QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2011 SKQB 249**

Date: **2011 06 24**
Docket: Q.B.G. No. 482 of 2010
Judicial Centre: Prince Albert

IN THE MATTER OF THE *ENFORCEMENT OF FOREIGN ARBITRAL AWARDS ACT, 1996*

AND IN THE MATTER OF THE *INTERNATIONAL COMMERCIAL ARBITRATION ACT*

BETWEEN:

SUBWAY FRANCHISE SYSTEMS OF CANADA LTD.

APPLICANT

- and -

CORA LAICH

RESPONDENT

Counsel:

P. G. Wagner — for the applicant
L. J. Zatlyn, Q.C. — for the respondent

JUDGMENT — MAHER J.
June 24, 2011

INTRODUCTION

[1] The applicant seeks an order that the arbitration award of Roy L. Barbieri dated May 17, 2010 be entered as a judgment of the Court of Queen's Bench for Saskatchewan. The respondent opposes the application.

[2] The applicant as well seeks a writ of possession for the premises leased by the respondent pursuant to the provisions of *The Landlord and Tenant Act*, R.S.S. 1978, c.L-6.

PRELIMINARY APPLICATION

[3] The respondent applies pursuant to Rule 319 of the *Queen's Bench Rules* to strike portions of the affidavit of Kris Perrier sworn November 26, 2010. The respondent's position is that an application to enter judgment is a final application and Rule 319 requires that, "affidavits shall be confined to such facts as the witness is able of his own knowledge to prove."

[4] I am satisfied and find that an application to enter judgment in this matter is a final application and not an interlocutory motion. I find, therefore, that all affidavits must be limited to a person's own knowledge as provided for in Rule 319.

[5] I am satisfied that after reviewing the affidavit and the cross-examination of Kris Perrier which took place in regard to his affidavit that he does not have the requisite personal knowledge as required by Rule 319. I therefore strike the following:

> Paragraph 5 - the first line "letter from our in house counsel";
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> Paragraph 5 - line three beginning with "As a policy to arbitral award" to "to confirm the arbitral award". in line six;
>
> Paragraph 6 - line one after the word "affidavit these letters are automatically generated and do not reflect the current circumstances."

BACKGROUND

[6] The respondent entered into a franchise agreement on November 24, 2003, with Subway Franchise Systems of Canada Ltd. (the "agreement") for the operation of a Subway Store at La Ronge, Saskatchewan. The respondent operated the restaurant pursuant to the

agreement. The applicant by letter in writing dated June 29, 2009, elected to terminate the agreement on the grounds that the respondent was in violation of paragraph 5(b) failure to "operate restaurant in accordance with the Operations Manual".

[7] The applicant requested the matters at issue between the parties be arbitrated pursuant to clause 10 of the agreement. The agreement provides, "the parties agree that Bridgeport, Connecticut shall be the sight for all hearings held under this Paragraph 10." Roy L. De Barbieri (the "arbitrator"), was designated to be the sole arbitrator pursuant to the agreement. May 7, 2010, was set for the hearing to commence at New Haven, Connecticut. The respondent requested an adjournment of the hearing date on medical grounds and such request was opposed by the applicant. The Arbitrator by e-mail refused the adjournment and directed the hearing proceed as scheduled on May 7, 2010.

[8] The hearing proceeded on May 7, 2010, with the respondent participating by telephone. The award of the arbitrator was as follows:

> 1. The Respondent has breached the Franchise Agreement for store #24668 executed with the Claimant November 24th 2003.
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> 2. The Respondent's Franchise Agreement dated November 24th 2003 is terminated.
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> 3. The Respondent must disidentify(sic) the SUBWAY restaurant and cease and desist use of all trade names, trademarks, service marks, signs, colors, structures, printed goods and forms of advertising indicative of the Claimant's sandwich business and return the Operations Manual to the Claimant as required by Paragraph 8 e of the Franchise Agreements.
>
> 4. The Respondent shall reimburse Claimant for all costs of this arbitration in accordance with the Franchise Agreement. Accordingly, the administrative fees and expense of the International Centre for Dispute Resolution ("IDCR") totaling (sic) $975.00 shall be borne entirely by the Respondent, and the compensation of the arbitrator totaling $1,960.00 shall be borne entirely by Respondent. Therefore, Respondent shall reimburse Claimant the sum of $2,935.00, representing said fees and expenses previously incurred by Claimant,

upon demonstration by Claimant that these incurred costs have been paid.

