

Court of Queen's Bench of Alberta

Citation: Arnason v. Arnason, 2011 ABQB 393

Date: 20110628
Docket: 1001 07760
Registry: Calgary

In the Matter of the Arbitration Act of Alberta and in the matter of an Arbitration

Between:

Wendy Elizabeth Arnason

Applicant

- and -

Dwaine Gregory Arnason

Respondent

**Reasons for Judgment
of the
Honourable Madam Justice R.E. Nation**

1. Introduction

[1] Ms. Arnason filed an originating notice of motion and affidavit, requesting that the decision of Michael Porter (the Arbitrator), issued April 29, 2010 (the Arbitration Award), be set aside pursuant to s. 45 of the *Arbitration Act*, R.S.A. 2000, c. A-43 (the *Arbitration Act*) or alternatively, that she be given leave to appeal the award.

[2] On June 11, 2010, Justice Stevens appointed a case management Justice for this matter and stayed the Arbitration Award until further order of the Court. Case management meetings dealt with getting the actual record of the arbitration filed, establishing deadlines for written briefs and the scheduling of oral submissions, as Ms. Arnason is self represented and asked for the ability to express her position in writing as well as orally.

[3] The originating notice of motion filed by Ms. Arnason in this matter asks for the right to be granted leave to appeal the Arbitration Award, and to stay the decisions in that award pending appeal. Paragraphs 3 to 16 of that notice allege errors of fact, law, or mixed questions of fact and law, and in para. 17 set out two matters that were not addressed in the award that the applicant wants addressed: medical expenses in 2009 and the timeshare maintenance fee. She asks also that the Court consider whether the award may be set aside based on the allegation that the applicant was not given sufficient opportunity to present a case, or to reply to the respondent's case.

[4] A record reflecting the documents which were provided to the Arbitrator from the date the mediation/arbitration commenced until the decision was rendered has been agreed to and filed (the Record). It is comprised of three binders provided by the Arbitrator. In addition, by order granted on May 9, 2011, additional documents outlined in his letter of April 14, 2011 and tabs 1 through 42 attached to Ms. Arnason's letter of April 26, 2011 were added to this Record, as it was agreed between the parties that those additional documents were correspondence the Arbitrator either received or sent.

[5] In the written brief filed by Ms. Arnason in support of her application, she sets out that she is firstly asking for the award to be set aside pursuant to section 45(1)(f) of the *Arbitration Act* and alternatively that she be granted leave to appeal the final award pursuant to s. 44 (1) and (2) of the *Arbitration Act*.

[6] Mr. Arnason, the respondent, objects to any relief under s. 45, arguing that the applicant does not fit under any of the allowable reasons in the section that would allow the Court to set aside the award. In addition, the respondent argues this is not a case where leave should be given to allow the applicant to appeal on an error of law, as the threshold test for leave to be granted has not been met, nor has any error of law been made by the Arbitrator.

2. Issues

[7] The issues before the Court are as follows:

1. Should leave to appeal on a question of law be granted?
2. Is the applicant entitled to set aside the Arbitration Award pursuant to s. 45(1)(f) of the *Arbitration Act*?

3. The Law

[8] A general understanding of the background to the *Arbitration Act* is important. This *Act* establishes that the Courts are to have a limited role in the review of arbitration decisions. This background is discussed in some detail by Manderscheid, J. in *Fuhr v. Husky Oil Marketing*, 2010 ABQB 495, paras.: 48 to 57. Arbitration is recognized as a valid form of dispute resolution,

and in general is treated as something the parties have chosen for themselves, and to which they should be left, in the absence of a strong reason to the contrary. The ability to appeal is severely limited, unless the arbitration agreement itself provides for an appeal. The Court's ability to set aside an arbitration award is statutorily defined.

3.1. The Right to Appeal

[9] The *Arbitration Act* in s. 44 allows for an appeal from an arbitration award only in certain situations. Section 44(1) allows for an appeal to this Court on a question of law, on a question of fact or on a question of mixed law and fact, if the arbitration agreement so provides.

[10] The *Arbitration Act* provides in s. 44(2) that 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 only with leave of the court, which the court shall grant only if it is 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.

