

# **In the Court of Appeal of Alberta**

**Citation: Schafer v Schafer, 2022 ABCA 358**

**Date:** 20221107  
**Docket:** 2201-0167AC;  
2201-0168AC  
**Registry:** Edmonton

**Between:**

**Glen Schafer**

Applicant/Respondent

- and -

**Gail Schafer**

Respondent/Applicant

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**Reasons for Decision of  
The Honourable Justice Dawn Pentelchuk**

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Applications for Permission to Appeal

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**I. Introduction**

[1] These applications arise out of arbitral proceedings in a family law dispute; specifically, a \$2,000 cost award granted against Mr Schafer who unsuccessfully challenged the arbitrator's jurisdiction to continue arbitrating parenting issues.

[2] Mr Schafer appealed the arbitrator's cost award to the Court of Queen's Bench, maintaining that he had an automatic right of appeal under the terms of the arbitration agreement. The matter was heard in morning chambers. Ms Schafer argued Mr Schafer needed permission to appeal and that his appeal should be struck because he was out of time to file the required application for permission to appeal. The chambers judge agreed and struck Mr Schafer's notice of appeal. Ms Schafer also argued that the chambers judge should award her solicitor and client costs as provided for in the arbitration agreement. The chambers judge declined to do so, and instead awarded Ms Schafer \$500 in costs.

[3] Mr Schafer now applies to a single judge of this Court for advice and direction on whether he requires permission to appeal the order of the chambers judge to this Court, and if permission is required, he seeks such permission. He has also filed an Appeal Record and the filing deadlines have been suspended pending the determination of this application. For her part, Ms Schafer seeks permission to appeal the chambers judge's cost award of \$500.

[4] The issues of whether Mr Schafer requires permission to appeal, and whether I should grant any required permission to appeal, engage the broader question of this Court's jurisdiction to hear the proposed appeals. This question depends, in turn, on the extent to which the *Arbitration Act*, RSA 2000, c A-43 [*Arbitration Act*] limits the broad jurisdiction of this Court as provided in the *Judicature Act*, RSA 2000, c J-2 [*Judicature Act*] and the *Alberta Rules of Court*, Alta Reg 124/2010 [*Rules of Court*].

[5] Arbitration appears to be increasingly favored as a means of resolving matrimonial disputes. While the quantum involved in the proposed appeals is nominal, the applications raise an important question of law regarding the scope of this Court's jurisdiction to hear appeals from the Court of Queen's Bench (now Court of King's Bench) in arbitral proceedings, for which the standard of review is correctness.

[6] While a single judge of this Court could opine on the issue, there is merit to having questions relating to an appellate court's jurisdiction to hear an appeal determined by a full panel, as occurs in Ontario: see *Singh v Heft*, 2022 ONCA 135 at para 7; *SB v JM*, 2020 ONCA 575 at

para 14; *Ontario (Provincial Police) v Assessment Direct Inc*, 2017 ONCA 986 at para 4; *Shinder v Shinder*, 2017 ONCA 822 at para 4; *RREF II BHB IV Portofino, LLC v Portofino Corporation*, 2015 ONCA 906 at para 6. This avoids the possibility of conflicting single judge decisions and continued uncertainty. Indeed, Ms Schafer is effectively asking that I dismiss Mr Schafer’s appeal on the basis that the Court of Appeal has no jurisdiction to hear it, an application that is reserved for a full panel of this Court: Rule 14.74(a); *Sun v Chartered Professional Accountants of Alberta*, 2019 ABCA 495; *Servus Credit Union Limited v Unruh*, 2021 ABCA 181 [*Unruh*].

[7] Accordingly, the parties are granted permission to appeal the question of whether this Court has jurisdiction to hear either or both of their appeals and the statutory authority for that jurisdiction. I am also prepared to grant permission to appeal the respective decisions of the chambers judge. This is of course conditional on the panel finding this Court has jurisdiction to hear those appeals.

## II. Background

[8] The parties were married, with one ten-year-old child, and are currently separated.

[9] In August 2019, the parties entered into an arbitration agreement to determine issues of parenting and decision-making, child support, spousal support, and property division.

[10] Following an interim award on parenting, Mr Schafer challenged the jurisdiction of the arbitrator to continue to act on issues of parenting. In September 2021, the arbitrator issued an award determining that she retained jurisdiction to address outstanding parenting issues. The arbitrator then issued a separate cost award in December 2021 arising from Mr Schafer’s jurisdictional challenge. Ms Schafer sought solicitor and client costs in the amount of \$4,885 while Mr Schafer argued no costs should be awarded as the agreement did not provide for costs from a jurisdictional challenge. The arbitrator exercised her discretion and awarded Ms Schafer \$2,000 in costs, noting that the parties had checked off “costs” as one of the substantive issues to be addressed through arbitration. She also referenced the broad discretion to award costs – including solicitor and client costs – afforded under ss 53(2) and (3) of the *Arbitration Act*.

