OPPOSING VIEWS OF COURT "ASSISTANCE" TO ARBITRATION IN ALBERTA AND ONTARIO

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I. INTRODUCTION

The *Arbitration Act* (the "Act" or "Acts") in both Alberta and Ontario contains the following provision:

> **Court intervention limited**
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> **6** No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;
> (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
> (d) to enforce awards.[1]

Although courts in both provinces interpret the same language, recent decisions from their courts of appeal highlight a stark and critically important difference in the ways they interpret this section. The difference lies in whether courts see this provision as creating avenues for court intervention in itself, or as expressing an overall policy or benchmark that may be used to understand other provisions of the Acts.

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[1] Alberta *Arbitration Act*, RSA 2000, c A-43, s 6; Ontario *Arbitration Act*, SO 1991, c 17, s 6. The two provisions are identical except that the subparagraphs in the Alberta Act are labeled (a)-(d), while in the Ontario Act they are labeled 1-4.

In Alberta, section 6 has been interpreted to mean that a party may seek relief from a court— and the court may grant such relief—for any of the purposes set out in section 6, independently of any other section in the Act and without regard to any of the particular conditions or restrictions in those other sections. This was the case in *Sivitilli v PesoRama Inc*.[2]

In Ontario, section 6 has been interpreted differently, to mean that any relief sought or granted must be as provided under another provision of the Act, whether or not section 6 is cited. This reasoning can be seen in *Toronto Standard Condominium Corporation No. 2299 v Distillery SE Development Corp.*[3]

These two cases can be very simply summarized.

II. THE *SIVITILLI* DECISION

In *Sivitilli*, PesoRama initially sought to stay an arbitration. It attempted to do so under section 47(1)(b) of the Alberta Act, on the ground that the arbitration agreement was invalid. It also argued under section 6, on the ground that court intervention was necessary to prevent manifestly unfair or unequal treatment. The application was rejected on both grounds by the application judge. PesoRama initiated an appeal. It sought leave to appeal, as required by the Act in relation to a decision under section 47, but also argued that no leave to appeal was necessary with respect to the order under section 6, as the Act imposed no limitation on the right to appeal an order made under that section. Hawkes JA, the leave application judge in the Alberta Court of Appeal, conducted an extensive review of the *Alberta Rules of Court* and section 3(b)(iv)(A) of the *Judicature Act,* to determine what rights of appeal exist from an order made by a judge under a statutory provision that expresses neither a right of appeal nor a limitation on rights of appeal. He concluded that in such a case, there is an unconditional right of appeal. On

[2] 2024 ABCA 249 [*Sivitilli*].

[3] 2024 ONCA 712 [*Distillery*].

that basis, the Court found that PesoRama could appeal as of right from the order made by the judge under section 6.

The important point for the present discussion is that Justice Hawkes's decision assumes that there was an order made under section 6. Beginning from that premise, his analysis led directly to an entitlement to appeal that order. In coming to this conclusion, Justice Hawkes followed an earlier decision of the Alberta Court of Appeal, in *New Era Nutrition Inc. v Balance Bar Company*,[4] which held that a party may apply for a stay of arbitration under section 6, even though section 6 does not explicitly provide for stays.[5] In *New Era*, the Alberta Court of Appeal had cited legislative history in Alberta, which demonstrated that an earlier proposal to restrict court intervention under section 6 to other specific provisions in the Act had been rejected in favour of the current language, which lists what seem to be exceptions to the general rule of exclusion of court intervention.

Although the Alberta Court of Appeal's decision in *New Era* has been called into question by at least one lower court,[6] it was never overturned and has now been affirmed in *Sivitilli.*

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[4] 2004 ABCA 280.

[5] s 7(4) provides for a stay of the arbitration only if an application to stay a court proceeding is refused. A respondent can move under s 47 of the Alberta Act (or s 48 of the Ontario Act) to have the arbitration declared invalid, but only if it has not participated in the arbitration and only on specified grounds. If those grounds do not exist, the respondent may commence an action in court and wait for the claimant in the arbitration to move to stay the action. If the claimant's motion is defeated, the arbitration will be stayed under s 7(4). However, if the respondent does not have the grounds to have the arbitration declared invalid and does not wish to commence its own action, there is no provision for the respondent to apply for a stay of the arbitration. One might view this, alternatively, as either a lacuna in the legislation or as an expression of legislative intent that a stay of the arbitration should not be allowed in these circumstances.

