

JUDICIAL SCRUTINY OF DOMESTIC
COMMERCIAL ARBITRAL AWARDS

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New provincial legislation on domestic commercial arbitration has abolished the court's ability to set aside an arbitral award for "error of law on the face of the record". The new legislation substitutes a statutory leave to appeal on issues of law. The manner in which this leave to appeal mechanism will be applied by the courts will determine whether the courts are to have a substantial role in scrutinising the merits of commercial awards. There is strong appellate authority in England and British Columbia which holds that, in the interests of speed and finality, leave to appeal should not generally be granted unless the award is obviously wrong at law. Decisions of first instance in other provinces and the more activist approach which has recently been taken in the review of labour arbitral awards make it uncertain whether this restrictive approach will be applied in other provinces. If it is not, the liberal granting of leave to appeal will result in increased costs and delays and create a significant possibility that commercial arbitration will not fulfil the promise its advocates say it holds.

Une nouvelle législation sur l'arbitrage commercial de droit interne a aboli la capacité pour un tribunal d'écarter une décision arbitrale pour «une erreur de droit à la face même du dossier». La nouvelle législation y a substitué un mécanisme légal de permission d'appel sur des questions de droit. La manière d'appliquer ce mécanisme d'appel déterminera si les tribunaux joueront, ou pas, un rôle substantiel dans l'examen des décisions arbitrales quant au fond. En Angleterre et en Colombie Britannique, il existe de fortes autorités, au niveau des cours d'appel, selon lesquelles, au nom de la finalité de la loi et pour réduire les retards dans l'administration de la justice, la permission d'en appeler ne devrait généralement pas être accordée à moins que la décision ne soit manifestement erronée en droit. En raison de décisions de première instance rendues dans d'autres provinces ainsi que de l'approche plus interventionniste qu'on a observée

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I would like to thank the anonymous reviewer for her very helpful (if somewhat honest) criticisms of an earlier, lengthier version of this article.

récemment dans la révision judiciaire des sentences arbitrales en droit du travail, il n'est pas certain si l'approche restrictive sera suivie dans les autres provinces en ce qui concerne les décisions arbitrales. Si elle ne l'est pas et que les tribunaux accordent libéralement la permission d'en appeler, cela entraînera une augmentation des coûts et des délais; de plus, cela créera la possibilité très réelle que l'arbitrage commercial ne soit pas à la hauteur des promesses de ses défenseurs.

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I. Introduction

Lawyers today are urged to "arbitrate not litigate". We are told that by clients, by academics, by fellow practitioners, and even by the courts. We are told that the litigation system is too costly, too inefficient, too inexpert, too structured and too tardy to meet the needs of parties to commercial disputes today. We are told that arbitration is the solution to, or at least an improvement upon, the delays and costs occasioned by the regular court system. The blossoming of arbitration in international commercial disputes is pointed to as the path to be followed domestically. Arbitration is said to be a kinder, gentler alternative to litigation.

Although much has been written about the merits of commercial arbitration and its stated advantages over litigation, the Canadian literature has been more discursive than practice-oriented in nature. Only time will tell whether the brave new world which arbitration is said to offer will be realized. However, whatever the relative merits of arbitration versus litigation, there is little doubt that arbitration is being increasingly resorted to today in commercial disputes. It is not too soon to consider some of the nuts and bolts of the new style domestic arbitration legislation. Already there is a large and growing body of case law. This article addresses one nut and bolt issue: the extent to which the courts under the new-style domestic commercial arbitration legislation will interfere with the merits of an arbitral award.

¹ Arbitration Act, S.O. 1991, c. 17 (the "Ontario Act").

² Commercial Arbitration Act, S.B.C. 1986, c. 3 as am., (the "British Columbia Act").

As at the time of writing, four common law provinces, Ontario,¹ British Columbia,² Alberta³ and Saskatchewan⁴ have enacted new domestic arbitration legislation. For ease of analysis, primary reference in the body of the article will be made to the *Ontario Act*, with reference as needed to the other acts.⁵ The extent to which the courts will interfere with commercial arbitral awards involves fundamental questions as to the proper role of courts in the arbitral process and the extent to which the arbitral process is to be encouraged by the courts. If one is to judge by the volume of jurisprudence relating to the proper scope of review of labour arbitral awards it is an issue which, if not settled at the outset, may be expected to keep lawyers and the courts busy for years. In order to understand the issue fully some examination must be made of the pre-existing law and the framework of the *Ontario Act*.

II. The Old Act

Prior to the passage of the *Ontario Act*, the legislative and judicial climate in Ontario was not hospitable to the arbitration of domestic commercial disputes. In fact, the law was hopelessly outdated. The applicable statute, the *Arbitrations Act*⁶ (the "*old Act*") was modelled on an 1889 English statute⁷ and did not take into account changes in commercial realities or in dispute resolution over the last one hundred years. The *old Act* and the case law arising out of it, its English ancestor and its provincial cousins, created opportunities both for judicial intervention in the arbitration process and for parties to avoid arbitration by resorting to litigation. A party to an arbitration agreement had little difficulty in being obstructive. It could launch preemptive litigation in the courts and seek to derail the arbitration on a number of preliminary bases.⁸ Although courts often paid lip service to the principle that a party seeking to avoid arbitration had

³ *Arbitration Act*, R.S.A. 1990, c. A-43.1 (the "*Alberta Act*").

⁴ *Arbitration Act*, S.S. 1992, c. A-24.1 (the "*Saskatchewan Act*").

⁵ The *Alberta Act* and the *Saskatchewan Act* are very similar to the *Ontario Act*. The acts arose out of joint consultations: W.H. Hurlburt, "New Legislation for Domestic Arbitration" (1992) 21 Can. Bus. L.J. 1. The *British Columbia Act* is somewhat earlier and has a number of differences. The federal government has also passed the *Commercial Arbitration Act*, R.S.C. 1985, c. 34.6 (the "*Federal Act*") which applies to domestic arbitrations in which the federal government is a party, or to those which relate to maritime law. The *Federal Act* adopts, with modifications, the Model Law referred to at footnote 13, *infra* and applies it to domestic arbitrations within its scope. Québec has also modified its domestic arbitration regime. E.C. Brierly, "Québec's New (1986) Arbitration Law" (1987) 13 Can. Bus. L.J. 58. All of the provinces and the federal government have enacted separate legislation relating to international commercial arbitrations. Since the writing of this article New Brunswick has also proclaimed a new act: *Arbitration Act* S.N.B. 1992, c. A-10.1.

⁶ R.S.O. 1990, c.A.-24. Prior to 1986, the arbitration statutes of all the common law provinces were very similar to the *old Act*. The case law was also similar to the Ontario case law.

⁷ *Arbitrations Act* (1889), 52-53 Vict. c.49.

⁸ Parties seeking to avoid arbitration might argue that:

(i) the dispute in question was not covered by the arbitration agreement;

a heavy onus of showing that arbitration was unsuitable, as a practical matter courts frequently exercised their discretion to permit the court process to continue.

If a party was unsuccessful in avoiding arbitration entirely it could still be obstructive. Once the arbitration commenced it could raise legal issues and request that the arbitral tribunal state a case for the opinion of the court. If the tribunal declined, the party could commence an interlocutory application to the court asking it to take jurisdiction over that issue of law.⁹ The case law effectively compelled an arbitrator to state a case if requested by a party and if a serious legal question existed.¹⁰ Interlocutory applications by way of stated case might relate to purely procedural points having nothing to do with the merits of the dispute.¹¹ At the end of the day, a party could seek to set aside any award rendered on the merits. It could do so on the basis of some alleged flaw in the arbitral process or on the basis that an error of law on the face of the record had been made.¹² Whatever else arbitration was under the *old Act*, without considerable goodwill on all sides, it was rarely quick or inexpensive. A competent lawyer acting for an obstructive client had ample scope to exhibit their competence. Whatever arbitration's theoretical advantages over litigation, those advantages were often lost in the costs and delays occasioned by multiple court applications.

The 1970's and 1980's saw a worldwide movement toward the implementation of procedures which would make the international arbitration of commercial disputes more feasible. To a large extent, the international movement was driven by the increasing globalization of trade and the need for effective dispute resolution procedures in international disputes. These developments gave rise in Canada to the passage of provincial and federal legislation relating to international arbitrations. In Ontario and elsewhere in Canada, this process resulted in international arbitrations being entirely exempted from the provisions

(ii) the entire agreement was void or voidable due to the circumstances of its entry or performance;

(iii) the dispute involved claims against persons not parties to the arbitration agreement, and that it had a right to litigate such claims; or

(iv) the issue involved was primarily one of law and ought to be decided by the courts instead of being arbitrated.

⁹ Section 26 of the *old Act*.

¹⁰ *Hafdem Grieg & Co. A/S v. Sterling Coal*, [1973] 2 All E.R. 1073, [1978] 1 Q.B. 843 (C.A.). In *Anataios Compagnie Naviera S.A. v. Salen Reotenterns AB*, [1985] 1 A.C. 191 at 208 (H.L.) Lord Roskill noted that this practice made the "arbitral process even more protracted than the judicial" and that the "abuse was notorious".

¹¹ *Re Ramot Gil Development Corp. v. Precision Homes Corporation Inc.* (1979), 27 O.R. (2d) 199 (Div. Ct.) 15 C.P.C. 293, 106 D.L.R. (3d) 558. (Jurisdiction of arbitral tribunal to award security for costs).