3.2. The Right to Set Aside an Arbitrator's Decision

[11] Section 45(1) of the *Arbitration Act* sets out specifically enumerated grounds on which a Court may set aside an arbitration award. The sub-section argued by the applicant is:

45(1)(f) That 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 the appointment of the arbitrator.

4. The Background Facts

[12] The parties, each represented by counsel, entered into a written agreement dated September 24, 2009 called Agreement to Mediate/Arbitrate (the Agreement). They agreed to retain Michael Porter to mediate a settlement of: (1) the support and maintenance of their children, (2) the possession, ownership and division of their matrimonial property, (3) spousal support and (4) costs. They agreed in clause 7 that if the mediation concluded with a provisional agreement, the mediator would prepare a mediation report outlining the provisional agreement, and provide it on a without prejudice basis. The parties agreed to review it with their counsel and acknowledged that it would not be binding until signed in a proper independent form. They also agreed in clause 13 that in the event no agreement was reached, then Michael Porter was appointed as sole Arbitrator. The Agreement provided that he was:

to decide by way of Final Decision all outstanding issues between them. The appointment as Arbitrator shall be under the *Arbitration Act of Alberta* and the Arbitrator shall be entitled to use all and any statements made by the parties and

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documents and material provided by them in the course of mediation, in arriving at his decision, despite the fact that such evidence may not have been obtained or given in accordance with the usual rules of evidence. The Award handed down to the parties shall be considered as a Final Award under the said *Arbitration Act*.

[13] Both parties filed voluminous material of the type that would be expected in this matrimonial dispute: tax returns, copies of credit card statements, bank records, house appraisals, debt information, and lists of assets and liabilities with back up documentation. Michael Porter held a two day mediation on September 24 and 25, 2009 which both parties attended with their counsel, during which positions were discussed and various spreadsheets were prepared.

[14] At the end of the meetings, the Arbitrator understood that a provisional agreement was reached which he outlined in a "draft of final award" set out in correspondence dated October 2, 2009 and sent to Mr. Wenngatz, counsel for Mr. Arnason and Mr. Ghert, counsel for Ms. Arnason. Mr. Wenngatz responded with a few changes, that were wording or minor adjustments to detail. Mr. Ghert responded by letter that Ms. Arnason did not want to proceed with the settlement. He outlined that she was distraught, she had some issues about disclosure and did not view this as a final contract. He indicated that Ms. Arnason, if she wished, was entitled to have the dispute arbitrated on its merits.

[15] Ms. Arnason wrote several e-mails (set out in the Record as tab 4 to 7 and 9 to 11, attached to the April 14 letter) which referenced her displeasure with the provisional agreement, and not only her specific concerns with certain terms, but also outlined her general emotional situation, her loss of self esteem, her concerns about her ability to work, and also her wish for more disclosure, largely relating to updating information to the fall 2009 time frame.

[16] The Arbitrator's letter of November 26, 2009 indicated that fundamentally the problem that arose was that Ms. Arnason did not feel that she had been afforded sufficient due process to accept and be bound by the terms set out in the "draft of award" circulated. He and both counsel discussed the options of how to proceed. They agreed that the best way to proceed would involve reopening the situation, providing some opportunity for further specific information to be requested by and provided to each side and then allowing for written briefs to be submitted. The Arbitrator would then make the final decision. Time lines were agreed to by the parties through their counsel.

[17] On December 1, 2009, Mr. Ghert advised that he would be ceasing the act for Ms. Arnason. Ms. Arnason by the December 2 deadline submitted her request for further information and changes. The request was responded to by Mr. Wenngatz on December 3. The December correspondence between Ms. Arnason and Mr. Wenngatz, and further production at that time is part of the Record. On December 16, 2009, Ms. Fox indicated she had been retained by Ms. Arnason. Ms. Fox requested clarification of some production.

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[18] On December 21, 2009, the Arbitrator directed that certain information be disclosed by Mr. Arnason before January 5, 2010. He denied some of Ms. Arnason's further requests for disclosure on the basis that they were irrelevant or unreasonable at that late stage, particularly for items or valuations after the September time frame for which no relevance was established. In addition, he extended various deadlines for submissions in light of the fact that Ms. Fox had been retained.