## III. The Arbitration Agreement

[11] The arbitration agreement signed by the parties (with the benefit of counsel) provided for remedies as follows:

### 15. REMEDIES PURSUANT TO THE *ARBITRATION ACT*

15.1 Any Award may be subject to Remedies under the *Arbitration Act*: (choose either (a) or (b) or (c))

- (a) In accordance with subsection 44 and/or 45 of the *Arbitration Act*;

(b) A party may apply for Remedies under the *Arbitration Act* (choose one or more of the following)

- A question of law;
- A question of fact; or
- A question of mixed fact and law;

(c) The parties agree there will be no right of Remedies under the *Arbitration Act* from the Arbitrator's Award.

The parties chose 15.1(a) – remedies in accordance with subsection 44 and/or 45 of the *Arbitration Act*.

[12] The arbitration agreement also provided for costs as follows:

#### **18. COSTS OF ENFORCEMENT OF AWARD**

...

18.3 In the event either party seeks leave for Remedies or does apply for Remedies under Sections 44 and 45 of the *Arbitration Act* regarding the Arbitration Award or any resulting Order, the other party shall be entitled to their solicitor and client costs of any such appeal if the party seeking Remedies is unsuccessful for any reason.

18.4 For further clarity, the parties agree that an unsuccessful appellant is 100% responsible for the Respondent's solicitor/client costs of the Remedies Application.

[Emphasis added]

#### **IV. Decision of the Chambers Judge**

[13] In January 2022, Mr Schafer filed an Originating Notice of Appeal of the costs award to the Court of Queen's Bench. Since the parties had not checked any boxes under paragraph 15.1(b) of the arbitration agreement, the chambers judge concluded that s 44(2) of the *Arbitration Act* applied, limiting the right of appeal to questions of law for which permission to appeal is granted. The chambers judge struck the Originating Notice of Appeal as Mr Schafer had failed to bring his application for permission to appeal within the time limits specified under s 46(1) of the *Arbitration Act*.

[14] Ms Schafer requested solicitor and client costs for the application, as provided for in the arbitration agreement. The chambers judge declined to award Ms Schafer solicitor and client costs on the basis there was "some novelty" to the issue before her. She did not see "anything here

ousting the jurisdiction of the Court” and given the proposed appeal involved \$2,000, concluded it was excessive to award solicitor and client costs exceeding that amount.

## V. Jurisdiction of the Court of Appeal

### *Appeals under the Judicature Act and the Rules of Court*

[15] A right of appeal to the Court of Appeal is grounded in statute: *Unruh* at para 4 (“This Court is a statutory court ... It does not have inherent jurisdiction to hear appeals independently of legislation”). Broad jurisdiction to review decisions of the Court of Queen’s Bench is found in s 3(b) of the *Judicature Act*:

#### 3. The Court of Appeal

...

(b) has jurisdiction and power, subject to the Rules of Court, to hear and determine

- (i) all applications for new trials,
- (ii) all questions or issues of law,
- (iii) all questions or points in civil or criminal cases,
- (iv) all appeals or applications in the nature of appeals respecting a judgment, order or decision of

(A) a judge of the Court of Queen’s Bench...

This broad jurisdiction is confirmed by the *Rules of Court* in Rule 14.4(1), which reads:

*Except as otherwise provided*, an appeal lies to the Court of Appeal from the whole or any part of a decision of a Court of Queen’s Bench judge sitting in court or chambers, or the verdict or finding of a jury. [Emphasis added]

[16] Rule 14.5(1) sets out instances where permission to appeal to this Court is required. In particular, Rule 14.5(1)(e) requires permission to appeal from any decision as to costs only; Rule 14.5(1)(g) requires permission to appeal any decision in a matter involving \$25,000 or less. Ms Schafer therefore concedes that if this Court has jurisdiction to hear her appeal, she first requires permission to appeal. On the other hand, Mr Schafer’s proposed appeal depends on whether his appeal is characterized as an issue of contractual interpretation, or whether it is also an appeal as to costs only.

*Appeals Under the Arbitration Act*

[17] The next question is the extent to which the *Arbitration Act* circumscribes the jurisdiction vested in the Court of Appeal under s 3 of the *Judicature Act* and Rule 14.4 of the *Rules of Court*. There are three provisions in the *Arbitration Act* that provide for appeals to this Court: ss 8(3), 15(5) and 48.

[18] Section 8(3) codifies a right to appeal decisions of the Court of Queen’s Bench to the Court of Appeal, with permission of the Court of Appeal, though seemingly restricted to “any question of law that arises during the arbitration” that is determined by the Court of Queen’s Bench under s 8(2). Section 15(5) provides for appeals of a decision of the Court of Queen’s Bench regarding removal of an arbitrator, with permission from the Court of Appeal.

[19] Section 48 of the *Arbitration Act* provides that “[a]n appeal from the Court of Queen’s Bench decision under section 44, 45 or 47 may, with the permission of a justice of the Court of Appeal, be made to the Court of Appeal”. The only avenue for the parties to appeal an arbitration award to the Court of Queen’s Bench is under s 44:

(1) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

(2) 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, with the permission of the court, appeal an award to the court on a question of law.