¹² See discussion at Section III, below.

¹³ The Model Law is found as a schedule to the various provincial international commercial arbitration Acts, e.g. *Ontario International Commercial Arbitration Act*, R.S.O. 1990 c. I-9.

of the usual arbitration statutes and instead being made subject to a regime based upon the UNCITRAL Model Law (the "Model Law").¹³ The process of considering sensible rules for international arbitrations in turn caused a reconsideration in many provincial jurisdictions of their laws relating to purely domestic arbitrations.¹⁴

All of the new domestic arbitration legislation has as one of its primary goals the lessening of judicial involvement, or interference, in the arbitral process. The Ontario, Alberta and Saskatchewan acts are particularly strong in this regard. Under the *Ontario Act*, the courts are not to intervene in arbitrations save in the specific instances contemplated by the legislation.¹⁵ The *Ontario Act* substantially reduces the extent to which parties can avoid an agreement which they have made to arbitrate disputes.¹⁶ It limits the scope of judicial intervention during the ongoing arbitration process.¹⁷ It contains new provisions reducing the court's ability to interfere with an award. The *Ontario Act* as a whole makes it substantially less likely that an arbitration proceeding will get tangled up with, if not swallowed up in, the litigation system. The arbitral system is to be parallel and unconnected to the judicial system save for the points of contact expressly provided for in the *Ontario Act*.

All of the preliminary indications are that the courts are respecting the new domestic commercial arbitration legislation and interpreting it to minimize the scope of judicial intervention.¹⁸ Indeed, at least some of the case law in the area of review of the merits of awards as rendered may indicate that the courts have on occasion embraced the non-interventionist ideal to such an extent that they are using it to modify what might, by some, be considered to be the plain wording of the statutes.

¹⁴ Hurlburt, *supra* footnote 5, W.C. Graham, "Internationalization of Commercial Arbitration in Canada: A Preliminary Reaction" (1987-8) 13 C.B.L.J. 2. One also suspects that in these financially troubled times governments are not adverse to transferring the cost burden of commercial dispute resolution from the publicly financed court system to the parties.

¹⁵ *Ontario Act*, s.6. *British Columbia Act*, s.31.1., *Alberta Act*, s.6.

¹⁶ The new stay provisions are found in section 17 of the *Ontario Act*. The Alberta and Saskatchewan stay provisions are substantially the same as Ontario's while the British Columbia stay provisions are not as strong.

¹⁷ A point of law is only to be referred to the court for its determination with the consent of all parties or of the arbitrator, *Ontario Act*, s.8(2), *British Columbia Act*, s.33, *Alberta Act*, s.8(2). A party therefore has no independent ability to require such a determination. Any appeal from a decision on a stated case requires leave, *Ontario Act*, s.8(3) and *Alberta Act*, s.8(3). In British Columbia the appeal is of right under section 33(3).

¹⁸ Most of the jurisprudence to date has been in relation to stay applications: e.g. *Re Scotia Realty Ltd. v. Olympia & York S.P. Corporation* (1992), 9 O.R. (3d) 414 (Gen. Div.) 9 C.P.C. (3d) 339; *Ontario Hydro v. Denison Mines Limited*, [1992] O.J. No. 7948 (Gen. Div.) (QL); *Fitz-Andrews v. Meisner*, [1993] O.J. No 191 (Gen. Div.) (QL), *Bakorp Management Ltd. v. Pepsi-Cola Canada Limited*, [1994] O.J. No. 873 (Gen. Div.) (QL). *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113, 43 C.P.R. (3d) 390 (C.A.); *Roy v. Boyce* (1991), 57 B.C.L.R. (2d) 187 (S.C.); *Campbell v. Murphy* (1993), 15 O.R. (3d) 444 (Gen. Div.); *Alton Developments v. Millcroft Inn Ltd.* (1992), 17 C.P.C. (3d) 334, (Ont. Gen. Div.); *Pembina Resources v. Saskenergy Inc.*

III. Scrutiny of Domestic Arbitral Awards prior to 1991

Under the *old Act*, a party dissatisfied with or seeking to delay the implementation of a domestic arbitration award had two possible procedural remedies: an appeal or an application to set aside for "misconduct". The *old Act* contained a consensual appeal provision. An appeal on the merits existed if the parties by their agreement had determined that an appeal would lie.¹⁹

There was scant authority on the scope of appellate review of arbitral awards. At least two reasons contributed to this. First, the *old Act* was unusual in allowing appeals. The English Act and those of most other provinces did not.²⁰ Second, as a practical matter, it may be that most arbitration agreements did not contain an express provision allowing appeals. What authority there was on the scope of appellate review of arbitration awards was old and often involved awards under specific statutes whose wording differed from that of the *old Act*. However, to the extent a settled rule may be said to have existed, the rule was that an appeal from an arbitration award would be dealt with on the same basis as a judgment of a lower court.²¹ As such, there would be a general reluctance on appeal to overturn findings of fact although an appellate court would feel free to substitute its opinion if it felt that an arbitral tribunal had erred on a point of law.

In recent years, there has been a tendency for courts on statutory appeals from administrative bodies, to treat the decisions of those bodies in some instances, with some greater deference than is typically shown in the litigation system. The cases originally arose in the context of not second-guessing a specialized

(1993), 7 Alta. L.R. (3d) 153, [1993] 3 W.W.R. 549, 14 C.P.C. (3d) 146 (Alta. C.A.). Note, however, *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131, 98 D.L.R. (4th) 509, 13 C.P.C. (3d) 72, 8 B.L.R. (2d) 294 (Gen. Div.) (stay of litigation refused as, *inter alia*, oppression remedy sought and arbitration clause as drafted did not include such a dispute).

¹⁹ The inclusion in the agreement of an appeal right was an essential condition to the right of appeal under the *old Act*, *Yap v. Chutter* (1990) 40 C.L.R. 318, 39 O.A.C. 10 (C.A.). Indeed, in the absence of an express term to the contrary, an implied term in every arbitration agreement under Schedule "A" to the *old Act* was that the decision of the arbitration tribunal would be "final and binding" on the parties.

²⁰ Provincially, only the acts of Ontario, Manitoba and Prince Edward Island contained provisions allowing the parties to agree to an appeal right.

²¹ *Sparks v. C.N.R.*, [1934] 1 D.L.R. 798 (S.C.C.); *Toronto Suburban R. v. Everson* (1917) 54 S.C.R. 395, 34 D.L.R. 421 (S.C.C.); *Toronto (City) v. Toronto Railway*, [1925] A.C. 177, [1924] 4 D.L.R. 1001; *Re Baldasaro & MacGregor Ltd. and The Queen* (1974) 4 O.R. (2d) 557 (Div. Ct.); *Revenue Properties Co. v. Victoria University* (1993) 101 D.L.R. (4th) 172, 62 O.A.C. 351 (Div. Ct.). R.H. McLaren and E.E. Palmer, *The Law and Practice of Commercial Arbitration* (Toronto: Carswell, 1982) at 114 - 115 states that the "appellate court should deal with the award as it would with the judgment of a subordinate court." If a right of appeal had been agreed to it was required that the arbitral evidence be recorded so that a transcript in addition to the exhibits would be available on appeal: *old Act*, subsection 16(5).

tribunal's exercise of its discretion within its jurisdiction. However, the deference has extended to decisions on questions of law within a specialized statutory tribunal's jurisdiction²² and even arguably extended to the interpretation placed by such tribunals on their constituent legislation.²³ The deference shown in some of the cases on appeal approaches that shown by courts on judicial review²⁴ and in some cases it is stated that an error of law must be unreasonable before it will be reversed on appeal. The question as to whether an Ontario court in considering an appeal of an arbitral award taken pursuant to the *old Act* would have been persuaded, by stretching an analogy, to impose a test of "unreasonableness" is moot. There are no reported cases over the last twenty years involving appeals from commercial arbitral awards under the *old Act* where the submission was made.

If the parties had not contractually agreed that there would be a right of appeal, section 12 of the *old Act* allowed an award to be set aside if the arbitral tribunal had "misconducted" itself. Misconduct included unfairness or impropriety in the arbitral process. However, it did not stop there. At least in Canada, it had a much wider connotation including the making of perfectly honest errors of fact or law which appeared in the award.²⁵ The jurisdiction to review for legal errors was generally interpreted allowing a court to review any error of law appearing on the face of the record.²⁶ As most commercial arbitrations involve an interpretation of a contract and as under the common law the proper interpretation of a contract is an issue of law, the practical scope of the jurisdiction to review was significant. However, even if the requirement of an error of law on the face of the record was met, an exception to the usual ability to review existed. There was no jurisdiction to review if a "specific legal question" had been submitted

²² E.g. *Bell Canada v. Canada* (CRTC), [1989] 1 S.C.R. 1722 at 1746, 60 D.L.R. (4th) 682, 97 N.R. 15.

²³ For a collection of authorities see the reasons of Iacobucci J. for the court in *Pezim v. B.C. (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, and the reasons of L'Heureux-Dubé J. in dissent in *Mossop v. Canadian Human Rights Commission*, [1993] 1 S.C.R. 554.

²⁴ In *Bell Canada v. Canada* (CRTC), *supra* footnote 22, at 1756 (S.C.R.) the deference on a statutory appeal was stated as follows "although the court has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise."