[19] On January 12, 2010, Ms. Fox wrote requesting further time for submissions, citing various reasons including a crash of Ms. Arnason's computer, and the passing of one of her close friends. This extension was opposed by Mr. Wennatz. In a letter of January 18, 2010, the Arbitrator outlined a telephone call that day with Mr. Wennatz and Ms. Fox where he confirmed all disclosure had taken place, and he extended the deadline to January 22 for Ms. Fox to file her written submissions, and to January 29 for Mr. Wennatz to do the same, and set February 5, 2010 as the date for any response by Ms. Fox.

[20] Ms. Fox filed her submissions within those time frames, Mr. Wennatz asked for an extension until February 12, which was granted. Ms. Arnason on January 30, 2010 provided communication to Mr. Wennatz and the Arbitrator, giving additional details of her thoughts, position, and her concerns. She attached various spreadsheets to the correspondence. Ms. Fox advised by letter of February 16 that Ms. Arnason was now representing herself. On February 25, Ms. Arnason sent a ten page fax: "to support her affidavit and brief". These documents, contained in the Record, outlined Ms. Arnason's thoughts after reviewing her counsel's brief, and provided details of her perceptions of issues arising out of the history of the marriage, as well as various spreadsheets.

[21] The final award was issued by Mr. Porter on April 29, 2010.

5. Should Leave to Appeal on a Question of Law be Granted?

5.1. What is a Question of Law?

[22] It is common ground that the agreement signed by the parties was an agreement to mediate, and if no agreement was reached and documented, to arbitrate, and it contained no clause that contemplated or allowed an appeal. Thus, no appeal is allowed by agreement. The only appeal allowed under s. 44(2) is restricted to questions of law. It is therefore necessary to outline what is a question of law, as opposed to a question of fact or mixed fact and law, for which there is no appeal. The cases of *Fuhr* at paras. 59 to 65 and *Metcalfe v. Metcalfe*, 2006 ABQB 798 at paras. 22 to 25 have considered this question in the context of an application for leave to appeal under s. 44 of the *Arbitration Act*.

[23] In summary form, an error of law is an incorrect statement of a legal standard or test. Also, the correct interpretation of the law must be used when applying the law to the facts, thus, the application of incorrect factors in applying the law to the facts is an error of law. Where there

is discretion in applying the law to the facts, the application of the discretion is a question of mixed fact and law, not a question of law. It is only if a wrong legal principle is used in the exercise of discretion, that an error of law arises.

5.2. The Errors of Law Raised by the Applicant

[24] Ms. Arnason in her written brief, filed May 4, 2011, complains of the following errors:

1. That in deciding the exemption on the RRSPs, and disallowing most of the exemptions claimed, the Arbitrator erred on the basis of a question of law and in questions of facts. The brief outlines that the Arbitrator pointed to insufficient evidence that the exemptions existed. The applicant's brief in discussing the error of law states that the Court of Appeal in the case of *Harrower* stands for the legal proposition that: "courts are usually quite generous with their willingness to trace exempt assets into subsequent property and the failure to trace at times appears to have a punitive aspect to it."
2. That incorrect numbers were used for the balances of the RRSPs in September 2009.
3. That the valuation of the matrimonial home was incorrect, it is suggested this is an error of a question of law and facts. Ms. Arnason feels that all the costs of maintenance, upkeep, property taxes, insurance and other expenses of the home should be deducted from the value of the home. Her brief indicates that: "Pursuant to the *Matrimonial Property Act* and case law on this issue, these costs should be considered and removed from the valuation of the property for the purposes of calculating the balancing payment".
4. That the time period for the equalization of the pension, from the date of the marriage in May of 1998 to September 2009 was incorrect. The Arbitrator eliminated the period of cohabitation prior to the marriage, stating that he felt each party's pensions during that time would have been about the same value. Ms. Arnason alleges this is not the correct decision pursuant to the *Matrimonial Property Act* and case law.
5. That the Arbitrator did not address the division of the Canada Pension Plan (CPP). CPP credits were not equalized, and Ms. Arnason states this results in an over evaluation of the assets going to Mr. Arnason.
6. That the Arbitrator erred in a question of law and in questions of fact, by using incorrect balances of the net assets. Ms. Arnason objects that the valuation date of September, 2009 was used in the award. She argues that during mediation, there had been an averaging of the value between April 2007, (the separation) and the

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date of the mediation (September 2009). She alleges that the Arbitrator made assumptions about the net assets when he did not have evidence. She alleges that: "In the final award, I do not feel the arbitrator considered the factors in S. 8 of the *Matrimonial Property Act* when dividing the balance of the assets equally."

