IN THE COURT OF APPEAL OF MANITOBA

B E T W E E N :

BROADBAND COMMUNICATIONS NORTH INC.	)	***C. R. MacArthur Q.C.*** *for the Applicant*
(Applicant) Applicant	)	***G. A. McKinnon*** *and* ***M. C. Ross*** *for the Respondent*
- and -	)	
I-NETLINK INCORPORATED	)	*Chambers motion heard:* ***July 11, 2018***
(Respondent) Respondent	)	*Decision pronounced:* ***November 1, 2018***

PFUETZNER JA

[1] In the Court below, each of the parties sought leave to appeal a final award (the final award) of a single arbitrator pursuant to section 44(2) of *The Arbitration Act*, CCSM c A120 (the *Act*). The application judge granted leave to appeal to each party for selected questions.

[2] The applicant now seeks an extension of time to file a notice of appeal of the application judge's decision denying leave to appeal on certain questions raised in its application for leave to appeal.

[3] The applicant's proposed grounds of appeal in the notice of appeal that it seeks to file are that the application judge erred:

1. by disregarding the applicant's statutory right to proceed with the arbitration on the basis that a finding in the preliminary

award was final and binding—specifically that the CSA standard was the standard for the construction of towers and foundations;

2. in upholding the final award given that the arbitrator clarified the preliminary award after the statutory 30-day time limit had expired;

3. in failing to find that the arbitrator was *functus* and lacked jurisdiction to clarify the preliminary award in the final award;

4. in failing to find that the portions of the final award that clarified the preliminary award or removed the requirements of the CSA standard were null and void.

[4] The test on a motion for an extension of time to file a notice of appeal is well settled. The party seeking the extension must show: a continuous intention to appeal from a time within which the appeal should have been commenced; a reasonable explanation for the delay; arguable grounds of appeal; and that any prejudice suffered by the other party can be addressed (see *Bohemier v Bohemier*, 2001 MBCA 161 at para 2).

[5] The issue here is whether the third criterion has been met; that is, whether there are arguable grounds of appeal. An arguable ground of appeal means "a realistic ground which, if established, appears of sufficient substance to be capable of convincing a panel of the court to allow the appeal" (*C (S) v C (AS)*, 2011 MBCA 70 at para 8).

[6] In my view, the real hurdle faced by the applicant is in establishing that this Court has jurisdiction to hear an appeal of the application judge's decision in light of the principle that no appeal generally lies from a decision denying or granting leave to appeal.

[7] Beard JA discussed this principle in an earlier decision in these proceedings (2014 MBCA 38). In that matter, the respondent (the applicant therein) sought leave to appeal the decision of another application judge who had denied leave to appeal the preliminary award made by the same arbitrator. In dismissing the application for leave to appeal, Beard JA observed (at paras 7, 11-12):

> Both parties agree that the general rule applicable to appealing a decision to grant or deny leave to appeal under s. 44(2) of the *Act* is that no appeal lies from that decision, with the exception that an appeal will lie if the tribunal mistakenly declined jurisdiction. This is based primarily on decisions from Ontario considering mirror provisions to ss. 44(2) and 48 of the *Act*, which are found in ss. 45 and 49 of the Ontario arbitration legislation, the *Arbitration Act*, 1991, S.O. 1991, c. 17. (See *Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce* (1996), 29 O.R. (3d) 612 (C.A.); *Denison Mines Ltd. v. Ontario Hydro* (2001), 56 O.R. (3d) 181 at paras. 5-8 (C.A.); *Metropolitan Toronto Condominium Corp. No. 879 v. Mereshensky*, 2012 ONCA 73 (QL); and *Jeffrys v. Veenstra*, 2004 MBCA 6 at para. 5.)
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> The principles regarding the exception for declining jurisdiction were set out by the Supreme Court of Canada in *Canadian Utilities Ltd. et al. v. Deputy Minister of National Revenue*, [1964] S.C.R. 57 (at p. 63):
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> > It appears to me to have been consistently held in our courts and in the courts of England that where a statute grants a right of appeal conditionally upon leave to appeal being granted by a specified tribunal there is no appeal from the decision of that tribunal to refuse leave, provided that the tribunal has not

> mistakenly declined jurisdiction but has reached a decision on the merits of the application.
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> In the case at bar it is clear that the learned President considered the applications for leave to appeal on their merits and reached the conclusion that the questions on which leave was sought were not questions of law and that, in any event, this was not the kind of case in which leave should be given. In no sense did he decline jurisdiction. ....
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> As stated above, this issue has been considered more recently on several occasions by the Ontario Court of Appeal in relation to arbitration legislation in Ontario that mirrors ss. 44(2) and 48 of the *Act*, and that court has consistently held that, where the judge considered the leave application and rendered a decision on the merits of the application, the judge did not decline jurisdiction and, therefore, leave to appeal does not lie from that decision. (See the decisions cited in para. 7 herein.)
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> [emphasis added]

[8] As indicated in the passage above, an exception to the general rule is that an appeal will lie when the tribunal mistakenly declined jurisdiction. The applicant does not argue that the application judge mistakenly declined jurisdiction—this was conceded by the applicant at a prior motion in these proceedings (see 2018 MBCA 24 at para 3). Indeed, the application judge carefully considered and decided upon each proposed ground of appeal raised by the parties (see 2017 MBQB 146).