5. The Respondent shall pay to the Claimant $250 per day for each day, after the issuance of this award, for which she continues to use the trade names, trademarks, service marks, signs, colors, structures, printed goods and forms of advertising indicative of the Company's sandwich business and/or use of the Operations Manual; as required by Paragraph 8 e of the Franchise Agreements.

6. The Respondent must abide by the following conditions as contained in paragraph 8 g of the Franchise Agreements and its location rider: For one (1) year after the termination, expiration or transfer of this Agreement, you will not directly or indirectly, engage in or assist another to engage in, any Sandwich business with three (3) miles/five (5) kilometers of any location where a SUBWAY restaurant operates or operated in the prior year. You will pay to the Claimant $12, 500 for each sandwich business location you are associated with, in the restricted area in violation of this Subparagraph, plus eight percent (8%) of the gross sales of such location, during the one (1) year period, as being a reasonable pre-estimate of the damages the Claimant will suffer.

7. This Award is the Final Award. It is effective immediately, without the necessity of further hearing and can be confirmed in any court having jurisdiction.

8. The Final Award is in full settlement of all claims submitted to the International Centre for Dispute Resolution, and decided in accordance with the Commercial Arbitration Rules of the American Arbitration Association, the Respondent having appeared at the hearing telephoncially (sic) by agreement of the parties.

[9] The applicant, by motion returnable November 9, 2010, has requested the following relief from the Court:

1. For an Order pursuant to Article 4 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as set out in the *Enforcement of Foreign Arbitral Awards Act, 1996,* and pursuant to Articles 35 and 36 of the Unicital Model Law on International Commercial Arbitration, set out in the *International Commercial Arbitration Act,* that:

(a) The Arbitration Award of Roy L. De Barbieri, of the American Arbitration Association, dated May 17, 2010, be entered as a Judgment of the Court of Queen's Bench for Saskatchewan and be recognized and enforced in the Province of Saskatchewan; and

(b) The Applicant be granted costs of this application.

POSITION OF THE APPLICANT

[10] The applicant requests that the arbitration award be entered as a judgment in Saskatchewan and be recognized and enforced as a judgment in the Province of Saskatchewan and a writ of possession be granted for the premises leased by the respondent.

[11] The applicant also requests an order for costs payable forthwith.

POSITION OF THE RESPONDENT

[12] That the application be dismissed on the following grounds:

(a) The party terminating the franchise agreement, Doctor's Associates Inc., was not a party to the agreement;

(b) Did the arbitrator err in hearing the matter in New Haven, Connecticut instead of Bridgeport, Connecticut?

(c) The costs awarded against the respondent are not as determined in the agreement between the parties dated November 24, 2003;

(d) The arbitrator failed to adjourn the hearing despite being informed of the respondent's medical condition, as the respondent was incapacitated and unable to attend the hearing;

(e) The award is penal in nature and offends common law principles and thus contrary to public policy;

(f) That the application for a writ of possession be dismissed as the applicants have not properly complied with *The Landlord and Tenant Act.* R.S.S. 1978, c.L-6.1 and the issues involved are too complex to be determined on a summary application.

THE SASKATCHEWAN STATUTORY FRAMEWORK

[13] 1. The *International Commercial Arbitration Act,* S.S. 1988-89, c.I - 10.2 ("ICA") pursuant to s. 3(1) adopts the Model Law on International Arbitration ("Model Law") which was adopted by the United Nations Commission on International Trade Law on June 21, 1985 as set out in the schedule attached to the Act.

