Private justice delayed
by Jonnette Watson Hamilton

***Flock v. Flock*, 2007 ABCA 287**
http://www2.albertacourts.ab.ca/jdb%5C2003-%5Cca%5Ccivil%5C2007%5C2007abca0287.pdf

***Flock v. Flock*, 2007 ABQB 307**
http://www2.albertacourts.ab.ca/jdb%5C2003-%5Cqb%5Ccivil%5C2007%5C2007abqb0307.pdf

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In September 2007, Mr. Justice Peter Martin denied leave to appeal of a May 2007 decision by Madam Justice K.M. Horner setting aside an arbitrator's award dividing matrimonial property. The couple embroiled in this dispute had married in 1982, separated in 1994 and divorced in 1999. The couple had a considerable amount of real property and thorny issues related to property owned prior to the marriage and the value of those properties that should be exempted from the matrimonial property regime. A 6-day arbitration hearing was held before one arbitrator, Alan Beattie, Q.,C., in Calgary in 2003 and he rendered an award 33 months later, in July 2006. Article IX of the arbitration agreement between the couple and Mr. Beattie required the arbitrator to communicate his award to the parties within 60 days of the end of the hearing. The past year of litigation has been devoted to the husband's application to set aside the July 2006 award.

The award did not parcel out the couple's property between them. Instead, the 2006 award required the wife to pay the husband a dollar amount based on the 2003 value of the four parcels of real property that were the major assets involved in the arbitration. As Albertans know, the price of Calgary real estate skyrocketed between 2003 and 2006. With the delay in rendering the award, the windfall was exclusively the wife's. The delay was therefore found by Madam Justice Horner to be prejudicial to the husband.

The delay was not the only problem with the award, however. The arbitrator decided that the wife had not met the burden of proof on her with respect to exemptions she had claimed. The arbitrator re-opened the hearing, 15 months after it had been closed, and asked the wife to present more evidence on the exemptions she claimed. He even provided details of what he had already decided and what he might decide if she made certain evidence available to him. The arbitrator identified exactly what information needed to be produced by the wife. Madam Justice Horner easily found this to be a breach of the principles of natural justice.

With the breaches in the principles of natural justice, Madam Justice Horner held that the arbitrator had lost the jurisdiction given to him by the parties under the Arbitration Agreement. She concluded the only appropriate remedy under section 45 of the *Arbitration Act*, R.S.A. 2000, c. A-43, was to set aside the award. She declined to remit the matter back to the arbitrator.

Mr. Justice Martin had little trouble in deciding whether or not to grant leave from Madam Justice Horner's decision. He referred to only one factor: consideration of the likelihood of

success, also known as an arguable ground of appeal. He held that all of Madam Justice Horner's determinations were unlikely to be interfered with on appeal.

The test for grant of leave to appeal in Alberta is usually taken from *West Edmonton Mall Property Inc. v. Duncan & Craig*, 2001 ABCA 40 at paras. 8 to 12, a case Mr. Justice Martin did not refer to. In the *West Edmonton Mall* case, Madam Justice Ellen Picard wrote that the test has four elements: (a) whether the point on appeal is of significance to the practice; (b) whether the point on appeal is of significance to the action itself; (c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and (d) whether the appeal will unduly hinder the progress of the action. Mr. Justice Martin appears to have relied upon the third factor exclusively: whether the appeal is *prima facie* meritorious. Subsequent comments by Mr. Justice Jack Watson in *Re Fantasy Construction Ltd. (Bankrupt),* 2007 ABCA 335 at paragraph 11 suggest all of the factors need to be balanced, casting doubt on the correctness of Mr. Justice Martin's approach in the *Flock* case. Perhaps, however, his use of only one factor merely indicates how much the appeal lacked in merit.

In addition to the leave to appeal application before Mr. Justice Peter Martin, the arbitrator was seeking leave to be granted intervener status on the leave to appeal application itself and also on the appeal, if the leave application was successful. This is one of the most interesting aspects of the leave to appeal decision. Mr. Beattie's lawyer advised the court that the arbitrator wanted to intervene to explain the record and argue the jurisdiction issue. Mr. Justice Martin also dealt with Mr. Beattie's application in short order, stating (at paragraph 14) that he was "completely unmoved by this application. . . . [I]t would be most inappropriate to allow the Arbitrator, whose conduct is being impugned, to . . . become a party to this case."

Arbitration may be intended to achieve speedy, efficient and fair resolutions of disputes. The facts of this case, however, make one wonder about the quality of justice being meted out in these private and confidential forums. We seldom get a glimpse into arbitration proceedings. If not for the steeply rising real estate market in Calgary in this case, there would have been little financial incentive for the husband to seek a remedy for the denials of natural justice.