²⁵ *Tankos Yarmon Ltd. v. T.E. Eaton Company* (1982), 40 O.R. (2d) 498 (C.A.) leave to appeal to S.C.C. refused 47 N.R. 398; *Re Mijon Holdings Ltd. v. City of Edmonton* (1980), 109 D.L.R. (3d) 383 (Alta C.A.) 12 Alta. L.R. (2d) 88, 15 C.P.C. 5, 23 A.R. 215; *Re Bailey Construction Company and the Township of Etobicoke*, [1949] O.R. 352 at 359 (C.A.), [1949] 3 D.L.R. 68. In *Scotia Construction Co. Ltd. v. City of Halifax*, [1935] S.C.R. 124 at 129 followed in *City of St. John v. Irving Oil Co. Ltd.*, [1966] S.C.R. 581, 58 D.L.R. (2d) 404 "manifest" legal error was said to constitute misconduct.

²⁶ Exhibits at the arbitration hearing would be before the court on a motion to set aside: *Old Act*, section 29.

to the tribunal for its decision.²⁷ What amounted to the submission of a specific legal question was itself often the subject of debate.²⁸

There was a considerable body of law relating to the review of commercial arbitration awards for errors of law on the face of the record. The case law roughly paralleled, although it lagged, the jurisprudence in relation to labour awards. Like the law relating to labour awards, the cases were not easily reconciled and the test employed altered with changing judicial opinion as to the appropriateness of an activist judicial role. Historically, many cases held that the court had considerable latitude to substitute its view of the law for that of the arbitral tribunal save where a "precise legal question" had been submitted. Up until the early 1980's, the actual practice as followed by the courts was that their jurisdiction to review for errors of law on the face of the record was very similar to the appellate jurisdiction exercised by a provincial appellate court over a trial court's findings of law.²⁹

In the 1980's a more restrictive test with respect to the review of the merits of commercial awards gradually emerged. The prevailing view by the late 1980's was that a court under its power to set aside for misconduct would only interfere with a commercial arbitral award if the award was unreasonable or involved an interpretation that the words could not reasonably bear. As at the date of the promulgation of *Ontario Act*, the exact status of the test was somewhat in flux. It was unclear whether the test to be applied was primarily a function of the exact wording of the submission to arbitration³⁰ or whether it was based on a more general policy basis that the courts should respect the decision resulting from the process selected by the parties³¹ and that this respect should be given even in the

²⁷ *Canada Permanent Trust Company v. Orvette Investments Ltd.* (1975), 11 O.R. (2d) 752 (C.A.); *Re C.N.R. and C.P. Ltd.* (1978), 95 D.L.R. (3d) 242 (B.C.C.A.), aff'd without written reasons [1979] 2 S.C.R. 668; *Kelanton Government v. Duff Development Co. Ltd.*, [1923] A.C. 395 at 409.

²⁸ E.g. *Volvo Ltd. v. Int'l Union United Automobile, Aerospace & Agricultural Implement Workers of America, Local 720*, [1980], S.C.R. 245 where the court split on the issue and where Estey, J. called the distinction between the submission of a general question and a specific legal question a "tenuous and artificial" one.

²⁹ *Tankoos Yarmon Ltd. v. T. Eaton Co. Ltd.* *supra* footnote 25; *R.O.M. Construction Ltd. v. Electric Power Equipment Ltd.*, [1981] 4 W.W.R. 97, 121 D.L.R. (3d) 753, (Alta C.A.) leave to appeal refused (1981), 38 N.R. 39, 121 D.L.R. (3d) 753n. *McLaren and Palmer*, *supra* footnote 21 at 119.

³⁰ *Consumers Co-Operative Refineries v. Newgrade Energy Inc.* (1990), 46 B.L.R. 138 (Sask. Q.B.). (The submission to arbitration was signed after the dispute arose and contained a clause holding the award shall be "final and binding on both parties and shall not be subject of appeal or review by way of judicial review ..."), *Standard Life Assurance v. Parc — IX Ltd.* (1991), 3 O.R. (3d) 782 (Div. Ct.) 82 D.L.R. (4th) 121 (clause expressly stating decision "shall be final and binding"); *Brine Estate v. Robert Caines Ltd.* (1991), 86 D.L.R. (4th) 502 (Nfld. C.A.) aff'd (1990), 271 A.P.R. 242.

³¹ *Shalansky v. Regina Pasqua Hospital* [1983] 1 S.C.R. 303, at 307, Laskin C.J. — in the context of a labour arbitration but arguably referring to all consensual arbitrations; *Volvo Ltd. v. Int'l Union United Automobile, Aerospace & Agricultural Implement Workers of America, Local 720*, *supra* footnote 28.

absence of words having a privative effect. As the *old Act* in the absence of express words to the contrary implied a term that an award was "final and binding", it may be that these two bases for restrictive judicial intervention merged. Arguably, there was built-in wording akin to that of a privative clause unless the parties expressly excluded it.³²

Under the *old Act*, the courts also retained the power to set aside an award if it was made in excess of jurisdiction. There was little case law considering the scope of this power, perhaps because a jurisdictional error would almost inevitably involve an error of law on the face of the record. And there was little need prior to the 1980's to attempt to characterize such an error as jurisdictional as the courts were quite willing to correct errors of law, whether inside or outside jurisdiction, using the power to review for error of law on the face of the record.

IV. *The New Statutory Provisions*

A. *Overview*

The *Ontario Act* contains its own code dealing with the power of the courts to intervene with an award once rendered. This code, in turn, is linked to the statutory requirements contained in the *Act* related to the duties of the arbitral tribunal. An arbitral tribunal under the *Act* must resolve a dispute in accordance with law, including equity.³³ It must also decide in accordance with the arbitration agreement and the underlying contract, if any.³⁴ The question becomes to what extent the courts may supervise the compliance by arbitral tribunals with these statutory requirements. The extent to which the courts are to exercise supervisory jurisdictions over domestic arbitral tribunals is a policy

³² *Fort McMurray School District No. 2883 v. Fort McMurray Roman Catholic Separate School District No. 32* (1984) 53 A.R. 191, 9 D.L.R. (4th) 224 (Q.B.) (holding that the usual term implied by operation of statute that the award be "final and binding" required the courts to apply the "patently unreasonable" test). *Hope v. Co-Operators Insurance Year* (1986), 53 O.R. (2d) 208 (Div. Ct.); *Toronto Dominion Bank v. Trizec Properties* (1992), 34 A.C.W.S. (3d) 9 (Alta Q.B.); *Stardust Enterprises Ltd. v. Rubin's Realty Ltd.* (1992), 35 A.C.W.S. (3d) 503 (N.B.C.A.); W.H. Hurlburt, "Setting Aside Private Non-Labour Arbitration Awards for Errors of Law" (1986) 26 Alta. L.R. 345 criticizes this approach as being contrary to the then consistent body of jurisprudence allowing awards to be set aside for error of law on the face of the record.

³³ *Ontario Act*, s. 31, *British Columbia Act*, s. 23, *Alberta Act*, s.31. In Ontario, the parties may contract out of this requirement under section 3. It would follow that if the parties specifically agree an arbitral tribunal could decide a matter as an *amiable compositeur*. Contracting out of the law may also occur under the *Alberta Act* (ss. 3 and 31) and under the *British Columbia Act* (s.23) although in British Columbia the contracting out can only occur after the dispute has arisen.

³⁴ *Ontario Act*, s. 33, *Alberta Act* s. 33, no specific provision in *British Columbia Act*. In addition to this mandatory requirement the tribunal *may* take into account trade usage. Presumably, this refers to trade usages which are not so established and notorious as to be implied terms of the contract. If so, the application of these terms would be required by substantive contract law.

question. A wide supervisory jurisdiction may be favoured by those who regard the courts as the primary dispensers or protectors of justice as it will allow the courts to ensure the law is followed.³⁵ A narrow jurisdiction arguably will be more in conformity with the parties' own choice of arbitration as the mechanism for the resolution of their dispute. It will give greater recognition to the fact that arbitrators may be in as good or better position than a court to correctly decide the issues between the parties. Non-interference in arbitral awards will reduce overall legal costs and delays. There is a balance to be struck between timely, final decisions and the quest for absolute legal accuracy. The new domestic arbitration acts adopt a compromise position allowing for judicial intervention in certain limited, specified circumstances.

The *Ontario Act* has two distinct remedies for attacking an arbitral award. First, under section 45 the parties in their submission to arbitration may agree as to whether an appeal will or will not lie and, if there is to be an appeal, the grounds upon which an appeal may be made. The section also provides default rules, discussed below, in the event that the submission to arbitration contains no agreement with respect to the right to appeal. Secondly, under section 46 an award may be set aside on a number of specific grounds. The grounds largely deal with procedural improprieties relating to unfairness in the arbitration process or to factors which would have initially invalidated the arbitration. One of the grounds for setting aside an award may, on occasion, involve some consideration of the merits of the decision. The court may set aside an award if the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the arbitration agreement. There is therefore a check by way of review on certain aspects of the content of arbitral awards.

The sections in the *Ontario Act* dealing with the appeal or review of arbitral awards have as their predecessor a 1979 amendment to the *English Arbitration Act* (the "*English Act*"). They have as their cousins, the new acts in British Columbia, Alberta and Saskatchewan.³⁶ The ability of the parties to choose what appeal rights, if any, will lie from an award is consistent with the general provisions of the *Ontario Act* which allow parties to an arbitration agreement to expressly or by implication vary or exclude any provisions in the *Act*, with some limited exceptions.³⁷

In the event that the arbitration agreement is silent on the question of the right of appeal from an award, subsection 45(1) will allow an appeal on a question of

³⁵ *Hurlburt, supra* footnote 5 at 354.