2. *The Enforcement of Foreign Arbitral Awards Act, 1996,* S.S. 1996, c-E 9.12 pursuant to s. 4 adopted the United Nations Convention on recognition and enforcement of foreign arbitral awards as set out in the Schedule attached to the Act.

3. *The Landlord Tenant Act,* R.S.S.1978 c.L-6.1.

ANALYSIS

[14] Gerwin J.A of the Saskatchewan Court of Appeal in *BWV Investments v. Saskferco Products Inc.* (1994), 119 D.L.R. (4th) 577, 125 Sask. R. 286 [1994] S.J. No. 629(QL)(C.A.) said the following on the international commercial arbitration Legislative framework in Saskatchewan at para. 35:

> 35 In Saskatchewan, international commercial arbitration matters are governed by the two Acts mentioned previously, namely, the ICAA (adopting the Model Law) and the EFAA (adopting the New York Convention). There is no question these acts apply to the instant appeal. The ICAA/EFAA legislative scheme is replete with indications that the legislature intended courts to observe the pattern of judicial deference to arbitration that has become the international practice. For added certainty, Article 5 of the Model Law states that no court shall intervene except as permitted by the Model Law itself, and s. 3 of the EFAA states that where conflict exists with other Acts, the EFAA prevails.

[15] Feldman J. (as she then was) in *Schreter v. Gazmac Inc.* (1992), 7 O.R. (3d) 608 [1992] O.J. No. 257 (Q.L.)(Gen. Div.) reviewed the public policy criteria for the enforcement of arbitral awards when she commented the following at para. 12:

> 12 The applicant has complied with article 35(2). Therefore the court shall enforce the award which shall be recognized as binding unless the court exercises its discretion based on one of the grounds set out in article 36. The onus is on the respondent under article 36(1)(a) to prove that one of the grounds exists for the court to exercise its discretion to refuse to recognize or enforce the arbitral award. Even then, the court is not obliged to refuse recognition of the award. Alternatively, under article 36(1)(b) there is no onus of proof on the respondent to prove that the award is contrary to the public policy of Ontario, but if the court so finds, it still retains discretion to recognize an award even in such a case.

[16] In the decision of *Corporacion Transnacional* v. *Stet*, (1992)45 O.R. (3d) 183 [1999] O.J. No. 3573(QL)(Ont. Sup. Ct.), affirmed by Court of Appeal (1992), 49 O.R.

(3d) 414 [2000] O.J. No. 3408 (Q.L.)(C.A.); (Affirmed by Supreme Court of Canada [2000] SCCA No. 581) Lax J. said the following:

> 26 The grounds for challenging an award under the Model Law are derived from Article V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). Accordingly, authorities relating to Article V of the New York Convention are applicable to the corresponding provisions in Articles 34 and 36 of the Model Law. These authorities accept that the general rule of interpretation of Article V is that the grounds for refusal of enforcement are to be construed narrowly: A.J. Van Den Berg, New York Convention of 1958 Consolidated Commentary, cited in Yearbook Comm. Arb. XXI (1996) at pp. 477-509.
>
> 27 An arbitral award is not invalid because, in the opinion of the court hearing the application, the arbitral tribunal wrongly decided a point of fact or law: *Quintette Coal, supra*, at p. 227. Where a Tribunal's jurisdiction is called into question as it is here, an applicant must overcome "a powerful presumption" that the arbitral tribunal acted within its powers: *Quintette Coal, supra*, per Hutcheon, J.A. at p. 223, citing with approval *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974).
>
> ...
>
> 30 Accordingly, to succeed on this ground the Awards must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal. The applicants must establish that the Awards are contrary to the essential morality of Ontario.

[17] Article 34(2)(a)(i) of the Model Law provides an arbitral award may be set aside if a party was “under some incapacity”. Article 34(3) provides an application for setting aside may not be made after three months from the elapsed time from the date on which the party making the application had received the award.