[6] *Alberici Western Constructors Ltd v Saskatchewan Power Corporation*, 2015 SKQB 74 at para 56. The decision in *Alberici Western Constructors* seems to

III. THE *DISTILLERY* DECISION

In *Distillery*, the Condo Corp. applied to the Ontario Superior Court, requesting appointment of an arbitrator. It invoked sections 6, 7, and 17 of the Ontario Act, and rule 14 of the *Rules of Civil Procedure*, RRO 1990, Reg 194. It made no reference to section 10 of the Act, which is the provision that authorizes the court to appoint an arbitrator, and which excludes any right of appeal from that decision. The Application Judge appointed an arbitrator. Distillery appealed that decision under section 6 of the Act, noting that neither section 6 itself nor the Rules of Civil Procedure imposed any express restriction on appeals under section 6.

The Ontario Court of Appeal rejected this submission:

> [18] Distillery's first point can be dealt with briefly. Although the Condo Corp. did not expressly cite s. 10 of the Act, the notice of application stated that it was made under the Act. It stated it was seeking directions (including the appointment) to ensure the arbitration was conducted in accordance with the SFA and the agreement to appoint Mr. Campbell. Section 6 of the Act, which the application did cite, permits court intervention for such purposes "in accordance with the Act". Section 10 is the only arguably applicable provision of the Act that contemplates the court appointing an arbitrator.
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> …
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> [20] Nor is it significant that the application judge did not cite the source of her authority to make the appointment. If the authority to appoint came

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miss, or gloss over, the question of whether an order may be made independently under s 6. Indeed, it seems to assert, without providing reasoning, that s 6 permits "intervention" in an ongoing arbitration to prevent "manifestly unfair treatment". *Ibid*.

> from the Act, it came from s. 10, whether or not the application judge referred to it.

The Ontario Court of Appeal conducted no examination of prior jurisprudence or statutory history in arriving at its conclusion, saying only that:

> In accordance with the modern approach to statutory interpretation, the meaning of [the provision in issue] must be determined by considering its text, context and purpose ….

It is noteworthy that the Ontario Court of Appeal considered section 10, not section 6, to be "the provision in issue" for the purpose of determining a right of appeal. This is consistent with its view that the order sought could only have been made under section 10. It might also be noted that, while the Court did not cite Brian Casey's treatise on arbitration in Canada, its position is consistent with Casey's:

> The words "as provided by this Act" [in s 6] limit court intervention to matters that are expressly set out in the Act. The court cannot treat the itemized purposes as creating some sort of general jurisdiction to intervene.[7]

IV. CORRECTNESS AND CONSEQUENCES

The purpose of this case comment is not to consider the correctness of either decision. Decisions of the Alberta Court of Appeal are not binding on the Ontario Court of Appeal, and vice versa. Moreover, the legislative history in Alberta which was cited in the *New Era* decision is not directly relevant to the interpretation of the Ontario Act, despite the identical wording in the two Acts' section 6. The modest goal of this case comment

[7] J Brian Casey, *Arbitration Law of Canada*, 4th ed (Huntington: Juris 2020) at 315.

is to draw attention to the immense consequences that could arise from the different approaches in the two provinces.

The effect of both approaches to the interpretation of section 6 is to give it a meaning that could be more clearly expressed with minimal change to the statutory language. To illustrate:

Alberta Approach: Clearer Rewording	**Ontario Approach: Clearer Rewording**
6 A court *may* intervene in matters governed by this Act, for the following purposes: (a) to assist the arbitration process; (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement; (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement; (d) to enforce awards.	**6** No court may intervene in matters governed by this Act, except as provided by this Act *and only* for the following purposes: (a) to assist the arbitration process; (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement; (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement; (d) to enforce awards.

Under the Alberta approach, the restrictive words of the lead-in to the enumerated purposes in the actual text of the section have no meaning. Obviously, a court may intervene where the Act says so in other sections of the Act. The gist of the Alberta interpretation is to say that a court may *also* intervene for the purposes enumerated in s 6. On the Alberta interpretation, the enumerated grounds are additive, so any curtailment of court intervention is read out of the section. Under the Ontario

approach, the words "as provided by this Act" are instead interpreted to not include section 6. The enumerated purposes are treated as a limitation on the exercise of jurisdiction under other provisions of the Act.