³⁶ The *Federal Act* follows a different pattern from the provincial legislation. It parallels the Model Law and the various provincial international arbitration acts in that it does not allow any direct attack on the legal merits of an award.

³⁷ The Saskatchewan appeal sections are identical to Ontario's. Under section 44(3) of the *Alberta Act* the parties cannot contract out of the right to seek leave to appeal. However, an appeal may not be brought on a question of law which has been expressly referred to the arbitral tribunal for decision. In British Columbia, the parties can contract out of the right to seek leave to appeal, but only after the arbitration is commenced (s. 34). In all jurisdictions the parties can contract for an appeal as of right.

law with leave.³⁸ In order to grant leave, it will be necessary for a court to be satisfied that the pre-conditions outlined in subsection 45(1) have been met. The subsection reads:

- 45(1) If the arbitration agreement does not deal with appeals on questions of law, 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,
 - (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
 - (b) the determination of the question of law at issue will significantly affect the rights of the parties.

Although meeting the two pre-conditions is a requirement for the granting of leave under the section, it may be that the section still allows the court discretion to refuse leave even when the pre-conditions have been met. Indeed, the appellate case law from England and British Columbia has effectively imposed an additional pre-condition that leave will not be granted in most cases unless it can be shown that the arbitration tribunal made a patently unreasonable error of law. The imposition of this additional pre-condition is not found in the wording of the legislation but has resulted from an attempt by the courts to structure the exercise of judicial discretion in granting leave in light of policy considerations. It is at present uncertain the extent to which the English and British Columbia case law will be applied in Ontario, Alberta or Saskatchewan.

B. *Leave to Appeal*

(a) *The Nema Test*

It is inevitable that Ontario courts in considering the proper application of section 45 will be drawn into a consideration of the case law which has arisen in relation to a similarly worded provision incorporated into the *English Act*. In 1979, the *English Act* was amended to provide that the courts no longer had jurisdiction to set aside awards for errors of law on the face of the record. The amendment also effectively abolished the stated case procedure which had in the past been used to take many legal questions out of the hands of arbitrators and put them into the hands of the Court.³⁹ The amendment instead provided for an appeal with leave on questions of law. Under the 1979 English amendment, the court shall not grant leave unless it considers that having regard to all the circumstances, "the determination of the question of law concerned could

³⁸ The *Ontario Act* is silent as to the material which may properly be put before the court on a leave to appeal application. However, as the previous requirement that the error of law be on the "face of the record" has not been continued, it would appear any relevant material could be properly placed before the court. The material would include exhibits and transcripts of evidence.

³⁹ See text at footnote 10, *supra*. Previously, in 1975 the *English Act* had been amended to substantially alter its stay provisions.

substantially affect the rights of one or more of the parties to the arbitration agreement”.

The first decisions considering the English appeal provision read it as many might read it on first reading: that the amendment specified a pre-condition for granting leave and if that pre-condition was met leave should be granted. However, this interpretation was quickly and firmly scotched by the Court of Appeal and the House of Lords in *Pioneer Shipping Ltd. et al. v. B.T.P. Dioxide Ltd., (The Nema)*.⁴⁰ *The Nema* involved a run of the mill charter party dispute. The principle issues in dispute were the proper interpretation of the charter party agreement and whether the agreement had been frustrated. The issue between the parties was of no general importance to the industry as a whole. It was an unusual, “one-off”, contract. The parties needed an immediate resolution of the dispute: the ship involved could not be used until the dispute was resolved. A court injunction was obtained restraining use of the ship pending arbitration. The matter was referred to a London maritime arbitrator of “great experience”.⁴¹ It provided for a “final arbitrement”⁴² of the dispute. The arbitration was commenced, a one day hearing conducted, and the award rendered in a period which, from start to finish, lasted approximately forty-five days.

The losing party then sought leave to appeal which was granted. The grant of leave to appeal was itself upheld on appeal. The appeal then proceeded. It went through a number of levels. The arbitral award was initially reversed in the High Court. The Court of Appeal reversed again and restored the arbitral award. The House of Lords affirmed the Court of Appeal. In all, the court procedures took eight separate court appearances lasting approximately sixteen days spread out over twenty-two months. A simple, quick arbitration had been turned into anything but by the appeal procedures.

Technically, the leave issue was not before either the Court of Appeal or the House of Lords in the reported cases. However, both took an opportunity to consider whether leave ought to have been granted. On compelling facts, both held that it should not. It was held that the leave to appeal provision, while imposing one pre-condition before leave to appeal could be granted, did not affect the general discretionary nature of the granting of leave. Guidelines were laid down for the judicial exercise of that discretion. It was held that an analysis of the provisions of the *English Act*, including the abolition of the ability to judicially review for error of law on the face of the record and the restriction of the right to state a case on a point of law in the course of the arbitration, indicated a Parliamentary intention to substantially limit the extent of judicial intervention. This intention should be applied to limit intervention by way of granting leave to appeal on questions of law. The purpose of the leave to appeal provision was to allow a degree of certainty in the law by continuing the court’s ability to exercise some supervisory powers over the development of the law in general.

⁴⁰ [1980] 3 All E.R. 117 (C.A.), aff’d [1981] 2 All E.R. 1030 (H.L.).

⁴¹ *Ibid.* at 1034 (H.L.).

⁴² *Supra* footnote 40 at 121 (C.A.).

The use of the power was not to be extended beyond that. The courts were not to become a forum for the re-argument of individual disputes. To do so would be to perpetuate the notoriously unsatisfactory judicial intervention which had plagued arbitration previously. In general, leave to appeal from arbitral awards ought to be rarely granted. Satisfaction of the pre-condition in the English Act did not give rise to a right of appeal. The test was:

- i) If the question of law involved on the leave to appeal application was the construction of a peculiar or "one off" clause in a contract, leave would not normally be given unless it was apparent on the mere perusal of the award itself, without the benefit of adversarial argument, that the meaning ascribed to the clause by the arbitrator was obviously wrong;⁴³ and
- ii) In relation to standard form contracts where there was at least some potential for an award to have an effect beyond the immediate parties to the award, leave should not be granted unless the judge considered that a strong *prima facie* case had been made out that the arbitrator had been wrong in his construction.

Later English cases have consistently applied these tests. There has been a particular reluctance to have the courts second guess commercial arbitrators by engaging in detailed semantic and syntactical analysis of the words found in agreements.⁴⁴ The House of Lords has held that a leave to appeal application should take no more than fifteen minutes of oral argument, as to secure leave the error must be so obvious that it will be immediately apparent to the court on brief submissions.⁴⁵ There have been some slight clarifications as to the application of the test in different circumstances than those dealt with in *The Nema*, but as a whole the test has remained intact and been reinforced.⁴⁶ Although stated to be "guidelines"⁴⁷ for the granting of leave and not rigid rules, in the vast majority of cases *The Nema* rules provide an additional test which must be met by an

⁴³ In *The Anataios*, *supra* footnote 10, the test was said to be whether "the arbitrator is so obviously wrong as to preclude the possibility that he might be right." Again, emphasis was laid on the Parliamentary intention to promote speed and finality in arbitral awards.

⁴⁴ Indeed, a prevailing theme in the cases is that the characterization of the interpretation of a contract as a "question of law" is itself anomalous and had perhaps survived the reason for its initial characterization. In *The Anataios*, *supra* footnote 10, Lord Diplock stated the interpretation of a contract was "technically, though hardly commonsensically" classified as a question of law.

⁴⁵ *The Anataios*, *supra* footnote 10, followed in *Attorney General v. Technical Construction Co. Ltd.* (1985) L.R.C. (Comm) 622 (H.K.).

⁴⁶ The principal clarification is contained in *The Anataios*, *ibid.* (where there are conflicting court decisions on legal issues, leave should be granted. Conflicting *dicta* would not be sufficient for leave). In arbitrations which raise public issues of considerable importance such as the applicability of a public law or a widespread circumstance to a class of contracts the ability to grant leave may be somewhat wider: *Bulk Oil (Zig) A.G. v. Scin International Ltd.*, [1984] 1 All E.R. 386 (C.A.).