7. That the Arbitrator made errors of questions of law and questions of fact in dealing with the income tax effect of spousal support.
8. That the Arbitrator made errors in questions of law and in questions of fact in the calculations and issues around future spousal support, not only in the duration of the time for which it was awarded but also as to the quantum. Ms. Arnason alleges that the decision is not consistent with the *Divorce Act* and case law on the subject. She states that the Arbitrator failed to apply the correct legal standard as stated in the *Divorce Act*.
9. That the Arbitrator did not take into account that the defendant stopped paying child support during the arbitration process. The error alleged is that the Arbitrator did not address that the spousal support he credited the respondent as paying from January to April, 2010 was never paid.
10. That the Arbitrator made an error in a question of law and in questions of fact regarding the assessment that Ms. Arnason pay occupational rent to Mr. Arnason. Ms. Arnason alleges that the Arbitrator's decision is not consistent with the *Matrimonial Property Act*, the *Divorce Act* and with case law on this subject. She states that the Arbitrator: "failed to apply the correct legal standard and tests as set out in case law on this issue. This type of cost is not generally ordered in the types of situations presented in the facts of our case."
11. That a cost assessment should not have been made against Ms. Arnason.
12. That the timeshare maintenance fee was not addressed by the Arbitrator, and this is an error in a question of law.

[25] In her oral presentation on May 26, 2011 Ms. Arnason was clear that she does not agree with many of the findings that the Arbitrator made, she is very unhappy with the process and the result.

5.3. Analysis of the Alleged Errors of Law

[26] I have set out the errors alleged by Ms. Arnason, as they firstly must be analyzed as to whether they truly raise issues of law. An appeal can only be advanced on a question of law. Even then, this Court can only grant leave for an appeal, where it is satisfied that the alleged error of law, if found, is of importance to the parties in the matters at stake that it justifies the appeal

and a determination of the question of law at issue will significantly affect the rights of the parties.

[27] So first I must decide which of the complaints brought forward by the applicant involve an issue of law. It is clear from looking at the brief and argument that although Ms. Arnason alleges errors of law for issues 2 (incorrect RRSP numbers), 3 (as it relates to the actual number chosen for the valuation of the home), 9 (stopping spousal support), 11 (the costs award) and 12 (that the timeshare was dealt with, but not the fees paid on it since 1998), these are not errors of law. If errors were shown, they would clearly be errors in findings of fact. The costs award results from an exercise of a discretion clearly granted to the Arbitrator.

[28] Much of Ms. Arnason's frustration expressed at the oral hearing related to findings of fact. For example, Mr. Arnason had presented two appraisals of the matrimonial home at the arbitration, one historical and one for September, 2009. Ms. Arnason had not provided a formal appraisal, but had presented detailed reasons why she felt the numbers in the appraisals were incorrect. She felt her detailed criticism of the appraisals should have been accepted by the Arbitrator, but he preferred the appraiser's opinion. This is clearly a finding of fact. Ms. Arnason's search for a detailed explanation on this finding is not something the Arbitrator is required to give. Nor is her wish to challenge this finding of fact something that is allowed by the *Arbitration Act*, in the circumstances of this case.

[29] Issue 5 (equalization of the CPP) is a right granted by federal legislation, *Canada Pension Plan*, R.S.C. 1985, C-8, s. 55.1 and the applicable regulations. The award on p. 19 specifically references the agreement of the parties to write to the CPP and ask that the relevant benefits be divided equally. The arbitrator simply indicated he saw no reason to change that arrangement. The effect of the legislation and regulations in relation to this marriage breakdown is that a request and various information must be provided to the Canada Pension Plan. It carries out an equalization. This Court or an Arbitrator has no ability to interfere with that split.