[9] Rather, the applicant makes two arguments. First, it argues that sections 25, 26 and 29 of *The Court of Appeal Act*, CCSM c C240, give this Court a broad and expansive jurisdiction to review "**judgment**[**s**] **appealed from**" (Manitoba, *Court of Appeal Rules*, Man Reg 555/88 R, r 1) and that such jurisdiction cannot be removed except by clear and unequivocal statutory

language. Relying on *Sandbar Construction Ltd v Pacific Parkland Properties Inc*, 1994 CarswellBC 104 (CA), it maintains that there is no statutory language in the *Act* that explicitly restricts the jurisdiction of this Court to hear an appeal from a denial of leave.

[10] Second, it asserts that there is a further exception to the general rule that no appeal lies from a denial of leave to appeal, that is, where the decision-maker "erred demonstrably on a matter of essential principle" (*West-Man Culvert & Metal Co v Manitoba (Provincial Municipal Assessor)* (1992), 94 DLR (4th) 260 at 264 (Man CA); see also *Chevron Canada Resources Ltd v Gabrielle*, 1990 CarswellMan 106 at para 4 (CA)). It submits that such an error is the functional equivalent of a decision that is so wrong as to amount to an injustice.

[11] I have not been persuaded that there is any merit to the applicant's submission that jurisdiction is granted to this Court by virtue of sections 25, 26 and 29 of *The Court of Appeal Act*. I agree with the respondent's submission that to find such jurisdiction would defeat the statutory intention of the *Act* to limit appellate intervention in commercial arbitration. The purpose of section 44(2) of the *Act* is to prevent an appeal unless the Court of Queen's Bench grants leave (see *Hillmond Investments Ltd v Canadian Imperial Bank of Commerce* (1996), 135 DLR (4th) 471 (Ont CA)). Here, the purpose of that section would clearly be defeated if this Court entertained an appeal where the Court of Queen's Bench considered the application on its merits, did not mistakenly decline jurisdiction and did not grant leave.

[12] Moreover, there is no question that an appeal to this Court of a decision of a Queen's Bench judge on an appeal on the merits of an arbitrator's

decision requires leave from this Court under section 48 of the *Act*. It would be a bizarre result if, in contrast, a party were entitled to appeal to this Court as of right from a decision of a Queen's Bench judge granting or denying leave to appeal (see *Denison Mines Ltd v Ontario Hydro*, 2001 CarswellOnt 3423 at para 7 (CA)).

[13] In support of its second argument, the applicant says that the errors of the application judge cited in its proposed notice of appeal are demonstrable and relate to matters of essential principle. First, I am not persuaded that a demonstrable error on a matter of essential principle is an exception to the general rule that no appeal under the *Act* will lie from the decision of a Queen's Bench judge granting or denying leave to appeal. The decisions relied on by the applicant to establish this exception were cases where a full panel of this Court considered the decision of a single judge of this Court in chambers to grant or deny leave under other statutory regimes.

[14] However, even if this exception applies in the context of the *Act*, I am not convinced that, in the circumstances, the application judge erred demonstrably on a matter of essential principle or that his decision was otherwise so wrong as to amount to an injustice. The application judge recognised that, under section 44(2) of the *Act*, he could only grant leave to appeal on questions of law. He granted leave to appeal on two questions of law raised by the applicant and denied leave on the other issues raised by the applicant because they failed to raise questions of law. I see no error in his decisions, let alone one that could amount to a demonstrable error on a matter of essential principle.

[15] Moreover, the applicant did not identify the alleged errors of the arbitrator, as now articulated in the proposed notice of appeal, before the application judge as grounds of appeal from the arbitrator's final award. This raises the spectre of whether the applicant is now attempting to raise new issues on appeal. If so, it is well established that "courts will not entertain new issues on appeal except under exceptional circumstances" (*Harder v Manitoba Public Insurance Corp et al*, 2012 MBCA 101 at para 12, quoting *Bates v Welcher*, 2001 MBCA 33 at para 32; see also *Anderson et al v Manitoba et al*, 2015 MBCA 123 at para 49). This matter has been before the courts multiple times over the course of several years. The interests of justice would not be served by allowing the issues raised by the applicant at this stage to proceed to a hearing before a full panel of this Court.

[16] In the result, I am not persuaded that the applicant has established that this Court has jurisdiction to hear an appeal of the application judge's decision. Moreover, even if this Court had such jurisdiction, the applicant has not raised an arguable ground of appeal capable of convincing a panel of the Court to allow the appeal.

[17] The motion for an extension of time to file a notice of appeal is dismissed with costs to the respondent.

Pfuetzner JA