[18] Article 35(1) of the Model Law provides as follows:

> (1) An arbitral award, irrespective of the count in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

[19] Article 36 of the Model Law provides the following:

> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
>
> (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
>
> (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> ...
>
> (b) if the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

[20] It is within this framework that I will consider the issues before me.

ISSUES

1. Has the applicant fulfilled the requirements of Article IV of the Model Law to obtain the recognition and enforcement of the arbitrator's award?

2. Has the respondent met the onus upon her that the recognition and enforcement should be refused?

3. Is the applicant entitled to an order for a writ of possession of the premises pursuant to s. 52 of *The Landlord and Tenant Act,* R.S.S. 1978, c.L-6.1*?*

1. Has the applicant fulfilled the requirements of Article IV of the Model law to obtain the recognition and enforcement of the arbitrator's award?

[21] Popescul J. in *West Plains Company v. Northwest Organic Community Mills*, 2009 SKQB 162, [2009] S.J. No. 266(Q.B.) (QL) considered the application of the New York Convention under the provisions of the *Enforcement of Foreign Arbitral Awards Act, 1996,* S.S. 1996, c-E-9.12. He commented the following:

> 5 The Legislature of Saskatchewan, by the enactment of *The Enforcement of Foreign Arbitral Awards Act, 1996* has adopted the New York Convention and by the enactment of *The International Commercial Arbitration Act*, has adopted the Model Law. The gist of both of these pieces of legislation is to require that arbitration awards made in accordance with arbitration rules mutually agreed to between the parties are universally recognized and enforceable by the courts of participating jurisdictions. The important commercial public policy objectives of both *The Enforcement of Foreign Arbitration Awards Act, 1996* and *The International Commercial Arbitration Act* was recognized by the Saskatchewan Court of Appeal in *BWV Investments Ltd. v. Saskferco Products Inc*., [1995] 2 W.W.R. 1.
>
> 6 The applicant must establish that it has met the statutory requirements for obtaining a recognition of a foreign arbitration award.

[22] I am satisfied on the evidence before me that the applicant has met the Model Law requirements for obtaining recognition of the foreign arbitration award dated May 17, 2010.

2. Has the respondent met the onus upon her that the recognition and enforcement should be refused?

[23] The respondent raises the following issues as to why the recognition and enforcement should be refused:

> (A) That "Doctor's Associates Inc.", not being a party to the agreement, was unable to terminate the franchise agreement.
>
> (B) Did the arbitrator err in hearing the matter in New Haven, Connecticut as opposed to Bridgeport, Connecticut as provided for in paragraph 10(a) of the agreement?
>
> (C) Did the arbitrator err in awarding to the applicant full costs which is contrary to paragraph 10(a) of the agreement?
>
> (D) That the arbitrator failed to adjourn the hearing despite being informed of the respondent's medical condition and her inability to attend which incapacitated the respondent as set out in Article 36(1)(b)(i).
>
> (E) That the recognition and enforcement of the award would be "contrary to public policy of the state" as provided in Article 36(1)(b)(ii).
>
> (F) That the application for a writ of possession be dismissed as the applicants have not properly complied with *The Landlord and Tenant Act.* R.S.S. 1978, c.L-6.1 and the issues involved are too complex to be determined on a summary application.

Issues (A) to (C):

[24] Article 34 of the Model Law establishes a procedure for recourse against an arbitral award. The application brought by the applicant is an application pursuant to Article 35 for recognition and enforcement of the award. The issues raised in items (A)

to (C) are matters requesting recourse against the arbitral award. The respondent has brought no application pursuant to the procedure set out in Article 34. However the respondent in her argument has presented to the Court these issues and wishes the Court to consider them.