[30] Because Ms. Arnason is self represented, and may not be able to identify a specific error of law, I have reviewed the decision in some detail to see if there were any statements of the law that were incorrect or erroneous. As the Arbitrator did not outline the details of the law as it related to each matter where the applicant argues there is an error of law, I have reviewed the decision to see if in the application of the law, a wrong legal principle had been used, so it could be said there was a basis for an allegation of an error of law, and thus a question of law that was in issue. I will deal with each of the errors of law alleged by Ms. Arnason, that have not been dealt with summarily in paras. 27 to 29 above.

5.3.1 Issue 1

[31] The RRSP exemption question is largely a decision based on a finding of facts, from the evidence. Ms. Arnason referenced the Court of Appeal case of *Harrower v. Harrower* (which she cited as an Alaskan case but should have been cited as (1989), 21 R.F.L. (3d) 369.). She cited it

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for the proposition that courts are generous with their willingness to trace exempt assets and that a failure to trace has a punitive aspect.

[32] In fact, the *Harrower* case, and later cases such as *Roenish v. Roenish*, (1991), 32 R.F.L.(3d) 233 (Alta. C.A.) emphasize the need to provide evidence of tracing, and specifically discuss how exemptions may be lost when original property is cashed in, or money taken out of an exempt account. In addition, the Court of Appeal was explicit in the case of *Hughes v. Hughes*, 1998 A.B.C.A. 409 para. 32, that the finding that exempt property is or is not traceable to existing property is a question of fact.

[33] There is nothing in the application of exemptions in this case, that suggests that the Arbitrator did not understand the law, or made an error of law.

5.3.2 Issue 3

[34] Ms. Arnason, as well as citing dissatisfaction with the finding of fact in the valuation of the home, takes the position that it was an error of law not to credit her with various of the carrying costs of the home. She suggests that this was an error of law, as: "...pursuant to the *Matrimonial Property Act* and case law on this issue, these costs should be considered and removed from the valuation of the property for the purposes of calculating the balancing payment". The *Matrimonial Property Act*, R.S.A 2000, c. M-9 gives no such direction. How carrying costs such as these are treated is a matter of discretion. Case law has dealt with issues of property taxes, insurance and other expenses of a matrimonial home. They are very fact specific determinations, integrated with a consideration of the support being paid or assessed, who is in the home, and a myriad of considerations, which are discretionary, and not the subject of defined rules. It cannot be said here that the Arbitrator made an error of law in not deducting these costs.

5.3.3 Issue 4

[35] The elimination of an equalization of pensions for the period of cohabitation prior to the marriage is not an issue that falls under the *Matrimonial Property Act*, as Ms. Arnason suggests. Equitable principles (such as unjust enrichment) may be involved in distributing assets acquired during a period of cohabitation. The pleadings had not specifically raised those claims.

[36] The decision of the Arbitrator was based on the parties' discussion during the mediation part of the sessions, and his findings on the facts. He did not make any equalization order. The application of equitable principles to the pre-marriage period is a discretionary call by the decision maker, and here, not the subject of an error of law.

5.3.4 Issue 6

[37] It is alleged that the Arbitrator erred by interpreting the law to mean that the valuation date of property should be the date of the hearing in September 2009. Ms. Arnason in her oral

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argument expressed a great deal of frustration over the valuation date, in essence saying the date of September, 2009: "makes no sense to me". She did not understand why the award referenced some of the 2007 values, and looked at increases or decreases to 2009, and adjusted some debt numbers. She expressed concern that the valuations the Arbitrator chose for September 2009 were not correct.

[38] The choice of valuation date is not an error of law. In fact it is the correct law, case law is clear that the appropriate date for the valuation of property is the date of trial (or here, the mediation/hearing date). The values chosen for that date are all questions of fact.

[39] It is further alleged that the Arbitrator did not consider the factors in s. 8 of the *Matrimonial Property Act*, in dividing the assets equally. The Arbitrator never expressly outlined s. 8, or specifically how he came to his determination of a fifty percent sharing of divisible property. He has accepted this as the split, it appears based on discussions during the mediated meetings.