(2.1) The court shall grant the permission referred to in subsection (2) 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.

(3) Notwithstanding subsections (1) and (2), a party may not appeal an award to the court on a question of law that the parties expressly referred to the arbitral tribunal for decision.

...

[20] In *719491 Alberta Inc v Canada Life Assurance Company*, 2021 ABCA 419, leave to appeal to SCC refused, 40069 (1 September 2022) [*719 Alberta Inc*], this Court recently confirmed

that s 48 of the *Arbitration Act* does *not* vest this Court with jurisdiction to hear an appeal from a refusal by the Court of Queen’s Bench to grant permission to appeal under s 44(2) of the *Arbitration Act*.

[21] The rationale for this holding is straightforward. The purpose of requiring parties to seek permission to appeal is to reduce frivolous appeals. However, if parties can appeal decisions refusing permission to appeal, they would also be able to appeal decisions granting permission to appeal. The result would be a multiplication of proceedings rather than a reduction in them: see *Sherwin-Williams Company v Walls Alive (Edmonton) Ltd*, 2003 ABCA 191 at para 12. This undermines the purpose of arbitral proceedings, which are “designed to produce finality of awards in an efficient and economical way and reduce judicial involvement to [a] minimum”: *Alberta Motor Association Insurance Company v Aspen Insurance UK Limited*, 2018 ABQB 207 at para 47, cited in *Esfahani v Samimi*, 2022 ABCA 178 [*Esfahani panel*] at para 15.

[22] One might draw the inference that if no appeal lies from a refusal to grant permission to appeal, no jurisdiction lies for appeals on ancillary or procedural matters arising from the arbitral proceedings. However, in *Esfahani v Samimi*, 2021 ABCA 290 [*Esfahani chambers*], a single judge of this Court granted permission to appeal on whether the process under s 44(2) of the *Arbitration Act* should be bifurcated, or whether permission to appeal and the appeal on the merits could be combined. It is not entirely clear the basis on which this Court determined its jurisdiction to hear the appeal. While this Court in *719 Alberta Inc* at paras 53-54 distinguished *Esfahani chambers*, some uncertainty exists on these jurisdictional questions.

[23] These decisions highlight the need for clarification of the scope of this Court’s jurisdiction to hear matters that are ancillary to the arbitral decision and to balance the need for reviewability (and consistency in the development of the law) with finality. Such clarification is best provided by a panel of this Court.

## VI. Applications for Permission to Appeal

[24] Since I am granting permission to the parties to argue the question of jurisdiction, I am prepared to grant permission to appeal the respective decisions of the chamber judge. As noted, this is conditional on the panel finding this Court has jurisdiction to hear the appeals.

[25] Without commenting on the merits of Mr Schafer’s proposed appeal, he argues that the arbitration agreement should be interpreted as providing him with a right of appeal on any question of law, question of fact, or question of mixed law and fact. If Mr Schafer’s appeal is characterized as a discrete issue of contractual interpretation, the nature of the contract is important. The parties referred to the arbitration agreement as “standard”, in which case its interpretation may be a question of law, as opposed to a question of mixed fact and law: *Ledcor Construction Ltd v Northbridge Indemnity Insurance Co*, 2016 SCC 37 [*Ledcor*] at para 4. The parties should be prepared to address the issue of whether the arbitration agreement is a standard form agreement as defined in *Ledcor* and, if necessary, make an application for fresh evidence on this issue.

[26] Assuming this form of arbitration agreement is ubiquitous in family law arbitrations, there is some merit to having this Court interpret its appeal provision.<sup>1</sup>

[27] Regarding Ms Schafer's proposed appeal, despite the fact costs are discretionary and attract a highly deferential standard of review and permission to appeal should be granted sparingly, I am satisfied she meets the test for permission to appeal: *Bun v Seng*, 2015 ABCA 165 at para 4.

## VII. Conclusion

[28] The parties are granted permission to appeal the question of whether this Court has jurisdiction to hear either or both appeals and the statutory authority for that jurisdiction. In the event a panel of this Court should hold that this Court does have jurisdiction, the parties are granted permission to appeal the respective decisions of the chambers judge. If this Court finds that it does not have jurisdiction, then both applications are denied.

[29] There will be no costs of these applications.

Application heard on August 25, 2022

Reasons filed at Edmonton, Alberta  
this 7th day of November, 2022



A handwritten signature in blue ink, appearing to be 'Pentelechuk', written over a horizontal line. Below the signature, the name 'Pentelechuk J.A.' is printed in black text.

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<sup>1</sup> This Court considered an identical remedies provision in *Esfahani panel* but in circumstances where the parties did not select any of the options.



**Appearances:**

L.M. Handfield  
for the Applicant/Respondent

A.J. Koeman  
for the Respondent/Applicant