[25] The limits on judicial review under Article 34 was discussed by Kelen J. in *Canada (Attorney General) v. S.D. Myers Inc.* 2004 F.C. 38, [2004] 3 F.C.R. 368 (F.C.) where he said the following at p. 42:

> 42 It is noteworthy, that article 34 of the Code does not allow for judicial review if the decision is based on an error of law or an erroneous finding of fact if the decision is within the jurisdiction of the Tribunal. The principle of non-judicial intervention in an arbitral award within the jurisdiction of the Tribunal has been often repeated.
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> ...
>
> An arbitral award is not invalid because, in the opinion of the Court hearing the application, the Arbitral Tribunal wrongly decided a point of fact or law. In the textbook, *Law and Practice of International Commercial Arbitration*, *supra*, at page 432: ...

[26] The provisions of Article 34(c) provide the following, "an application for setting aside may not be made after three months have elapsed from the date on which the party making the application had received the award or a request had been made under Article 33 from the date on which the request has been closed out by the arbitral tribunal."

[27] I find that Issue A, B, and C are a request for a recourse against the arbitral award and that more than three months have elapsed since the respondent received the award. I therefore find that the Court has no jurisdiction to consider those issues.

Issue D

[28] The respondent submits that she was "under some incapacity" as set out in Article 36(1)(a)(i).

[29] The record discloses that the respondent applied to adjourn the application by reason of her illness. The arbitrator heard submissions from the applicant and the respondent. The arbitrator ruled, on May 5, 2010, that for safety issues the matter was to proceed. The respondent has provided to this Court a medical opinion as to her incapacity on May 5th, 2010. However such an opinion is dated November 10, 2010. There is no evidence before me that this medical report was filed or was ever before the arbitrator in May of 2010. I am also cognizant that in the arbitral award of May 17th the arbitrator said the following, "the respondent, having testified and submitted her defences in telephonic testimony" indicates to me that her submissions were heard and considered by the arbitrator.

[30] I find on the evidence and materials before me that the respondent was not under incapacity as contemplated by Article 36(1)(a)(i) of the Model Law as she testified and made submissions to the arbitrator.

Issue E

[31] That the award would be contrary to public policy of the Province of Saskatchewan. The applicable provisions of the Convention are Article 36(1)(b)(ii) which state:

Article 36. Grounds for refusing recognition or enforcement

> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may
>
> be refused only:
>
> ...
>
> (b) if the court finds that:
>
> ...
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

[32] The matter of public policy was commented on in *Schreter v. Gasmac Inc.(supra)* by Feldman J. when she said the following at para. 46 and 47:

> 46 The June 1985 Report also gives some guidance on the intended scope of the public policy ground for refusal of recognition (p. 63):
>
> > 296. In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice . . .
> >
> > 297. . . . It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.
>
> 47 The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on

> the part of the tribunal which could not be seen to be tolerated or condoned by our courts.

[33] Lax J. in *Corporacion Transnacional de Inversiones S.A. de C.V. v. Stet International S.p.A. (Supra)* made comments on public policy as well when he said the following at para. 29 and 30:

> 29 At p. 624 of *Schreter v. Gasmac*, *supra*, the court quotes with approval from the decision of the *United States Court of Appeals Second Circuit in Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150 (1984) at p. 152. It was held there that public policy grounds for the setting aside of an award should apply only where enforcement would violate our "most basic notions of morality and justice". In this jurisdiction, the Ontario Court of Appeal has emphasized the care which courts must exercise in relying upon public policy as a reason for refusing enforcement of a foreign award. In *Boardwalk Regency Corp. v. Maalouf* (1992), 6 O.R. (3d) 737 (C.A.), the court states at p. 743:
>
> > The common ground of all expressed reasons for imposing the doctrine of public policy is essential morality. This must be more than the morality of some persons and must run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred.
>
> 30 Accordingly, to succeed on this ground the Awards must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal. The applicants must establish that the Awards are contrary to the essential morality of Ontario.

[34] The arbitration award made the following determination at para. 5 on the appellant's claim:

> The Respondent shall pay the Claimant $250.00 per day for each day, after the issuance of this award, for which she continues to use the trade names, trademarks, service marks, signs, colors, structures,

> printed goods and forms of advertising indicative of the Company's sandwich business and/or use of the Operations Manual; as required by Paragraph 8 e of the Franchise Agreements.