⁴⁷ *The Nema*, *supra* footnote 40 at 739, 740; *The Anataios*, *supra* footnote 10 at 200. *Acten Refinery Co. Ltd. v. Ugialan Management Ltd.*, [1987] Q.B. 650 (C.A.).

applicant seeking leave to appeal over and above the test specified in the statute. It may be that as a result it is now virtually impossible in England to obtain leave to appeal on a question of law.⁴⁸

The new provincial acts have many of the same features relied upon by the House of Lords in *The Nema*. They too, evidence an intention to substantially lessen the court's role in arbitration. Like England, the power to review for error of law on the face of the record has been abolished and the ability to state a case to the court effectively curtailed. However, there are two significant differences between the Canadian and English arbitral regimes and it is worthwhile to consider these differences before turning to the Canadian case law. The first difference of note is that the appeal provisions of the *English Act* apply to both international and domestic arbitrations. This dual application is somewhat of an anomaly. Many other sections of the *English Act* are exclusive to one type of arbitration or the other and the legislation generally recognizes a greater role for the court in domestic arbitrations.⁴⁹ A motivating factor behind the 1979 English amendment and *The Nema* was a concern that liberal rules for judicial intervention in international commercial arbitrations might well result in an eclipse of England as an attractive forum for international arbitrations.⁵⁰

The tendency in international arbitrations is to prohibit any court review of the legal merits of arbitral awards.⁵¹ *The Nema* guidelines restricting the right to appeal help achieve a consistency between the English approach to the review of international arbitral awards and that adopted internationally. That consistency assists England in remaining competitive as a forum for international arbitration. Ontario (and the other provinces) has already by its *International Commercial Arbitration Act* (the "*Ontario I.C.A.A.*")⁵² adopted the Model Law. It has abolished any review of the merits of international awards save for errors which result in the award going beyond the scope of the arbitration agreement. To the extent that the English decisions in interpreting the *English Act* may have been influenced by a desire to achieve a harmonization of English and international standards relating to the review of arbitral awards, that factor does not exist for an Ontario court in interpreting the proper scope of section 45 of the *Ontario Act*. The harmonisation with international practice is achieved by the incorporation in the *Ontario I.C.A.A.* of the Model Law, not by a restrictive interpretation of the leave to appeal section of the *Ontario Act*.

⁴⁸ Nappert, *The House of Lords on Security for Costs and ICC Arbitration* (1994) 73 Can. Bar Rev. 582, footnote 2.

⁴⁹ Graham, *supra* footnote 14 at 37.

⁵⁰ Craig, Park, Paulsson, *International Chamber of Commerce Arbitration* (1990, Oceana Publications Inc., New York) at 466 states that one estimate provided in the House of Lords debate on the passage of the 1979 amendments was that international arbitrations might be worth £500 million per year to the United Kingdom in "invisible exports". In *The Nema*, *supra* footnote 37 at 1037, Lord Diplock commented that the *English Act* contained several indications in favour of the finality of arbitral awards "*particularly in non-domestic arbitrations ...*"

⁵¹ Graham, *supra* footnote 14 at 13.

⁵² R.S.O. 1990 c.I-9.

The second point to be noted is that the great majority of the English decisions deal with maritime arbitration. Reference is made to arbitrators of "great experience" and the advantages accruing to arbitrators having specialized knowledge of the trade. The English courts have been influenced by the consideration that the expertise and specialization of English arbitrators in maritime cases results in the arbitrators being "just as likely to be right as a judge, perhaps more so."⁵³ The most recent trend in the Supreme Court of Canada in the context of the review of the decisions of statutory tribunals is said to be that one must take a "functional and pragmatic approach" in determining whether deference should be extended. One needs to look at a number of factors, including the institutional expertise of the tribunal, the extent to which the tribunal is involved in policy decisions and whether the tribunal is subject to review or appeal. On this test it has been recently held that a labour arbitrator's decision pursuant to a mandatory arbitration provision falls toward the lower end of the spectrum of those tribunals to which the court should defer.⁵⁴ This is particularly the case if the arbitrator is applying general common law concepts over which he or she has no exclusive or unique claim to expertise.⁵⁵ There is even less deference on appeals than there is on judicial review. In appeals, the deference does not apply to findings of law in which a board has no particular expertise⁵⁶ and the deference shown to "ad hoc" decision makers has been negligible.⁵⁷ A review standard approaching correctness is applied where the tribunal is not engaged in policy making, there is a statutory right of appeal and where the tribunal has no greater institutional expertise than the court.⁵⁸

Clearly, commercial arbitrators only decide issues on an *ad hoc* basis. They have no power to set policy or precedents. Further, the present reality is that commercial arbitration in Ontario has not reached the degree of specialization and institutional expertise apparently achieved in England in maritime arbitrations. Many, if not most, arbitrators are retired judges or practising

⁵³ *The Nema* (C.A.) *supra* footnote 40 at 124, Denning M.R. Further, the nature of maritime arbitrations appears to be such that the parties frequently need an immediate decision as they cannot get on with their business without a determination of their rights. *Natural Rumour Compania SA v. Lloyd — Libra Navegacao*, [1982] Com L.R. 4.

⁵⁴ *Dayco (Canada) Ltd. v. C.A.W.*, [1993] 2 S.C.R. 230.

⁵⁵ *Dayco (Canada) Ltd. v. C.A.W.* *supra* footnote 54 at 267 (S.C.R.). A detailed discussion of the jurisprudence in the area of labour arbitrations is outside the scope of this article. There is a school of thought which sees the recent Supreme Court of Canada decisions as reflecting a subconscious anti-union bias, e.g. B.E. Etherington, "Arbitration, Labour Boards and the Courts in the 1980's: Romance Meets Realism" (1989) 68 Can. Bar Rev. 405. If such a bias exists, it would presumably would not be a factor in the proper test for the review of commercial arbitrations.

⁵⁶ *Zurich Insurance v. Ontario (Human Rights Commission)* [1992] 2 S.C.R. 321.

⁵⁷ *Canada (Attorney General) v. Mossop*, *supra* footnote 23.

⁵⁸ *Pezim v. British Columbia (Superintendent of Brokers)*, *supra* footnote 23 at 244 (B.L.R.).

lawyers. Their abilities may vary.⁵⁹ Their expertise usually lies in the law. Parties presumably choose legal experts as arbitrators because they want the "legal" result even though the parties may not want all of the delays, formalities and costs associated with the court process. Most commercial arbitrations involve at their heart legal questions such as the interpretation of contracts. It is at least arguable that a court should not provide any more deference on leave to appeal to the reasons of a retired judge acting as an arbitrator than it would have provided on an appeal of a decision from that same individual before their retirement from the bench.⁶⁰ The most recent Supreme Court of Canada decisions in the review of labour arbitral awards may not afford significant deference to the expertise of labour arbitrators on contractual interpretation. Although acting individually on a case by case basis, labour arbitrators have managed to establish a separate and distinct body of jurisprudence. The mandatory arbitration provisions found in the various labour relations statutes have, for the most part, sealed the courts off from being centrally involved in the shaping of labour jurisprudence. If labour arbitrators, operating in an area separate and distinct from that of the Courts, are as a class to be afforded little deference by the courts on review, one might logically argue that commercial arbitrators deciding the same types of issues that trial judges decide every day, and potentially subject to appeal rather than to mere review, should not as a class be afforded any deference at all.

(b) *The Canadian Cases*

The first Canadian cases to consider the new domestic appeal provisions and *The Nema* guidelines were from British Columbia, as it was the first jurisdiction to pass new domestic arbitration legislation. The *British Columbia Act* has three alternate pre-conditions for the granting of leave to appeal on points of law. The first, section 31(2)(a), focuses on the importance of the arbitration to the parties. Under this subsection, the importance of the result of the arbitration to the parties must justify the court's intervention and it must be necessary that the determination of the point of law may prevent a "miscarriage of justice".⁶¹ The

⁵⁹ Similarly, the New Zealand Law Commission, *Report* (No. 20) on *Arbitration* at 87 noted "there was wide agreement that the legal and other experience of arbitrators was variable". Indeed it may be that in England arbitrators in many areas of the law are not as expert as those involved in maritime arbitration. See the strong criticisms of the application of *The Nema* test to construction arbitration in *Hudson's, Building and Engineering Contracts* (11th ed, London, Sweet & Maxwell, 1993) at xii, 1564-6, 1579 and 1702-5.

⁶⁰ Conversely, under the *Ontario Act* the appeal is to a single judge of the Ontario Court (General Division) rather than to a three person panel of the Divisional Court as it was under the *old Act*. D. Stockwood, *How the New Legislation Altered the Commercial Arbitration Process* (Toronto: Canadian Bar Assoc. Ontario, 1993) points out it may be odd to have an award of a retired judge of considerable commercial expertise go on appeal to a single judge who may have considerably less experience or background in commercial matters.

⁶¹ The phrase "miscarriage of justice" is an odd one in the context of a civil statute. It may carry some connotation of a legal determination which is not simply wrong but is

other two alternate pre-conditions adopt wider grounds for granting leave. Under 31(2)(b) and (c) leave may be granted if the point of law is of importance to some class or body of persons or is of general public importance.

The initial trial decisions considering the leave to appeal provisions held that *The Nema* guidelines for granting leave should be followed under the *British Columbia Act*. These decisions were endorsed by the British Columbia Court of Appeal in *Domtar Inc. v. Belkin Inc.*,⁶² a case involving a "one of a kind" contract. The Court of Appeal affirmed that a residuary discretion to refuse leave existed even if the pre-condition under section 31(2)(a) to the grant of leave had been met. In considering the proper scope of the residuary discretion the court wrote:

The advantage and disadvantages of the arbitration process are discussed in the 1982 "Report on Arbitration" at pp. 2-5. The advantages are supposed to be expertise, speed, privacy, finality and the maintenance of amicable relations. The disadvantages are said to be, roughly, that the advantages do not always work out in practice.

In any consideration of the residuary discretion we must start from the fact that the parties before the court have decided by mutual agreement to resolve their dispute by arbitration. They have agreed for a reason. Probably that reason is that they want one or more of the advantages that I have mentioned. Free and ready access to the courts on every point of law on which the arbitrator makes a decision will certainly do away with speed, privacy, finality and the maintenance of amicable relations.

