

Opposing counsel agree that family law ADR a "Nightmare"

A rare and successful appeal from an arbitrator's decision in a family law case is also a cautionary tale, say lawyers for both sides who rue their matrimonial clients' "nightmare" experience with alternative dispute resolution.

With little jurisprudence to guide her because judicial reviews of family law arbitral decisions are few and far between, Alberta Court of Queen's Bench Justice Rosemary Nation of Calgary said she hoped her November judgement might "be instructive" for family law lawyers drafting future arbitration agreements.

Justice Nation identifies four errors of law made by the Calgary lawyer-arbitrator to whom Donald Metcalfe and Debra Metcalfe turned after six years of wrangling over child and spousal support and the property accumulated during their 20 year marriage.

Their four-page arbitration agreement restricted them to asking for curial review only of alleged errors of law (not of mixed law and fact) but didn't stipulate what the remedy for errors of law would be.

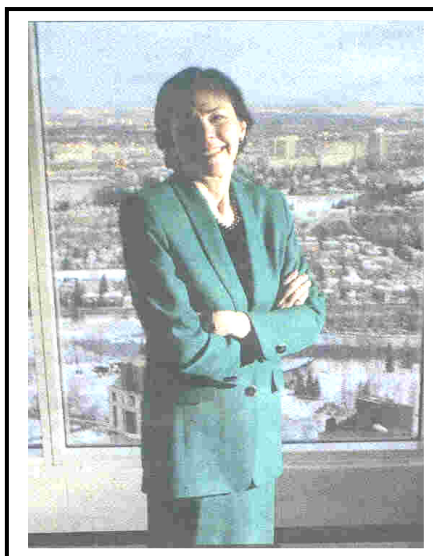
The Husband won his appeal since Justice Nation agreed that the arbitrator erred in law. But his victory seemed largely pyrrhic to the husband since the case was sent back to be re-determined by the same arbitrator, in whom the husband no longer has confidence. Matters were made worse by the fact that the arbitrator took four months to render his ruling, despite the arbitration agreement's requirement that a decision be released within 30 days. "It's been a nightmare," commented husband's Counsel Glenda Graham of Calgary's McLeod Dixon. "This has been horribly expensive and had none of the touted benefits of ADR. It wasn't fast. It wasn't expedient. It wasn't more economical. And we are still going on.

The Judge found four errors of law, and now we are being sent back to the same arbitrator to try to correct the matter in areas where there is significant discretion."

Echoed the wife's counsel, Laurie Allen of Calgary's Laurie Allen & Associates, "this particular case was a 'nightmare'. The primary reason counsel chose the arbitration process was that the evidence, established over a six-year separation, was extensive. It was hoped that the less formal evidentiary requirements of the arbitration process would make that hearing far shorter, and therefore far less expensive, than a trial. As it turns out, I suspect the ultimate cost of the process will exceed the cost of traditional litigation. The parties' arbitration agreement, whole more detailed than some, did not deal with remedies which turned out to be a serious problem, elaborated Graham. "One should think very carefully about remedies in the event the [arbitrator's] decision goes awry, she advised. "What this case shows is that lawyers, in

looking at ADR, had better be concerned about a number of factors: First of all, how complicated are the issues you are dealing with, and do you want to leave them in the lap of an arbitrator for a final decision? [Second] is the arbitrator going to deal with it in the timely manner?"

She also suggested it can be a false economy, in some cases, for the parties to agree not to create a transcript below, since a reviewing judge who later finds an error of law, as Justice Nation did, may be reluctant to step in to correct the error without such evidence before her.



Allen told *The Lawyers Weekly* "the most important thing for lawyers to take away from the Metcalfe decision is that they must clearly contemplate the parameters of appeal before drafting and entering into an arbitration agreement. If the decision is made to allow appeals (even on question of law only), lawyers may want the court to be in a position to correct errors on appeal.

Counsel could specifically agree that in the event of a successful appeal, the error must be remitted to the arbitrator. Alternatively, a transcript could be agreed to, with specific agreement that the court on appeal would correct any errors."

Allen noted "my enthusiasm for the arbitration process has been significantly dampened by the Metcalfe decision. I have come to the conclusion that I would loath to suggest arbitration, unless the issues require straight forward determinations of fact, or mixed law [and] fact.

Graham also said she "will be far more cautious" before opting for ADR in future. "We look at arbitration, at ADR, as always a better option than going to court [but] if it goes wrong, it can be a disaster. Based on this case, I can say that I am far less optimistic that we will get a timely and appropriate decision in an economical way. Next time arbitration comes up as a [possible] route to use, I will be thinking long and hard in making sure the process, if the clients want to use it, is as mistake-proof as possible."

Justice Nation rejected the husband's contention that the arbitrator lost jurisdiction due to his delay in rendering the decision. She held that the parties

effectively waived their right to complain since they did not object until after the decision was rendered. The judge also warned family law lawyers who do arbitration to be "realistic" about the time necessary to render a decision.

"Four months is not an inordinate amount of time to render a complex decision of this type," the judge explained.

"Having said that, I do want to be clear that lawyers who take on arbitrations have to be honest about their work commitments, and should only take on arbitration work with time limits which they can achieve. One of the main advantages touted for arbitration is to get a quick decision, faster than court. That advantage is often lost when the award is delayed.

Also one has to question whether 30 days was realistic here, with all the documentation and the complex issues involved, if the arbitrator was not in a position to clear his desk and work on it without interruption.

As to what should be done to remedy the arbitrator's mistakes, the husband urged the judge to set aside the arbitration award in its entirety (as though the arbitration never took place) thus leaving the parties with the option of setting the case down for trial, or taking another stab at ADR with someone else in the driver's seat.

The respondent wife argued for an end to the arduous dispute. She contended the arbitrator's award should therefore stand, with those elements set aside by the judge to either be varied by Justice Nation: "the parties, after years in the litigation process, chose a specific arbitrator, set up an arbitration agreement, and went to arbitration, consciously deciding that a record of the evidence would not be kept (for example, by way of transcript) and allowing for an appeal only on a question of law. When I consider that here three or four errors of law cannot be properly addressed without a good and detailed knowledge of evidence I find that the most appropriate remedy is that a copy of this decision, which identifies the errors of law, shall be provided to the arbitrator, each party shall provide a written submission to the arbitrator as to how each error should be considered and how it impacts the decision and the arbitrator shall provide a supplementary decision, reviewing the four portions of his decision with the guidance in this decision and issuing an amended decision with reasons."

Justice Nation held that the arbitrator erred in averaging the husband's income over three years - \$424,700 per annum - in order to assess retroactive child and spousal support. Instead the arbitrator should have used the husband's actual annual income amounts for those years, which are known. The arbitrator also erred in the way he dealt with dividing the s. 7 special expenses for the children between the parties, and in how he addressed the impact of a retroactive spousal support award on the matrimonial property division, she ruled.