[40] The *Matrimonial Property Act* s. 7(4) provides that if the property is not exempt property, the Court shall distribute the property equally between the spouses, unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in s. 8. Here the Arbitrator chose the equal division. It would not usually be required for him to justify this position, unless he was deviating from the fifty percent division.

[41] It cannot be said, without some clear indication from the applicant why the division of property should not have been equal, that it was an error of law to apply the fifty percent designated by statute as the default and usual division.

5.3.5 Issue 7

[42] Ms. Arnason alleges that the Arbitrator erred in his understanding of the law of taxation. At p. 40, the Arbitrator went through calculations of spousal support for the years 2007 through 2009. These payments, had they been paid and received in the years for which they were assessed, would have been taxable to the recipient and deductible by the payor. That tax effect cannot be claimed retroactively in this case. Therefore, the Arbitrator used a thirty-three percent deduction to approximate the tax adjustment. It was clearly an approximation, to come to a net amount lump sum payment.

[43] This is a legally allowable adjustment when one must assess support for the past, and convert it to a lump sum amount. In her oral argument, the applicant emphasized that the Arbitrator had the tax returns for the relevant years, so he could have worked out the exact effect on each party. However, the issue is that a compromise between the two rates is generally necessary, as the exact tax effect to each party is impossible to replicate in the lump sum award. Courts often use approximate figures when assessing taxation effects. The assumptions made and the application of them to the facts of this case, do not show any wrong appreciation of the law,

or the application of a wrong principle. The rate picked is a question of fact based on the evidence available to the Arbitrator.

5.3.6 Issue 8

[44] Ms. Arnason argued that errors of law were made by the Arbitrator in deciding the quantum of spousal support and the period of time for which it should be payable. The Arbitrator acknowledged this was a highly contentious area, and was detailed in the names of cases and legislated principles that he considered. The Arbitrator at pp. 29 to 32 set out the law that applies to spousal support, based on the considerations set out in the *Divorce Act*, R.S.C., 1985, c. 3 (2nd. Supp.). There was no error in his statement of the law. He set out the range of support numbers under the spousal support guidelines, which are not legislated or mandatory, but often looked at as a guide to consider in applying the factors set out in the *Divorce Act*. He then applied the law to the facts as he found them.

[45] The applicant takes no specific issue with the Arbitrator's articulation of the law. She disagrees with the way the Arbitrator took the legal principles and applied them to the facts. There is nothing in the record or reasoning that indicates an error of law, or an incorrect legal principle was applied by the Arbitrator in coming to his decision.

5.3.7 Issue 10

[46] It was suggested that the Arbitrator made an error in understanding and applying the correct legal standards and tests as set out in the case law in relation to the issue of occupational rent. The applicant alleges that one fact in law that appears to consistently be linked with a denial of occupation rent is that the children are occupying the matrimonial home (no specific authority was provided by her for this statement).

[47] Nothing is said in the decision about the principles or the factors the law says are to be applied in deciding whether to assess occupational rent. It is a discretionary assessment, allowed when a court is looking at jointly held property in which one party lives, while the other seeks and pays for alternate accommodation, leaving the equity in the jointly held home for the use of the other party. It is a fact driven determination, depending on many factors, including: the use and costs of the property; the comparative living expenses of the parties; the other assets and debts of the couple; the income available to the parties (including support payments); their conduct around the retention or sale of the property; and their reasonableness in dealing with property management. There is no legal principle that it is not assessed if children are in the home, that is merely one consideration to be taken into account. Also, here, the children were in a shared parental arrangement for a period of the time under consideration by the Arbitrator.

[48] There is nothing to indicate an error of the law was made, or an incorrect legal principle was applied by the Arbitrator in coming to his decision on this issue.

5.4. Conclusion As To Questions or Errors of Law

[49] As a result of the above analysis, I am unable to say that there is an identifiable question of law in the complaints raised. The issues raised identify questions of fact or mixed law and fact. There is no question of law that arises to be considered on appeal, that is such that it would be important to the parties and the matters at stake, and the determination of that question of law would significantly affect the rights of the parties.