After considering the statements of Lord Diplock in *The Nema*, the court continued:

In matters of substance the nature of the point of law that has been determined must guide the exercise of the residuary discretion on whether to grant leave. In cases where the disentitlement is avoided by compliance with cls. (b) or (c) the effect of the award or the point of law on people who were not parties to the arbitration will tend to dispel the advantages of arbitration, none of which accrue to non-parties. The function of the court to protect those who have not had an opportunity to protect themselves will tend to dictate that leave be granted.

The matter is otherwise where the disentitlement is avoided by compliance with cl. (a). Some of such cases will no doubt involve points of law other than the construction of a "one of a kind" clause in a "one of a kind" agreement. Those cases will raise individual issues for consideration. But where the point of law consists of the construction of a "one of a kind" clause in a "one of a kind" agreement I think that the question of leave is clearly and correctly dealt with by Lord Diplock in the *Pioneer Shipping* case.

If the decision of the arbitrator in such cases is so obviously wrong that he cannot have reached his decision on a matter of substance by a considered decision-making process, which is what the parties have contracted for, then leave should be granted. Otherwise, it should be refused."

unreasonably wrong. There are many decisions involving the interpretation of contracts with which one could disagree without characterizing such decisions as amounting to a "miscarriage of justice". However, none of the British Columbia cases, discussed below, pick up on this point and it has been ignored as a matter of statutory interpretation.

⁶²[1989] 1 W.W.R. 144 aff'd (1989) 62 D.L.R. (4th) 530, [1990] 2 W.W.R. 242 (C.A.).

In summary, the British Columbia Court of Appeal held that as the grant of leave was discretionary the court was under no obligation to grant leave simply because the statutory pre-conditions to grant had been met. In structuring its discretion, the court adopted *The Nema* guidelines for one-off contracts but indicated some willingness to adopt a more liberal rule in cases raising issues of more general importance having regard to the separate consideration given to such cases in the *British Columbia Act*.⁶³ The exercise of discretion in cases of wider importance was significantly influenced, although not dictated, by the specific provision of subsections 31(2)(b) and 31(2)(c).

As a matter of black letter wording, the leave to appeal provisions of the Ontario, Alberta and Saskatchewan Acts are linguistically closer to the English Act than to the British Columbia Act. To meet the pre-condition for leave, the matter must be of sufficient importance to the parties to justify an appeal and it is necessary that the determination of the question of law "will significantly" affect the rights of the parties. The English Act uses similar words "could substantially". The high degree of linguistic similarity would lead one to expect that all other things being equal it would be highly likely that the Ontario, Alberta and Saskatchewan courts would follow the House of Lords in imposing *The Nema* guidelines. The competition to this view would be that although the explicit wording of the leave to appeal sections are similar, *The Nema* decision amounts to an improper fettering of discretion. And that, in any event, it is not as appropriate in a Canadian context to extend deference to commercial arbitral awards given recent Canadian law in relation to review of labour arbitral awards and due to possible differences in the relative expertise of English and Canadian commercial arbitrators.⁶⁴

The relatively sparse case law in Ontario, Alberta and Saskatchewan has yet to fall into any pattern following *The Nema*. In some cases, leave has been granted on issues of law relating to "one-off" contracts with no consideration as to whether the decision involved was unreasonable.⁶⁵ The courts in those cases

⁶³ *Domtar Inc. v. Belkin Inc.*, *ibid.*, has since been followed in a number of other British Columbia cases: *Shaw Cable Systems v. David Black*, [1993] B.C.J. 1178 (C.A.) (QL); *R & P West 8th Ave v. Mariposa Stores Ltd. Partnership* (1990), 47 B.C.L.R. (2d) 354 (C.A.); *Sandbar Const. Ltd. v. Pacific Parkland Properties Inc.* (1992), 6 C.L.R. (2d) 248 rev'd on other grounds (1994) 23 C.P.C. (3d) 207 (B.C.C.A.); *Brewer v. ICBC* (1991), 59 B.C.L.R. (2d) 115, 4 C.C.L.I. (2d) 108. However, some cases still exhibit a tendency to second guess the correctness of the award: *Marathon Realty Co. v. McIntosh Centre Ltd.* (1994), 44 A.C.W.S. 203; *British Columbia Trade Development Corp. v. Royal Bank of Canada* (1994), 44 A.C.W.S. 1131; *Kovacs v. I.C.B.C.* (1994) 23 Admin. L.R. (2d) 142; *British Columbia v. MacMillan Bloedel* (1994) 47 A.C.W.S. 11. In *Sandbar Construction Ltd. v. Parkland*, *supra*, leave was granted by the Court of Appeals under section 31(2)(b) as the case involved the interpretation of a term in a standard form construction contract. It was stated: "its proper construction should be settled by the judges".

⁶⁴ Discussed at Section IV(b)(i) above.

⁶⁵ *Metropolitan Separate School Board v. Daniels Lakeshore Corp.* [1993] O.J. 2375; *Charles v. Saweway Gas & Fuels Limited* [1993] O.J. 833. No mention was made in those decisions of *The Nema* or *Re Domtar and Belkin* and it is possible the courts were not referred to them. In *Dascon Investments Ltd. v. 558167 Ontario Limited* [1993] O.J. 731, leave was granted without any consideration as to whether the award was unreasonable.

assume that if the pre-conditions are met, leave should be granted. The jurisdiction to grant leave has been exercised in order to allow the court to deal with possible individual errors in individual cases rather than to merely exercise a supervisory power over the development of the law in general. There has been no principled discussion of the framework of the new domestic legislation, of *The Nema* or the differences which may exist between the domestic provincial legislation and the statutory regime in England. Nor has there been any reference to the more aggressive approach recently advanced by the Supreme Court in the review of labour awards.

The present situation in Ontario, Alberta and Saskatchewan is virtually a clean slate. In the next few years a choice will have to be made whether to follow *The Nema* and *Domtar v. Belkin*. Are the courts to use the leave to appeal mechanism to permit the parsing of individual arbitral awards for possible errors of law or is their intervention to be limited to correcting serious errors which, if unremedied, may lead to a divergence between the broad principles of commercial law as applied by the courts and as applied by arbitrators? The answer to that question may depend upon the judiciary's assessment of the relative costs and benefits associated with the alternatives. There may be much to be said for the proposition that in Canada, as in England, the costs and delays associated with a liberal application of the leave to appeal rules will outweigh whatever benefit may result from securing judicial decisions on points of law. It may be questionable whether there is any solid basis for concluding that the courts, in fact, will do a better job on legal issues arising in commercial arbitrations than would arbitral bodies. It may be that in an era of increased specialization, the person voluntarily chosen by the parties to arbitrate their dispute is likely to have as much expertise as an individual judge chosen at random by a court administrator.

Even if the courts are more "expert" on legal issues it may be that the benefit of any additional expertise they could bring to bear on appeal would be more than offset by additional costs and delays. Moderately complex commercial arbitrations will usually involve many days of transcript and volumes of documents. The costs of an appeal may be significant. The delay to an appeal decision may be more than the delay to an arbitral award. Given the considerations of cost and delay it may be that even if the courts can lay claim to greater legal expertise the arbitration process as a whole would be well served by the application of *The Nema* guidelines or similar guidelines.⁶⁶ *The Nema* guidelines

However, the test in *The Nema* was then applied by the same judge as one basis for dismissing the appeal. In *Pachanga Energy Inc. v. Mobil Investments* [1994] 3 W.W.R. 352, (1993) 15 Alta. L.R. (3d) 31, 149 A.R. 75 (C.A.) a *Nema*-like test was employed, albeit arguably in an *obiter* context. It was held leave should not be granted unless the arbitrator was "clearly wrong". The *Nema* guidelines received a poor reception by courts in Australia, *Quantas Airways Ltd. v. Joseland* (1986) N.S.W.L.R. 327; *Leighton Contractors Ltd. v. Kirkpatrick Green Pty. Ltd.* [1992] 2 V.R. 505, until they were specifically written into the legislation. In *Leighton*, *The Nema* guidelines were referred to as "judicial legislation of a most objectionable kind".

⁶⁶ The Canadian cases have not yet considered the leave to appeal rules where the arbitral award involves a consideration of statute. *McLeod v. Egan* [1975] 1 S.C.R. 517,

will reduce the costs to individual litigants by limiting appeals and the time for argument of leave to appeal applications. There will also be a benefit to the court system. Application of the guidelines will reduce the strain on already crowded court dockets.

Whether *The Nema* test will be adopted is by no means clear. In the area of statutorily⁶⁷ mandated arbitration regimes the most recent authority will provide support for an activist approach in reviewing arbitral awards. Judges, if tempted by nice "neat" issues of law arising in commercial arbitrations may be enticed into accepting legal questions for judicial decision. There is already some evidence this is happening on a case to case basis. This tendency, if not checked soon, may lead to an inadvertent adoption of a practice of liberally granting leave without there being any analysis as to what the practice may entail for the arbitration system as a whole in terms of increased costs and delays and lessened overall utility.

Finally, whatever the leave to appeal test is to be, it is to be hoped that it will be firmly and conclusively decided in the next few years. There is no reason why there should be any need to continually review and revise the test as to when courts will interfere in commercial awards as has been done in the area of labour awards over the last 25 years. The issue is a narrow one and should not have to be debated anew by each and every litigant seeking leave to appeal.