[35] The basis for the determination by the arbitrator is para. 8 c of the agreement, which says:

> ...If you breach the provisions you will pay us $250 per day for each day you are in default as being a reasonable pre-estimate of the damages we will suffer.

[36] The evidence before me is that since the award both parties have continued to operate under the provisions of the original agreement in partnership, notwithstanding the arbitrator's findings in para. 2 of his award that the agreement was terminated. The respondent has provided to the Court evidence that she has continued to make all remittances since the award of May 17, 2010. There have been no changes in the support that the applicant has provided the respondent in operating the store. The respondent's evidence is that all royalties due to the applicant since the award have been paid. Therefore, they have sustained no financial loss.

[37] The respondent filed with the Court a copy of a letter from the applicant dated September 23, 2010, which compliments the respondent for her record breaking sales. The letter is signed by the President and Co-founder of the applicant, Frederick DeLuca, who says, "we hope the great sales trend and momentum continues. Franchisee profitability is the cornerstone of our 2010 strategic plan. Together with our partners in the field we continue to work on finding new and improved ways to help you build your business. Once again, congratulations on a job well done." The applicant's only evidence to rebut or contradict this evidence is "that those letters are automatically generated". The letter indicates the financial status between the parties and that the

partnership between the parties is an ongoing relationship. The letter from the President of the applicant indicates that the partnership between the applicant and the respondent continues to flourish. There is no evidence that the applicant has sustained any actual damages or financial loss since the award.

[38] I find the applicant has by its actions waived the termination decision by the arbitrator as it continued to work with and support the respondent in a profitable partnership.

[39] The applicant is requesting the Court to allow the registration of the arbitrator's award and grant judgment to the applicant in the amount of $46,935, which would amount to double recovery from the respondent being the award sought plus the profits earned by the applicant from the ongoing operation of the Subway store. The issue I must determine is whether a double recovery would be contrary to public policy as set out in article 36(1)(b)(ii).

[40] The matter of public policy was considered in *Boardwalk Regency Corp. v. Maalouf*, (1992) 6 O.R. (3d) 737, [1992] O.J. No. 26 (QL) (Ont. C.A.) by Carthy J.A. when he made the following comments:

> 21 In my opinion, the respondent has not satisfied the burden of showing that the enforcement of the contract or of the New Jersey judgment would be contrary to public policy. I agree that the foreign judgment should not be declared unenforceable on grounds of public policy unless its enforcement would violate conceptions of essential justice and morality. I am here referring to domestic public policy as well as national public policy at the international level. Where the foreign law is applicable, Canadian courts will generally apply that law even though the result may be contrary to domestic law. Professor

Castel's discussion of public policy regarding the application of foreign law or the enforcement of a foreign judgment is helpful in this respect (Castel, Conflict of Laws, para. 91 (pp. 153-55)):

> Canadian courts will not recognize or enforce a foreign law or judgment or a right, power, capacity, status or disability created by a foreign law that is contrary to the forum's stringent public policy or "essential public or moral interest" or "our conception of essential justice and morality."
>
> It is almost impossible to give a precise definition of public policy; nor can a general statement be made about its scope. Evidence of public policy can be found in the total body of the constitutional and statute law as well as the case law of the forum, since it will reflect the local sense of justice and public welfare. It is not enough to deny recognition of the claim that the local law on the same point differs from the foreign law.
>
> In the conflict of laws, public policy must connote more than local policy as regards internal affairs. It is true that internal and external public policy stem from the national policy of the forum but they differ in many material respects. Rules affecting public policy and public morals in the internal legal sphere need not always have the same character in the external sphere. Also, there should be a difference of intensity in the application of the notion of public policy depending upon whether the court is asked to recognize a foreign right or legal relationship or to create or enforce one based on some foreign law. Public policy is relative and in conflicts cases represents a national policy operating on the international level.
>
> If foreign law is to be refused any effect on public policy grounds, it must at least violate some fundamental principle of justice, some prevalent conception of good morals, or some deep-rooted tradition of the forum. . . . . .
>
> In the absence of legislation establishing the stringency of public policy, it is for the courts to define its precise limits according to their judgment and good conscience.