[50] The applicant is therefore denied leave to appeal the Arbitration Award.

6. Is the Applicant entitled to set aside the Arbitration Award pursuant to s. 45 (1)(f) of the *Arbitration Act*?

[51] Ms. Arnason asks that the Arbitration Award be set aside pursuant to s. 45(1)(f) of the *Arbitration Act*. She submits that she was treated manifestly unfairly and unequally and she was not given an opportunity to present her case nor to respond to Mr. Arnason's case.

[52] The applicant has raised issues around the signing of the Agreement, saying she was not properly advised about the Agreement or her rights. She has also expressed dissatisfaction with her representation at the mediation and in the written submissions of her counsel for the arbitration. The Agreement was signed by both Mr. and Mrs. Arnason who each had legal counsel. Although Ms. Arnason expressed concern about the quality of her counsel, and the legal advice in relation to signing the Agreement, that is a matter between herself and her counsel, it is not a matter that is before me in this application. The Agreement has to be considered at face value. This is not the forum to go behind the solicitor/client relationship.

[53] Ms. Arnason complains that not all spreadsheets or documents prepared by herself and given to counsel were given to the Arbitrator. Again these are matters between her and her counsel. Nothing on the face of the record indicates that the representation by counsel was deficient to the extent that a Court should be concerned about the process based on the conduct of counsel.

[54] Ms. Arnason's other complaints under s. 45 relate to the time frames and the detail of information provided and received and analyzed. She is dissatisfied with the timing of the production of information from Mr. Arnason, and feels she did not have time to respond to the valuation using September 2009 as the valuation date. In addition she raises the personal issues she was having after the "draft of award" was circulated. She also raises the issue of disclosure, the Arbitrator allowed her some but not all of the additional disclosure that she requested in the fall of 2009. Ms. Arnason complains that the Arbitrator did not give her all the time extensions which she requested.

[55] In oral argument on May 26, 2011, Ms. Arnason elaborated on her written brief. She raised the concern that the Arbitrator had not read all the material before him, and if he did, then

he should have given more explanation for his findings. She felt things should have been explained in more detail both in the mediation meetings and in the arbitration decision.

[56] The chronology of the events, including all the exchange of information and communication between the parties about disclosure, deadlines, and extensions is documented in the Record, and pertinent highlights are summarized in paras. 14 to 20 of this decision. This confirms that there was an exchange of information, followed by the September meetings to see if a mediated agreement could be achieved. Both parties at that mediation had a chance to present their positions and respond to the discussion. After the mediation, Ms. Arnason felt she was pressured to agree, and was displeased with what she saw as a lack of disclosure. The "draft of award" or provisional agreement was not confirmed. Correspondence was exchanged, and further deadlines and procedure was agreed by both counsel, with more disclosure occurring. All this was with the view to ultimate arbitration.

[57] The exchange of requests for information and information provided is clear from the Record. After the parties were clear they were headed to arbitration, specific disclosure was requested, and exchanged. Eventually, the Arbitrator made a direction as to what was to be disclosed by Mr. Arnason to counsel for Ms. Arnason by January 5, 2010. That direction (tab 15 of the Record) addressed the issue of September 2009 valuations, and statutory declarations, bank records, visa statements, and it stated that information after the September 2009 valuation date was not relevant.

[58] Some deadlines were relaxed, both to accommodate Ms. Fox and also Mr. Wenngatz. The Arbitrator clearly wanted to set firm deadlines to deal with the exchange of further information and briefs. The time that passed from the mediation meeting in September, to the end of submissions on February 25 was a period of some five months. Written arguments were filed by counsel for Ms. Arnason and counsel for Mr. Arnason. On January 30, and again on February 25, Ms. Arnason filed detailed briefs outlining her position and responding to the issues. The decision was rendered April 29, 2010.

[59] Matrimonial arbitration is often an emotionally charged and draining experience, as is matrimonial litigation. The test is to be sure that the information was received and considered, and that due process was provided. The test is not that the result is acceptable or satisfactory to each party. Nor does perfection have to be achieved, with every minutia of detail covered. Arbitration is picked by the parties with a view to having a quicker, private hearing, with a procedure tailored to their needs, which often does not require the detail, time and expense of a court proceeding.