(c) *What Constitutes Contracting Out?*

The ability to contract out of section 45 means that the Court will respect any agreement by the parties relating to their appeal rights. The contracting out may be express or by implication. The potential for dispute between parties as to whether there has been contracting is significant given that the *Ontario Act* applies to all arbitrations commenced after January, 1992. Many such arbitrations will involve agreements entered into prior to 1992 containing arbitration provisions or will be copied from precedents created prior to 1992. Such agreements will not have been drafted with a view to the specific provisions of the *Ontario Act*. It is possible that parties may be found to have inadvertently contracted out from any review of the legal merits of an arbitral award. Wording

would suggest the proper test would be one of correctness. Such an onerous test would render arbitration less attractive in disputes where stakes impact such as shareholder or consumer disputes. The desirability of applying *McLeod v. Egan* to private arbitration might well be questioned.

⁶⁷ The statutory nature of arbitration in labour disputes may be a ground for distinguishing *Dayco* and for holding that the courts should take a less interventionist approach in consensual commercial arbitrations. Commercial arbitration does not give rise to the same sort of quasi-constitutional questions which arise when one considers the role of an independent judiciary in supervising the decision making of inferior statutory tribunals. Depending on one's political views, government intervention by way of statutory tribunals may give rise to questions of the freedom of the subject from state interference. Consensual commercial arbitrations raise no such issues.

put in under one arbitral regime will be considered under another. A particular problem in this regard may be faced by parties who have entered into agreements which contain wording to the effect that the arbitration award will be "final and binding". In other contexts, that wording has historically been held to exclude all appeal rights,⁶⁸ although not excluding the right to seek judicial review. If the same interpretation is placed on such words under the *Ontario Act* they will amount to a contractual waiver of the right to seek leave to appeal - the only remedy now available to directly attack the legal correctness of an award.

To a considerable extent, the inclusion of the "final and binding" wording prior to the passage of the *Ontario Act* had no real effect: such a term, in any event, was implied under the *old Act* in the absence of it being expressly stated. Under the *Ontario Act*, a question will arise as to whether such an express provision amounts to the parties contracting out of any appeal remedy under section 45. The very thin case law under the *Ontario Act* is mixed. Some cases indicate such words will be construed as amounting to a contracting out of any right to seek leave to appeal on a point of law.⁶⁹ Others do not.⁷⁰

It may be questionable whether an exclusionary interpretation of "final and binding" wording is consistent with the reasonable expectations of the parties for pre-1992 agreements. It achieves a result that would not have been expected at the entry into the arbitration agreement. One way around the possible unfairness flowing from an exclusionary interpretation would be to apply by analogy cases holding that statutory finality provisions do not preclude a right of appeal where the appeal right is created after the enactment of the finality provision.⁷¹ This would insulate pre-1992 arbitration provisions containing "final and binding" wording from being held to amount to a waiver of appeal rights. Further, in the absence of specific and binding authority, one would think that under general principles the contracting out of a statutory right to seek leave

⁶⁸ *Fraser v. Fraserville*, [1917] 2 A.C. 187, 34 D.L.R. 211; *Confederation Coal & Coke Ltd. v. Birmingham* (1939) O.R. 157, [1939] 1 D.L.R. 420 (Ont. C.A.); *Yorkville North Development Ltd. v. North York* (1988) 64 O.R. (2d) 225; *Hi-Rise Structures Inc. v. Scarborough (City)* (1992), 10 O.R. (3d) 299 (C.A.).

⁶⁹ *Superior Propane Inc. v. Valley Propane (Ottawa) Limited* [1993] O.J. 442. (Where it may be that the "final and binding" provision was implied as a result of a course of dealings). *Bramalea Ltd. v. T. Eaton Co.* [1994] O.J. 38 (where this was held notwithstanding that the parties had reserved the right to state a question of law). The same result was reached in an Australian case under a similar statutory regime - *White Construction (NT) Pty Ltd. v. Mutton and Another* (1988), 57 N.T.R. 8 (Aust. Nor. Ter. S.C.). J.B. Casey, *International and Domestic Commercial Arbitration* (Scarborough, Ont.: Carswell, 1993) at 4-29, in a comment on the *Ontario Act*, states that "if the arbitration agreement says that it is final and binding, there is no appeal". A similar statement is made at 9-2.

⁷⁰ *Metropolitan Separate School Board v. Daniels Lakeshore Corp.*, *supra* footnote 65 (while the parties agreed that the arbitrator's decision would be final and binding there is no express or implied term that the right to appeal would be excluded).

⁷¹ *The Queen v. Bridge* (1890), 24 Q.B. 609; *Mayor of Westminster v. Garden Hotels Ltd.*, [1908] A.C. 142 (H.L.). The potential problem posed by the inadvertent contracting out in advance by "final and binding" wording in old agreements will not apply in British Columbia or Alberta given their different rules on contracting out of appeal rights.

to appeal would have to be clear and that ambiguous wording would not generally be sufficient to constitute a waiver of a statutory right. An ability to seek leave to appeal may, therefore, still exist even where a post-1992 arbitration agreement contains "final and binding" wording.

In addition to contracting out of appeal rights entirely, it may be possible to modify the scope of appellate review by providing a contractual privative clause. This issue would only be relevant if *The Nema* guidelines are not followed and if the parties, although not wishing to entirely exclude the possibility of court appeals, wish to restrict the circumstances where appeals can be taken to instances similar to that laid down in *The Nema*.⁷²

The ability to imply a term that appeal rights have been waived should be virtually non-existent. Not only would this result in the denial of a statutory right but it is hard to see that it would ever be "necessary" to imply such a term in order to give an arbitration agreement business efficacy.⁷³

C. *The Test on Consensual Appeal*

The parties are free to agree that an appeal will lie as of right from an award. In instances of prior agreement to appeal rights, the case for arguing that deference should be extended to the arbitral award is very weak. The jurisdictional mechanism for erecting *The Nema* barriers to the granting of leave to appeal is the inherently discretionary nature of the granting of leave and the ability of the courts to structure that discretion in the interests of the efficient administration of justice. An appeal taken pursuant to an agreement has no discretionary aspect to it. It is an appeal of right: a right created by the contract between the parties. The parties by that contract willingly embrace the costs and delays associated with appeals, presumably in return for the perceived greater legal expertise which a court will bring. In advance, the parties have contracted for supervision by way of full judicial appeal. There is no reason for the courts not to respect that choice. It is to be expected, therefore, that where a right of appeal has been contractually agreed the courts will treat the arbitration award in the same manner as an appellate court would treat a trial judgment.

The authority which exists on point supports this proposition and lays emphasis on the enforcement of the private contractual ordering of the parties.⁷⁴ If the parties agree to an appeal, the appeal will be a full appeal on the merits. The

⁷² 887574 *Ontario Inc. v. Pizza Pizza*, [1995] O.J. 936, raises the prospect that a contractual privative clause would be respected by the courts. This is consistent with previous authority discussed at footnotes 30 and 32, *supra*.

⁷³ The test set out in *C.P. Hotels Ltd. v. Bank of Montréal*, [1987] 1 S.C.R. 711, 77 N.R. 161, 41 C.C.L.J.1, (1987) 40 D.L.R. (4th) 385 (S.C.C.) at 423-4 and *Brixham Investments Ltd. v. Hansink*, (1971) 18 D.L.R. (3d) 553, [1971] 2 O.R. 589 (C.A.) at 592 for the implication of contractual terms.

⁷⁴ On the writer's research there are three cases: *Willick v. Willick*, (1994) 158 A.R. 52 (Q.B.); 887574 *Ontario Inc. v. Pizza Pizza Ltd.*, *supra* footnote 72, and *Petro-Lon Canada Limited v. Petrolon Distribution Inc.* (unreported decision of Ont. Ct. Gen. Div.,

Canadian authorities in addition to enforcing the agreement between the parties also discuss the standard of review on appeal in the context of general jurisprudence in the administrative law area and cases such as *Pezim*.⁷⁵ They hold that on the spectrum of review articulated in the administrative law cases, consensual appeals of private arbitral awards fall into the area of "correctness" as the appropriate standard of review. The authorities will no doubt be used (or mis-used) by counsel on leave to appeal applications who will use them for authority for the proposition that *The Nema* should not be followed on leave to appeal applications. It is suggested that the statements made in the cases involving appeals of arbitral awards as of right should be used cautiously by courts considering leave to appeal applications given the different circumstances in which such comments have been made. Caution in using the cases is particularly dictated as it is by no means apparent from the cases that the courts in the consensual appeal cases were referred to *The Nema*.⁷⁶ It is also worthy of note that although the cases involving consensual appeals agree that the review standard is one of correctness, they all uphold the awards of the arbitrators for the reasons given in the awards.⁷⁷

D. Judicial Review

(a) Statutory Review

In addition to the leave to appeal provisions, the *Ontario Act* in section 46 gives the Court a number of specified bases to set aside awards.⁷⁸ It allows the Court to set aside an award on the grounds that the award deals with a "dispute that the arbitration agreement does not cover or contains a decision on a matter which is beyond the scope of the arbitration agreement".⁷⁹ Such a check on the content of an award is no doubt needed. Arbitration is consensual. Parties only agree to the arbitration of the disputes submitted. A party should not be bound on

April 18, 1995). The last two cases involve clear agreements permitting either party to appeal.

⁷⁵ *Supra* footnote 23.

