrator exceeds his mandate, he or she essentially makes an error of law, I do not find it appropriate to apply s. 44 of the *Act* to the failings of the Arbitrator in this case. It is my view that the existence of ss. 44 and 45 as separate and distinct provisions with differing remedies has two purposes. First, it indicates the Legislature's intent to limit the remedies for errors in the nature of the grounds listed in s. 45, whether those errors be characterized as errors of law, fact or mixed law and fact. Second, it indicates the Legislature's intent to limit this Court's ability to vary an award to those circumstances in which the error made by an arbitrator is not one listed in s. 45.

[68] In any event, even if I had found an error of law allowing me to vary the Award under s. 44, there is insufficient evidence before me to establish a connection between the alleged errors of law and the variations sought. I am told that no transcript of the Arbitration is available, nor did the parties introduce evidence or argument as to what date should be used to value the property, nor did they make it clear as to what instructions could or should be made with respect to the actual exemptions, other than the Applicant's request that they be set at zero. Accordingly, I am in no position to substitute my own findings for those of the Arbitrator. The most appropriate remedy here is under s. 45 of the *Act*.

[69] Briefly stated, the remedies available to a Court under s. 45 of the *Act* are to set the Award aside or to remit it to the Arbitrator with instructions. The Applicant has requested that, if the Award cannot be varied as requested, it should be set aside.

[70] I agree with the Applicant that this Court can have no confidence that the Arbitrator would respond to an order to remit the Award in any sort of reasonable time frame. Furthermore, there is some support for the proposition that when a Court has determined that the principles of natural justice have been violated after evidence has been heard and findings of credibility and fact have been made fair treatment of the parties can only be secured by conducting the hearing again before a new arbitrator. In these circumstances that is the only appropriate remedy.

[71] Costs of this application are to be borne by each party as although the Applicant has been successful the Arbitrator is clearly at fault here.

Heard on the 30th day of January and the 1st day of February, 2007.

Dated at the City of Calgary, Alberta this 14th day of May, 2007.

K.M. Horner
J.C.Q.B.A.

Appearances:

Glenda F. Graham, Q.C. of Macleod Dixon LLO
for the Applicant

Judy D. Burke of Demianschuk Milley Burke & Hoffinger LLP
for the Respondent