(Emphasis added; footnotes omitted)

[41] Cameron J. in *Lambert (Re)*,26 C.B.R. (4th) 235 (Ont. Sup. Ct.) [2001] O.J. No. 2776 (QL) held at para. 76:

> It is not consonant with our system of justice and general moral outlook to countenance a double recovery in these circumstances. See *Boardwalk Regency Corp. V. Maalouf* (1992), 6 O.R. (Ed) 737 (C.A.) Per Carthy J.A. at p. 743 cited in *Beals* at p.143. It would, in my view, bring the administration of justice into disrepute.

[42] The provisions of s. 8 of the Agreement specify that the $250 per day is damages. "As being a reasonable pre-estimate of the damages we will suffer." The applicant has continued to profit from the operations of the store by the respondent, and there is no evidence of the applicant sustaining any damages. I find that to allow the applicant to register the arbitration as a judgment in the monetary amount of $46,935 would amount to a double recovery and be contrary to "Public Policy" and to the law of Saskatchewan as provided in Article 36(1)(b)(ii) of the Convention. I therefore dismiss the application to recognize the arbitration award as a judgment.

3. Is the applicant entitled to an order for a writ of possession of the premises pursuant to s. 52 of *The Landlord and Tenant Act,* R.S.S. 1978.c.L-6.1*?*

[43] The applicant seeks a summary order for possession pursuant to s. 52 of the provisions of *The Landlord and Tenant Act.* This application is fraught with numerous procedural errors.

[44] The first error is that there is insufficient evidence as to the service of the demand for possession in Form B. Kris Perrier states, "the demand for possession was

served on the respondent on August 10, 2010". He provides no evidence as to who served the demand, how the demand was served, or what was served or where it was served.

[45] The second issue is that the demand in Form B that is attached as exhibit "C" to Perrier's affidavit is not in the statutory form as required. The copy of exhibit "C" filed with the Court is undated and unsigned.

[46] The third issue is that the applicant pursuant to s. 52(3) must satisfy the Court that there has been no order made by the Provincial Mediation Board prohibiting the proceedings, filed with the local registrar of the Court of Queen's Bench. The only evidence in that regard is the affidavit of Perrier who says that no order from the Provincial Mediation Board has been "filed with the local registrar of the Court of Queen's Bench to my knowledge". Perrier's affidavit does not say how he gained that knowledge, it does not indicate if he personally searched a file at the local registrar's office. If he searched a file at a local registrar's office, was it the local registrar's office in Saskatoon where he resides, or was it the local registrar's office in Prince Albert where this application has been brought? An affidavit of this nature qualifying it "to my knowledge" again, is not sufficient to comply with the provisions of the Act.

[47] The provisions of s. 52 of *The Landlord and Tenant Act* are a summary proceeding and should not be utilized where there are complex questions of fact and law. See: *10114191 Saskatchewan Ltd. v. Gustafson*, 2011 SKQB 76 (Q.B.), [2011] S.J. No. 99(Q.L.).

[48] The applicant is requesting a summary order for a writ of possession pursuant to *The Landlord and Tenant Act.* I find that the applicant has failed to comply with essential statutory requirements of the Act to allow this Court to proceed in a summary manner. I am as well satisfied that the issues between the parties are complex and of mixed fact and law. It would not be appropriate to have this matter resolved in a summary fashion. I therefore dismiss the application.

CONCLUSION

[49] Both applications are dismissed. The respondent being successful in this application is entitled to her costs. On the amount of costs, I reserve and request counsel to provide me with written submissions within thirty days.

J.
R. D. MAHER