While both judgments arose in relation to rights of appeal, the underlying analysis turns on an issue of much broader application: whether section 6 provides a separate and independent basis for court applications, as well as for court jurisdiction and rights of appeal in dealing with those applications. If it does not, any analysis based on rights of appeal from a court order made under a section that makes no provision for a right of appeal is irrelevant because there is no statutory basis for the order in the first place. This is the core distinction between the approaches of the Alberta and Ontario Courts of Appeal.

The clear implication is that, in Alberta, applications that parties bring in reference to arbitrations need not be confined to—or even invoke—any of the other provisions of the Act as long as their applications engage (or are alleged to engage) one of the very broad purposes enumerated in section 6. On this interpretation, section 6 is broad enough, for example, to empower a court to make directions to the tribunal during an arbitration "to prevent manifestly unfair treatment".

If section 6 provides an independent basis for judicial intervention, parties may bring applications only under section 6 or in combination with applications under other sections of the Act; in either case, the outcomes of those applications can be appealed as of right. Possibly, this unconditional appeal right would exist even if an application is not brought under section 6, but the judge who makes the order invokes section 6. The effect is to eliminate any limitations on rights of appeal under other sections of the Act as long as grounds for the application can be stated under section 6.

Indeed, if section 6 is treated as an independent basis for applying to the court, it is not clear why any other sections

granting specific jurisdiction to the court in particular circumstances are necessary. The purposes enumerated in section 6 would be broad enough to cover almost any situation. The exceptions will have swallowed the rules.

This observation highlights another feature of section 6, namely that the section does not refer to any specific form of application that may be brought or any specific relief that the court is empowered to grant. Legal and judicial creativity, based on an appeal to the equitable discretion of the court and exercised in reference to the enumerated "purposes", is encouraged by this approach. The salient point on this interpretation is the judge's intention in granting or refusing an order under section 6.

On first reading, the overall impression of section 6 is that imposes a restriction. However, if read as providing an independent power of courts to intervene for any of a number of widely stated purposes, and carrying an unconditional right of appeal, section 6 would appear to confer a jurisdiction to intervene more extensive than even the largest-footed Chancellor's shoes. This approach could easily lead to numerous, lengthy court interventions during any arbitration. While that appears to be the law in Alberta, it is not so in Ontario.

V. THE TREND AWAY FROM COURT INTERVENTION

In concluding, it is worth noting that, while *Sivitilli* and *Distillery* may correctly state the law in their respective provinces, the general trend in Canada and internationally, for some time, has been in the direction of greater and more specific limitations on court intervention. For example, the *Uniform Arbitration Act* promulgated in 2016 by the Uniform Law Conference of Canada[8] recommends using the simpler wording of the equivalent

[8] Uniform Law Conference of Canada, *Uniform Arbitration Act* (2016), online: <https://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Arbitration-Act/Uniform-Arbitration-Act-(2016)>.

provision of the *UNCITRAL Model Law on International Commercial Arbitration*:

> **6** No court may intervene in matters governed by this Act, except as expressly provided by this Act.[9]

The same recommendation was made in February 2021 by the Arbitration Act Reform Committee of the Toronto Commercial Arbitration Society.[10]

The new *Arbitration Act* enacted in British Columbia in 2020 contains the following provision, which presumably addresses additional issues which have arisen in that province:

> **4** In matters governed by this Act,
> (a) a court must not intervene unless so provided in this Act, and
> (b) the following must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act:
> (i) an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal;
> (ii) a determination or direction by the designated appointing authority.[11]

Thus, regardless of the correctness of *Sivitilli*, or perhaps especially because it should be taken as a correct statement of

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[9] *UNCITRAL Model Law on International Commercial Arbitration*, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006) at art 6.

[10] Toronto Commercial Arbitration Society, "AARC Final Report" (2021), online: <https://web.archive.org/web/20250201193921/https://torontocommercialarbitrationsociety.com/arbitration-act-reform-committee/>.

[11] *Arbitration Act*, SBC 2020, c 2.

Alberta law, the need for legislative reform and greater clarity seems obvious and urgent. The entrenchment in Alberta or elsewhere in Canada of the notion that courts can intervene in an arbitration, directly and independently, for any of the purposes set out in section 6, with any such intervention being subject to an absolute right of appeal would be problematic. It would dismantle of all other protections against court intervention that have previously been assumed to be integral to Canadian arbitration legislation.