[60] The legislature has provided a Court review to see that the treatment was not manifestly unfair or unequal, and that the party was given proper notice of the hearing and an opportunity to present their case and respond.

[61] In *Clarke v. Bean*, 2009 ABQB 755, Wachowich, C.J. had to consider if one side had the opportunity to present and respond to a case before the Arbitrator, in the context of s. 45(1)(f) of the *Arbitration Act*. In paras. 30 to 35, he confirmed that the Court must consider whether the parties received a fair hearing and participated in an arbitration process that was free from bias and free from procedure which conferred relative advantages or disadvantages to one of the parties. The rules of natural justice do apply to an arbitration. However, deference should be accorded to an arbitrator's decision about and choice of procedure, in absence of finding evidence of manifestly unfair or unequal treatment to either party as a result of that procedure.

[62] After reviewing the record, and the procedure adopted here, I do not find that there is reason to say that the applicant was treated manifestly unfairly or unequally. Not can it be said that she was not given an opportunity to present her case, or respond to the other party's case. Proper notice of the arbitration or the appointment of the arbitrator is not in issue here. Although Ms. Arnason wished to have been able to provide more detail, and to have had more time to respond to Mr. Arnason's written submissions, and she also requested more disclosure, the decisions on procedure made by the Arbitrator in conjunction with counsel do not in any way meet the level of being described as manifestly unfair or unequal treatment.

[63] As a result, the arbitration award is not set aside on the basis of section 45(1)(f) of the *Arbitration Act*.

7. Other Sections of the *Arbitration Act* Raised by Ms. Arnason

[64] Ms. Arnason in para. 51 through 57 of her brief asks for various sections of the *Arbitration Act* to be used as the basis for Court intervention in the Arbitration Award. These were sections: 6, 19, 21, 25, 32, 40 and 43. None of these are grounds to invoke Court intervention after an award is made, especially when an appeal and an application under sections 44 and 45 are in issue.

[65] Specifically, s. 6 directs that a Court may not intervene except for purposes as provided by the *Act* to assist the process, to ensure the arbitration is carried on in accordance with the agreement, to prevent manifestly unfair or unequal treatment and to enforce awards. Sections 19, 21, and 25 are procedural. Section 32 deals with conflict of laws. Section 40 deals with amplification of reasons. None of these are a basis to ask the court to intervene after an arbitration award has been delivered, outside of or in addition to the provisions of sections 44 or 45.

[66] Section 43 may be relevant, it relates to corrections due to oversight. It was argued by Ms. Arnason that the Arbitrator deducted amounts for support said to be paid but in fact those amounts were not paid for January through April of 2009. Mathematical errors, or clear misunderstandings such as money that was credited but proven not to have been paid, are matters that can be dealt with, under the *Arbitration Act* section 43, either by the Arbitrator, or at the point of enforcement of the decision, if a judgement or orders are required by this Court.

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[67] At p. 24 of the Arbitration Award there was provision that if the respondent received a bonus for 2009 that was not included in his T4 for that year, then there should be adjustment to the numbers for child support. At p. 47, the Arbitrator directs confirmation about the Canada Revenue Agency issues (dealt with at para. e on p. 21 of the Arbitration Award). He reserved jurisdiction to deal with any dispute that arose once the information was available. These are two examples of items that were specifically reserved for further consideration, if necessary.

8. Conclusion

[68] The application of the applicant for leave to appeal the award of the Arbitrator in this matter is denied. The application by the applicant to set aside the decision of the Arbitrator is also dismissed.

[69] As a result, either party is at liberty to apply to this Court for any order that may be necessary to enforce the Arbitration Award.

[70] Either party is also at liberty to apply to the Court to determine their entitlement to the costs of this application.

Written submissions filed the 3rd day of May, 2011 and the 17th day May, 2011.
Heard on the 26th day of May, 2011.

Dated at the City of Calgary, Alberta this 28th day of June, 2011.

R.E. Nation
J.C.Q.B.A.

Appearances:

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