⁷⁶ The writer's firm was involved as counsel in *Petro-Lon*, footnote 74 *supra*. No reference was made to *The Nema* to the court as the respondent implicitly conceded that as the appeal right had been agreed to, the proper review standard was one of correctness. In *Petro-Lon* one of the parties was only willing to agree to arbitration provided there was an agreed appeal right.

⁷⁷ The two Ontario cases at footnote 74, *supra*, involved appeals from awards by the Hon. R.E. Holland, Q.C., a former trial judge with very considerable experience in commercial matters. It may be that although no institutional deference is to be extended to arbitral awards on consensual appeals, judges will on a case by case basis be influenced by the experience and reputation of the individual arbitrator rendering the award.

⁷⁸ The parties cannot contract out of section 46.

⁷⁹ *Ontario Act*, s. 46(1).3, *Alberta Act*, s.48(1)(c). The wording in British Columbia is different. In British Columbia a court may set aside an award if the tribunal "exceeds its powers" (s.30 and 1(c)). This power was applied in *De Mitri v. Plumtree* (1989) 63 D.L.R. (4th) 229, (1989) 44 B.L.R. 278 (B.C.C.A.).

issues on which it has not consented to be bound. However, to a Canadian lawyer familiar with cases such as *Metropolitan Life*,⁸⁰ the question naturally arises as to whether this power to review may be used in lieu of the appeal provisions of the *Ontario Act*. It is likely that if the Canadian case law follows *The Nema* relating to the criteria for leave to appeal, that litigants will have an incentive to attempt to characterize legal errors in reasoning as being jurisdictional in nature. The argument would presumably go along the lines that it is an implied term of every arbitration agreement that the rights of the parties are to be determined according to law,⁸¹ that a legal error results in this term being breached, the award not being in conformity with the arbitration agreement, and hence subject to review.

There are a number of factors which make such an argument unlikely of achieving success. First, the *Ontario Act* contains an appeal provision specifically dealing with questions of law and there is ample case law in the judicial review of statutory decisions for the proposition that a court will be hesitant to characterize an error of law as jurisdictional in nature if it is doubtfully so.⁸² Secondly, the wording of section 46 itself must be considered. Section 46 does not provide that awards are to be set aside for "jurisdictional" errors. It provides an award may be set aside if it deals with a dispute or matter that is not covered by or is beyond the scope of the arbitration agreement. It therefore focuses on the nature of the dispute dealt with and not the legal analysis used by the tribunal in resolving the dispute. On the plain wording of the section, it will be difficult to characterize errors in legal analysis as amounting to the dealing with a dispute or matters beyond the scope of the arbitration agreement.⁸³ Third, the wording is very similar to one of the few grounds of review of international arbitral awards in the provincial international arbitration statutes. Indeed, the wording in the *Ontario Act* was obviously inspired by the Model Law.⁸⁴ The Canadian case law dealing with the Model Law provisions indicates that the scope of

⁸⁰ *Metropolitan Life Insurance Co. v. International Union of Operating Engineers Local 796*, [1970] S.C.R. 425, applying *Anisminic Ltd. v. Foreign Compensation Comm.*, [1969] 2 A.C. 147 (H.L.).

⁸¹ *Namlooe etc, Vulcan v. A/S Ludwig Mowinckels Rederi* (1938), 43 Com. Cas 252 at 257 (H.L.) (it is an implied term of every arbitration agreement that the arbitrator must decide the dispute according to the existing law of contract), *Chandis v. Isbrandtsen — Moller Co. Inc.*, [1951] 1 K.B. 240 at 261-262 (C.A.); *Techno-Impex v. Gebr. Van Weelde Scheepvaartkothoor BV*, [1981] Q.B. 648 (C.A.); *President of India v. La Pintada Navagacion SA*, [1984] 2 All E.R. 733 (H.L.).

⁸² *C.U.P.E. Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227.

⁸³ In England it has been held that the courts have an inherent power to set aside an award made in excess of jurisdiction: *Mineral & Metals Trading Corp. v. Encounter Bay Shipping Co. Ltd.*, [1988] 1 Lloyd's Rep. 51; *Food Corporation of India v. Achilles Halcoussis*, [1988] 2 Lloyd's Rep. 56. It is doubtful whether this would be the case under the *Ontario Act*. The combination of section 6 and statutory review provisions which were obviously intended to be all inclusive leaves no room for inherent jurisdiction.

⁸⁴ The Model Law, Article 34(2)(iii).

review under this criterion is very narrow.⁸⁵ Fourth, to the extent foreign case law may be considered, the consistent approach in other common law jurisdictions is not to allow jurisdictional arguments to become a back-door substitute for appeal provisions. In England, it has been held that the power to review for jurisdictional errors should not be used to circumvent the statutory limitations placed on judicial review of the merits of decision by the statutory appeal provision and *The Nema* guidelines.⁸⁶ In the United States, the relevant statutes allow review where a tribunal has exceeded its powers. However, the case law makes it clear that this must go beyond and be different from a mere error of law. It is not even enough that an award be “clearly erroneous”. It must amount to some “manifest” disregard for the law.⁸⁷

(b) Common Law Judicial Review

The *English Act* specifically provides that the court will no longer have jurisdiction to set aside an award on the ground of error of law on the face of the record.⁸⁸ The *Ontario Act* has no such specific provision. It might be argued, therefore, that in addition to the statutory rights to seek leave to appeal a common law right to review for errors of law on the face of the record remains. Any such argument is specious. There is no doubt that the *Ontario Act* was intended to comprehensively define the procedures relating to domestic arbitrations. Section 6 specifically provides that the court is not to intervene save in accordance with the *Act*. The *Ontario Act* contains specific provisions relating to court review of awards. To resurrect the ghost of “error of law on the face of the record” would undermine the thrust of the legislation. Further, there is considerable doubt as to whether prior to the *Ontario Act* review for error of law on the face of the record was jurisdictionally grounded in a common law inherent jurisdiction or, instead, was statutorily based on the ability under the *old Act* to review for misconduct. If no common law inherent jurisdiction existed prior to 1991, it is impossible that it somehow sprang into life after 1991. Given the difficulties associated with trying to graft common law judicial review upon the *Ontario Act*, it is not surprising that in the one case in Ontario

⁸⁵ *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 50 B.C.L.R. (2d) 207 (C.A.) leave to appeal refused 50 B.C.L.R. (2d) xxviii.

⁸⁶ *Moran v. Lloyd's* [1983] Q.B. 542 at 550 (C.A.); *Bulk Oil (Zug) Ltd. v. Sun International Ltd.* (No. 2), [1984] 1 Lloyd's Rep. 531; *President of India v. Jadranska Slobonda Plovidba*, [1992] 2 Lloyd's Rep. 274 (Q.B.).

⁸⁷ *Wilco v. Swan*, 346 U.S. 436; *Saxix S.S. Co. v. Multifacs International Traders Inc.*, 375 F. 2d 577 at 582 (2d Cir. 1967); *Merrill Lynch v. Bobker*, 808 F. 2d 903 (2d Cir. 1986). J. Paulsson, “Means of Recourse Against Arbitral Awards Under U.S. Laws” (1989), J. Int. Arb. 101.

⁸⁸ *Arbitrations Act (U.K.)*, 1979, ss. 1(1). Wording having a similar effect is found in the *British Columbia Act*, s. 30(3) and s. 31.1(2)(b) as added by *Attorney-General Statute Amendment Act*, S.B.C. 1992, c.31, and in the *Federal Act*, s. 34(1).

where it has been argued,⁸⁹ the court categorically rejected the proposition that judicial review of merits by way of certiorari exists in addition to the rights, and statutory review. There is little doubt that this is an eminently sensible result and that there is every reason for it to be applied in the future.

V. Conclusion

The next few years will show whether the courts are able to avoid, in the area of the review of commercial arbitration awards, the jurisprudential morass which has bedeviled the review of labour awards over the last thirty years. That experience has been sufficiently time consuming and confusing to litigants, lawyers and judges that there may be a strong practical motivation to impose clear rules which severely restrict the scope of judicial intervention in arbitral awards. This practical impulse will find solid legal precedent in the House of Lords decision in *The Nema*. It will also find support in the changes to the arbitral regime effected by the new style domestic arbitration acts, although it must be conceded that a legislative intent to severely restrict appeal rights is not so much contained in the explicit wording of the appeal provisions as it is to be inferred from the changes which the acts as a whole have effected to the arbitration process.

However, it is today premature to say with anything approaching authority that the courts will stay away from second guessing questions of law raised in individual commercial arbitration awards. If clear restrictions, as in *the Nema*, on the discretion to grant leave are not imposed, individual judges faced with interesting legal questions raised in arbitrations may choose to decide those questions themselves. Some of the early cases have simply assumed that if the pre-conditions to leave to appeal under the appeal sections are met leave should be granted. If that case law continues the courts will have a substantial role in reviewing commercial arbitral awards for legal errors. It is uncertain whether their determination of legal issues will, on the whole, be any better than that of the tribunal chosen by the parties. Liberal application of the leave to appeal provision will increase costs and delays and create a significant possibility that commercial arbitration will not fulfil the promise that its advocates say it holds.

⁸⁹ *Superior Propane Inc. v. Valley Propane (Ottawa) Ltd.*, (1993) 4 W.D.C.P. (2d) 123. In *Willick v. Willick*, *supra* footnote 74, there may be a suggestion that this power continues to exist. Such a suggestion is rightly criticized in *Hurlburt, Case Comment*, (1994) 33 Alta. L.Rev. 178.